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

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Introduction

A. Purpose of the present report

1. It is proposed in this preliminary report to identify the various types of relevant materials available on the topic of jurisdictional immunities of States and their property. An examination of such materials will reveal the areas of interest to be covered by the study, and may help to determine with a reasonable measure of precision the appropriate aspects of the topic to be selected for further study to be undertaken in depth. This exercise is designed to ensure a systematic treatment of the body of customary and evolutionary rules of international law on the subject, which appear to be ripe and ready for codification and progressive development.

2. The selection of issues to be examined and the identification and determination of the material contents to be included in the treatment of the topic will require utmost care and circumspection. While flexibility of approach is recommended, a delicate balance should also be maintained so as to facilitate a successful search for a just and reasonable solution in each case, taking into account the divergent interests of all the parties involved in the application of the rules of international law regulating the granting of jurisdictional immunities of States and their property.

3. Codification efforts in the recent past will be briefly reviewed to provide an historical insight into earlier endeavours on the part of the international community,[1] leading up to the assumption of the current undertaking.

4. It is also proposed in this preliminary report to prepare an analytical outline of the general aspects of the topic, which to an appreciable extent may reflect on the future work of the Commission in this and other related areas.

5. Certain limits will have to be set to help to define with some accuracy and delimit with sufficient clarity the scope of the study to be made in the preparation and eventual elaboration of draft articles on jurisdictional immunities of States and their property. The scope, it is submitted, should be wide enough to allow all the principal and substantial questions to be treated in intelligible detail. On the other hand, it should be sufficiently narrow to permit a meaningful examination of the main core of the subject, with an assured prospect of timely completion.

6. The sources of international law on the topic offer an interesting variety of source materials, which can be found in abundance in the judicial and governmental practice of States, in national legislation and international conventions, as well as in recent and contemporary legal literature. A quick glance at these sources will serve to emphasize the unique and distinctive nature of the origin and source of the law of State immunity, which is in constant process of evolution and, occasionally, of crystallization.

7. A general survey of relevant materials and a brief review of legal developments and opinions on the topic are likely to indicate some tentative conclusions pointing to possible general trends which could serve as helpful guidance for the preparation and submission of further reports on the subject in the years ahead.

B. Basis of the current study

8. In the course of its twenty-ninth session, in 1977, the Commission took occasion to examine possible additional topics for study following the implementation of its existing programme of work. From five remaining topics of international law selected for codification in 1949 pursuant to article 18, paragraph 1, of its Statute, the Commission recommended the question entitled "Jurisdictional immunities of States and their property" for selection in the near future for active consideration by the Commission, bearing in mind its day-to-day practical importance as well as its suitability for codification and progressive development.[2] Moreover, as indicated in the documents

[1] For a brief historical review of the activities of the Commission in this area, see the report submitted by the Working Group on jurisdictional immunities of States and their property (A/CN.4/L.279/Rev.1 of 31 July 1978), sect. II, paras. 4–10.

[2] See *Yearbook ... 1977*, vol. II (Part Two), p. 130, document A/32/10, para. 110.

prepared by the Secretary-General in 1948 and 1971, respectively entitled *Survey of international law and selection of topics for codification*[3] and "Survey of international law",[4] it is doubtful whether considerations of any national interest of decisive importance stand in the way of a codified statement of the law on this topic.[5]

9. At its thirty-second session, the General Assembly considered the recommendation of the Commission and, after due deliberation in the Sixth Committee,[6] on 19 December 1977 adopted its resolution 32/151, paragraph 7 of which reads:

[*The General Assembly*]

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

10. In response to this invitation, the Commission at its thirtieth session established a Working Group to consider the question of jurisdictional immunities. The Working Group submitted a report to the Commission containing an examination of some general aspects of the topic and an exploration of possible avenues and approaches to its study, as well as possible methods of work thereon.[7]

11. The Commission considered the report of the Working Group and, on the basis of the recommendations contained in paragraph 32 thereof, decided to:

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

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

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

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

(*e*) request the Secretariat to prepare working papers and materials on the topic, as the need arises and as requested by the Commission or the Special Rapporteur for the topic.[8]

12. The report of the Commission received extensive discussion in the Sixth Committee during the course of the thirty-third session of the General Assembly.[9] By its resolution 33/139, adopted on 19 December 1978, the General Assembly,

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

...

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

...

6. *Further recommends* that the International Law Commission should continue its work on the remaining topics in its current programme,[10] including notably the topic "Jurisdictional immunities of States and their property".

13. On the basis of the recommendation made by the General Assembly, the Special Rapporteur has been encouraged to prepare and submit the present preliminary report on the topic in the spirit in which the subject matter has been discussed in the Commission and the Sixth Committee and in the light of relevant materials hitherto made available by Member States.[11]

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[3] United Nations publication, Sales No. 1948.V.1 (I); hereinafter referred to as "1948 Survey".

[4] *Yearbook ... 1971*, vol. II (Part Two), p. 1, document A/CN.4/245; hereinafter referred to as "1971 Survey".

[5] 1971 Survey, para. 75.

[6] See *Official Records of the General Assembly, Thirty-second Session, Annexes*, agenda item 112, document A/32/433, paras. 214–215.

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

[8] *Ibid.*, p. 153, para. 188.

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

[10] Paras. 4 and 5 of the resolution contain recommendations that the Commission should continue its work on State responsibility (4(*a*)), succession of States in respect of matters other than treaties (4(*b*)), treaties concluded between States and international organizations or between international organizations (4(*c*)), the law of the non-navigational uses of international watercourses (4(*d*)), and the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (5).

[11] Pursuant to the request contained in para. 188(*d*) of the report of the Commission on the work of its thirtieth session, cited in para. 11 above, the Legal Counsel of the United Nations addressed a circular letter LE 113 (32), dated 18 January 1979, to Member States. By 30 June 1979, several important replies had been received from Member States.

CHAPTER I

Historical sketch of international efforts towards codification

A. League of Nations Committee of Experts

14. The question of jurisdictional immunities of States has attracted the attention of the international community from the early days of its organization. In 1928, the League of Nations Committee of Experts

was of the view that some aspects of the subject of State immunities were ripe for codification and should be considered by an international conference convened for that purpose. It was further noted that, in reply to the questionnaire sent to Governments by the Committee, 21 Governments had expressed themselves in favour of codification of this subject, while only three had answered in the negative.[12]

B. The International Law Commission

15. The 1948 Survey, prepared for the first session of the Commission, included a separate section on "Jurisdiction over foreign States" in which it was stated that the subject covered "the entire field of jurisdictional immunities of States and their property, of their public vessels, of their sovereigns, and of their armed forces".[13]

16. At its first session, in 1949, the Commission drew up a provisional list of 14 topics selected for codification, including one entitled "Jurisdictional immunities of States and their property".[14]

17. In 1970, the Commission requested the Secretary-General to submit a new working paper as a basis for the selection by the Commission of another list of topics that might be included in its long-term programme of work.[15] The Secretary-General submitted the working paper requested ("1971 Survey"), which included a section on "Jurisdictional immunities of foreign States and their organs, agencies and property".[16]

18. In 1973, the Commission considered its long-term programme of work on the basis of the 1971 Survey. Among the topics repeatedly mentioned in the discussion was that of jurisdictional immunities of foreign States and of their organs, agencies and property. It was decided by the Commission to give further consideration to the various proposals or suggestions in the course of future sessions.[17] This the Commission eventually did in 1977,[18] and recommended that the topic should be given active consideration. In the same year, the General Assembly adopted its resolution 32/151, by which it invited the Commission to commence work on the topic.

C. Other international efforts

19. The practical problems involved in State immunities have attracted world-wide attention. In addition to the endeavours attributable to the League of Nations Committee of Experts and the Commission, other international efforts towards codification of international law on some aspects of State immunities also deserve mention. Contributions have been made by regional legal committees as well as by professional and academic societies of international repute.

1. Regional legal committees

20. The subject of State immunities has been considered by various legal committees set up by States on a regional basis. The interest shown by regional legal committees is indeed noteworthy.

(a) *Asian–African Legal Consultative Committee*

The first session of the Asian–African Committee, held in New Delhi in 1957, had on its agenda an item entitled "Restrictions on immunity of States in respect of commercial transactions entered into by or on behalf of States and by State Trading Corporations".[19]

(b) *European Committee on Legal Co-operation*

The European Committee has in some measure contributed to the conclusion of the European Conven-

[12] See 1948 Survey, para. 50.

[13] *Ibid.*

On the contemporary suitability of codifying the topic, the 1948 Survey indicated the following (para. 52):

"There would appear to be little doubt that the question—in all its aspects—of jurisdictional immunities of foreign States is capable and in need of codification. It is a question which figures, more than any other aspect of international law, in the administration of justice before municipal courts. The increased economic activities of States in the foreign sphere and the assumption by the State in many countries of the responsibility for the management of the principal industries and of transport have added to the urgency of a comprehensive regulation of the subject. While there exists a large measure of agreement on the general principle of immunity, the divergencies and uncertainties in its application are conspicuous not only as between various States but also in the internal jurisprudence of States . . .".

