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**Fifth report on jurisdictional immunities of States and their property, by Mr. S. Sucharitkul,
Special Rapporteur**

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JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

[Agenda item 2]

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Fifth report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur

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Introductory note

1. The introductory note in the fourth report on jurisdictional immunities of States and their property may still serve as a useful introduction to the present report, which is the fifth in the series of reports¹ prepared by the Special Rapporteur on the topic and submitted to the International Law Commission for consideration.² This fifth report is also foreshadowed by the general considerations of the scope of part III (art. 11), set out in the fourth report.³

A. Consideration of draft articles in progress

2. It may be useful at this juncture to give a very brief account of the general structure of the draft articles, to indicate the extent of progress achieved so far and what is envisaged for the remainder of the study. The four

previous reports have covered the first two parts, namely part I (Introduction) and part II (General principles), as well as the initial articles of Part III (Exceptions to State immunity).

1. PART I. INTRODUCTION

3. Part I (Introduction) comprises five articles. Article 1 (Scope of the present articles) was revised and provisionally adopted by the Commission at its thirty-fourth session.⁴ Article 2 (Use of terms) has in part been discussed: a definition has been adopted for the term "court"; some terms have been withdrawn and others are yet to be discussed and revised.⁵ Article 3 (Inter-

⁴ Article 1 as revised reads as follows:

"Article 1. Scope of the present articles

"The present articles apply to the immunity of one State and its property from the jurisdiction of the courts of another State."

See *Yearbook ... 1982*, vol. II (Part Two), p. 99.

⁵ For the original text of article 2, *ibid.*, p. 95, footnote 224. The definition adopted (para. 1 (a)) is as follows:

"1. For the purposes of the present articles:

"(a) 'court' means any organ of a State, however named, entitled to exercise judicial functions;" (*Ibid.*, p. 100.)

The definitions of the terms "territorial State" (para. 1 (c)) and "foreign State" (para. 1 (d)) have been withdrawn. The term "trading or commercial activity" (para. 1 (f)) is yet to be considered by the Drafting Committee, in connection with article 12.

¹ This series of reports was preceded by an exploratory report prepared in 1978 by the Working Group on the topic (A/CN.4/L.279/Rev.1), reproduced in part in *Yearbook ... 1978*, vol. II (Part Two), pp. 153-155.

² The previous reports were: (a) preliminary report, *Yearbook ... 1979*, vol. II (Part One), p. 227, document A/CN.4/323; (b) second report, *Yearbook ... 1980*, vol. II (Part One), p. 199, document A/CN.4/331 and Add.1; (c) third report, *Yearbook ... 1981*, vol. II (Part One), p. 125, document A/CN.4/340 and Add.1; (d) fourth report, *Yearbook ... 1982*, vol. II (Part One), p. 199, document A/CN.4/357.

³ Document A/CN.4/357 (see footnote 2 (d) above), paras. 10-28.

pretative provisions) has been partly abandoned, while paragraph 2 remains to be discussed in connection with the criterion for determining the commercial character of trading or commercial activity as defined in article 2, para. 1 (f).⁶ Article 4 (Jurisdictional immunities not within the scope of the present articles) and article 5 (Non-retroactivity of the present articles)⁷ have been presented to facilitate consideration of the draft articles and, as customary, will be discussed by the Commission after the remaining draft articles have been completed. Thus, of the five articles constituting part I,⁸ only article 1 has been provisionally adopted, while the other provisions await further discussion and action by the Commission.

2. PART II. GENERAL PRINCIPLES

4. Part II (General principles) contains a series of five more articles, all of which have been fully discussed by the Commission. Draft article 6 (State immunity), provisionally adopted by the Commission at its thirty-second session,⁹ is currently under review in the Drafting Committee, which is expected to propose an improved version for reconsideration by the Commission.¹⁰ Articles 7, 8 and 9 were provisionally adopted by the Commission at its thirty-fourth session, while article 10, which for lack of time is still with the Drafting Committee, is not expected to present insuperable difficulties.¹¹

⁶ For the text of article 3, *ibid.*, p. 96, footnote 225. Paragraph 1 (a), which deals in detail with what is meant by the expression "foreign State" for the purposes of the jurisdictional immunities of States, is to be examined later; paragraph 1 (b) is no longer required in view of the adoption of draft article 7, and the definition of the term "jurisdiction" has been replaced by that of the term "court" (see footnote 5 above).

⁷ For the texts of articles 4 and 5, see *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227, respectively.

⁸ Articles 1 to 5 were first presented in the second report of the Special Rapporteur (see footnote 2 (b) above), which was considered by the Commission at its thirty-second session (*Yearbook ... 1980*, vol. II (Part Two), pp. 138 *et seq.*, paras. 111-122) and by the Sixth Committee of the General Assembly at its thirty-fifth session (see "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-fifth session of the General Assembly" (A/CN.4/L.326), paras. 311-326).

⁹ Article 6 as provisionally adopted by the Commission at its thirty-second session reads as follows:

"Article 6. State immunity

"1. A State is immune from the jurisdiction of another State in accordance with the provisions of the present articles.

"2. Effect shall be given to State immunity in accordance with the provisions of the present articles."

See *Yearbook ... 1982*, vol. II (Part Two), p. 100, footnote 239.

¹⁰ Several revisions have been proposed, such as:

"A State is immune from the jurisdiction of the courts of another State *except as provided in the present articles*"; or "... except as provided in articles ... and ..."; or "... to the extent and subject to the limitations provided in the present articles".

¹¹ Articles 7 to 10 were considered by the Commission at its thirty-third and thirty-fourth sessions: see *Yearbook ... 1981*, vol. II (Part Two), pp. 154 *et seq.*, paras. 208-227; and *Yearbook ... 1982*, vol. II (Part Two), pp. 97-98, paras. 185-192. See also the observations made by the Sixth Committee of the General Assembly in "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-seventh session of the General Assembly" (A/CN.4/L.352), paras. 171-178.

5. Article 6 attempts to state the general principle of State immunity as a sovereign right from the point of view of a State claiming immunity from the jurisdiction of the courts of another State. On the other hand, article 7, now entitled "Modalities for giving effect to State immunity",¹² endeavours to restate, in paragraph 1, the corresponding obligation on the part of the other State to accord immunity or give effect to State immunity by refraining from exercising the jurisdiction of its otherwise competent judicial authority in a given case involving a foreign State. Paragraph 2 identifies what may be considered to be proceedings against another State, even when it is not named as a party, while paragraph 3 gives a general classification of what constitutes a State for the purposes of jurisdictional immunities, namely an organ of the State, an agency or instrumentality of the State in respect of "an act performed in the exercise of governmental authority", or "one of the representatives of that State in respect of an act performed in his capacity as a representative". A State is also impleaded when the proceeding is designed to deprive that State of its property or of the use of property in its possession or control. Article 7 is, indeed, a central provision of part II of the draft articles. Together with article 6, which is to be revised, it contains the main general principles of State immunity.¹³

6. Article 8 (Express consent to the exercise of jurisdiction)¹⁴ constitutes an important qualification by stipulating that absence of consent is a prerequisite for a successful claim of State immunity. It also spells out the various ways in which consent may be expressly given.¹⁵

¹² "Article 7. Modalities for giving effect to State immunity

"1. A State shall give effect to State immunity [under article 6] by refraining from exercising jurisdiction in a proceeding before its courts against another State.

"2. A proceeding before a court of a State shall be considered to have been instituted against another State, whether or not that other State is named as a party to that proceeding, so long as the proceeding in effect seeks to compel that other State either to submit to the jurisdiction of the court or to bear the consequences of a determination by the court which may affect the rights, interests, properties or activities of that other State.

"3. In particular, a proceeding before a court of a State shall be considered to have been instituted against another State when the proceeding is instituted against one of the organs of that State, or against one of its agencies or instrumentalities in respect of an act performed in the exercise of governmental authority, or against one of the representatives of that State in respect of an act performed in his capacity as a representative, or when the proceeding is designed to deprive that other State of its property or of the use of property in its possession or control." (*Yearbook ... 1982*, vol. II (Part Two), p. 100.)

¹³ See the commentary to article 7, *ibid.*, pp. 100 *et seq.*

¹⁴ "Article 8. Express consent to the exercise of jurisdiction

"A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to any matter if it has expressly consented to the exercise of jurisdiction by that court with regard to such a matter:

"(a) by international agreement;

"(b) in a written contract; or

"(c) by a declaration before the court in a specific case." (*Ibid.*, p. 107.)

¹⁵ See the commentary to article 8, *ibid.*, pp. 107 *et seq.*

7. Article 9 (Effect of participation in a proceeding before a court)¹⁶ specifies the conditions for giving consent by conduct and defines the extent to which a State is considered to have consented by participating in a proceeding before a court, and, by so limiting the scope of its effect, also serves to indicate the circumstances in which a State can intervene or take a step in a proceeding without being considered to have consented to the exercise of jurisdiction by that court.¹⁷

8. Article 10 (Counter-claims), as revised by the Special Rapporteur,¹⁸ is still under consideration by the Drafting Committee. It deals with the extent of the effect of counter-claims against a State which has itself instituted a legal proceeding in a court of another State, as well as counter-claims by a State.¹⁹

3. PART III. EXCEPTIONS TO STATE IMMUNITY

9. Articles 11 (Scope of the present part) and 12 (Trading or commercial activity), presented by the Special Rapporteur in his fourth report,²⁰ were the subject of extensive preliminary discussion during the thirty-fourth session of the Commission. The drafts of these articles in their original form, as well as the revised versions²¹ prepared in the light of the discussion in the

Commission,²² are still with the Drafting Committee. The Commission has resolved to appoint and convene the next Drafting Committee at the beginning of the forthcoming session, so as to allow it to complete its work on the draft articles referred to its predecessor and to itself.

10. Article 11 (Scope of the present part), in its revised form,²³ may still have a useful role to play as a link between part II (General principles) and part III (Exceptions to State immunity) and as warning sign announcing the approach to a "grey zone".

11. Article 12 (Trading or commercial activity), both in its original version and as slightly revised by the Special Rapporteur,²⁴ represents the first entry into a "controversial area". The Commission has had an interesting round of discussion on this subject and the draft will be examined by the Drafting Committee in 1983.

B. Debate in the Sixth Committee of the General Assembly

12. As the thirty-seventh session of the General Assembly, the debate of the Sixth Committee on the substance of the topic of jurisdictional immunities of States and their property was particularly rich. More than 40 representatives spoke on one aspect or another of State immunity and commented on the draft articles provisionally adopted by the Commission on those still under consideration by the Drafting Committee and on the methods of approach.²⁵ The Special Rapporteur has been encouraged by the constructive observations from representatives of Member States and ventures to think that it would be useful to clarify some of the points raised so as to make them crystal clear, beyond any reasonable shadow of doubt, especially regarding the methods, objectives and structure of the work undertaken on the topic and to be progressively continued.

1. THE INDUCTIVE METHOD

13. Despite certain criticism from outside the Commission and the Sixth Committee of the seeming indifference and relatively inactive role of developing nations

¹⁶ "Article 9. Effect of participation in a proceeding before a court"

"1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has:

"(a) itself instituted that proceeding; or

"(b) intervened in that proceeding or taken any other step relating to the merits thereof.

"2. Paragraph 1 (b) above does not apply to any intervention or step taken for the sole purpose of:

"(a) invoking immunity; or

"(b) asserting a right or interest in property at issue in the proceeding.

"3. Failure on the part of a State to enter an appearance in a proceeding before a court of another State shall not be considered as consent of that State to the exercise of jurisdiction by that court." (*Ibid.*, p. 109.)

¹⁷ See the commentary to article 9, *ibid.*, pp. 109 *et seq.*

¹⁸ "Article 10. Counter-claims"

"1. In any legal proceedings instituted by a State, or in which a State has taken part or a step relating to the merit, in a court of another State, jurisdiction may be exercised in respect of any counter-claim arising out of the same legal relationship or facts as the principal claim, or if, in accordance with the provisions of the present articles, jurisdiction could be exercised, had separate proceedings been instituted before that court.

"2. A State making a counter-claim in proceedings before a court of another State is deemed to have given consent to the exercise of jurisdiction by that court with respect not only to the counter-claim but also to the principal claim, arising out of the same legal relationship or facts [as the counter-claim]." (*Ibid.*, p. 95, footnote 218.)

¹⁹ Certain doubts were expressed in the general discussion in the Commission at its thirty-fourth session as to the usefulness of paragraph 2. On balance, it appears to have an independent purpose. It is useful to know precisely the extent to which a State making a counter-claim may be said to have consented to the exercise of jurisdiction by the court in respect of the principal claim and none other.

²⁰ For the texts of articles 11 and 12 as originally presented by the Special Rapporteur, *ibid.*, p. 95, footnotes 220 and 221, respectively.

²¹ The revised texts of articles 11 and 12 were presented to the Drafting Committee as document A/CN.4/L.351 (see footnotes 23 and 24 below).

²² *Yearbook ... 1982*, vol. II (Part Two), pp. 98-99, paras. 193-197.

²³ "Article 11. Scope of the present part"

"The application of the exceptions provided in part III of the present articles may be subject to a condition of reciprocity or any other condition as mutually agreed between the States concerned." (*Ibid.*, p. 99, footnote 237.)

²⁴ "Article 12. Trading or commercial activity"

"1. Unless otherwise agreed, a State is not immune from the jurisdiction of the courts of another State in respect of proceedings relating to any trading or commercial activity conducted, partly or wholly, in the territory of that other State, by the State itself or by one of its organs or agencies whether or not organized as a separate legal entity.

"2. Paragraph 1 does not apply to transactions or contracts concluded between States or on a government-to-government basis." (*Ibid.*)

²⁵ See "Topical summary ... " (A/CN.4/L.352), paras. 157-185.

in the process of international law-making,²⁶ it is reassuring to hear comments in the Sixth Committee highlighting the practical importance of the topic and its extreme complexities, notwithstanding its assignment for the first time to an Asian Special Rapporteur from a developing country of very great antiquity. It is also most reassuring to this Special Rapporteur to hear confirmation of his finding, through the inductive method as proposed by Mr. Tsuruoka²⁷—another Asian jurist of profound traditional legal background—that State immunity is based on fundamental principles of international law, among which have been mentioned, unchallenged, the sovereignty and sovereign equality of States. The inductive method has not been the primary approach used in the study of all topics but is highly recommended for the present topic and has become the selected and respected method.²⁸

14. According to this inductive method, as the Special Rapporteur has pointed out time and again, no *deus ex machina* is used. Rather, reference is made in the study to the existing practice of all States, large and small, rich and poor, developing or industrially more advanced, before reaching any conclusion. The search is concentrated first and foremost on judicial practice, or judicial decisions, but not necessarily confined to them. It covers also national legislations as evidence of State practice and opinions of writers on the practice as well as the principles. It does not omit or overlook the views of Governments on all relevant questions. The treaty practice of all States has also been examined, as well as bilateral treaties and multilateral or regional conventions.

15. Indeed, the search for basic materials has been very thorough and, from the start of its study of the topic, the Commission decided, on the recommendation of the Special Rapporteur, to ask all Member States to lend their support by communicating information, materials concerning judicial decisions, case-law, national legislation and opinions of Governments, as well as replies to the questionnaire prepared by the Secretariat in co-operation with the Special Rapporteur.²⁹ Neither he nor those States which have not provided information concerning judicial and government practice can be justly accused of omission or neglect, since practice is to evolve and cannot be fabricated. Nevertheless, neither the Special Rapporteur, nor the Commission, nor the Sixth Committee can belittle the significance of existing practice as is prevalent the world over and which remains unopposed

by other silent States in the absence of opposing practice.

2. CONTRADICTIONS AND DIVERGENCES IN STATE PRACTICE

16. On the other hand, it should also be observed that, in the study of the present topic, resort to the inductive method has proved most disconcerting. To begin with, not all States have developed or even started to develop a judicial practice on this or indeed on any topic of public or private international law. Within the Commission, the question has been raised whether it could be said that the principle of State immunity was ever truly established in State practice, when the Commission has had before it the judicial practice of only a handful of States. The Special Rapporteur was at pains to explain that all the available evidence of existing State practice on State immunity had been presented to the Commission. It was not at random or by a selective method that the practice of only 25 countries had been used in the preparation of earlier reports and that not all examples had been individually presented for examination and comments in the study of each and every aspect of State immunity, to which some were in any event not really pertinent.

