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Sompong Sucharitkul
Golden Gate University School of Law, ssucharitkul@ggu.edu

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Travaux préparatoires

Justitia et Pace

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droit national. Je vous trouve aussi trop rapidement sévère pour le vocabulaire *jure imperii, jure gestionis,* et pour les « actes de nature commerciale » : le vrai problème est peut-être d'éclairer ce vocabulaire par des « standards » dérivés. Mais de toutes façons, à moins de procéder par assertions dogmatiques, nous sommes condamnés à formuler des directives assez souples, que l'on propose ces directives comme des règles de droit international public, ou comme des règles de droit uniforme.

Permettez-moi pour le moment de ne pas répondre dans le détail à votre questionnaire ; je le ferai volontiers un peu plus tard, oralement ou par écrit.

Croyez-moi, mon cher Confrère, votre tout dévoué

Paul Reuter

8. *Observations of Mr Sompong Sucharitkul*

25 April 1986

1. I agree with the Rapporteur that the words "recent aspects" in the mandate of the Commission should be interpreted with a certain liberality with sufficient latitude for the Rapporteur to investigate the root causes of all the current problems relating to jurisdictional immunities. The Rapporteur should have a wide discretion to determine the precise extent of the "aspects" that should be covered in his report whether or not they are still considered to be of recent development.

2. The distinction between immunities *ratione personae* and immunities *ratione materiae* has served a practical and useful purpose in a special connection, in relation to the immunities accorded to representatives of States, especially diplomatic representatives of one State accredited to another State and personal sovereigns. The distinction has a clear function in determining the types of immunities that survive the mission of the accredited representatives or personal sovereigns and those that terminate with the end of their mandates. The distinction is supported by the practice of States in regard to the possibility of actions against ex-diplomats or ex-sovereigns.

Thus in *Léon* c. *Diaz,* Clunet 19 (1892), 1137, a former Minister of Uruguay in France was held amenable to the jurisdiction « *par la double raison que Diaz a cessé ses fonctions diplomatiques en France depuis 1889, et qu'il s'agit, dans son différend avec Léon, d'intérêts absolument privés et entièrement étrangers à ses fonctions de ministre* ». Similarly, in *Laperdrix* c. *Kouzouboff et Belin,* Clunet 53 (1926), page 64, an ex-Secretary of the U.S. Embassy in Paris was ordered to pay an indemnity for injury caused to two persons in a car accident. The action was brought three weeks after the cessation of his diplomatic functions in France in respect of an accident which occurred during his mission. The court observed : (at page 65)

> « *Cons. que le principe de l'immunité diplomatique érigé dans l'intérêt des gouvernements, et non dans celui des diplomates, ne s'étend pas au-delà de la mission ; que la thèse contraire aboutirait à créer au profit de l'agent diplomatique une sorte de prescription et une irresponsabilité indéfinie.* »

The practice of other States, such as Swiss (see Clunet 54 [1927], 1175 and 983-987, and also 1179), British (see *Magdalena Steam Navigation Co.* v. *Martin* [1859], 2 E. & E. 94, and *Re Suarez, Suarez* v. *Suarez* [1917] 2 Ch. 131, 139, [1918] 1 Ch. 176) and American (see *District of Columbia* v. *Paris* (1939), Cases Nos. 448485-448494, M.S. Dept. St. File 701.9411/1194 regarding an ex-employee of the Japanese Ambassador to the U.S.A.) also confirms this trend.

Article 14 of the Resolutions of the Institut de Droit International (1895) and Article 20 of the Havana Convention (1928) contain similar provisions. The Harvard Draft Convention and the Draft of the Inter-American Institute of International Law also contain virtually the same provisions. Article 39 (2) of the Vienna Convention on Diplomatic Relations, 1961, provides :

> "*When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall submit until that time, even in case of armed conflict. However, with respect to the exercise of his functions as a member of the mission, immunity shall continue to subsist.*"

Thus immunities accorded to diplomats *ratione personae* terminate with their diplomatic functions, whereas immunities accorded *ratione materiae* continue to subsist, being, as it were, immunities of the States they represent.

