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Immunities from Jurisdiction in Contemporary International Law

Sompong Sucharitkul

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

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Dr. Sompong Sucharitkul is currently Associate Dean and Distinguished Professor of International and Comparative Law at Golden Gate University School of Law (San Francisco, U.S.A.). He also directs Golden Gate Center for Advanced International Legal Studies and the LL.M. and S.J.D. International Programs.

Professor Sucharitkul holds a B.A. (Hons. Jur.), M.A., B.C.L., Doctor of Philosophy (D. Phil.) and Doctor of Civil Law (D.C.L.) from Oxford; he is Docteur en Droit (D.E.S.D.I. Pub.) from Paris; and Master of Laws (LL.M.) from Harvard. He also has a Diploma from the Hague Academy of International Law and is Barrister-at-Law of the Middle Temple, United Kingdom.

For fifteen years, Dr. Sucharitkul served as Ambassador of Thailand to the BENELUX, Japan and four other European countries as well as the European Communities, the UNESCO and the FAO. For nearly three decades, he has been frequently Representative of Thailand to the United Nations General Assembly, and served as Chairman of the Delegation to the Third U.N. Conference on the Law of the Sea. Dr. Sucharitkul served for ten years as Member of the International Law Commission, for nine years as Special Rapporteur of the Commission and sometimes as its First Vice-Chairman and Chairman of the Drafting Committee.

Ambassador Sucharitkul has been a Member of the Permanent Court of Arbitration (Thai National Group) and is currently Member of the Commercial Arbitration Centre at Cairo, of the Regional Arbitration Centre at Kuala Lumpur, and Member of the Panels of Arbitrators and of Conciliators of ICSID (International Centre for the Settlement of Investment Disputes), World Bank, Washington D.C. He is a Member of World Intellectual Property Organization (WIPO) Mediation and Arbitration Center, Geneva, and a Commissioner on the United Nations Compensation Commission (UNCC), Geneva. He is also serving as Commissioner of the United Nations Compensation Commission (UNCC), Geneva. Dr. Sucharitkul is an elected Member of the Institute of International Law (Geneva) and a Corresponding Collaborator of UNIDROIT (Rome), and he is currently serving as President of the ASEAN Investment Dispute Tribunal.

As teacher of international law, apart from universities in Thailand, Dr. Sucharitkul has served as Fulbright Professor of International Law and World Affairs at the University of North Carolina at Charlotte (U.S.A.), as Visiting Professor of Law at the National University of Singapore, as Robert Short Professor of International Law and International Human Rights at Notre Dame Law School (U.S.A.), as Visiting Professor of International Law and Business at Lewis & Clark Northwestern School of Law (U.S.A.), and as Cleveringa Professor of International Law at the University of Leiden (the Netherlands).

Dr. Sucharitkul has conducted research and published extensively in international law and world affairs. His publications include eight UN reports for the International Law Commission. His works are mainly in English, French and Thai.
Main Publications

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B) Monographs, Articles, Chapters of Books:
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This course is designed to cover legal questions relating to jurisdictional immunities under current international law. The term «immunities from jurisdiction» presupposes the existence of or pre-existing, national jurisdiction, without which the need to examine any exemption therefrom would never have arisen. The two notions, «immunities» and «jurisdiction», when conjunctively employed, would appear to leave no room for any consideration of questions of jurisdictional immunities, where there is not a valid jurisdiction to begin with. Yet, this assertion of what appears to be simple logic, is not always readily acceptable in the practice of some legal systems, under which «jurisdictional immunity» or «immunity from jurisdiction» seems to have been confused with «lack of jurisdiction» or «incompetence.» It should be noted at the outset that while the effect of a successful plea of jurisdictional immunities would invariably entail the non-exercise of jurisdiction by the otherwise competent national or territorial forum, scarcely distinguishable in its legal consequences from the finding by the national or territorial authority that it is without jurisdiction or that it is incompetent in regard to the matter in dispute. The truth is that under the prevailing rules of private international law in a particular national legal order, there are several other legal bases or reasons for the trial court or the forum State to decline jurisdiction or to feel uncomfortable or unwilling to exercise its otherwise valid and competent jurisdiction, such as the doctrine of forum non conveniens, «non-justiciability», «act of State», «inadmissibility of the claim» or the fact that the dispute is a lis pendens pending before another concurrently competent jurisdiction. Judicial restraint may dictate abstention or abstinence from exercising concurrent jurisdiction for any one of the grounds enumerated. Thus, «immunities from jurisdiction» is a notion that subsists in private international law as well as a fundamental principle of public international law or the law of nations. Since the practice of States will be examined as a primary source of the law that is in some degree a fusion between national and international law, it is with the greatest caution that this study should proceed.

The arrangement in this course follows the classification of the generally admitted categories of beneficiaries of immunities from national jurisdiction under contemporary international law. The treatment of jurisdictional immunities will consequently be divided into three principal parts, namely (1) jurisdictional immunities of States and their property, (2) diplomatic and consular immunities from the jurisdiction of the accrediting States, and (3) immunities of international organizations from national jurisdictions.
A. JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

I. Introduction

1. General Notion of Jurisdictional Immunities of States

All States, large or small, rich or poor, are equal in the eyes of international law. Each State is sovereign and independent. Statehood is vested with the type of sovereignty and independence that is recognized as exclusive and absolute within its territory. It is by reason of this absolute and exclusive sovereignty and this equality of States and their mutual independence, that in certain circumstances, a State is presumed to have consented to waive the exercise of its jurisdiction which is exclusive within its territory in a proceeding in which another State is being proceeded against without its consent. In other words, the territorial State is presumed to have consented to refrain from exercising its jurisdiction. This abstention or non-exercise of jurisdiction by the territorial State is in recognition of its international obligation of a principle of international law as expressed in the general notion of jurisdictional immunities of States.

2. Extended Coverage of State Immunities

«Jurisdictional immunities of States» carries a more extended coverage than at first sight imaginable. The list of beneficiaries of State immunities does not appear to have ceased growing. State itself, its organs such as head of State, head of Government, departments of Government, State agencies and even ad hoc agents of State enjoy an appreciable measure of immunities from the jurisdiction of foreign national authorities which may be otherwise competent to adjudicate or determine disputes to which the State is an unwilling party before a foreign court of law.

Beside State entities and agencies which enjoy the benefit of jurisdictional immunities of the State of which they form part, property of the State said to be publicis usibus destinata or «destined to public uses» is also covered by immunities of State from seizure, attachment, execution and other forms of measure of constraint, such as freezing of the asset or bank account of a State or the application of Mareva injunction.

1. See The Schooner Exchange v. McFadden (1812), 7 Cranch 116, where Chief Justice Marshall said: «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 the 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.» Compare, The Prinz Frederik (1820), 2 Dodson’s Admiralty Reports, p. 451; and the Cour de Cassation in le Governement espagnol c. Cassaux (1849), Recueil periodique et critique de jurisprudence et de doctrine, Paris: Dalloz, 1849-I-6; Recueil general des lois et des arrêts, Sirey, 1849-I-83; L.M. Devill in a footnote: «C'est la première fois que la Cour de Cassation se prononce sur ces importantes questions de droit international.»
3. Method of Work and Treatment of the Topic

Immunity is positive in form but negative in substance, in the sense that in its jural relationship the right-holder or beneficiary of State immunities may be said to enjoy the privilege of jurisdictional immunity, whereas the duty-bearer, i.e. the State of the forum is under an obligation not to exercise its jurisdiction against an unwilling sovereign State. The rule can be stated in the formulation that no court of any State could implead a foreign sovereign. But this rule is not absolute. It is relative and only applies to the foreign sovereign who is unwilling to submit to the local jurisdiction. This relativity of State immunity is translatable into the ability of the foreign sovereign State to waive its immunities, thereby preventing the occurrence of being impleaded against his will whether directly or indirectly through seizure or attachment of property belonging to a foreign State or in its possession or control.

The method of work and treatment of the topic in this course is necessarily inductive. Not unlike the task of the International Law Commission, a scientific approach to the study of jurisdictional immunities of States could not proceed on purely deductive methods by deducing legal rules from abstract theories. Rather the rules of international law relating to State immunities could be verified, found and established by the use of an inductive method. To be more specific, this study is based primarily on the empirical examination and investigation of the practice of States which has given rise to a class of cases wherein jurisdictional immunities are recognized as a rule of international law. According to this rule, a State is obliged to abstain or refrain from exercising its otherwise competent jurisdiction against another involuntary State. It follows that there is no absolute prohibition against such exercise where the foreign State has elected to submit to the jurisdiction of the territorial State of the forum by itself bringing an action against another entity which is normally within the jurisdiction of the territorial forum. The foreign State is also free to waive its jurisdictional immunity either in facie curiae, that is in the face of or before the Court, or by implication of its conduct such as by itself initiating the proceeding or intervening in an on-going proceeding.

II. The Sources of Public International Law Governing State Immunities

An inductive approach to the search for rules of international law regulating the questions of jurisdictional immunities of States has revealed an intimate link between public international law which is based on the comparison of the practice of States with regard to the scope of exercise of jurisdiction to adjudicate, to legislate and to enforce. A comparative study of the rules of private international law of various jurisdictions will pave the way to the finding of rules of public international law, which are primarily rules of customary international law.

1. The Practice of States

An investigation into the practice of various national legal systems indicates clearly that all three branches of the Government have been involved invariably at
various stages of legal development in the making, formation and moulding of rules of international law governing State immunities.

a. Judicial Practice

The practice of national tribunals is naturally the first and foremost substantive and primary source of international law since it directly concerns the practice of national courts in the exercise or non-exercise of their otherwise competent jurisdiction. Opinions of writers which also contribute to a subsidiary source of international law on the subject amply demonstrate their foundations in the comparison and systematic analysis of the practice of States as a path-finder to the formation of comminis opinio doctorum or the opinions and writings of the most highly qualified publicists. It is essentially in the judicial decisions of national courts that rules of international law regarding State immunities are to be formed. National jurisprudence constitutes the primordial legal basis of State immunities.

b. Governmental Practice

It will be seen in this particular connection that the executive branches of national governments also have a role to play in the progressive development of the practice of States. Examples abound in the reliance placed by the Courts of law on the conclusiveness of Certificates of the Foreign Office or Department of State attesting the status of the personality or entity involved. Thus, a letter from the U.S. Ambassador testifying that the United States Shipping Board Emergency Fleet Corporation was not a corporation but a department of the U.S. Government dispensed with further proof of its governmental character. Executive interventions amicus curiae before national courts are not infrequent in the form of an amicus brief, or certificate of the Foreign Office or suggestion of immunities by the Department of State in a particular proceeding or in a general circular note such as the Tate Letter. Government practice as such includes the opinions and views emanating from various executive branches, such as the Department of Justice, the Attorney-General, the Procureur de la République, the Avocat Général, the Avocato dello Stato, and the Department of State or Foreign Office or its legal advisers. The practice of the political branch of the Government is often visible from the treaty practice of that State, either in a series of bilateral treaties or in a regional or general convention relating to State immunities. This executive


3. See e.g., Republic of Mexico v. Hoffman, 324 U.S., pp. 30-42: «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....» (Chief Justice Stone).