17. It is not unnatural that contradictions and divergences abound in the judicial practice of the various nations examined, and indeed in the practice of the same legal system or even of the same court of law over the same period of time. If the Special Rapporteur had been shy to expose such inconsistencies, he would have been guilty of further distorting the already much distorted practice of States. It is distorted in that its development has followed a somewhat zigzagging and tortuous path, almost like the mighty Asian river, the Mekong, which has its source in the highest mountains in the world, the Himalayas, and whose water is derived from unrecorded rainfall and melting snow, flowing from endless tributaries through the rapids of Tibet and converging into the Mekong's main stream between Burma, Laos and Thailand, rushing through Kampuchea with added momentum from the Great Lake, forming countless islands and precipices, disfiguring landscapes and finally diverging into a gushing delta before plunging into the absorbing Gulf of Thailand.

3. EMERGENCE OF CONVERGING PRINCIPLES AND PRACTICE

18. A bird's-eye view of the tortuous path taken by legal developments, comparable to that of the Mekong River, is bound to give a picture that appears twisted and distorted, with the exception of some relatively straighter stretches. Just as it does not appear humanly possible to straighten the course of the Mekong, so it seems impossible to unbend every twist and turn in the path of development of the law. As the Thames flows through many bends and brooks before reaching its estuary and the North Sea, so British practice concerning trading or commercial activity of State-owned or State-operated vessels cannot be said to have finally

²⁶ See UNITAR, *The International Law Commission. The Need for a New Direction* (United Nations publication, Sales No. E.81.XV.PE/1), especially pp. 13-15.

²⁷ See *Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 48th meeting, para. 40.

²⁸ See, on this question, the fourth report of the Special Rapporteur (see footnote 2 (d) above), para. 10.

²⁹ The materials submitted by Governments, as well as their replies to the questionnaire, appear in the volume of the United Nations Legislative Series entitled *Materials on Jurisdictional Immunities of States and their Property* (Sales No. E/F.81.V.10).

been settled until the long overdue decision of the House of Lords in the "*I Congreso del Partido*" case (1981),³⁰ and not without legislative initiatives and judicial hesitations. A study of the judicial practice of States does not lend itself to a facile restatement of ready-made law of any country. On the contrary, it shows an intensified process of judicial reasoning which is dialectic and empirical rather than dogmatic or dictatorial.

19. The Sixth Committee concurred with the finding of the Commission that the general principle of State immunity was established in the practice of States. It should be added that, when State immunity was considered to have been firmly established, the world was not so divided into socialist and non-socialist, or developing and industrially advanced countries. Indeed, when the principles of an international law of State immunity were widely accepted, there were no socialist States, nor so-called advanced countries. The first pronouncement of the law was by the highest authority of the world's youngest nation at the time, the United States of America, in *The Schooner "Exchange" v. McFaddon and others* (1812),³¹ and it was from the start based on existing customary international law, not on United States law, nor on American law. Indeed, the United States was only an infant nation compared with aged Thailand and old Japan; it was like a child just starting to talk and walk, having just won its national independence. The process of decolonization took more than a few decades. It was during the height of the Napoleonic Wars (1812), with Europe torn by serious conflicts in the north, the east and the south, that State immunity was recognized. The law on the subject came to be settled in that young, revolutionary and thriving nation even before it had to undergo a national convulsion, the unsettling experience of the Civil War.

20. International law on State immunity was established in Belgium³² and Italy³³—equally young and newly independent States of Europe—in a very restrictive sense. Egyptian practice³⁴ followed suit. Although

its mixed courts were somewhat international, Egypt, itself an old nation, belongs to Africa and the Mediterranean rather than to central Europe. Practice did not start developing all at once in every country at the same time.

21. The Commission and subsequently the Sixth Committee of the General Assembly were able to recognize the existence of a general principle of State immunity on the basis of an examination of the judicial practice of a few States in the nineteenth century, although of course the extent of State immunity was by no means uniform. The practice of major European Powers such as the United Kingdom,³⁵ France³⁶ and Germany³⁷ was full of uncertainties and surprises. Nevertheless, out of this utter confusion it was possible to identify the emergence of a clear general rule of State immunity.

4. ABSENCE OF PRACTICE IN SOME STATES

22. Doubts have been raised as to the correctness of identifying as international law the customary law as developed through the practice of only 25 countries and applying it to the rest of the community of nations, as if the Commission had deliberately omitted to examine the practice of any State. The truth is the opposite. Each and every State has been consulted. The examination of State practice has been thorough and exhaustive. None was left out. There are no other decisions or outside experts to be consulted, no extraterrestrial beings to inform us of what the law is in such and such a country at such and such a time. The fact remains that, of the existing and available practice of States, the Commission has taken occasion to consider all, without fear or favour.

23. The conclusion that is emerging is clear enough. State immunity was never considered to be an absolute principle in any sense of the term. At no time was it viewed as a *jus cogens* or an imperative norm. The rule was from the beginning subject to various qualifications, limitations and exceptions. This is recognized even in the recent legislation adopted in certain socialist countries.³⁸ The differences of opinion seem to linger only in the areas where exceptions and limitations are put into application. That is why part III of the draft articles, "Exceptions to State immunity", has already given rise to some controversies. But the argument should apply *a fortiori*, or at least with equal force, that the evolutionary process of the law does not require the positive or active participation of all States. While it cannot exclude any State from participation, absence of practice is no ground for liability for neglect or negligence on the part of States. However, such absence cannot be invoked to invalidate or otherwise downgrade

³⁰ *The All England Law Reports*, 1981, vol. 2, p. 1064; see the judgment pronounced by Lord Wilberforce (pp. 1066-1078), as well as the concurring opinion of Lord Edmund-Davies in favour of dismissing the appeal in the "*Marble Islands*" case (pp. 1080-1082), and the dissenting opinions of Lord Diplock (pp. 1078-1080) and of Lord Keith and Lord Bridge (pp. 1082-1083), in favour of allowing an appeal in both cases.

³¹ W. Cranch, *Reports of Cases argued and adjudged in the Supreme Court of the United States* (New York, 1911), vol. VII (3rd ed.), p. 116.

³² See, for example, *Etat du Pérou v. Kreglinger* (1857) (*Pasicrisie belge*, 1857 (Brussels), part 2, p. 348); see also the decision of the Court of Appeal of Brussels of 30 December 1840 (*ibid.*, 1841, part 2, p. 33), and the cases cited in the fourth report of the Special Rapporteur (see footnote 2 (d) above), paras. 58-59.

³³ See, for example, *Morellet v. Governo Danese* (1882) (*Giurisprudenza Italiana* (Turin), vol. XXXV, part 1 (1883), pp. 125 and 130-131), and the cases cited in the fourth report of the Special Rapporteur (see footnote 2 (d) above), paras. 56-57.

³⁴ See, for example, the S.S. "*Sumatra*" case (1920) (*Bulletin de législation et de jurisprudence égyptiennes* (Alexandria), vol. 33 (1920-1921), p. 25; *Journal du droit international* (Clunet) (Paris), vol. 48 (1921), p. 270), and the cases cited in the fourth report of the Special Rapporteur (see footnote 2 (d) above), paras. 60-61.

³⁵ See, for example, the cases cited in the fourth report of the Special Rapporteur (see footnote 2 (d) above), paras. 80-87.

³⁶ *Idem*, paras. 62-66.

³⁷ *Idem*, paras. 67-68.

³⁸ See, for example, article 61 of the Fundamentals of Civil Procedure of the Union of Soviet Socialist Republics and the Union Republics, reproduced in United Nations, *Materials on Jurisdictional Immunities ...*, p. 40.

the existing and prevailing practice of which abundant evidence is available elsewhere. If once it was admissible that there was a law of State immunity, it should be equally admissible to define and identify its contents and examine its application in controversial areas. That is precisely the purpose of part III.

C. Advancement of work on preparation of the draft articles

24. Encouraged by the substantial support voiced in the Sixth Committee for the existing structure of the draft articles, and bearing in mind the words of caution and wise advice pronounced by so many well-wishers, as well as the constructive proposals for drafting improvements which will be taken into consideration at or before the second reading of the draft articles, the Special Rapporteur is ready to proceed along the path that has been charted with the approval of the Commission and the endorsement of the Sixth Committee. Without prejudice to his future findings, the Special Rapporteur heartily and gratefully accepts the reminder that, in his approach to the "grey zone", the paramount interests of humanity must be recognized, and that consideration should equally be given to safeguarding the vital interests of all States, including the socialist States, the developing States and the least developed countries, whatever their denomination, size, location or ideology, and of all nations of whatever social, political or economic structure.

25. At this juncture, the Special Rapporteur begs to lodge a caveat in the same co-operative and constructive spirit: it is easy to say, in the absence of State practice in a given country or without reference thereto, that the law as developed in the practice of so wide a region as Asia, Africa or Latin America points in a definite direction, or is the opposite of the prevailing practice in Western Europe, or is in any way similar to the practice of socialist countries. Nothing could be further from the truth. Nothing could be nearly so dangerous as such a sweeping statement, which the Special Rapporteur, in all earnestness and good conscience, feels compelled to implore representatives of States to avoid. A glance at the judicial practice and national legislations of Pakistan, India, Singapore or Japan will reveal a strong trend away from any absolute doctrine. Neither Pakistan nor Singapore can be said not to be Asian, nor to be no longer thriving and developing nations. A brief examination of their legislation and practice will suffice to silence any sweeping statements about Asian practice being identified with that of socialist or capitalist countries. There is no such thing as practice which could be said to be the common law of Asia, Africa or Latin

America, nor are the interests of developing nations identical or necessarily alike on every issue. Indeed, each area of controversy should be examined on its own merits. No predetermined dogma nor any amount of absolutism should be allowed to dictate or disturb any serious study of relevant progressive legal developments. The Special Rapporteur continues to benefit from the lessons to be learned from the inductive method and craves the indulgence of representatives of Governments to continue to be patient so that the process of sedimentation and crystallization of the law may proceed unimpeded.

26. As planned, therefore, the draft articles dealing with specified areas in which limitations or exceptions to State immunity may be recognized and applied will be as follows:

Article 13 "Contracts of employment";

Article 14 "Personal injuries and damage to property";

Article 15 "Ownership, possession and use of property";

Article 16 "Patents, trade marks and other intellectual properties";

Article 17 "Fiscal liabilities and customs duties";

Article 18 "Shareholdings and membership of bodies corporate";

Article 19 "Ships employed in commercial service";

Article 20 "Arbitration".

27. It is no accident that the specified areas of controversy under examination in part III have been the subject of some regulation in a multilateral convention³⁹ and have partially received legislative ratification in some countries, both signatories and indeed non-signatories to this Convention. Such an investigation does not imply endorsement or disapproval of the proposals contained in the Convention or in any other bilateral agreements in particular, or as revised and modified by a number of national legislations.⁴⁰

³⁹ See Council of Europe, *European Convention on State Immunity and Additional Protocol* (1972), European Treaty Series (Strasbourg), No. 74 (1972); reproduced in United Nations, *Materials on Jurisdictional Immunities ...*, pp. 156 *et seq.* See also the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (Brussels, 1926) and Additional Protocol (Brussels, 1934) (League of Nations, *Treaty Series*, vol. CLXXVI, pp. 199 and 215; reproduced in United Nations, *Materials on Jurisdictional Immunities ...*, pp. 173 *et seq.*).

⁴⁰ See, for example, the United States *Foreign Sovereign Immunities Act of 1976* (see footnote 66 below), the United Kingdom *State Immunity Act 1978* (see footnote 65 below), the Pakistan *State Immunity Ordinance, 1981* (see footnote 69 below) and Singapore's *State Immunity Act, 1979* (see footnote 68 below).

Draft articles on jurisdictional immunities of States and their property (*continued*)

PART III. EXCEPTIONS TO STATE IMMUNITY (*continued*)

ARTICLE 13 (Contracts of employment)

A. General considerations

1. SCOPE OF "CONTRACTS OF EMPLOYMENT" AS AN EXCEPTION TO STATE IMMUNITY

28. The purpose of draft article 13 is to define the scope of the area specified as "contracts of employment" as a possible exception to the general principle of State immunity. Many questions are immediately relevant to the general considerations in this specific area which concerns primarily "contracts of employment" between individuals and a State for the performance of services within the territory of another State.

29. "Contracts of employment" between individuals and a corporation or an agency not attributable to a State, nor to an organ of a State, nor to one of its agencies or instrumentalities acting in the exercise of the governmental authority of the State as stipulated in article 7, paragraph 3,⁴¹ of the present draft articles, will lie outside the scope of the current study. Only "contracts of employment" concluded by or on behalf of a State as employer would come under the purview of article 13. The first element is therefore employment by a State, as the area of investigation is confined to the contractual relationship between individuals and a State for the performance of services in the territory of another State.

30. The second element appears to be the services to be rendered by the employees of that State within the territory or the territorial jurisdiction of another State. The cause of action or the dispute in question would relate to the contractual relationship with the State as an employer before the courts of another State.

31. The third element is the possibility or justiciability of proceedings brought before the courts of another State against the employer State by an employee seeking redress in respect of a breach of a term of the contract of employment, based on an existing contractual relationship binding on the State in respect of services rendered or performed in the territory of another State. The subject-matter of the dispute may be classified as labour relations or the terms and conditions of employment, covering compensation, social security, pensions, and so on. In other words, the gist of this specified area of exceptions to State immunity covers the actionability of obligations undertaken by, or binding on, a State and arising out of contracts of employment of individuals for the performance of services in another State. Excluded from the scope of this article are questions of vicarious responsibility or employer's liability in respect

of acts performed by its employees, even in the territory of another State. Such liability may be relevant in a different context, but the present question is concerned exclusively with proceedings based on the relationship between individual employees and an employer which is a foreign State or foreign Government from the point of view of the State of the forum.

2. THE QUESTION OF JURISDICTION

32. In an examination of the extent of State immunity in any specified area of activity, the question of jurisdiction is not altogether irrelevant, since, in any event, it is the jurisdictional immunity of a foreign State that is at stake. State immunity, in the area of "contracts of employment" under examination, necessarily presupposes the existence of jurisdiction, the non-exercise of which is required by application of State immunity. For this reason, the scope of "contracts of employment" in the present study is confined to the employment by a State of individuals for a service to be rendered or performed in the territory of another State, that is in the territory of the forum—in other words, within the jurisdiction of the courts of that other State.

33. Jurisdiction is therefore presupposed in any question of State immunity. The closest connection should exist with the court trying the dispute arising out of the contract of employment. This is translatable in terms of the territory where the service is performed under the contract of employment, namely within the territory of another State, and therefore within the jurisdiction of the courts of that other State. Without this intimate link to the territory of that other State, the question of State immunity could be confused with other questions or other grounds for non-justiciability of the dispute, for lack of jurisdiction, either because of the absence of a territorial connection or because of the nature of the subject-matter of the dispute, or for any other reason, such as the "act of State" doctrine. Since jurisdiction of a court is a matter of local or national law, it is not for this study to lay down a set of uniform rules regarding the qualifications for jurisdiction of a court of law or a labour court in a given country. Jurisdiction may, in any event, be initially presumed to exist once there is *prima facie* proof of sufficient territorial connection with the trial court through performance of the employment within the territory of the State of the forum. The rules to be proposed in respect of the extent of State immunity in this specified area should preclude circumstances in which the courts of a State would have jurisdiction in a case concerning a contract of employment performed outside its territory or, regardless of the place of performance, on account of a special arrangement or régime, such as that governing civil servants or government employees in active service at an embassy or consulate or a comparable office accredited

⁴¹ See footnote 12 above.

in another country. In such circumstances, the administrative tribunal or the civil service commission or any other analogous institution of the State employing the individual could still have an operable jurisdiction, and the applicable law is still the administrative law or the law governing the civil servants of the employing State as distinct from the labour law of the country in which the service is to be performed.

3. THE QUESTION OF APPLICABLE LAW

34. In private international law as well as in the borderland where it overlaps with public international law, the choice of applicable law is often indicative if not determinative of the preferred jurisdiction among the competing or concurrent competent authorities. The question of applicable law may accordingly be highly pertinent, especially when it is a specialized branch of the law peculiar to a special régime or system, such as the regulations regarding the staff of the Secretariat of the United Nations and the specialized agencies. The Administrative Tribunal of the United Nations is probably considered the chosen forum for disputes regarding administrative matters (pensions, promotion, leave, etc.) affecting members of the staff of the United Nations Secretariat. It is probably a preferred jurisdiction compared with other competent local or territorial courts of law or a labour tribunal. The same could be said of the regulations applying to State employees, at least the higher-ranking officials, or the international staff in the case of international organizations.

