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

Topic:

Jurisdictional immunities of States and their property

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JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

[Agenda item 5]

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ABBREVIATIONS

I.C.J.	International Court of Justice
I.C.J. Reports	I.C.J., *Reports of Judgments, Advisory Opinions and Orders*
OAS	Organization of American States

Introductory note

1. The present report on the topic of jurisdictional immunities of States and their property is a continuation of a series of studies prepared for the International Law Commission. It follows the first preliminary report on the same topic, submitted by the Special Rapporteur in June 1979,[1] which in turn was preceded by an exploratory report presented in 1978 by the Working Group on jurisdictional immunities of States and their property.[2]

2. In that exploratory report the Working Group examined some general aspects of the topic and

[1] See *Yearbook... 1979*, vol. II (Part One), p. 227, document A/CN.4/323.

[2] A/CN.4/L.279/Rev.1 (partially reproduced in *Yearbook... 1978*, vol. II (Part Two), pp. 153–155, document A/33/10, chap. VIII, sect. D, annex).

explored possible approaches to its study, as well as possible methods of work for such a study.[3] The report also contained a brief historical background of the interest in and decisions taken by the Commission in relation to this topic, which appeared in a 1948 memorandum of the Secretary-General[4] under a separate section entitled "Jurisdiction[4] over foreign States" covering "the entire field of jurisdictional immunities of States and their property, of their public vessels, of their sovereigns, and of their armed forces".[5] The topic as it is now entitled was included in the provisional list of 14 topics selected for codification by the Commission at its first session, in 1949.[6] Although in its work on various topics the Commission had touched upon certain aspects of the question of jurisdictional immunities of States and their property,[7] it did not have time to give further consideration to the topic until 1977, notwithstanding a second "Survey of international law" submitted by the Secretary-General in 1971[8] which included a section entitled "Jurisdictional immunities of foreign States and their organs, agencies and property".[9] At its twenty-ninth session, the Commission recommended selection of the topic for active consideration in the near-future, bearing in mind its day-to-day practical importance as well as its suitability for codification and progressive development.[10] On 19 December 1977, the General Assembly adopted resolution 32/151, paragraph 7 of which reads as follows:

[*The General Assembly*]

...

Invites the International Law Commission, at an appropriate time and in the light of progress made on the draft articles on State responsibility for internationally wrongful acts and on other topics in its current programme of work, *to commence work on** the topics of international liability for injurious consequences arising out of acts not prohibited by international law and *jurisdictional immunities of States and their property.**

3. In response to that invitation, the Commission at its thirtieth session established a working group on the topic.[11] On the basis of the recommendations contained in paragraph 32 of the exploratory report submitted by the Working Group,[12] the Commission decided to:

(*a*) include in its current programme of work the topic "Jurisdictional immunities of States and their property";

(*b*) appoint a Special Rapporteur for that topic;

(*c*) invite the Special Rapporteur to prepare a preliminary report at an early juncture for consideration by the Commission;

(*d*) request the Secretary-General to address a circular letter to the Governments of Member States inviting them to submit by 30 June 1979 relevant materials on the topic, including national legislation, decisions of national tribunals and diplomatic and official correspondence;

(*e*) request the Secretariat to prepare working papers and materials on the topic, as the need arose and as requested by the Commission or the Special Rapporteur for the topic.[13]

4. The report of the Commission relating to the work done on the topic was the object of extensive discussion in the Sixth Committee during the thirty-third session of the General Assembly.[14] By its resolution 33/139, adopted on 19 December 1978, the General Assembly stated:

Taking note of the preliminary work done by the International Law Commission regarding the study of... jurisdictional immunities of States and their property,

...

3. *Approves* the programme of work planned by the International Law Commission for 1979;

...

6. *Further recommends* that the International Law Commission should continue its work on the remaining topics in the current programme—

including, notably, jurisdictional immunities of States and their property.

5. On the strength of the recommendation made by the General Assembly, the Special Rapporteur pre-

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[3] *Ibid.*, paras. 11–31.

[4] *Survey of International Law in Relation to the Work of Codification of the International Law Commission* (United Nations publication, Sales No. 1948.V.1(I)).

[5] *Ibid.*, para. 50.

[6] See *Yearbook... 1949*, p. 281, para. 16.

[7] The Commission referred to the immunities of State-owned ships and warships in its 1956 draft articles on the law of the sea (*Yearbook... 1956*, vol. II, pp. 256 *et seq.*, document A/3159, chap. II, sect. II). The immunities of State property used in connection with diplomatic missions were considered in the 1958 draft articles on diplomatic intercourse and immunities (*Yearbook... 1958*, vol. II, pp. 89 *et seq.*, document A/3859, chap. III, sect. II), while those of such property used in connection with the consular posts were dealt with in the 1961 draft articles on consular relations (*Yearbook... 1961*, vol. II, pp. 92 *et seq.*, document A/4843, chap. II, sect. IV). The 1967 draft articles on special missions also contained provisions on the immunity of State property (*Yearbook... 1967*, vol. II, pp. 347 *et seq.*, document A/6709/Rev.1, chap. II, sect. D), as did the 1971 draft articles on the representation of States in their relations with international organizations (*Yearbook... 1971*, vol. II (Part One), pp. 284 *et seq.*, document A/8410/Rev.1, chap. II, sect. D). International conventions have been elaborated on the basis of the above-mentioned sets of draft articles (see *Yearbook... 1978*, vol. II (Part Two), p. 152, document A/33/10, chap. VIII, sect. D, annex, footnote 686).

[8] *Yearbook... 1971*, vol. II (Part Two), p. 1, document A/CN.4/245. In the survey, it was said:

> "Differences of view exist on these questions, as indeed they do on the substantive matters referred to above. But it may be suggested that the differences are not in all cases large, although they can nevertheless cause friction and uncertainty; that, as was said in the 1948 Survey, it is doubtful whether considerations of any national interest of decisive importance stand in the way of a codified statement of the law on this topic, commanding general acceptance; and that its day-to-day importance makes it suitable for codification and progressive development." (*Ibid.*, p. 20, para. 75.)

[9] *Ibid.*, pp. 18–21, chap. 1, sect. 5.

* Emphasis by the Special Rapporteur.

[10] *Yearbook... 1977*, vol. II (Part Two), document A/32/10, para. 110.

[11] *Yearbook... 1978*, vol. II (Part Two), p. 152, document A/33/10, para. 179.

[12] See footnote 2 above.

[13] *Yearbook... 1978*, vol. II (Part Two), p. 153, para. 188.

[14] *Official Records of the General Assembly, Thirty-third Session, Annexes*, agenda item 114, document A/33/419, paras. 263 and 264.

pared and submitted the first preliminary report on the topic[15] in the spirit in which the topic had been discussed in the Commission and in the Sixth Committee and in the light of relevant materials made available by Governments of Member States in response to a request circulated by the Legal Counsel on 18 January 1979.[16] The first report identified the types of relevant source materials to be examined, namely, the practice of States, in the form of national legislation, judicial decisions of municipal courts and governmental practice; international conventions; international adjudication; and opinions of writers. It contained a historical sketch of international efforts towards codification, including those of the League of Nations Committee of Experts and of the International Law Commission, as well as of regional legal committees and professional and academic institutions. It gave a rough analytical outline of the possible content of the law of State immunity covering a number of initial questions: the problem of defining certain concepts, the general rule of State immunity including the extent of its application—noting consent as an element of the rule together with some possible exceptions—immunity from attachment and execution, as well as other procedural and related questions. The first report also underlined the possibility and practicability of the eventual preparation of draft articles on the topic.

6. The first report was discussed by the Commission during its thirty-first session, and a consensus emerged to the effect that the Special Rapporteur should clarify, in the first instance, the general principles and the content of the basic rules governing the subject and endeavour with the utmost caution to define the limits of immunities and determine the exceptions to them.[17] As reported by the Chairman of the Commission to the Sixth Committee, emphasis had also been placed on the need for detailed analysis of the practice and legislation of all States, particularly of the socialist countries and the developing countries.[18] Moreover, it had been the Commission's view that consideration of the topic should take the practice of States as its point of departure. The topic was further discussed in the Sixth Committee, which recommended to the General Assembly for adoption a draft resolution,[19] reading in part as follows:

The General Assembly,

...

Noting further with appreciation the progress made by the International Law Commission in the preparation of draft articles on State responsibility and on treaties concluded between States and international organizations or between international organizations, as well as the work done by it regarding the study of the law of the non-navigational uses of international watercourses, jurisdictional immunities of States and their property, the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and the review of the multilateral treaty-making process,

...

4. *Recommends* that the International Law Commission should:

...

(*e*) Continue its work on jurisdictional immunities of States and their property, taking into account information furnished by Governments and replies to the questionnaire addressed to them, as well as views expressed on the topic in debates in the General Assembly;

...

7. Pursuant to the recommendation made by the General Assembly, the Special Rapporteur continued his study and examination of the source materials on the topic in the light of the debate that had taken place in the Sixth Committee and the views expressed in that Committee by various representatives as well as the direction of emerging trends indicated by the Commission. In the meantime, replies from Governments continued to reach the Special Rapporteur both in the form of information in response to the circular note of 18 January 1979 and of replies to the questionnaire circulated by the Secretariat to Governments of Member States on 2 October 1979.[20]

8. On the basis of the source materials hitherto made available to the Special Rapporteur, the present (second) report on the topic has been prepared for submission to the Commission in the form of draft articles with an appropriate analysis of source materials leading to the formulation of the provisions of each article. The draft articles are present in two parts: part I, entitled "Introduction", covering initial questions essential to the study of the topic, and part II, entitled "General principles", regulating the question of jurisdictional immunities of States and their property.

9. Further discussion by the Commission on the initial questions and general principles will throw more light on subsequent parts of the draft articles on the topic under consideration. Additional information from Governments of Member States regarding their practice and replies to the questionnaire will provide a welcome source of information and views to be consulted in the preparation of the remaining parts of the study of the topic. Comments and observations of representatives of Governments in the Sixth Committee will afford further help in the search for balanced and practical solutions to specific problems involved in the question of jurisdictional immunities of States and their property.

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[15] See footnote 1 above.

[16] Pursuant to the Commission's request noted in para. 3(*d*) above.

[17] *Yearbook... 1979*, vol. II (Part Two), p. 186, document A/34/10, para. 178.

[18] *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 38th meeting, para. 30; and *ibid.*, Sessional fascicle, corrigendum.

[19] A/C.6/34/L.21, adopted by the Sixth Committee by consensus. The General Assembly followed the recommendation of the Sixth Committee and adopted the draft without a vote on 17 December 1979 as resolution 34/141.

[20] Replies to the questionnaire will serve to indicate the views of Governments on a number of key issues vital to the preparation of draft articles on the topic.

Draft articles on jurisdictional immunities of States and their property

PART I. INTRODUCTION

10. Part I of the draft articles on jurisdictional immunities of States and their property is entitled "Introduction". Appropriately enough, it will serve to introduce the substantive content of norms of international law to be embodied in the ensuing parts of the draft articles by identifying with sufficient clarity and delineating the scope of the articles, by defining the meaning and clarifying the use of certain terms which initially appear indispensable in any serious study and treatment of the issues involved in the jurisdictional immunities of States and their property, and by indicating with precision the prospective intertemporal effect of the articles.

11. It should be made clear at the very outset that provisions of the draft articles in this part deal with initial questions, prior to an analytical examination of the substantive content of the rules to be elaborated. Subsequent treatment of the ensuing operative parts may reveal a need for a closer look at part I to see whether additional provisions might be required to complete a revised version of the articles in that part.

ARTICLE 1: Scope of the present articles

12. One of the questions to be determined in the very first instance is the scope of the draft articles, which may or may not take the form of a general convention. The purpose of the articles is to codify what might be considered as existing customary rules of international law on the topic of jurisdictional immunities of States and their property. Closely linked to the process of identifying or determining existing rules is the possibility or opportunity of progressively developing additional rules to supplement and accelerate the process of crystallization of norms on the subject.

13. The identity of the subject matter may be defined by reference to the ultimate utilization of the draft articles, the scope of which in turn will become clearer. This first provision should therefore indicate without equivocation the questions to which the articles should apply. The simplest and clearest indication would directly bring out the composite ingredients or constituent elements of the topic under examination. In any given situation in which the question of State immunity may arise, a few basic notions or concepts appear to be inevitable. In the first place, the main character or the principal subject of the present study is unequivocally "jurisdictional immunities", whatever the inherent complexities and subtleties of that notional concept. Secondly, the existence of two independent sovereign States is a prerequisite to the question of jurisdictional immunities. For the purpose of the present articles, one will be called the "territorial State" and another the "foreign State". The selection of the two contrasting terms is designed to avoid the possibility of conceptual overlapping, as the question arises in fact when the activities of the "foreign State" overlap the territorial jurisdiction of the "territorial State". The jurisdictional immunities in question are accorded in normal circumstances to States, and they are sometimes said, and correctly said, to belong to States, namely, foreign States. On the other hand, such immunities, which are indubitably and incontestably the immunities of States, are sometimes said to cover—or, with fairness and accuracy, to "extend to"—property of States, without becoming, as it were, the right of State property or exercisable by the State. It should be added finally that the scope of the present articles should be wide enough not only to cover the question of jurisdictional immunities of States and their property but also to encompass or include provisions for all the questions relating thereto.

TEXT OF ARTICLE 1

14. The first article in the present draft could accordingly read as follows:

Article 1. Scope of the present articles

The present articles apply to questions relating to jurisdictional immunities accorded or extended by territorial States to Foreign States and their property.

ARTICLE 2: Use of terms

15. The use of certain key terms for the purpose of the draft articles requires primary attention, immediately following the identification of the scope of their application in article 1. A number of terms that appear to need clarification by way of precise definition are visible from a glance at the wording of the preceding article. As an initial minimum, the use of the following terms should be clarified:

(*a*) "immunity"
(*b*) "jurisdictional immunities"
(*c*) "territorial State"
(*d*) "foreign State"
(*e*) "State property"
(*f*) "trading or commercial activity"
(*g*) "jurisdiction".

16. This initial list is clearly not exhaustive of the terms that may need definition and further clarification. The terms listed are nevertheless indicative of the expressions which, at this stage of the study, appear to constitute vital elements readily discernible in the early parts of the draft articles. The need for inclusion of additional terms may become apparent in

subsequent reports dealing with limitations and exceptions to jurisdictional immunities and other incidental questions. The current list may therefore be regarded as open-ended, until all other parts of the draft articles have been fully considered.

(a) "*Immunity*"

17. "Immunity" is a legal concept which can be expressed in terms of jural relationship. Just as a "right" is correlated to a corresponding "duty" incumbent on another party, "immunity" to which a person or party or State is entitled is correlated to "no power" on the part of the corresponding authority. It signifies absence or lack of power, or necessity to withhold or suspend the exercise of such power. In other words, the expression "immunity" connotes the non-existence of power or non-amenability to the jurisdiction of the national authorities of a territorial State.

18. Viewed generically, "immunity" is but a species, or another aspect, of privilege. The term "privilege" is more often used, and correctly so, with a more positive connotation. "Privileges" presuppose the availability of positive or substantive advantages, whereas "immunities" imply the absence of power or abstention from its exercise. The term "privilege" is closer to "power", which is correlated to "liability", but the expression is not easily expressible in jural terminology. Privileges, in general usage, are matters of courtesies subject to reciprocity, and are not always enforceable as legal rights unless specifically confirmed in an international convention or by mutual agreement.

19. "Immunity" therefore is a right or a privilege. Hence, the expression "the privilege of immunity" is not uncommon. By way of illustration, the proposition that a foreign State possesses jurisdictional immunity, or is immune from the jurisdiction of competent courts of the territory, can be restated correlatively: "the territorial State has or exercises no power or jurisdiction over the foreign sovereign State". Immunity can as such be regarded as a right that is positive in form, but negative in substance. It is negative in the sense that it denotes "no power" or "non-use of authority" by the correlative partner or otherwise fully competent counterpart.

(b) "*Jurisdictional immunities*"

20. State immunity, like the immunity accorded to ambassadors and members of a diplomatic mission, is jurisdictional in nature. States are immune from the jurisdiction of another equally sovereign State. "Jurisdictional immunities" do not result in exemption from the application of substantive law. No foreign State can be said to be immune from the laws of the territorial State applicable within that State's territory. Just as diplomatic agents are required to observe the laws of the host country notwithstanding their immunities from the jurisdiction of the territorial authorities,[21] States which extend their activities within the territorial confines of other States will find themselves subject to the internal laws of the territorial States. Thus the fiction of exterritoriality or extraterritorial rights of ambassadors, which has long been exploded in international practice,[22] has never had any consistent application in regard to States. As each State possesses a territory which does not overlap or coincide with that of another State, there is no physical presence, as in the case of an accredited diplomat, in the territorial jurisdiction of another State. Nevertheless, the activities of a State could be conducted within the territory of another State, and its property located in the areas under the territorial jurisdiction of that other State could become a subject of dispute or a target for seizure or attachment or execution of a judgement debt. In this way, the question of State immunity may arise—but it should be noted that the immunity in question is from the jurisdiction of the territorial authorities only, and not from the application of the substantive provisions of the territorial law.

21. In the case of States, the absence of legal or substantive immunity from the territorial laws of other States is clearly manifested upon waiver of jurisdictional immunities or voluntary submission to the territorial jurisdiction or otherwise consenting to be proceeded against before the authorities of the territorial State. Thereafter, the substantive and also procedural rules of the local law, including all aspects of the *lex fori*, that may be or may have been temporarily suspended on account of State immunities, will resume their normal application. The comparison with the purely jurisdictional character of diplomatic immunities is further illustrated by the necessarily provisional nature of the immunities *ratione personae* of a diplomatic agent. Thus, if an action is brought after the end of his mission, the diplomatic agent concerned is amenable to the local jurisdiction in respect of his private and non-official acts, including those performed during the term of his office.[23]

22. As will be seen in connection with the use of the term "jurisdiction", State immunities are exemptions from the jurisdiction of the judicial as well as of the administrative authorities of the territorial State. It will

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[21] See art. 41 of the 1961 Vienna Convention on Diplomatic Relations (United Nations, *Treaty Series*, vol. 500, p. 95); hereinafter called "1961 Vienna Convention".

[22] See for example the case The Empire *v.* Chang and others (1921) (*Annual Digest of Public International Law Cases, 1919–1922* (London), vol. 1 (1932), case No. 205, p. 288), where the Supreme Court of Japan confirmed the conviction of ex-employees of the Chinese Legation in respect of offences committed during their employment as attendants but unconnected with their official duties.