4. See the Tate Letter of May 5, 1952, and another letter to the Acting Attorney-General, Depart. Of St. Bulletin vol. 26, p. 984, June 23, 1952, to the effect that «The Department has now reached the conclusion that such immunity should no longer be granted in certain types of cases.» Contrast Mr. McGregor’s earlier letter of November 25, 1918, Att. Gen. File 195/230: «The Department of Justice is convinced that as the law now stands these ships (foreign State trading vessels) are immune», in relation to the Pesaro Case (1926) refusing to accept Secretary Lansing’s view.
branch of the Government also plays a role which is at times decisive in the initiation and passage of a legislative act, giving effect to its views.

c. Legislative Practice

It is the legislative branch of the State, whatever the constitutional structure, that has the final word on the scope and extent of jurisdictional immunities that the State is ready, willing and prepared to concede to foreign States. In this sense, the legislature may be called upon to play a conclusive and decisive role in the expression and determination of the limits of jurisdictional immunities the State could confer upon foreign sovereign nations.

It is of interest to observe that it is more among the common-law jurisdictions where the doctrine of precedent or stare decisis plays a significant part in the progressive development of State practice that a legislative act is found indispensable to update the state of legal development, as the law courts have been bound by their own previous decisions, or are otherwise unable or reluctant to deviate from their settled positions.

Thus, the United States was the first among the common-law nations to have to resort to legislative measures to put an end to pre-existing controversies that had lingered in spite of the hesitant positions taken by the executive branches of the U.S. Government. The Foreign Sovereign Immunities Act of 1976, ushered in a new era of restrictive immunity. The United Kingdom also followed suite with the British State Immunities Act 1978 and the State Immunity (Merchant Shipping) (USSR) Order of 1978, Singapore (1979), Pakistan (1981), South Africa (1981), Canada (1981) and Australia (1984).

2. The Practice of International Judicial Instances

As at present writing, there has been only one decided case in the jurisprudence of the International Court of Justice (ICJ). On 14 February 2002, the principal judicial organ of the United Nations, the ICJ delivered its historic Judgment concerning the Arrest Warrant of 11 April 2001, in the case of the Democratic Republic of Congo v. Belgium (2002) in its Judgment which is final, without appeal and binding for the Parties, the Court found, by thirteen votes to three:

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«That the issue against Mr. Abdulaye Yerodie Ndombasi of the arrest warrant of 11 April 2001, and its international circulation, constitutes violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law.»

It has taken an international judicial instance one hundred and ninety-years since the Schooner Exchange v. M’Faddon (1812) to make a historic judicial pronouncement upholding the doctrine of State immunities, in its extended application to national criminal jurisdiction asserted against an incumbent Minister of Foreign Affairs of another State.

3. Relevant International and Regional Conventions

There have been a number of attempts made in some regions to prepare a Draft Convention on Jurisdictional Immunities of States to introduce some clarifications for certain areas where the practice of States within a particular region appears to warrant a possible unification of regional rulings.

The first such endeavour was made by the Council of Europe. The draft was finalized in the form of the European Convention on State Immunity 1972\(^\text{14}\). Parties to the European Convention currently include Austria, Belgium, Cyprus, Luxemburg, the Netherlands, the Federal Republic of Germany, Switzerland and the United Kingdom\(^\text{15}\). The European Convention contains provisions setting out exceptions to immunities before the final article 15, which states the general principle of jurisdictional immunities of States apart from the exceptions previously enumerated\(^\text{16}\).

The Inter-American community has prepared a draft convention for the Organization of American States, but the draft has not been finalized\(^\text{17}\).

The Asian-African Legal Consultative Committee at its session in Katmandu in 1984 also considered the possibility of such a project, but in view of the impending draft under preparation by the International Law Commission, the Committee decided to await the results of the collective efforts of the United Nations.

4. Draft Articles Prepared by the International Law Commission

Prior to the initiative of the work by the International Law Commission, the topic has attracted the attention of the international community since the League


\(^{16}\) See Explanatory Reports, cited in note 14 supra, see articles 1-15, pp. 49-53.

\(^{17}\) Compare the first session of the Asian African Legal Consultative Committee, New Delhi 1957, which had on its Agenda: «Restrictions on Immunities of States in respect of commercial transactions entered into by or on behalf of States or by State Trading Corporations,» referred to by India.
of Nations, whose Committee of Experts was of the view that some aspects of the subject were ripe for codification. Other international efforts include those of regional legal committees and drafts prepared by various professional and academic institutions.

The International Law Commission at its thirtieth session in 1978, appointed a working group to report on the topic of «Jurisdictional Immunities of States and the Property,» and on 25 July 1978 decided to appoint Mr. Sompong Sucharitkul (Thailand), Special Rapporteur on the topic. The Special Rapporteur submitted his preliminary report and seven further successive reports from 1979 through 1986. The draft articles contained in the reports were successively approved and finally adopted at first reading in 1986. For the second reading, Mr. Motoo Ogiso (Japan) was appointed Special Rapporteur in 1987, the second Special Rapporteur submitted his preliminary report based on replies received from Governments in 1988 and 1990 respectively. On 4 July 1991, the Commission adopted the draft articles at second reading and decided to recommend the draft articles to the General Assembly of the United Nations.

The General Assembly in its resolution 55/150 of 12 December 2000, established an Ad Hoc Committee on Jurisdictional Immunities of States and their Property and the Ad Hoc Committee was convened in December 2001 and met from 4 to 13 February 2002, and adopted a Report at the 57th Session of the General Assembly.

It is evident that the most authoritative and readily available and comprehensive sources of international law on State Immunities are now closer at hand than ever before. As international law continues progressively to develop, there are certain aspects and certain areas of State activities, which require more in-depth exploration to ascertain the precise extent and true nature of jurisdictional immunities to which States are entitled in the current practice of States, including the scope of exemption of certain types of State property from measures of constraint of any kind, such as seizure, attachment, execution, garnishment, freezing of assets, injunction etc.

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18. See the 1948 Survey, para. 50, UN Publication, Sales No. 1948.V.1(1); 21 Governments had expressed themselves in favour of codification of this topic, while only three had answered in the negative. See also the Harvard Draft, Supp. To 26 AJIL (1932), No. 3; P.C. Jessup, Rapporteur.

19. See e.g., The Asian-African Legal Consultative Committee, New Delhi 1957, in note 17 above, the European Committee on legal Cooperation, and the Inter-American Juridical Committee, «Immunity of States from Jurisdiction.»


III. General Principles of State Immunity

1. The Rule of State Immunities

The rule of State immunities in international law is clearly stated in draft article 5 of the Draft Articles adopted by the International Law Commission at second reading.

*State Immunity:* «A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present articles» 23

This principle is attributable to the classic dictum of Chief Justice Marshall, in the *Schooner Exchange* v. *McFadden* (1812)24, where he said:

«This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an exchange 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» 25.

This principle has been confirmed in subsequent English cases. Most notable among English judicial pronouncements is that of Lord Atkin in *The Cristina* (1935)26, in the House of Lords, which stated the principle in this formula:

«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 which he is in possession or control» 27.

In *Le Gouvernement espagnol c. Cassaux* (1849)28 the French Cour de Cassation took occasion to formulate the principle in these terms:

«Att. Que l’indépendance réciproque des États est l’un des principes les plus universellement reconnus du droit des gens, — Que de ce principe, il résulte qu’un gouvernement ne peut être soumis, pour les engagements qu’il contracte, à la juridiction de l’État étranger; — Qu’en effet le droit de juridiction qui appartient à chaque gouvernement pour juger les différends nés à l’occasion des actes émanés de lui est un droit inhérent à son


2. The Doctrine or Legal Basis of State Immunity

Thus, the rule of State Immunity under international law may be said to have been based inevitably on the principle of «equality of States» or «independence» of States which are reciprocally equal. No one equal could exercise sovereign authority over another equal. Or, to borrow a Latin maxim, *par in parem non habet imperium* or *jurisdictionem*.

The theoretical or doctrinal basis for State immunities is to be found in the established practice that States are independent, sovereign and equal in their reciprocal legal relations, one having no superior authority over another. The *communis opinio doctorum*, as expressed in the various dicta and judicial pronouncements cited above appears to militate strongly in favour of this general and wide-spread consistent practice of States, supported by written opinions not only of judges but also of the most highly qualified publicists.

3. The Term «State» including all Beneficiaries of State Immunities

For present purposes, the term «State» is used much more widely than otherwise generally understood to include also organs, agencies and entities of States and even individuals that act as an organ of State, sharing the benefits of the privilege of jurisdictional immunities belonging ultimately to the foreign State for reasons of the principles of sovereignty, independence, equality and dignity of all States under international law. Thus, the use of the term «State» under Article 2(l)(a) of the draft articles, refers to

(i) The State and its various organs of government;

(ii) Constituent units of a federal State;

(iii) Political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State;

(iv) Agencies or instrumentalities of the State and other entities, to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State;

29. S. 1849-I-81 at p. 93; D.P. 1849-I-5, 93.
30. See, for instance, HACKWORTH, G. H.: *Digest of International Law*, vol. II, chapter VIII, 1946, p. 393: «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....» See also LAUTERPACHT, H.: «Jurisdictional Immunities of Foreign States,» in XXVIII *BYIL* (1951), pp. 226-232, at p. 228. Judge Lauterpacht considered to be orthodox the view that the rule of State immunity follows from the principles of sovereignty, independence, equality and dignity of States, but characterized his own personal misgivings as unorthodox.
(v) Representatives of the State acting in that capacity.\textsuperscript{31}

By way of illustration, a sovereign or a head of State, in his public capacity as a principal organ of a State is also entitled to immunity.\textsuperscript{32} Organs or departments of government comprise the various ministries of a government, including the armed forces, consular posts, and council of State.\textsuperscript{33}

In an oblique way the immunities of States from jurisdiction of other States may extend their coverage to entities that under international law may have been accorded jurisdictional immunities under another heading, such as diplomatic or consular immunities, especially in respect of embassies and consular posts, special missions and other affiliated overseas offices of the central government. In a sense, immunities enjoyed by representatives of Government, ratione personae, are stricte sensu and in the ultimate analysis, also State immunities. For apparent reasons, they belong to the State which could waive them or otherwise decline to invoke them before the courts of another State. In this way, immunity must be regarded as generally very «relative» and never «absolute» in any sense of the expression.