The same distinction applies to acts of personal sovereigns or heads of State. Thus, in *Empereur Maximilien du Mexique* c. *Lemaitre,* Clunet 1 (1874), 32, immunity was upheld on the ground that the Emperor was the reigning sovereign in an action relating to the purchase of furniture for the decoration of his residence without payment. On the other hand, in *Mellerio* c. *Isabelle de Bourbon,* Clunet 1 (1874), 33, the court assumed jurisdiction on the grounds : (1) that the defendant, formerly Queen of Spain no longer retained that public office, and (2) that the order of jewels was for her own personal use (*ratione personae*) and not « *pour le compte du Trésor* ». The distinction between a « *prince régnant* » and an « *ancien sultan* » was maintained in the case of *Wiercinsky* c. *Seyyid Ali Ben Hamond,* Prince Bashid, ex-Sultan of Zanzibar in respect of unpaid personal service of massage rendered by the plaintiff.

Immunities enjoyed by diplomats and sovereigns *ratione personae* end with the cessation of their official functions, but the immunities accorded to them *ratione materiae* in the exercise of their functions continue to subsist. But the continued subsistance of immunities *ratione materiae* merely signified that they subsist as State immunities, and are therefore treated as such. Thus in the

Iran Embassy case as well as the Philippines Embassy's Bank Account case, the immunities invoked are immunities *ratione materiae*, the question raised concerns the precise extent of such State immunities which may also be restricted as in the Italian case of *La Mercantile* c. *Regno di Grecia*, Tribunale di Roma, 30-1-1955, Rivista di diritto internazionale 38 (1955), pp. 376-378, I.L.R. 1955, pp. 240-242.

The distinction between immunities *ratione personae* and immunities *ratione materiae*, which is useful in separating acts of representatives of States which are protected by States immunities *ratione materiae* and those which are only entitled to a temporary protection during the terms of office, is without use with regard to acts attributable to the States which are immune in any event *ratione materiae*. Continued reference to the expression might confuse jurisdictional immunities *rationae materiae*, i.e., State immunities with lack of subject-matter jurisdiction and "non-justiceability" of the proceedings under the *lex fori*.

The expression immunities *in personam* is not accurately phrased since it is more in contradiction to immunity *in rem*, while the phrase "*ratione materiae*" is to be contrasted with "*ratione personae*" with the special function of distinguishing between acts performed by State representatives on behalf of the States in the exercice of official functions and acts performed in their individual personal capacity unconnected with any official duty.

3. This is a fundamental question, meaningful perhaps in the common law jurisdictions, where the court may first have to establish the existence of its jurisdiction and then decide whether or not to exercise it. Thus, an English or American court would have the discretion to exercise or to decline to exercise jurisdiction on several grounds, including those other than State immunity, such for instance, as an act of State, non-justiceability, lack of personal jurisdiction, absence of subject-matter jurisdiction, or the existence of a better *forum conveniens* or other grounds recognized in private international law.

The practice of civil-law jurisdiction may be more compelling with less discretion. Thus, once the court decides that it is « *compétente* », it cannot decline jurisdiction. It has to determine the question submitted to it for decision. This is one of the problem areas in which Professor Niboyet has endeavoured to draw a line of distinction between « *immunité de juridiction* » which is public international law and « *incompétence d'attribution* » which is probably private international law reasoning.

The answer to question No. 3 therefore depends on the judicial system or the court of the country called upon to decide a given case. It cannot be stated categorically in advance that the court in general or a particular court can or cannot be given a discretion in according or withholding immunity. Such a discretion may in turn depend on the judgement or opinion of the court regarding the nature of the acts attributable to the foreign State.