[23] The Supreme Court of Japan held that:

"...an offence committed by such persons is not purged of its *prima facie* quality as an illegal act. Whilst they may not be tried in the territorial courts during the term of their office or employment, this may naturally be effected when they become divested of it..." (*ibid*).

also be seen that the application of State immunity presupposes the existence of a situation in which the territorial State would be vested with a valid or competent jurisdiction in accordance with the ordinary rules of private international law. The expression covers immunities from various phases, not only from jurisdiction *par excellence* but also, as will be seen later, from execution.

(c) "*Territorial State*"

23. To invoke the application of the maxim *par in parem imperium non habet* there must be two equals, i.e. two equal sovereign States. The term "territorial State" is adopted for practical convenience to denote the State before whose authorities proceedings have been brought and jurisdictional immunities invoked. A "territorial State" is therefore the State in whose territorial jurisdiction a dispute has arisen involving another State claiming exemption from the exercise of such jurisdiction over an unwilling or unconsenting State from outside the boundary of the territorial State. The State of the territory is therefore the State the exercise of whose jurisdiction is being questioned, if not challenged, because a party before its authorities enjoys an equally sovereign status and as such is not subject or amenable to its jurisdiction without consent.

24. A dispute which has arisen in any given case may concern a foreign State directly or only indirectly, because its property is involved as a subject of litigation or in a provisional measure of attachment or in satisfaction of a judgement.

(d) "*Foreign State*"

25. The expression "foreign State" does not require much clarification. The term is practically self-evident if not self-explanatory. It signifies a State foreign to the jurisdiction of the territorial State. It has an identity distinct from the local State whose territorial jurisdiction has been invoked in legal proceedings against the external or foreign State or involving the property of that State. The foreign State is therefore a *sine qua non* in the situation in which the question of immunity of equals arises. It is the other equal in the duality of equality of States.

(e) "*State property*"

26. The notion of property belonging to a State, or "State property" ("*biens d'Etat*") has received some clarification from earlier work by the Commission, especially in the context of the draft articles on succession of States in respect of matters other than treaties.[24] The use of this term for the purpose of the draft articles under preparation appears to be essentially similar. There is therefore no need to attempt to redefine the term "State property"; the meaning to be ascribed to it could remain as earlier defined. It should include not only property, but also rights and interests which are owned by the State, in the present context, the foreign State. Ownership for the purpose of this definition is determined in the first instance by the internal law of the State owning the property.[25] This does not mean, however, that the territorial authorities would have no say on the question. As a matter of fact, differences in the internal laws on questions of ownership or proprietary rights or interests constitute a rich source of conflict of laws. The use of the term as clarified is serviceable, but it is not determinative of the question whether or not in a given situation a property said to be property of a foreign State is actually immune from the jurisdiction of the territorial State. This could well depend on the classification of the types of State property for purposes of immunities from jurisdiction as well as immunities from execution, which will require a fresh and closer examination in the later parts of the draft articles.

(f) "*Trading or commercial activity*"

27. Without at this stage indicating, on the basis of State practice, whether or not and to what extent the foreign State will be accorded jurisdictional immunities in regard to its trading or commercial activities by the authorities of the territorial State, it is abundantly clear that it is in the area of trading activities that the question of jurisdictional immunities of States and their property most frequently arises. While the determination of the precise extent of immunities recognized and accorded in the practice of States in the field of trading activities is a matter to which considerable attention will be devoted in the future part III of the present articles, it is clearly desirable to clarify the notion of trading or commercial activity in this initial article on the use of terms.

28. "Trading or commercial activity" in this context can mean more than just a particular commercial transaction or a particular commercial act. It certainly covers the entire series of acts or transactions that constitute a regular course of commercial conduct. Thus a commercial transaction or act or contract, or the combination of several such activities, will be considered as forming part of the course of conduct traditionally associated with trade or commerce.

(g) "*Jurisdiction*"

29. The term "jurisdiction" when used in connection with immunities from jurisdiction covers not only the tail end of jurisdiction—namely, the power to give satisfaction to the judgement rendered or execution of judgement—but also each and every aspect of the

[24] See arts. 4–14 of the draft articles on succession of States in respect of matters other than treaties, and commentaries thereto, as adopted by the Commission at its thirty-first session (*Yearbook... 1979*, vol. II (Part Two), pp. 15 *et seq.*, document A/34/10, chap. II, sect. B). See also the seventh report on succession of States in respect of matters other than treaties: *Yearbook... 1974*, vol. II (Part One), p. 91, document A/CN.4/282.

[25] *Yearbook... 1979*, vol. II (Part Two), p. 17, document A/34/10, chap. II, sect. B, art. 5.

judicial and administrative power connected with adjudication. Although the expression "jurisdiction" may have more than one meaning, including that in comparative law terminology which signifies a particular legal system or the territorial limits of the application of a juridical system, for present purposes the term is employed in its more traditional usage as synonymous with "competence", and when applied to a court is referable principally to the judicial competence or the power of a tribunal to adjudicate or to settle disputes by a peaceful means known as judicial settlement or adjudication. The expression *juris-dictio* literally means the announcement (or pronouncement or determination) of the law or the respective rights of the parties in litigation before the sitting or trying authority.

30. Furthermore, the expression "jurisdiction" in this context is used not only in relation to the right of sovereign States to exemption from the exercise of the power to adjudicate, normally assumed by the judiciary or magistrate within a legal system, but also in relation to the non-exercise of all other administrative and executive powers, by whatever measures or procedures and by whatever authorities of the territorial State. The concept therefore covers the entire judicial process, from the initiation or institution of proceedings, service of writs, investigation, examination, trial, orders which can constitute provisional or interim measures, to decisions rendering various instances of judgements and execution of the judgements thus rendered, or their suspension and further exemption.

31. It is clear that while "jurisdiction" covers "execution", the immunities of States from the one are entirely distinguishable and separate from the other. Thus, a waiver of immunity from jurisdiction does not imply consent or submission to measures of execution. Similarly, the court of the territorial State may in a given situation decide to exercise jurisdiction in a suit against a foreign State on different grounds, such as the commercial nature of the activities involved, the consent of the foreign State, voluntary submission, or waiver, but will have to reconsider and re-examine the question of its own competence when it comes to execute the judgement so rendered. It will be seen that at a later stage of execution the immunities attributable to State property will vary with further distinctions to be made of the types of State property which may or may not be susceptible to measures of execution.

A meaning other than that defined in the articles

32. It is important to point out that the use of the terms listed in this article as explained and clarified is not intended to affect the use of those terms or the meanings that may be attributed to them in another context, in a different connection, in the internal law of any State, or even by the rules of any international organization. Reference is made to such rules of international organizations since they may be relevant in relation to the status of the premises of permanent missions accredited to an international organization within the territory of a host country under a headquarters agreement or an international convention.

TEXT OF ARTICLE 2

33. Article 2 of the present articles may be thus formulated:

Article 2. Use of terms

1. For the purposes of the present articles:

(*a*) "immunity" means the privilege of exemption from, or suspension of, or non-amenability to, the exercise of jurisdiction by the competent authorities of a territorial State;

(*b*) "jurisdictional immunities" means immunities from the jurisdiction of the judicial or administrative authorities of a territorial State;

(*c*) "territorial State" means a State from whose territorial jurisdiction immunities are claimed by a foreign State in respect of itself or its property;

(*d*) "foreign State" means a State against which legal proceedings have been initiated within the jurisdiction and under the internal law of a territorial State;

(*e*) "State property" means property, rights and interests which are owned by a State according to its internal law;

(*f*) "trading or commercial activity" means:

(i) a regular course of commercial conduct, or

(ii) a particular commercial transaction or act;

(*g*) "jurisdiction" means the competence or power of a territorial State to entertain legal proceedings, to settle disputes, or to adjudicate litigations, as well as the power to administer justice in all its aspects.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meaning which may be ascribed to them in the internal law of any State or by the rules of any international organization.

ARTICLE 3: Interpretative provisions

34. It follows from the examination of the list of terms defined and to some extent clarified in the preceding article that at least two or three of the terms listed should be given further illustration by way of interpretation. Another article is called for to serve as interpretative provisions for the expressions "foreign State" and "jurisdiction", as well as an indication of the method of interpreting or determining the trading or commercial activity of a State. The interpretative clauses are not absolute, in the sense that the expressions to which possible interpretations are

outlined may still be open to other, different, meanings if such were expressly indicated or specifically provided in the relevant articles, or otherwise agreed to by the parties concerned.

(a) *The expression "foreign State"*

35. Upon further analysis, the term "foreign State", which may seem to have been given sufficient definition and clarification in article 2, paragraph 1(*d*), appears to require further explanation, especially in the context of jurisdictional immunities, with reference to the essential components which compose or constitute the "foreign State" for the purpose of receiving the benefits of State immunity. The list of beneficiaries of State immunity merits some attention at this stage, on the clear understanding that the types of beneficiaries listed may or may not, in any or all cases, be accorded jurisdictional immunities. The list of such potential recipients of State immunity is noteworthy as an indication of possible categories of entities which could in actual State practice participate in the enjoyment of jurisdictional immunities in the name and on behalf of the State of which they form an essential or central part. Such a list may include the following categories:

(i) *The sovereign or head of State*

36. That a foreign sovereign enjoys jurisdictional immunity, including immunity from personal arrest and detention within the territory of another State, has been firmly established in State practice.[26] The majority of writers have treated the immunities of foreign sovereigns together with those of foreign States. In an early draft convention,[27] for instance, the head of State was included in the definition of the term "State".

37. In the practice of some countries, the doctrine of State immunity has grown out of the immunity of foreign sovereigns who are representatives of the nations of which they are the heads.[28] Sovereign immunity in Anglo-American practice, for instance, can be said to be a consequence of the personal immunity of the local sovereign.[29] It is not clear in State practice how far foreign sovereigns could enjoy jurisdictional immunities from the local courts. Judicial decisions in some jurisdictions are indecisive,[30] while the jurisprudence of many countries tends to confine the application of personal immunities of foreign sovereigns and other heads of State within even narrower limits.[31] Although earlier cases frequently concerned immunities of the sovereign heads of State, more recent cases have been reported concerning immunities of heads of State who are not sovereigns. Presidents of republics[32] are as much entitled to State immunities as emperors, kings and other potentates. The expression "sovereign immunity", used interchangeably with the term "State immunity", still lingers in the official texts of common law jurisdictions—in national legislation as well as in judicial decisions.[33]

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[26] See for example the case Mighell *v.* Sultan of Johore (1893) (United Kingdom, *The Law Reports of the Incorporated Council of Law Reporting, Queen's Bench Division, 1894* (London), vol. I, p. 149) and the cases Wadsworth *v.* Queen of Spain and De Haber *v.* Queen of Portugal (1851) (*id., Queen's Bench Reports*, new series, vol XVII (London, Sweet, 1855), p. 171). See remarks of Chief Justice Campbell in the De Haber case: footnote 28 below Compare with Hullett *v.* King of Spain (1828) (R. Bligh, *New Reports of Cases heard in the House of Lords*, vol. II (1828) (London, Saunders and Benning, 1830), p. 31) and Duke of Brunswick *v.* King of Hanover (1844) (C. Clark and W. Finnelly, *House of Lords Cases*, vol. II (1848–1850) (London, Spettigue and Farrance, 1851), p. 1).

[27] See art. 1, para. (*a*) of the "Draft convention and comment on competence of courts in regard to foreign States, prepared by the Research in International Law of the Harvard Law School", in *Supplement to The American Journal of International Law* (Washington, D.C.), vol. 26, No. 3 (July 1932), p. 475.

[28] See for example the Statement of Chief Justice Campbell in the De Haber *v.* the Queen of Portugal case:

> "...To cite a foreign potentate in a municipal court, for any complaint against him in his public capacity, is contrary to the law of nations, and an insult which he is entitled to resent." (United Kingdom, *Queen's Bench Reports* (*op. cit.*), pp. 206–207.)

[29] See the case of the *Prins Frederik* (1820), the first British case that touched the immunities of foreign States and their property (J. Dodson, *Reports of Cases Argued and Determined in the High Court of Admiralty*, vol. II (1815–1822) (London, Butterworth, 1828), p. 451).

[30] See for example the case *The Swift* (1813), where Lord Stowell said:

> "The utmost that I can venture to admit is, that, if the King traded, as some sovereigns do, he might fall within the operation of these statutes [Navigation Acts]. Some sovereigns have a monopoly of certain commodities, in which they traffick on the common principles that other traders traffick; and, if the King of England so possessed and so exercised any monopoly, I am *not prepared to say** that he must *not** conform his traffick to the general rules by which all trade is regulated."
>
> (*Ibid.*, vol. I (1815), p. 339.)

[* Emphasis added by the Special Rapporteur.]

[31] See for example the case The Schooner *Exchange v.* McFaddon and others (1812), where Chief Justice Marshall said:

> "...there is a manifest distinction between private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction." (W. Cranch, *Reports of Cases argued and adjudged in the Supreme Court of the United States* (New York, Banks Law Publishing, 1911), vol. VII, 3rd ed., p. 145.)

Compare the decision of the Corte di Cassazione di Roma in Nobili *v.* Carlo d'Austria (1921) (*Annual Digest..., 1919–1922* (London), vol. 1 (1932), case No. 90, p. 136). Contrast the two French decisions: Héritiers de l'Empereur du Mexique Maximilien *v.* Lemaître (1872) (*Journal du droit international privé* (Clunet, Paris), No. 1 (January–February 1874), p. 32), and Mellerio *v.* Isabelle de Bourbon, ex-reine d'Espagne (1872) (*ibid.*, p. 33).

[32] See for example Venore Transportation Co. *v.* President of India, 67 Civ. 2578, 68 Civ. 1134–1139 (District Court for Southern District of New York, 1967 and 1968), and Psinakis *v.* Marcos, Civil Action No. C-75-1725-RHS (District Court for Northern District of California, 1975) (decisions cited in *Digest of United States Practice in International Law*, 1977, ed. J. A. Boyd (Washington, D.C., U.S. Government Printing Office, 1979), pp. 1067 and 1077).

[33] The United States of America's *Foreign Sovereign Immunities Act of 1976* (United States of America, *United States Code,*

(*Continued on next page.*)

(ii) *The central government and its various organs or departments*

38. Apart from sovereigns and other heads of State, the expression "foreign States" of course comprehends all States: all types of States, whatever their political or economic structures and irrespective of the appellation attributed to them, whether State, republic, kingdom, empire, commonwealth or otherwise.[34] Each State, whatever its denomination, normally acts through its central government. An action against a foreign Government is therefore an action against the foreign State on whose behalf the Government has acted. Governments as such are direct beneficiaries of State immunity in their own right.[35]

39. The government of a country is often composed of subsidiary organs and departments which act on its behalf. Such organs of State and departments of government can be and often are separate legal entities within the internal legal system. Although without international legal personalities of their own, they could represent the State or the central government of the State of which they form an integral part. Instances of State organs and departments of government are the various ministries that compose the central government,[36] including the armed forces, the subordinate divisions or departments within each ministry, such as embassies, special missions and consular posts, and offices, commissions or councils,[37] which need not form part of any ministry but are State organs answerable to the central government or to one of its departments, or administered by it. Other principal organs such as the legislative and the judiciary of a foreign State could also enjoy State immunity.

(iii) *Political subdivisions of a foreign State in the exercise of its sovereign authority*

40. The practice of States in regard to State immunities recognized and accorded to political subdivisions of a foreign State is far from uniform. In general, most courts have held political subdivisions of State amenable to the local or territorial jurisdiction on the ground that they lack international personality and external sovereignty.[38] On the other hand, cases of

(*Footnote 33 continued*)

1976 Edition (Washington, D.C., U.S. Government Printing Office, 1977), vol. 8, title 28, sect. 1330; text of the act reproduced in: *International Legal Materials* (Washington, D.C.), vol. XV, No. 6 (November 1976), p. 1338) as an example of the expression, although in the Act itself, sect. 1330 of title 28 is entitled "Actions against foreign States," and chapter 97 of that title "Jurisdictional immunities of foreign States".

The latest relevant British law is entitled *State Immunity Act 1978* (United Kingdom, *The Public General Acts, 1978* (London, H.M. Stationery Office), part 1, chap. 33, p. 715; text of the act reproduced in: *International Legal Materials*, *op. cit.*, vol. XVII, No. 5 (September 1978), p. 1123), following perhaps the nomenclature adopted in the European Convention on State Immunity and Additional Protocol of 1972 (Council of Europe, *European Convention on State Immunity and Additional Protocol*, European Treaty Series, No. 74 (Strasbourg, 1972)).

[34] See for example the cases Dralle *v.* Republic of Czechoslovakia (1950) (*International Law Reports* (London), vol. 17 (1956), case No. 41, pp. 155 *et seq.*); Etat espagnol *v.* Canal (1951) (*Journal du droit international* (Clunet) (Paris), 79th year, No. 1 (January–March 1952), p. 220); Patterson–MacDonald Shipbuilding Co., McLean *v.* Commonwealth of Australia (1923) (United States of America, *The Federal Reporter* (St. Paul, Minn., West Publishing, 1924), vol. 293, p. 192; de Froe *v.* The Russian State, now styled "The Union of Soviet Socialist Republics" (1932) (*Annual Digest..., 1931–1932* (London), vol. 6 (1938), case No. 87, p. 170); Irish Free State *v.* Guaranty Safe Deposit Company (1927) (*Annual Digest..., 1925–1926* (London), vol. 3 (1929), case No. 77, p. 100); Kingdom of Norway *v.* Federal Sugar Refining Co. (1923), (United States of America, *The Federal Reporter* (*op. cit.*, 1923), vol. 286, p. 188); Ipitrade International S.A. *v.* Federal Republic of Nigeria (1978) (United States of America, *Federal Supplement* (St. Paul, Minn., West Publishing, 1979), vol. 465, p. 824); 40 D 6262 and 40 E 6262 Realty Corporation *v.* United Arab Emirates Government (1978) (*ibid.* (1978), vol. 447, p. 710); Kahan *v.* Pakistan Federation (1951) (United Kingdom, *The Law Reports of the Incorporated Council of Law Reporting, King's Bench Division, 1951* (London), vol. II, p. 1003).

[35] Instances of proceedings against foreign Governments which are entitled to State immunity are many. See for example Morellet *v.* Governo Danese (1882) (*Giurisprudenza italiana* (Turin, Unione Tipografico-editirice torinese, 1883), vol. I, p. 125); Letort *v.* Gouvernement ottaman (*Revue juridique internationale de la locomotion aérienne* (Paris), vol. V (1914), p. 142); Lakhowsky *v.* Swiss Federal Government and Colonel de Reynier (1919 and 1921) (*Annual Digest..., 1919–1922* (London), vol. 1 (1932), case No. 83, p. 122); U Kyaw Din *v.* His Britannic Majesty's Government of the United Kingdom and the Union of Burma (1948) (*Annual Digest..., 1948* (London), vol. 15 (1953), case No. 42, p. 137); and Société générale pour favoriser l'industrie nationale *v.* Syndicat d'amortissement, Gouvernement des Pays-Bas et Gouvernement belge (1840) (*Pasicrisie belge—Recueil général de la jurisprudence des cours et tribunaux et du Conseil d'Etat belge* (Brussels, Bruylant, 1841), vol. II, p. 33).