[14] *Yearbook . . . 1949*, p. 281, document A/925, para. 16.

[15] See *Yearbook . . . 1970*, vol. II, p. 309, document A/8010/Rev.1, para. 87.

[16] 1971 Survey, chap. I, sect. 5.

In para. 75 of that document the Secretary-General stated:

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

[17] See *Yearbook . . . 1973*, vol. II, pp. 230–231, document A/9010/Rev.1, paras. 173–174.

[18] See *Yearbook . . . 1977*, vol. II (Part Two), pp. 129–130, document A/32/10, paras. 107–111.

[19] Asian–African Legal Consultative Committee, *First Session, New Delhi, India, April 18 to 27, 1957* (New Delhi), p. 3, agenda item V. The item had been referred to the Committee by India.

tion on State Immunity of 1972,[20] and is actively interested in the outcome of its implementation.

(c) *The Inter-American Juridical Committee*

The Inter-American Juridical Committee also has on its current programme of work an item entitled "Immunity of States from jurisdiction".[21]

2. PROFESSIONAL AND ACADEMIC INSTITUTIONS

21. Learned and professional institutions competent in international legal affairs have also been keenly aware of the problems, and deeply interested in legal developments in respect of State immunities. Without giving an exhaustive list of such institutions, the following institutions may be noted:

(a) *Institut de droit international*

In 1891, the Institut, at its session held in Hamburg, adopted a resolution of which article III contains a provision limiting the application of State immunities in certain cases.[22] The Institut also adopted further resolutions on the topic of State immunities in 1951[23] and 1954.[24]

(b) *The International Law Association*

Strupp's draft code of 1926 prepared for the International Law Association enumerates certain exceptions to the doctrine of sovereign immunity.[25] The Association took occasion to restudy the problem at its 44th and 45th Conferences in 1950 and 1952.

(c) *Harvard Law School: "Research in International Law"*

The Harvard Law School "Research in International Law" has prepared a number of draft conventions with commentaries. The draft on competence of courts in regard to foreign States (1932)[26] has a direct bearing on the topic under review.

(d) *International Bar Association*

At the meeting of the International Bar Association at Cologne in 1958, a draft resolution was proposed incorporating the doctrine of restrictive or qualified immunity.[27] A resolution was adopted at its meeting at Salzburg in 1960 spelling out the circumstances in which State immunity might be withheld.

[20] Council of Europe, *European Convention on State Immunity and Additional Protocol*, European Treaty Series, No. 74 (Strasbourg, 1972).

See the statement by Mr. Furrer at the thirtieth session of the Commission (*Yearbook ... 1978*, vol. I, p. 228, 1516th meeting, para. 33). He referred to the possibility of ratification of the Convention by the United Kingdom by the autumn of 1978.

[21] See the statement by Mr. López Maldonado at the thirtieth session of the Commission (*ibid.*, p. 231, 1517th meeting, para. 16).

[22] "Projet de règlement international sur la compétence des tribunaux dans les procès contre les Etats, souverains ou chefs d'Etat étrangers" (rapporteurs: L. de Bar and J. Westlake), *Annuaire de l'Institut de droit international, 1891–1892* (Brussels), vol. 11 (1892), pp. 436–437.

[23] *Annuaire de l'Institut de droit international, 1952* (Basel), vol. 44, No. I, pp. 36 *et seq.*

[24] *Annuaire de l'Institut de droit international, 1954* (Basel), vol. 45, No. II, pp. 293–294.

[25] ILA, *Report of the Thirty-fourth Conference, held at Vienna, August 5th to August 11th, 1926* (London, 1927), p. 426; *Zeitschrift für Völkerrecht* (Breslau), Supplement to vol. XIII (1926).

[26] "Draft convention and comment on competence of courts in regard to foreign States, prepared by the Research in International Law of the Harvard Law School" (Reporter, P.C. Jessup), *Supplement to the American Journal of International Law* (Washington, D.C.), vol. 26, No. 3 (July 1932).

[27] See *American Bar Association Journal* (Chicago, Ill.), vol. 44, No. 6 (June 1958), pp. 521–523.

CHAPTER II

Sources of international law of State immunities

22. The sources of international law on the subject of State immunities appear to be more widely scattered than normally expected in the search for rules of international law on any other topic. As the Working Group indicated in 1978:

> Evidence of rules of international law on State immunities appears to be eminently available primarily in the judicial and governmental practice of States, in the judicial decisions of national courts, in the opinions of legal advisers to Governments, and partially in the rules embodied in national legislation as well as international conventions of universal or regional character within the limits of the subject-matter concerned.[28]

23. As the question of jurisdiction of a municipal court or the extent of competence of a national tribunal is primarily determined by the court or the tribunal itself, at least in the first instance it is invariably the trial judge who is called upon to decide on the limits of

[28] *Yearbook ... 1978*, vol. II (Part Two), p. 154, document A/33/10, chap. VIII, sect. D, annex, para. 17.

his own jurisdiction. The judge may do so by referring to the relevant law on the competence of his own court. It follows therefore that international usage or customary international law on the subject of State immunities has grown principally and essentially out of the judicial practice of States on the matter, although in actual practice other branches of the government, namely, the executive and the legislature, have had their share in the progressive evolution of rules of international law. Sources other than the practice of States have also played a constructive part in the final crystallization of international law of State immunities. The types of relevant materials to be examined in the course of this study may therefore be grouped under four separate headings: State practice, international conventions, international adjudication, and opinions of writers.

A. State practice

1. National legislation

24. The jurisdiction of a municipal court is usually defined by the law establishing the court itself. Legislative enactments on the judicial system may be found in the law of the Constitution, the basic law, or the specific law on the organization of the courts, the establishment of the judicial hierarchy or of a particular court. National legislation on the competence of municipal courts may prescribe the possibilities for States or State agencies becoming parties in litigation before them, especially where foreign States have appeared as plaintiffs or have consented to the proceedings or otherwise voluntarily submitted to the territorial jurisdiction. In this manner, legislative pronouncements on the question of jurisdiction provide the legal foundation for the jurisdictional immunities of foreign States and at the same time furnish evidence of State practice in the formulation of norms of general international acceptance in the field of State immunities.

25. Instances of such legislative enactments are found in readily available public documents or official records, or in the materials furnished by member Governments in response to the request made by the Secretary-General of the United Nations. Thus, article 61 of the Fundamentals of Civil Procedure of the USSR and the Union Republics[29] may be given as an appropriate example.

26. Of the more recent pieces of national legislation covering more or less wholly or in part the topic of State immunities, two significant Acts deserve particular mention, as they will require further investigation and comments with the closest attention. Without discussing their substance at this stage, the two national enactments are:

(*a*) The Foreign Sovereign Immunities Act, 1976, of the United States of America, which came into effect on 19 January 1977,[30] and

(*b*) The State Immunity Act, 1978, of the United Kingdom, which came into force on 22 November 1978.[31]

27. There are also several legislative texts in various countries dealing not exclusively and partially with certain aspects of State immunity, such as, for instance, the immunities extended to the premises of a foreign embassy or the residence of an accredited ambassador,[32] to the premises of a mission accredited to an international organization,[33] to warships and State-owned ships employed in governmental and non-commercial service,[34] to foreign princes,[35] or to the property of a foreign sovereign State.[36]

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[29] Approved by the law of 8 December 1961 of the USSR (USSR, *Vedomosti Verkhovnogo Soveta Soiuza Sovetskih Sotsialisticheskih Respublik* [Gazette of the Supreme Soviet of the Union of Soviet Socialist Republics] (Moscow), 24th year, No. 50 (15 December 1961). sect. 526, p. 1306). The first paragraph of art. 61 (*ibid.*, p. 1322) reads as follows:

"*Suits against foreign States: diplomatic immunity*

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

[30] United States of America, *United States Code, 1976 Edition* (Washington, D.C., U.S. Government Printing Office, 1977), vol. 8, title 28, sect. 1330. The text of the Act is reproduced in: American Society of International Law, *International Legal Materials* (Washington, D.C.), vol. XV, No. 6 (November 1976), p. 1388.

[31] United Kingdom, *The Public General Acts, 1978* (London, H.M. Stationery Office), Part I, chap. 33, p. 715. The text of the Act is reproduced in: American Society of International Law, *op. cit.*, vol. XVII, No. 5 (September 1978), p. 1123.

[32] See for example Act No. 29–1964 of Jamaica, entitled *Diplomatic Immunities and Privileges Act, 1964* (Jamaica, *The Acts of Jamaica passed in the Year 1964* (Kingston, The Government Printer, n.d.)).