4. The examples given in paragraph 18 provide excellent illustrations of apparent absence of legal basis for jurisdiction or reluctance on the part of municipal courts to examine cases in which under the rules of private international law they are without jurisdiction or for lack of essential competence, or subject-matter jurisdiction or remoteness of territorial connection or other grounds of non-justiceability under private or public international law. They are to be distinguished from areas where the courts are otherwise competent or have a valid ground on which to base jurisdiction under national law but refrain from exercising it on grounds of State immunity as required by public international law.

5. The principle of consent has a decisive role in relation to State immunity. It is possible to regard the question of State immunity as arising as the result of an interplay of a series of presumptions of consent, consent on the part of the host State to allow the passage of foreign troops for instance, or consent on the part of the sending State for its representatives to be subjected to the jurisdiction of the territorial courts when instituting legal proceedings in those courts. Consent has also been used to determine the possibility or the very existence or claimworthiness of State immunity, as immunity presupposes lack of consent on the part of the State claiming it. As such, immunity is *never* absolute, but always relative and can be waived by the State at any time or any stage of the proceeding. The question whether or not immunity will be granted or withheld in a given case may well depend on the readiness or reluctance with which the court will presume or assume or imply the existence of consent. On the other hand, immunity may also depend on the rigidity or strictness of requirements regarding the procedure of claiming immunity. Thus, immunity may be denied or presumed to have been waived, if no one has claimed it, or it may be denied if not properly claimed, such as by someone not recognized by the court as representing the State concerned.

Consent may be implied from the conduct of the State, and the readiness on the part of the local law to imply consent may reflect the degree of restriction municipal courts are prepared to place on the application of State immunities. It may provide a convenient common ground for a compromise to be worked out so as to give satisfaction to the various theories and schools of thought regarding the desirable optimum extent of sustainable jurisdictional immunities of States in international relations having regard to the co-existence of different ideologies, forms of government and economic structures.

6. The Commission's task would be incomplete without reference to the question of "heads of State and ministers of foreign governments". Precisely how far the Commission should treat various aspects of the immunities accorded and enjoyed by heads of States as State organs, and ministers as departments of government, is a matter to be carefully examined and accurately measured. There are other questions involved, such as immunities *ratione personae* during the tenure of their office, and immunities *ratione materiae* which survive their official functions, but which are equally subject to whatever restrictions that may be adopted to limit the application of State immunities par excellence. The question referred to in question No. 6 could be treated under the heading of State organs, departments of government, or agencies

and instrumentalities of States entitled to immunity. They are included on the list of recipients or beneficiaries of State immunities, of which the question of precise extent should merit the attention of the Commission.

7. "Foreign armed forces" can be subsumed under the heading of State organs. Their immunities depend on the extent of consent of the receiving State as well as of the sending State. Foreign armed forces constitute organs of the foreign States and are treated as such. The practice of States regarding the immunities of visiting foreign forces in time of peace is abundant. While the immunities accorded to foreign visiting forces or men of war are subsumed under other general categories of State immunities such as State organs, they nevertheless deserve special attention. The emphasis in this connection should be placed not so much on the granting or denial of immunities, but rather on the division or partition or priorities of the exercise of concurrent jurisdiction. Competition should be properly balanced between the exercise of disciplinary or supervisory military jurisdiction of the visiting forces and due process of the local criminal law. In actual practice, there are no hard-and-fast rules save the existence of concurrent jurisdiction that must be carefully partitioned and adjusted so as to achieve a healthy balance between various conflicting interests of the territorial States and the sending States. Several bilateral status of forces agreements and regional collective defence treaties may provide revealing examples of possible cooperation between the authorities exercising concurrent jurisdiction. But the matter is delicate and susceptible of high sensitivity and popular emotion, especially in areas where foreign bases have been established. This is a trans-ideological problem whether in NATO alliance or in Warsaw pact, it has to be handled with extreme caution.