[36] See for example Bainbridge and another *v.* The Postmaster-General and another (1905) (United Kingdom, *The Law Reports of the Incorporated Council of Law Reporting, King's Bench Division, 1906* (London), vol. I, p. 178); Henon *v.* Egyptian Government and British Admiralty (1947) (*Annual Digest..., 1947* (London), vol. 14 (1951), case No. 28, p. 78); Triandafilou *v.* Ministère public (1942) (*The American Journal of International Law* (Washington, D.C.), vol. 39, No. 2 (April 1945), p. 345); Piascik *v.* British Ministry of War Transport (1943) (*Annual Digest..., 1943–1945*), (London), vol. 12 (1949), case No. 22, p. 87); and Turkish Purchases Commission case (1920) (*Annual Digest..., 1919–1922* (London), vol. 1 (1932), case No. 77), p. 114).

[37] See for example Mackenzie–Kennedy *v.* Air Council (1927) (United Kingdom, *The Law Reports of the Incorporated Council of Law Reporting, King's Bench Division, 1927* (London), vol. II, p. 517); Graham and others *v.* His Majesty's Commissioners of Public Works and Buildings (1901) (*ibid., 1901* (London), vol. II, p. 781); Société Viajes *v.* Office national du tourisme espagnol (1936) (*Annual Digest..., 1935–1937* (London), vol. 8 (1941), case No. 87, p. 227); Compañia Mercantil Argentina *v.* United States Shipping Board (1924) (*Annual Digest..., 1923–1924* (London), vol. 2 (1933), case No. 73, p. 138); and Telkes *v.* Hungarian National Museum (No. 11) (1942) (*Annual Digest..., 1941–1942* (London), vol. 10 (1945), case No. 169, p. 576).

[38] See for example the case Etat de Ceara *v.* Dorr et autres (1932) (M. Dalloz, *Recueil périodique et critique de jurisprudence, de législation et de doctrine, année 1933* (Paris), part 1, p. 196), in which the court said:

"Whereas this rule [of incompetence] is to be applied only when it is invoked by an entity which shows itself to have a

recognition of immunity by assimilation of the position of a political subdivision of a State, a semi-sovereign State or even a dependency to that of a foreign sovereign State are not rare. National courts have sometimes accorded sovereign immunity to such subdivisions of a foreign State on the ground that the actions in fact impleaded the foreign Government.[39]

Doubts have been expressed whether every political subdivision of a foreign State which exercised substantial governmental powers was immune.[40] The possibility exists, nevertheless, that the courts of a territorial State may decline jurisdiction in proceedings against political subdivisions of a foreign State in regard to acts performed in the exercise of the sovereign authority of the foreign State in question. In such a situation, State immunity appears to extend also to subordinate organs or departments of the political subdivision acting in the exercise of the sovereign authority assigned to it by the federal or central Government.[41]

(iv) *Agencies or instrumentalities acting as organs of a foreign State in the exercise of its sovereign authority*

41. In a way comparable to political subdivisions of a State, agencies and instrumentalities of a foreign State or Government could benefit from the principle of State immunity only in regard to acts performed in the exercise of the sovereign authority of the State and only when acting as State organs or agents. Unlike the sovereign or other heads of State and the central Government and its various organs or departments, which can be presumed to be acting for the State and in the exercise of its sovereign authority, agencies and instrumentalities of a State are not always so empowered. Immunity appears to be based on the attribution of activities to the State and on the fact that the act was done in the exercise of the sovereign authority of the State. Once these two qualifications are fulfilled, the agencies or instrumentalities of a foreign Government would in all likelihood be accorded the same immunity as that granted to the foreign State within whatever limits are recognized in prevailing State practice.

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personality of its own in its relations with other countries considered from the point of view of public international law; whereas such is not the case of the State of Ceara, which, according to the provisions of the Brazilian Constitution legitimately relied upon by the lower courts and whatever its internal status in the sovereign confederation of the United States of Brazil of which it is a part, being deprived of diplomatic representation abroad, does not enjoy from the point of view of international political relations a personality of its own..." (*ibid.*, p. 197). [Translation by the Secretariat.]

Compare with Schneider *v.* City of Rome (1948) (*Annual Digest..., 1948* (London), vol. 15 (1953), case No. 40, p. 131); Ville de Genève *v.* Consorts de Civry (1894) (M. Dalloz, *Jurisprudence générale—Recueil périodique..., année 1894* (Paris) part 2, p. 513; and *ibid., année 1895*, part 1, p. 344); Dumont *v.* State of Amazonas (1948) (*Annual Digest..., 1948* (London), vol. 15 (1953), case No. 44, p. 140); Somigli *v.* Etat de São Paolo du Brésil (1910) (*Revue de droit international privé et de droit pénal international* (Darras) (Paris), vol. VI (1910), p. 527); Feldman *v.* Etat de Bahia (1907) (*Pasicrisie belge—Recueil général..., année 1980* (Brussels, Bruylant), vol. II, p. 55) (see also *Supplement to The American Journal of International Law* (*op. cit.*), p. 484); Duff Development Company Ltd. *v.* Government of Kelantan and other (1924) (United Kingdom, *The Law Reports of the Incorporated Council of Law Reporting, House of Lords*, Judicial Committee of the Privy Council and Peerage Cases, 1924 (London, 1924), p. 797); Sayce *v.* Bahawalpur State (Ameer) (1952) (United Kingdom, *The All England Law Reports, 1952* (London, Butterworth, 1953), vol. 2, p. 64).

[39] See for example the case van Heyningen *v.* Netherlands Indies Government (1948) (*Annual Digest..., 1948* (London), vol. 15 (1953), case No. 43, p. 138), in which Judge Philips of the Supreme Court of Queensland, holding the defendant to be an integral part of the Royal Dutch Government, said:

> In my view an action cannot be brought in our courts against a part of a foreign sovereign State. Where a foreign sovereign State sets up as an organ of its Government a governmental control of part of its territory which it creates into a legal entity, it seems to me that that legal entity cannot be sued here, because that would mean that the authority and territory of a foreign sovereign would be subjected in the ultimate result to the jurisdiction and execution of this court." (*Ibid.*, p. 140.)

This dictum is significant, as Australian courts do not normally accord immunity to their own political subdivisions. See Commonwealth of Australia *v.* New South Wales (1923), *Annual Digest..., 1923–1924* (London), vol. 2 (1933), case No. 67, p. 130). See also Principality of Monaco *v.* Mississippi (1934) (*Annual Digest..., 1933–1934* (London), vol. 7 (1940), case No. 61, p. 166); Hans *v.* Louisiana (1890) (United States of America, *United States Reports*, vol. 134 (New York, Banks Law Publishing, 1910), p. 1); South Dakota *v.* North Carolina (1904) (*ibid.*, vol. 192 (1911), p. 286); United States *v.* North Carolina (1890) (*ibid.*, vol. 136 (1910), p. 211); Bey de Tunis et consorts *v.* Ahmed-ben-Aïad (1893) (M. Dalloz, *Jurisprudence générale—Recueil périodique..., année 1894* (*op. cit.*), p. 421); Huttinger *v.* Compagnie des chemins de fer du Congo supérieur aux Grands Lacs africains *et al.* (1934) (*Revue critique de droit international* (Paris), vol. XXXII, No. 1 (January–March 1937), p. 186); Poortensdijk Ltd. *v.* Soviet Republic of Latvia (1941–1942) (*Annual Digest..., 1919–1942* (Supplementary volume) (London), vol. 11 (1947), case No. 75, p. 142); Sullivan *v.* State of São Paulo (1941) (*Annual Digest..., 1941–1942* (London), vol. 10 (1945), case No. 50, p. 178).

[40] See for example Sullivan *v.* State of São Paulo (cited in note 39 above, *in fine*): in that case, the United States State Department had recognized the claim of immunity. Judge Clark suggested that immunity could be grounded on the analogy with member States within the United States of America, while Judge Hand expressed his doubts as to the general applciation of that principle. See also Schneider *v.* City of Rome (cited in note 38 above).

[41] See for example Rousse and Maber *v.* Banque d'Espagne et autres (1937) (France, *Recueil général des lois et des arrêts, année 1938* (Paris, Recueil Sirey) part 2, p. 17), especially the note by Rousseau (*ibid.*, pp. 17–23) referring to provincial authorities which could equally be "an executive organ of a decentralized administrative entity". However, in that case the Court of Poitiers did not think that the Basque Government had acted "*par délégation*". See also Gaekwar of Baroda State Railways *v.* Hafiz Habib-ul-Haq *et al.* (1938) (*Annual Digest..., 1938–1940* (London), vol. 9 (1942), case No. 78, p. 233); The Superintendent, Government Soap Factory, Bangalore *v.* Commissioner of Income Tax (1943) (*Annual Digest..., 1941–1942* (London), vol. 10 (1945), case No. 10, p. 38); Kawananakoa *v.* Polyblank (1907), (United States of America, *United States Reports*, vol. 205 (New York, Banks Law Publishing, 1921), p. 349).

42. Such agencies or instrumentalities could be granted State immunity in an appropriate situation, regardless of their constitution, whether or not they are clothed with a separate legal personality or existence by virtue of an Act of Parliament, or a process of incorporation or charter, or otherwise.[42] Recognition of immunity is accorded irrespective of the fact that they form an integral part of the central Government or not.[43] The test for participation in the enjoyment of State immunity lies in the nature of the activities involved, which should be conducted in the exercise of sovereign authority, under instruction from or with the authorization of the foreign State or Government in question. In the circumstances, they may be said to be acting as organs of the State, entitled in that connection to State immunity.

(b) *The expression "jurisdiction"*

43. The term "jurisdiction" as defined in article 2, paragraph 1(*g*), requires further interpretative assistance. To illustrate the types of power envisaged in the expression "jurisdiction" used in the context of the present articles, there is a need for a provision that makes explicit what otherwise would have been understood, or at any rate implied, by the terminology adopted. The term "jurisdiction" as employed in this context includes:

(i) the power to adjudicate,
(ii) the power to determine questions of law and of fact,
(iii) the power to administer justice and to take appropriate measures at all stages of legal proceedings, and
(iv) such other administrative and executive powers as are normally exercised by the judicial or administrative and police authorities of the territorial State.

44. The power to adjudicate (i) does not require further elucidation. It covers the power to settle disputes, to conciliate, to arbitrate, or otherwise to render a decision in response to a request by one party to the dispute. The power to determine questions of law and of fact (ii) is a necessary incidental to the power to adjudicate. The decision of an authority, judicial or administrative or otherwise, is based on facts as presented and determined and on legal principles enunciated (*juris-dictio*).

45. The power to administer justice (iii), including the authority to take appropriate measures at all stages of legal proceedings, is indeed very comprehensive and wide-ranging. It is exercisable in some countries in the name of the king, in others on behalf of the people or of the State. This power is generally part of the functions entrusted to the judicial authorities, but in its actual administration several aspects are performed by other officers, such as the police, the administrative officer of a tribunal or a court or of a local authority, or the department of public prosecution. Thus, the expression covers the issuance and service of summons or a warrant of arrest or search warrant and other types of writ to initiate proceedings, the arrest and detention of a person, investigation and inquiry or inquest, the provision of security for costs, interim measures or injunction, attachment of property or freezing of assets, as well as other procedural steps before and during the hearing and trial by a court of law. It also includes the power of the judicial authority to pronounce judgement and to order measures to satisfy and execute the judgements rendered, as well as award of costs and charge of fees for the administration of justice. This should also cover all other administrative and executive powers (iv) normally exercised by the judicial or administrative and police authorities of the territorial State. The remaining power could be illustrated, by way of example, as the power to prosecute or stay prosecution, to suspend proceeding, to compel a witness to give evidence on oath, to hold the proceedings *in camera* (*"à huis clos"*). This residuary power could be discretionary in nature, such as the incidence of costs, the assessment of damages in accordance with certain scales, the choice of property or assets to be seized or attached in the event of execution of a judgement debt, the challenge of members of a jury, procedural privileges of some parties, such as the Crown or the State, and countless other powers exercisable under heading (iv). Further enumeration of instances of the power included in the expression "jurisdiction" could be excessively long and yet not exhaustive.

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[42] See for example Krajina *v.* The Tass Agency and another (1949) (*Annual Digest..., 1949* (London), vol. 16 (1955), case No. 37, p. 129); and Baccus S.R.L. *v.* Servicio Nacional del Trigo (1956) (United Kingdom, *The Law Reports, Queen's Bench Division, 1957* (London, The Incorporated Council of Law Reporting for England and Wales), p. 438, in which Chief Justice Jenkins observed:

> "Whether a particular ministry or department or instrument, call it what you will, is to be a corporate body or an unincorporated body seems to me to be purely a matter of governmental machinery." (*Ibid.*, p. 466.)

See also Monopole des Tabacs de Turquie and another *v.* Régie co-intéressé des tabacs de Turquie (1980) (*Annual Digest..., 1929–1930* (London), vol. 5 (1935), case No. 79, p. 123).

[43] See for example the opinion of Judges Cohen and Tucker in the case Krajina *v.* The Tass Agency and another (cf. footnote 42 above). In Baccus S.R.L. *v.* Servicio Nacional del Trigo (*ibid.*), Lord Justice Parker stated:

> "I see no ground for thinking that the mere constitution of a body as a legal personality with the right to make contracts and to sue and be sued is wholly inconsistent with it remaining and being a department of State." (United Kingdom, *The Law Reports* (*op. cit.*), p. 472.)

See also Emergency Fleet Corporation, United States Shipping Board *v.* Western Union Telegraph Company (1928) (United States of America, *United States Reports* (Washington, D.C., U.S. Government Printing Office, 1928), vol. 275, p. 415):

> "Instrumentalities like the national banks or the federal reserve banks, in which there are private interests, are not departments of the Government. They are private corporations in which the Government has an interest." (*Ibid.*, pp. 425–426.)

(c) *The criterion for determining a trading or commercial activity*

46. To render further assistance in the interpretation of the expression "trading or commercial activity" as defined in article 2, paragraph 1(*f*), a criterion is proposed to remove uncertainties in identifying an activity as "commercial" or characterizing it as a "trading activity". The activity or course of conduct or particular act attributable to a foreign State should not be determined by reference to its motivation or purpose. An act performed for a State is inevitably designed to accomplish a purpose which is in a domain closely associated with the State itself or the public at large. In the ultimate analysis, reference to the purpose or motive of an activity of a foreign Government is therefore not helpful in distinguishing the types of activity which could be regarded as commercial from those which are non-commercial. The present article proposes a reference to the nature of the activity or the character of the transaction or act. If it is commercial in nature, the activity can be regarded as a trading or commercial activity. Further reference to the purpose which motivated the activity could serve to obscure its true character. The purpose could best be overlooked in determining whether an activity is commercial or not, especially for the purpose of deciding upon the availability or applicability of State immunity.

47. The objective criterion, i.e. the commercial nature of the transaction or the activity, as opposed to the subjective test of purpose, which breeds uncertainties, is preferred in the present articles. Indeed, it has been adopted in increasing measure in the recent practice of States, as evidenced in national legislation,[44] judicial decisions,[45] and international conventions.[46] The criterion does not eliminate all doubts and hesitations regarding the question of State immunities, it merely removes some uncertainties and helps to settle the question whether an activity, a course of conduct, a transaction or an act in question is to be considered commercial or not. Once an activity is so determined and its commercial nature established, the question that remains to be examined and answered is the precise extent of jurisdictional immunities in a given situation. An examination of this question will be included in part III of this report.

TEXT OF ARTICLE 3

48. The interpretative provisions of article 3 could be formulated as follows:

Article 3. Interpretative provisions

1. In the context of the present articles, unless otherwise provided,

(*a*) the expression "foreign State", as defined in article 2, paragraph 1(*d*), above, includes:

(i) the sovereign or head of State,

(ii) the central government and its various organs or departments,

(iii) political subdivisions of a foreign State in the exercise of its sovereign authority, and

(iv) agencies or instrumentalities acting as organs of a foreign State in the exercise of its sovereign authority, whether or not endowed with a separate legal personality and whether or not forming part of the operational machinery of the central government;

(*b*) the expression "jurisdiction", as defined in article 2, paragraph 1(*g*), above, includes:

(i) the power to adjudicate,

(ii) the power to determine questions of law and of fact,

(iii) the power to administer justice and to take appropriate measures at all stages of legal proceedings, and

(iv) such other administrative and executive powers as are normally exercised by the judicial, or administrative and police authorities of the territorial State.

2. In determining the commercial character of a trading or commercial activity as defined in article 2, paragraph 1(*f*), above, reference shall be made to the

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[44] See for example art. 1603, para. *d*, of Title 28 of the United States Code, as modified by the *Foreign Sovereign Immunities Act of 1976* (see footnote 33 above), which provides:

"A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."

Compare art. 3, para. 3, of the United Kingdom *State Immunity Act 1978* (*ibid.*), which defines a commercial transaction by giving a description of its nature and enumerating the types of contract envisaged.

[45] See for example Trendtex Trading Corporation Ltd. *v.* Central Bank of Nigeria (American Society of International Law, *International Legal Materials* (Washington, D.C.), vol. XVI, No. 3 (May 1977), p. 471), where the Court of Appeal, applying the test of the nature of the transaction, held the purchase of cement for the construction of barracks for the army in Nigeria to be commercial and as such not covered by State immunity, irrespective of its purpose or motivation. See, however, the mixed criterion of "*acte de commerce*" in French case-law. See also the judgement of the Supreme Court of Austria of 10 February 1961 (2 Ob 243/60):

"Thus we must always look at the act itself which is performed by State organs, and not its motive or purpose... Whether the act is of a private 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." (*Juristische Blätter* (Vienna), 84th year, No. 1/2 (13 January 1962), pp. 143 *et seq.* [translation by the Secretariat]). (An English translation of the judgement appears in the mimeographed document A/CN.4/343/Add.2, of 1981.)

[46] See for example arts. 4 and 7 of the European Convention on State Immunity of 1972 (for reference, see footnote 33 above), concerning contractual relations and activities conducted in the same manner as a private person *more privatorum*.

nature of the course of conduct or particular transaction or act, rather than to its purpose.

