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**Report of the Working Group on jurisdictional immunities of States and their property**

Topic:  
**Jurisdictional immunities of States and their property**

Extract from the Yearbook of the International Law Commission:-  
**1978, vol. II(2)**

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work.<sup>687</sup> In 1971, the Secretary-General submitted the requested working paper, entitled "Survey of international law",<sup>688</sup> which included a section on "Jurisdictional immunities of foreign States and their organs, agencies and property". After indicating, in that Survey, various problems posed by its subject-matter, the Secretary-General added:

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.<sup>689</sup>

185. During the Commission's consideration of the item on the review of its long-term programme of work at its twenty-fifth session, in 1973, the 1971 Survey served as a basis for discussion. Among the topics repeatedly mentioned in the discussion was that of the jurisdictional immunities of foreign States and of their organs, agencies and property. The Commission decided that it would give further consideration to the various proposals or suggestions in the course of future sessions.<sup>690</sup>

186. In 1977, at its twenty-ninth session, the Commission considered possible additional topics for study following the implementation of the current programme of work, and included a section thereon in its report.<sup>691</sup> The topic "Jurisdictional immunities of States and their property" was recommended for selection in the near future for active consideration by the Commission, bearing in mind its day-to-day practical importance as well as its suitability for codification and progressive development.<sup>692</sup>

187. The General Assembly, having considered the report of the Commission on the work of its twenty-ninth session, adopted on 19 December 1977 resolution 32/151, paragraph 7 of which reads as follows:

[The General Assembly]

...

7. 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.

188. The Commission considered the report of the Working Group at its 1524th meeting, on 24 July 1978, and on the basis of the recommendations contained in paragraph 32 of the report 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.

189. On 27 July 1978, at its 1427th meeting, the Commission took note of the report of the Working Group and decided to include section III of that report in this section of the Commission's report.

190. At its 1525th meeting, held on 25 July 1978, the Commission appointed Mr. Sompong Sucharitkul Special Rapporteur on the topic "Jurisdictional immunities of States and their property".

## ANNEX

### Report of the Working Group on jurisdictional immunities of States and their property<sup>a</sup>

...

#### III. GENERAL ASPECTS OF THE TOPIC

##### A. Nature of the topic and legal basis of jurisdictional immunities

11. The doctrine of State immunity is the result of an interplay of two fundamental principles of international law: the principle of territoriality and the principle of State personality, both being aspects of State sovereignty. Thus, State immunity is sometimes expressed in the maxim *par in parem imperium non habet*.

12. "Jurisdictional immunities of States and their property" is clearly a topic of public international law affecting the rights, interests and duties of States as well as of private persons, inasmuch as conflicts and disputes may arise from the intercourse and transactions between foreign States and private persons.

13. The topic is of interest to States broadly from two opposing standpoints: States as territorial sovereigns for the exercise of their sovereign authority over the entirety of their territorial units, and States as foreign sovereigns being impleaded or pursued in litigation or suits by individual or corporate plaintiffs before the judicial or administrative authorities of another State exercising territorial jurisdiction over cases involving foreign States.

14. It is therefore in the interest of States generally that the rules of international law governing State immunities should be made more easily ascertainable so as to give general guidance to States to enable them to adopt and maintain a consistent attitude in the exercise of their territorial sovereign authority as well as in their insistence on the sovereign right to be exempt from the exercise of a similar authority by another State. In reality, however, the views of States, as expressed by them or implied from their past

<sup>687</sup> Yearbook ... 1970, vol. II, p. 309, doc. A/8010/Rev.1, para. 87.

<sup>688</sup> Yearbook ... 1971, vol. II (Part Two), p. 1, doc. A/CN.4/245.

<sup>689</sup> Ibid., p. 20, para. 75.

<sup>690</sup> Yearbook ... 1973, vol. II, pp. 230 and 231, doc. A/9010/Rev.1, paras. 173 and 174.

