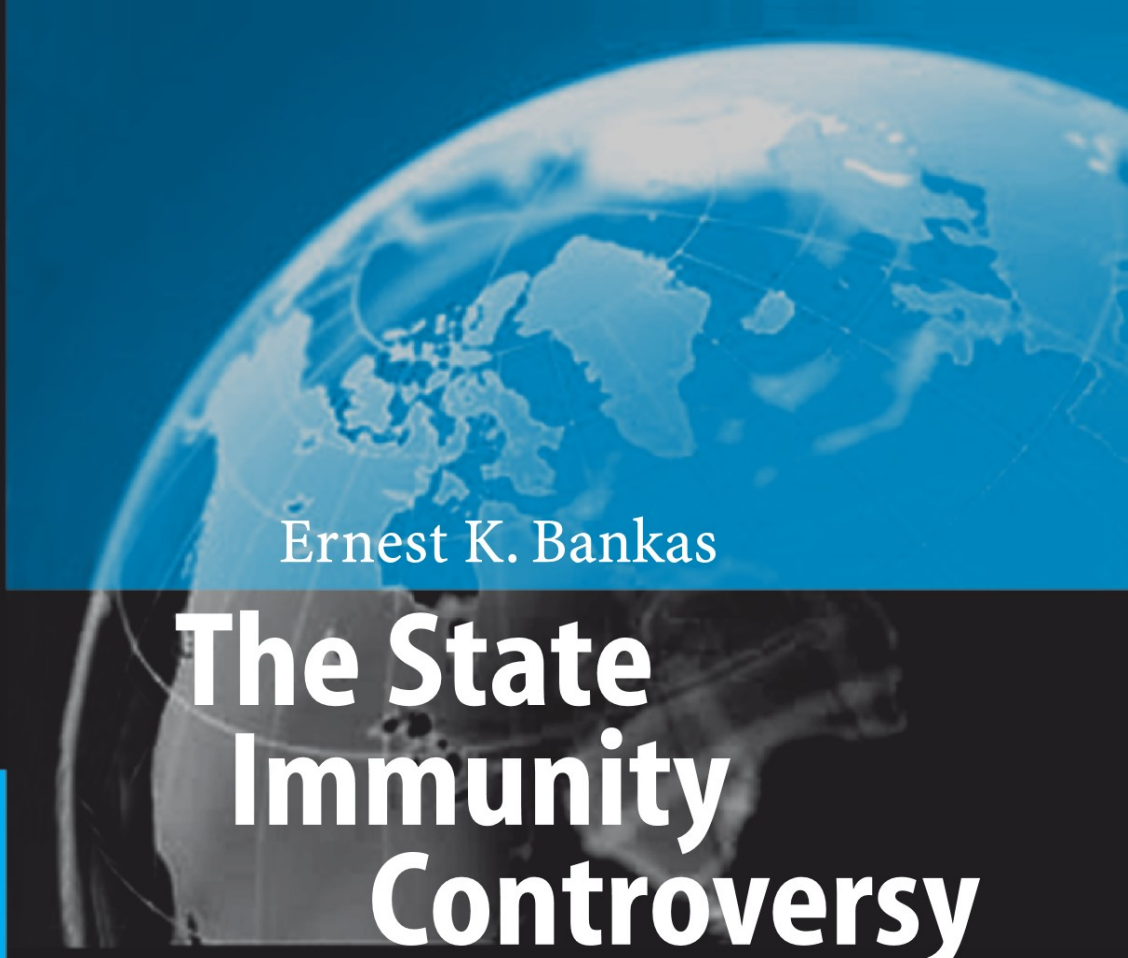

Ernest K. Bankas

The State Immunity Controversy in International Law

Private Suits Against Sovereign States in Domestic Courts

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Dedication

Dedicated to my Parents:

Darling Dzah and Joseph S.K. Bankas – popularly known as "Shall Pass" – for their love, kindness and support

Specially to my lovely wife, Maureen, and children, Krystle Mawuse Abra Bankas, Latasha Nukunya Ama Bankas; the twins, Alison Akofa Yawa and Alethea Akpene Yawa Bankas, and Joshua Kofi Tawiah Bankas – for their love, kindness and encouragement.

I remain indebted to my wife for her encouragement and patience through all these years. Her contribution to the writing of this book is immeasurable, for she always kept the fort whilst I was away studying and conducting research at the University of Durham Faculty of Law, and the World Court (The Hague). A substantial part of the study was done at the University of Durham, UK, Great Britain.

Again, special thanks to my family and I shall forever be grateful. When the cock crows early tomorrow morning, be advised that Ernest Kwasi Bankas is still saying thank you.