8. In as much as the extent of immunity may be said to reflect policy considerations regarding the rationale or justification of State immunity, a serious attempt to determine the precise scope or limit of immunity must of necessity take into account policy considerations underlying the concept of immunity. If indeed immunity is a general principle of international law, a more fundamental principle is to be found in the concept of sovereignty and equality of States on which immunity is based. Yet more basic than sovereignty is the principle of territoriality to which immunity is but an accepted exception. Doctrinal approach varies considerably with the policy considerations, especially now the controversy is further complicated by the growing voice of the third world of developing nations. It would be a grave error to overlook or underestimate the cries of the overwhelming majority of States simply because they were neither European nor Socialist, or because their attitude and approach may be basically different from the West or the East. Whatever principles of international law to be developed, the courts should take into account the relevant interests of all States and the policy considerations of all nations, whose dignity or existence may depend on the general recognition of an optimum volume or measure of State immunity. The nature test is basic but not always conclusive. In appropriate instances the purpose test may be determinative.

9. The formulation of immunity as a general principle is justifiable as long as it is recognized that in relation to a more basic concept of territoriality or territorial sovereignty, immunity itself is an exception to the more general and fundamental rule of jurisdiction of the territorial State. It is on the basis of implied waiver of jurisdiction or consent of the territorial State that immunity has come to be regarded as a general rule and in that context can be so formulated. Another approach has also been suggested that there are two equally valid general rules: one of jurisdiction and another of immunity, and that each one constitutes an exception to the other. The exercise of jurisdiction is not infrequent in practice in well-defined areas of non-immunity. It might be possible to work out areas of immunity at the same time as areas of non-immunity on an equal basis. This approach has not been adopted in effect, as State practice as well as codification efforts have started from the proposition of immunity being a general rule and non-immunity in specified areas being its acknowledged exceptions.

10. While the practice of many States such as the United States, Federal Republic of Germany, the Netherlands, Austria and to some extent also the United Kingdom and France recognize the distinction between acts *jure imperii* and acts *jure gestionis*, the practice of other countries such as Italy, Belgium and Egypt probably accepted a more fundamental distinction between the public and private character of State acts or between the public and private capacity or personality of State. On the other hand, in socialist jurisdictions all activities attributable to the State are public. Apart from being objectionable in the eyes of many legal systems, the distinction is also unsuitable as a basis for the development of international law, as it is unworkable in practice and admits of considerable loopholes. It may even be considered arbitrary and lead to injustices or inconsistent results.

11. The Rapporteur's "preferred solution" offers an interesting possibility in theory but appears to be far removed from the existing State practice. If the law of State immunity is empirical, an inductive approach is to be preferred. The Rapporteur's suggestion merits closer attention with regard to the existence of criteria and not the application of a single criterion for determining immunity or non-immunity. None of the illustrations or examples furnished by the Rapporteur readily commend themselves to any generally acceptable solutions. Indeed, the jurisprudence or case law of several States has come up with different answers, different solutions and different results, depending on the criteria employed. The two principal distinctions proposed by the Rapporteur could be helpful. The first is similar to Professor Niboyet's distinction between « immunité de juridiction » and « incompétence d'attribution », now incompetence *ratione materiae* or lack of subject-matter jurisdiction. The second distinction between the *essence* of national policies and the *normal risks* of implementation by means of private law transaction may attract some support from developing countries if priority is accorded to their national policies.

12. My "preferred solution" is one based on an inductive approach, *wherever possible on existing State practice*, or on current trends in the practice of States. This is possible if acts attributable to States to which legal proceedings relate may be classified into specified areas. In each of these areas particular attention should be paid to the types of criteria that could be adopted for distinguishing elements giving rise to immunity from those giving rise to non-immunity.

13. It is understandable that the Rapporteur's treatment of non-contractual aspects finds justification in the existing dichotomy of the common law between contract and tort. In civil law and Roman law treatment of obligations and things, non-contractual aspects are simply too broad a perspective to be placed under one single category. The Rapporteur has referred to various specified areas such as the right to property, the use of property, the protection of industrial property, personal injury, damage to property, succession to property and trust. The broad spectrum of "non-contractual aspects" is not inaccurate but may tend to reduce the significance or true value of other branches of the law, such as State responsibility, international liability, capacity to acquire property rights, etc. It is therefore at best inadequate to indicate a wide variety of residual areas outside the realm of contractual aspects.