<sup>691</sup> Yearbook ... 1977, vol. II (Part Two), pp. 129 and 130, doc. A/32/10, paras. 107-111.

<sup>692</sup> Ibid., p. 130, para. 110.

<sup>a</sup> A/CN.4/L.279/Rev.1.

practice, have been far from uniform. Nor indeed have the views of different departments within the same government or territorial unit been necessarily harmonious.

### B. Scope of the study

15. The topic concerns the immunities of foreign States from the jurisdiction of territorial authorities, be it a court of law, an administrative tribunal or any other judicial or administrative authority. The topic also covers the immunities accorded by territorial authorities to foreign States as well as to their property.

16. The application of State immunities to the property of foreign States extends mainly to two distinct domains, namely, immunities from jurisdiction and immunities from execution. The jurisdiction of a territorial State is sometimes founded on the physical presence of movable or immovable property to be seized or attached within its territorial confines. The exercise of territorial jurisdiction over such property may directly or indirectly implead a foreign sovereign State which owns, possesses or has effective control over the property in question. A mere statement by the foreign State that it has proprietary rights to, or interests in, the property under seizure or attachment order may or may not be decisive of the issue of immunity.

### C. Sources of international law for the study of the topic

17. Evidence of rules of international law on State immunities appears to be eminently available primarily in the judicial and governmental practice of States, in the judicial decisions of national courts, in the opinions of legal advisers to governments, and partially in the rules embodied in national legislation as well as international conventions of universal or regional character within the limits of the subject-matter concerned.

18. Customary law in this connexion appears to have grown largely out of the judicial practice of States, since the question of extent of jurisdiction of a municipal court is invariably determined by the court itself. Additional difficulties have arisen owing to differences in the procedural rules prevailing in each State, but these difficulties are not insurmountable with the aid of comparative law of techniques. The practice of States, both judicial and governmental, will therefore have to be consulted as primary evidence of the existence of rules of international law, and also as indications of the direction in which international law is progressively developing.

19. At a later stage in the study of the topic, the views of governments may be sought as to the nature, scope and extent of the immunities States are prepared to accord to each other mutually, and the immunities they consider themselves entitled to claim from each other. At any rate, for the purposes of the present initial stage in the study, it would be helpful to request governments to provide basic information and materials relating to State practice in this sphere.

### D. Title of the topic

20. For present purposes, the topic as it is now entitled can be usefully maintained, but further analysis should not foreclose the possibility of refining the title for the purposes of future work undertaken by the Commission on the topic, so as to conform more closely to the existing realities of State practice and taking into account earlier titular variations.<sup>b</sup>

21. Suffice it to note at this initial stage that the implied dichotomy of States and of their property seems unreal, as in the ultimate analysis it is to States and in their name—and in their name only—that immunities are accorded. All references to the immunities of “their property” relate only to the coverage or the scope or

extent of application of the rules of State immunities. States are entitled to immunities in respect of activities of several bodies and in relation to things, including to some extent their property.

### E. Content of State immunities

22. An examination should be made of the content or substance of State immunities in various forms and manifestations; for instance, immunities from civil jurisdiction, immunities from penal or criminal jurisdiction and immunities from provisional measures of protection by way of seizure and attachment. Exemptions from taxation and other fiscal impositions are also illustrations of State immunities.

23. The exercise of jurisdiction by the judicial authority of a State is essentially different from the exercise of enforcement measures by the competent authority of that State in execution or satisfaction of judgement. Immunities from execution form a different dimension of State immunities, requiring special attention and distinct treatment. Waiver of immunities from jurisdiction does not, as a general rule, extend to waiver of execution. In each case, a separate waiver is normally required if execution is to proceed against a foreign State or any of its property.