[33] See for example the relevant legislation of a number of States giving effect to the 1946 Convention on the Privileges and Immunities of the United Nations (United Nations, *Treaty Series*, vol. 1, p. 15) and to the 1947 Convention on the Privileges and Immunities of the Specialized Agencies (*ibid.*, vol. 33, p. 261).

[34] See for instance the Public Vessels Act of 1925 of the United States of America (United States of America, *The Statutes at Large of the United States of America from December, 1923, to March, 1925* (Washington, D.C., U.S. Government Printing Office, 1925), vol. 43, Part 1, chap. 428, p. 1112; *idem, United States Code Annotated, Title 46, Shipping, sects. 721–1100* (St. Paul, Minn., West Publishing [1975]), sects. 781–799); and various national legislations implementing the International Brussels Convention of 1926 for the Unification of Certain Rules relating to the Immunity of State-owned Vessels and its Additional Protocol of 1934 (League of Nations, *Treaty Series*, vol. CLXXVI, pp. 199 and 215), the 1958 Convention on the Territorial Sea and the Contiguous Zone (United Nations, *Treaty Series*, vol. 516, p. 205), and the 1958 Convention on the High Seas (*ibid.*, vol. 450, p. 11).

[35] See for example the General Statute of 1793 Governing the Administration of Justice in the Prussian States (1793), para. 76, and the Prussian Order in Council of 1795, noted in S. Sucharitkul, *State Immunities and Trading Activities in International Law* (London, Stevens, 1959), p. 11.

[36] See for example the law of 26 April 1917 and the Royal Decree of 29 May 1917 of the Netherlands (*ibid.*, pp. 85 and 226).

2. JUDICIAL DECISIONS OF MUNICIPAL COURTS

28. The jurisprudence or the case law of the principal legal systems provide an inexhaustible source of supplies for rules of international law on State immunities. The task of examining the judicial practice of all States, large and small, would appear to be virtually impossible, if not, indeed, undesirable. The main difficulties and obstacles encountered in an endeavour to codify rules of international practice on State immunity may be said to result from the diversity of legal procedures and the divergency of judicial practice, which varies from system to system and from time to time. Nevertheless, such difficulties are not really insuperable, nor are obstacles insurmountable, especially as municipal courts and national judges have recently started to acquaint themselves with the decisions of other national tribunals on the subject of State immunities. The process of unification or harmonization by municipal courts has already begun. In point of fact, the efforts towards uniformity and harmony in judicial developments have resulted in several notable judicial pronouncements expressly recalling precedents and decisions of other national courts, which are otherwise foreign to the legal system. Such utilization of comparative law techniques could become a healthy habit for municipal courts faced with difficult and delicate questions of international law.

29. To illustrate the application of the comparative technique, the Mixed Court of Appeal of Egypt in a case concerning the Turkish Tobacco Monopoly[37] identified its own case law as following the Italian and Belgian practice.

Another example highly illustrative of the use of a similar technique is furnished by a decision of the Supreme Court of Austria in 1950,[38] which reviewed the practice of Austria and other States on the subject before reaching the decision. In that decision, the Court observed:

> In the result, therefore, it cannot be said that there is any uniformity of case law in so far as concerns the extent to which foreign States are subject to Austrian jurisdiction. In view of the fact that we are here concerned with a question of international law we have to examine the practice of the courts of civilized countries and to find out whether from the practice we can deduce a uniform view; this is the only method of ascertaining whether there still exists a principle of international law to the effect that foreign States, even in so far as concerns claims belonging to the realm of private law, cannot be sued in the courts of a foreign State.[39]

30. Common law courts have also begun to cite decisions of foreign courts on matters concerning jurisdictional immunities of States. Thus, in 1940, the Appellate Division of the Supreme Court of New York, in *Hannes* v. *Kingdom of Roumania Monopolies Institute*[40] observed that questions of immunity were ordinarily determined under international law as matters of comity, involving therefore considerations of expendiency in friendly, international intercourse, rather than the principle of municipal law. The Appellate Court referred to the practice prevailing in Romania as quoted in a French decision concerning the Polish State.[41] An outstanding illustration is further furnished by a most recent English decision of the Court of Appeal in the *Trendtex Trading Corporation Ltd.* v. *Central Bank of Nigeria* case in 1977,[42] which reflects a new approach to the methods of identifying rules of contemporary international law. A European Convention signed although not yet ratified by the United Kingdom was found to be persuasive, and reference was made in a progressive way to a wide variety of other sources, including decisions of foreign courts, as evidence of existing rules of international law.

31. Any serious study of international law of State immunities cannot fail to take into account the judicial practice of States. Surveys of case law hitherto conducted by private research are limited to accessible sources from which relevant materials are available, such as the United Kingdom, the United States of America, France, Italy, Belgium, Netherlands, Egypt, Austria, Germany and Switzerland.[43] Materials from the judicial practice of the countries whose reports are not publicly available may be further supplied by member Governments in reply to the request made by the Secretary-General.[44] In the ultimate analysis, the study will not be complete without a review of all the available case law across the breadth and length of the various legal systems, from *The schooner "Exchange"* v. *McFaddon and others* case (1812)[45] to the *Trendtex Trading Corporation Ltd.* v. *Central Bank of Nigeria*

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[37] See Monopole des Tabacs de Turquie and Another *v.* Régie co-intéressée des Tabacs de Turquie: *Annual Digest of Public International Law Cases, 1929–1930* (London, 1935), Case No. 79, pp. 123–125.

[38] Dralle *v.* Republic of Czechoslovakia: *International Law Reports* (London), vol. 17 (1956), Case No. 41, pp. 155 *et seq.*

[39] *Ibid.*, pp. 157–158 [translation by the Secretariat]. The Court reviewed a large number of Italian, Belgian, Swiss, Egyptian, English, American, German, French, Greek, Romanian and Brazilian decisions before reaching its own conclusion.

[40] *Annual Digest and Reports of Public International Law Cases, 1938–1940* (London, 1942), Case No. 72, pp. 198 *et seq.*

[41] Banque de crédit [of Prague] *v.* Etat polonais case (*ibid.*, pp. 202–203).

[42] American Society of International Law, *International Legal Materials* (Washington, D.C.), vol. XVI, No. 3 (May 1977), p. 471.

[43] See, for instance, the cases reviewed by H. Lauterpacht in "The problem of jurisdictional immunities of foreign States", *The British Year Book of International Law, 1951* (London), vol. 28 (1952), pp. 220–272. See also a survey of decisions of various courts by the Special Rapporteur in *State Immunities ...* (*op. cit.*), *passim*, and in "Immunities of foreign States before national authorities", *Recueil des cours de l'Académie de droit international de La Haye, 1976-I* (Leyden, Sijthoff), No. 149 (1977), pp. 93–211.

[44] See footnote 11 above.

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

case (1977),[46] from *the "Prins Frederik"* (1820),[47] *the "Parlement belge"* (1880),[48] *the "Porto Alexandre"* (1920),[49] *the "Cristina"* (1938)[50] cases to *the Comisaría General de Abastecimientos y Transportes* v. *Victory Transport Inc.* (1965)[51] and *the "Philippine Admiral"* (1975)[52] cases. Suits against foreign States and foreign Governments abound before the municipal courts of various countries. Instances of foreign States involved in municipal litigation include suits brought against the Danish Government (1882),[53] the Greek State (1951),[54] the USSR (1926),[55] the National Iranian Oil Company (1965),[56] the Government of Pakistan (1975),[57] the United Arab Emirates (1978),[58] the Federal Republic of Nigeria (1978),[59] and a host of other nations.

3. GOVERNMENTAL PRACTICE

32. The practice of the executive branch of the government constitutes another important source of rules of international law of State immunities, as opinions of the executive or governmental authorities regarding the question whether or not, in a given case, a particular foreign Government ought to be accorded State immunity, could be conclusive if not determinative of the issue. The policy followed by the executive with regard to the jurisdictional immunities of foreign States should also reflect the extent to which the State itself would wish to be accorded the same extent of immunities from foreign courts in like circumstances. It is within the primary responsibility of the executive itself not only to advise the State but also to take action in relation to its decision, in any given situation, to claim or disclaim sovereign immunities from the jurisdiction of another State.

33. Official opinions in the form of internal or inter-departmental advice given by the legal advisers or the attorneys-general, or as contained in diplomatic correspondence communicating the views of the State concerned, are useful evidence of State practice in both directions, as they reflect the positions of the State as grantor and as beneficiary or recipient of State immunity.

34. The executive branch of the government appears therefore to have at least three distinctive roles to play in its contribution to the evolution of State practice. In the first place, it can play a central role in initiating, introducing and assuring the passage of a legislative enactment on State immunities in line with the views and policy of the government in power.[60] Secondly, in many countries, it is interesting to note the increasing part the executive branch of the government is playing by giving advice to the judiciary on matters of State immunities,[61] or by issuing statements or certificates to its own courts confirming the status of an entity or the existence of statehood or any pertinent question of international law or a question of fact of international relevance, which could have a direct bearing on the claim of State immunity presented by the foreign State in a given case.[62] Thirdly, the views of the executive

[46] For reference, see footnote 42 above.