14. There may be more than one discussion of the distinction between immunity from jurisdiction and immunity from measures of enforcement. There is to begin with the time dimension in which the question of immunity from jurisdiction must first be settled not only in the negative but also positively in the form of judgement debt or award before any question of measure of execution could be considered. In the second place, enforcement measure by way of execution presupposes the existence of property, movable or immovable within the jurisdiction of the State of the forum. Execution can only be levied against such property. Other enforcement measures such as specific performance or injunction are not likely to be imposed as they seem inappropriate or unenforceable against a foreign State.

Whatever the nature of distinction between immunity from jurisdiction and immunity from execution, the two immunities represent two succeeding phases in the legal proceedings. This does not preclude the possibility of seizure or attachment of property *ad fundandam jurisdictionem* or other types of sequestration or freezing of assets as security measures, which constitute pre-trial enforcement measures from which State immunity may also be invoked. Thus waiver of immunity from execution is also possible but as a separate act from waiver of immunity from jurisdiction.

Immunity from adjudication is immunity from the jurisdiction to adjudicate It is an ordinary meaning ascribed to jurisdictional immunity, which in its extended interpretation also covers immunity from the jurisdiction to seize or attach property as security or in execution of a judgement. The authority or agencies empowered to adjudicate are invariably the judges or the courts or judicial authority, whereas the power to execute may be conferred in various

countries on administrative authorities or executive agencies other than the judiciary or even the « police judiciaire ». Such enforcement measures should be ordered or authorized by the courts.

15. I do not disagree with the Rapporteur's provisional view that the immunity "from execution" is essentially the same immunity as that "from jurisdiction". Indeed both are covered by the expression jurisdictional immunities. However, I beg to differ as regards considerations of principle and policy that are not necessarily identical in both cases. Consent to be sued is separate from and cannot be identified with consent to measures of execution. In fact, consent to execution *per se* is inadequate to allow enforcement measure to proceed. There must also be clearly identifiable assets or property against which execution is leviable with the consent of the foreign State. Here, opinions of government may differ as to the sacrosanctity or unattachability of certain types of public property such as military aircraft, man-of-war or military installations and facilities, funds of the central bank, which lie beyond the power of the territorial State to seize or detain, some say by presumption, others even by consent. To protect the interest of developing countries against the new frontier of enforcement measures which have recently been adopted by the courts of highly advanced countries a rule of law is being progressively developed in the direction of prohibiting seizure or attachment of several types of State property, at any rate without the clear and unequivocal consent of the State. If it relates to permanent sovereignty over natural resources, even such consent may be insufficient.

16. I would not approach the problem of general accounts as presented in the Philippines Embassy Case in the same manner as was adopted by the United States Court in the Tanzania Embassy Case, which resulted in the interruption of the normal diplomatic relations, a decision which should be left to the discretion of the political branch of the government. A mixed account or general accounts of an embassy should never in any circumstances be presumed or construed to serve as deposit of payment to service future or pending adjudged debts. Too facile a presumption or imputation of consent would make a mockery of international law if not indeed of natural justice. National courts should not be tempted to perform miracles in areas where even international tribunals dare not enter. In the absence of practical measures of enforcement against States in the international legal order, it would seem premature to suggest that municipal courts could enforce payments of debts or performance of an obligation by a foreign State.

17. My opinion of the provisions of Article III of the I.L.A. Draft Convention cited in question No. 17 is consequential on my reply to the previous question. Is it possible for municipal courts of a State to arrogate to themselves the power to decide questions of legality of a nationalization decree or the taking of property in violation of international law? How far can such unilateral decision have any effect in international relations; particularly, should the State of the *forum* assume the role of a *judex in sua causa?* There appear to be

countless considerations that militate against such a proposal. True it may be that it is about time some responsibility was assigned to national authorities of a State, but assuredly this is not an area where national adjudication or enforcement could pave the way to international cooperation. Consent is the key to the solution of all pertinent questions. Without consent no enforcement measure should be encouraged, nor should consent ever be lightly presumed or implied, when it comes to seizing or freezing or attaching property of a foreign State. The exception of property or assets earmarked for servicing of contractual debts or obligations arising out of commercial transactions should not be confused with property taken, whether or not there is or can ever be property taken in violation of international law, which surely belongs to a different chapter of international law. It should give no grounds for municipal courts unilaterally to purport to redress an alleged internationally wrongful act. Such a mandate should be reserved for international instances, judicial, arbitral, conciliatory or otherwise.