35. The choice of law may be expressed by the parties, which tends to suggest almost exclusively the choice of jurisdiction. With regard to civil servants and high-ranking State employees, it is presumed that it is the administrative law of the employer State that governs labour relations and that the court of law or administrative tribunal of the employer State or sending State is the chosen forum, if not indeed the *forum pro rogatum*, alone competent to decide the issue. Territorial courts or local labour courts, however substantively competent to deal with such disputes, would likely be less conversant with the applicable labour laws of the sending State or the employer State. The question of applicable law in a given case must therefore be properly considered in this particular connection.

36. Concurrence of jurisdiction exercisable by the territorial court or the State of the forum and by the national court or the court of the sending State is further complicated by the concurrence of their respective applicable laws. In a clear case of applicable administrative law of the sending State, because of the high offices of the civil servants or government employees in question, for example, the local labour court or even the territorial administrative tribunal or authorities may feel inclined to yield to the application of foreign administrative law and therefore may decline jurisdiction in favour of a more proper or more convenient forum, on the grounds perhaps of *forum non conveniens*, because of the special relationship or the special nature of the foreign administrative law. If, on

the other hand, the case concerns local staff of lower rank and does not call for the application of foreign administrative law, but more appropriately the applicable local labour law or the law governing contracts of employment in the State of the forum, then the territorial court would not hesitate to exercise its competent jurisdiction, being more certain of the application of its own substantive law relating to the operation of contracts of employment, working conditions, terms of compensation, and so on. The question may appropriately be asked whether and how far the territorial State wishes to impose its own labour laws and regulations on all employment of services within its territory.

4. THE QUESTION OF STATE IMMUNITY

37. Only when the court in the State in which services under the contract of employment are to be performed considers that it has jurisdiction and that it is competent will it proceed to apply its own substantive law regarding labour disputes and labour relations. Where the employer happens to be a foreign State or Government, the question of immunity comes into play. But, of course, in actual practice the foreign State being proceeded against does not normally wait until the court reaches that finding, but would be expected to raise a plea of State immunity in any event. Thus the court is called upon to decide the issue of State immunity quite often when there is not yet any necessity to do so, since, without the question of State immunity, the court could have easily declined jurisdiction on any of the grounds mentioned, such as lack of competence, *forum non conveniens* or choice of jurisdiction and choice of applicable law, for reasons of public policy, or because of the "act of State" doctrine.

38. However, when the court is faced with the question of State immunity in this specified area of "contracts of employment", the first essential point which may determine the exercise or non-exercise of its jurisdiction relates to the existence of the governmental authority of the State,⁴² in the exercise of which a cause of action has arisen. If, for instance, the dispute concerns the appointment or non-appointment of an officer by a foreign State or by one of its organs, agencies or instrumentalities, then there is a clear case for State immunity because such appointment or non-appointment would have to result from an act in the exercise of the governmental authority of that foreign State or Government. The same is true of the dismissal or suspension of an employee by a State or governmental agency, which could never be compelled to re-employ or reinstate an employee thus dismissed as a result of an act done in the exercise of governmental authority. It does not follow, however, that the legal consequences of dismissal in breach of a contract of employment are necessarily a result of an act done in the exercise of governmental authority. There appears to be an area, therefore, where the local courts can still exercise jurisdiction in proceedings against a foreign State as employer of a worker for services rendered in the territory of the State of the

⁴² See article 7, para. 3, in footnote 12 above.

forum and unconnected with the exercise of governmental authority by the employer State. To put it differently, the question could be phrased: how far is the sending State required to conform to local labour laws and regulations of the territorial State?

B. The current practice of States

1. GENERAL OBSERVATIONS

39. In contrast to the superabundance of judicial and governmental practice of States in the area of trading or commercial activity covered by article 12,⁴³ there have been relatively fewer judicial decisions and little evidence of State practice in regard to contracts of employment. Yet the adoption of the inductive method implies a search for guidance from State practice. None the less, a glance at State practice reveals an equally startling number of inconsistencies and contradictions, while the paucity of decisions precludes any reference to practice on a State-by-State basis. If the treatment of the exception of trading or commercial activity has been criticized for not covering the practice of all 165 countries, or for distorting it in some cases, the current practice of States with regard to contracts of employment can offer no greater comfort nor absolute proof approaching a universal or uniform State practice. It only indicates a deeper intrusion into a darker or greyer zone of greater controversy, and, if article 13 is to be at all meaningful, greater care and prudence must be applied: wild or sweeping statements would not be helpful.

40. State practice in the specified area of contracts of employment appears to be comparatively recent, unlike the rich State practice concerning trading or commercial activities. This contrast is attributable to the fact that States have engaged in trading or commercial activities across or beyond their borders for a long time, resulting in litigations and judicial decisions in several jurisdictions. On the other hand, the employment abroad of local personnel by an organ of State or one of its agencies or instrumentalities in the exercise of its governmental authority has been a matter of relatively recent practice. Disputes concerning relations between servants and masters, or employees and foreign State employers, have not been too frequent. It is even more uncommon to find a recorded settlement by local judicial decision or other administrative adjudication.

41. The stages of development of a separate branch of civil law or of the law of contract governing labour relations and labour disputes are far from being uniform. Indeed, many countries do not have a labour code or special labour courts or tribunals for the settlement of labour disputes. Some systems have administrative tribunals to determine questions or to hear grievances from employees of their own Government but are not specifically equipped to apply foreign administrative laws or to extend their own administrative laws for the

benefit of employees of foreign Governments. The current enquiry is, however, limited to existing practice and does not investigate the causes of its scarcity.

2. JUDICIAL PRACTICE

42. Owing to the uneven stages of development of different internal laws governing the specified area of "contracts of employment", jurisprudence or case-law cannot be presented on a country-by-country basis; rather, the content may be treated topic by topic or by subtopic. However, a meaningful analysis of practice as evidence of the progress of legal developments will still have to be based on the inductive method, difficult as it may seem.

(a) Appointment or employment by a State

43. There appears to have developed a relatively more consistent trend in the case-law of States that the question of appointment or employment of personnel of an office by a State or one of its organs, agencies or instrumentalities is immune from the jurisdiction of the territorial judicial authorities, provided of course that the activities of such agencies or instrumentalities are performed in the exercise of governmental authority.⁴⁴

44. Italian jurisprudence is rich in examples of clear judicial pronouncements to the effect that the act of appointment or non-appointment of an employee, or the decision to employ or not to employ a person, by a foreign State agency is an act of public law essentially exempt from local jurisdiction. The act of appointment is often said to be performed in the exercise of governmental functions.⁴⁵ Thus, in a decision rendered by the United Sections of the Supreme Court of Cassation in 1947,⁴⁶ the Soviet Trade Delegation was held to be exempt from jurisdiction in matters of employment of an Italian citizen, being *acta jure imperii*, notwithstanding the fact that the appointing authority was a separate legal entity, or for that matter a foreign corporation established by a State. Similarly, in a more recent case decided in 1955,⁴⁷ the Court of Cassation declined jurisdiction in an action brought by an Italian citizen in respect of his employment by a United States military

⁴⁴ See article 7, para. 3, and the commentary thereto (see footnotes 12 and 13 above); see also paras. 5-6 of the present report.

⁴⁵ The distinction between the "functions of the State in the exercise of its sovereign power, and its activity as a subject of rights of property" was restated afresh in the judgment of the Court of Appeal of Genoa in *Canale v. Governo Francese* (1937) (*Rivista di diritto internazionale* (Rome), 29th year (1937), p. 81, with a critical note by C. Cereti; *ibid.*, 30th year (1938), p. 226; *Annual Digest and Reports of Public International Law Cases, 1935-1937* (London), vol. 8 (1941), p. 237).

⁴⁶ *Tani v. Rappresentanza commerciale in Italia dell'U.R.S.S.* (1947) (*Il Foro Italiano* (Rome), vol. LXXI (1948), p. 855; *Annual Digest ...*, 1948 (London), vol. 15 (1953), case No. 45, p. 141).

⁴⁷ *Department of the Army of the United States of America v. Gori Savellini* (1955) (*Rivista di diritto internazionale* (Milan), vol. XXXIX (1956), pp. 91-92; *International Law Reports, 1956* (London), vol. 23 (1960), p. 201). See also *Alexeef v. Rappresentanza commerciale dell'U.R.S.S.* (1932) (*Giurisprudenza Italiana* (Turin), vol. I (1933), p. 489), where no distinction was made between diplomatic and commercial activities of the Trade Agency.

⁴³ See the fourth report of the Special Rapporteur (see footnote 2 (d) above), paras. 49-107.

base established in Italy in accordance with the North Atlantic Treaty, this being an *attività pubblicistica* connected with the *funzioni pubbliche o politiche* of the United States Government.⁴⁸ The act of appointment was necessarily performed in the exercise of governmental authority, and as such considered to be an *atto di sovranità*.

45. In a different context, the French Conseil d'Etat regarded appointment of a French national to a position in UNESCO, as well as failure of the French Government to support the claims of an ex-official of the Institute of Intellectual Co-operation and his entitlement to a UNESCO position, as being outside the competence of the French authorities.⁴⁹

(b) Cases of dismissal

46. Dismissal cases are more abundant in State practice and point to the conclusion that the courts do not have competence. The act of dismissal has been regarded as an exercise of sovereign power or governmental authority rather than a breach of an ordinary commercial or private contract. Italian case-law may be cited in support of this proposition. It is all the more conclusive that Italian jurisprudence appears, from its very early days, to be the most restrictive of all State practice.

47. Thus immunity was upheld in an action for wrongful dismissal brought by an ex-employee of the Milan branch of the Soviet Trade Delegation in the *Kazmann* case, decided by the Italian Supreme Court in 1933.⁵⁰ This decision became a leading precedent followed by other Italian courts.⁵¹ A later decision by the United Sections of the Supreme Court of Cassation in the *Tani* case in 1947⁵² must be regarded as final and decisive on this point. It also confirmed the decision of the Appellate Court of Milan rejecting the action

brought by an employee of the Soviet Trade Delegation for wrongful dismissal. A decision of the French Conseil d'Etat in 1929 in another context also took the same line.⁵³

(c) Employment or labour relations

48. In spite of earlier hesitancy in the case-law,⁵⁴ recent State practice appears to consider questions of labour relations or contracts of employment in substance as matters in regard to which foreign State agencies are entitled to immunity, as long as it is established that the agencies in question performed activities in the exercise of governmental authority.⁵⁵ Contracts of employment were conceived by Italian judicial authorities as exceptions to the normal transactions between a foreign State and local citizens amenable to the jurisdiction of Italian courts.⁵⁶ Viewed as *atti di sovranità*, contracts of employment of employees of foreign Governments were exempted from the jurisdiction of the Italian courts which applied the most restrictive principle of State immunity. Thus, in 1956,⁵⁷ an action brought by Gori Savellini against a United States military base established in Italy was dismissed. In two more recent cases, judicial pronouncements were even more explicit. Thus, in *De Ritis v. Governo degli Stati Uniti d'America* (1971),⁵⁸ immunity was upheld in an action brought by De Ritis, a librarian with the United States Information Service (USIS) in Italy, having regard to the substantive and objective contents of the employment or service to be performed, however modest. The Supreme Court considered USIS to be an overseas office of the United States Information Agency, *un ente od ufficio statale americano ... che agisce all'estero sotto la direzione ed il controllo del Segretario di Stato ... per la persecuzione di fini pubblici sovranici dello Stato americano come tale*.⁵⁹ The Court held De Ritis to be an "employee of the United States Government" and *secondo concetti propri del nostro diritto pubblico ma indubbiamente applicabili anche alla fattispecie ... perchè l'impiegato di uno Stato è per definizione impiegato pubblico*.⁶⁰ Although the contract of employment was undoubtedly *un rapporto di lavoro*, it

⁴⁸ Cf. *De Ritis v. Governo degli Stati Uniti d'America* (1971) (*Rivista ...*, vol. LV (1972), p. 483) and *Luna v. Repubblica socialista di Romania* (1974) (*ibid.*, vol. LVIII (1975), p. 597). Contrast, however, the decisions in *De Semenoff v. Amministrazione delle Ferrovie dello Stato della Norvegia* (1935, 1936) (*ibid.*, 29th year (1937), p. 224; *Annual Digest ...*, 1935-1937, *op. cit.*, case No. 92, p. 234), concerning a case of employment by the State railways of a foreign Government operating in Italy, and in *Slomnitzky v. Rappresentanza commerciale dell'U.R.S.S.* (1932) (*Annual Digest ...*, 1931-1932 (London) vol. 6 (1938), case No. 86, p. 169).

⁴⁹ *Weiss v. Institute of Intellectual Co-operation* (1953) (*Journal du droit international* (Clunet) (Paris), vol. 81 (1954), p. 745, with a note by P. Huet).

⁵⁰ *Rappresentanza commerciale dell'U.R.S.S. v. Kazmann* (1933) (*Rivista ...*, 25th year (1933), p. 240; *Annual Digest ...*, 1933-1934 (London), vol. 7 (1940), case No. 69, p. 178).

⁵¹ See, for example, *Little v. Riccio e Fischer* (Court of Appeal of Naples, 1933) (*Rivista ...*, 26th year (1934), p. 110), (Court of Cassation, 1934) (*Annual Digest ...*, 1933-1934, *op. cit.*, case No. 68, p. 177); the Court of Appeal of Naples and the Court of Cassation disclaimed jurisdiction in this action for wrongful dismissal by Riccio, an employee in a cemetery the property of the British Crown and "maintained by Great Britain *jure imperii* for the benefit of her nationals as such, and not for them as individuals". Cf. *Mazzucchi v. Consolato Americano* (1931) (*Annual Digest ...*, 1931-1932, *op. cit.*, case No. 186, p. 336).

⁵² See footnote 46 above; an illuminating judgment may be found in *Annual Digest ...*, 1948, pp. 145-146.

⁵³ *The Marthoud case* (1929) (*Recueil des arrêts du Conseil d'Etat* (Paris, Sirey, 1929), vol. 99, p. 409).

⁵⁴ Earlier decisions by Italian courts denied immunity on the grounds that contracts of employment were private-law transactions, while the act of dismissing or appointing a government employee or a civil servant was invariably regarded as an exercise of sovereign authority. See, for example, *De Semenoff v. Amministrazione delle Ferrovie dello Stato della Norvegia* (1935, 1936) (footnote 48 above). Cf. also *Ferrovie Federali Svizzere v. Comune di Tronzano* (1929) (*Il Foro Italiano*, vol. LIV (1929), p. 1146; *Annual Digest ...*, 1929-1930 (London), vol. 5 (1935), p. 124), where immunity was denied to the Swiss Federal Railways.

⁵⁵ See S. Sucharitkul, *State Immunities and Trading Activities in International Law* (London, Stevens, 1959), pp. 239-242.

⁵⁶ See Sucharitkul, "Immunities of foreign States before national authorities", *Collected Courses of The Hague Academy of International Law, 1976-1* (Leyden, Sijthoff, 1977), vol. 149, pp. 130-132.

⁵⁷ See footnote 47 above.

⁵⁸ See footnote 48 above.

⁵⁹ *Rivista ...*, vol. LV (1972), p. 485.

⁶⁰ *Ibid.*, p. 486.

was not *un rapporto di diritto privato*.⁶¹ In another case, *Luna v. Repubblica socialista di Romania* (1974),⁶² concerning an employment contract concluded by an economic agency forming part of the Romanian Embassy in Rome, immunity of the Socialist Republic of Romania was upheld. The Supreme Court dismissed Luna's claim for 7,799,212 lire as compensation for remuneration based on the employment contract. The court regarded such labour relations as being outside Italian jurisdiction, *qualora lo Stato abbia agito come soggetto di diritto internazionale, la giurisdizione italiana non può sussistere, in virtù della norma consuetudinaria di diritto internazionale, generalmente riconosciuta, sull'immunità giurisdizionale degli Stati esteri* ...⁶³ Looking at the objective elements, the Court held that *il rapporto d'impiego in contestazione va senz'altro inquadrato nell'ambito dell'attività che lo Stato romeno (quale soggetto di diritto internazionale) svolge in Italia per propri fini istituzionali* ...⁶⁴

(d) *Absence of jurisdiction*

49. There appears, therefore, to be no consistent case-law anywhere pointing to the conclusion that contracts of employment or any aspect thereof could constitute an exception to State immunity. On the contrary, even in the most limited application of the principle of State immunity, as in the case-law of Italy, immunity is recognized and fairly consistently applied in all cases, covering appointment, dismissal and actions for compensation or for breach of other terms of the employment or service contract. There appears to be a general absence of jurisdiction or reluctance to exercise jurisdiction in the field of labour relations.