[47] J. Dodson, *Reports of Cases argued and determined in the High Court of the Admiralty* (London, Butterworth, 1811–1822), vol. II, p. 451.

[48] United Kingdon, *The Law Reports, Probate Division*, (London, Incorporated Council of Law Reporting for England and Wales. 1880), vol. V, p. 197.

[49] *Ibid.* (1920), p. 30.

[50] *Ibid., House of Lords, Judicial Committee of the Privy Council and Peerage Cases, 1938* (London, 1938), p. 485.

[51] United States of America, *Federal Reporter*, 2nd series, vol. 336 (St. Paul, Minn., West Publishing, 1965), p. 354. *Certiorari* denied: *United States Reports*, vol. 381 (Washington, D.C., U.S. Government Printing Office, 1965), p. 934.

[52] American Society of International Law, *International Legal Materials* (Washington, D.C.), vol. XV, No. 1 (January 1976), pp. 133–145.

[53] Morellet *v.* Governo Danese (1882): *Giurisprudenza Italiana* (Turin, Unione tipografico-editrice torinese, 1883), vol. I, p. 125.

[54] Socobelge et Etat belge *v.* Etat hellénique, Banque de Grèce et Banque de Bruxelles (1951): *Journal du droit international* (Clunet), (Paris), 79th year, No. 1 (January–March 1952), pp. 244–266.

[55] Société Le Gostorg et URSS *v.* Association France-Export (1926): France, *Recueil général des lois et des arrêts, année 1930* (Paris, Recueil Sirey), part 1, p. 49.

[56] N.V. Cabolent *v.* National Iranian Oil Company (1965–1968): American Society of International Law, *International Legal Materials* (Washington, D.C.), vol. IX, No. 1 (January 1970), p. 152.

[57] Thai-Europe Tapioca Service Ltd. *v.* Government of Pakistan, Ministry of Food and Agriculture, Directorate of Agricultural Supplies (1975): United Kingdom, *The All England Law Reports, 1975* (London, Butterworth, 1976), vol. 3, p. 961.

[58] 40 D 6262 Realty Corp. *v.* United Arab Emirates (1978): United States of America, *Federal Supplement* (St. Paul, Minn. West Publishing, 1978), vol. 447, p. 710 (Southern District of New York, 1978).

[59] Ipitrade International S.A. *v.* Federal Republic of Nigeria (1978): *ibid.* (1979), vol. 465, p. 824 (District of Columbia District, 1978).

[60] For instance, in the United States of America, the revised bill (H.R. 11315) on foreign State immunities submitted to the House of Representatives on 19 December 1975 on behalf of the Department of State and the Department of Justice (see United States of America, *Congressional Record, Proceedings and Debates of the 94th Congress, First Session*, vol. 121—Part 32 (Washington, D.C., U.S. Government Printing Office, 1975), p. 42017).

[61] See for example the United States of Mexico *et al. v.* Schmuck *et al.* case (1943): *Annual Digest and Reports of Public International Law Cases, 1943–1945* (London, 1949), Case No. 21, p. 75. See also *Ex parte* Republic of Peru: United States of America, *United States Reports*, vol. 318 (Washington, D.C., U.S. Government Printing Office, 1943), p. 578. The Executive Branch may recognize or allow a claim of immunity. The courts are bound, in some legal systems, to abide by the decisions of the government. In the United States of America, for example, all questions connected with the claim of immunity cease to be judicial once the State Department has authoritatively recognized or allowed the claim.

[62] See for example Republic of Mexico *et al. v.* Hoffman (1945): *Annual Digest and Reports of Public International Law Cases, 1943–1945* (London, 1949), Case No. 39, p. 143. The State Department certified that it recognized ownership of the vessel by the Government of Mexico but did not state that ownership without possession would constitute a ground for immunity.

appear to be final if not decisive on the question whether the State should claim or waive its own sovereign immunities in a given set of circumstances.[63]

35. In addition to the three types of activities undertaken by the executive branch of the government, contributing to the formation of State practice on the question of immunities, the executive or the competent administrative authorities of the State are in reality the State agencies directly responsible for the allowance, refusal or suspension of certain types of immunities. If the term "jurisdictional immunities" refers mainly to the immunities of a sovereign State from the jurisdiction, or more especially immunity from the power of adjudication, of the court of another State without its consent, there appear to be several other types of immunities which belong more eminently to the domain of the executive power, such as immunities from search, arrest, detention and service of writs and immunities from execution. Accordingly, the exercise or non-exercise of such administrative power is tantamount to the recognition or explicit allowance of various types of immunity other than immunity from adjudication, or in the reverse case, to the denial or refusal of such immunity.

36. In the practice of States, the decisions of the national tribunals of a given country do not necessarily follow the same line as the conclusion or the views held by the executive branch of the government. Such lack of co-ordination within the same legal system may lead to political embarrassments in some instances.[64] To ensure a higher degree of co-ordination and harmonization, it is often necessary for the political branch of the government in some countries to take the lead by identifying certain areas of activities where immunities should be recognized and allowed, either for the general guidance of the courts[65] or on an *ad hoc* basis.[66]

37. It is not seldom that, when a suit is brought against a foreign Government, its official representatives accredited to the host country of the court are instructed to assert or present the claim of immunity. Thus a diplomatic agent may be instructed by his Government to claim State immunity in a case where the Government is being impleaded, or to present the relevant national laws confirming the official status of an entity or the official character of its activities or the fact of its constitution as a State agency or instrumentality entitled to sovereign immunity.[67] This task could also be performed by making representations to the political branch of the government, which may in turn communicate its views to the trial court.[68]

38. The relative scarcity or scantiness of materials in the form of official or diplomatic correspondence in readily accessible publications appears to present no major obstacle to the search for the views of Governments on matters of State immunities. Since the subject is of vital interest to States both as grantors and as recipients of immunity, the comparative shortage of known opinions of Governments could be effectively remedied by requesting States to give their official views on certain important issues. Answers to a questionnaire by Governments, with additional comments and suggestions, could help to compensate for the current lack of adequate expression of official views in existing governmental practice. Replies from Member States will clearly constitute a significant body of source materials for the purpose of the present inquiry.

B. International conventions

1. Relevant general conventions

39. As there appears to be no general treaty or agreement currently applicable to State immunities,

[63] See *Yearbook ... 1978*, vol. II (Part Two), pp. 153–154, document A/33/10, chap. VIII, sect. D, annex, paras. 13–14.

[64] In the Mexico *v.* Hoffman case (1945), Chief Justice Stone declared:

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

[65] See for example the famous "Tate letter" of 19 May 1952 from the Acting Legal Adviser to the Acting Attorney-General, declaring that:

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

[66] See for example the "Beaton Park" case (1946): *Annual Digest and Reports of Public International Law Cases, 1946* (London, 1951), Case No. 35, p. 83; and the "Martin Behrman" case (1947): *ibid., 1947* (London, 1951), Case No. 26, p. 75. The court rejected immunity in one case and sustained it in another, following the position taken by the political branch of the Government in each case.

[67] See for example the certificate of the Ambassador of the United States of America regarding the status of the United States Shipping Board in the Compañía Mercantil Argentina *v.* U.S.S.B. case (1924): United Kingdom, *Law Journal Reports, King's Bench, New Series*, vol. 93, p. 816; and the affidavits submitted by the Ambassador of Spain in the Baccus S.R.L. *v.* Servicio Nacional del Trigo case (1956): United Kingdom, *The Law Reports, 1957, Queen's Bench Division* (London, The Incorporated Council of Law Reporting for England and Wales), vol. 1, p. 438. Similarly, the assertion by the Ambassador of the USSR regarding the representative character of Tass as a State agency was accepted by the court (Krajina *v.* The Tass Agency and Another (1949): United Kingdom, *The All England Law Reports*, 1949 (London, The Law Journal, 1950), vol. 2, p. 274).

[68] See for example the E.W. Stone Engineering Co. *v.* Petróleos Mexicanos case (1945), where the court held that:

"A determination by the Secretary of State with respect to the status of such instrumentalities is as binding on the courts as is his determination with respect to [the] foreign Government itself." (*Annual Digest and Reports of Public International Law Cases, 1946* (London, 1951), Case No. 31, p. 78.)

and as the present study is designed to lead to the eventual codification of the applicable rules of customary international law on the subject, attention should be directed towards existing general conventions of a universal character that contain provisions directly concerning certain aspects of the topic or cover areas closely linked or related to, or even partially overlapping, the subject of State immunities.

