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REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK
OF ITS FORTY-FIRST SESSION

Draft articles adopted by the International Law Commission
on topics considered at its forty-first session

Note by the Secretary-General

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* A/44/150.

I. INTRODUCTION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, in accordance with its Statute annexed thereto, as subsequently amended, held its forty-first session at its permanent seat at the United Nations Office at Geneva from 2 May to 21 July 1989.
2. The Commission's agenda for its forty-first session consisted of the following items:
 1. Organization of work of the session.
 2. State responsibility.
 3. Jurisdictional immunities of States and their property.
 4. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.
 5. Draft Code of Crimes against the Peace and Security of Mankind.
 6. The law of the non-navigational uses of international watercourses.
 7. International liability for injurious consequences arising out of acts not prohibited by international law.
 8. Relations between States and international organizations (second part of the topic).
 9. Programme, procedures and working methods of the Commission, and its documentation.
 10. Co-operation with other bodies.
 11. Date and place of the forty-second session.
 12. Other business.
3. The work of the Commission during its forty-first session is described in its report to the General Assembly. ¹/ Chapter I of the report is concerned with the organization of the session. Chapter II of the report relates to the topic "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier". Chapter III concerns the topic "Draft Code of Crimes against the Peace and Security of Mankind". Chapter IV relates to the topic "State responsibility". Chapter V is devoted to the topic "International liability for injurious consequences arising out of acts not prohibited by international law". Chapter VI concerns the topic "Jurisdictional immunities of States and their property". Chapter VII relates to the topic "The law of

the non-navigational uses of international watercourses". Chapter VIII concerns the second part of the topic "Relations between States and international organizations". Chapter IX contains matters relating to the programme, procedures and working methods of the Commission and its documentation, as well as co-operation with other bodies, and also considers certain administrative and other matters.

4. The present document has been prepared by the Secretariat, pursuant to a decision of the International Law Commission. 2/ Section II sets out the final text of a set of 32 draft articles and of draft optional Protocols One and Two on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, adopted by the Commission at its forty-first session. Section III sets out the texts of the three draft articles on the draft Code of Crimes against the Peace and Security of Mankind provisionally adopted by the Commission at its forty-first session.

II. DRAFT ARTICLES AND DRAFT OPTIONAL PROTOCOLS ONE AND TWO ON
THE STATUS OF THE DIPLOMATIC COURIER AND THE DIPLOMATIC
BAG NOT ACCOMPANIED BY DIPLOMATIC COURIER

PART I

GENERAL PROVISIONS

Article 1

Scope of the present articles

The present articles apply to the diplomatic courier and the diplomatic bag employed for the official communications of a State with its missions, consular posts or delegations, wherever situated, and for the official communications of those missions, consular posts or delegations with the sending State or with each other.

Article 2

Couriers and bags not within the scope of the present articles

The fact that the present articles do not apply to couriers and bags employed for the official communications of special missions or international organizations shall not affect:

- (a) the legal status of such couriers and bags;
- (b) the application to such couriers and bags of any rules set forth in the present articles which would be applicable under international law independently of the present articles.

Article 3

Use of terms

1. For the purposes of the present articles:

(1) "diplomatic courier" means a person duly authorized by the sending State, either on a regular basis or for a special occasion as a courier ad hoc, as:

(a) a diplomatic courier within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

(b) a consular courier within the meaning of the Vienna Convention on Consular Relations of 24 April 1963; or

(c) a courier of a permanent mission, a permanent observer mission, a delegation or an observer delegation within the meaning of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of 14 March 1975;

who is entrusted with the custody, transportation and delivery of the diplomatic bag and is employed for the official communications referred to in article 1;

(2) "diplomatic bag" means the packages containing official correspondence, and documents or articles intended exclusively for official use, whether accompanied by diplomatic courier or not, which are used for the official communications referred to in article 1 and which bear visible external marks of their character as:

(a) a diplomatic bag within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

(b) a consular bag within the meaning of the Vienna Convention on Consular Relations of 24 April 1963; or

(c) a bag of a permanent mission, a permanent observer mission, a delegation or an observer delegation within the meaning of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of 14 March 1975;

(3) "sending State" means a State dispatching a diplomatic bag to or from its missions, consular posts or delegations;

(4) "receiving State" means a State having on its territory missions, consular posts or delegations of the sending State which receive or dispatch a diplomatic bag;

(5) "transit State" means a State through whose territory a diplomatic courier or a diplomatic bag passes in transit;

(6) "mission" means:

(a) a permanent diplomatic mission within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961; and

(b) a permanent mission or a permanent observer mission within the meaning of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of 14 March 1975;

(7) "consular post" means a consulate-general, consulate, vice-consulate or consular agency within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;

(8) "delegation" means a delegation or an observer delegation within the meaning of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of 14 March 1975;

(9) "international organization" means an intergovernmental organization.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or the internal law of any State.