18. My view conforms with the general practice of States on the status of political subdivisions, including constituent units of federal States, and State instrumentalities. Political subdivisions may directly enjoy State immunities in their own names if so provided in the constituent instrument establishing the confederation, such as Switzerland and Brazil. Otherwise, they could act as organs of the government entitled to State immunity. The expression "State instrumentalities" is not new in American constitutional history, but difficult of translation into other European or Asian languages to be sufficiently meaningful. Do instrumentalities include warships, spacecraft, naval base, military installations and embassy premises as well as other "*instrumentum legati*"? If so, should the immunity accorded be one relating to the State as an international person or more precisely to the instrumentality as State property rather than State organ or reprensentative of State? These are separate questions that require distinct clarifications. Political subdivisions are State organs or agencies rather than instrumentalities of government.

19. I do not consider the separate incorporation of an entity as a legal person under municipal law to be automatically conclusive of the intent of the State to waive or renounce immunity. On the contrary, many States give legal personalities to their ministries and departments of government to provide them with necessary legal capacity to sue and be sued in their own courts. But when it comes to proceedings before the courts of another State, the capacity to sue and be sued still persists subject to the claim of State immunity. It should be stated, however, that in the practice of some States, such as the Soviet Union and other socialist countries, trading corporations are established precisely to engage in external commercial operations with clear provision also in bilateral treaties waiving immunities in no uncertain terms, not only immunity from jurisdiction but also from execution, by allocating or setting aside bank accounts or assets for that very purpose. Yet in practice private litigants were not content with the solution so generously offered but

still sought to proceed directly against the foreign State *eo nomine*, hence the source of unnecessary misgivings. (See the Qureshi's Case in Pakistan Supreme Court.)

20. N.B.

Additional Comments :

One of the most recent aspects of jurisdictional immunities is the law suit crisis now very current in the U.S.A., the U.K. and other industrially advanced countries. The cost of a law suit may be so exhorbitant and so prohibitive that to establish State or sovereign immunity alone may cost more than the total value of the claim against the foreign State. (See, e.g., Document No. AALCC/IM/83/1 Asian-African legal Consultative Committee, Meeting of Legal Advisers, New York, November 1983; and the House of Lords Judgment in *Alcom Limited* v. *Colombia et Al.* [1984] A.C. where Lord Dipplock said at page 725, regarding the cost incurred in the garnishee proceedings for the bank account of the Embassy of Colombia in London: "*Those, to the discredit of our legal system, Your Lordships were told, already exceeded the amount of the judgment debt even before the appeal reached this House.*")

Sompong Sucharitkul

9. *Observations of Mr Yuichi Takano*

Tokyo, July 1983

Section 1.

State Immunity has lately attracted considerable attention from the international community. The main cause for this concern is deemed to be increasing opportunities for Nation States to participate in economic and commercial activities.

States have traditionally been subjects of diplomatic, political and military relations on the international plane. Such relationships between States are in principle authoritative by nature, based on international agreements, or international law in general. However, when States appear on the international stage of economic and commercial activities, they are not necessarily acting as authoritative subjects, nor upon the basis of international agreements or international law in general. States today are known to frequently form economic and commercial relations in the same manner as private individuals or organizations and act on the contractual or municipal private law basis.

When problems arise during the course of such State activities in the economic and commercial fields within the territory of other sovereign States, the question is raised whether States are subject to the jurisdiction of those terri-