ARTICLE 4: Jurisdictional immunities not within the scope of the present articles

49. In the practice of States, jurisdictional immunities could be accorded in respect of activities attributable ultimately to a foreign State but, in view of the fact that they have been treated in earlier international conventions or instruments or have followed a separate legal development, they should be excluded from the scope of the present articles. This is to define and delineate still further the precise scope of the present articles, taking into consideration the possibility of some overlapping provisions in existing general or regional conventions, or indeed the existing rules of customary international law marginally touching upon certain aspects of State immunities. The present articles are not intended to deal specifically with certain areas or to affect the legal status and the extent of jurisdictional immunities recognized and accorded to missions such as embassies, consulates, delegations and visiting forces, regulated by international or bilateral conventions or prevailing rules of customary international law.

50. The missions which represent States and whose status has been the subject of separate treatment in international conventions include diplomatic missions under the Vienna Convention of 1961,[47] consular missions under the Vienna Convention on Consular Relations of 1963,[48] special missions under the Convention on Special Missions of (1969),[49] missions under the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of (1975)[50] and other permanent missions or delegations of States to international organizations in general.[51] Such missions or delegations could be regarded as State organs, agencies or instrumentalities of States in the conduct of their international relations, and are entitled to jurisdictional immunities from the receiving States.[52]

51. The missions mentioned above invariably have premises in the receiving States or the host countries which, for the purpose of the present articles, are included in the term "territorial States". The immunities accorded in respect of such missions, their members, the various categories of their staff, and their premises including archives, means of transport and communications, which are inviolable—form the subject of separate conventions treated earlier, such as those on diplomatic privileges and immunities, consular immunities, and immunities accorded to special missions and other permanent missions and delegations of States members or associate members or otherwise accredited to international organizations of a universal character, or other types of organizations which could be regional in character or an international community of regional dimension.[53]

52. The fact that the present articles are not designed specifically to apply to jurisdictional immunities accorded to States in respect of the missions referred to above does not affect the application to such missions or representation of States, or indeed, to international organizations, of any of the rules set forth in the articles to which such missions or representations would also be subject under international law independently of the articles. The premises and archives of such missions, for instance, constitute property of foreign States within the meaning and scope of the present articles. Several aspects of their status, including inviolability and immunities from search, requisition, attachment and execution, have been regulated by existing conventions.[54] Immunities extended to foreign visiting forces are similarly excluded from the present study, and therefore from the present articles.[55]

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[47] For reference, see footnote 21 above.

[48] United Nations, *Treaty Series*, vol. 596, p. 261. Hereinafter called "1963 Vienna Convention".

[49] General Assembly resolution 2530 (XXIV) of 8 December 1969, annex.

[50] *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 207. Hereinafter called "1975 Vienna Convention".

[51] See, for instance, Article 105 of the Charter of the United Nations; the 1946 Convention on the Privileges and Immunities of the United Nations (United Nations, *Treaty Series*, vol. 1, p. 15); and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies (*ibid.*, vol. 33, p. 261).

[52] There is an inevitable overlapping, but the practice of States shows no trend of incompatible legal developments. Thus the proposition that there is no substantive immunity from the territorial law finds parallel expression in the provisions of art. 41, para. 1, of the 1961 Vienna Convention and in art. 55, para. 1, of the 1963 Vienna Convention (see footnotes 21 and 48 above).

[53] For the European Communities, see, for instance, J.J.A. Salmon, "Les Communautés en tant que personnes de droit interne et leur privilèges et immunités", *Les Novelles—Droit des Communautés européennes*, ed. by W.J. Ganshof van der Meersch (Brussels, Larcier, 1969), pp. 121–122, No. 363; P. Pescatore, "Les Communautés en tant que personnes de droit international", *ibid.*, pp. 109–110, No. 333; L. Plouvier, "L'immunité de contrainte des Communautés européennes", *Revue belge de droit international* (Brussels), vol. IX (1973), No. 2, p. 471. Compare with art. 3 of the Agreement on Privileges and Immunities of the OAS (Washington, D.C., Pan American Union, 1961), Treaty Series, No. 22). See also *Legislative texts and treaty provisions concerning the legal status, privileges and immunities of international organizations*, vol. II (United Nations publication, Sales No. 61.V.3), p. 377; the Agreement relating to the Legal Status, Facilities, Privileges and Immunities of the United Nations Organization in the Congo (United Nations, *Treaty Series*, vol. 414, p. 229); and various other headquarters agreements.

[54] See for example art. 22, paras. 1 and 3 of the 1961 Vienna Convention and art. 31, paras. 1 and 4, and art. 33 of the 1963 Vienna Convention (see footnotes 21 and 48 above).

[55] Foreign visiting forces, army, air force and navy personnel of a foreign State invited to a host country are accorded a certain measure of courtesies, facilities and privileges. There are generally agreements regulating the exercise of concurrent jurisdiction over members of visiting forces, including the question of priorities of such exercise. In this connection, see, for instance, the 1951

53. Nor indeed would the same fact affect the application of the rules set forth in the present articles to States and international organizations non-parties to the articles, in so far as such rules may have the force of customary international law independently of the articles. There appears to be a need to reconfirm that the rules of customary international law continue to apply generally, on this as well as on other matters, to parties and non-parties to the articles alike, irrespective and independently of the articles. The provisions of the articles will be binding on the parties and States which have otherwise declared themselves bound by them in respect of matters expressly regulated by the rules formulated and incorporated in the present articles.[56] Rules embodied in other conventions may also continue to apply on matters directly covered by this study in so far as they form part of international customs not modified by the articles.[57]

TEXT OF ARTICLE 4

54. Article 4, on the delineation of the scope of the articles, could be formulated as follows:

Article 4. Jurisdictional immunities not within the scope of the present articles

The fact that the present articles do not apply to jurisdictional immunities accorded or extended to

(i) diplomatic missions under the Vienna Convention on Diplomatic Relations of 1961,

(ii) consular missions under the Vienna Convention on Consular Relations of 1963,

(iii) special missions under the Convention on Special Missions of 1969,

(iv) the representation of States under the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of 1975,

(v) permanent missions or delegations of States to international organizations in general,

shall not affect

(*a*) the legal status and the extent of jurisdictional immunities recognized and accorded to such missions and representation of States under the above-mentioned conventions;

(*b*) the application to such missions or representation of States or international organizations of any of the rules set forth in the present articles to which they would also be subject under international law independently of the articles;

(*c*) the application of any of the rules set forth in the present articles to States and international organizations, non-parties to the articles, in so far as such rules may have the legal force of customary international law independently of the articles.

ARTICLE 5: Non-retroactivity of the present articles

55. The provisions of the present articles will embody rules that could be regarded as codification as well as progressive development of international law. Since international law is not static but continues to develop, it is not unnatural to include in part I of the draft articles an initial provision confirming the principle of non-retroactivity. The rules enunciated in the articles should become binding on signatory States which have ratified or States which have acceded to the articles only upon their entry into force, and not before. The articles will therefore not be given retrospective or retroactive effect and will govern the relations among States only from the date of their entry into force, unless, of course, the parties agree otherwise, or unless the rules so embodied have the force of existing customary international law already receiving general application independently of the present articles.

56. The provisions of the present articles, which are merely declaratory of prevailing State practice or evidentiary of emerging rules *in statu nascendi* with their crystallizing effect, will clearly afford evidence of existing rules of international law. They are only evidence of the established practice of States, and have no binding force as treaty provisions. The provisions which are prophetic of future legal developments may be considered as entailing a generating effect for progressive developments of practice to rally behind new rules about to emerge.[58] It should be further observed in this connection that the general principles of State immunity are rules of international law only in so far as they oblige the territorial State in a given set of circumstances to accord certain measures of jurisdictional immunity to foreign States. The territorial State is not obliged to refuse or deny jurisdictional immunities when no international obligation exists to grant or accord such immunities in the first place. The over-generosity of States falls into the realm of courtesies and outside the ambit of the rules of international law. There is nothing to prevent States from showing more kindness than is required in State practice.

Agreement between the Parties to the North Atlantic Treaty regarding the status of their forces (United Nations, *Treaty Series*, vol. 199, p. 67), the status of forces of parties to the Warsaw Treaty, under art. 5 of the treaty (*ibid.*, vol. 219, p. 29), and various bilateral arrangements or agreements on status of forces, such as the 1966 Republic of Korea–United States of America Agreement (*ibid.*, vol. 674, p. 163). See also national legislation on the subject.

[56] For an interesting study on recent developments of customary international law by the process of international codification conferences and multilateral general conventions, see E. Jiménez de Aréchaga, "International law in the past third of a century", *Recueil des cours de l'Académie de droit international de La Haye, 1978-I* (Alphen aan den Rijn, Sijthoff, 1979), vol, 159, pp. 9 *et seq.*, chap. I "Custom as a source of international law").

[57] See for example the 1972 European Convention on State Immunity (see footnote 33 above), the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone (United Nations, *Treaty Series*, vol. 516, p. 205), and the 1958 Geneva Convention on the High Sea (*ibid.*, vol. 450, p. 11).

[58] See Jiménez de Aréchaga, *loc. cit.*, pp. 14–27.

TEXT OF ARTICLE 5

57. The non-retroactive provision could run thus:

Article 5. Non-retroactivity of the present articles

Without prejudice to the application of any rules set forth in the present articles to which the relations between States would be subject under international law independently of the articles, the present articles apply only to the granting or refusal of jurisdictional immunities to foreign States and their property after the entry into force of the said articles as regards States parties thereto or States having declared themselves bound thereby.

PART II. GENERAL PRINCIPLES

58. It is proposed in this part of the report to examine State practice—judicial, administrative and governmental—relating to the fundamental principles of international law of State immunities. In the process of this examination, references will be made primarily to the case-law and jurisprudence of various States having a direct bearing on the principles to be declared, confirmed and restated. National legislation, official communications and diplomatic correspondence will be consulted together with the opinions of writers, so as to help detect and verify the existing or emerging trends in the practice of States, as evidence of the current state in which international law finds itself.

59. The first draft article of this part, article 6, seeks to reflect prevailing State practice in support of the principles of State immunity as one of the fundamental principles of international law. Efforts will be made to bring out more clearly the true nature of State immunity as progressively developed in the practice of the judicial and administrative authorities of territorial States, as well as the views and practice of Governments on the subject. Relevant national legislation and international conventions will also be examined as evidence of existing customary rules of international law on the doctrine of State immunity. Historical developments in the principle of State immunity in the practice of States will serve to indicate some of the closest resemblances and affinities which the principles of State immunity or sovereign immunity bears in comparison to the jurisdictional immunities accorded to foreign sovereigns and accredited diplomats or other representatives of foreign Governments in the practice of States. Article 6 will restate the principle of State immunity as a general rule substantiated by a rational legal basis.

60. As part of an effort to outline general principles, article 7 will draw a line of distinction between cases where the question of State immunity arises with the fulfilment of all conditions necessary for the judicial or administrative authorities to assume and exercise territorial jurisdiction were it not for the application of the doctrine of State immunity, and another type of case where there is no question of State immunity since the territorial State lacks jurisdiction or competence under its own internal law regarding the competence of the judicial or administrative authorities in the first place.

61. Article 8 will deal with the relevance of consent as an important element of the doctrine of State immunity. With the consent of the foreign State, the judicial or administrative authorities of the territorial State will not be constrained from exercising their otherwise competent jurisdiction. The question of State immunity therefore arises in circumstances where the foreign State declines to give consent or is otherwise not disposed to consent to the exercise of territorial jurisdiction.

62. Article 9 will concern itself with another aspect of consent, namely voluntary submission to the territorial jurisdiction and the methods whereby a foreign State may be said to have invoked territorial jurisdiction or voluntarily submitted to the exercise of local jurisdiction by the territorial State.

63. Article 10 will relate to the effect of counter-claims against a foreign State and the extent to which the foreign State will not be accorded jurisdictional immunity where it has itself raised a counter-claim in a suit against it.

64. Article 11, the last provision of part II, will deal with waiver of State immunity, how it is effected, and when it could be considered that the foreign State has in fact waived its sovereign immunity, as well as the effect and extent of a waiver.

ARTICLE 6: The principle of state immunity

I. *Historical and legal developments of the principle of State immunity*

65. The principle of international law regarding State immunity has developed principally from the judicial practice of States. Municipal courts have been primarily responsible for the growth and progressive development of a body of customary rules governing the relations of nations in this particular connection. The opinions of writers and international conventions relating to State immunity are practically all of subsequent growth, although there is markedly a growing interest appreciable in the writings of contemporary publicists and in relatively recent provisions of treaties and international conventions, as well as national legislation. The scantiness of pre-nineteenth century judicial decisions bearing upon the question of jurisdictional immunities of States serves as eloquent

explanation for the total absence of reference to the topic in the classics of international law and the complete silence in earlier treaties and internal laws. To give but a few illustrations, neither Gentili[59] nor Grotius,[60] Bynkershoek[61] nor Vattel[62] revealed any trace of the doctrine of State immunity, although the problems of diplomatic immunities and the immunities of the person of sovereigns received extensive discussion in their monumental treatises. Legislative provisions in Europe or elsewhere and international conventions of the same period made no mention of any principle of State immunity, while references to the immunities of ambassadors and the person of sovereigns were to be found in European statutes of the corresponding period[63] as well as in the case-law of several nations from the eighteenth century onwards.[64]

66. It was mainly in the nineteenth century that national courts began to formulate the doctrine of State immunity in their practice. Since then, judicial deliberations of this doctrine have generated a greater and possibly more divergent volume of municipal jurisprudence hitherto unknown in any other branch of international law.[65] The diversity and complexity of the problems involved in the application by national authorities of this comparatively recent doctrine of State immunity have increasingly enriched the archives of modern international legal literature.[66]

A. State immunity in the judicial practice of States

1. Common law jurisdictions

(a) *A sequence of personal immunity*

67. It was in the nineteenth century that the doctrine of State immunity came to be established in the practice of a large number of States. In common-law jurisdictions, especially in the United Kingdom, the principle that foreign States are immune from the jurisdiction of the territorial States has, to a large extent, been influenced by the traditional immunity of the local sovereign, apart altogether from the application of international comity or *comitas gentium*. In the United Kingdom, at any rate, the doctrine of sovereign immunity has been a direct result of English constitutional usage expressed in the maxim "The King cannot be sued in his own courts". To implead the national sovereign was therefore a constitutional impossibility.

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[59] On the contracts of ambassadors, see A. Gentili, *De legationibus, libri tres* (1594), reproduced and trans. in *The Classics of International Law*, Carnegie Endowment for International Peace (New York, Oxford University Press, 1924), vol. II. chap. XIV.

[60] On the personal inviolability of ambassadors, see H. Grotius, *De jure Belli ac pacis, libri tres* (1646), *The Classics of International Law*, *idem.* (Oxford, Clarendon Press, 1925), vol. II, chap. XVIII, sect. IV.

[61] On the immunities of ambassadors from civil jurisdiction, see C. van Bynkershoek, *De foro legatorum tam in causa civili, quam criminali, liber singularis* (1721), *The Classics of International Law* (Oxford, Clarendon Press, 1946), chaps. XIII–XVI, and regarding the immunities of foreign sovereigns and their property, *ibid.*, chaps III and IV. See also E. A. Gmür, *Gerichtsbarkeit über fremde Staaten* (Zurich, Polygraphischer Verlag, 1948), pp. 38–43 (thesis); and J. Barbeyrac's translation of and notes on Bynkershoek's work: "*Traité du juge compétent des ambassadeurs, tant pour le civil que pour le criminel* (The Hague, Johnson, 1723), pp. 43 and 46.

[62] On the immunities of personal sovereigns, see E. de Vattel, *Le droit des gens, ou Principes de la loi naturelle* (1758), *The Classics of International Law* (Washington, D.C., Carnegie Institution of Washington, 1916), vol. III, book IV, chap. VII, para. 108. De Vattel, however, recognized the principle of independence, sovereignty and equality of States (*ibid.*, vol. I, book II, chap. III, para. 36, and chap. VII, paras. 79 and 81), and the immunity of the local State or sovereign from the jurisdiction of its or his own courts (*ibid.*, chap. XIV, para. 214).

[63] See for example the British law *Statute of 7 Anne* (1708), chap. XII (sects. I–III, "An Act for preserving the privileges of ambassadors and other public ministers of foreign princes and States" (United Kingdom, *The Statutes at Large of England and of Great Britain*, vol. IV (London, Eyre and Strahan, 1811), p. 17; a statute of the United States of America of 1790, which contains a clause providing that:

> "Whenever a writ or process is sued out or prosecuted... whereby a person of any ambassador... is arrested or imprisoned, or his goods or chattels are distrained, seized or attacked, such writ or process shall be deemed void." (United States of America, *United States Code, 1964 Edition*, Title 22, "Foreign relations and intercourse" (Washington, D.C., U.S. Government Printing Office, 1965), vol. 5, p. 4416);

and a French decree concerning envoys of foreign Governments, dated 13 Ventôse year 2 (3 March 1794); which provided:

> "The National Convention prohibits any constituted authority from proceeding in any manner against the person of envoys of foreign governments; claims which may be raised against them shall be brought to the Committee of Public Safety, which alone is competent to satisfy them." (J.B. Duvergier, *Collection complète des lois, décrets, ordonnances, règlements et avis du Conseil-d'Etat* (Paris, Guyot et Scribe, 1825), vol. 7, p. 108). [Translation by the Secretariat.]

A decree of the Constituent Assembly of 11 December 1789 also confirmed this principle ("Arrêté sur une demande faite par les ambassadeurs relativement à leurs immunités", *ibid.* (1824), vol. 1, p. 73).

[64] See for example the British cases Buvot *v.* Barbuit ["Barbuit's case"] (1773) (*British International Law Cases*, British Institute Studies in International and Comparative Law (London, Stevens, 1967), vol. 6, No. 1, p. 261) and Triquet and others *v.* Bath (1764) (*ibid.*, p. 211); a Dutch case reported in 1720 concerning the Envoy Extraordinary of the Duke of Holstein (see van Bynkershoek, *De foro legatorum...* (*op. cit.*), chap. XIV); and the French case of Bruc *v.* Bernard (1883), in which the Court of Appeals of Lyon stated:

> "it must be recognized that full immunity from jurisdiction in civil matters is enjoyed by anyone invested with an official character as representing a foreign Government in any way..." (M. Dalloz, *Recueil périodique et critique de Jurisprudence, de Législation et de Doctrine année 1885* (Paris, Bureau de la Jurisprudence générale), part 2, pp. 194–195). [Translation by the Secretariat.]

[65] See especially the case law that will be examined in part III and the parts which follow.

[66] See the selected bibliography annexed to S. Sucharitkul, *State Immunities and Trading Activities in International Law* (London, Stevens, 1959), pp. 361–380, and more recently in *Recueil des cours..., 1976-I* (Leyden, Sijthoff, 1977), vol. 149, pp. 212–215.