### F. Beneficiaries of State immunities

24. State immunities are enjoyed by States themselves. State organs, instrumentalities, agencies and institutions that exercise the sovereign authority of the State are also entitled to State immunities. The expanding list of beneficiaries of State immunities and the ever-widening application of such immunities deserve thorough and careful examination. In particular, an inquiry should be made as to what constitutes a “foreign State” for the purpose of immunities. This inquiry will entail the study of the types of organs, agencies, instrumentalities and institutions which, forming part of the machinery of the State, participate in the enjoyment of State immunities. The beneficiaries of some State immunities certainly include the armed forces of States or, conversely, “foreign visiting forces” and all the men and equipment, such as members of the armed forces, men-of-war, military vehicles and military aircraft. The status of political subdivisions of States and the position of constituent members of a federal union also merit special treatment.

25. The benefits of the rules of State immunities also extend to other manifestations of State authority that have no legal personality or, more accurately, that take the form of things or property.

### G. Extent of State immunities

26. The crucial question in any study of State immunities is the extent to which States are to be accorded jurisdictional immunities. The doctrine of State immunities was formulated in the nineteenth century,<sup>c</sup> during which States confined their activities to functions

<sup>c</sup> See e.g. the following cases: *The Schooner “Exchange” v. McFaddon and others* (1812) (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. 116 opinion of C. J. Marshall); *The “Prins Frederik”* (1820) (J. Dodson *Reports of Cases argued and determined in the High Court of the Admiralty*, London, Butterworth, 1811-1822, vol. II, p. 451, opinion of Sir William Scott (later Lord Stowell)); the “*Charkieh*” (1873) (United Kingdom, *The Law Reports, High Court of Admiralty and Ecclesiastical Courts*, London, Incorporated Council of Law Reporting for England and Wales, 1875, vol. IV, p. 97, opinion of J. Phillimore); *The “Parlement belge”* (1880), United Kingdom, *The Law Reports, Probate Division*, London, Incorporated Council of Law Reporting for England and Wales, 1880, vol. V, p. 203, opinion of L. J. Brett); *Spanish Government v. Casaux* (1849) (Daloz, *Jurisprudence générale. Recueil périodique*

<sup>b</sup> See paras. 181 and 184 above.

traditionally recognized as properly within the spheres of State duties and responsibilities. Immunities were accorded to States on the grounds of their sovereign equality and political independence, irrespective of the nature of their activities. However, this doctrine, which has been styled "absolute" or "unqualified" immunity, has not been followed with consistency in the practice of States.

27. A glance at the more recent practice of States and contemporary legal opinions will clearly show that immunity has not been accorded in all cases, and that several limitations have been recognized, with the result that in several categories of cases immunity has been denied. Theories have been advanced advocating limitation of the domain of State immunities. These theories, which have sometimes been styled "restrictive", appear to be gaining further ground in State practice.

28. The current trends in the practice of States and in the opinion of jurists deserve further and closer examination to ascertain more clearly the direction in which State practice is developing. Neither State practice nor the *opinio doctorum* can now be said to have been fully orchestrated to the "restrictive" tune, since the bases for measuring the quantum of immunities to be accorded to foreign States are far from uniform or generally consistent.

29. The time has come for a careful study to be made in an effort to codify or progressively develop rules of international law on State immunities, in order to define or assess with greater precision the amount or quantum of State immunities or the extent to which immunities should be granted. A working distinction may eventually have to be drawn between activities of States performed in the exercise of sovereign authority which are covered by immunities, and other activities in which States, like individuals, are increasingly engaged, often in direct competition with the private sector. It is sometimes said that current practice seems to indicate that immunities are accorded only in respect of activities that are public in character, official in purpose or sovereign in nature. In other words, only *acta jure imperii*, or acts of sovereign authority, as distinct from *acta jure gestionis* or *jure negotii*, are covered by State immunities. This indication should also be further examined with the greatest care and scrutiny.

30. Finally, any examination of the extent of jurisdictional immunities should also cover related matters such as voluntary submission to local jurisdiction, waiver of immunities, counter-claims, service of writs, security for costs, and the question of execution of judgements against foreign States.