Chronologically and historically, the immunities of Ambassadors and Consuls from the jurisdiction of the courts of the State of the accreditation have preceded that of States and of heads of State who serve to personify their States. Thus, the cour d'Appel de Bruxelles in Société Générale pour favoriser l'industrie nationale c. le Syndicat d'amortissement, le Gouvernement des Pays-Bas, et le Gouvernement Belge (1840)\textsuperscript{34} observed:

«Att. dès lors qu'il faut tenir avec les autorités les plus graves que les immunités des ambassadeurs sont la conséquence du caractère représentatif dont ils sont investis et remontent à l'indépendance des nations qui sont censés agir par leur ministère; Att. que les principes du droit des gens applicables aux ambassadeurs le sont avec une grande supériorité de raison aux nations qu'ils représentent.»\textsuperscript{35}

Similarly in regard to a foreign head of State, or foreign sovereign, Lord Campbell C.J. in De Haber v. The Queen of Portugal (1851)\textsuperscript{36} made this pertinent observation:

«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 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

\textsuperscript{31} See Article 2(l)(a) of the ILC Draft Articles, cited in note 23 above.
\textsuperscript{32} For immunities from jurisdiction and execution of Heads of State and Government in international law, see Resolution of the Institut de Droit International adopted at its session in Vancouver, August 2001, 13ème Commission; M. Joe Verhoeven, Rapporteur.
\textsuperscript{33} For personal immunities of an incumbent Foreign Minister, see The Arrest Warrant case (2002) in note 13 above.
\textsuperscript{34} Pasicrisie Belge, 1841-II-33.
\textsuperscript{35} Ibid. PB 1841-II-33, at pp. 52-53.
\textsuperscript{36} 17 QB (1851), p. 171.
his public capacity is contrary to the law of nations, and an insult which he is entitled to resent» 37.

It will be seen how principles of international law regarding jurisdictional immunities of foreign heads of State have developed since 1851. Today it is clear that former heads of State are only entitled to State immunities in respect of acts performed by them in their public capacity, *ratione materiae*, and will not be extended to cover acts which are performed *ratione personae*, unconnected with the exercise of the sovereign functions while in their office as heads of State. The House of Lords recently held that acts of torture attributable to a head of State or government while in office, are not to be considered as acts performed in his public capacity as head of State and as such are not covered by any cloak of State immunities 38.

IV. Exceptions to the Immunities of States

Prior to an examination of some of the widely accepted exceptions to the principle of jurisdictional immunities of States, relativity of the notion of State immunity would appear to dictate a preliminary appreciation of the circumstances in which a State may be said to have waived its immunity from the jurisdiction of the court of another State.

In the first place, it should be noted that there is no necessity for a State to invoke its immunity when a proceeding is not directed against it. A proceeding is said to be directed against a State (a) when it is named as a party to that proceeding; or (b) when, not so named, but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State 39.

Secondly, the practice of States regarding formalities in the invocation or pleading of jurisdictional immunity of State still varies in term of emphasis on the strictness in the entry or raising of the plea of immunity or in the waiver of immunity with ensuing variation in results. Generally, a waiver is an express consent to the exercise of jurisdiction 40, assuming there is valid jurisdiction according to the applicable rules of private international law of the Forum State. Consent can be expressly given (a) by international agreement; (b) in a written contract; or (c) by a declaration before the court (*in facie curiae*) or by a written communication in a specific proceeding 41. While there is no clear-cut time-limit as to the entry of the plea of jurisdictional immunity, there are certain requirements in some

38. See the decision of 24 March 1999, *ex parte* Pinochet of the new Appellate Committee of the House of Lords upholding the extraditability of General Augusto Pinochet, former head of state of the Republic of Chile, in regard to extradition proceedings requested by Spain for acts of torture, in particular Lord Browne-Wilkinson delivering an overwhelming majority judgment of six to one denying immunity *ratione materiae*. See also *RGDIP* (1999), p. 321.
40. See Article 7 of the draft articles (1991).
41. See Article 7 of the draft articles. The claim of immunity by one State reflects the waiver of the exercise of territorial or other type of jurisdiction by the Forum State. See e.g., Chief Justice Marshall in the *Schooner Exchange v. McFadden* (1812), 7 Cranch 116, at pp. 136-137 cited in note 1 above.
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jurisdictions regarding the appropriate authority to invoke immunity on behalf of the State, such as, the State itself, its agent or the master or captain of a vessel belonging to the State, or in its possession or under control\(^{42}\).

A State cannot invoke immunity from the jurisdiction, if is has (a) itself instituted the proceeding; or (b) intervened in the proceeding or taken a step relating to the merits, such as making a counter-claim or cross-claim. However, a State could intervene in a proceeding or take any other step for the sole purpose of (a) invoking immunity; or (b) asserting a right or interest in property at issue in the proceeding, without being considered to have waived its immunity or thereby consented to the exercise of jurisdiction by the Forum State. Nor does failure to appear or appearance of a representative as a witness amount to consent or waiver of immunity from the jurisdiction\(^{43}\).

1. «Commercial Transactions» Exception

The expression «commercial transactions» was first used in the preliminary report of the first Special Rapporteur in 1979\(^{44}\) and was reconfirmed in Article 10 of the draft article by the Commission at second reading in 1991\(^{45}\) although in the meantime another term had been used at first reading: «commercial contracts,» which appears to have been too restrictive. The first Special Rapporteur would have been comfortable with the expression «commercial» or even «trading» «activities» to respond more accurately to the exigencies and realities of international economic relations.

Whatever «expressions» may be ultimately adopted, it is sufficiently clear that whatever the reasons given, there has been a common approach agreeing to this exception in practice. In effect, «a State cannot invoke immunity from the jurisdiction of the court of another State in a proceeding arising out of a commercial transaction with a foreign national or juridical person and by virtue of the applicable rules of private international law, differences relating to the commercial transactions fall within the jurisdiction of the court of that State»\(^{46}\).

To this exception, there are overriding exceptions, namely (a) in the case of a commercial transaction between States or Government to Government transaction; or (b) if the parties to the commercial transactions have agreed otherwise\(^{47}\).

A third paragraph of draft article 10 has been a subject of considerable debate. At one time this exception to the exception was a foregone conclusion in respect

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42. Immunity could not be raised by a representative of an unrecognized State or Government or by a new State with which the Forum State has no diplomatic relations.
46. See Article 10 of the draft articles (1991).
of transactions conducted by State trading corporations, in regard to which the trading State has long recognized the practical necessity of waiving its immunity from jurisdiction and even from execution and this is incorporated in its bilateral treaty practices to promote the activities of the trading corporations, supervised by its trade delegations for overseas activities. The fact of the matter was that the State has already consented to proceedings being instituted against its trading corporation, *eo nomine*, and having to some extent earmarked certain funds or assets to be used in this connection; but that State has by no means consented to subject itself to the jurisdiction of the territorial court. This was intended not to encourage the practice of casting a wider net of addressing the claim against a multiplicity of entities, jointly as well as severally, as is still sometime the practice in some jurisdictions.

The exceptions to the exception of «commercial transactions» constitute a compromise between the test of the «nature» of the transactions and its «purpose.» This is reflected in the use of terms in article 2 of the 1991 Draft Articles. «Commercial transactions» include not only «(i) any commercial contract or transaction for the sale of goods or supplies of services;» nor «(ii) any contract for a loan or other transaction of a financial nature, including any obligation or guarantee or indemnity in respect of any such loan or transaction;» but also «(iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons».

This compromise is further incorporated in paragraph 2 of the same draft article 2 under which reference is made primarily to the nature of the contract or transaction, without losing sight of its purpose «if, in the practice of the State which is a party to it, that purpose is relevant to determining the non-commercial character of the contract or transaction».

Another condition could be added or substituted «and that determination is not precluded by the mandatory rule of the State of the Forum.»

This controversy continues unabated even at the time of writing. The current ad-hoc committee appointed by the General Assembly came up with some alternative variants, in regard to paragraph 3 which could either be deleted for redundancy or otherwise reasserted in a manner not open to any challenges. There is never any need to overprotect the interests of private traders against the trading State when the latter has already consented to waive immunities in respect of its trading entities or corporations.


49. See e.g. Qureshi *v. The Union of Soviet Socialist Republics*, *Supreme Court of Pakistan*.

50. See Article 2(1)(c) of the draft articles (1991).

51. See Article 2(2) of the draft articles (1991).

2. Contracts of Employment

This is an area where a preference has to be made or priority accorded to the employment of persons to perform a given task within the territory of the State of the forum. The State operating an office in the territory of another State, whether an embassy or consular post or immigration office or office of tourism or purchasing bureau, is likely to recruit and hire employees to work in the country of assignment according to the administrative law of the recruiting State. However, the territorial State retains a vital interest in the continuing applicability of its labour law to any contract of employment, wherever concluded, for the protection of labour to be performed within the territorial State. In addition to the likely concurrence of jurisdiction of both the hiring State or the employer State and the territorial State, there is also the possibility of an overlap and even competition of the applicability of the administrative law of the employer State and the employment law or labour law of the territorial State. Thus a compromise is struck in article 11 of the 1991 Draft Articles with the result that immunity is maintained in the following circumstances, where

(a) the employee has been recruited to perform functions closely related to the exercise of governmental authority;\(^53\);

(b) the subject of the proceeding is the recruitment, renewal of employment or reinstatement of an individual;\(^54\);

(c) the employee was neither a national nor a resident of the State of the forum at the time when the contract of employment was concluded;\(^55\);

(d) the employee is a national of the employer State at the time when the proceeding is instituted;\(^56\);

(e) the employer State and the employee have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject matter of the proceeding.\(^57\)

It should be noted that any one of the circumstances enumerated above could serve as a justification for the employer State to insist on the grant of jurisdictional immunity.

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53. See Article 4: Contracts of employment of the draft articles (1991); and the controversial decision of the Swiss court in S. c. Etat India, 11 Annuaire suisse de droit international (1985), p. 172, where the case concerned the dismissal of an Indian national who was locally recruited and employed as a radio-telegraphist. The Tribunal fédéral did not find his functions to be close enough to the discharge of governmental authority. A different view was upheld on appeal.

54. On this ground alone, the Swiss federal tribunal in note 53 above should have declined to exercise jurisdiction, as the cause of action related to the prerogative of the employer state not to renew or to discontinue employment. See in this sense Department of the Army of the U.S.A. c. Gori Savellino, 23 International Law Reports (1960) p. 201. The corti di cassazione declined jurisdiction on the ground that employment or non-employment of NATO base in Italy, being an attività pubblicistica connected with the funzioni publiche o politiche of the US government.