3. GOVERNMENTAL PRACTICE

50. Further examination is warranted to see whether, outside the case-law, there is anywhere any support for restricting immunity in regard to employment contracts.

(a) *National legislation*

51. In the absence of judicial decisions indicating acceptance of "contracts of employment" as an exception to State immunity, it is only possible to conjecture that, in the countries which have adopted national legislation restricting immunity in this specified area of "contracts of employment" or "labour relations", the courts will in future have to apply their national legislation.

52. On the basis of this assumption, it is interesting to note that section 4 of the United Kingdom *State Immunity Act 1978*⁶⁵ contains such a provision. It reads:

⁶¹ *Ibid.*, p. 485. See also, in regard to employment cases, judgment No. 467 of 1964 concerning the United States Army—Southern European Task Force, and judgment No. 3160 of 1959 concerning a Venezuelan naval mission (*ibid.*).

⁶² See footnote 48 above.

⁶³ *Rivista* ... , vol. LVIII (1975), p. 599.

⁶⁴ *Ibid.*

⁶⁵ United Kingdom, *The Public General Acts, 1978*, part 1, chap. 33, p. 715 (reproduced in United Nations, *Materials on Jurisdictional Immunities* ... , pp. 41 *et seq.*).

Exceptions from immunity

...

4. (1) A State is not immune as respects proceedings relating to a contract of employment between the State and an individual where the contract was made in the United Kingdom or the work is to be wholly or partly performed there.

(2) Subject to subsections (3) and (4) below, this section does not apply if:

(a) at the time when the proceedings are brought the individual is a national of the State concerned; or

(b) at the time when the contract was made the individual was neither a national of the United Kingdom nor habitually resident there; or

(c) the parties to the contract have otherwise agreed in writing.

(3) Where the work is for an office, agency or establishment maintained by the State in the United Kingdom for commercial purposes, subsection (2) (a) and (b) above do not exclude the application of this section unless the individual was, at the time when the contract was made, habitually resident in that State.

(4) Subsection (2) (c) above does not exclude the application of this section where the law of the United Kingdom requires the proceedings to be brought before a court of the United Kingdom.

(5) In subsection (2) (b) above "national of the United Kingdom" means a citizen of the United Kingdom and Colonies, a person who is a British subject by virtue of section 2, 13 or 16 of the British Nationality Act 1948 or by virtue of the British Nationality Act 1965, a British protected person within the meaning of the said Act of 1948 or a citizen of Southern Rhodesia.

(6) In this section "proceedings relating to a contract of employment" includes proceedings between the parties to such a contract in respect of any statutory rights or duties to which they are entitled or subject as employer or employee.

53. While this provision has no equivalent in the United States *Foreign Sovereign Immunities Act of 1976*,⁶⁶ nor in Canada's *State Immunity Act* of 1982,⁶⁷ it appears to have been followed very closely in section 6 of Singapore's *State Immunity Act, 1979*,⁶⁸ in section 6 of the *State Immunity Ordinance, 1981* of Pakistan,⁶⁹ and in section 5 of the South African *Foreign States Immunities Act, 1981*.⁷⁰ Since the practice of English courts has, in the past, been associated with a more absolute principle of State immunity, this change of attitude, which as been followed in a number of important Commonwealth countries applying common law, is bound to have far-reaching influence in the development of future practice, not only in common-law jurisdictions. The restrictive practice in this particular area of "contracts of employment" is capable of gathering momentum.⁷¹

⁶⁶ *United States Code, 1976 Edition*, vol. 8, title 28, chap. 97, p. 206 (*idem*, pp. 55 *et seq.*).

⁶⁷ "Act to provide for State immunity in Canadian courts", which came into force on 15 July 1982 (*The Canada Gazette, Part III* (Ottawa), vol. 6, No. 15 (22 June 1982), p. 2949, chap. 95).

⁶⁸ Entitled "Act to make provision with respect to proceedings in Singapore by or against other States, and for purposes connected therewith", of 26 October 1979 (reproduced in United Nations, *Materials on Jurisdictional Immunities* ... , pp. 28 *et seq.*).

⁶⁹ *The Gazette of Pakistan* (Islamabad), 11 March 1981 (*idem*, pp. 20 *et seq.*).

⁷⁰ The Act came into force on 6 October 1981 (*idem*, pp. 34 *et seq.*).

⁷¹ There is a distinct possibility that other countries, in the Caribbean and elsewhere, such as St. Kitts and Trinidad and Tobago, will follow this tendency.

54. It is also to be assumed that the practice of the States which have ratified the 1972 European Convention on State Immunity,⁷² such as Austria,⁷³ Belgium⁷⁴ and Cyprus,⁷⁵ like the United Kingdom, will be restrictive in this area.

(b) *International conventions*

(i) *1972 European Convention on State Immunity*

55. The 1972 European Convention on State Immunity came into force in accordance with article 36, paragraph 2, between Austria, Belgium and Cyprus on 11 June 1976. Article 5 of the Convention contains virtually the same provisions as section 4 of the United Kingdom *State Immunity Act 1978* intended to give effect to the Convention⁷⁶ and reads as follows.

Article 5

1. A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to a contract of employment between the State and an individual where the work has to be performed on the territory of the State of the forum.

2. Paragraph 1 shall not apply where:

(a) the individual is a national of the employing State at the time when the proceedings are brought;

(b) at the time when the contract was entered into the individual was neither a national of the State of the forum nor habitually resident in that State; or

(c) the parties to the contract have otherwise agreed in writing, unless, in accordance with the law of the State of the forum, the courts of that State have exclusive jurisdiction by reason of the subject-matter.

3. Where the work is done for an office, agency or other establishment referred to in Article 7, paragraphs 2 (a) and (b) of the present article apply only if, at the time the contract was entered into, the individual had his habitual residence in the Contracting State which employs him.

(ii) *Inter-American Draft Convention on Jurisdictional Immunity of States*

56. While the fullest implications of such a provision cannot yet be assessed, its snowballing effect is reflected in an increasing amount of legislation in various countries, albeit not always uniform. Worthy of notice at this juncture is the recent, Inter-American Draft Convention on Jurisdictional Immunity of States (1983).⁷⁷ Article 6 contains the following provision restricting immunity:

⁷² See footnote 39 above.

⁷³ See the declarations by Austria giving effect to the provisions of the Convention, in United Nations, *Materials on Jurisdictional Immunities* ... , p. 5. Austria ratified the Convention on 10 July 1974.

⁷⁴ Belgium ratified the Convention on 27 July 1975.

⁷⁵ Cyprus ratified the Convention on 10 March 1976.

⁷⁶ See also the almost identical formulations in the corresponding provisions of national legislation.

⁷⁷ Draft approved by the Inter-American Juridical Committee, Rio de Janeiro, on 21 January 1983 (OEA/Ser.G-CP/doc.1352/83, of 30 March 1983). See also *International Legal Materials* (Washington, D.C.), vol. XXII, No. 2 (March 1983), p. 292.

Article 6

States shall not claim immunity from jurisdiction either:

(a) in labour affairs or employment contracts between any State and one or more individuals, when the work is performed in the forum State;

...

4. INTERNATIONAL OPINION

57. Opinions of writers on the question of contracts of employment have been very scanty. Traditionally, this specific area has been regarded as more exclusively within the scope of the administrative law of the employing State and therefore more properly pertaining to the jurisdiction of that State.⁷⁸ Commentaries by individual writers on national legislation and international conventions have been somewhat varied. The critique has centred upon the wording of the texts, which are unnecessarily complex and difficult of appreciation.⁷⁹ It is, of course, the sovereign right of any State to legislate on the subject-matter by prescribing the conditions under which foreign States are allowed to engage in certain activities within its territory. Each State has the inherent power, subject to treaty obligations, to exclude from its territory foreign public agencies, including even diplomatic representation.⁸⁰

58. It is not surprising to see a restrictive trend reflected in the draft articles for a convention on State immunity proposed by the International Committee on State Immunity and adopted by the International Law Association at Montreal in 1982.⁸¹ This draft contains the following provision:

Article III. Exceptions to immunity from adjudication

A foreign State shall not be immune from the jurisdiction of the forum State to adjudicate in the following instances *inter alia*:

...

C. Where the foreign State enters into a contract for employment in the forum State, or where work under such a contract is to be performed wholly or partly in the forum State and the proceedings relate to the contract. This provision shall not apply if:

1. At the time proceedings are brought the employee is a national of the foreign State; or

⁷⁸ On this question, see, for example, F. Seyersted, "Jurisdiction over organs and officials of States, the Holy See and intergovernmental organizations", *The International and Comparative Law Quarterly* (London), vol. 14 (1965), pp. 31-82 and 493-527.

⁷⁹ See, for example, F. A. Mann, "The State Immunity Act 1978", *The British Year Book of International Law*, 1979 (London), vol. 50, p. 54.

⁸⁰ See, for example, I. Brownlie, *Principles of Public International Law* (3rd ed.) (Oxford, Clarendon Press, 1979), p. 334:

"If a State chooses, it could enact a law governing immunities of foreign States which would enumerate those acts which would involve acceptance of the local jurisdiction. ... States would thus be given a licence to operate within the jurisdiction with express conditions and the basis of sovereign immunity, as explained in *The Schooner 'Exchange'*, would be observed." See also I. Sinclair, "The law of sovereign immunity: Recent developments", *Collected Courses* ... , 1980-II (Alphen aan den Rijn, Sijthoff and Noordhoff, 1981), vol. 167, pp. 214-216.

⁸¹ See ILA, *Report of the Sixtieth Conference, Montreal, 1982* (London, 1983), pp. 5-10, resolution No. 6: "State Immunity".

2. At the time the contract for employment was made the employee was neither a national nor a permanent resident of the forum State; or
3. The employer and employee have otherwise agreed in writing.¹²

...

5. AN EMERGING TREND

59. While the current practice of States is relatively silent on contracts of employment as a possible area of exceptions to State immunity, there appears to be an emerging trend in favour of limitation in this darkest area of the "grey zones". The choices available depend on the eventual outcome of legal developments in labour affairs and labour relations. In an endeavour to restate the law in the process of its progressive development, utmost care should be taken to avoid interference with the application of foreign administrative law, while maintaining reasonable standards of labour conditions in employment contracts within the State of the forum. At the same time, nothing should be attempted that would aggravate existing problems of unemployment in a given society.

60. All things considered, an emerging trend appears to favour the application of local labour law in regard to recruitment of the available labour force within a country, and consequently to encourage the exercise of territorial jurisdiction at the expense of jurisdictional immunities of foreign States. It is not unnatural in such endeavours to adopt national legislation which tends to prescribe also the scope and limits of exercisable jurisdiction in addition to the restriction of State immunity in this specified area. It is clear that private-law jurisdiction has to be firmly established before the question of jurisdictional immunity arises to be resolved. Regional conventions tend to draw also on national jurisdiction, which should be established in a uniform manner so as to avoid any unnecessary vacuum or overlapping of competence.

C. Formulation of draft article 13

61. The principle to be incorporated in the draft article should reflect the fluid state of legal developments. Flexibility and balanced considerations should guide any effort to formulate a draft article on "contracts of employment". The possibility should be left open for this exception to assert itself in State practice. On the other hand, this should not constitute any intrusion into the sphere of administrative law or the administrative functions of government officials. Rather, a mild incentive could be introduced to encourage conformity with local labour law and improve social conditions, labour relations and the employment outlook. Two criteria are eligible for support. First, the nationality of the employee could be taken into consideration as an element in favour of the application of the administrative

law of the employing State or, as the case may be, of the application of the labour law of the territorial State. The second criterion is residence in the State of the forum, which could be qualified as regular, habitual or permanent, not so much as the basis for jurisdiction in private international law, but more exactly as justification for the exercise of existing territorial jurisdiction or predilection in favour of the territorial connections, to ensure protection of the nationals and alien residents of the forum State.

62. Article 13 might read as follows:

Article 13. Contracts of employment

1. Unless otherwise agreed, a State is not immune from the jurisdiction of the courts of another State in respect of proceedings relating to a "contract of employment" of a national or resident of that other State for work to be performed there.

2. Paragraph 1 does not apply if:

- (a) the proceedings relate to failure to employ an individual or dismissal of an employee;
- (b) the employee is a national of the employing State at the time the proceedings are brought;
- (c) the employee was neither a national nor a resident of the State of the forum at the time of employment; or
- (d) the employee has otherwise agreed in writing, unless, in accordance with the law of the State of the forum, the courts of that State have exclusive jurisdiction by reason of the subject-matter.

ARTICLE 14 (Personal injuries and damage to property)

A. General considerations

1. SCOPE OF "PERSONAL INJURIES AND DAMAGE TO PROPERTY" AS AN EXCEPTION TO STATE IMMUNITY

63. The purpose of draft article 14 is to examine possible limitations of State immunity in the area of "personal injuries and damage to property". This area covers the liability of a State or one of its organs, agencies or instrumentalities to pay damages or monetary compensation in respect of an act or omission attributable to the State, resulting in personal injury (physical damage) to a natural person or physical damage to property as distinct from depreciation of its value. In common-law jurisdictions, such causes of action may be included under the heading of tortious liability. For the purposes of jurisdictional immunity, they may be categorized as non-commercial tort. In civil-law and other jurisdictions, a similar heading may be entitled civil responsibility for physical damage to persons resulting in bodily harm, personal injuries or death, and physical damage to tangible movable or immovable property as opposed to infringements of property rights, or libel or other forms of defamation.

¹² *Ibid.*, pp. 7-8. An interesting commentary on this provision may be found in the final report (24 June 1982) of the International Committee on State Immunity, chaired by Mr. M. Leigh; see ILA, *The ILA Montreal Draft Convention on State Immunity* (London, 1983), pp. 51-52, para. 25.

64. Without further inquiry into the niceties of various internal laws on the subject, which may cover a wide area of civil liability for physical damage to persons and property, one could mention, for example, negligence or nuisance in the common-law system, where damage is occasioned by an act or omission, or cases of stricter liability for occupation of land and premises, or liability for dangerous animals or for possession and transport of dangerous substances. In the strictest application of liability without fault, an action may lie not only for malfeasance or misfeasance or, indeed, for non-feasance but also for failure to prevent the occurrence of damage. The duty of care may vary in standard and quality depending on the strictness of liability and the degree of protection provided by the internal law for the injured party, be it physical injury to the person or damage to property. The damage could be the result of a wilful act, neglect, omission or negligence, or, indeed, it could be unintended or even accidental. The causes of action under this heading or possible remedies for damage grouped under "personal injuries and damage to property" include a wide variety of circumstances giving rise to legal relief for the injured party, including not only the persons injured, but also, in the event of consequent death, their heirs and dependants. As for damage to property, similar causes of action may be available to the owner, user or possessor or the combination of such right-holders.

65. The purpose of article 14 is therefore to limit the application of jurisdictional immunity in respect of personal injuries and damage to property caused by an act or omission attributable to a foreign State or to one of its organs, agencies or instrumentalities. The restriction operates where there is State immunity, that is to say even where the agency or instrumentality of a foreign State has been acting in the exercise of governmental power, so long only as the personal injury or damage to property occurred in the territory of the State of the forum. The extent of damage or remoteness thereof and the types of available redress in various internal laws lie outside the ambit of the present study.

2. THE LEGAL BASIS FOR JURISDICTION

66. The exception of "personal injuries and physical damage to property" is not an issue, or does not arise, where there is no question of State immunity from the jurisdiction of the courts of another State. By the same token, the question of State immunity should not be raised, or indeed need not be raised, when the causes of action are outside the jurisdiction of the courts, or when the courts before which proceedings have been brought have no jurisdiction, because of the subject-matter or for territorial reasons, or are otherwise not competent to consider and decide the case in question. It is significant to note at this juncture that, in order to avoid unnecessary inquiry into the grounds or legal bases for jurisdiction in respect of tort or civil liability for personal injuries and damage to property, whether wilful, malicious or merely accidental, an agreed basis or an unchallenged or undoubted basis for jurisdiction is obviously the *locus delicti commissi*.