As the King personified the State, constitutionally speaking, the courts forming part of the machinery of justice of the central government of that State could not logically exercise jurisdiction over the sovereign, in whose name and in whose name only they could act. The immunity of the local sovereign is thus a legacy of legal history. Within the confines of a territory, the domestic sovereign was the fountain of law and justice. The sovereign did justice not as a matter of duty but of grace. The immunity of the Crown, although a historical accident, was later extended to cover also the sovereign heads of other nations, or foreign sovereigns with whom at the subsequent stage of legal development foreign States have been identified. The survival of this ancient constitutional practice in the international domain is illustrated by the fact that it is still common usage for courts in the United Kingdom to refer to foreign States as foreign sovereigns, particularly in the present context of State or sovereign immunity.

68. The basis of immunity has been the sovereignty of the foreign sovereign in a way analogous to or comparable with that of the local sovereign. In the *"Prins Frederick"* case (1820),[67] the first English case that contained a pronouncement on the principle of international law relating to jurisdictional immunities of foreign States and their property, as well as in subsequent cases in which jurisdictional immunity was accorded to foreign States,[68] the court declined jurisdiction on the grounds that the foreign State as personified by the foreign sovereign was equally sovereign and independent and that to implead him would insult his "regal dignity".[69] In *De Haber* v. *the Queen of Portugal* (1851), Chief Justice Campbell, basing sovereign immunity on international law, said:

> In the first place, it is quite certain, upon general principles... that an action cannot be maintained in any English court against a foreign potentate, for anything done or omitted to be done by him in his public capacity as representative of the nation of which he is the head; and that no English court has jurisdiction to entertain any complaints against him in that capacity... To cite a foreign potentate in a municipal court, for any complaint against him in his public capacity, is contrary to the law of nations, and an insult which he is entitled to resent.[70]

(b) *Transition from the attributes of a personal sovereign*

69. A further rationalization of the doctrine of sovereign immunity was given by Lord Justice Brett in his classic dictum in the *"Parlement belge"* case (1880):

> The principle... is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence and dignity of every other sovereign State, each and everyone declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction.[71]

70. The rationale of sovereign immunity as propounded by Brett, appears to rest on a number of basic principles—such as the common agreement or usage, international comity or courtesy, the independence, sovereignty and dignity of every sovereign authority—representing a progressive development from the attributes of personal sovereigns to the theory of equality and sovereignty of States and the principle of consent. Immunities accorded to personal sovereigns and ambassadors as well as to their property appear to be traceable to the more fundamental immunities of States.

71. A clearer judicial confirmation of the view that these immunities are regulated by rules of international law can be found in the oft-cited dictum of Lord Atkin in the *"Cristina"* case (1938):

> The foundation for the application to set aside the writ and arrest of a ship is to be found in two propositions of international law engrafted into our domestic law, which seem to me to be well established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.
>
> The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control.[72]

72. State immunity is thus translatable in terms of absence of the power on the part of the territorial authorities to implead a foreign sovereign. The concept of impleading relates to the possibility of compelling the foreign sovereign, against his will, to become a party to legal proceedings, or otherwise to an attempt to seize or detain property which is his or in his possession or control.

(c) *Impact of the Constitution of the United States of America*

73. In a way not dissimilar from developments in the United Kingdom, State immunity in the practice of the United States of America appears to have taken firm

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[67] See footnote 29 above.

[68] See for example the case Vavasseur *v.* Krupp (1878) (United Kingdom, *The Law Reports, Chancery Division*, vol. IX (London, Incorporated Council of Law Reporting for England and Wales, 1878), p. 351) and that of the *Parlement belge* (1880) (*idem, The Law Reports, Probate Division*, vol. V (London, Incorporated Council of Law Reporting for England and Wales, 1880), p. 197).

[69] Lord Justice Esher in the *Parlement belge* case (United Kingdom, *The Law Reports, Probate Division* (*op. cit.*), p. 207).

[70] United Kingdom, *Queen's Bench Reports* (*op. cit.*), p. 207.

[71] *Idem, The Law Reports, Probate Division*, vol. V (*op. cit.*), pp. 214–215.

[72] *Idem, The Law Reports, House of Lords, Judicial Committee of the Privy Council and Peerage Cases, 1938* (London), p. 490; *Annual Digest and Reports of Public International Law Cases, 1938–1940* (London, 1942), case No. 86, p. 252.

root in common ground, where the original doctrine of the common law regarding the prerogative of immunity from suit of the local sovereign had earlier flourished. In a case concerning the Territory of Hawaii,[73] Justice Holmes expressed the view that an entity which is the fountain of rights is above the rule of law, by basing immunity "on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends".[74] But it may, with some weight of authority, be contended that the legal basis for the immunity from suit accorded to foreign Governments in United States practice lies in a principle which is much more peculiar to the United States Constitution than the common law doctrine of immunity of the Crown; its strength lies in the impact of the federal Constitution of the United States of America and the influence it has on the necessity to resolve questions to ensure harmony in the reciprocal relations between the federal Union and its member States.

74. In *Principality of Monaco* v. *Mississippi* (1934),[75] the court endorsed the insistence made by Hamilton in *The Federalist, No. 81*, saying:

> There is... the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been "a surrender of this immunity in the plan of the convention."

This insistence on the need to safeguard the sovereignty of the member States of the Union finds occasional reinforcement in certain cases in which United States courts have gone to the length of recognizing the same need with regard to member-States of a foreign federal union,[76] while denying immunity in other cases to other similar entities.[77]

[73] Kawananakoa *v.* Polyblank (1907): "...the doctrine [of sovereign immunity] is not confined to powers that are sovereign in the full sense of juridical theory, but naturally is extended to those that in actual administration originate and change at their will the law of contract and property, from which persons within the jurisdiction derive their rights. A suit presupposes that the defendants are subject to the law invoked. Of course, it cannot be maintained unless they are so. But that is not the case with a territory of the United States, because the Territory itself is the fountain from which rights ordinarily flow. (United States of America, *United States Reports*, vol. 205 (*op. cit.*), p. 353.)

[74] *Ibid.* Cf. J.F. Lalive, "L'immunité de juridiction des Etats et des organisations internationales", *Recueil des cours..., 1953-III* (Leyden, Sijthoff, 1955), vol. 84, p. 218.

[75] See G.H. Hackworth, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1941), vol. II, p. 402.

[76] See for example Sullivan *v.* State of São Paulo (footnote 39 above). Judge Clark suggested that immunity could be grounded on the analogy with member States within the United States of America. The State Department of the United States had recognized the claim of immunity.

[77] See the case of Schneider *v.* City of Rome, where the court said: "That the City of Rome is a 'political subdivision' of the Italian Government which exercises 'substantial govenmental powers' is not alone sufficient to render it immune." (*Annual Digest... 1948* (London), vol. 15 (1953), case No. 40, p. 132.) Judge Learned Hand expressed doubt whether every political subdivision of a foreign State which exercised substantial governmental powers was immune (*ibid.*).

(d) *Classic statement of the principle of State immunity*

75. The judicial authorities of the United States were among the first to formulate the doctrine of State immunity, not uninfluenced by the common law concept of the immunity of the domestic sovereign nor unaffected by the impact of the United States Constitution. The principle of State immunity, which was later to become widely accepted in the practice of States, was clearly stated by Chief Justice Marshall in *The schooner "Exchange"* v. *McFaddon and others* (1812):

> The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation, within its own territory is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty, to the extent of the restriction, and an investment of that sovereignty, to the same extent, in the power which could impose such restriction. All exceptions, therefore, to the *full and complete power** of a nation *within its own territories*,* must be traced up to the *consent of** the nation itself. They can flow from no other legitimate source.
>
> This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory. The world being composed of distinct sovereignties, possessing *equal rights** and *equal independence*,* whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation, in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers. This consent may, in some instances, be tested by *common usage*,* and by *common opinion*,* growing out of that usage. A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilised world.
>
> This *full and absolute territorial jurisdiction** being alike the *attribute of every sovereign*,* and being capable of conferring extraterritorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights, as its objects. One sovereign being in no respect *amenable* to another; and being bound by obligations of the highest character not to degrade the *dignity** of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the *immunities* belonging to his *independent sovereign station*,* though not expressly stipulated, are reserved by implication and will be extended to him.
>
> This *perfect equality** and *absolute independence of sovereigns*,* and this common interest impelling them to mutual intercourse and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to *waive** the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.[78]

* Emphasis is added by the Special Rapporteur.

[78] Cranch, *op. cit.*, vol. VII, 3rd ed., pp. 135–136. See J. Hostie, "Contribution de la Cour Suprême des Etats-Unis au Développement du droit des gens,", *Recueil des cours..., 1939-III* (Paris, Sirey, 1939), vol. 69, pp. 241 *et seq.*

76. In this classic statement of the principle of State immunity, the immunity accorded to a foreign State by the territorial State was founded on the attributes of sovereign States, including especially independence, sovereignty, equality and dignity of States. The granting of jurisdictional immunity was based on the consent of the territorial State as tested by common usage and confirmed by the *opinio juris* underlying that usage.

2. Civil law countries: primarily a question of competence

77. Civil law countries have taken a different route from that followed by common law jurisdictions in the history of legal developments of the principle of State immunity. Primarily, jurisdictional immunity is closely related to the question of "*compétence*" which literally means "jurisdiction" or jurisdictional authority or power. A brief review of nineteenth-century practice of a number of European countries could illustrate this point.

78. In France, for instance, the principle of State immunity received broad application in the nineteenth century, in regard both to foreign States and also to their property. The acceptance of the principle of State immunity was worthy of notice in view of the French legal system, under which proceedings could be instituted against its own Government before the various Tribunaux administratifs. A distinction has been drawn between "*actes d'autorité*" subject to the competence of the Tribunaux administratifs and "*actes de gouvernement*" which are not subject to review by any French authority, judicial or administrative. As foreign affairs form a significant part of "*actes de gouvernment*", acts attributable to foreign States, emanating from the sovereign authority of the Government, could generally be regarded as "*actes de gouvernement*". Thus, in 1827, the Tribunal civil du Havre decided in *Blanchet* v. *République d'Haiti*[79] that article 14 of the Code Civil permitting suits in French courts against foreigners did not apply to a foreign State. This principle was reaffirmed by the Tribunal civil de la Seine in 1847 in a case concerning the Government of Egypt,[80] and by the Cour de Cassation, for the first time, in *Gouvernement espagnol* v. *Casaux* (1849).[81] The Cour de Cassation stated the principle of State immunity in the following terms:

> The reciprocal independence of States is one of the most universally recognized principles of the Law of Nations;—it results from this principle that a government may not be subjected, in regard to its undertakings, to the jurisdiction of a foreign State;—the right of jurisdiction possessed by each government to judge disputes arising out of acts emanating from it is a right inherent in its sovereign authority, to which another government may not lay claim without risking a worsening of their respective relations;...[82]

79. This court appears to have found State immunity on reciprocal independence and sovereign authority of the foreign States. This formulation led commentators of that time to suggest that State immunity be limited to cases where the foreign State was acting in its "sovereign capacity".[83] This distinction was recognized in regard to ex-sovereigns, but was generally rejected by French courts in the nineteenth century. Sovereignty, in its unqualified form, continues to be asserted as the foundation of State immunity from French jurisdiction.

80. In Belgium, articles 52 and 54 of the civil code adopted the principles of article 14 of the French Code Civil, permitting suits against foreigners before the local courts. Following the reasoning advanced by French courts, jurisdictional immunities were accorded to foreign States whenever the exercise of territorial jurisdiction would violate the principles of sovereignty and independence of States. Thus, in a case decided in 1840, the Appellate Court of Brussels disclaimed jurisdiction in regard to the Netherlands Government and a Dutch public corporation, holding both defendants to represent the Dutch State. Immunity was based on "the sovereignty of Nations" and "the reciprocal independence of States".[84] In its reasoning, the Court

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[79] *Recueil périodique et critique..., 1849* (*op. cit.*), part I, p. 6; *Recueil général des lois et des arrêts* (Paris, Sirey, 1849), part I, p. 83. See also the cases Balguerie *v.* Gouvernement espagnol (1825) (*Recueil périodique et critique...* (*op cit.*), p. 5); République d'Haïti *v.* la maison Ternaux-Gandolphe (1828); and Gouvernement d'Espagne *v.* la maison Balguerie de Bordeaux (1828), Tribunal civil de la Seine, 2 May 1828 (*Recueil général des lois...* (*op cit.*), p. 85, and *Recueil périodique et critique...* (*op. cit.*), p. 7).

[80] Solon *v.* Gouvernement egyptien (1847) (*Recueil périodique et critique...* (*op. cit.*), p. 7, and *Journal du Palais* (Paris, 1849), vol. I, pp. 172 *et seq.*).

[81] *Recueil périodique et critique...* (*op. cit.*), p. 9, and *Recueil général des lois...* (*op. cit.*), pp. 81 and 94. See also an interesting footnote by L.M. Devilleneuve:

> "This is the first ruling by the Cour de Cassation on these important questions of international law and extraterritoriality, although they had already been raised in the courts several times." (*Ibid.*, p. 81.)

[82] *Recueil général des lois...* (*op. cit.*), p. 93; *Recueil périodique et critique...* (*op. cit.*), p. 9. See also C.J. Hamson, "Immunity of foreign States: The practice of the French courts", *The British Year Book of International Law, 1950* (London), vol. 27, p. 301. Cf. a decision by the French Conseil d'Etat of 2 May 1828 to the effect that art. 14 of the Civil Code did not apply to foreign ambassadors resident in France (*Recueil périodique et critique...* (*op. cit.*), p. 6, *Recueil général des lois...* (*op. cit.*), p. 89, and *Gazette des tribunaux* (Paris), 3 May 1828).

[83] See for example C. Demangeat, "Les tribunaux français peuvent-ils valider la saisie-arrêt formée, en France, par un Français, sur des fonds appartenant à un gouvernement étranger?", *Revue pratique de droit français* (Paris), vol. I (1856), pp. 385 *et seq.*, and "Conference des avocats de Paris, 27 décembre 1858" (*ibid.*, vol. VII (1859), pp. 182–186).

[84] Société générale pour favoriser l'industrie nationale *v.* Syndicat d'amortissement, Gouvernement des Pays-Bas et Gouvernement belge (see footnote 35 above). The decision was not altogether uninfluenced by the Treaty of Peace between Belgium and Holland. See E.W. Allen, *The Position of Foreign States before Belgian Courts* (New York, Macmillan, 1929), pp. 4–7.

appears to have rationalized State immunity by analogy with the basis of diplomatic immunities. The Court said:

> It must therefore be held with the weightiest authorities that the immunities of ambassadors are the consequence of the representative character with which they are invested and stem from the independence of nations which are deemed to act through them; the principles of the Law of Nations applicable to Ambassadors are applicable *a fortiori* to the nations which they represent.[85]

81. In Italy, the principle of State immunity was recognized and applied by Italian courts in the nineteenth century. Immunity was viewed as a logical result of independence and sovereignty of States. But even at the very outset, in *Morellet* v. *Governo Danese* (1882), the Corte di Cassazione of Turin distinguished between the State as "*ente politico*" and as "*corpo morale*", and confined immunity to the former. The Court stated that:

> it being incumbent upon the State to provide for the administration of the public body and for the material interests of the individual citizens, it 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.[86]

A similar distinction was made between the State as "*potere politico*" and as "*persona civile*" by the Corte di Cassazione of Florence in *Guttieres* v. *Elmilik* (1886).[87] Jurisdiction was exercised in respect of service rendered to the Bey of Tunis. A further distinction was recognized by the Corte di Appello di Lucca in 1887, between "*atti d'impero*" and "*atti di gestione*", in another case connected with the same Bey of Tunis.[88]

82. In Germany, the Minister of Justice was empowered by legislation to authorize certain measures ordered by the judiciary.[89] In 1819, the Minister of Justice refused an order of attachment made by the Court of Saarbrücken against the Government of Nassau on the ground that the general principles of sovereign immunity formed part of international law. In a letter to the Advocate-General, the Minister based immunity on the grounds that "The exercise of jurisdiction against [a] foreign government was not consonant with international law maxims as they had developed," and that "the Prussian Government would not brook such an action against itself, thereby recognizing it as in contradiction with the law of nations."[90] This view of the law was adopted by German courts in later nineteenth-century cases.[91]

3. Other legal systems

83. Apart from the common law jurisdictions and the civil law systems already examined, the judicial practice of other countries prevailing in the nineteenth century was not so firmly established on the question of jurisdictional immunities of foreign States and their property. Countries belonging to the developing continents such as Africa, Asia and Latin America were preoccupied with other problems. Africa was not composed of many independent sovereign States; peoples were struggling to assert their self-determination and to regain complete political independence. The process of decolonization was not started until much later, after the advent of the United Nations and the adoption by the General Assembly of resolution 1514 (XV) of 14 December 1960.[92] Asia was also partially colonized. The Asian countries that maintained their sovereign independence throughout the nineteenth century and all through their national history did not escape subjection to a so-called "capitulation regime", whereby some measures of extraterritorial rights and powers were recognized in favour of foreign States and their subjects. The question of State immunity was relatively insignificant, since even foreigners were outside the competence of the territorial authorities, administrative or judicial. It was not until well into the present century that extraterritoriality was gradually and ultimately abolished, leaving behind certain trails of misery and injustices in the memories of territorial States which had to endure the regime as long as it lasted.[93] The Latin American continent was com-

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[85] *Pasicrisie belge* (*op. cit.*), pp. 52–53. [Translation by the Secretariat.]

[86] *Giurisprudenza Italiana* (*op. cit.*), pp. 125, 130 *et seq.*

[87] *Il Foro Italiano* (Rome, 1886), vol. I, pp. 920–922, and Corte di Appello, Lucca, *ibid.*, p. 490, decision quoted (trans.) in *Supplement to the American Journal of International Law* (Washington, D.C.), vol. 26, No. 3 (July 1932), part III, "Competence of courts in regard to foreign States", pp. 622–623.

[88] Hamspohn *v.* Bey de Tunisi, Corte di Appello, Lucca (1887) (*Il Foro Italiano* (*Rome*, 1887), vol. I, pp. 485–486; trans. in *Supplement to the American Journal of International Law* (*op. cit.*), pp. 480 *et seq.*). Cf. the decision of the same court in the case Elmilik *v.* Mandataire de Tunis (*La Legge* (Rome, 1887), part II, p. 569; cited in *Journal du droit, international privé* (Clunet) (Paris, 1888) vol. 15, p. 289). The court stated:

> "Treasury bonds issued by a foreign Government... result from an act of mere administration by the Government and not from the exercise of the right of sovereignty." [Translation by the Secretariat.]