55. The critical moment is the time of conclusion of the contract of employment.

56. The change of nationality or another critical moment of the nationality of claim is the moment when the proceeding is initiated.
immunity regardless of the existence of the territorial concurrent jurisdiction and clear applicability of its employment law, unless the public policy of the territorial State dictates its exclusive jurisdiction or the preferred applicability of its law or the preponderance of public interest.

3. Personal Injuries and Damage to Property

This is an exception to State immunity that has not been uniformly adopted in the practice of States, especially in the legislative enactment of immunity for foreign States. The most persuasive argument is to be found in the compensation that should be made available to a victim of an accident, for which a representative of a foreign State may be held accountable. An equally valid justification can also be based on the ready availability of local remedies without having to impede a foreign sovereign or a foreign government. The majority of occurrences resulting in personal injuries or physical damage to tangible properties could be redressed through the existing system of insurance. Insurable interests, once insured will not need to impair or impede the performance of any governmental functions of a foreign State within the territories of the forum State.

The difficulty surrounding this exception is the unsettled basis for jurisdiction in civil wrong or tort. Most legal systems recognize the *lex loci delicti commissi* as the applicable law, while a few legal systems still retain a different criterion which is not easy to determine in a given case where there is diversity jurisdiction for instance. Besides, the exception may have proved susceptible of abuses, notably in the jurisdiction which encourages litigation or permits contingency fees for attorneys who might consider it a fair game to cast a wide net against all possible defendants. Thus, in New York, the strict or absolute liability of occupier of a premise for keeping the pavement clear of snow might end up in a lawsuit against the Ambassador, Permanent Representative of a member of the UN to the United Nations, his Foreign Ministry, Foreign Minister and the Government of the Permanent Mission representative. What is considered not out of the ordinary in one system may be regarded as vexatious litigation or malicious prosecution in another. In this area, abuses have occurred both by and against a permanent representative or mission of a foreign State.

On balance, the Commission has approved this exception at both readings and most recent national legislations contain such an exception. The shock-absorber against abuse or misuse of this exception might be found in the existence of insurable interests which could be further strengthened by mandatory insurance, in case of vehicles,

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57. This is a case of a *forum prorogatum* or freedom of contract, subject to the peremptory or mandatory norms of the Forum.
58. See, for instance, Pakistan 1981 Ordinance which omits this exception of tortious liability or accountability of a foreign state.
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boats, aircraft and other means of transport as well as tortious liability of occupiers of buildings and users of other movable or immovable properties⁶⁰.

4. Ownership, Possession and Use of Property

This exception, as reflected in article 13 of the 1991 Draft Articles, has given rise to little or no opposition. It is an exception to the immunity of States in respect of their properties. It is without prejudice to the immunities or inviolability accorded to diplomatic premises, embassies, residences of diplomatic agents, consular posts⁶¹ or permanent missions and permanent observer missions to an international organization⁶².

The determination of any right or interest of a foreign State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum can only be made by the court of the State in which the immovable property is situated. The lex situs governs all questions relating to ownership, possession or use of land or immovable property within the jurisdiction of the forum State. A foreign State asserting an interest in it or is interested in having its title determined cannot possibly invoke its immunity from the only jurisdiction that is exclusively competent to adjudge and make declaration regarding its right, title, or interest in the property. This first exception (a) regarding immovable property is therefore inevitable. Public international law bases jurisdiction on the principle of territoriality while private international law appears uniformly to respect the supremacy of the lex situs which is exclusively applicable⁶³.

The second exception (b) relates to «any right or interest of the State in movable property arising by laws of succession, gift or bona vacantia.» This has not given rise to any serious opposition. A foreign State asserting its title as a universal successor or legatee or recipient of a donation or gift or property becoming devolved on it from one of its nationals or companies. If succession also involves a determination or vesting of right or title of the State is situated in a third jurisdiction, i.e. outside of the State of the forum, then a separate proceeding may be needed to give effect to the lex situs which is the only applicable law.

The third exception in subparagraph (c) is peculiar to the situation in many legal systems, especially in the common-law jurisdiction where the court, originally the Court of Chancery, exercises some supervisory jurisdiction or other functions with regard to the administration of trust property or property otherwise held on a fiduciary basis⁶⁴.

⁶¹ See B. Diplomatic and Consular Immunities below.
⁶² See C. Immunities of International Organizations and their Officials below.
⁶³ See however, a Brazilian Court decision regarding determination of title between Syria and Egypt does not appear to relate to private-law ownership, but rather the questions of State succession to be determined by the Parties to the dispute with reference to public international law.
⁶⁴ See the English case of Lariviere v. Morgan (1872), 7 Ch. D. (1872), p. 550. Lord Hatherly in the Court of Appeal denied immunity, treating Morgan as trustee of the bank account on behalf of the
5. Intellectual and Industrial Property

This exception is included in article 14 of the 1991 Draft Articles\textsuperscript{65}. It covers cases not falling under article 10 the «commercial transactions» exception or the exception under article 13 «ownership, possession and use of property.» Intellectual and industrial property appears to deserve particular attention, not being immovable or tangible movable property. Measures of protection under the internal law of the State of the forum which are further strengthened by international agreements, such as those under the auspices of the World Intellectual Property Organization (WIPO) appear to leave no room for the invocation of State immunity. A State could claim such measures of protection for its right in a patent, industrial design, trade name or business name, trade mark, copyright or any other form of intellectual or industrial property. Conversely, the measures of protection could be sought in the Court of the forum State in respect of an alleged infringement by the State of a right which belongs to third person and is protected in the State of the forum.

6. Participation in Companies or other Collective Bodies

This is an exception that practically speaks for itself without additional explanation. The State cannot invoked immunity in a proceeding relating to its participation in a company or other collective body, whether incorporated or unincorporated, concerning the relationship between the State and that body or other participants, provided that the body has participants other than States or international organizations and is incorporated or otherwise constituted under the law of the State of the forum or has its seat or principal place of business in that State.

This exception will not apply if the States concerned have so agreed or if the parties to the dispute have so provided by an agreement in writing or if the instrument constituting or regulating the body in question contains provisions to that effect\textsuperscript{66}.

7. Ships Owned or Operated by a State

This exception is applicable only to a proceeding relating to the operation of the ships for other than governmental non-commercial purposes. Article 16 of the 1991 Draft Articles resorts to the use of a double criterion of «governmental non-commercial purposes.» The implication is that there may be purposes that are commercial and non-governmental, without precluding the possibility of the use of a ship for governmental commercial purposes. The dichotomy of «governmental» and

\textsuperscript{65} See Article 14 of the draft articles (1991), and commentary, UN Doc. Supp. No. 10 (A/46/10), pp. 110-114; see in particular Dralle v. Republic of Czechoslovakia (1950), 17 ILR (1950), p. 115, Case no. 41.

\textsuperscript{66} See paragraph 2 of Article 15 of the draft articles (1991). This is clearly an area where the state is not exercising any of its governmental authority, given that other non-States and non-governmental organizations could also participate.
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«commercial» need not always be diametrically opposite. Of course, warships and naval auxiliaries regardless of the nature of their services and all other ships operated by a State and used exclusively for governmental non-commercial services, such as police patrol boat coast guard services would continue to enjoy jurisdictional immunities from the court of another State otherwise competent.

The proceedings in question may relate to collision or other accidents of navigation; assistance, salvage and general average; repairs, supplies or other contracts relating to the ship; or consequences of pollution of the marine environment.

The exception does not apply to cargo carried onboard the ship or owned by a State or used or intended for use exclusively for government non-commercial purposes.

As for the method of proving the government non-commercial character of a ship owned or operated by a State or cargo owned by a State, a certificate signed by a diplomatic representative or other competent authority of that State and communicated to the court will serve as evidence of the character of that ship or cargo.

The double requirement of governmental non-commercial appears to mirror almost verbatim the test adopted in the Brussels Convention of April 10, 1926 for the Unification of Certain Rules concerning the Immunities of Government Vessels. Article III(1) of the 1926 Convention refers to the cause of action arising «exclusively on governmental and non-commercial service» where immunity is still upheld for «ships of war, government yachts, patrol vessels, supply ships and other craft owned by the State and at the material time used exclusively for governmental non-commercial purposes».

The formula adopted by the Commission has also been used in the 1982 UN Convention on the Law of the Sea. Article 96 stipulates that «ships owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State».

8. Effect of an Arbitration Agreement

This is strictly speaking not an exception nor a rule of non-immunity. It is but a corollary or necessary extension of the acceptance by the State of the consequences of

67. See paragraphs 1 and 2 of Article 15.
68. See paragraph 3 ibid.
69. See ibid., paragraph 5.
70. See ibid., paragraph 6, see e.g. Compañía Mercantil Argentina v. United States Shipping Board Emergency Fleet Corporation (1924), 40 TLR (1924), p. 601.
72. See Official Text of the 1982 UN Convention on the Law of the Sea with Annexes and Index, UN, New York 1983, Article 96. See also Article 95: Immunity of warships on the high seas. The Convention appears to provide for immunity from legislative as well as adjudicative and enforcement jurisdiction of all other States including coastal states.
an obligation to arbitrate. As a logical consequence of an agreement in writing to submit to arbitration, the State consenting to arbitration cannot invoke immunity from jurisdiction before a court of another State in a proceeding relating to (a) the validity or interpretation of the arbitration agreement; (b) the arbitration procedure; (c) or the setting aside of the arbitral award. These are questions involving the supervisory jurisdiction of a court of another State, including a request for an execution of the award.

There is nothing sacrosanct about an obligation to arbitrate under a treaty or an agreement in writing, to which the State is a party. Once agreed to submit to arbitration or to a specific arbitral institution, the State is not allowed to withdraw or otherwise to derogate from its promise to submit to the agreed dispute settlement mechanism. It does not mean that the obligation to arbitrate is a peremptory norm, or a *jus cogens* that is automatically enforceable on the basis of universal jurisdiction. On the contrary, it is an ordinary obligation of conduct, which a State may fail to observe at the risk of breaking or violating that obligation with legal consequences to follow, such as a judgment by default.

An obligation to arbitrate in a concession contract or a State contract does not imply any denial of justice when the State fails to honour or implement that obligation. An obligation to submit to an ICSID arbitration is not an obligation to submit to any other type of arbitration proceeding such as the AAA or UNCITRAL or ICC with its incidentals of supervisory jurisdiction by the court of the forum State. An unmistakable obligation on the part of a State solemnly pledged with an international organization, such as the United Nations, should naturally be taken more seriously than an undertaking not to nationalize or an obligation to submit an investment dispute to arbitration. In the case of nationalization in violation of a previous undertaking, only a secondary obligation to pay appropriate compensation is expected under international law, while failure to appear before an arbitral tribunal under a written agreement to arbitrate...