67. Of course, under the rules of private international law, there are possible competing criteria for the existence or foundation of jurisdiction in the circumstances under examination, such as the nationality of the injured person, the place where the plaintiff suffered injury as opposed to or distinct from the place where the act or omission occurred. As regards damage to property, jurisdiction may be founded on the basis of the physical situation (*situs*) of the immovable or movable property damaged, as opposed to or distinct from the place where the wrongful act or omission was committed or where negligence or neglect of the required duty of care occurred. It will be seen, quite correctly and not without well-founded reason, that national legislation and regional conventions containing provisions on this particular exception invariably specify the pre-existence of legitimate jurisdiction based on the *locus delicti commissi* and the eventual and justifiable exercise of such jurisdiction, even in respect of damage resulting from activities normally categorized as *acta jure imperii*, and also, in any event, from activities of a non-commercial character, whether or not classified as *acta jure gestionis*. The distinction between *jus imperii* and *jus gestionis*, or the two types of activities attributable to the State, appears to have little or no bearing in regard to this exception, which is designed to allow normal proceedings to lie and to provide relief for the individual who has suffered an otherwise actionable physical damage to his own person or his deceased ancestor or to his property. The cause of action relates to the occurrence or infliction of physical damage for which a foreign State is answerable, although local judicial authorities have hitherto been reluctant to exercise jurisdiction.

3. THE BASIS FOR THE EXERCISE OF JURISDICTION OR NON-IMMUNITY

68. It should be stated at the outset that, whatever the legal basis for the existence or assumption of jurisdiction by the *forum loci delicti commissi* or the application of the *lex loci delicti commissi*, which may not be challenged by other competing jurisdictions or the choice of other applicable laws, the basis for actual exercise of jurisdiction when the act or omission complained of is attributable to a foreign State cannot be found in customary international law. It will be seen that the exercise of jurisdiction in proceedings involving a foreign State as a defendant is not warranted in the traditional practice of States. There appear, nevertheless, to be impelling reasons for an emerging trend in the recent case-law of countries which have adopted national legislation restricting immunity in this specified area to apply a restrictive doctrine whereby the courts may exercise jurisdiction in cases involving personal injuries or damage to property in the territory of the State of the forum.

69. Many theoretical justifications could be advanced in support of the exercise of jurisdiction, or for the absence of State immunity, in such circumstances. Whatever the activities of a State giving rise to personal injuries or damage to property within the territory of

another State, whether in connection with *acta jure imperii* or *acta jure gestionis*, the fact remains that injuries have been inflicted upon and suffered by innocent persons, whether the act or omission was deliberate or unintentional or, indeed, negligent or accidental. The exercise of jurisdiction by the court of the place where the damage has occurred is probably the best guarantee of sound and swift justice. Adequate relief can be expected as the court is in reality a *forum conveniens* or, indeed, a most practical and convenient judicial authority with an unchallenged claim to exercise jurisdiction and facilities to establish or disprove evidence of liability and to assess compensation. Questions of causation or remoteness of damage as well as the quantum of retribution or measure of damages can best be determined by the competent forum of the place where the damage occurred and in accordance with the law of that place (*lex loci*).

70. It goes without saying that the reverse is equally convincing. Non-exercise of jurisdiction in such a case may result in a vacuum. Not only will there be a shortage of a more appropriate law to be applied, but also a more suitable court of competence will not easily be found to try the case, which may be falling between two stools. The absence of competent judicial authority and lack of applicable law would leave the injured party remediless and without adequate relief or possible recourse, except at the mercy of the foreign State, which might or might not feel obliged to pay compensation, either on a voluntary basis or *ex gratia*. In the interests of the rule of law and of justice, normal legal remedies should continue to be available, regardless of the public or private character of the defendant. This is easier said than done, for, in actual practice, as will be seen below, the courts have tried hard to restrict immunity in this specific area, basing their restriction on the type of activities carried on by the State agencies or instrumentalities concerned, or the direct connection with State activities which may be said to be genuinely *acta jure imperii* as opposed to *acta jure gestionis*. The results have been not altogether clear and apparently far from certain. The practice of States remains to be closely consulted on this particular point.

71. Whatever the emerging trend in State practice, the restrictive theories have sought to qualify or limit State immunity on the grounds, *inter alia*, that the tortious liability of a foreign State should be locally justiciable if the damage to property, death or personal injuries have occurred in the territory of the forum. The main purpose is the protection of the injured parties, whether they happen to be nationals or residents of the State of the forum, or indeed aliens or tourists temporarily in the territory, which is nevertheless bound to afford a reasonable measure of legal protection for the safety and security of their persons as well as their tangible belongings.

72. The sovereignty of the State responsible or liable for the damage incurred by the injured individual is not directly at stake in most cases. A State conducting ac-

tivities in the territory of another State is obliged to respect local laws and regulations and to abide by all ground rules. In case of infraction or violation of local laws, with or without intent, the liability to pay compensation for damage should be accompanied by actual payment. In particular, the primary liability of the State in most cases of road accidents would be replaced or absorbed by insurance coverage under the existing requirements of most local traffic regulations. Payment of compensation by an insurance company on behalf of a foreign State is no longer regarded as an affront to anyone, neither to the foreign State nor to the host Government. All parties should be satisfied, especially the aggrieved individuals who have been injured in a motor accident.

73. The areas specified as personal injuries and damage to property are mainly concerned with accidental death, personal injuries or damage to property such as vehicles or fixed objects involved in a highway collision. Their scope is none the less somewhat wider, covering also cases such as assault and battery, malicious damage to property, arson and even murder or political assassination. Justice should not only be done but should also be seen to be done.

74. In an eagerness to mete out justice, care should be taken lest a fundamental principle of international law, namely the principle of State immunity, be made an object of sacrifice without sufficient cause or true justification. While, in general, it is possible to conceive of day-to-day activities of States which could be covered by an insurance policy in case of fire or accident or other natural disaster or calamity attributable to an agency or instrumentality of a State, the possibility that State immunity is still needed should not be precluded, particularly in cases where the State has performed an act exclusively in the domain of the laws of war, such as in military operations or military exercises or manoeuvres, or indeed in operations to quell riots, disturbances, civil war or civil strife, which are not generally covered by peacetime insurance.

75. The sovereignty or governmental authority of a foreign State is not being challenged when, like any other responsible party, the State answerable for the physical damage to persons or property is called upon to come to the aid and assistance of the injured party. To be humane and merciful is not inconsistent with statehood or sovereignty. Humanity also deserves the protection of international law. To protect the integrity and security of the individual and his property is the duty of every territorial State. To allow an insurance company to settle claims against a foreign Government is not a derogation of any sovereign right or governmental power. Social welfare requires that every person should be safe and secure and that personal injuries be accorded the necessary remedies. Damage to tangible property should also be made good by the responsible party, whoever that may be. A State is a highly respectable and very responsible party in this context. No question of sovereign equality is really involved.

B. The practice of States

1. JUDICIAL PRACTICE PRIOR TO NATIONAL LEGISLATION

76. Before the intervention by legislatures in the 1970s and, indeed, prior to the adoption and ratification of international conventions on State immunities, the practice of States had been neither uniform nor consistent. The exception of "personal injuries and damage to property" is relatively unknown in those jurisdictions applying a more "absolute" principle of immunity, mainly the common-law countries, such as the United Kingdom, the United States of America, Canada, Australia, New Zealand and other members of the Commonwealth. The practice of socialist countries in this area is virtually unknown. On the whole, there has been very little evidence of State practice allowing or disallowing State immunity in respect of proceedings for "personal injuries and damage to property".

77. It is noteworthy, nevertheless, that in a number of countries where judicial practice has tended to favour a less absolute or a more restrictive principle of State immunity, attempts have been made to justify the exercise of jurisdiction by competent courts on the grounds that the act or omission in question relates to State acts *jure gestionis* or, at any rate, not to acts *jure imperii*. On the other hand, in the same "restrictive" jurisdictions, immunity has been upheld wherever the courts have found the activities giving rise to damage to property or personal injuries to have been conducted *jure imperii*.

78. Thus, in a Belgian case, *S.A. "Eau, gaz, électricité et applications" v. Office d'aide mutuelle* (1956),⁸³ the Court of Appeal of Brussels upheld a plea of immunity in proceedings arising out of a motor accident which had occurred in March 1945 involving a British military truck carrying troops back from leave. At the time of the accident, the troops were engaged in belligerent operations in Belgium. The court decided that:

As far as allied belligerents who carry out operations of war on Belgian territory are concerned, the immunity from jurisdiction of foreign States acting *jure imperii* prevents their being sued in Belgian courts.⁸⁴

79. The Court of Appeal of Schleswig in the Federal Republic of Germany adopted this general approach and granted jurisdictional immunity in a 1957 case involving the immunity from jurisdiction of the United Kingdom.⁸⁵ The plaintiff, a haulage contractor, claimed to have suffered injury to his health when performing his part of the contract for the recovery of certain arms and military plans in the Soviet zone. The court found a close link between the events giving rise to the plaintiff's claim and the performance of sovereign functions by the British Army.

80. In this connection, following the restrictive trend in the practice of many States, Egyptian courts have

consistently allowed immunity from jurisdiction in respect of acts *jure imperii*. There have been a number of cases concerning acts of members of armed forces of a foreign State in Egypt. The courts have frequently allowed immunity in cases of tort-accident or collision between private cars and army vehicles being driven by officials of a foreign State in the exercise of their public duty.⁸⁶ On the other hand, Egyptian courts have denied immunity in respect of crimes committed by members of foreign armed forces when not "on duty".⁸⁷ Thus, in *Guebali v. Colonel Mei*,⁸⁸ it was held that the French Army had no immunity from civil jurisdiction even in matters relating to a military mission.⁸⁹

81. In a more recent decision involving a motor accident caused by negligent driving of a car owned by a foreign Government, the Austrian Supreme Court delivered an illuminating judgment based on interesting analysis of the crucial acts. Thus, in *Holubek v. Government of the United States* (1961),⁹⁰ it was argued for the defendant that the carriage of mail for and on behalf of the United States Embassy constituted the performance of a "sovereign act" by the United States Government. The Austrian Supreme Court, applying a distinction between *acta jure imperii* and *acta jure gestionis*,⁹¹ ruled that the act on which the plaintiff

⁸⁶ See, for example, *Dame Galila Bassionni Amrane v. G. S. John Esq.* (1932) (*Journal du droit international* (Clunet) (Paris), vol. 62 (1935), p. 195; *Annual Digest ...*, 1931-1932, *op. cit.*, case No. 90, p. 174; *Annual Digest ...*, 1933-1934, *op. cit.*, case No. 74, p. 187); cf. the later case of *Joseph Abouteboul v. Etai hellénique* (1948) (*The American Journal of International Law* (Washington, D.C.), vol. 44 (1950), p. 420), where immunity appears to have been correctly recognized with regard to acts performed by State agents not only while on duty or on mission, but also in the exercise of a public duty.

⁸⁷ See, for example, *Ministère public v. Constantin Tsoukharis* (1943) (*Bulletin de législation et de jurisprudence égyptiennes* (Alexandria), vol. 55 (1942-1943), p. 89; *Annual Digest ...*, 1943-1945 (London), vol. 12 (1949), case No. 40, p. 150); *Efstratios Gounaris v. Ministère public* (1943) (*Bulletin de législation et de jurisprudence égyptiennes ...* (1942-1943), p. 156; *Annual Digest ...*, 1943-1945, *op. cit.*, case No. 41, p. 152); *Manuel Malero v. Ministère public* (1943) (*Bulletin de législation et de jurisprudence égyptiennes ...* (1942-1943), pp. 41 and 125; *Annual Digest ...*, 1943-1945, *op. cit.*, case No. 42, p. 154). See also *Georges Triandafilou v. Ministère public* (1942) (*The American Journal of International Law* (Washington, D.C.), vol. 39 (1945), p. 345).

⁸⁸ *Dame Safia Guebali v. Colonel Mei* (1943) (*Bulletin de législation et de jurisprudence égyptiennes ...* (1942-1943), p. 120; *Annual Digest ...*, 1943-1945, *op. cit.*, case No. 44, p. 164).

⁸⁹ Cf. *Hénon v. Gouvernement égyptien* (1947) (*Bulletin de législation et de jurisprudence égyptiennes* (Alexandria), vol. 59 (1946-1947), p. 225; *Annual Digest ...*, 1947 (London), vol. 14 (1951), case No. 28, p. 78), where it was held that agents of a foreign Government were immune from jurisdiction with regard to the requisition of a villa by order of a foreign government department.

⁹⁰ *Juristische Blätter* (Vienna), vol. 84 (1962), p. 43; *International Law Reports* (London), vol. 40 (1970), p. 73; the judgment of the Supreme Court is reproduced in English in United Nations, *Materials on Jurisdictional Immunities ...*, pp. 203-207.

⁹¹ The court declared:

"... an act must be deemed to be a private act where the State acts through its agencies in the same way as a private individual can act. An act must be deemed to be a sovereign act where the State, on the basis of its sovereignty, performs an act of legislation or administration (makes a binding decision). Sovereign acts are those in respect of which equality between the parties is lacking and where the place of equality is taken by subordination of one party to the other." (United Nations, *Materials ...*, p. 205.)

⁸³ *Pasicrisie belge* (Brussels), vol. 144 (1957), part 2, p. 88; *International Law Reports*, 1956 (London), vol. 23 (1960), p. 205.

⁸⁴ *Ibid.*, p. 207.

⁸⁵ *Immunity of United Kingdom from jurisdiction (Germany)* (1957) (*International Law Reports*, 1957 (London), vol. 24 (1961), p. 207).

based his claim for damages was not the collection of mail, but the operation of a motor vehicle by the defendant and the latter's action as a road user. The plea of immunity was rejected. Thus, the court said,

... we must always look at the act itself which is performed by State organs and not at its motive or purpose. We must always investigate the act of the State from which the claim is derived. Whether an act is of a private or sovereign nature must always be deduced from the nature of the legal transaction, viz. the inherent nature of the action taken or of the legal relationship which arises.⁹²

82. Without at this stage commenting on the general applicability of such a test or the criterion of the "nature of the act" as the basis for a distinction to be drawn between acts for which there is jurisdictional immunity of States and acts for which there is not, it is apparent that the complexity of the different facets of an act, such as the operation of a motor vehicle, the collection of mail or the transport of diplomatic bags, could be viewed differently from different angles and standpoints, with varying results and even diametrically opposite conclusions.

2. JUDICIAL PRACTICE FOLLOWING ADOPTION OF RESTRICTIVE NATIONAL LEGISLATION

83. Following the adoption of national legislation on State immunity in a number of countries in the past decade or so, it is now to be expected that the judicial practice in those countries will be guided by such legislation. As will be seen below (paras. 86-95), the case-law of several jurisdictions, such as the United States of America, the United Kingdom, Austria, Cyprus, Pakistan, Canada, Singapore and South Africa, which almost invariably had tended in the past to adhere to a more absolute doctrine of State immunity, might appear, since the introduction of more restrictive legislation on immunity, to follow the restrictive trend in this area.