#### H. Relationship with other topics

31. Jurisdictional immunities are necessarily closely related to other categories of immunities in international law, such as diplomatic immunities, consular immunities, immunities of special missions, immunities of representatives of States in international organizations and international conferences<sup>d</sup> and immunities of international organizations.<sup>e</sup>

(Foot-note <sup>o</sup> continued.)

*et critique de jurisprudence, de législation et de doctrine*, 1849, Paris [undated], p. 5 (Cour de cassation); Société générale pour favoriser l'industrie nationale v. le Syndicat d'amortissement, le Gouvernement des Pays-Bas et le Gouvernement belge (1840) (*Pasicrisie belge. Recueil général de la jurisprudence des cours et tribunaux et du Conseil d'État belge*, Brussels, Bruylant, 1841, vol. II, pp. 33 *et seq.*, especially pp. 52 and 53 (Cour d'appel de Bruxelles)); Morellét v. Governo Danese (1882) (*Giurisprudenza Italiana*, Turin, Unione tipografico-editrice torinese, 1883, vol. I, pp. 125, 130 and 131 (Corte di Cassazione di Torino)); Guttieres v. Elmilik (1886) (*Il Foro Italiano*, Rome, Società editrice del Foro Italiano, 1886, vol. I, pp. 913 *et seq.*, especially pp. 920 and 922 (Corte di Cassazione di Firenze)).

<sup>d</sup> See para. 183 above.

<sup>e</sup> See *Yearbook...1977*, vol. II (Part One), p. 139, doc. A/CN.4/304.

#### E. Programme and methods of work of the Commission

191. At its 1475th meeting, held on 9 May 1978, the Commission decided to establish again a Planning Group of the Enlarged Bureau for the current session. The Group was composed of Mr. Milan Šahović (Chairman), Mr. Roberto Ago, Mr. Leonardo Díaz González, Mr. Abdullah El-Erian, Mr. Stephen M. Schwebel, Mr. Abdul Hakim Tabibi, Mr. Nikolai Ushakov and Sir Francis Vallat. It was entrusted with the task of considering the future programme and methods of work of the Commission and reporting thereon to the Enlarged Bureau of the Commission. The planning Group met on 22 June and on 18 and 24 July 1978. Members of the Commission other than members of the Group were invited to attend, and a number of them participated in the meetings.

192. On the recommendation of the Planning Group, the Enlarged Bureau recommended to the Commission, for inclusion in the Commission's report to the General Assembly on the work of the current session, paragraphs 193 to 201 below. At its 1528th meeting, held on 27 July 1978, the Commission considered the recommendations of the Enlarged Bureau and, on the basis of those recommendations, adopted the following paragraphs of this section for inclusion in the present report.

193. Having proceeded to an overall review of its programme and methods of work in 1977, the broad outlines and specific recommendations of which were endorsed by the General Assembly in its resolution 32/151 of 19 December 1977, the Commission at its current session concentrated its attention mainly on matters relating to the organization of its thirty-first session, to be held in 1979, as well as on some other issues of permanent concern for the effective fulfilment by the Commission of its tasks.

194. Bearing in mind the General objectives and priorities established by the Commission, with the approval of the General Assembly, at previous sessions, and the completion at the current session of work on the topic entitled "the most-favoured-nation clause" by the adoption of a final set of draft articles thereon, as requested by the General Assembly in resolution 32/151, as well as the progress achieved on other topics during the current session, the Commission should at its thirty-first session, in 1979, devote its attention primarily to consideration of the three topics of its current programme to which the General Assembly, has given priority, namely, State responsibility, succession of States in respect of matters other than treaties, and the question of treaties concluded between States and international organizations or between two or more international organizations.

195. Thus, on the basis of the reports that the Special Rapporteur on State responsibility intends to submit, the Commission should be able to make further progress at its next session in the preparation of draft articles on international responsibility for internationally wrongful acts, with a view to completing the first reading of the set of articles constituting part I of the draft as soon as possible, within the current term of office of the members of the Commission, as requested by the General Assembly in resolution 32/151. With regard to succession of States