73. See Article 17 of the draft articles (1991), and the sixth report of the first Special Rapporteur, AJCN 4, 376, pp. 247-253.

74. *Max* F.A.: «State Contracts and International Arbitration», 42 *BYIL* (1967), pp. 27-28. F.A. *Man* appears to think that there is no reason to prevent a refusal to arbitrate from escalating into a «denial of justice» giving ground for bypassing or avoiding exhaustion of local remedies. See also The Restatement (Third) §712.


76. See the Advisory Opinion of the International Court of Justice on the obligation to arbitrate under the Headquarters Agreement between the USA and the UN 1947, in particular the separate opinion of Judge Stephen Schwebel in *ICJ Reports 1988* (ICJ Rep. 12). See also Schwebel, S.: *107 International Arbitration* (1987).
merely signifies a breach or violation of an obligation of conduct, the gravity of which will depend on a number of surrounding circumstances. 

V. State Immunity from Measures of Constraint in Connection with Proceedings before a Court

1. The Need for a Separate Waiver of Immunity from Measures of Constraint

It is essential to observe at this point that consent to submit a dispute to the jurisdiction of the court of another State is not to be taken as consent to waive the immunity of that State in respect of its property from measures of constraint in connection with proceedings before that court. Both stages of the proceedings, i.e., on the merits as well as with regard to measures of constraints require separate waivers or expressions of consent to the jurisdiction of the court of the forum, namely submission or consent to the jurisdiction to adjudicate, and in a separate instrument another submission or consent to the jurisdiction to enforce or to execute the judgment delivered or the award rendered. In the case of an international or foreign arbitration, this necessity for a second waiver or expression of consent is vital to the request for an execution in execution of a «foreign» award under the New York Convention of 1958. Without an express consent to enforcement measures, no execution could be levied against the property of a foreign State which is otherwise immune from all measures of constraint.

2. Modalities of Expressing Consent to Measures of Constraint

The express consent of the State to measures of constraint can be given (a) by international agreement; (b) by an arbitration agreement or in a written contract; or (c) by a declaration before the court (in facie curiae) or by a written communication after the dispute between the parties has arisen. It is further required that the State has also allocated or earmarked property for the satisfaction of the claim which is the subject of that proceeding.

In addition, the property so earmarked or allocated must be specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum and has a connection with the claim which is the object of the proceeding or with the agency or instrumentality against which the proceeding was directed.

79. See Article 18 (1) of the draft articles (1991).
80. See ibid., Article 18(1)(a)(ii).
81. See ibid., Article 18(1)(b).
82. See ibid., Article 18(1)(c). The criterion «for other than government non-commercial purposes» appears to reflect the classic formula publicis usibus destinata, and the requirement of connection.
3. Specific Categories of State Property

To give fuller meaning to the test of «government non-commercial purposes,» Article 19 of the 1991 Draft Articles seeks to identify the property specifically in use or intended for use by the State for other than government non-commercial purposes as follows:

(a) property, including any bank account, which is used or intended for use for the purpose of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences;

(b) property of a military character or used or intended for use for military purposes;

(c) property of the central bank or other monetary authority of the State;

(d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale;

(e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale83.

These specific categories of property of the State are not intended to preclude the State from expressly consenting to the taking of such measures of constraint under article 18(1)(a) and (b), with identifiable allocation or earmark for the satisfaction of the claim84.

VI. Conclusion

The preceding survey of State practice and a brief review of the status of the rules of international law on the subject of jurisdictional immunities of States and their property as incorporated in the various multilateral conventions currently in force, bordering on the areas of direct concern to practitioners in the field, will demonstrate an emerging trend rallying around the draft articles prepared by the international Law

is warranted as a binnen beziehung under Swiss federal law to ensure and enhance unmistakable specificity, clearly identifiable as such. There can be no seizure of property ad fundandam jurisdictionem if the property is in no way connected with the object of the dispute.


84. The specific categories of property are listed as guidance to pre-empt any presumption that there is an implied waiver of immunity from execution in a given case without prejudice to actual and express waiver by the state with sufficient specificity to dispel any doubt as to the declared explicit intent of the state.
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Commission since 1978 and culminating in the final draft approved at first reading in 1986 and at second reading in 1991. Progressive development of rules of international law has found its resonance in the legislative, executive and judicial practice of States.

The main principle of immunity of States and property appears to have been settled beyond dispute. Its exceptions are concretizing and look sufficiently firmly established. The principal exception of trading activities of States stands in need of further ramifications especially in regard to the secondary test of the «purpose» in addition to the primary test of the «nature» of the transactions.

What has emerged clearly from the views of the governments appears to center upon the double requirement of the State activities or the use of the property owned, possessed or controlled by the State being exclusively for «government non-commercial» services. The commercial use of State property by the government in the exercise of its sovereign or governmental authority, or the prérrogative de la puissance publique, jure imperii, or publicis usibus destinata seem each and all invariably to point to the trends now occurring of settling disputes involving actions by States in the regulation of international trade without resorting to local remedies available within the jurisdiction of the State of the forum. In the last analysis, most States are actors in the regulation of international trade, for which a separate third-party institution has been installed to settle trade disputes in the global arena of the World Trade Organization.

Ordinary trading or commercial activities of States conducted side by side with individuals and corporations of other countries or nationalities must follow the rules of the marketplace and remain subject in the first instance to the jurisdiction of the court of the forum State otherwise competent to decide the disputes in question. Loose ends remain to be tied by the Ad Hoc Committee recently set up by the General Assembly to clarify some of the lingering doubts that need clarifications and simplification with yet greater precision. There is no need, for instance, to institute proceedings against a State eo nomine, in respect of activities conducted by its trading corporation, when that State has already waived the immunity of its agency, instrumentality, or entity, and has even identified, earmarked or allocated funds or assets specifically to be used in satisfaction of whatever judgments or awards that may be given in regard to the disputes under consideration.

It should be recalled that a State doubly enjoys immunity from the jurisdiction of the court of another State. That is to say, immunity from the jurisdiction to adjudicate, or to determine the merits of the dispute, and a separate immunity from the jurisdiction to enforce in another phase of the proceeding. Property owned by the State, or in its possession or control, and used in exclusively government non-commercial service also benefits from the enforcement phase of immunity. It is important to note specific categories of property for which it cannot be lightly presumed that the State would consent to submit to measures of constraint, unless there is an explicit or express waiver or consent communicated by the State in a way that leaves no room for any doubt, and that such property which is open to attachment or seizure by way of execution must have been earmarked, or allocated for that purpose.
To implead a foreign State or to levy execution against its property is in violation of the general rule of State immunity unless there is an express consent by the State in any phase of the proceeding or the proceeding is of the type that constitutes an accepted exception to the general rule of jurisdictional immunity.

B. DIPLOMATIC AND CONSULAR IMMUNITIES

I. Introduction

1. Historical Perspective of Diplomatic and Consular Relations

As indicated in the preceding part, diplomatic and consular relations together with the notion of diplomatic and consular immunities and privileges had long preceded the concept of jurisdictional immunities of States. Indeed the classics of international law and classical writers such as Gentili85, Grotius86, Bijnkershoek87, and Vattel88 made no mention of the doctrine of State immunity, while the problems of diplomatic immunities and the immunities of personal sovereigns were extensively discussed in their treatises.

While diplomatic relations were established at the level of heads of States, consular relations were set up to look after the interests of nationals within consular districts, on a lower level of representation, between governmental or administrative authorities, as distinguished from diplomatic representation with accreditation to the heads of States. Soon consuls or consuls general were given exequatur by the heads of the sending State, while the head of a diplomatic mission needs to be pre-approved by the process of agrément from the host State. The diplomatic representation is countrywide, while consular relations may be confined to smaller districts within the country of reception. Thus, there can be several consular representatives functioning under or without the supervision of their diplomatic mission. A consular post may be independent of a diplomatic mission, while an embassy could have its consular division complete with a consul general, consuls and vice-consuls and other officials of lower administrative ranks.

2. Progressive Development of International Law Relating to Diplomatic and Consular Relations

Not unlike State immunities but in some way more settled, diplomatic immunities have been established in the practice of States from antiquity, not only as between

86. See Grotius, H., De Jure Belli ac Pacis (1646). Liv. II, Chap. XVIII, s IV, concerning the personal inviolability of ambassadors.
87. See Bijnkershoek, C. Van: De Foro Legatorum (1744), Chaps. XIII, XIV, XV, and XVI, concerning the immunities of ambassadors from civil jurisdiction, and Chaps. IV and V, the immunities of foreign sovereigns and their property; also Foro Competente Legatorum (1723), pp. 43 and 46.
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European States since the Treaty of Westphalia of 1648, but also in ancient Greece and Rome and with the Egyptians, the Persians, the Mesopotamians and the Mongolians and Chinese dynasties. Diplomatic immunities have become an established practice even preceding the advent of the modern law of nations. Their theoretical bases may have been debated and confused with the notion of extraterritoriality of Ambassadors. Fictitious theories have all been put to rest now that a sounder functional basis has been preferred. Diplomatic agents are required to respect the laws and regulations of the receiving State.

Consular immunities have also grown out of the practice of older and more modern States, although in the more recent age prior to the Vienna codification, States were wont to conclude their bilateral consular treaties. Discrepancies existed in the past with different levels of representation in diplomatic as well as in consular relations. Contemporary international law has tended to prefer a more uniform practice through the universal process of multilateral codification conventions.

II. The Sources of Public International Law of Diplomatic and Consular Immunities

As the law appears to have been relatively settled and the practice of States practically consistent if not always uniform, the sources of international law on the subject are comparatively less difficult to determine.

1. The Practice of States

There has been consistent time-honoured practice of States regarding the exchange of embassies and diplomatic envoys as well as consular posts and consular agents. This practice has given rise to customary rules of international law recognizing the status and immunities and privileges of diplomatic and consular agents with their limitations, qualifications and exceptions or restrictions.

Relatively modern national legislation includes the Statute of 7 Anne, c. 12 (1708) Act for Preserving the Privileges of Ambassadors and other Public Ministers of Foreign Princes and States. The French décret of 13 Ventôse, an II, (1789) also recognized the inviolability of accredited envoys. In 1790, the United States also adopted an act prohibiting the issuance of a writ or process against «a person of any ambassador».

88. See VATTEL, E. DE: Le Droit des Gens (1758), liv. IV, Chap. VII, s. 108, concerning the immunities of personal sovereigns.
91. See Statute of 7 Anne, c. 12, secs. 1, 2 and 3.
92. See décret of the «Assemblée Constituante» of December 11, 1789.
European courts have established a common approach to the treatment of accredited ambassadors and consular agents.