40. Among such instruments, attention may be turned to the following conventions:

(a) *Geneva Conventions on the Law of the Sea (1958)* The immunities applicable to warships and State-owned ships employed in governmental and non-commercial service in certain circumstances have been included in the Convention on the Territorial Sea and the Contiguous Zone (1958),[69] and in the Convention on the High Seas (1958).[70]

(b) *Vienna Convention on Diplomatic Relations (1961)* The immunities of State property used in connection with diplomatic missions are partially included in this Convention.[71]

(c) *Vienna Convention on Consular Relations (1963)* The immunities of State property used in connection with consular missions are partially covered by this Convention.[72]

(d) *Convention on Special Missions (1969)* The immunities of State property used in connection with special missions are in part treated in this Convention.[73]

(e) *Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (1975)*. The immunities of State property used in connection with the premises, offices or missions of the representation of States in their relations with international organizations are included in this Convention.[74]

41. The above general conventions were prepared and adopted by the Commission in the form of draft articles.[75] It is useful to note also that some of the aspects of the current study are closely related to other topics under examination by the Commission, such as the topic of relations between States and international organizations,[76] and succession of States in respect of matters other than treaties.[77]

42. Prior to the adoption of the 1958 Conventions of the Law of the Sea, there was already in force, mainly in Europe, the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (Brussels, 1926),[78] and its Additional Protocol of 1934.[79] It is a general Convention, but with application limited to the 13 countries which ratified it and to the immunities of States in respect of State-owned or State-operated vessels employed exclusively in governmental and non-commercial service.

2. Regional conventions

43. Apart from bilateral arrangements which could have some bearing on the problem of State immunities, there is now currently in force the European Convention on State Immunity of 1972,[80] to which attention should be directed. This Convention covers several aspects of State immunity. It came into force on 11 June 1976, and its application is widening as more signatories ratify it. The Convention provides interesting evidence of the general trends towards which a group of States in Europe are prepared to see the practice develop. It is clearly a useful source material for the present study.

C. International adjudication

44. While municipal judicial decisions are numerous in the practice of States, there appears to have been no incident, no conflict, which has compelled States to seek international judicial settlement or even an advisory opinion of the International Court of Justice or the Permanent Court of International Justice on any question of State immunity. No known arbitration has been noted in any report, whether by the Permanent Court of Arbitration or by any international arbitral tribunal. This should not be taken to mean that the

[69] United Nations, *Treaty Series*, vol. 516, p. 205.

[70] *Ibid.*, vol. 450, p. 11.

[71] *Ibid.*, vol. 500, p. 95.

[72] *Ibid.*, vol. 596, p. 261.

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

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

[75] The 1956 draft articles on the law of the sea: *Yearbook ... 1956*, vol. II, pp. 256 *et seq.*, document A/3159, chap. II, sect. II; the 1958 draft articles on diplomatic intercourse and immunities: *Yearbook ... 1958*, vol. II, pp. 89 *et seq.*, document A/3859, chap. III, sect. II; the 1961 draft articles on consular relations: *Yearbook ... 1961*, vol. II, pp. 92 *et seq.*, document A/4843, chap. II, sect. IV; the 1967 draft articles on special missions: *Yearbook ... 1967*, vol. II, pp. 347 *et seq.*, document A/6709/Rev.1, chap. II, sect. D; the 1971 draft articles on the representation of States in their relations with international organizations: *Yearbook ... 1971*, vol. II (Part One), pp. 284 *et seq.*, document A/8410/Rev.1, chap. II, sect. D.

[76] See *Yearbook ... 1977*, vol. II (Part One), p. 139, document A/CN.4/304; and *Yearbook ... 1978*, vol. II (Part One), p. 263, document A/CN.4/311 and Add.1.

[77] See *Yearbook ... 1974*, vol. II (Part One), p. 91, document A/CN.4/282.

[78] League of Nations, *Treaty Series*, vol. CLXXVI, p. 199.

[79] *Ibid.*, p. 215. For a brief report on the Convention, see J.W. Garner, "Legal status of government ships employed in commerce", *American Journal of International Law* (Washington, D.C.), vol. 20, No. 4 (October 1926), p. 759.

[80] For reference, see footnote 20 above. See Council of Europe, *Explanatory Reports on the European Convention on State Immunity and the Additional Protocol* (Strasbourg, 1972). For an interesting article, see I.M. Sinclair, "The European Convention on State immunity", *International and Comparative Law Quarterly* (London), vol. 22, part 2 (April 1973), pp. 254 *et seq.*

matter of State immunities is not subject to regulation by international law. There have been no cases for international adjudication on subjects such as diplomatic immunities, which have been understood to fall indubitably within the province and function of international law. Thus the absence of international judicial decisions or pronouncements on the subject, while indicating that the search through this particular type of sources will not be fruitful, does not imply that there will be no case before the international tribunal shortly. An eye should therefore be kept open to examine relevant materials from this source which may become available in the near future.

D. Opinions of writers

45. There is a rich legal literature on the doctrine and practice of States on jurisdictional immunities of foreign sovereign States. Opinions of writers will be consulted as widely as possible in order to ascertain and verify the emerging trends of legal developments. Without at this stage given an exploratory bibliography or an index of selected authors on the subject of State immunities or on general treatises with important reference to the subject of immunities, it can be asserted with assurance that the *opinio doctorum*, varied and varying as it may be with time and place, will constitute a main source of materials to be consulted in the present and further studies. Legal analyses and systematic theorizations of State practice undertaken by recent and contemporary writers on the international law of State immunities offer an irresistible challenge to any serious attempt at codification and progressive development of existing rules of international law on jurisdictional immunities of States and their property.

CHAPTER III

Possible content of the law of State immunities

A. Initial questions

46. The main purpose of this preliminary report is to determine, even though provisionally, the possible content of the rules of international law applicable to the question of State immunities. The present chapter will contain the core of all the relevant questions and issues involved in each and every aspect of jurisdictional immunities of States and their property. Once the content of these questions is determined and identified with relative clarity, it is hoped that the scope of the draft articles to be prepared will be more distinctly delineated. With the scope of the study thus defined with reasonable precision and the substantive content of applicable norms ascertained and verified, it will be desirable to examine at a later stage the question of the structure and the order of presentation of the body of rules of international law in the form of draft articles. In the mean time, of no less significance and relevance to the question of determining the content of the law is the question of the extent of the application of each rule of law. In other words, for each item in the substantive content of the norms selected for codification it is essential to appreciate the limits of its practical applicability or the circumstances in which it may be actually invoked or applied. Another question of comparable material importance appears to suggest itself in regard to the types of grantors of State immunities on the one hand, and the beneficiaries or recipients of the right—or, more aptly, the privilege—of State immunities on the other.

47. The apparent dichotomy between States and their property poses certain queries, but a closer examination will reveal the true nature of the questions involved. Immunities belong in any event, and in each and every instance, to the State, and exclusively to the State, without exception. Thus it can be assumed that the special mention of the property of States in the title of this study is not designed to detract from the reality or the validity of the proposition of law that only the State is capable of rights and duties under international law, although its property may receive certain protection or be covered by certain benefits or privileges by virtue of the application of the rules of international law of State immunities. Property as such, whether owned by the State or by any other personality, is not capable of rights and duties as a subject of international law. State property can be viewed as an object rather than as a subject of international rights and liabilities. The dichotomy, although misleading and possibly unintended, is helpful in a different respect. It helps to explain that, in the consideration of the question of State immunities, there are several stages or phases of the application of the rules, involving notably immunities from the power or competence of the court to adjudicate, immunities from preliminary or provisional measures before trial which could be of an administrative character, such as immunities from seizure and attachment, and ultimately immunities from execution following final judgement of the court. The distinction between States and their property might also serve to indicate at an

early stage of the initial study that the pre-trial and post-trial types of immunities present certain basic differences in features and characteristics, and that the post-judgement phase may relate more to questions of immunities in respect of State property than to immunities in respect of State activities.

B. The question of definitions

48. For the purpose of the present study and also of the eventual draft articles, certain key words appear to require very precise definitions. Without at this stage excluding the possibility that other terms may require definition, it might be useful to clarify the notional concept of certain terms that seem basic to any treatment of the subject of State immunities.

1. Jurisdiction

49. The term "jurisdiction" or "competence", in its more frequent usage, applicable to the court, refers to the judicial competence or power of a tribunal to adjudicate or to settle disputes by adjudication. The expression *juris dictio* literally means the announcement or pronouncement or determination of the law or the rights of the parties in litigation. The same expression can also mean a particular legal system, or a country having a distinct legal system.

2. Jurisdictional immunities

50. The word "jurisdictional" is referable to the jurisdiction or competence of the tribunal or the judiciary as above noted, but it has also been used to cover other types of jurisdiction not necessarily judicial in nature, such as administrative and executive power sometimes exercised by the court and at other times by the administrative or police authorities.

51. The term "jurisdictional immunities" could therefore refer to the right of sovereign States to exemption from the exercise of the power to adjudicate as well as to the non-exercise of all other administrative and executive powers by whatever measures or procedures by another sovereign State. The concept covers the entire judicial process, including investigation, examination, rendering of judgement and also execution of the judgement rendered.