February 23, 2005

Preface

Prior to 1900 the immunity of sovereign states from the judicial process and enforcement jurisdiction of municipal courts was absolute and this in the main *ex hypothesi* was derived from two important concepts, namely sovereignty and the equality of states. Sovereignty may be defined as the power to make laws backed by all the coercive forces it cares to employ. This means that a sovereign state has what can be known as *suprema potestas* within its territorial boundaries. Jean Bodin was the first of writers to propose this idea of sovereignty, but in his exposition of this notion, he undoubtedly created a confusion about the *leges imperii* which arguably turned out to be a starting point for the long controversy between what can be denoted as analytic and an historical method in meta–juridical philosophy as regards immunity of states. His influence, however, has remained a lasting imprint on public international, backed by the fact that all states are equal and independent within their spheres of influence (*superanus*), which implicitly has given root to a meta–juridical philosophy that foreign states be accorded immunity in domestic courts. That this meta–juridical philosophy found application in the Schooner Exchange v. McFaddon is clearly exemplified by Chief Justice Marshall's judgment in the following formulated manner.

"This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an exchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation." [See (1812) 7 Cranch 116.]

The decision in the Schooner Exchange over the years in fact became well grounded in the practice of states until quite recently when its currency was thrown into doubt because of the great increase in commercial activities of states.

The Current State of the Law of State Immunity

The power of a domestic court or a national authority to determine whether it has jurisdiction over a particular legal controversy is without doubt a question of private international law and this notion is wholly predicated on whether the subject matter at issue is properly associated with a foreign element. The *lex fori* is therefore designated as an important means of defining legal issues and in determining whether to take jurisdiction or not because it is considered as the basic rule in private international law. The problem, however, becomes more difficult if a sover-

eign state is directly or indirectly impleaded before a national authority. In this respect, the court would be faced with the issue of whether a sovereign state can be sued by a private entity in a foreign court.

Until quite recently the notion of absolute sovereign immunity was embraced and accepted without question, but of late, many have started questioning the legitimate basis of the concept of state immunity and have in turn suggested that limitations be placed on state immunity. This in fact has prompted some countries, notably U.S.A., U.K., Canada, Singapore, Australia, Pakistan and South Africa, to resort to legislation as a means of introducing restrictive immunity into their statute books. In spite of the call by some leading countries to abrogate or modulate the concept of absolute immunity in transnational litigation, Russia and the developing nations, however, still cling without any reservations to the notion of absolute immunity.

It is instructive to note that recent writers have suggested and supported the introduction of restrictive immunity but arguably have failed to provide a straightforward and precise prescription to the problem. While it is clear that the jurisdictional immunity accorded to foreign states is most readily recognised for public acts, it is no more recognised in the Western world for acts essentially commercial in nature. There is therefore a strong trend among some countries toward the complete acceptance of commercial restriction on state immunity. Be this as it may, one is still left wondering whether in this complex world without any supranational authority legislation per se is adequate in containing this elusive problem.

The major problem likely to face litigating parties is that restrictive immunity depends wholly on a method by which governmental (public acts) and commercial acts of states are distinguished in order to determine whether to accord immunity or not. So far it has become almost impossible to find a common ground to formulate a criterion that would perhaps be acceptable to all and sundry. Even domestic courts within many sovereign states have differed in their reasoning or quest to formulate a suitable methodology or proper standards to distinguish commercial acts of states from public acts. This in turn has led to persistent divergence in the practice of states as far as restrictive immunity is concerned. It is therefore far from clear as to the current state of the law of state immunity in respect of customary international law or general international law because it would seem restrictive immunity lacks *usus* and the psychological element of *opinio juris sive necessitatis*. These difficulties in a way have created albeit a penumbra of doubt in the application of the doctrine of restrictive immunity.

It is suggested that codification is inherently problematic and not the only means of resolving the controversy. The hub of this thesis is to find an alternative means of dealing with the problem, thus looking at the influence of early writers on the doctrine of sovereign immunity. In this light I would be able to lay bare the problem and then deal with it objectively. Chapter One focuses on the historical origins of the concept of absolute immunity, where an attempt would be made to prove that early European writers did influence Chief Justice Marshall 's judgment in the Schooner Exchange decision. Chapter Two addresses specifically the reasoning behind the Schooner Exchange judgment and how the said judgment found application in other courts around the globe. Chapter Three reexamines some as-

pects of the rational foundation of state immunity and the reasons why some states are finding it difficult to give up the old order, i.e., state immunity.

Chapter Four evaluates the reasons behind the changing views of states on absolute immunity. It also covers observations on current legal position on absolute and restrictive immunity in the USA and UK, respectively. Chapter Five covers in many respects private suits against African states in foreign courts, while Chapter Six examines the practice of African states in respect of state immunity. Chapter Seven is devoted to ILC draft articles on jurisdictional immunities. Chapter Eight covers issues relating to some unresolved problems of state immunity. Chapter Nine covers issues relating to suits against states for the violation of international law and some aspects of *jus cogens* and *obligations erga omnes*. Chapter Ten reviews the recent adoption of the UN Draft Convention on Jurisidictional Immunity of States and their Property. Chapter Eleven covers issues relating to the current state of the law.