2. The Practice of International Judicial Instances

One source that stands out in the recent years has been the jurisprudence of the International Court of Justice. Indeed, the case concerning US Diplomatic and Consular Staff in Teheran (USA v. Iran) 1979 and 1980 was historic in more ways than one. In the first place, this was the very first case that went to an international instance in our time. The decision of the Court in record time indicating provisional measures requiring the immediate release of hostages in US Embassy in Tehran and US Consulate in Iran was instructive and memorable, not only in regard to the speed with which the Court reached its conclusion but also in regard to the unanimity with which the Court was able to come to grips with the situation and to indicate provisional measures restraining both parties from activities that might deteriorate the conditions. This was also the first time that the principle of inviolability of the diplomatic premises and also of the consular posts and the personal inviolability of the diplomatic agents and staff as well as consular officials and staff were upheld on the merits although in the absence of Iranian representation. The President of the Court, Sir Humphrey Waldock, also took occasion to remind the United States of its lack of respect for the highest international judicial instance in connection with the rescue party on 24-25 April 1980, organized by the U.S. under President Carter. The Court observed that this operation was of a kind calculated to undermine respect for the judicial process in international relations, especially in view of the provisional measures indicated by the Court in response to the request by the United States.

Two other decisions, both instituted against the United States, first by Paraguay and the second by the Federal Republic of Germany for violation of the Consular conventions requiring notification. In both cases, the Court indicated provisional measures requesting the United States to do everything within its power to stay execution of the prisoner pending the decision of the Court on the merits. In both cases, the prisoners were executed forthwith in the face of the Court Order which is clearly binding under the Statute of the Court.

3. Multilateral Conventions on Diplomatic, Consular and Special Missions

Declarations of existing practice of States, consistent and widespread, three international instruments constitute the current corpus juris of the law of diplomatic, consular and special mission relating to immunities. They are

94. For the practice of European States, see Sucharitkul, S.: State Immunities and Trading Activities in International Law, Chapter 2 «Immunities of Sovereigns and Ambassadors with respect to Trading Activities,» London: Stevens & Sons Ltd., Publisher, 1959, pp. 23-47.
95. See ICJ Reports 1979 (ICJ Rep. 7) and 1980 (ICJ Rep. p. 3).
96. See ibid., 1980, at p. 3 et seq.
97. See ibid., paragraphs 93 and 94.
99. See the case concerning Walter LaGrand, ICJ Reports 1999 and the decision of the Court on the merits, see 93 AJIL (1999), p. 924.
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(1) Vienna Convention on Diplomatic Relations (1961)\(^{100}\);
(2) Vienna Convention on Consular Relations (1963)\(^{101}\); and
(3) UN Convention on Special Missions (1969)\(^{102}\).

These three conventions embody the most comprehensive sets of rules of international law on the subjects, having regard to their codificatory character and the general adherence by States, including newly emerged States. The codification conventions have been received as the most authoritative sources of international law that can be obtained in our contemporary multi-cultural world\(^{103}\). The Treaty provisions have become evidence of existing rules of international law and practice.

4. International Norms and their Practical Application in the Experience of States

Immunities attributed to diplomatic and consular agents are theoretically State immunities, in the sense that the sending States reserve the discretionary power to waive them, or alternatively to recall the agents by terminating their mandates or ending their missions. In point of fact, the true test is that the diplomatic agent himself is not capable of renouncing his personal immunities without authorization from the sending State. Thus, in *Dessus c. Ricoy* (1907)\(^{104}\), the Court said:

«L'immunité des agents diplomatiques ne leur étant pas personnelle, mais étant un attribut et une garantie de l'Etat qu'il représente; que la renonciation de l'agent est nulle surtout qu'il ne produit pas à l'appui de cette renonciation aucune autorisation émanant de son gouvernement»\(^{105}\).

The practice of States before the advent of the three codification conventions reflected the continuing fluctuation and progressive development of the law, not entirely uninfluenced by the interplay of the doctrine of absolute and restrictive immunities. A survey of national case laws will reveal the various stages of normative developments.

While common-law systems, such as the United Kingdom and the United States, have known of conflicting decisions and dicta regarding the commercial ventures of

\(^{100}\) Done at Vienna on 18 April 1961, with two Optional Protocols, entry into force 24 April 1964, *UNTS* vol. 500, p. 95. See Multilateral Treaty Deposited with the Secretary General, status as at 30 April 1999; pp. 56-71, signatories 69, Parties 179, Registration No. 7310, 24 June 1964.


\(^{103}\) In particular, the two Vienna Conventions of 1961 and 1963 are treated as purely declarations of existing rules of customary international law in view of the numerical strength of their Parties.

\(^{104}\) See 34 *Journal Clunet* (1907), p. 1086.

\(^{105}\) See *ibid.*, at p. 1087. See also *Reichenbach et Cie c. Mme. Ricoy*, *ibid.*, at p. 111: «La renonciation de Ricoy n'aurait de valeur que si elle était autorisée par son gouvernement, qu'à défaut de cette autorisation Ricoy est sans qualité pour renoncer à l'incompétence de ce tribunal;» similarly, *ibid.*, at p. 1090.
accredited diplomatic agents, older Dutch and French case laws appeared to suggest a more restrictive view with regard to capital invested in business enterprises in the Netherlands or actes de commerce of foreign diplomats in France. In one case, before the Cour de Cassation, concerning M. Tchichérine the Russian Counsel who furnished the funds to start a newspaper, La Nation, and to support it financially. Looking at the nature of the transaction, the Tribunal de Commerce considered it to be an acte de commerce without immunity, but the Court of Appeal held the transaction to be entitled to diplomatic immunity for want of spéculation commerciale. In the Cassation, the Avocat Général Descoutures, intervened amicus curiae, and observed:

«...quelle que soit la cause de l'obligation contractées par Tchichérine, des qu'on le traduit devant un Tribunal français pour l'exécution de cette obligation, on viole son immunité, son droit...car on le trouble dans l'exercice de sa fonction, on porte atteinte à sa liberté...»

The doubts which lingered before the French Courts in 1868, were revived in the series of controversial Italian decisions. The Corti di Cassazione in Comina v. Kite (1922) reintroduced and applied the distinction between private and public acts of Ambassadors. This was severely criticized by Italian jurists such as Anzilotti and Cavaglieri. The French Ambassador as acting Dean of the diplomatic corps at Rome wrote a strong protest note to the Italian Minister of Foreign Affairs. Its repercussion was manifested in the case of Barrie Lurie c. Steinmann (1928) but the distinction was restored in subsequent cases. However, in 1940, the United Session of the Corti di Cassazione di Roma once more expressly confirmed the validity of the protest lodged by the French Ambassador nearly two decades earlier, thus according immunity without distinction.

Today, these lingering doubts no longer persist since the adoption of the Vienna Convention of 1961, which may be said to have put an end to these age-old controversies.

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111. See 15 Rivista di diritto internazionale (Rivista) (1924), pp. 173-75.

112. See F.I.t., 1922-I-343, at p. 351.


114. See 20 Rivista (1928), p. 528, and a note by Bosco at pp. 528-530.

regarding the nature and extent of diplomatic immunities, especially for their private commercial ventures. Both the rule and the exceptions were confirmed on a more rational basis.

III. General Principles of Diplomatic and Consular Immunities

It may be convenient to consider first diplomatic immunities and then compare the immunities accorded to consular officers and special missions.

1. General Rules

a. Diplomatic Immunities

For the purpose of the present study, «diplomatic immunities» refer to the immunities of diplomatic agents from the criminal, civil and administrative jurisdiction of the authorities of the receiving States, and not of the sending States.

In general, under the Vienna Convention on Diplomatic Relations 1961, a diplomatic agent is entitled to other privileges and facilities, such as personal inviolability, exemption from taxation and import duties, social securities, immigration and national services and charges. Except for personal inviolability, other privileges, immunities and facilities normally extended to diplomats lie outside the scope of this course.

Nor does this course cover questions of «inviolability of the diplomatic premises, archives, means of transport, private residences, private correspondence, etc. which are highly interesting but nonetheless beyond the scope of the present enquiry. Other properties, assets, funds, etc. of the Embassy, including bank accounts, may be of some marginal interest in connection with the status of instrumentum legati and its coverage which is entitled to the protection by the territorial authorities of the receiving State.

It should be contended at this point that neither the embassies nor accredited diplomatic agents enjoy any privilege of «extra-territoriality.» They are all intra-territorial the receiving State and are entitled to their protection, as such, which inevitably includes the recognition of personal inviolability and necessarily immunity from the criminal, civil and administrative jurisdiction of the national and provincial authorities of the receiving State.

Personal inviolability implies freedom or immunity from arrest, detention and exile. Properties of a diplomatic agent in the receiving State are also entitled to some form of protection and are otherwise immune from seizure, arrest and attachment, except for certain private properties and the uses or services of which are disentitled from jurisdictional immunities under current international law.

b. Immunities for Consular and Special Missions

It may be useful, as a general principle, to indicate at this point that special missions, being more or less of the same or even higher level of governmental
representation, appear to enjoy the same type and extent of immunities as diplomatic agents, albeit for a shorter duration. Consular officers, however, are entitled to as much of jurisdictional immunities as the extent of their official functions. They are not immune ratione personae, except for the duty of notification on the part of the receiving State, and the obligation not to impede, nor to disrupt the mission of the consular posts.

2. The Maxim: Ne Impediatur Legatio

The raison d’être for diplomatic immunities is different from that of State immunities, which are based on the equality and independence or sovereignty of States. For diplomatic immunity the underlying theory appears functional. That is to say, the receiving State should undertake an obligation to protect the safety and security of diplomats and not to impede or obstruct the functioning or operation of an embassy, either by disrupting or disturbing their quiet and peaceful enjoyment of their workplace and the performance of their diplomatic functions. The obligation of the receiving State is one of conduct as well as of result, of positive action namely protection and vigilance, as well as of absence of omission in allowing others to disturb or disrupt the work of a diplomatic mission. This is best expressed in the well-known Latin imperative: ne impediatur legatio, or let the embassy be free from impediment. In other words, do not impede the embassy.

To some extent, the maxim applies mutatis mutandis also to special missions for a more limited duration on an ad hoc basis and to consular posts to a limited extent, since a consulate enjoys a lesser degree of immunities and privileges that could be characterized as diplomatic.