[89] The doctrine of State immunity was traceable back to the Prussian General Statute of 6 July 1793, sect. 76, which obliged the courts to notify the Foreign Office whenever the personal arrest of a foreigner of rank was contemplated. A Prussian Order in Council of 14 April 1795 provided for exemption from arrest for German princes as well as foreign princes unless otherwise ordered by a Cabinet Minister. This rule was limited to German princes by the Declaration of 24 September 1798, but was revived by the General Statute of 1815 in respect of foreign princes. See E.W. Allen, *The Position of Foreign States before German Courts* (New York, MacMillan, 1928), pp. 1–3.

[90] *Ibid.*, p. 3.

[91] See for example a decision of the Prussian Superior Court in 1832 and Prussian Order in Council of 1835 (*ibid.*, pp. 4–5).

[92] This resolution is in part an answer to the call made in the final communiqué of the Asian-African Conference in Bandung, 24 April 1955, sect. D, "Problems of Dependent People"; see Indonesia, Ministry of Foreign Affairs, *Asian-African Conference Bulletin*, No. 9 (Jakarta, 1955), p. 2.

[93] See for example A. de Heyking, *L'Exterritorialité* (Berlin, Puttkammer and Muhlbrecht, 1889) and "L'exterritorialité et ses applications en Extrême-Orient", *Recueil des cours..., 1925-II* (Paris, Hachette, 1926), vol. 7, p. 241, as well as V.K.W. Koo, *The Status of Aliens in China* (New York, Columbia University, 1912).

paratively more recent in its emergence as a new continent of thriving independent sovereign nations. Socialist legality was not yet established in Eastern Europe at that time. There were scarcely any reported cases from these countries in the nineteenth century on this particular question of State immunity.

4. Current State practice

84. It should be observed at this point that the principle of State immunity which was formulated in the early nineteenth century and was widely accepted in common law countries as well as in a large number of civil law countries in Europe in that century, has later been adopted as a principle of customary international law on a solid and uncontested basis in the general practice of States. Thus the principle of State immunity continues to be applied, to a lesser or greater extent, in the practice of the countries already examined in connection with its case-law in the nineteenth century, both in common law jurisdictions[94] and in civil law systems in Europe.[95] Its application is consistently followed in other countries. To give an example, the District Court of Dordrecht in the Netherlands, in *F. Advokaat* v. *I. Schuddinck & den Belgischen Staat* (1923), upheld the principle of State immunity in respect of the public service of tugboats. The Court said:

> The principle [of immunity], which at first was recognized in respect of acts *jure imperii* only—has gradually been applied also to cases where a State, in consequence of the continuous extensions of its functions, and in order to meet public needs, has embarked upon activities of a private-law nature;... this extension of immunity from jurisdiction must be deemed to have been incorporated into the law of nations...[96]

85. Another interesting illustration of the current State practice is the recent decision of the Supreme Court of Austria in *Dralle* v. *Republic of Czechoslovakia* (1950), which confirmed the principle of State immunity in respect of *acte jure* imperii. After reviewing judicial decisions of various national courts and other leading authorities on international law, the Court stated that:

> The Supreme Court therefore reaches the conclusions that it can no longer be said that, under recognized international law, so-called *acta gestionis* are exempt from municipal jurisdiction.... Accordingly, the classic doctrine of immunity has lost its meaning and, *ratione cessante*, can no longer be recognized as a rule of international law.[97]

Without, at this stage, attempting to verify the measure or extent of application of the principle of State immunity to various types of activities attributable to foreign States, suffice it to restate that there is clear authority in the established practice of Sates confirming the general acceptance of the principle of State immunity in respect of foreign States and their property.

86. Further illustrations of the current practice of States reconfirming the general acceptance of the principle of State immunity have been furnished by replies received from Governments.[98] Thus, in its ruling of 14 December 1948, Poland's Supreme Court stated:

> The question of jurisdiction by Polish courts over other States cannot be based on provisions of articles 4 and 5 of the Code of Civil Procedure of 1932; a foreign State cannot be considered an alien in the meaning of article 4 of the Code of Civil Procedure nor of the provisions of article 6 of the Code which applies to diplomatic representatives of such a State... In deciding upon the questions of *court immunities* with regard to foreign States, one should base directly on the generally recognized principles accepted in international jurisprudence, outstanding among which is that of reciprocity among States. The principle consists in one State rejecting or granting court immunity to another State to the very same extent as the latter would grant or reject the immunity of the foreigner.[99]

The ruling of the Supreme Court of Poland of 26 March 1958 stipulates that due to customary international practice, whereby bringing summons against one State in the national courts of another State is inadmissible, Polish courts, in principle are not competent to deal with cases against foreign States.[100]

87. Similarly, courts in the Latin American continents have reaffirmed the principle of State immunity.

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[94] See for example the following cases: the *Porto Alexandre* (1920) (United Kingdom, *The Law Reports, Probate Division* (*op. cit.*, 1920), p. 30); the *Christina* (1938) (*idem, The Law Reports, The House of Lords* (*op. cit.*, 1938), p. 485); Compañia Mercantil Argentina *v.* U.S. Shipping Board (1924) (*idem, The Law Journal Reports, King's Bench*, new series, vol. 93, p. 816); Baccus S.R.L. *v.* Servicio Nacional del Trigo (1956) (see footnote 42 above); Berizzi Bros. Co. *v.* S.S. *Pesaro* (1925) (United States of America, *United States Reports: Cases Adjudged in the Supreme Court* (Washington, D.C., U.S. Government Printing Office 1927), vol. 271, p. 562); the United States of Mexico *et al.* *v.* Schmuck *et al.* (1943) (*Annual Digest..., 1943–1945* (London, 1949), case No. 21, p. 75); Isbrandtsen Tankers *v.* President of India (1970) (American Society of International Law, *International Legal Materials* (Washington, D.C.), vol. X, No. 5 (September 1971), pp. 1046–1050).

[95] See for example the following cases: Epoux Martin *v.* Banque d'Espagne (1952) (*Journal du droit international* (Clunet) (Paris). No. 3 (July–September 1953), p. 654; Governo francese *v.* Serra *et al.* (1925) (*Rivista di diritto internazionale* (Rome), vol. IV, series III (1925), p. 540); de Ritis *v.* Governo degli Stati Uniti d'America (1971) (*ibid.* (Milan), vol. LV, No. 3 (1972), p. 483); Luna *v.* Republica Socialista di Romania (1974) (*ibid.*, vol. LVIII, No. 3 (1975), p. 597); Dhelles et Masurel *v.* Banque centrale de la République de Turquie (1963) (*Journal des tribunaux belges*, 19 January 1964, p. 44).

[96] *Weekblad van het Recht* (The Hague), No. 11088 (5 October 1923); *Nederlandse jurisprudentie* (Zwollen, 1924), p. 344; *Annual Digest..., 1923–1924* (London, 1933), case No. 69, p. 133. For a critical note by G. van Slooten, see *Bulletin de l'Institut intermédiaire international* (The Hague, Nijhoff, 1924), vol. X, p. 2.

[97] *Österreichische Juristen Zeitung* (Vienna), No. 14/15 (29 July 1950), case No. 356, p. 341 (included in material submitted by the Austrian Government). See also *International Law Reports 1950* (London), vol. 17 (1956), case No. 41, p. 163, and *Journal du droit international* (Clunet) (Paris), No. 1 (January–March 1950), p. 747.

[98] See *Yearbook... 1979*, vol. II (Part Two), p. 186, document A/34/10, para. 183.

[99] Decision C.635/48: see *Państwo i Prawo* (Warsaw), vol. IV, No. 4 (April 1949), p. 119.

[100] Decision 2 CR.172/56: see *Orzecznictwo Sadów Polskich i Komisji Arbitrazowych* (Warsaw), No. 6 (June 1959), p. 60.

Thus, the Supreme Court of Justice of Chile, by a decision of 3 September 1969, upheld the principle of State immunity, stating that

> it is a universally recognized principle of international law that neither sovereign nations nor their Governments are subject to the jurisdiction of the courts of other countries. There are other extrajudicial means of claiming from those nations and their Governments performance of the obligations incumbent on them.[101]

By a more recent decision of 2 June 1975, in *A. Senerman* v. *República de Cuba*, the Court declined jurisdiction on the ground that:

> foremost among the fundamental rights of States is that of their equality, and from the equality derives the need to consider each State exempt from the jurisdiction of any other State. It is by reason of this characteristic, erected into a principle of international law, that in regulating the jurisdictional activity of different States the limit imposed on this activity, in regard to the subjects, is that which determines that a sovereign State must not be subjected to the jurisdictional power of the courts of another State.[102]

88. The courts of Argentina also accepted the principle of State immunity. In *Baima & Bessolino* v. *el Gobierno de Paraguay* (1915),[103] the court held that a foreign Government cannot be sued in the courts of another country without its consent. In another case, involving the vessel *Cabo Quilates*, requisitioned by the Spanish Government during the Civil War and assigned to the auxiliary naval forces for Government Service, the court, recognizing the sovereign immunity of the Spanish government, observed that it was a fundamental principle of public international law and constitutional law that there could be no compulsion of a State to submit to territorial jurisdiction. The court stated:

> The wisdom and foresight of this rule of public law are unquestionable. If the acts of a sovereign State could be examined by the Courts of another State and could perhaps contrary to the former's wishes be declared null and void, friendly relations between Governments would undoubtedly be jeopardized and international peace disturbed.[104]

89. While recent African decisions have not been widely known or published for the simple reason that the occasion has not arisen for such a decision, Asian courts have had opportunities to express their views on the principle of State immunity. Reported decisions have recently become available from English-speaking Asian countries, following a pattern closely associated with developments in the Anglo-American practice. While there is a certain harmony in the case-law of Commonwealth countries, owing to the possibility, in some cases, of appeal to the Privy Council, a recent collection of the decisions of the Philippine Supreme Court on jurisdictional immunities of the State and its properties[105] is most revealing in the emergence of trends and confirmation of practice closely resembling developments in the United States of America, admitting different circumstances and variations in the judicial reasoning. Thus, in *Larry J. Johnson* v. *Howard M. Turner* (1954),[106] the Court held the action to be really a suit against the Government of the United States acting through its agents and that, because the said Government had not given consent thereto, the trial courts had no jurisdiction to entertain the case. In *Donald Baer* v. *Hon. Tito V. Tizon et al.* (1974),[107] the Court held that a foreign Government acting through its naval commanding officer is immune from suit relative to the performance of an important public function of any government—the defence and security of its naval base in the Philippines under a treaty.

5. General practice of States as evidence of customary law

90. The preceding survey of the judicial practice of common law jurisdictions and civil law systems in the nineteenth century and of other countries in that contemporary period indicates a uniformity in the unchallenged acceptance of the principle of State immunity. While it would be neither possible nor desirable to review the current case-law of all countries which might uncover some discrepancies in historical developments and actual application of the principle,[108] it should be observed that for the countries which know of no reported judicial decisions on the subject, there is no indication that the principle of State immunity as a principle of international law has been or will be rejected. The conclusion is therefore warranted that, in the general practice of States as evidence of customary law, there is not a single doubt that the principle of State immunity has been firmly established as a norm of customary international law. There has been no evidence to the contrary, nor of any modification of the content of such a norm, insofar as the basic principle of immunity is concerned.

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[101] Included in material submitted by the Government of Chile.

[102] *Idem.*

[103] See R.T. Méndez, E. Imaz and R.E. Rey, *Fallos de la Corte Suprema de Justicia de la Nación* (Buenos Aires, Imprenta López), vol. 123, p. 58.

[104] *Ibid.*, vol. 178, p. 173. See also *Annual Digest..., 1938–1940* (*op. cit.*), pp. 293–294.

[105] Information submitted by the Government of the Philippines.

[106] Decision of the Philippines Supreme Court No. L-6118 of 26 April 1954: see *Philippine Reports* (Manila, Bureau of Printing), vol. 94, p. 807.

[107] Decision of the Philippines Supreme Court of 3 May 1974, No. L-24294: see Republic of the Philippines, *Official Gazette* (Manila), vol. 70, No. 35 (2 September 1974), pp. 7361 *et seq.*

[108] For instance, in the case Secretary of the United States of America *v.* Gammon-Layton (1970), an appeal for immunity of a foreign State was dismissed by the Appellate Court of Karachi, which held that sect. 86 of the Code of Civil Procedure, 1908 (Pakistan, Ministry of Law and Parliamentary Affairs, *The Pakistan Code* (Karachi), vol. V (1908–1910) (1966), p. 53) was applicable to foreign rulers and not to foreign States as such, and that it was wrong to hold that the principles of English law had to be followed in the construction of that section (*All-Pakistan Legal Decisions* (Karachi), vol. XXIII (1971), p. 314).

B. Governmental practice

1. The part played by the executive in State practice

91. The practice of States in regard to jurisdictional immunities of foreign States and their property has been gathered mainly from judicial decisions constituting the jurisprudence or case-law of individual nations. As the immunities or exemptions from jurisdiction are accorded to foreign States by the territorial authorities, judicial or administrative, which in so doing have decided not to exercise the power normally vested in them, such decisions are to be found in the records of the courts or the official reports of decided cases more often than in the files or public records of the police or other administrative authorities. On the other hand, in the practice of several countries, the executive branch of the government has undertaken a task or assumed an active part in the process of decision-making by the courts of law. Thus it is not unnatural to enquire further into the governmental practice of States in order to appreciate the overall practice attributed to States as evidence of general custom. This enquiry may reveal an interesting phenomenon. It is not uncommon that, in litigation involving foreign States or Governments, the executive branch of the government of certain States may have a more or less active role to play or may intervene or participate, at one stage or another, in legal proceedings before the Court. The governmental agencies involved in the process could be the Ministry of Foreign Affairs, the Ministry of Justice, the Attorney General's Office, the office of the Director of Public Prosecution, or other like offices of equivalent designation or comparable functions.

92. In some countries, a legal proceeding against a foreign prince is not legally permissible without prior authorization by a Cabinet Minister or by the Government.[109] This requirement of prior governmental authorization is probably attributable to one of the rational bases for State immunity, namely, the fact that the conduct of foreign relations could be jeopardized by uncontrolled or unauthorized proceedings against foreign sovereigns or foreign States. Exercise or assumption of jurisdiction by the territorial court might also, in certain cases, cause political embarrassment for the political branch of the home government.[110] Therefore, the decision which, on the face of it is purely judicial, may have been tainted or influenced by political considerations emanating from the territorial government or its political branch, because the matter may have the potential tendency to affect adversely the conduct of foreign affairs or the Government may run the risk of political embarrassment in international relations as well as in the internal political arena.

2. The forms of participation by the political branch of the Government

93. The executive could participate or intervene in legal proceedings before the territorial court in several ways and at various stages. First, it could do so as regards questions of fact or status, such as the existence of a state of war or peace, the recognition of a foreign State or Government, the official acceptance of the representative character of a delegation or mission, the legal status of an agency or instrumentality of a foreign State or Government, the official text of legal provisions or statutes of a foreign country establishing an entity or incorporating a legal body. Verifications and confirmations of such facts could have a direct bearing on the question of State immunity, whether or not in a given case, a claim of immunity will be upheld or rejected. In the practice of some countries, where the acceptance of a statement of fact by a foreign Government[111] or the determination of the question of status[112] by the executive has been regarded as binding on the courts and decisive as to those facts and status, the courts nevertheless retain jurisdiction to decide other questions left open for determination. Thus, where the executive has sustained the claim of immunity, the courts could decide whether there had been a waiver of immunity, or submission to the jurisdiction on the part of the foreign government.[113]

94. Apart from the determination of the question of fact or of status, the executive could also intervene *amicus curiae*, through a responsible governmental

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[109] See for example the Prussian practice noted in para. 82 above. The practice of Netherlands courts has also been influenced by intermittent interpositions of the executive, either directly or through the legislature. Compare with the Pakistani case Secretary of State of the United States of America *v.* Gammon-Layton (1970) (see footnote 108 above).

[110] For example, the Philippines case Baer *v.* Tizon (1974) noted in para. 89 above. For United States of America cases, see United States of Mexico *et al. v.* Schmuck *et al.* (1943) (see footnote 94 above); *Ex parte* Republic of Peru (United States of America, *United States Reports* (Washington, D.C., U.S. Government Printing Office, 1943), vol. 318, p. 578); the *Beaton Park* (1946) (*Annual Digest..., 1946* (London, 1951), case No. 35, p. 83); the *Martin Behrman* (1947) (*ibid., 1947* (London, 1951), case No. 26, p. 75); and Isbrandtsen Tankers *v.* President of India (1970) (see footnote 94 above).

[111] See for example the American Tobacco Co. *v.* the *Ioannis P. Goulandris* (1941) (United States of America, *Federal Supplement, District Court of New York* (St. Paul, Minn., West Publishing, 1942), vol. 40).

[112] See for example the case of E. W. Stone Engineering Co. *v.* Petróleos Mexicanos (1954), in which the court declared:

> "A determination by the Secretary of State with respect to the status of such instrumentalities is as binding on the courts as is his determination with respect to the foreign government itself." (*Annual Digest..., 1946* (*op. cit.*), case No. 31, p. 78.)

See also the case United States *v.* Pink *et al.* (United States of America, *United States Reports* (Washington, D.C., U.S. Government Printing Office, 1942), vol. 315, p. 203). For British cases, see for example Krajina *v.* The Tass Agency and Another (footnote 42 above): Compañia Mercantil Argentina *v.* U.S.S.B. (footnote 94 above); and Baccus S.R.L. *v.* Servicio Nacional del Trigo (1957) (footnote 42 above).