Article 4

Freedom of official communications

1. The receiving State shall permit and protect the official communications of the sending State, effected through the diplomatic courier or the diplomatic bag, as referred to in article 1.

2. The transit State shall accord to the official communications of the sending State, effected through the diplomatic courier or the diplomatic bag, the same freedom and protection as is accorded by the receiving State.

Article 5

Duty to respect the laws and regulations of the
receiving State and the transit State

1. The sending State shall ensure that the privileges and immunities accorded to its diplomatic courier and diplomatic bag are not used in a manner incompatible with the object and purpose of the present articles.
2. Without prejudice to the privileges and immunities accorded to him, it is the duty of the diplomatic courier to respect the laws and regulations of the receiving State and the transit State.

Article 6

Non-discrimination and reciprocity

1. In the application of the provisions of the present articles, the receiving State or the transit State shall not discriminate as between States.
2. However, discrimination shall not be regarded as taking place:
 - (a) where the receiving State or the transit State applies any of the provisions of the present articles restrictively because of a restrictive application of that provision to its diplomatic courier or diplomatic bag by the sending State;
 - (b) where States by custom or agreement extend to each other more favourable treatment with respect to their diplomatic couriers and diplomatic bags than is required by the present articles.

PART II

STATUS OF THE DIPLOMATIC COURIER AND THE CAPTAIN OF A SHIP
OR AIRCRAFT ENTRUSTED WITH THE DIPLOMATIC BAG

Article 7

Appointment of the diplomatic courier

Subject to the provisions of articles 9 and 12, the sending State or its missions, consular posts or delegations may freely appoint the diplomatic courier.

Article 8

Documentation of the diplomatic courier

The diplomatic courier shall be provided with an official document indicating his status and essential personal data, including his name and, where appropriate, his official position or rank, as well as the number of packages constituting the diplomatic bag which is accompanied by him and their identification and destination.

Article 9

Nationality of the diplomatic courier

1. The diplomatic courier should in principle be of the nationality of the sending State.
2. The diplomatic courier may not be appointed from among persons having the nationality of the receiving State except with the consent of that State, which may be withdrawn at any time. However, when the diplomatic courier is performing his functions in the territory of the receiving State, withdrawal of consent shall not take effect until he has delivered the diplomatic bag to its consignee.
3. The receiving State may reserve the right provided for in paragraph 2 also with regard to:
 - (a) nationals of the sending State who are permanent residents of the receiving State;
 - (b) nationals of a third State who are not also nationals of the sending State.

Article 10

Functions of the diplomatic courier

The functions of the diplomatic courier consist in taking custody of the diplomatic bag entrusted to him and transporting and delivering it to its consignee.

Article 11

End of the functions of the diplomatic courier

The functions of the diplomatic courier come to an end, inter alia, upon:

- (a) fulfilment of his functions or his return to the country of origin;

/...

(b) notification by the sending State to the receiving State and, where necessary, the transit State that his functions have been terminated;

(c) notification by the receiving State to the sending State that, in accordance with paragraph 2 of article 12, it ceases to recognize him as a diplomatic courier.

Article 12

The diplomatic courier declared persona non grata or not acceptable

1. The receiving State may, at any time and without having to explain its decision, notify the sending State that the diplomatic courier is persona non grata or not acceptable. In any such case, the sending State shall, as appropriate, either recall the diplomatic courier or terminate his functions to be performed in the receiving State. A person may be declared non grata or not acceptable before arriving in the territory of the receiving State.
2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1, the receiving State may cease to recognize the person concerned as a diplomatic courier.

Article 13

Facilities accorded to the diplomatic courier

1. The receiving State or the transit State shall accord to the diplomatic courier the facilities necessary for the performance of his functions.
2. The receiving State or the transit State shall, upon request and to the extent practicable, assist the diplomatic courier in obtaining temporary accommodation and in establishing contact through the telecommunications network with the sending State and its missions, consular posts or delegations, wherever situated.

Article 14

Entry into the territory of the receiving State or the transit State

1. The receiving State or the transit State shall permit the diplomatic courier to enter its territory in the performance of his functions.
2. Visas, where required, shall be granted by the receiving State or the transit State to the diplomatic courier as promptly as possible.