52. It is therefore clear that, while the expression "jurisdictional immunities" can include both types of immunities, namely, "immunity from jurisdiction" and "immunity from execution", the former is essentially different in kind as well as in stage from the latter. Thus waiver of "immunity from jurisdiction" does not imply submission to measures of execution. Similarly, the court may decide to exercise jurisdiction in a suit against a foreign State on various grounds, such as the commercial nature of the activities involved, the consent of the foreign State, or voluntary submission, but will have to reconsider or re-examine the question of its own jurisdiction when it comes to executing the judgement. It will be seen that not all types of property of the State will be susceptible to measures of execution.

53. Furthermore, it should be noted that "jurisdictional immunities" does not imply any exemption from the application of substantive law. States are not immune from each other's territorial laws. This absence of legal or substantive immunity is clearly manifested upon waiver of jurisdictional immunities or voluntary submission by one State to the jurisdiction of another State. Thereafter, the substantive and also the procedural rules of the local law, including the *lex fori*, which may be temporarily suspended on account of State immunities, will resume their normal application. On the other hand, "jurisdictional immunities" presupposes the existence of valid or competent jurisdiction in accordance with the ordinary rules of private international law.[81]

3. State

54. There will be no necessity to define the term "State" for all purposes, but for the purpose of the current study the need may arise to indicate with certainty, in regard to the question of recipients or beneficiaries of State immunities, whether the expression "State" should cover only the State as such, or also its sovereign head, its government, and all departments forming part of the central government, thereby excluding all other separate entities and national enterprises.[82] It is possible to envisage a treatment of this problem in separate provisions dealing with the forms of the structural organization of the State to be understood as forming an integral part of the State as a united whole, and those separate entities which, subject to certain limitations and conditions, could enjoy the benefits of State immunities, for instance when acting for or on behalf of the State, and in the exercise of sovereign and governmental functions. With adequate provisions on the extent of State immunities based on the criterion of the nature of the activities, there may be no need to incorporate the question of the form of the State organization or its structure in the definition section,

[81] A further distinction has been observed in French jurisprudence between *"immunité de juridiction"* and *"incompétence d'attribution"*. While the former has afforded a criterion for restricting immunity on the basis of the private capacity in which the State has acted, the latter bases the incompetence of the court on the nongovernmental nature of the State activities. See Epoux Martin *v.* Banque d'Espagne case (1952): *Journal de droit international privé* (Clunet) (Paris), 80th year, No. 3 (July–Sept. 1953), p. 654, with a note by J.-B. Sialelli; see also J.-P. Niboyet, "Immunité de juridiction et incompétence d'attribution", *Revue critique de droit international privé* (Paris), vol. XXXIX, No. 2 (April–June 1950), p. 139.

[82] See for example the United Kingdom *State Immunity Act 1978* (for reference, see footnote 31 above), art. 14, para. 1.

which could be exclusively devoted to clarifying each notional concept by defining its content.

4. STATE PROPERTY

55. The concept of "State property" or "biens d'Etat" has been made clear in earlier work of the Commission, especially in the context of the draft articles on succession of States in respect of matters other than treaties.[83] Accordingly, a new definition may be superfluous, and the meaning to be ascribed to it could remain as defined, viz., property, rights and interests which are owned by the State according to its internal law.[84] However, the problem of classification of the types of State property for purposes of immunities from jurisdiction and execution will require a fresh and close examination.

C. General rule of State immunity

56. In 1978, the Working Group on jurisdictional immunities of States and their property described the nature of the topic and its legal basis in this fashion:

> The doctrine of State immunity is the result of an interplay of two fundamental principles of international law: the principle of territoriality and the principle of State personality, both being aspects of State sovereignty. Thus, State immunity is sometimes expressed in the maxim *par in parem imperium non habet*.[85]

57. It is of utmost importance to restate at the outset of the study the general rule of State immunity, which is the consequence of the concurrent application of two basic principles of international law that come into play whenever one sovereign entity is engaged in activities within the territorial jurisdiction of another. Without the coincidence of the two aspects of sovereignty, namely the State as a national sovereign and the State as a territorial sovereign, there would be no overlapping of sovereign powers. It will be necessary to trace the origin and the historical development of this doctrine of State immunity.

58. In tracing legal developments concerning State immunity through national experiences, it will be seen that certain analogous principles have been followed in the adoption of the principle of State immunity in the judicial practice of States.[86] Thus in common law jurisdictions the doctrine of immunity of foreign States has, to a large extent, been influenced by the traditional immunity of the local sovereign. The transition of the principle of the immunity of the local sovereign to that of a foreign sovereign[87] has been followed by a further transition from the attributes of a personal sovereign to the immunities of the very State he represents.[88] Earlier decisions of national courts appear to have linked State immunity to the principles of diplomatic immunities and the immunities of personal sovereigns.[89] All the three instances cited have been placed on the same footing.[90] The relation between these principles finds occasional expression in the theory that the immunities enjoyed by the sovereigns and ambassadors belong ultimately to the State they represent, which is further reflected, in the case of diplomatic agents, in the rule

[83] See *Yearbook ... 1974*, vol. II (Part One), p. 91, document A/CN.4/282.

[84] See *Yearbook ... 1973*, vol. II, p. 205, document A/9010/Rev.1, chap. III, sect. B, art. 5.

[85] *Yearbook ... 1978*, vol. II (Part Two), p. 153, document A/33/10, chap. VIII, sect. D, annex, para. 11.

[86] See for example the case of the Schooner "Exchange" *v.* McFaddon and others (Cranch, *op. cit.*, p. 116), where Chief Justice Marshall stated the classic formulation of the doctrine of sovereign immunity. His dictum runs in part:

> "The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation, in practice, in cases under certain peculiar circumstances, of that absolute and complete interdiction within their respective territories which sovereignty confers." (*Ibid.*, p. 135)

See also the "Prins Frederik" case (1820) (Dobson, *op. cit.*, p. 451) and the case Gouvernement espagnol *v.* Casaux (1849) (Dalloz, *Recueil périodique et critique de jurisprudence, de législation et de doctrine, année 1849* (Paris, Bureau de la jurisprudence générale), part one, p. 6; *Recueil général des lois et des arrêts, année 1849* (Paris, Sirey), part one, p. 83).

[87] It was held in the "Prins Frederik" case that the foreign State as personified by the foreign sovereign is equally sovereign and independent, and that to implead him would insult his "regal dignity". (Dodson, *op. cit.*, p. 451). See also Lord Campbell C.J. in the case De Haber *v.* the Queen of Portugal (1851):

> "... it is quite certain, upon general principles ... that an action cannot be maintained in an English Court against a foreign potentate ... To cite a foreign potentate in a municipal court for any complaint against him in his public capacity, is contrary to the law of nations, and an insult which he is entitled to resent." (United Kingdom, *Queen's Bench Reports*, new series (London, Sweet, 1855), vol. XVII, pp. 206–207.)

[88] See for example the classic dictum of Lord Justice Brett in The "Parlement Belge" case (1880):

> "The principle ... is that, as a consequence of the absolute independence of every sovereign authority, ... each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to public use ...". (United Kingdom, *The Law Reports, Probate Division* (London, Incorporated Council of Law Reporting for England and Wales), vol. V (1880), pp. 214–215).

[89] See for example Société générale pour favoriser l'industrie nationale *v.* Syndicat d'amortissement, Gouvernement des Pays-Bas et Gouvernement belge case (1840): *Pasicrisie belge—Receuil général de la jurisprudence des cours et tribunaux et du Conseil d'Etat belge* (Brussels, Bruylant, 1841), vol. II, pp. 33 *et seq.* The Brussels Court of Appeals said: "... the principles of human rights applicable to ambassadors are all the more applicable to the nations that they represent." (*Ibid.*, pp. 52–53.) [Translation by the Secretariat.]

[90] See Chief Justice Marshall in the case The Schooner "Exchange" *v.* McFaddon and others (Cranch, *op. cit.*, pp. 137–139). The three instances mentioned are: (1) the exemption of the person of the sovereign from arrest and detention within a foreign territory; (2) the immunity which all civilized nations allowed to foreign ministers; and (3) the implied cession of the portion of its territories where he (the sovereign or the State) allows the troops of a foreign prince to pass through his domain.

that diplomatic immunities can only be waived by an authorized representative of the foreign government and with the latter's authorization.[91]

59. Whatever the legal foundation of the doctrine of State immunity, whether historically it is based on the analogy with the immunity of the local sovereign, or is merely an inevitable extension of diplomatic immunities, or whether analytically it is founded on the principles of sovereignty, independence, equality and dignity of States, or additionally on reciprocity, comity of nations and avoidance of political embarrassment in international relations, the principle of State immunity should be taken as a point of departure in any logical treatment of the topic. State immunity should be the general rule. Further examination may disclose important conditions and elements which constitute the basis of the general rule.