3. The Double Character of Diplomatic Immunities

a. Immunities Ratione Materiae

A diplomatic agent enjoys immunity from the criminal and civil jurisdiction in respect of all acts performed in his official capacity within the scope of his official functions and missions. These acts by virtue of their official nature are imputable to the States that the diplomats represent. They are attributable to the sending States and as such are covered by State immunities even after the diplomats have long left their posts. Their immunities ratione materiae subsist the termination of diplomatic functions and survive or outlive the end of their missions116.

b. Immunities Ratione Personae

A diplomatic agent enjoys complete immunity from the criminal and practically all civil jurisdiction in respect of all acts performed in their purely personal and private capacity unattached to the official functions of this mission. These immunities ratione personae are nevertheless limited in two ways

116. See Article 39 (1) and (2) of the Convention of 1961.
(1) *Ratione Temporis*, by reason of the duration of the mission. In this way, a diplomatic agent enjoys his personal immunities

- *Eundo*, coming or traveling, transiting to take up his position in the receiving State;
- *Morando*, remaining in the receiving State, maning his diplomatic post; and
- *Redeundo*, leaving the receiving State, or returning to his homestead.

(2) It follows that outside of this time-frame, namely prior to his departure to take up his position in the receiving State and after leaving the post, if the ex-diplomatic agent or former ambassador should return to revisit his former country of diplomatic residence, all the rights of action and his criminal, civil and tortious liability which may have been barred or suspended during his mandate as a diplomatic agent, will forever be revived. The period of limitation which may have been suspended, delayed or interrupted, will again be resumed, especially in respect of his personal liabilities for which he had enjoyed immunities *ratione personae* (by virtue of his personality)\(^{117}\).

**IV. Exceptions to Immunities from Civil Jurisdiction during Active Mission**

The only redress the receiving State may have for abuses by the accredited diplomatic agents, is in the notification to the sending State with a request for recall or in a more serious case a declaration of the diplomat as a *persona non grata* followed by an expulsion order or an invitation to leave the country. This has occurred in many instances of grave incidents or abuses for serious breach of national security, but not for ordinary criminal offenses or prosecutions, from which the diplomat seems to enjoy complete immunity.

For civil actions or administrative jurisdiction, however, Article 31 of the Vienna Convention of 1961, prescribes three exceptions, almost an exact parallel of exceptions to State immunity. They include

- (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission\(^{118}\);
- (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State\(^{119}\).

\(^{117}\). See e.g., *Léon c. Diaz*, 19 Journal Clunet (1892), p. 1137. C.A. Amiens, a former Minister of Uruguay in France was held amenable to the French 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 du ministre.» See also a Swiss case, 54 Journal Clunet (1927), p. 1179.

\(^{118}\). Compare Article 13 (a) of the 1991 Draft Articles on state immunities, ownership, possession and use of property. Even the sending state would not be able to invoke immunity in a similar proceeding.

\(^{119}\). Compare Article 13 (b) *ibid.*, relating to succession.
(c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.\(^\text{120}\)

Diplomatic immunities under Article 31 are enjoyed by members of the diplomatic staff only. Members of the staff employed in the administrative and technical service of the mission are also covered by Article 31 but members of the service staff only in respect of acts performed in the course of their duties.\(^\text{121}\) Such is the case for consular officers.\(^\text{122}\)

V. Conclusion

Diplomatic immunities, including a lesser form of consular immunities and a special less enduring form of immunities for special missions do not in contemporary practice give rise to serious insurmountable problems. Personal immunities are limited by the duration of the official mandates, diplomatic mission, consular term of appointment or the ad hoc or temporary nature of the special missions. Jurisdictional immunities may be equated to suspension of rights of action or deferral of the initiation of the proceedings against active diplomats, or consular officers in service, or members of special missions en fonction.

The current trilogy of Conventions, two Vienna and one General Assembly, provide an exhaustive treatment of diplomatic, consular and special mission immunities, in as much as rules of international law continue to evolve. Suffice it to state that the three multilateral conventions provide clearer signposts which serve to guide diplomats, consuls and special missions in their functions and services and to afford adequate protection from the perspective of the sending States without imposing intolerable and undue burden on the part of the receiving States. After all, they do take turns; on the basis of reciprocity every receiving State is also sooner or later a sending State in all these fields of international endeavours.

C. IMMUNITIES OF INTERNATIONAL ORGANIZATIONS AND THEIR STAFF AND ACCREDITED MISSIONS

I. Introduction

The third category of jurisdictional immunities in contemporary international law relates to the status of international organizations as international legal persons in the law of nations and the immunities accorded to their international staff of recognized rank and to resident missions accredited to the international organizations, including their permanent representatives and delegates to meetings convened by their organs. For present purposes, «international organizations» means inter-governmental organizations.

\(^\text{120}\) Compare Article 10 ibid., relating to commercial transactions concluded by the state.
\(^\text{121}\) See Article 37 (2) and (3).
\(^\text{122}\) See Article 43 of the Vienna Convention on Consular Relations, 1963 «immunity from jurisdiction.»
Two types of beneficiaries of jurisdictional immunities need to be examined under this heading:

1. The immunities accorded to the organizations and its organs, as such, and the executive and high-ranking administrative staff of the organization; and

2. The immunities accorded to the permanent mission and permanent observers’ mission and permanent representatives, observers and delegates as well as members of their mission, delegation and their administrative and technical staff.

The senior staff of the organizations, such as Secretaries-General, directors-general, and executive directors enjoy virtually the same privileged position as diplomatic agents accredited to the receiving State or host country, while members of the permanent missions, permanent observers’ missions and delegations have been treated for all practical purposes as members of a diplomatic or special missions, whose status has been discussed in part B above.

1. Autonomy and Independence of the Organizations and of the Members of their Staff

Writers on international organizations regard the success or failure of their operation as depending on the absence of control by member States of the organization, especially the host State. It has been argued that their autonomy, fiscal and otherwise, as well as their independence of judgment and decision provide the only key to their viability and the only chance of their timely attainment of the objectives for which the organizations have been constituted123. In other words, jurisdictional immunities from the courts of members of the organization, especially the host State, in respect of the organization, its property and assets, its officials and representatives and delegates accredited to the organization shall be accorded to the extent necessary to permit the full and efficient discharge of the responsibilities of the organization and to facilitate and not in the least to hamper the fulfillment of its purposes and objectives124. The functional criteria provide a solid legal foundation for jurisdictional immunities of international organizations.

2. International Organizations and their Member States, with Particular Emphasis on Host Country

It should be observed at this point that international organizations are not normally immune from the jurisdiction of international judicial instances. If they are not able to...
participate in any contentious proceedings before the International Court of Justice, it is principally because the Statute of that Court only allows States to be parties to contentious proceedings, and not because of any inherent defect in their status. International organizations are generally regarded as international legal persons, with capacity to conclude treaties under international law and other transactions or contracts under national legal systems, especially in the territory where they have their headquarters or regional offices. They also are endowed with the capacity to participate in legal proceedings, which includes institution of proceedings as well as being proceeded against where immunity has been waived or non-existent. For international judicial instances there is room for advisory opinions to be requested in accordance with the Charter.

II. The Sources of Public International Law on Immunities of International Organizations

The sources of international law on the jurisdictional immunities of international organizations are of relatively recent origin. There were no pre-existing customary rules of international law before the era or advent of the earliest primitive, practical, administrative world organizations, such as the Universal Postal Union (UPU), the Telephone and Telegraph Union, now International Telecommunications Union (ITU) and the International Labor Organization (ILO).

The first international organization of universal character is probably the League of Nations created after World War I, whose defunct was followed by the birth of the United Nations Organization after the end of hostilities in World War II. The laws and customs of international organizations are to be found in the constituent instruments, or the treaties which establish the organizations concerned, such as the Covenant of the League of Nations and the Charter of the United Nations.

1. Multilateral Conventions

Contemporary rules of international law can be ascertained from a number of basic international instruments, including notably


125. See Article 34 (1) of the Statute of the ICJ 1945: «Only states may be parties before the Court.»
127. See, e.g., Article VIII Settlement of Disputes, Section 29 (b) of the Convention on the Privileges and Immunities of the United Nations, 21 UST 1418, TIAS. No. 6900.
(2) Convention on the Privileges and Immunities of the Specialized Agencies, approved by the General Assembly, 21 November 1947\textsuperscript{130}; and

(3) Vienna Convention on the Representation of States in their Relations with International Organizations of Universal Character, 14 March 1975\textsuperscript{31}.

2. Headquarters Agreements

For the United Nations alone several Headquarters Agreements have been concluded with member States having one of the seats in their territory, such as the United States, 26 June 1947\textsuperscript{132}; the Netherlands for the ICJ, 26 June 1946\textsuperscript{133}; Chile for ECLA, 16 February 1953\textsuperscript{134}; Thailand for ESCAP, Geneva, 26 May 1954\textsuperscript{135}; Ethiopia for ECA, 18 June 1958\textsuperscript{136}; and Japan for UN, 25 July 1952\textsuperscript{137}, and UN Forces in Japan, 19 February 1954\textsuperscript{138}. Countless other like agreements and arrangements have been concluded for specialized agencies and other organizations.

3. National Legislation

National Legislative enactments giving effect to bilateral Headquarters agreements and multilateral conventions have been compiled in two volumes by the United Nations in a legislative series on Legislative Texts and Treaty Provisions concerning the legal status, privileges and immunities of international organizations, published in 1959 and 1961\textsuperscript{139}.

4. Decisions of National and International Tribunals

Decisions of national courts abound in the legal systems where international organizations operate with their principal headquarters, or head offices or regional offices.

At least three important advisory opinions of the International Court of Justice deserve close attention.

(1) Reparation for Injuries Suffered in the Service of the United Nations, 1949\textsuperscript{140};
(2) Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, 1989141; and

(3) Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, 1999142;

III. General Principles of Immunities in Respect of International Organizations

As earlier indicated, the present study is confined more exclusively to the immunities of international organizations and officials, as well as missions accredited to them, from the jurisdiction of the national courts of the State members of the organization, especially of the host country. The questions of standing, admissibility or immunities of international organizations before international tribunals are outside the scope of this enquiry.

1. Functional necessity

In strict theory, functional necessities appear to have served as a motivating force in support of immunities under this section. The criteria in which immunity is based may be viewed as comprising the following

a. Necessities of the official functions

Immunity is necessitated by the functions of the organizations which are in turn dictated by the aims and purposes or objectives and plans of the organizations. In this manner, each organization to a greater or less extent is driven by whatever is required by its functions to fulfill the objectives and to serve the avowed purposes of the organization as enshrined in its constituent instruments.

b. Institutional Autonomy

Immunity is designed to ensure institutional autonomy. Without immunity, the organization is exposed to all measures of vexatious and frivolous pressures.

c. Independence of Action

Immunity will serve to assure the independent operation and management of the organization. Without immunity, the organization will be subject to the unwarranted pressure of senseless litigation or other forms of compulsory dispute settlement.