Article 15

Freedom of movement

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State or the transit State shall ensure to the diplomatic courier such freedom of movement and travel in its territory as is necessary for the performance of his functions.

Article 16

Personal protection and inviolability

The diplomatic courier shall be protected by the receiving State or the transit State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

Article 17

Inviolability of temporary accommodation

1. The temporary accommodation of the diplomatic courier carrying a diplomatic bag shall, in principle, be inviolable. However:

(a) prompt protective action may be taken if required in case of fire or other disaster;

(b) inspection or search may be undertaken where serious grounds exist for believing that there are in the temporary accommodation articles the possession, import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State or the transit State.

2. In the case referred to in paragraph 1 (a), measures necessary for the protection of the diplomatic bag and its inviolability shall be taken.

3. In the case referred to in paragraph 1 (b), inspection or search shall be conducted in the presence of the diplomatic courier and on condition that it be effected without infringing the inviolability either of the person of the diplomatic courier or of the diplomatic bag and would not unduly delay or impede the delivery of the diplomatic bag. The diplomatic courier shall be given the opportunity to communicate with his mission in order to invite a member of that mission to be present when the inspection or search takes place.

4. The diplomatic courier shall, to the extent practicable, inform the authorities of the receiving State or the transit State of the location of his temporary accommodation.

Article 18

Immunity from jurisdiction

1. The diplomatic courier shall enjoy immunity from the criminal jurisdiction of the receiving State or the transit State in respect of acts performed in the exercise of his functions.
2. He shall also enjoy immunity from the civil and administrative jurisdiction of the receiving State or the transit State in respect of acts performed in the exercise of his functions. This immunity shall not extend to an action for damages arising from an accident involving a vehicle the use of which may have entailed the liability of the courier to the extent that those damages are not recoverable from insurance. Pursuant to the laws and regulations of the receiving State or the transit State, the courier shall, when driving a motor vehicle, be required to have insurance coverage against third-party risks.
3. No measures of execution may be taken in respect of the diplomatic courier, except in cases where he does not enjoy immunity under paragraph 2 and provided that the measures concerned can be taken without infringing the inviolability of his person, his temporary accommodation or the diplomatic bag entrusted to him.
4. The diplomatic courier is not obliged to give evidence as a witness on matters connected with the exercise of his functions. He may, however, be required to give evidence on other matters, provided that this would not unduly delay or impede the delivery of the diplomatic bag.
5. The immunity of the diplomatic courier from the jurisdiction of the receiving State or the transit State does not exempt him from the jurisdiction of the sending State.

Article 19

Exemption from customs duties, dues and taxes

1. The receiving State or the transit State shall, in accordance with such laws and regulations as it may adopt, permit entry of articles for the personal use of the diplomatic courier carried in his personal baggage and grant exemption from all customs duties, taxes and related charges on such articles other than charges levied for specific services rendered.
2. The diplomatic courier shall, in the performance of his functions, be exempt in the receiving State or the transit State from all dues and taxes, national, regional or municipal, except for indirect taxes of a kind which are normally incorporated in the price of goods or services and charges levied for specific services rendered.

Article 20

Exemption from examination and inspection

1. The diplomatic courier shall be exempt from personal examination.
2. The personal baggage of the diplomatic courier shall be exempt from inspection, unless there are serious grounds for believing that it contains articles not for the personal use of the diplomatic courier or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State or the transit State. An inspection in such a case shall be conducted in the presence of the diplomatic courier.

Article 21

Beginning and end of privileges and immunities

1. The diplomatic courier shall enjoy privileges and immunities from the moment he enters the territory of the receiving State or the transit State in order to perform his functions, or, if he is already in the territory of the receiving State, from the moment he begins to exercise his functions.
2. The privileges and immunities of the diplomatic courier shall cease at the moment when he leaves the territory of the receiving State or the transit State, or on the expiry of a reasonable period in which to do so. However, the privileges and immunities of the diplomatic courier ad hoc who is a resident of the receiving State shall cease at the moment when he has delivered to the consignee the diplomatic bag in his charge.
3. Notwithstanding paragraph 2, immunity shall continue to subsist with respect to acts performed by the diplomatic courier in the exercise of his functions.

Article 22

Waiver of immunities

1. The sending State may waive the immunities of the diplomatic courier.
2. The waiver shall, in all cases, be express and shall be communicated in writing to the receiving State or the transit State.
3. However, the initiation of proceedings by the diplomatic courier shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. The waiver of immunity from jurisdiction in respect of judicial proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgement or decision, for which a separate waiver shall be necessary.