60. In this connection, a number of factors or elements deserving closer attention may be noted, in particular:

(*a*) the existence of a sovereign State with valid territorial jurisdiction over the activities of another sovereign State; or, to put it differently,

(*b*) the exercise of sovereign authority by one State within the territorial jurisdiction of another; and

(*c*) the absence of consent of the foreign sovereign State to the exercise of territorial jurisdiction by the State authorities.

D. Consent, waiver and other incidental questions

61. It is often stated that consent of States is the basis of international obligation and the foundation of jurisdiction for international settlement of disputes as well as for the exercise of foreign territorial jurisdiction. It is in the ultimate analysis the source of the binding force of rules of international law. Consent is therefore an important element in the doctrine of State immunity. Once consent is given by the State entitled to immunity, the territorial authorities can exercise their normal jurisdiction. Some national laws restate the rule of jurisdiction over foreign States by making express reference to the existence of consent.[92] Many questions are connected with consent.

1. Consent and voluntary submission to jurisdiction

62. The consideration of the element of consent appears to entail an examination of a number of questions, such as the manner and circumstances in which consent is said to have been given, or communicated: expressly or by implication, verbally or in writing, or contained in a written agreement. Further questions concern the agencies or organs which are competent to give or express consent. Voluntary submission to the territorial jurisdiction, whether as claimant, plaintiff or otherwise, is another clear evidence of consent in respect of the case before the court.

2. Waiver of immunity

63. Closely connected with the expression or implication of consent is the question of waiver of immunity. Similar enquiries may be made as to the manner and methods of waiving immunity, explicitly or impliedly. The question of timing of waiver is also significant—whether it should be made before or after commencement of the proceedings, or during litigation. An interesting question concerns the expression of consent, which is sometimes said to be validly given only *in facie curiae*. Current practice appears to accept waiver also out of court or in a prior agreement.

64. It is important to note that several exceptions to the general rule of State immunity have been advanced on the basis of implied consent, or on the theory of implied waiver. Such theories are in turn based on other criteria which could justify the implication of consent or waiver.

3. Counter-claim

65. Related to the question of voluntary submission by a foreign State by becoming claimant or plaintiff in a suit before the court of another State is that of the possible extent of allowable counter-claim. It may be asked whether voluntary submission opens up all the possibilities of unlimited counter-claims, or whether counter-claims are limited as to the subject-matter involved or by the amount of the original claim, thus operating as a set-off only.

4. Incidence of costs

66. Consent to a legal proceeding or voluntary submission or indeed waiver of immunity constitutes in each case consent to be bound by the judgement of the court, including the judicial discretion to award costs in favour of either party in litigation.

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[91] See for example the Dessus *v.* Ricoy case (1907), where the court said:

"... the immunity of diplomatic agents not being personal, but rather an attribute and a guarantee of the State they represent ..., the waiver of such an agent is invalid, especially if no authorization from his government is produced in support of that waiver." (*Journal du droit international privé* (Clunet), (Paris), 34th year (1907), p. 1087 and 1086.) [Translation by the Secretariat.]

[92] See for example art. 61 of the Fundamentals of Civil Procedure of the USSR and the Union Republics (footnote 29 above).

5. THE QUESTION OF EXECUTION

67. Consent to the exercise of local jurisdiction is not consent to execution of judgement. Waiver of jurisdictional immunity does not constitute or automatically entail waiver of immunity from execution. A separate waiver will be needed at the time satisfaction of judgement is sought. The court will not normally issue an execution order, unless under prevailing practice it has other internationally recognized means of seizing the property belonging to the judgement debtor State, in satisfaction of its judgement.

E. Possible exceptions to the general rule of State immunity

68. In more ways than one, the treatment of the question of consent together with its ramifications represents an initial effort to delimit the areas of operation of the doctrine of State immunity on grounds of consent, waiver or voluntary submission. There are areas of activity where State immunity is applicable and others where the rule of State immunity does not apply. It is sometimes said that according to the prevailing practice of States, immunity is only recognized in respect of State activities which are official or sovereign in character, public in purpose, or governmental in nature. In other words, only *acta jure imperii*, as distinct from *acta jure gestionis* or *jure negotii*, are covered by the doctrine of State immunity. Such distinctions are said to be applicable also to the property of the State in connection with its immunity from jurisdiction, as well as from execution.

69. Two approaches are open for the determination of the precise limits of the application of the doctrine of State immunity. One possible solution is to state the circumstances in which a State is entitled to sovereign immunity by listing the types of activities covered by the doctrine, thereby leaving out the uncovered areas of activities as lying outside the province of its application. Another would be to specify the types of activities, or the private or commercial nature of the transactions, or the non-governmental functions or capacities assumed by the State which will be subject to the territorial jurisdiction of another State. Both approaches could be pursued simultaneously. However, the Special Rapporteur is more inclined towards a more convenient approach: stating the general rule of State immunity, followed by the suggestion and discussion of possible exceptions. An exploratory list of such exceptions could be ventured on a tentative basis. Possible exceptions could be grouped under more general headings.[93]

1. COMMERCIAL TRANSACTIONS

70. One possible exception to the rule of State immunity is the trading activity of a foreign State having a substantial connection with the country of the forum. An element to be emphasized is the commercial nature of the transaction, as opposed to the motivation or the aim and purpose of the contract.[94] For instance, purchase of boots would be commercial in nature regardless of the eventual use of the boots (or other commodities). What is required is the private or commercial character of the contract together with the connection with the country of the forum, such as performance in that country. This exception may be extended to all types of private-law contracts to be performed wholly or in part in the territory of the forum.

71. Under this heading of "commercial transactions" are included contracts for the supply of goods or services; loans or other transactions for the provision of finance and any guarantee, or of any other financial obligation; and other transactions or activity (whether of a commercial, industrial, financial, professional or other similar character) concluded by a State otherwise than in the exercise of sovereign authority.[95] A question may arise in regard to government-to-government transactions, which may belong to a separate category of international transactions by themselves, requiring further attention at a later stage.

2. CONTRACTS OF EMPLOYMENT

72. Disputes concerning the terms of contracts of employment constitute another possible exception to the rule of State immunity, although there is room for argument that the question of appointment, nomination or dismissal of a government employee is not subject to investigation by the authority of another State, being an exercise of sovereign authority. There is a distinction to be drawn between the act of appointment or dismissal and the consequences of a breach of contractual obligations. Labour disputes and relations are new fields which require a close attention, as the State of the forum has a vital interest in maintaining orderly developments in the field of labour relations.[96]

[93] See the European Convention on State Immunity (for reference, see footnote 20 above). Compare the *State Immunity Act of 1978* of the United Kingdom (see para. 26 and footnote 30 above) and the *Foreign Sovereign Immunities Act of 1976* of the United States of America (*ibid.*).

[94] See Trendtex Trading Corporation Ltd. *v.* Central Bank of Nigeria (for reference, see footnote 42 above). The purchase of cement for the construction of barracks for the army was held to be commercial in nature and therefore not covered by State immunity, irrespective of its purpose or motivation.

[95] For example, Nederlandse Rijnbank, Amsterdam, *v.* Mühlig Union, Teplitz-Schönau (1947), in which the rule of State immunity was held not to apply to "State-conducted undertakings in the commercial, industrial or financial fields" (*Annual Digest and Reports of Public International Law Cases, 1947* (London, 1951), case No. 27, p. 78).

[96] Compare De Ritis *v.* Governo degli Stati Uniti d'America (1971), *Rivista di diritto internazionale* (Milan), vol. LV, No. 3 (1972), p. 483 and Luna *v.* Repubblica Socialista di Romania (1974), *ibid.*, vol. 58, No. 3 (1975), p. 597. Immunity was upheld in both cases concerning appointment and dismissal of government employees, and the activities of the agencies were not considered of a commercial character.

3. Personal injuries and damage to property

73. Another possible exception to the rule of State immunity relates to an act or omission on the part of a foreign State in the territory of another State, causing death or personal injury, or damage to, or loss of tangible property within, the country where a suit is brought against the State. The purpose of this exception is to avoid the hardships incurred by individuals, who would otherwise have no relief. This exception will require further reflection, especially in connection with the more strict liability of the State.

4. Ownership, possession and use of property

74. A State is not immune in respect of activities connected with any interest of the State in, or its possession or use of, immovable property in the territory of another State; or any obligation of the State arising out of its interest in, or its possession or use of, any such property. The rationale of this exception lies in the fact that questions relating to immovable property are normally governed by the law of the *forum rei sitae*, and the territorial court is the proper forum.

75. This exception also covers activities of a State in relation to its interest in movable or immovable property, being an interest arising by way of succession, gift or *bona vacantia.*

76. The same exception applies to the claim of interest a State may have in any property relating to the estates of deceased persons or persons of unsound mind, or to insolvency, the winding up of companies or the administration of trusts within the territorial competence of the forum.