2. Effectiveness

Effectiveness is a doctrine which requires the highest quality of the organization to be able to function to attain its ends. Efficiency is a vehicle by which for the

141. 15 December 1989, ICJ Rep. 177. Mr. Dimitru Mazilu, a Romanian national was elected to serve as a member of the sub-commission for a three year term to expire on 31 December 1986, later extended, but prevented from attending and reporting on «Prevention of Discrimination and Protection of Children.» The Court unanimously upheld the applicability.

organization to achieve its final objectives. To be effective the organization should be free from the hazard of unwarranted harassment and untarnished by possible abusive or oppressive measures within the host State.

3. Use of Terms

The term «international organization» means for purposes of this course «inter-governmental organizations.» It necessarily excludes «non-governmental organizations» or NGO, without prejudice to the applicability of jurisdictional immunities and to the scope, extent and limitations of immunities enjoyed by non-governmental organizations in their bilateral relations with the host country.

4. Absence of Reciprocity

Immunities enjoyed by international organizations are not restricted by any condition of reciprocity, as States are not immune from the jurisdiction of the Court of an international organization. Indeed, States are not subject to the jurisdiction of any international tribunal without their consent. On the contrary, it is a question of competence or jurisdiction of the court and consent to it by the State, rather than State immunity or exemption therefrom.

IV. Types and Extent or Limitations of Immunities of International Organizations

As earlier suggested, some of the types of immunities accorded in respect of international organizations resemble, in no small measure, the immunities from the jurisdiction enjoyed by diplomatic agents, and to a limited extent by consular officials. Other types are apparently institutional immunities, either available to the organizations themselves or to the permanent missions accredited to them.

1. Immunities Enjoyed by International Organizations as International Legal Persons under National and International Law

The nature, scope and extent or limitations of jurisdictional immunities applicable to international organizations are essentially limited by the provisions of the constituent instruments, prescribing their aims and purposes, powers and function, duties and responsibilities. Beyond constitutional constraints, the international organizations cannot proceed. Their immunities are further circumscribed by the Convention on Privileges and Immunities of the United Nations 1946 or of the Specialized Agencies 1947 or other instruments. In the final analysis, they are specified limitatively in the relevant headquarters agreements, and in the case of the UN in the USA, by the agreement of 1947.

Thus, article 1, section 1 of the 1946 Convention stipulates that:

- the United Nations shall possess juridical personality. It shall have the capacity
  (a) to contract;
  (b) to acquire and dispose of immovable and movable property; and
Section 2 stipulates that:

«The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in as far as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to execution»

Inviolability of the premises of the UN is provided in section 3 which also guarantees immunity from search, sequester, confiscation, expropriation or any other form of interference with its property and assets. UN archives are likewise inviolate.

2. Immunities Enjoyed by Resident Permanent Missions

Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character 1975 contains provisions relating to the inviolability of the premises of the mission and of its archives and documents, as well as those of a delegation to organs and to conferences. Although this Convention has not yet come into force as of 30 April 1999 and would not be binding on the United States in any case, in actual practice the UN Headquarters agreement with the United States in 1947 appears to have worked out a satisfactory modus vivendi to that effect.

Thus, in this context, the Secretary General of the United Nations had occasion to request the International Court of Justice under section 21 (b) of the Headquarters Agreement of 1947 for an advisory opinion on the applicability of the obligation of the United States to arbitrate in connection with the threat to close down PLO Permanent Observer’s Mission in New York.

3. Immunities Accorded to Permanent Representatives, Officials and Experts on Mission

As natural persons performing official functions connected with the activities of international organizations, such as the United Nations, grow in number, those categories of individuals are accorded necessary jurisdictional immunities to facilitate the performance of their special function and services.

143. UNTS vol. I, p. 15, article 1, section 1.
144. Ibid., article 1, section 2.
145. See ibid., section 3.
146. See ibid., section 4.
147. Done at Vienna, on 14 March 1975, Doc. A/CONF.67/16, Signatories 21; Parties 30, not yet entered into force.
148. See ibid., article 23.
149. See ibid., article 25.
150. See ibid., article 55.
a. Permanent Representatives to the Organization

The Headquarters Agreement of 1947\textsuperscript{152} as well as the General Convention of 1946\textsuperscript{153} contain provisions confirming their status as beneficiaries of immunities.

Every person designated by a member as the principal resident representative, or permanent representative, with the rank of Ambassador or Minister Plenipotentiary to be agreed upon between the UN Secretary General, the host government, and the member government shall be entitled in the territory of the United States to the privileges and immunities, subject to the corresponding conditions and obligations, as the US Government accords to diplomatic envoys accredited to it. For unrecognized governments, such privileges and immunities need be extended to such representatives, or persons on the staff of such representatives only within the headquarters district at their residence and offices outside the district, in transit between district and such residences and offices, in transit on official business to and from foreign countries\textsuperscript{154}.

Article IV section 11 of the General Convention on 1946\textsuperscript{155} specified in particular, while exercising their functions and during their journey through and from the place of the meeting, (a) immunity from personal arrest or detention and from seizure of their personal baggage and in respect of words spoken or written and all acts done by them in their capacity as representatives, immunity from legal process of every kind; and (b) inviolability of all papers and documents; and (c) such other privileges and immunities and facilities as diplomatic envoys enjoy, except for exemption from customs duties on goods imported otherwise than as part of their personal baggage or from excise duties or sales taxes\textsuperscript{156}.

b. Officials

Officials of the United Nations to be specified by the Secretary-General to the General Assembly regarding their categories shall under section 18 of the General Convention of 1946\textsuperscript{157} be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity. They shall be accorded the same privileges in respect of exchange facilities and repatriation facilities in time of international crisis as diplomatic envoys\textsuperscript{158}. They may also import free of duty their furniture and effects at the time of first taking their post in the country in question\textsuperscript{159}.

In addition, the Secretary-General and all assistant Secretaries-General are also «accorded in respect of themselves, their spouses and minor children, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance

\textsuperscript{152} UNTS vol. II, p. 11.
\textsuperscript{153} UNTS vol. II, p. 15.
\textsuperscript{155} UNTS vol. I, p. 15, section 11 (a) and (b).
\textsuperscript{156} Ibid., section 11 (c). In reality, however, certain excise duties and sale taxes are exempted.
\textsuperscript{157} See ibid., article V, Officials, sections 17 and 18.
\textsuperscript{158} See ibid., section 18 (e) and (f).
\textsuperscript{159} See ibid., section 18 (g).
with international law. Thus, the senior executive officials of the United Nations with the rank of Secretary-General, Assistant Secretary-Generals, possibly also under Secretary-Generals would be treated in the same manner as Ambassador or envoys of comparable rank.

It should be emphasized that these privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefits of individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. In the case of the Secretary-General, the Security Council shall have the right to waive immunity.

c. Experts on Mission for the International Organization

Apart from officials coming from within the scope of article V of the 1946 General Convention, experts performing mission for the United Nations are accorded such privileges and immunities as are necessary for the independent exercise of their functions, during the period of their missions, including the time spent on journeys in connection with their missions. In particular, they are accorded (a) immunity from personal arrest and detention and from seizure of personal baggage, and (b) immunity from legal process of any kind in respect of words spoken or written and acts done by them in the course of the performance of their mission. This immunity subsists after the experts concerned are no longer employed on mission for the Organization.

This is comparable to immunity ratione materiae for diplomatic agents, which survive the mission because such official acts are attributable to the State and, as such, are covered also be State immunity. In the case of experts on mission, such acts entailing liability would be attributable to the organization on whose behalf they were committed in the performance of official functions by the expert on mission.

Thus, in a recent case concerning Dato Kummaraswamy, expert on mission as special rapporteur of the «Commission on Human Rights on the Independence of Judges and Lawyers.» In the advisory opinion of 29 April 1999, the Court upheld the applicability of section 22 of the General Convention of 1946, holding the special rapporteur financially harmless, being entitled to immunity from legal process of any kind under the Convention.

160. See ibid., article V, Officials, sections 19.
161. For regional headquarters, the Chief executive or representative of the UN at the Regional Office would normally be accorded similar immunities.
In paragraph 66 of the Advisory Opinion, the Court observed, per curiam:

«Finally the Court wishes to point out that the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. The United Nations may be required to bear responsibility for the damages arising from such acts. However, as is clear from article VIII, section 29, of the General Convention, any such claims against the United Nations shall not be dealt with by national courts but shall be settled in accordance with the appropriate modes of settlement that “the United Nations shall make provisions for” pursuant to section 29165. Furthermore, it need hardly be said that all agents of the United Nations, in whatever official capacity they act, must take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations»166.

To some extent, the status and immunity accorded to experts on mission may depend on the dispositions of the host State167.

V. Conclusion

It is opportune at this point of time to attempt a general conclusion to cover the immunities from jurisdiction under contemporary international law in all its forms and manifestations and for all the three categories or headings studied in this course.

The preceding survey appears to warrant a final general conclusion that immunity from jurisdiction from the court of the territorial State is recognized in principle as well as in practice for

(1) foreign States and organs of States identified as such;
(2) diplomatic agents, consular officials, and members of special missions; and
(3) international organizations, their resident missions and permanent representatives and officials as well as experts on mission for the organization.

This general principle is qualified by a number of important limitations or exceptions, or cases where immunities will not be accorded either ratione personae after the end of the mission or ratione materiae if the acts in question are not in the exercise of governmental authority, or are otherwise prescribed as exceptions to immunities or are not considered necessary to the performance of official functions.

It should be added in the final analysis of the existing practice of States and international organizations, that the progressive evolution of international norms on

165. Ibid., para. 66 (2), see also article VIII, Settlement of Disputes, article 29 and 30.
166. Ibid., para. 66 (3); see also section 23 of the 1946 General Convention which provides for the right and duty of the Secretary-General to waive the immunity of the expert in any case where, in his opinion the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations.
167. Thus, members of the International Law Commission, who are «experts on mission» in Geneva, have since 1978 been accorded the status of accredited «heads of Mission» by the Swiss government.
the subject appears to be developing concurrently, simultaneously and independently in two diametrically opposite directions.

There is a clear trend in the first place to expand the list of beneficiaries of immunities under the headings examined to include further and more classes of the entities and individuals, families, spouses, children, servants, etc. that would benefit from the doctrine of jurisdictional immunity.

As if by magic the further the list of beneficiaries of immunities continues to grow, the further innovations of limitations, qualifications and restrictions are found necessary to maintain the delicate balance between the «rule of law» on the one hand, which should have universal application, and the «functional necessities» which serve as criteria to justify the continuing subsistence of immunity which, albeit purely jurisdictional and never substantive, nevertheless constitutes an impairment if not a temporary suspension of the otherwise mandatory application of the «rule of law.»

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