5. If the sending State does not waive the immunity of the diplomatic courier in respect of a civil action, it shall use its best endeavours to bring about an equitable settlement of the case.

Article 23

Status of the captain of a ship or aircraft entrusted with the diplomatic bag

1. The captain of a ship or aircraft in commercial service which is scheduled to arrive at an authorized port of entry may be entrusted with the diplomatic bag.

2. The captain shall be provided with an official document indicating the number of packages constituting the bag entrusted to him, but he shall not be considered to be a diplomatic courier.

3. The receiving State shall permit a member of a mission, consular post or delegation of the sending State to have unimpeded access to the ship or aircraft in order to take possession of the bag directly and freely from the captain or to deliver the bag directly and freely to him.

PART III

STATUS OF THE DIPLOMATIC BAG

Article 24

Identification of the diplomatic bag

1. The packages constituting the diplomatic bag shall bear visible external marks of their character.

2. The packages constituting the diplomatic bag, if not accompanied by a diplomatic courier, shall also bear visible indications of their destination and consignee.

Article 25

Contents of the diplomatic bag

1. The diplomatic bag may contain only official correspondence, and documents or articles intended exclusively for official use.

2. The sending State shall take appropriate measures to prevent the dispatch through its diplomatic bag of items other than those referred to in paragraph 1.

Article 26

Transmission of the diplomatic bag by postal service or any mode of transport

The conditions governing the use of the postal service or of any mode of transport, established by the relevant international or national rules, shall apply to the transmission of the packages constituting the diplomatic bag in such a manner as to ensure the best possible facilities for the dispatch of the bag.

Article 27

Safe and rapid dispatch of the diplomatic bag

The receiving State or the transit State shall facilitate the safe and rapid dispatch of the diplomatic bag and shall, in particular, ensure that such dispatch is not unduly delayed or impeded by formal or technical requirements.

Article 28

Protection of the diplomatic bag

1. The diplomatic bag shall be inviolable wherever it may be; it shall not be opened or detained and shall be exempt from examination directly or through electronic or other technical devices.

2. Nevertheless, if the competent authorities of the receiving State or the transit State have serious reason to believe that the consular bag contains something other than the correspondence, documents or articles referred to in paragraph 1 of article 25, they may request that the bag be opened in their presence by an authorized representative of the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin.

Article 29

Exemption from customs duties and taxes

The receiving State or the transit State shall, in accordance with such laws and regulations as it may adopt, permit the entry, transit and departure of the diplomatic bag and grant exemption from customs duties, taxes and related charges other than charges for storage, cartage and similar services rendered.

PART IV

MISCELLANEOUS PROVISIONS

Article 30

Protective measures in case of force majeure or other exceptional circumstances

1. Where, because of reasons of force majeure or other exceptional circumstances, the diplomatic courier, or the captain of a ship or aircraft in commercial service to whom the diplomatic bag has been entrusted, or any other member of the crew, is no longer able to maintain custody of the bag, the receiving State or the transit State shall inform the sending State of the situation and take appropriate measures with a view to ensuring the integrity and safety of the bag until the authorities of the sending State recover possession of it.
2. Where, because of reasons of force majeure or other exceptional circumstances, the diplomatic courier or the unaccompanied diplomatic bag is present in the territory of a State not initially foreseen as a transit State, that State, where aware of the situation, shall accord to the courier and the bag the protection provided for under the present articles and, in particular, extend facilities for their prompt and safe departure from its territory.

Article 31

Non-recognition of States or Governments or absence of diplomatic or consular relations

The State on whose territory an international organization has its seat or an office or a meeting of an international organ or a conference is held shall grant the facilities, privileges and immunities accorded under the present articles to the diplomatic courier and the diplomatic bag of a sending State directed to or from its mission or delegation, notwithstanding the non-recognition of one of those States or its Government by the other State or the non-existence of diplomatic or consular relations between them.

Article 32

Relationship between the present articles and other conventions and agreements

1. The present articles shall, as between parties to them and to the conventions listed in subparagraph (1) of paragraph 1 of article 3, supplement the rules on the status of the diplomatic courier and the diplomatic bag contained in those conventions.

2. The provisions of the present articles are without prejudice to other international agreements in force as between parties to them.

3. Nothing in the present articles shall preclude the parties thereto from concluding international agreements relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, provided that such new agreements are not incompatible with the object and purpose of the present articles and do not affect the enjoyment by the other parties to the present articles of their rights or the performance of their obligations under the present articles.