5. Patents, trade marks and other intellectual property

77. A State is not immune in regard to activities relating to any patent, trade mark, design or copyrights registered or protected in another State, nor from any suit for infringement of such rights by the State. Litigation concerning the right to use a trade name or business name in another State will not be an area in which a State can claim sovereign immunity. The niceties of international registration and national protection of intellectual properties as well as industrial property rights render imperative the non-application of the doctrine of State immunity for the ultimate benefit of the State concerned, as well as in the interest of fair competition in world trade.

6. Fiscal liabilities and customs duties

78. A significant exception has been recognized in the realm of fiscal jurisdiction. A State is not exempt from the fiscal competence of another in regard to value-added tax, any duty or customs or excise, or any agricultural levy. Nor is the State immune from proceedings relating to its liability to pay rates in respect of premises occupied by it for commercial purposes in the territory of another State. Whatever fiscal exemption a foreign State may have been accorded in practice, it has been based on courtesy rather than any compelling rule of international law. Reciprocal treatment might have afforded a ground for temporary relaxation of fiscal authority. In this field, States appear to be in a less privileged position than their diplomatic representatives in the country of accreditation.

7. Shareholdings and membership of bodies corporate

79. In respect of its membership of a body corporate, or an uncorporated entity or a partnership, a State is not immune from suits against it in the country where jurisdiction is being exercised, whether the subject matter relates to the dispute with that body or its other members or partners. Proceedings relating to the operation of a trading corporation or commercial enterprise in which the State has an interest as shareholder or stockholder, or to its interests in the shares or stock in that body, lie outside the scope of application of the rule of State immunity.

8. Ships employed in commercial service

80. A State is not immune in respect of actions *in rem* or in admiralty or *in personam* for enforcing a claim in connection with a ship owned or operated by it in commercial service. This exception, though relating especially to ships as a special category of State property, is a logical reflection of a more general exception of commercial activities of the State. National case law of State immunity has grown out of shipping cases. Several conventions of a universal character have been concluded dealing with sea-going vessels and the operation of State-owned ships in commercial service which are not covered by the immunity of State.[97]

9. Arbitration

81. Where a State has consented to submit a dispute to arbitration, there is no immunity in respect of proceedings relating to arbitration. Although this exception comes within the purview of the qualifications or conditions of consent as an element of State

[97] For example, the Brussels International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels of 1926 and the Geneva Conventions of 1958 on the Law of the Sea (referred to in paras. 42 and 40 above). See also the cases cited in footnotes 86–90 above.

immunity itself, it does not concern the right to derogate from submission to arbitration. However, a suit may be brought against the State in respect of judicial approbation of an arbitral award or arbitration decision. In certain jurisdictions, an arbitration can take place either within the court or out of court. An exception to the application of State immunity in this connection at this juncture may be useful and timely.

F. Immunity from attachment and execution

82. The immunity of a State from attachment and execution in regard to its public property or property in governmental use forms part and parcel of the composite whole of the doctrine of the jurisdictional immunity of States. As has been seen in regard to waiver of immunity from jurisdiction, immunity from execution relates to the second, or post-judgement, stage of judicial process. Immunity from attachment could be involved at any stage, whenever attachment is sought against property of the foreign sovereign State.

83. The general rule appears to be that the property of a foreign State—especially property in its possession or control—is exempt from provisional measures of seizure or attachment, as well as from execution. An important question then to be considered is the extent to which this general rule applies in practice. The requirement of ownership, possession or control offers one criterion. The use of the property, or sometimes the purpose of its use, may be relevant to the determination of the question whether, in a particular case, a State property is immune from attachment and execution.

84. It is clear that when the State consents to an interim measure of seizure or attachment, or indeed, to execution of its property, such a measure could be implemented. But there appear to be clearly defined procedural rules requiring such consent to be given in writing by a competent organ of the State to which the property belongs.

85. Apart from consent, there appear to be other exceptions to the rule of immunity from execution—a question which arises only after final judgement of the competent territorial tribunal. Whereas execution is possible, it can only be levied against certain types of State property in commercial use. It is clearly confirmed by usage and recent practice that State property used in connections with its sovereign functions, such as diplomatic or consular or governmental representation, remains immune from attachment and execution.[98]

G. Other procedural questions

86. Several other procedural questions are involved in any examination of the application of State immunity. The service of judicial process is one that has to be overcome before the State can be served with a notice of a suit being brought against it.

87. There are also certain procedural privileges to which a State is entitled. For instance, no penalty by way of committal or fine is conceivable in respect of any failure or refusal by or on behalf of the State to disclose or produce any document or other information for the purposes of proceedings to which it is a party. Furthermore, it is not likely that relief will be given against a State by way of injunction, or order for specific performance, or for recovery of land or other property. The property of a State is not subject to any process for the enforcement of a judgement or arbitration award, or, in an action *in rem*, for its arrest, detention or sale without that State's written consent. The immunity of a State from attachment and execution will be further examined in future reports.

88. It is important to note that questions of procedure are of practical significance in any litigation, although each legal system has its own peculiar rules, which it will not be suitable to investigate in greater detail for the present purpose.

H. Other related questions

89. Countless questions are connected with or closely related to the topic of State immunity. Among these is that of the privileges and immunities enjoyed by ambassadors and other diplomatic agents, as well as those extended to international organizations (and to their staff) having headquarters in the territory of the State of the forum. A comparison might usefully be drawn to determine whether the extent or degree—or indeed, the quality and quantity—of privileges and immunities recognized and accorded by operation of international law in favour of States, their representatives and their intergovernmental organizations, are justified in practice and on legal grounds.

[98] See also the Vienna Conventions mentioned in para. 40 above.

CHAPTER IV

Conclusion

90. The preceding survey of the types of available source materials to be further examined and the relevant questions to be considered in the study of the topic of jurisdictional immunities of States and their property does not lend itself to any general statement by way of conclusion, even of a tentative and

provisional nature. Some concluding observations in connection with future treatment of the subject may nonetheless be warranted.

91. It appears to be desirable to continue the study of this topic, and not only possible but practicable eventually to prepare draft articles along the lines indicated in this preliminary report.

92. It would be useful if most, if not all, of the source material on the topic could be put at the disposal of the Special Rapporteur in the course of his research, so that he could be better prepared to assist the Commission in its task of codification and progressive development of relevant rules on the subject. A reasonable amount of legal opinion contained in the written works of jurists should be available. Although there is little to be expected on the topic from international judicial jurisprudence or arbitration, information on the practice of States in regard to case law, national legislation and governmental practice could be sought from Governments which are States Members of the United Nations. These materials would have practical relevance to current legal development, as they could be indicative of the position and the trend of contemporary State practice on the subject. They could provide clearer evidence of the present state of the law, and a persuasive indication of how the law is likely to develop in the foreseeable future.

93. The collection of comments and views of Governments of States Members of the United Nations appears to be indispensable to any future study of the topic because of its high value as authoritative source material. All States, without distinction, are now more than ever before in the history of international legal development in a position to influence the progressive development of international law through their active participation in the law-making process. The replies to a questionnaire requesting the views of Member Governments would indeed constitute invaluable source material for the planning of the topic and for the preparation of draft articles.

94. The structure of the draft articles could follow the usual pattern, with general definitions and statement of their purpose and their scope of application. Their contents could cover practically all the questions to which allusion has been made in this preliminary report. In particular, the draft articles should contain a provision on certain definitions, statement of the general rule of State immunity, its application, qualifications and constitutive elements. Exceptions to the general rule should also be examined in each separate category of cases in different areas where possibly no immunity will be needed. A section can be devoted to procedural questions, including procedural privileges. The treatment of each question would contain appropriate comments.

95. As the present report is only preliminary, it will not be necessary at this stage to suggest a solution to all of the problems involved in each of the items forming the content of the rule of State immunity and its possible exceptions.

96. One important question which will eventually need to be decided at least provisionally is the treatment of the immunity from attachment and execution of State property and its possible exceptions. The entire topic of State immunities could be included in one series of draft articles which may be composed of two parts: part one, relating to the jurisdictional immunity of the State, and part two, to the immunity from attachment and execution of State property. The two parts could conceivably be included in one composite set of draft articles. Such an arrangement might be practical, as it would correspond to the existence of two distinct phases of State immunity.

97. The proposed tentative plan of the structure and presentation of the subject-matter are subject to variation and modification upon closer investigation of its contents. Further reflection, after close examination of other materials, may lead to firmer recommendations as to the form the treatment of the topic should take. At this stage, suffice it to express the hope that with guidance from the International Law Commission through the views expressed by its members, and that of the comments and views of Member States, the final product will be based on a balanced approach and the draft articles it will contain will be able to accommodate and harmonize the views and interests of States and of all the parties involved.

98. Towards this end, it would be of considerable assistance to the Special Rapporteur in the performance of the task assigned to him if the Secretary-General of the United Nations could be requested to circulate a questionnaire inviting comments and the views of Member Governments on the various points outlined in this report as possible elements of the topic of jurisdictional immunities of States and their property.