84. A case directly in point which deserves mention in this connection is the decision of the United States District Court for the District of Columbia in *Letelier v. Republic of Chile* (1980).⁹³ In September 1976, former Chilean Ambassador and Foreign Minister Orlando Letelier and his associate Ronni Moffitt were killed in Washington, D.C., when the car in which they were travelling was destroyed by an explosive device. Two years later, their survivors and personal representatives brought a civil action against Chile, seeking compensation for tortious injuries connected with the deaths.⁹⁴ Plaintiffs alleged that the bomb which

destroyed Letelier's car was detonated by certain individual defendants acting under the direction and with the aid of defendants the Republic of Chile, its intelligence service, Centro Nacional de Inteligencia (CNI), and certain individual CNI agents and officers.⁹⁵ In a preliminary opinion, the court held that it had subject-matter jurisdiction⁹⁶ and also ruled that the *Foreign Sovereign Immunities Act of 1976*,⁹⁷ which permits a foreign State to claim immunity for certain enumerated non-commercial torts and for acts based on "discretionary functions", does not provide a defence against liability where a foreign State has ordered its agents to conduct an assassination or other acts of political terrorism in the United States.⁹⁸ In its judgment of 5 November 1980, the court awarded approximately \$US 4.9 million in pecuniary damages for the survivors and personal representatives of the victims.⁹⁹ The decisions in this case constitute a clear precedent for the award of pecuniary damages against a foreign State in connection with proven acts of political violence in the United States. Future determination of questions of State immunity will probably be made with reference to the terms of the *Foreign Sovereign Immunities Act* as the "sole and exclusive standards", and not on the basis of the more customary notions of "public acts" or acts *jure imperii*, such as those developed prior to 1976. Foreign States can no longer claim immunity on the grounds that assassinations or other acts of officially sanctioned violence against targets in the United States are public acts.¹⁰⁰ In other words, the *Foreign Sovereign Immunities Act* does not purport to give foreign States licence or discretion to commit assassinations or other illegal acts in the United States.¹⁰¹

85. On the other hand, in other cases in which they might have applied the exception of non-commercial torts under section 1605, paragraph (a) (5), of the *Foreign Sovereign Immunities Act*, the courts have declined to find jurisdiction. Thus jurisdiction was found to be lacking in *Yessenin-Volpin v. Novosti Press Agency, Tass Agency and the Daily World* (1978),¹⁰² where a libel action was brought against two Soviet press services for defamation in connection with articles printed abroad but circulated in the United States. The

pursuant to section 112 of title 18 of the *United States Code* (1976), which proximately resulted in this death and that of Moffitt (*Federal Supplement*, vol. 488, p. 666).

⁹³ For the names of the defendants, *ibid.*, pp. 665-666. For the criminal actions instituted at the same time: *United States v. Sepulveda* (1 August 1978), *United States v. Sampol* (2 April 1979 and 23 March 1979), *United States v. Diaz* (2 April 1979), *ibid.*, p. 666, footnote 1.

⁹⁶ In accordance with sections 1330, 1332, para. (a), 1391, para. (f), 1441, para. (d), and 1602-1611 of title 28 of the *United States Code* (1976).

⁹⁷ Section 1605, para. (a) (5) (A) (see para. 87 below).

⁹⁸ *Federal Supplement*, vol. 488, p. 673.

⁹⁹ See *Federal Supplement*, vol. 502 (1981), p. 259.

¹⁰⁰ Concerning other cases of political assassination and acts of international terrorism, see, for example, *Time*, vol. 116, No. 5 (4 August 1980), p. 36; and *Newsweek*, 19 May 1980, p. 38.

¹⁰¹ See footnote 98 above.

¹⁰² *Federal Supplement*, vol. 443 (1978), p. 849.

⁹² *Ibid.*

⁹³ United States of America, *Federal Supplement*, vol. 488 (1980), p. 665. See, on this question, the interesting articles by H. D. Collums, "The *Letelier* case: Foreign sovereign liability for acts of political assassination", *Virginia Journal of International Law* (Charlottesville, Va.), vol. 21 (1981), p. 251.

⁹⁴ The plaintiffs set forth five causes of action: (1) conspiracy to deprive decedents of their constitutional rights, in violation of section 1985 of title 42 of the *United States Code* (1976); (2) assault and battery resulting in death; (3) negligent transportation and detonation of explosives; (4) assassination of decedents in violation of international law; (5) assault upon Letelier, an "internationally protected person"

court found the Novosti press service to be an "agency or instrumentality" of the Soviet State entitled to immunity.¹⁰³ An exception to immunity was not available because libel actions are specifically excluded from this area of general exception.¹⁰⁴ Again, in *Upton et al. v. Empire of Iran* (1978),¹⁰⁵ the court declined to assume jurisdiction because the incident concerned, namely the collapse of the roof of a building at Tehran airport, belonging to the Iranian State, in 1974, occurred outside the United States.¹⁰⁶ In *Carey v. National Oil Corporation* (1978),¹⁰⁷ the court declined jurisdiction on the grounds that the exception to immunity for tort actions does not apply to claims involving interference with contract rights.¹⁰⁸ The Letelier case was therefore the first of a kind, with a clean slate for application of the exception of "personal injuries and damage to property", resulting in "non-immunity" for an act of political assassination. The far-reaching implications of the decision in this case are still to be seen in the future practice of United States courts.¹⁰⁹

3. GOVERNMENTAL PRACTICE

(a) National legislation

86. Since legal developments in the case-law of States are foreshadowed to a large extent by the adoption of recent national legislation on State immunity recognizing the general exception of "personal injuries and damage to property", it is necessary and desirable to examine the pertinent provisions of these statutory enactments.

87. As has been clearly illustrated by the example of judicial decisions in the United States of America, the *Foreign Sovereign Immunities Act of 1976*¹¹⁰ contains an interesting and sweeping provision, which reads:

¹⁰³ *Ibid.*, p. 854 (citing section 1603, para. (b), of the *Foreign Sovereign Immunities Act*).

¹⁰⁴ *Ibid.*, p. 855. The court also held that the provisions of section 1605, para. (a) (2), concerning "commercial activities" as an exception to immunity, did not apply because the activities in question were of a "public or governmental" and not a commercial nature.

¹⁰⁵ *Federal Supplement*, vol. 459 (1979), p. 264.

¹⁰⁶ The court observed that, even if there had been negligence on the part of the defendants, it had not caused a "direct" effect in the United States (*ibid.*, pp. 265-266). Judgment affirmed on appeal in 1979 (*Federal Reporter, 2nd Series*, vol. 607 (1980), p. 494).

¹⁰⁷ *Federal Supplement*, vol. 453 (1978), p. 1097.

¹⁰⁸ This case concerned an action brought by a New York corporation against the Libyan Government and the Libyan National Oil Corporation. The New York corporation sought damages for the cancellation of supply contracts by the Libyan corporation during the 1973-1974 Arab oil embargo, involving highly visible "political" acts by the Libyan State (*ibid.*, pp. 1099-1100). The judgment of the district court was affirmed on other grounds by the Court of Appeals of the Second Circuit in 1979 (*per curiam*) (*Federal Reporter, 2nd Series*, vol. 592 (1979), p. 673).

¹⁰⁹ See Collums, *loc. cit.* (see footnote 93 above), pp. 263-266. The five categories of strictly political or public acts as noted in *Victory Transport Inc. v. Comisaría General de Abastecimientos y Transportes* (1964) (*Federal Reporter, 2nd Series*, vol. 336 (1965), p. 354, at p. 360; *International Law Reports* (London), vol. 35 (1967), p. 110) may be open to doubts.

¹¹⁰ See footnote 66 above.

Section 1605. General exceptions to the jurisdictional immunity of a foreign State

(a) A foreign State shall not be immune from the jurisdiction of courts of the United States or of the States in any case:

...

(5) not otherwise encompassed in paragraph (2) above,¹¹¹ in which money damages are sought against a foreign State for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign State or of any official or employee of that foreign State while acting within the scope of his office or employment; except this paragraph shall not apply to:

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

88. The United Kingdom *State Immunity Act 1978*¹¹² contains a shorter and less detailed provision. Section 5 of the Act provides:

Exceptions from immunity

...

5. A State is not immune as respects proceedings in respect of:

(a) death or personal injury; or

(b) damage to or loss of tangible property, caused by an act or omission in the United Kingdom.

89. A closely similar if not identical provision can be found in the more recent legislation of several common-law or Commonwealth countries in Asia, southern Africa and North America, in particular in section 7 of Singapore's *State Immunity Act, 1979*,¹¹³ in section 6 of the *Foreign States Immunities Act, 1981* of South Africa¹¹⁴ and in section 6 of Canada's *State Immunity Act of 1982*.¹¹⁵ It is interesting to observe that the Canadian Act follows closely the wording of the United Kingdom Act in this connection, while in regard to "contracts of employment" it has not chosen to adopt the United Kingdom solution. On the other hand, Pakistan's *State Immunity Ordinance, 1981*¹¹⁶ does not include "death, personal injury and damage to property" as a general exception to State immunity. Since the common-law practice, especially that of the United Kingdom, had been considered to favour a most unqualified principle of State immunity, this relatively sudden change of heart is causing extensive reflection in the legislation and judicial practice of other common-law jurisdictions the world over.

¹¹¹ "(2) in which the action is based upon a commercial activity carried on in the United States by the foreign State; or upon an act performed in the United States in connection with a commercial activity of the foreign State elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign State elsewhere and that act causes a direct effect in the United States;"

¹¹² See footnote 65 above.

¹¹³ See footnote 68 above.

¹¹⁴ See footnote 70 above. The expression "tangible property" is also used.

¹¹⁵ See footnote 67 above.

¹¹⁶ See footnote 69 above.

90. It should be further noted that national legislation dealing with State immunity invariably touches upon the question of scope and extent of subject-matter jurisdiction. Thus, while the United Kingdom Act of 1978 bases jurisdiction on the *locus delicti commissi*, its counterparts in other common-law jurisdictions contain more than slight variations. Singapore's Act of 1979 and South Africa's Act of 1981 appear to follow this principle, with reference to the place of occurrence of the act or omission being in the territory of the State of the forum. The Canadian Act, on the other hand, bases jurisdiction on the place of occurrence of loss of life or property, or damage to person and property, being in Canada. The United States legislation, more akin to the Canadian, seems to place greater emphasis on the occurrence of the "personal injury or death, or damage to or loss of property" in the United States, caused by an act or omission of a "foreign State or of any official or employee of that foreign State while acting within the scope of his office or employment". The United States legislation in a way defines the attribution of liability to the foreign State for the act or omission of its official or employee. This general exception is, in turn, subject to many exceptions with regard to the causes of action, which in other jurisdictions would appear unlikely to derive from physical damage to person or property or the loss of life or property. The end results would appear to be broadly similar, if not the same, as it is difficult to imagine the possibility of physical injury to person or property caused by an act or omission other than intentional, negligent or accidental. The area under consideration covers physical damage to the person which may cause death or disability or other bodily harm, and physical damage to tangible property or corporeal hereditament as opposed to intangible rights, and indeed total loss or destruction of such tangible property. By definition, this area excludes defamation—libel and slander—but probably includes stricter liability attributable to occupiers of premises, holders of dangerous chattels and keepers of animals, at least in respect of physical injuries or damage to property resulting from breach of a strict duty of care.

91. While the current practice of States which have adopted legislation restricting immunity in this specified area is still in its infancy and awaiting further developments, it is to be assumed that other States which have ratified an international convention containing a similar restriction will also be bound to adopt a restrictive practice in this area. Thus Austria, Belgium and Cyprus may be presumed to have opted for limitation of State immunity in this particular area.¹¹⁷

(b) *International conventions*

(i) *1972 European Convention on State Immunity*

92. The 1972 European Convention on State Immunity,¹¹⁸ which came into force on 11 June 1976 in accordance with article 36, paragraph 2, between

¹¹⁷ States having ratified the 1972 European Convention on State Immunity (see footnotes 73 to 75 above).

¹¹⁸ See footnote 39 above.

Austria, Belgium and Cyprus, contains the following provision:

Article 11

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred.

93. This provision also serves to identify or delimit the scope of the causes of action, which are confined to physical damage to person or tangible property, with the *locus delicti commissi* being within the territory of the State of the forum. Territorial jurisdiction with respect to the occurrence of the facts which occasioned the injury or damage is reinforced by a further territorial requirement that the author of the act or omission, be it an official or employee of a foreign State to which liability is attributable, must have been physically present in the territory at the time those facts occurred. This double requirement ensures the solid grounds on which the State of the forum may found universally recognized jurisdiction and exercise it even in proceedings involving a foreign State.

(ii) *Inter-American Draft Convention on Jurisdictional Immunity of States*

94. While the fullest implications of article 11 of the 1972 European Convention have not yet been assessed in relation to the practice of States which have ratified and applied it, national legislation already abounds in States sympathetic to a restrictive principle in this area. The recent Inter-American Draft Convention on Jurisdictional Immunity of States (1983)¹¹⁹ may be cited as an example of regional efforts in pursuit of this restrictive trend. The draft provides:

Article 6

States shall not claim immunity from jurisdiction ... :

...

(e) In proceedings for losses and damages or tort liabilities arising from the activities mentioned in article 5, paragraph one;

...

95. The first paragraph of article 5 of the inter-American draft convention provides: "States shall not invoke immunity against claims relative to trade or commercial activities undertaken in the State of the forum." This provision also bases subject-matter jurisdiction on the place of occurrence of losses and damage being within the forum State. It further confines grounds for action to tort liabilities arising from trade or commercial activities undertaken by the foreign State within the territory of the State of the forum. In some more or less precise way, the *locus delicti commissi* appears to afford an internationally accepted criterion for the assumption of jurisdiction and a sound basis for its exercise, if ever a general exception to State immunity is to become universally recognized in future State practice.

¹¹⁹ See footnote 77 above.

4. INTERNATIONAL OPINION

96. While it is still too early to monitor opinions of writers with regard to this particular area of "personal injuries and damage to property" as an exception to State immunity, there appears to be a growing sympathy in the thinking of contemporary authors, who are invariably supporters of a restrictive trend. In this as well as in other specified areas where there have been legislative enactments and regional conventions restricting State immunity, writers can readily find justification for such restriction. If a State so chooses, it could enact a law governing immunities of foreign States which would enumerate those acts requiring acceptance of the local jurisdiction.¹²⁰ There appears to be danger that legal developments may not follow the same or a similar pattern if States are encouraged to adopt their own national legislation without regard for evolving international standards. Even regional conventions applicable exclusively among the contracting States could generate restrictive principles for third States, once participating countries proceed to implement their regional treaty obligations by enacting national legislation which would in any event be applicable to foreign States alike in regard to the exercise of territorial jurisdiction or subject-matter jurisdiction, closely linked to the territory of the forum State or with substantial contacts with the territorial State.

97. This restrictive trend finds unmistakable expression in the draft articles for a convention on State immunity prepared at the 1982 conference of the International Law Association,¹²¹ which groups international lawyers from all walks of life and from the various legal systems the world over. It is the collective support for a restrictive trend in this particular area that deserves mindful attention. Thus the draft provides:

Article III. Exceptions to immunity from adjudication

A foreign State shall not be immune from the jurisdiction of the forum State to adjudicate in the following instances *inter alia*:

...

F. Where the cause of action relates to:

1. Death or personal injury; or
2. Damage to or loss of property.

Subsections 1 and 2 shall not apply unless the act or omission which caused the death, injury or damage occurred wholly or partly in the forum State.

...

98. Subject-matter jurisdiction is therefore unmistakably tied to the *locus delicti commissi*. This provision is not necessarily intended to regulate questions of conflict of laws or of jurisdictions in private international law, but rather to suggest a sound foundation in public international law and an acceptable international standard for the exercise of territorial jurisdiction by the

State of the forum in proceedings against foreign States in this specified area.

5. AN EMERGING TREND

99. In the light of the growing opinion of writers and the increasing practice of States favouring the exercise of jurisdiction, where there is sound subject-matter jurisdiction, in proceedings against foreign States for personal injuries and damage to property, an emerging trend is becoming more readily discernible in favour of relief being granted to individuals for the personal injury suffered or for the loss of or damage to their property. The problem confronting the international community is not so much whether or not to limit or restrict the application of State immunity, but rather how to allow the exercise of territorial jurisdiction in a generally accepted area. The emerging trend could lead to confusion and disorder if the international community fails to intervene at this stage by giving whatever advice and guidance may be needed to harmonize and reorient the emerging trend towards to healthier direction and achieve more salutary results for all concerned, the foreign sovereign States as well as the aggrieved individuals.

C. Formulation of draft article 14

100. In an endeavour to formulate a draft article containing this general exception, adequate expression should be given to the emerging trend in international legal opinion reflecting the mounting practice of States—judicial and legislative as well as governmental. Some basic elements appear to require precise specification. The area under review unequivocally covers "personal injury", including loss of life or physical injury to the person, as well as "damage to property", including loss or total destruction of tangible property. It is clear from the type of physical damage inflicted upon the person or property that the causes of action could arise from any activities undertaken by a foreign State or one of its organs, agencies or instrumentalities within the State of the forum. It is equally clear that the infliction of personal injury or physical damage to property could be intentional or accidental or the result of negligent or reckless conduct, for which the foreign State is liable, either in tort as is commonly understood in common-law jurisdictions, such as for assault, battery, negligence or a traffic accident, or in any other type of civil action for personal injury or damage to property. Damage to reputation or defamation is not personal injury in the physical sense, nor can interference with contract rights or any rights, including economic or social rights, be viewed as damage to tangible property. Of course, the territorial connection should also be expressly mentioned so as not to confer extraterritorial jurisdiction or otherwise un-overreachable subject-matter jurisdiction on the State of the forum simply to provide a remedy for redressing personal injury or damage to property where none would in any event exist within the forum State.