**DRAFT OPTIONAL PROTOCOL ONE ON THE STATUS OF THE COURIER
AND THE BAG OF SPECIAL MISSIONS**

The States Parties to the present draft Protocol and to the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, hereinafter referred to as "the draft articles",

Have agreed as follows:

Article I

The draft articles also apply to a courier and a bag employed for the official communications of a State with its special missions within the meaning of the Convention on Special Missions of 8 December 1969, wherever situated, and for the official communications of those missions with the sending State or with its other missions, consular posts or delegations.

Article II

For the purposes of the draft articles:

(a) "mission" also means a special mission within the meaning of the Convention on Special Missions of 8 December 1969;

(b) "diplomatic courier" also means a person duly authorized by the sending State as a courier of a special mission within the meaning of the Convention on Special Missions of 8 December 1969 who is entrusted with the custody, transportation and delivery of a diplomatic bag and is employed for the official communications referred to in article I of the present draft Protocol;

(c) "diplomatic bag" also means the packages containing official correspondence, and documents or articles intended exclusively for official use, whether accompanied by a courier or not, which are used for the official communications referred to in article I of the present draft Protocol and which bear visible external marks of their character as a bag of a special mission within the meaning of the Convention on Special Missions of 8 December 1969.

Article III

1. The present draft Protocol shall, as between parties to it and to the Convention on Special Missions of 8 December 1969, supplement the rules on the status of the diplomatic courier and the diplomatic bag contained in that Convention.
2. The provisions of the present draft Protocol are without prejudice to other international agreements in force as between parties to them.
3. Nothing in the present draft Protocol shall preclude the parties thereto from concluding international agreements relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, provided that such new agreements are not incompatible with the object and purpose of the draft articles and do not affect the enjoyment by the other parties to the draft articles of their rights or the performance of their obligations under the draft articles.

DRAFT OPTIONAL PROTOCOL TWO ON THE STATUS OF THE COURIER AND THE BAG OF INTERNATIONAL ORGANIZATIONS OF A UNIVERSAL CHARACTER

The States Parties to the present draft Protocol and to the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, hereinafter referred to as "the draft articles",

Have agreed as follows:

Article I

The draft articles also apply to a courier and a bag employed for the official communications of an international organization of a universal character:

- (a) with its missions and offices, wherever situated, and for the official communications of these missions and offices with each other;
- (b) with other international organizations of a universal character.

Article II

For the purposes of the draft articles:

- (a) "diplomatic courier" also means a person duly authorized by the international organization as a courier who is entrusted with the custody, transportation and delivery of the bag, and is employed for the official communications referred to in article I of the present draft Protocol;

(b) "diplomatic bag" also means the packages containing official correspondence, and documents or articles intended exclusively for official use, whether accompanied by a courier or not, which are used for the official communications referred to in article I of the present draft Protocol and which bear visible external marks of their character as a bag of an international organization.

Article III

1. The present draft Protocol shall, as between parties to it and to the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 or the Convention on the Privileges and Immunities of the Specialized Agencies of 21 November 1947, supplement the rules on the status of the diplomatic courier and the diplomatic bag contained in those Conventions.
2. The provisions of the present draft Protocol are without prejudice to other international agreements in force as between parties to them.
3. Nothing in the present draft Protocol shall preclude the parties thereto from concluding international agreements relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, provided that such new agreements are not incompatible with the object and purpose of the draft articles and do not affect the enjoyment by the other parties to the draft articles of their rights or the performance of their obligations under the draft articles.

III. DRAFT ARTICLES ON THE DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

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CHAPTER II

ACTS CONSTITUTING CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

Part I. Crimes against peace

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Article 13

Threat of aggression

Threat of aggression consisting of declarations, communications, demonstrations of force or any other measures which would give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State.

/...

Article 14

Intervention

1. Intervention in the internal or external affairs of a State by fomenting [armed] subversive or terrorist activities or by organizing, assisting or financing such activities, or supplying arms for the purpose of such activities, thereby [seriously] undermining the free exercise by that State of its sovereign rights.
2. Nothing in this article shall in any way prejudice the right of peoples to self-determination as enshrined in the Charter of the United Nations.

Article 15

Colonial domination and other forms of alien domination

Establishment or maintenance by force of colonial domination or any other form of alien domination contrary to the right of peoples to self-determination as enshrined in the Charter of the United Nations.

Notes

1/ Official Records of the General Assembly, Forty-fourth Session, Supplement No. 10 (A/44/10).

2/ Yearbook of the International Law Commission, 1977, vol. II (Part Two), p. 133, document A/32/10, para. 130.