[113] See for example the case United States of Mexico *et al.*, *v.* Schmuck *et al.* (see footnote 94 above) and Ulen's Co. *v.* Bank Gospodarstwa Krajowego (1940) (*Annual Digest..., 1938–1940* (*op. cit.*), case No. 74, pp. 214–215).

agency such as the legal adviser or the attorney-general, by making a suggestion to the effect that in a given case immunity should be accorded or denied. It is a matter of considerable controversy whether the judicial authority would necessarily follow a positive or negative suggestion from the executive. The weight of persuasiveness of such a suggestion very much depends on the prevailing attitude of the court at the material time.[114]

95. Since the judiciary is normally, in principle as well as in practice, independent of the executive in matters of adjudication, due to the doctrine of separation of powers,[115] it appears that the courts are not always bound to follow the lead of the executive in every case. If the executive suggests that immunity should be accorded, the courts are likely to follow suit,[116] although not in every conceivable instance.[117] If, however, the political branch of the government chooses to suggest that no immunity was justifiable, the courts could still grant jurisdictional immunity, not out of wilful disregard, but in principle, to assert their constitutional independence from other branches of the government, if indeed not their supremacy.[118]

96. The hesitations entertained by the courts in regard to "suggestions" made by the executive through the Attorney-General or other officials acting under the direction of an analogous agency, have led the executive to assume a more prominent part in the process of decision-making. It is true that the executive branch of the government may recognize or allow a claim of immunity which the courts are bound to follow, and all questions connected with the claim of immunity cease to be judicial when the executive has authoritatively recognized the claim of immunity.[119] The courts are not always enthusiastic about following the lead of the political branch of the government.[120] Thus, whenever the necessity arises, the executive could always resort to a more radical means to ensure its leading role in this particular connection. It could make a declaration of a general policy regarding the application of the principle of State immunity, for instance, by imposing some restrictions or limitations.[121] It could also advise the State to become party to an international or regional convention on State immunities that would oblige the judicial authorities to observe the new trends.[122] It could also introduce or cause to be adopted a legislation more in line with the general direction in which it considers international law to be progressively developing.[123]

97. The political branch of the government may indeed have a more or less significant part to play in the formation of the practice of a given State in regard to the granting of jurisdictional immunities to foreign States. On the other hand, it is the executive branch of the government that makes a decision whether, in a given case involving its own State or government or agency or instrumentality or property, it will assert a claim of immunity, including the time at which and the form in which such assertion will take place. The claim of State immunity is often made through diplomatic or

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[114] See for example the cases Miller *et al. v.* Ferrocarril del Pacífico de Nicaragua (1941) (*Annual Digest..., 1941–1942* (*op. cit.*), case No. 51, p. 191); United States of Mexico *et al. v.* Schmuck *et al.* (see footnote 94 above); E.W. Stone Engineering Co. *v.* Petróleos Mexicanos (see footnote 112 above). See also A.B. Lyons, "The conclusiveness of the 'suggestion' and certificate of the American State Department", *The British Year Book of International Law, 1947* (London), vol. 24, p. 116.

[115] See Montesquieu, *De l'Esprit des lois.*

[116] See for example Chief Justice Stone's statement in the case Republic of Mexico *et al. v.* Hoffman (1945):

> "It is therefore not for the courts to deny an immunity which our Government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." (United States of America, *United States Reports*, vol. 324 (Washington, D.C., U.S. Government Printing Office, 1946), p. 35.)

Cf. *Ex parte* Republic of Peru (see footnote 110 above).

[117] See for example Secretary Lansing's letter of 8 November 1918 (file 195/229a); the refusal of the Attorney General to adopt the Secretary's suggestion (file 195/230); and Mr. Nielson's letter to Mr. Justice Mack of 2 August 1921 (file 800).

[118] The United States Supreme Court deliberately refused to adopt the suggestion of the executive that immunity should not be accorded to vessels employed by a foreign government in commercial operations. Compare the attitude of the Department of Justice as reflected in Mr. McGregor's letter of 25 November 1918 (Attorney General File 190/230).

[119] See for example the cases United States of Mexico *et al. v.* Schmuck *et al.* (see footnote 94 above) and *ex parte* Republic of Peru (see footnote 110 above).

[120] See for example the case Republic of Mexico *et al. v.* Hoffman (footnote 116 above); see also Lyons, *loc. cit.* Cf. the role played by the various Secretaries of State of the United Kingdom in regard to questions of status of foreign sovereigns, as, for example, in the cases Duff Development Co. Ltd. *v.* Government of Kelantan and another (see footnote 38 above, *in fine*) and Kahan *v.* Pakistan Federation (see footnote 34, *in fine*).

[121] See for example a letter of 19 May 1952 in which J.B. Tate, Acting Legal Adviser to the United States of America Department of State, wrote:

> "It will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity." (United States of America, *Department of State Bulletin* (Washington, D.C.), vol. XXVI, No. 678 (23 June 1952), p. 985.)

See also W.W. Bishop, Jr., "New United States policy limiting sovereign immunity", *The American Journal of International Law* (Washington, D.C.), vol. 47, No. 1 (January 1953), pp. 93 *et seq.*

[122] For example, the 1972 European Convention on State Immunity: see Council of Europe, *Explanatory Reports on the European Convention on State Immunity and the Additional Protocol* (Strasbourg, 1972). See also I.M. Sinclair, "The European Convention on State Immunity", *International and Comparative Law Quarterly* (London), vol. 22 (April 1973), part 2, pp. 254 *et seq.*

[123] For example, the United States *Foreign Sovereign Immunities Act of 1976* (see footnote 33 above). See also T. Atkeson, S. Perkins and M. Wyatt, "H.R. 11315—The revised State-Justice bill on foreign sovereignty immunity: Time for action", *The American Journal of International Law* (Washington, D.C.), vol. 70, No. 2 (April 1976), pp. 298 *et seq.*, and the British *State Immunity Act 1978* (see footnote 33 above), which came into force on 22 November 1978, preceding the ratification by the United Kingdom of the European Convention of 1972.

consular agents accredited to the territorial State in which legal proceedings have been instituted involving the foreign State.[124] It is also possible in certain jurisdictions to assert such claims through diplomatic channels and, ultimately, via the Ministry of Foreign Affairs of the territorial State.[125]

3. The influence of governmental practice

98. There are many different forms that participation by the political branch of the government can take in assuring communication or compliance of its views and, occasionally, in ensuring its lead in matters affecting the conduct of foreign relations, including, inevitably, legal proceedings against foreign States which could entail political embarrassments. The views of the government expressed through its political branch are highly relevant and indicative of general trends in the practice of States. While legal developments in the field of judge-made law may be slow, and not receptive to radical changes, the lead taken by the government could be decisive in bringing about desirable legal developments through forceful assertion of its positions or through the intermediary of the legislature, or by way of governmental acceptance of principles contained in an international convention. Conversely, the government is clearly responsible for its decision to assert a claim of State immunity in respect of itself and its property, or to consent to the exercise of jurisdiction by the court of another State, or to waive its sovereign immunity in a given case. That the government can exert a considerable influence over legal developments in this field, both as grantor and as recipient of immunity in State practice, therefore cannot be gainsaid. As will be seen in the ensuing paragraphs concerning national legislation and international conventions, the role of the executive in introducing bills or draft laws on State immunity,[126] in securing passage of such bills through parliament,[127] and its decision in engaging governmental responsibility by signing and ratification of an international convention on the subject[128] will clearly reflect its substantial contribution to the progressive development of State practice and, ultimately, of principles of international law governing State immunity.

C. National legislation

99. As has been seen, the principle of State immunity was first recognized in judicial decisions of municipal courts. The practice of States has been more preponderantly established and followed by the courts, although its subsequent growth has received some impetus from the executive branch of the Government. Direct contribution from the legislature to legal department in this field has been a relatively recent occurrence. It is nevertheless not without significance to note that national legislation constitutes an important element in the overall concept of State practice. It is clearly a convenient measure, a decisive indication as to the substantive content of the law and also of the actual practice of States.

1. Special legislation on State immunity

100. An instance of legislation that deals directly with the topic under consideration is the United States of America's *Foreign Sovereign Immunities Act* of 1976. Section 1604 reconfirms the principle of sovereign immunity or immunity of a foreign State from jurisdiction, as it is entitled. It provides:

> Subject to existing international agreements, to which the United States is a party at the time of enactment of this Act a foreign State shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.[129]

101. A still more recent leglislation on the subject is the United Kingdom *State Immunity Act, 1978*. Article 1, entitled "Immunity from Jurisdiction", provides:

> 1. (1) A State is immune from jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this part of this Act.
>
> (2) A court shall give effect to the immunity conferred by this Section even though the State does not appear in the proceedings in question.[130]

102. The United Kingdom, having adopted the State Immunity Act 1978, proceeded to ratify the European Convention on State Immunity (1972), which it had

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[124] See for example the cases Krajina *v.* The Tass Agency and another (footnote 42 above); Compañia Mercantil Argentina *v.* U.S.S.B. (footnote 94 above); and Baccus S.R.L. *v.* Servicio Nacional del Trigo (footnote 42 above), and also Civil Air Transport Inc. *v.* Central Air Transport Corp. (1953) (United Kingdom, *The Law Reports, House of Lords*... (*op. cit.*, 1953), p. 70), and Juan Ysmael and Co. *v.* Government of the Republic of Indonesia (1954), (*idem., The Weekly Law Reports, House of Lords*... (London, 1954), vol. 3, p. 531).

[125] See for example Isbrandtsen Tankers *v.* President of India (see footnote 94 above), where the United States of America Department of State had presented a written suggestion of immunity. Contrast the case Comisaría General de Abastecimientos y Transportes *v.* Victory Transport Inc. (1965) (United States of America, *Federal Reporter*, St. Paul, Minn., West Publishing, 1965), 2nd series, vol. 336, p. 354).

[126] See for example Atkeson, Perkins and Wyatt, *loc. cit*, and United States of America, *94th Congress, 2nd Session, Senate Reports*, vol. 1–11 (Washington D.C., U.S. Government Printing Office, 1976), Report No. 94-1310. This bill (H.R.11315) came into effect in the United States on 19 January 1977.

[127] See for example the British State Immunity Act 1978 mentioned in footnote 33 above.

[128] See for example the European Convention on State Immunity which is in force between Austria, Belgium, Cyprus and the United Kingdom (see footnote 33 above). The Federal Republic of Germany, Luxembourg, the Netherlands and Switzerland have signed the Convention. The Additional Protocol is not yet in force.

[129] United States of America, *United States Statutes at Large, 1976* (Washington, D.C., U.S. Government Printing Office, 1978), vol. 90, part 2, Public Law 94-583, pp. 2891–2892; *idem, United States Code, 1976 Edition* (*op. cit.*) chap. 97, sect. 1604.

[130] For reference, see footnote 33 above.

earlier signed. Other countries which have ratified the Convention have likewise made appropriate declarations or passed legislation giving effect to the provisions of the Convention. For instance, Austria, a signatory to the Covention, has adopted the following legislative measures:

(*a*) Austrian declaration in accordance with article 28, paragraph 2, of the European Convention;[131]

(*b*) Federal law of 3 May 1974 concerning the exercise of jurisdiction in accordance with article 21 of the Convention;[132]

(*c*) Declaration of the Republic of Austria in accordance with article 21, paragraph 4, of the Convention.[133]

103. Belgium is another country that has adopted similar legislation to facilitate the implementation of the provisions of the European Convention.[134]

2. General laws on jurisdiction of courts

104. Apart from special legislation on State immunity, there are legislative provisions in various statutes and basic laws generally dealing with questions of jurisdiction or competence of the courts, or general regulations concerning suits against foreign States. A typical example is the provision of article 61 of a Soviet Act entitled "Fundamentals of Civil Procedure in the Soviet Union and the Union Republics, 1961", which reads (para. 1):

Actions against foreign States: Diplomatic immunity

The filing of a suit against a foreign State, the collection of a claim against it and the attachment of its property located in the USSR may be permitted only with the consent of the competent organs of the State concerned...[135]

105. This act, confirming the principles of State immunity, of diplomatic immunity and of consent, introduces in the third paragraph of the same article an important condition based on reciprocity in practice with the possibility of recourse to countermeasures of a retaliatory character.[136]

106. As earlier noted, the principle of State immunity has been established in several countries as a result of judicial interpretation or application of legal provisions, such as the restrictive application of article 14 of the French Code Civil[137] or articles 52 and 54 of the Belgian Civil Code,[138] resulting in non-exercise of territorial jurisdiction.

107. On the other hand, the appropriate laws of many countries may contain provisions exempting some categories of privileged persons such as foreign sovereigns,[139] foreigners of rank,[140] or rulers of foreign States.[141]

3. Laws on specific aspects of State immunity

108. Without at this stage going into details of specific aspects of State immunity or the immunity accorded to certain types of property owned, possessed or controlled or in the employment of a foreign State, such as aircraft and vessels, it is interesting to note that, in some countries, laws have been passed dealing specifically with certain specialized aspects of State immunities. The United States Public Vessels Act of 1925,[142] with its provisions on vessels

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[131] "The Republic of Austria declares, according to Article 28, paragraph 2 of the European Convention on State Immunity that its constituent States Burgenland, Carinthia, Lower Austria, Upper Austria, Salzburg, Styria, Tyrol, Vorarlberg and Vienna may invoke the provisions of the European Convention on State Immunity applicable to Contracting States, and have the same obligations." (Austria, *Bundesgesetzblatt für die Republik Österreich* (Vienna), No. 128 (18 August 1976), document No. 432, p. 1840.)

[132] *Ibid.*, document No. 433, p. 1840.

[133] *Ibid.*, No. 47 (5 May 1977), document No. 173, p. 711.

[134] See for example the Belgian declaration: "In accordance with Article 21, the Belgian Government designates the court of first instance as competent to determine whether the Belgian State must give effect to a foreign judgement."

[135] Law of 8 December 1961 of the USSR (*Sbornik zakonov SSSR i ukazov Prezidiuma Verkhovnogo Soveta SSSR 1938–1975* [Compendium of laws of the USSR and of decrees of the Presidium of the Supreme Soviet of the USSR, 1938–1975] (Moscow, Izvestia Sovetov Deputatov Trudiashchikhsia SSR, 1976), vol. 4, p. 53).

[136] That paragraph reads:

"Where a foreign State does not accord to the Soviet State, its representatives or its property the same judicial immunity which, in accordance with the present article, is accorded to foreign States, their representatives or their property in the USSR, the Council of Ministers of the USSR or other authorized organ may impose retaliatory measures in respect of that State, its representatives or the property of that State" (*ibid.*, pp. 53–54).

[137] See for example Blanchet *v.* République d'Haiti, mentioned in para. 78 above.

[138] See for example Société générale pour favoriser l'industrie nationale *v.* Syndicat d'amortissement, mentioned in para. 80 above.

[139] See for example the requirement of prior governmental authorization for legal proceedings against foreign princes, under Prussian legislation (see para. 82 above).

[140] For example, the Royal Decree of the Netherlands of 29 May 1917 (Government of the Netherlands, *Staatsblad van het Koninkrijk der Nederlanden*, (The Hague), No. 446 (6 June 1917)), and Netherlands practice as noted in para. 84 above.

[141] For example, sect. 86 of the Code of Civil Procedure of Pakistan upholding the immunity of foreign rulers as distinguished from foreign States (see footnote 108 above).

[142] See United States of America, *The Statutes at Large of the United States of America from December, 1923, to March, 1925* (Washington D.C., U.S. Government Printing Office, 1925), vol. 43, part 1, chap. 428, sects. 1, 3 and 5, pp. 1112–1113; *idem, United States Code Annotated, Title 46, Shipping, Sections 721 to 1100* (St. Paul, Minn., West Publishing, 1975), sects. 781–799); see also sect. 9 of the *United States Shipping Act, 1916* (*idem, The Statutes at Large... from December 1915 to March 1917* (*op. cit.*, 1917), vol. 39, part 1, chap. 451, pp. 728, 730 and 731), noted in Hackworth *op. cit.*, vol. II, p. 431), which provides that vessels purchased, chartered or leased from the United States Shipping Board, while employed solely as merchant vessels, "shall be subject to all laws, regulations and liabilities

(*Continued on next page.*)

employed solely as merchant vessels, may be cited as an example of such legislation. It should also be noted that by 1938 thirteen States had deposited their instruments of ratification of the International Convention for the Unification of certain Rules relating to the Immunity of State-owned vessels (Brussels), 1926) and its Additional Protocol (1934),[143] and that many countries have since adopted national legislation to implement the provisions of the Convention.[144] The United Kingdom is among the latest that have just introduced legislation on the subject.[145]

109. Other laws have been adopted by various countries following ratifications or acceptance or adhesion to a number of international conventions on diplomatic and consular relations which, as will be seen, have enabled States to fulfil their obligations under the conventions they have signed and ratified or otherwise accepted.[146]

D. International conventions

110. As has been noted in the preliminary report on the topic,[147] international conventions have a decisive role to play in the final stages of international legal developments in the field of jurisdictional immunities of States as well as in other fields of international law. Without analysing the substantive contents of each convention that may have a more or less direct bearing on the principle of State immunity, suffice it to note the conclusion and general direction of such conventions, and whenever specific provisions are appropriately relevant to cite them *in extenso* without additional comments.

1. Conventions on State immunity

111. As there are at present no general conventions of a universal character directly on State immunities and the present study is designed to contribute towards the adoption of such an international instrument, conventions of narrower scope in geographical application and in membership may deserve particular attention. In this connection, the European Convention on State Immunity (1972) has a direct bearing on the point under current consideration. The last article of chapter I, "Immunity from jurisdiction", contains the following provision:

Article 15

A Contracting State shall be entitled to immunity from the jurisdiction of the courts of another Contracting State if the proceedings do not fall within Articles 1 to 14; the court shall decline to entertain such proceedings even if the State does not appear.[148]

2. International conventions relevant to some aspects of State immunity

112. The current treaty practice of States indicates the application of provisions of several conventions of universal character dealing with some special aspects of State immunity. The following instruments have been noted:

(*a*) The Geneva Conventions on the Law of the Sea of 1958, notably the Convention on the Territorial Sea and Contiguous Zone[149] and the Convention on the High Seas, [150] which contain provisions confirming the principle of State immunity in respect of warships and State-owned ships employed in governmental and non-commercial service in certain circumstances.

(*b*) The 1961 Vienna Convention,[151] which contains an endorsement of the principle of State immunity in respect of State property used in connection with diplomatic missions.

(*c*) The 1963 Vienna Convention,[152] which contains corresponding provisions partially covering the immunities of State property used in connection with consular missions.

(*d*) The Convention on Special Missions (1969),[153] which also treats in part some aspects of State

(*Footnote 142 continued.*)

governing merchant vessels". This must in turn be read subject to sect. 7 of the *Suits in Admiralty Act, 1920* (United States of America, *The Statutes at Large... from May, 1919, to March, 1921*, vol. 41, chap. 95, pp. 525 and 527; *idem, United States Code Annotated...* (*op. cit.*), sects. 741–752) and *Special Instruction, Consular No. 722, 21 May 1920, U.S. Department of State* file 195/283; and the enquiry made by the United Kingdom Ambassador as to the interpretation of sect. 7 (file 195/482) and the reply thereto (file 195/503): Hackworth, *op. cit.*, vol. II, pp. 434 and 441. See also Gregory's letter of 25 November 1918 (file 195/230 of the Attorney General) refusing to accept the suggestion of Secretary of State Lansing (file 195/229a) (*ibid.*, p. 430).

[143] League of Nations, *Treaty Series*, vol. CLXXVI, pp. 199 and 214. See Hackworth, *op. cit.*, vol. II, p. 465.

[144] For example, the Swedish law implementing the International Convention of 1926 (see footnote 143 above), as applied in the *Rigmore* case (1942) (*The American Journal of International Law* (Washington, D.C.), vol. 37, No. 1 (January 1943), p. 141, and *Annual Digest..., 1941–1942* (*op. cit.*), Case No. 63, p. 240). Compare the Norwegian cases such as the *Frederikstad* (*Norsk Retstidende 1949* (Olso), 114th year, p. 881, and *International Law Reports* (London, 1956), Case No. 42, p. 167).