¹²⁰ See, for example, the authors cited above: Mann (footnote 79), Brownlie (footnote 80) and Sinclair (*ibid.*).

¹²¹ See footnote 81 above.

101. Article 14 might read as follows:

Article 14. Personal injuries and damage to property

Unless otherwise agreed, a State is not immune from the jurisdiction of the courts of another State in respect of proceedings relating to injury to the person or death or damage to or loss of tangible property, if the act or omission which caused the injury or damage in the State of the forum occurred in that territory, and the author of the injury or damage was present therein at the time of its occurrence.

ARTICLE 15 (Ownership, possession and use of property)

A. General considerations

1. SCOPE OF "OWNERSHIP, POSSESSION AND USE OF PROPERTY" AS AN EXCEPTION TO STATE IMMUNITY

102. As has been seen in connection with part II, "General principles", under article 7, paragraph 3, "a proceeding before a court of a State shall be considered to have been instituted against another State ... when the proceeding is designed to deprive that other State of its property or of the use of property in its possession or control".¹²² State immunity could thus be invoked even though the proceeding is not brought directly against a foreign State but is merely aimed at depriving that State of its property or of the use of property in its possession or control. Without, at this stage, touching on the question of State immunity in respect of attachment and execution of its property, it will suffice to recall that a State is immune when a proceeding affects its ownership of property, or when the use of property in its possession or control is thereby affected.

103. Jurisdictional immunity of a State in respect of its ownership or use of property in its possession or control is recognized as a general principle. It is the purpose of the present draft article to define and delineate the scope of its application. Admittedly, as a general rule, a proceeding seeking to deprive a foreign State of its property or the use of property in its possession or control will be disallowed on application of the principle of State immunity. There are, however, various categories of circumstances or cases in which a proceeding will be permitted even though it may involve ownership of property contested by a foreign State or the use of property in the possession or control of that State.

104. In the first place, a proceeding may be brought which relates to the property of a foreign State or to the use of property in its possession or control situated in the territory of the State of the forum if it does not seek to deprive the foreign State of its ownership of that property or of its use but merely, for instance, to have the transfer of title deeds properly registered or to estab-

lish the existence or compel registration of easements or mortgage or other charges connected with the property.

105. In order to invoke State immunity in a proceeding relating to ownership of its property or the use of property in its possession or control, the State may have to assert its claim of interest, which could cover either ownership of the right to use the property, or its actual possession or effective control. Mere assertion will nowadays not suffice to establish jurisdictional immunity in such a case, unless ownership by the State or its right to use is admitted by the parties to the litigation, or unless the State can provide *prima facie* evidence of title or proof of its claims of interest. Unless and until such claims of interest are established, the court may exercise jurisdiction; but once ownership by the State is established or its right to use the property is proven, then the general principle of State immunity comes into play and the proceeding may only be resumed if it still falls within one of the exceptions in part III. With regard to property, there is a clear exception to be embodied in draft article 15. The scope and application of this important, time-honoured exception will become more apparent upon closer study and analysis of certain essential questions.

2. PREDOMINANT AUTHORITY OF THE STATE OF THE *SITUS* A DECISIVE FACTOR

106. An important aspect of the principle *par in parem imperium non habet* is reflected in the proposition that an extraterritorial authority cannot be vested with the power to exercise *imperium* within the *territorium* of another sovereign State, unless of course the territorial sovereign expressly consents to such exercise, which will have to be very limited in time as well as in scope. An unlimited concession of the exercise of extraterritorial sovereign authority would have a destructive effect upon the very existence of territorial sovereignty. The generally recognized sovereign authority over persons and things situated or present within the territory of a State must therefore be vested in the territorial State itself. Thus the authority of the territorial State to administer or to legislate or decide disputes relating to persons or property within the confines of its territory can be challenged by no other State. No one may contest the exercise of territorial jurisdiction over persons and property within the recognized framework and consistently with other principles of international law, such as the treatment of aliens, the principle of non-discrimination or human rights.

107. As far as property is concerned, especially immovable property, the State of the *situs* exercises supreme authority as part and parcel of its sovereignty. Indeed, the concept of ownership and other proprietary rights or interests can only exist within the framework of the legal system of the *situs*, and such a concept is bound to be inherently absorbed within the notion of territorial sovereignty of the State of the *situs* itself. This appears to constitute a sound proposition of international law, as the inductive approach adopted in the present study will later reveal (paras. 116-137 below).

¹²² See footnote 12 above.

108. While a State may conceivably exercise its sovereign authority over its nationals and its officials, agencies or instrumentalities in the conduct of their activities abroad or in the territory of another State, such control or authority based on the national character or personal nature is eminently absent in so far as property situated outside its territorial boundary is concerned, especially if the property in question, whether movable or immovable, is situated within the territory of another State. A State has the authority to require its nationals to pay taxes or to perform traditional national services, but it cannot hope to extend similar authority, whether legislative, administrative or even judicial, over property situated outside its territorial authority; much less if the property is situated in the territory of another sovereign authority; far less also if it is an immovable property, subject to the *lex situs* and the territorial sovereignty of the local sovereign authority. The predominant authority of the State of the *situs* is a decisive factor in determining the question of available jurisdiction.

3. PRIORITY OF THE *LEX SITUS* A DETERMINATIVE ELEMENT

109. If the authority of the State of the *situs* should prevail in any event or in most cases where there appears to be overlapping or concurrence, if not conflict, of jurisdictions, there seems to be an added reason for the predominance or primacy of the territorial authority. The applicable law is unmistakably the *lex situs* as no other law can be more proper than the law of the place where the property itself is situated. *A fortiori* the régime or legal relationship with regard to land or immovable property, with its peculiar history, niceties and complexities, has developed in response to the needs of the territorial society, its traditions, usages and customs. Every system of land law or law concerning immovable property is unique in itself. Its exclusive applicability cannot be disputed, since ownership and other proprietary rights or interests in property do not and cannot exist except within the framework and purview of the *lex situs*. The supremacy of the *lex situs* and its sole authority in regard to property have rendered the assumption and exercise of territorial jurisdiction by the *forum rei sitae* all the more inevitable; in the absence of any alternative or competitive system of law, neither the *lex patriae* nor the *lex fori* of an extraterritorial authority could qualify to replace or supplant either the jurisdiction of the *forum rei sitae* or the exclusive applicability of the *lex situs*.

110. Faced with the decisive priority of the territorial jurisdiction and the exclusive application of its internal law governing legal relations with regard to property, especially immovable and to a large extent also movable property, a kind of exception has long been recognized and admitted in the practice of States. A State is not immune from the jurisdiction of the courts of another State in respect of proceedings relating to a series of classes or categories of cases involving the application of the internal law of the State of the *situs*. In any event, the *forum rei sitae* is a most convenient court competent to apply the internal law of the State of the *situs*. The

rights and interests of the foreign State or the extraterritorial State with regard to property situated within the territory of the State of the *situs* can only be recognized under the internal law of the territorial State. When it comes to the authority of the internal law and a foreign State may derive rights and interests only by virtue of the application of the internal law of the *situs* and with the aid and assistance of the judicial authority of the *situs*, then the only sensible solution is to recognize the determinative authority or the deciding power of the territorial State. The extraterritorial State may be said to have waived immunity or to have itself invoked the jurisdiction of the territorial State when questions of property rights within the State of the *situs* have to be determined by the judicial authority or the local sovereign and with its internal law, the *lex situs*, being the only applicable law.

111. An alternative solution or sheer insistence on the principle of State immunity would only lead to chaos and absurdity. There would be a legal vacuum, as the rights and interests of the extraterritorial authority itself would be without legal foundation, failing its own recognition of and respect for the internal law of the territorial State. In fact, this is an accurate and orderly application of the maxim *par in parem jurisdictionem non habet*. It is the extraterritorial State that has no authority to introduce a new legal system within the territorial framework of another sovereign State. It follows that the only internal law that prevails in the circumstances is that of the State of the *situs*. If need be, such an exceptional situation could be viewed from the standpoint of the outside State or extraterritorial authority as an exception to its otherwise available jurisdictional immunity.

4. POSSIBILITY OF ACQUISITION OF PROPRIETARY RIGHTS BY A FOREIGN STATE UNDER THE INTERNAL LAW OF THE STATE OF THE *SITUS*

112. If a State acquires property in the form of ownership or other proprietary rights and the property, whether immovable or movable, is situated in the territory of another State, the acquisition of such property is made possible only by virtue of the application of the internal law or private law of the State of the *situs*. The outside State or extraterritorial State as an outsider must, from the start, fully recognize and respect the local or territorial internal law which unquestionably governs the legal relationship between the foreign State and the property so acquired. To disobey the rules of the internal law of the *situs* is to forfeit, abandon or relinquish legal rights to property under the prevailing system. This is particularly true of immovable property which cannot change its location, while movable property could be transported out of the territory of its former *situs* and be subjected to a different system of internal law. Whatever the case, internal law of the *situs* governs the questions of acquisition and loss of property, including title and other proprietary rights.

113. Under the internal law of the *situs*, there may be several methods of acquiring property, such as by sale

or purchase, by *usucapio longi temporis* or prescription, by testate or intestate succession, or by devolution or transfer as *bona vacantia*. Thus it is pre-eminently by virtue of the internal law of the *situs* that questions of title, ownership and other proprietary rights are to be determined.

114. It is also the judicial authority of the *situs* that appears to be omniscient to apply the *lex situs*, and it is by the grace and authority of the *forum rei sitae* that questions or disputes relating to titles, ownership or acquisition of property are adjudicated. In proceedings concerning the ascertainment of ownership or other rights to property, such as trust funds, real estate or bank accounts, parties interested in the determination of their rights or their *portio legitima* do come to court of their own free will. There is no element of compulsion or, to use an old English term, "no impleading of a foreign sovereign against his will". If the foreign State intervenes or interpleads, it does so on a voluntary basis, for such proceedings are often not against any party, but merely to determine the nature and extent of the legal interests of all the parties concerned. If the foreign State chooses to seek the judicial determination of its rights and titles under the internal law of the *situs*, it is free to do so or to be represented before the court of competence. If, however, the foreign State does not feel so inclined or obliged, it may decline at the risk of forfeiting its rightful title or property.

115. With regard to movable property, there may be different types of property that can enter and leave the territory of another State. It is no longer enough that the foreign State merely asserts its title; it may be required to give evidence to prove title or to establish its ownership or possession or the right to use. This is all the more significant if the property in question is a seagoing vessel, an aircraft, a hovercraft or a spaceship, or indeed a communications satellite or a space laboratory. While there are special régimes of public international law regulating many of the questions involved, such as the responsibility of the launching State for damage caused and the obligation to return the space object,¹²³ the more mundane and fundamental questions of title, rights and interests in property under the internal law remain to be adjudged, in each instance, by the court of recognized competence which, in most cases, even for movable property, still happens to be the *forum rei sitae*, namely the court of the State in whose territory the property is situated or to be found at the time of the proceedings.

B. The practice of States

1. JUDICIAL PRACTICE

116. The judicial practice of States in this area of "ownership, possession and use of property" as an exception to State immunity is not unknown. If there is an area which is less grey as an exception to State immu-

ity, it is this one. For reasons that are apparent from the general considerations above, State practice seems to bear out the absence of immunity for proceedings involving determination of ownership of property and its acquisition or title under the internal law of the State of the *situs* by the territorial court.

117. A decision by the District Court of Tokyo in *Limbin Hteik Tin Lat v. Union of Burma* (1954)¹²⁴ is a case directly in point. The proceedings related to a dispute as to title to a piece of land in Tokyo. The court ruled that Japan had jurisdiction and that the court had competence over the proceedings, in which the respondent was a foreign State. The court declared:

A State is not subject to the exercise of power by another State, and therefore is not subject to the jurisdiction of another State in the matter of civil proceedings. This is to be admitted as a principle of international law recognized in general. ... However ... in an action concerning immovables, it is widely admitted that jurisdiction belongs exclusively to the State of the *situs*, and consequently it must be said that a foreign State may be subject to the jurisdiction of another State.¹²⁵

118. The case-law of the United Kingdom has been accurately summarized by Lord Denning, Master of the Rolls, in *Thai-Europe Tapioca Service Ltd. v. Government of Pakistan, Ministry of Food and Agriculture, Directorate of Agricultural Supplies* (1975),¹²⁶ in his judgment confirming a restrictive view he had earlier proposed in *Rahimtoola v. Nizam of Hyderabad* (1957).¹²⁷ Accepting the general principle that "except by consent, the courts of this country will not issue their process so as to entertain a claim against a foreign sovereign for debt or damages", Lord Denning then outlined four existing exceptions in English case-law:

First, [there is] no immunity in respect of land situate in England. ...

Second ... in respect of trust funds here or money lodged for the payment of creditors. ...

Third ... in respect of debts incurred here for services rendered to ... property here. ...

Fourth, [when] a foreign sovereign ... enters into a commercial transaction with a trader here and a dispute arises which is properly within the territorial jurisdiction of [English] courts.¹²⁸

119. Lord Denning's dicta and observations have been found to have compelling reasons even outside the

¹²⁴ *International Law Reports* (London), vol. 32 (1966), p. 124; text reproduced in United Nations, *Materials on Jurisdictional Immunities* ... , pp. 339-340.

¹²⁵ The court added:

"... an immovable is an object *par excellence* of territorial sovereignty of the State of its *situs* and this fact has been regarded as worthy of respect as a matter of international comity; hence it has come to be recognized for a long time that an action directly concerning immovables comes within the exclusive jurisdiction of the State of the *situs*. It has to be admitted, therefore, that ... this principle has been recognized as applicable in actions in which a foreign State is a party, as well as where a private person is a party."

¹²⁶ *The All England Law Reports*, 1975, vol. 3, p. 961.

¹²⁷ United Kingdom, *The Law Reports, House of Lords*, 1958, p. 379.

¹²⁸ *Loc. cit.* (footnote 126 above), pp. 965-966. See also the judgment of the Supreme Court of Ontario in *Harold W. M. Smith v. United States Securities and Exchange Commission* (1976) (*International Legal Materials* (Washington, D.C.), vol. XV, No. 2 (1976), p. 319).

¹²³ See Convention on International Liability for Damage Caused by Space Objects (United Nations, *Treaty Series*, vol. 961, p. 187).

United Kingdom.¹²⁹ With regard to the exception of trading or commercial activities considered earlier, the position was reaffirmed by the House of Lords in the "*I Congreso del Partido*" case (1981).¹³⁰ The first three exceptions fall within the specified area of the present draft article, viz. immovable and movable property, including trust funds.

120. The doctrine of "trust" as conceived by the Chancery and other courts of equitable jurisdiction has long been recognized in English practice as an exception to immunity. Actions may proceed in spite of the fact that a foreign Government may have an interest in the trust fund. In *Duke of Brunswick v. King of Hanover* (1844),¹³¹ Lord Langdale, Master of the Rolls, considered it possible to make a foreign sovereign a party to administration proceedings, since doing so did not "compel" him to take part in them, it merely gave him "an opportunity to come in to ... establish his interest". Similarly it was said by Justice Maugham in the *Russian Bank for Foreign Trade* case (1933)¹³² that the fact that the proceedings related to funds in which the Soviet Government had an interest could not prevent the Chancery Division from performing its duty.

121. This notion of trust has also provided the Chancery courts with a new basis for exercising jurisdiction in actions against third parties in respect of State-owned property in their hands, whenever it is possible to regard the property as trust funds in the custody of the trustees. This was actually decided by Lord Hatherley in *Larivière v. Morgan* (1872),¹³³ concerning the supply of cartridges to the French Government during the Franco-Prussian war. Morgan opened a bank account in England on behalf of the French Government for settlement of the latter's contractual obligations. The Court of Appeal denied immunity, treating the bank account as trust property and the action as one against Morgan, not as a foreign State agent, but as a trustee. The House of Lords appears to have approved of this doctrine of trust.¹³⁴ The same principle has been applied in subsequent cases.¹³⁵

¹²⁹ See, for example, Justice Owen in the Court of Appeal of Quebec in *Venne v. Democratic Republic of the Congo* (1969) (Canada, *The Dominion Law Reports, Third Series* (Toronto), vol. 5 (1969), p. 128).

¹³⁰ See footnote 30 above.

¹³¹ *House of Lords Cases* (London), vol. II (1848-1850) (1851), p. 1; see also Lord Radcliffe in the "gold bars" case, *United States of America and Republic of France v. Dollfus Mieg et Cie S.A. and Bank of England* (1952) (*The All England Law Reports*, 1952, vol. 1, p. 572, at p. 589).

¹³² United Kingdom, *The Law Reports, Chancery Division*, 1933, p. 745. The court assumed jurisdiction despite the fact that the Soviet Government might possibly intervene to establish a claim to some part of the assets.

¹³³ United Kingdom, *The Law Reports, Chancery Appeal Cases*, vol. VII (1872), p. 550.

¹³⁴ *Morgan v. Larivière* (1875) (*The Law Reports, English and Irish Appeal Cases*, vol. VII (1875), p. 423).

¹³⁵ See, for example, *Haile Selassie v. Cable and Wireless Limited* (1937) (*The Law Reports, Chancery Division*, 1938, p. 545), on appeal (1938) (*ibid.*, p. 839); *Nizam of Hyderabad and another v. Jung and others* (1956) (*The All England Law Reports*, 1957, vol. 1, p. 257); and *Rahimtoola v. Nizam of Hyderabad* (1957) (*loc. cit.* (footnote 127 above), pp. 392-398 (Viscount Simonds)).

122. Reference to English case-law recognizing the exception under consideration is not without significance in view of the traditional association of English judicial practice with an almost unqualified principle of sovereign immunity. It is not surprising that a similar exception is recognized in other case-laws, such as in Italy, where the jurisprudence distinguishes between the State as *potere politico* and as *persona civile*. Thus, as early as 1882, the dual personality of the State was recognized in *Morellet v. Governo Danese*,¹³⁶ where the Court of Cassation of Turin distinguished between the State as a political entity and as a *corpo morale* and observed that, in the latter capacity, the State must "acquire and own property, it must contract, it must sue and be sued, and in a word, it must exercise civil rights in like manner as any other juristic person or private individual (*un altro corpo morale o privato individuo qualunque*)".¹³⁷

123. The case-law of the States applying a restrictive principle of State immunity invariably allows actions to proceed which may involve titles or interests of a foreign Government or transactions concerning immovable property situated in the territory of the State of the forum.¹³⁸

2. GOVERNMENTAL PRACTICE

124. Judicial practice in this particular area appears to be more settled and consistent in support of an established exception to State immunity, although there is no prototype judicial decision on every point at issue in every existing case-law. It would be neither desirable nor practical to expect that every judicial system must have litigation on any given point. The practice of States in this connection amply supplements judicial practice in a number of ways, notably by way of replies to the Secretariat's questionnaire and by adoption of specific national legislation on the precise point under consideration.

(a) Views of Governments

125. In the replies to the questionnaire,¹³⁹ it is possible to gather interesting evidence of governmental opinion

¹³⁶ *Loc. cit.* (footnote 33 above), pp. 130-131.

¹³⁷ *Idem*; cited in Harvard Law School, *Research in International Law*, part III, "Competence of Courts in regard to Foreign States" (Cambridge, Mass., 1932), published as *Supplement to The American Journal of International Law* (Washington, D.C.), vol. 26 (1932), pp. 481-482.

¹³⁸ See, for example, *S.E. Echref Badnjević ès qualité de Ministre de Yougoslavie en Egypte v. W. R. Fanner* (1947) (*Journal du droit international* (Clunet) (Paris), vols. 73-76 (1946-1949), p. 113), where the Mixed Court of Cairo denied immunity for the purchase of an immovable property by a foreign legation to be used as a *hôtel diplomatique*. Cf. the *Republic of Latvia case* (1955) (*International Law Reports*, 1955 (London), vol. 22 (1958), p. 230), where the Court of Appeal of West Berlin confirmed the decision of the Restitution Chamber (1953) on the grounds that "that principle does not apply if the foreign State enters into property relations with other States or their citizens, and acts not as the holder of sovereign powers but exclusively as the holder of private rights and liabilities in the field of private law, being active in the field of civil-law and especially commercial-law transactions."

¹³⁹ See footnote 29 above.

and practice in support of the exception under review. Thus, in Hungary, a socialist country, State immunity is regulated by item (a) of section 56 of Law Decree No. 13 of 1979, under which a foreign State is exempt from the jurisdiction of a court or other public authority of the Hungarian State.¹⁴⁰ The landed property of a foreign State in Hungary, however, belongs to the exclusive jurisdiction of a Hungarian court of law or other public authority.¹⁴¹

126. Madagascar adopted the same restrictive view. Under article 29 of Ordinance No. 62-041 of 19 September 1962:

"Property is governed by the law of the place where it is situated.

"In particular, immovable property situated in Madagascar, even when foreign-owned, is governed by Malagasy law."

Under this provision, if movable or immovable property is situated in Madagascar, the foreign State's title to that property or other property rights are governed by Malagasy law.

As to testate succession:

If the property is immovable, it is governed by the law applicable where it is situated;

If the property is movable, it is governed by the law applicable where the deceased was domiciled (art. 31 of Ordinance No. 62-041 of 19 September 1962).¹⁴²

127. Similar views were expressed by other Governments in their replies to the questionnaire, including Togo, Portugal and Trinidad and Tobago. Thus, in the view of Togo:

If a foreign State owns or succeeds to an immovable or movable property situated in Togo, that State is subject to the régime of proof established by Togolese law for determining title to property. However, if the immovable or movable property is for diplomatic or similar uses, it enjoys extraterritoriality and immunity from distraint.¹⁴³

128. Giving a list of exceptions to State immunity, the Portuguese reply contained the following:

Relying on what might be described as a universally accepted doctrine, the Portuguese courts agree that such immunity ceases only if:

The proceedings relate to immovable property;

There is an express or tacit waiver of immunity;

The *forum hereditatis* exception is allowed.¹⁴⁴

129. The views expressed by Trinidad and Tobago are equally revealing:

The exceptions or limitations provided by the common law of Trinidad and Tobago and those recognized by governmental practice in Trinidad and Tobago with respect to jurisdictional immunities of foreign States and their property relate to:

(i) Actions relating to land within the jurisdiction (e.g. actions to recover rent from mortgage interest);

(ii) Actions by a local beneficiary relating to a trust fund within the jurisdiction.¹⁴⁵

¹⁴⁰ Text reproduced in United Nations, *Materials on Jurisdictional Immunities* ... , p. 17.

¹⁴¹ See the reply of Hungary to question 1, *ibid.*, p. 575.

¹⁴² Reply of Madagascar to question 14, *ibid.*, p. 583.

¹⁴³ Reply of Togo to question 14, *ibid.*, p. 609.

¹⁴⁴ Reply of Portugal to question 3, *ibid.*, p. 592.

¹⁴⁵ Reply of Trinidad and Tobago to question 11, *ibid.*, p. 612.

(b) National legislation

130. An increasing amount of national legislation has been adopted in the past 10 years or so, recognizing or confirming the existence of an exception in regard to property situated in the State of the forum. These provisions are far from identical and do not always deal with the same subject-matter.

131. Thus, in the United States *Foreign Sovereign Immunities Act of 1976*,¹⁴⁶ there are two unrelated provisions concerning property:

Section 1605. General exceptions to the jurisdictional immunity of a foreign State

(a) A foreign State shall not be immune from the jurisdiction of courts of the United States ... in any case:

...

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign State; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign State and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

...

132. The United Kingdom *State Immunity Act 1978*¹⁴⁷ contains a provision analogous to that cited above, but which is more detailed. Section 6 of the Act reads:

Exceptions from immunity

...

6. (1) A State is not immune as respects proceedings relating to: (a) any interest of the State in, or its possession or use of, immovable property in the United Kingdom; or

(b) any obligation of the State arising out of its interest in, or its possession or use of, any such property.

(2) A State is not immune as respects proceedings relating to any interest of the State in movable or immovable property, being an interest arising by way of succession, gift or *bona vacantia*.

(3) The fact that a State has or claims an interest in any property shall not preclude any court from exercising in respect of it any jurisdiction relating to the estates of deceased persons or persons of unsound mind or to insolvency, the winding up of companies or the administration of trusts.

(4) A court may entertain proceedings against a person other than a State notwithstanding that the proceedings relate to property:

(a) which is in the possession or control of a State; or

(b) in which a State claims an interest,

if the State would not have been immune had the proceedings been brought against it or, in a case within paragraph (b) above, if the claim is neither admitted nor supported by *prima facie* evidence.

133. It should be further noted that a corresponding provision is also included in section 8 of Singapore's *State Immunity Act, 1979*,¹⁴⁸ in section 7 of Pakistan's

¹⁴⁶ See footnote 66 above.

¹⁴⁷ See footnote 65 above.

¹⁴⁸ See footnote 68 above. Section 8 is a verbatim reproduction of section 6 of the United Kingdom model.

State Immunity Ordinance, 1981,¹⁴⁹ in section 7 of the *Foreign States Immunities Act, 1981* of South Africa,¹⁵⁰ and in section 8 of Canada's *State Immunity Act* of 1982.¹⁵¹

(c) *International conventions*

(i) *1972 European Convention on State Immunity*

134. The 1972 European Convention on State Immunity¹⁵² contains two relevant provisions:

Article 9

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to:

(a) its rights or interests in, or its use or possession of, immovable property; or

(b) its obligations arising out of its rights or interests in, or use or possession of, immovable property

and the property is situated in the territory of the State of the forum.

Article 10

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to a right in movable or immovable property arising by way of succession, gift or *bona vacantia*.

135. Article 9 provides for non-immunity in proceedings concerning the rights and obligations of a State in, or in connection with, immovable property situated in the territory of the forum State. "Possession" is not always regarded as a right in the sense attributed to that term in certain legal systems. The expressions "right", "use" and "possession" should be interpreted broadly. This article covers proceedings concerning the rights of a foreign State in immovable property in the forum State, including mortgages, nuisance, trespass or other unauthorized use, lease or tenancy agreements, possession or eviction, rents or payments for use of the property and liabilities of the occupier of immovable property. Article 10 provides for non-immunity in proceedings relating to a right arising by way of succession, gift or *bona vacantia*, which in some legal systems is considered as a right of succession, and in others as a right of forfeiture of goods without ownership.

(ii) *Inter-American Draft Convention on Jurisdictional Immunity of States*

136. The recent Inter-American Draft Convention on Jurisdictional Immunity of States (1983)¹⁵³ contains a brief provision on this exception:

¹⁴⁹ See footnote 69 above. Section 7 of the Pakistan Ordinance is entitled "Ownership, possession and use of property".

¹⁵⁰ See footnote 70 above. Subsection (2) of section 7 exempts from the jurisdiction of South African courts proceedings relating to a foreign State's title to, or its use or possession of, property used for a diplomatic mission or a consular post.

¹⁵¹ See footnote 67 above. Section 8 is confined to proceedings relating to a State's interest in property arising by way of succession, gift or *bona vacantia*.

¹⁵² See footnote 39 above.

¹⁵³ See footnote 77 above.

Article 6

States shall not claim immunity from jurisdiction ... :

...

(b) In proceedings for the distribution of assets, be they of a civil, trade or commercial nature;

(c) In actions involving real property located in the State of the forum with the exceptions contained in international treaties or in diplomatic or consular practices;

...

137. Paragraph (c) also bases the assumption of jurisdiction on the location or geographical situation of the immovable property, subject to the limitations contained in bilateral or multilateral agreements, or in diplomatic or consular practice. It does not include movable property. Paragraph (b) deals with another type of proceedings, namely distribution of assets of a civil, trade or commercial nature.

3. INTERNATIONAL OPINION

138. In this particular field of proceedings relating to rights to property, especially immovable property, situated in the State of the forum, opinions of writers are practically uniform in favour of the assumption and exercise of jurisdiction by the competent judicial authority of the forum State. This relatively clear trend of legal opinions has reflected the less controversial practice of States in upholding jurisdiction and rejection of immunity in the interest of administration of justice. The opinions of lawyers may be gathered from international meetings such as that of the Institute of International Law in 1952,¹⁵⁴ and more recently that of the International Law Association in 1982.

139. The draft articles for a convention on State immunity adopted by the International Law Association in 1982¹⁵⁵ contain the following provision:

Article III. Exceptions to immunity from adjudication

A foreign State shall not be immune from the jurisdiction of the forum State to adjudicate in the following instances *inter alia*:

...

D. Where the cause of action relates to:

1. The foreign State's rights or interests in, or its possession or use of, immovable property in the forum State; or
2. Obligations of the foreign State arising out of its rights or interests in, or its possession or use of, immovable property in the forum State; or
3. Rights or interests of the foreign State in movable or immovable property in the forum State arising by way of succession, gift or *bona vacantia*.

...

4. AN ESTABLISHED EXCEPTION

140. In a far less controversial area such as that of "ownership, possession and use of property" by States,

¹⁵⁴ See, for example, the views expressed by members of the Institute on the report and final draft resolutions presented by E. Lémonon on "L'immunité de juridiction et d'exécution forcée des Etats étrangers" (*Annuaire de l'Institut de droit international*, 1952 (Basel), vol. 44, part I, pp. 5 *et seq.*). See also P. Jessup, rapporteur for the Harvard Law School draft on "Competence of Courts in regard to Foreign States", *op. cit.* (footnote 137 above).

¹⁵⁵ See footnote 81 above.

currently under examination, it is possible to conclude, after having analysed the judicial, governmental and legislative practice of States, that there is an established general exception to State immunity. International legal opinion lends credence to such a proposition. The problem is not to overcome a political or psychological barrier, but rather to define, delimit and possibly demarcate the scope of the application of this general exception and its ramifications. Further analysis may be needed in an endeavour to formulate an appropriate provision for this draft article.

C. Formulation of draft article 15

141. The contents of this draft article should cover immovable as well as movable property of a State or in which a State has or claims an interest. It should also cover the use of property in the possession or control of a foreign State. Proceedings may relate to rights as well as obligations of the foreign State in regard to property situated in the State of the forum. They may also relate to rights and interests of a foreign State arising within the State of the forum by way of succession, gift or *bona vacantia*. The provision should also deal with the possibility of a foreign State asserting ownership or any other claims of interest in a property in issue¹⁵⁶ and with the borderline between the various cases in which the court rejects or recognizes such claims of interest, and in which it could thereby deny or uphold immunity and decline to exercise further jurisdiction after having ex-

¹⁵⁶ See, for example, the "gold bars" case (1952) (see footnote 131 above); *Hong Kong Aircraft: Civil Air Transport Inc. v. Central Air Transport Corp.* (1953) (United Kingdom, *The Law Reports, House of Lords*, 1953, p. 70), cf. the judgment in first instance by Sir Leslie Gibson (1950) (*International Law Reports*, 1950 (London), vol. 17 (1956), p. 173, case No. 45); and *Juan Ysmael & Co. v. Government of the Republic of Indonesia* (1954) (*The Law Reports, House of Lords*, 1955, p. 72).

amined or established prima facie evidence of title or proof of possession or effective control of property in issue or the use of which is in dispute. There are also reasons for excluding from this exception the special status of diplomatic and consular premises.

142. Article 15 might read as follows:

Article 15. Ownership, possession and use of property

1. Unless otherwise agreed, a State is not immune from the jurisdiction of the courts of another State in respect of proceedings relating to:

(a) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, any immovable property situated in the State of the forum; or

(b) any right or interest of the State in any immovable or movable property in the State of the forum, arising by way of succession, gift or *bona vacantia*; or

(c) the distribution of assets in connection with the estates of deceased persons or persons of unsound mind or insolvency, the winding up of companies or the administration of trusts, in which a State has or claims a right or interest in any property; or

(d) any property in the possession or control of a State or in which a State claims a right or interest, if the claim is neither admitted nor supported by prima facie evidence, and the proceedings have been brought against a person other than a State, if the State itself would not have been immune had the proceedings been brought against it.

2. Paragraph 1 is without prejudice to the immunities of States in respect of their property from attachment and execution, or the inviolability of premises of diplomatic or special missions or consular premises.