[145] United Kingdom, *International Convention for the Unification of certain Rules concerning the Immunity of State-owned Ships (Brussels, 10 April 1926, with Supplementary Protocol, Brussels, 24 May 1934)*, Cmnd. 7800 (London, H.M. Stationery Office, 1980). The legislation entered into force on 3 January 1980.

[146] See sect. D below.

[147] *Yearbook... 1979*, vol. II (Part One), pp. 236–237, document A/CN.4/323, paras. 39–43.

[148] See Council of Europe, *Explanatory Reports...* (*op. cit.*), p. 53 (article) and p. 22 (commentary). See also footnotes 122 and 128 above.

[149] See footnote 57 above (art. 22).

[150] See footnote 57 above.

[151] See footnote 21 above (art. 22, on the inviolability of premises; art. 24, on archives and documents; art. 27, on communications).

[152] See footnote 48 above.

[153] See footnote 49 above.

immunity in respect of property used in connection with special missions.

(*e*) The 1975 Vienna Convention,[154] which contains appropriate provisions maintaining the immunities of State property used in connection with the premises, offices or missions of the representatives of States in their relations with international organizations with headquarters in the territory of a host country.

3. Regional conventions

113. Apart from bilateral arrangements which have played an important part in the development of treaty practice of some States in some specialized fields, there are now currently in force, mainly in Europe, the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels and its Additional Protocol of 1934.[155] The Convention is significant as living testimony of treaty endorsement of the principle of State immunity as applied to State-owned or State-operated vessels employed exclusively in governmental and non-commercial service.[156]

E. International adjudication

114. While municipal jurisprudence abounds with decisions indicating general acceptance of the principle of State immunity in the practice of States, there appears to be complete silence on the part of international adjudication, either arbitration or judicial settlement. This singular absence of international judicial pronouncement is no evidence of the principle not being subject to regulation by international law, any more than diplomatic and consular immunities as enshrined in the Vienna Conventions of 1961 and 1963,[157] which received little or no international judicial endorsement until this year in the case between the United States of America and Iran.[158]

[154] See footnote 50 above (arts. 54, 56 and 58).

[155] See footnote 143 above. See also J.W. Garner, "Legal status of Government ships employed in commerce", *The American Journal of International Law* (Washington, D.C.) vol. 20, No. 4 (October 1926), p. 759.

[156] See art. 3, para. 1 of the Convention:

"The provisions of the two preceding Articles shall not be applicable to ships of war, Government yachts, patrol vessels, hospital ships, auxiliary vessels, supply ships, and other craft owned or operated by a State, and used at the time a cause of action arises exclusively on governmental and non-commercial service, and such vessels shall not be subject to seizure, attachment or detention by any legal process, nor to judicial proceedings *in rem*." (League of Nations, *Treaty Series*, vol. CLXXVI, p. 207.)

[157] See footnotes 21 and 48 above.

[158] See United States Diplomatic and Consular Staff in Tehran, Judgment: *I.C.J. Reports*, p. 3.

F. Opinions of writers

115. The principle of State immunity has been widely upheld in the writings of publicists of the nineteenth century, almost without reservation or qualification of any description. Among earlier writers who have propounded a doctrine of State immunity could be mentioned Gabba,[159] Lawrence.[160] Bluntschli,[161] Chrétien[162] and the authorities referred to by de Paepe.[163] Later publicists advancing an equally strict theory of State immunity include Nys,[164] de Louter,[165] Kohler,[166] Westlake,[167] Cobbett,[168] van Praag,[169] Anzilotti,[170] Provinciali,[171] Fitzmaurice[172] and Beckett.[173]

[159] C.F. Gabba, "De la compétence des tribunaux à l'égard des souverains et des Etats étrangers", *Journal du droit international privé* (Clunet) (Paris), vol. XV, No. III–IV (1888), p. 180; *ibid.*, vol. XVII, No. I–II (1890), p. 27.

[160] W.B. Lawrence, *Commentaire sur les éléments du droit international et sur l'histoire des progrès du droit des gens, de Henry Wheaton* (Leipzig, Brockhaus, 1873), vol. 3, p. 420.

[161] J.G. Bluntschli, *Le droit international codifié* (Paris, Alcan, 1895), art. 139, p. 124.

[162] A. Chrétien, *Principes de droit international public* (Paris, Chevalier-Marescq, 1893), p. 247.

[163] P. de Paepe, "De la compétence civile à l'égard des Etats étrangers et de leurs agents politiques, diplomatiques ou consulaires", *Journal du droit international privé* (Clunet) (Paris), vol. 22, No. I–II (1895), p. 31.

[164] E. Nys, *Le droit international* (Brussels, Weissenbruch, 1912), t. I, vol. II, pp. 340 *et seq.*

[165] J. de Louter, *Het stellig volkenrecht* (The Hague, Nijhoff, 1910), part I, pp. 246–247.

[166] J. Kohler, "Klage und Vollstreckung gegen einen fremden Staat", *Zeitschrift für Volkerrecht* (Breslau, 1910), vol. IV, pp. 309 *et seq.*; see also P. Laband, "Rechtsgutachten im Hellfeld-fall", *ibid.*, pp. 334 *et seq.*

[167] J. Westlake, *A Treatise on Private International Law*, 6th ed. (London, Sweet and Maxwell, 1922), sects. 190–192, pp. 256 *et seq.*

[168] P. Cobbett, *Cases on International Law*, 6th ed. (London, Sweet and Maxwell, 1947), vol. I, pp. 102–104.

[169] L. van Praag, *Juridiction et droit international public* (The Hague, Belinfante, 1915); "La question de l'immunité de juridiction des Etats étrangers et celle de la possibility de l'exécution des jugements qui les condamnent", *Revue de droit international et de législation comparée* (Brussels), vol. XV, No. 4 (1934), p. 652; *ibid.*, vol. XVI, No. 1 (1935), pp. 100 *et seq.* (see especially pp. 116 *et seq*).

[170] D. Anzilotti, "L'esenzione degli stranieri dalla giurisdizione", *Rivista di diritto internazionale* (Rome), vol. V (1910), pp. 477 *et seq.*

[171] R. Provinciali, *L'immunità giurisdizionale degli stati stranieri* (Padua, Milani, 1933), pp. 81 *et seq.*

[172] G. Fitzmaurice, "State immunity from proceedings in foreign courts", *The British Year Book of International Law, 1933* (London), pp. 101 *et seq.*

[173] See the observation by Beckett in *Annuaire de l'Institut de droit international, 1952-I* (Basel), vol. 44, p. 54, that:

"the amount of State immunity accorded by the English courts at present is somewhat wider than is required by the principles of public international law and is perhaps wider than is desirable".

For a review of authorities before 1928, see C. Fairman, "Some disputed applications of the principle of State immunity", *The American Journal of International Law* (Washington D.C.), vol. 22, No. 3 (July 1928), pp. 566 *et seq.*

116. On the other hand, even at the outset, another theory of State immunity has received some adherence in the writings of early publicists such as Heffter,[174] Gianzana,[175] Rolin,[176] Laurent,[177] Dalloz,[178] Spée,[179] von Bar,[180] Fauchille,[181] Pradier-Fodére,[182] Weiss,[183] de Lapradelle,[184] Audinet[185] and Fiore.[186] This view of State immunity was reflected in the resolution of the Institut de droit international in 1891.[187]

117. Contemporary writers are favourably inclined towards a less unqualified principle of State immunity.[188] A few publicists have gone to the length of denying the sound foundation of State immunity in international law but view it as emanating from the notion of "dignity", which cannot continue as a rational basis of immunity.[189]

118. An opinion which may be said to give an accurate and lucid description of the principle of State immunity is probably that given by Judge Hackworth, as follows:

> The principle that, generally speaking, each sovereign state is supreme within its own territory and that its jurisdiction extends to all persons and things within that territory is, under certain circumstances, subject to exceptions in favour particularly of foreign friendly sovereigns, their accredited diplomatic representatives... and their public vessels and public property in the possession of and devoted to the service of the state. These exemptions from the local jurisdiction are theoretically based upon the *consent*,* express or implied, of the local state, upon the principle of *equality of states** in the eyes of international law, and upon the necessity of yielding the local jurisdiction in these respects as an indispensable factor in the conduct of friendly intercourse between members of the family of nations. While it is sometimes stated that they are based upon international comity or courtesy, and while they doubtless find their origin therein, they may now be said to be based upon generally accepted custom and usage, i.e., international law.[190]

II. *Rational bases of State immunity*

119. The preceding review of historical and legal developments of the principle of State immunity appears to furnish ample proof of the solid foundations of the principle as a general norm of international law. The rational bases of State immunity could be stated in many different ways, some of which are more cogent than others.

A. The principles of the sovereignty, independence, equality and dignity of States

120. The most convincing arguments in support of the principle of State immunity can be found in international law as evidenced in the usages and practice of States, expressed in terms of the sovereignty, independence, equality and dignity of States. All these notions seem to coalesce, together constituting a firm international legal basis for sovereign immunity. State immunity is derived from sovereignty. Between two co-equals, one cannot exercise sovereign will or authority over the other: *par in parem imperium non habet.*[191]

B. Historical explanation: analogy with the local sovereigns

121. Another rational explanation is based on historical development of the analogy with the immuni-

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[174] A.W. Heffter, *Das europäische Völkerrecht der Gegenwart auf den bisherigen Grundlagen*, 7th ed. (Berlin, Schroeder, 1881), p. 118.

[175] S. Gianzana, *Lo straniero nel diritto civile italiano* (Turin, Unione tipografico-editrice torinese, 1884), vol. I, p. 81.

[176] A. Rolin, *Principes de droit international privé* (Paris, Chevalier-Marescq, 1897), vol. I, pp. 212–213.

[177] F. Laurent, *Le droit civil international* (Brussels, Bruylant-Christophe, 1881), vol. III, p. 44.

[178] De Paepe, *loc. cit.*

[179] G. Spée, "De la compétence des tribunaux nationaux à l'égard des gouvernements et des souverains étrangers", *Journal du droit international privé* (Clunet) (Paris), vol. 3, No. IX–X (September–October 1876), pp. 329 *et seq.*

[180] L. von Bar, "De la compétence des tribunaux allemands pour connaître des actions intentées contre les gouvernements et les souverains étrangers", *ibid.*, vol. XII, No. XI–XII (November–December 1885), p. 645; *Das internationale Privat- und Strafrecht* (Hannover, Hahn, 1862), vol. II, pp. 412 and 502; *Theorie und Praxis des internationalen Privatrechts* (Hannover, Hahn, 1889), vol. II, pp. 660 *et seq.*

[181] H. Bonfils, *Manuel de droit international public*, 7th ed., rev. by P. Fauchille (Paris, Rousseau, 1914), p. 169, No. 270.

[182] P. Pradier-Fodéré, *Traité de droit international public* (Paris, Durand et Pedone-Lauriel, 1887), vol. III, Case No. 1589, p. 514.

[183] A. Weiss, *Traité théorique et pratique de droit international privé* (Paris, Sirey, 1913), vol. V, pp. 94 *et seq.*

[184] A. de Lapradelle, "La saisie des fonds russes à Berlin", *Revue de droit international privé et de droit pénal international* (Paris), vol. 6 (1910), pp. 75 *et seq.* and 779 *et seq.*

[185] E. Audinet, "L'incompétence des tribunaux français à l'égard des Etats étrangers et la succession du Duc de Brunswick", *Revue générale de droit international public* (Paris), vol. II (1895), p. 385.

[186] P. Fiore, *Nouveau droit international public* (Paris, Durand et Pedone-Lauriel, 1885), vol. I, Case No. 514, pp. 449 *et seq.*

[187] *Annuaire de l'Institut de droit international, 1891–1892* (Brussels), vol. 11 (1892), pp. 436 *et seq.*

[188] See for example P.B. Carter, "Immunity of foreign sovereigns from jurisdiction: Two recent decisions", *International Law Quarterly* (London), vol. 3, No. 1 (January 1950), pp. 78 *et seq.*, and *ibid.*, No. 3 (July 1950), pp. 410 *et seq.* See also, in footnote 173 above, the observation by Beckett; and W.H. Reeves, "Good fences and good neighbours: Restraints on immunity of sovereigns", *American Bar Association Journal* (Chicago), vol. 44, No. 6 (June 1958), pp. 521–524 and 591–593.

[189] See for example H. Lauterpacht, "The problem of jurisdictional immunities of foreign States", *The British Year Book of International Law, 1951* (London), vol. 28, pp. 220 *et seq.* (in particular, pp. 226–236).

* Emphasis added by the Special Rapporteur.

[190] Hackworth, *op. cit.*, vol. II, chap. VII, p. 393, para. 169. Compare with the statement of Chief Justice Marshall in the case The Schooner *Exchange v.* McFaddon and others (see para. 75 above).

[191] See above (para. 75) the language used by Chief Justice Marshall in the case The Schooner *Exchange v.* McFaddon and others; compare Hackworth (para. 118 above). See also The *Parlement belge* and Brett's analysis in para. 69 above; also the case Gouvernement espagnol *v.* Casaux (see footnote 81 above).

ties of the local sovereign.[192] This is peculiar to common law countries and is sometimes expressed in the proposition that member States of a federal union. while still possessing attributes of sovereignty, are immune from suits. An entity which is the fountain of right cannot be impleaded in its own courts.[193] This principle is also designed to ensure harmonious relations between the federal union and its member States.

C. Relevance of diplomatic immunities

122. If ambassadors and diplomatic agents are accorded immunities under international law in their capacity as representatives of foreign States or foreign sovereigns, *a fortiori* the States or the sovereigns they represent should be entitled to no lesser a degree of favoured treatment. Immunities belong to a category of favourable treatment. Diplomatic immunities may be said to have given an added reason for State immunities. It is true that in the practice of States the immunities of ambassadors had been well-established before those of States, and that diplomatic immunities are functional in foundation; yet the two concepts are not totally unrelated. Diplomatic immunity is accorded not for the benefit of the individual, but for the benefit of the State in whose service he is. There is no immunity if the diplomat ceases to represent a sovereign State.[194]

D. Reciprocity, comity of nations, international courtesy or political embarrassment in international relations

123. Political expediency or consideration of good international relations has sometimes been advanced as a subsidiary or additional reason for recognition of State immunity. Reciprocity of treatment, *comitas gentium* and *courtoisie internationale* are very closely allied notions, which contribute in some measure to further enhance the basis of State immunity. Thus Chief Justice Marshall, in *The Schooner "Exchange" v. McFaddon and others*, invoked the concept of "mutual benefit in the promotion of intercourse and an exchange of good offices dictated by humanity",[195] while Brett, in the "*Parlement belge*" case, referred to State immunity as a "consequence of the absolute independence of every sovereign authority, and of the *international comity* which induces every sovereign State to respect the independence and dignity of every other sovereign State".[196]

124. Closely related to the notion of comity of nations is its ancillary rule that in the conduct of international relations the courts of law should refrain from passing judgement or exercising jurisdiction which would embarrass the political arm of the Government, especially in areas that are better reserved for political negotiations.[197] Avoidance of political embarrassment in international relations or disturbance of international peace provides a clear additional basis for the courts not to exercise jurisdiction in certain circumstances, especially where there has been a suggestion or submission from another department of government.[198]

E. Other considerations

125. Functional necessities have provided a sound foundation for the immunities of ambassadors and personal sovereigns. They are self-restrictive in the sense that the functional criterion operates to limit the extent of immunity to sovereign or diplomatic immunities in their representative capacity, rather than serving as a rational justification for State immunity. Functional necessities as such afford no legal basis for State immunity.

126. Difficulties or impossibility of execution of judgement against foreign States have sometimes been put forward as an argument for the territorial State to abstain from exercising jurisdiction.[199] A better view

[192] See Chief Justice Campbell's statement in the case De Haber *v.* the Queen of Portugal (para. 68 above):

"To cite a foreign potentate in a municipal court, for any complaint against him in his public capacity, is contrary to the law of the nations, and an insult which he is entitled to resent."

[193] See the cases Principality of Monaco *v.* Mississippi (footnote 39 above) and Kawananakoa *v.* Polyblank (footnote 41 above).

[194] See for example Dessus *v.* Ricoy (1907), in which the court declared:

"The immunity of diplomatic agents is not personal to them but an attribute and a guarantee of the State which they represent; the renunciation of the agent is invalid, particularly if he produces no authorization from his government in support of it." [Translation by the Secretariat.] (*Journal du droit international privé* (Clunet) (Paris), 34th year (1907), pp. 1087 and 1086.)

[195] See para. 75 above.

[196] United Kingdom, *The Law Reports, Probate Division* (*op. cit.*, 1880), vol. V, p. 217. In De Decker *v.* United States of America, the Appellate Court of Leopoldville referred to the enjoyment of immunity by foreign States in accordance with international tradition, "founded on a notion of courtesy towards foreign sovereignty which is indispensable to good understanding between countries and unanimously accepted". (*Pasicrisie belge* (*op. cit.*), 144th year, No. 2 (February 1957), part II, p. 56.) See also *International Law Reports 1956* (London, 1960), p. 209.

[197] See for example Republic of Mexico *et al. v.* Hoffman (see footnote 116 above) and the statements of Justices Frankfurter, Black and Stone (*Annual Digest..., 1943–1945* (*op. cit.*), case No. 39, p. 143). See also United States *v.* Lee (*United States Reports*, vol. 106 (New York, Banks Law Publishing, 1911), p. 196) and *Ex parte* Republic of Peru (see footnote 110 above).

[198] See for example Baima y Bessolino *v.* el Gobierno del Paraguay (see para. 88 above), and another Argentine case, involving the vessel "Cabo Quilates" (*ibid.*), in which the Court said: "If the acts of a foreign State could be examined by the Courts of another State... friendly relations between Governments would undoubtedly be jeopardized and international peace disturbed."

[199] For example, in the Tilkens case (1903), the Court said: "A jurisdiction reflected in unenforceable judgements, in commands having no sanction or in injunctions lacking the force of constraint would not be in keeping with the dignity of the Judiciary." (*Pasicrisie belge* (*op. cit.*) (1903), part II, p. 180.)

appears to be that the validity of a judgement does not depend on the possibility or likelihood of its execution.

TEXT OF ARTICLE 6

127. Without mention of immunity in respect of State property of various types and descriptions, and without stating the manner in which the question of State immunity should be or may be raised, the principle of State immunity as discussed above with reference to its historical and legal developments could be stated as follows:

Article 6. The principle of State immunity

1. A foreign State shall be immune from the jurisdiction of a territorial State in accordance with the provisions of the present articles.

2. The judicial and administrative authorities of the territorial State shall give effect to State immunity recognized in the present articles.