Chapter Twelve, the conclusion, is structured as to have regard to the overall position of the thesis: (1) that codification has its own problems; (2) that treaty provisions between states would be helpful and will certainly bring about stability in transnational business transactions; (3) that there should be judicial development of the law of sovereign immunity as exemplified in Lord Denning 's reasoning on state immunity; (4) that domestic courts should follow the principles of justice, equity and good conscience in dealing with sovereign immunity issues, and thus must make it a point to rely on or supplement their forum data with comparative survey of state practice the world over; (5) that national legislation must be discouraged so as to pave way for the modern judge to have a latitude of freedom to explore and solve by reasoning the difficulties usually associated with immunity of states and international commercial transaction (*jus gentium publicum*). For restrictive immunity is an incomplete doctrine which must be relegated to the background and that municipal courts would be better off by balancing the justified expectations of private traders as against the rights of sovereign states.

This is an expanded version of a thesis which was submitted to the University of Durham, for the degree of Doctor of Philosophy in Law.

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Ernest W. K. Bankas
at Durham
February 1998

Contents

1 The Origins of Absolute Immunity of States

The principal purpose for which this study is conducted is to explore the sovereign immunity controversy[1] regarding claims against foreign sovereign states in domestic courts. This then leads us to an important question which runs thus: If a sovereign state has entered into a sale contract for the supply of cement with a foreign corporation and as a result of the violation of the terms of the contract, the state is sued in a foreign court, is it possible that the plea for sovereign immunity can successfully be litigated according to the lex fori? Many believe it is possible.[2] While others have answered in the negative in the light of recent developments in the law.[3]

1.1 Source Analysis

In order to offer an objective assessment of the subject matter at stake, it is apposite that an inquiry be made into the historical sources or foundation of absolute immunity. Judge T. O. Elias, in his exposition on the development of modern international law, had this to say:

"The first and earliest period was characterized by often rudimentary arrangements for regulating the almost ceaseless old–world struggles between empires, kingdoms and city states. The medieval period witnessed the break–up of Western Christendom under the Holy Roman Empire as a result of the Treaty of Westphalia (1648) and the consequent rise

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[1] Sompong Sucharitkul, State immunities and trading activities in international law (1959). Allen, The position of foreign states before national courts (1928–33). Gamel Badr, State immunity, an analytical and prognostic view (1984). Christopher Schreuer, State immunity, some recent developments (1993). Fitzmaurice, State immunity from proceedings in foreign courts (1933) 14 BYIL. 101 Lauterpacht, H., The problem of jurisdictional immunities of foreign states (1951) 28 BYIL. 220.

[2] The Schooner Exchange v. McFaddon (1812) 7 Cranch 116; The Prins Frederik (1820) 2 Dods 451. The Parlement Belge (1880) 5 PD 197; The Cristina (1938) AC 485; Fitzmaurice, State immunity from Proceedings in Foreign Courts (1933) 14 BYIL. 101 Hyde, International Law (1947), "In his view a state always acts as a public person."

[3] See Lauterpacht, H., The problem of jurisdictional immunities of foreign states (1951) 28 BYIL; 220 Pasicrisie (1857) II 348 Foro Italiano 1887, 1474. See generally Briton, Suits against foreign states (1931) 25 AJIL 16. For recent rule: See Trendtex Trading Corp v. Central Bank of Nigeria (1977) I All ER 881.

of nation–states based upon the Cult of Political Sovereignty adumbrated by Jean Bodin and others."[4]

In fact, historical records[5] show that Jean Bodin (1530–1596), a French political scientist and jurist, was the first of writers to develop the concept of sovereignty in the sixteenth century.[6] And it is believed Bodin took up the challenge because of the ceaseless sixteenth century struggles between empires and nation–states, and more particularly because of the problems of political instability facing France.[7] In an attempt to find solutions to these problems, Bodin undoubtedly created a confusion about the leges imperii[8] which arguably turned out to be a starting point for the long controversy between what can be denoted as analytic and an historical method in meta juridical philosophy as regards immunity of states.

1.2 Jean Bodin's Philosophy on Sovereignty

The term superanus means sovereignty which in simple terms denotes supreme power. Sovereignty is therefore an essential characteristic of the state and it continues to be part of the state so long as the state subsists[9] In other words, sovereignty in reality is inseparable from the state.

The modern theory of sovereignty came into being in France[10] because of its internal political contradictions. Bodin lived in France at that historical epoch. And during that era, France was divided as to whether to obey the Monarch or the Pope as he was believed to be the head of Christendom.[11] The controversy regarding the location of the sovereign power was to a large extent due to the fact that, at that historical epoch, the French war of religion was at its zenith.[12] These problems with respect to the location of the sovereign power thus prompted Bodin to express his thoughts on the concept of sovereignty in the following formulated manner. Defining the state:

"as an aggregation of families and their common possessions ruled by a sovereign and by reason, he said that in every independent community governed by law there must be some authority whether residing in one person or several, where the laws themselves are established and from which they proceed. And this power being the source of law must be above the law though not above duty and moral responsibility."[13]

For Bodin, in practical terms any legitimate power being the source of state law must be above the law though somewhat limited by the demands of duty and

[4] T. O. Elias, Africa and the development of International Law (1990) p. 63.

[5] George Sabine and Thomas Thorson, A history of political theory (1973) pp. 348–385; A. Appadorae: The substance of politics (1968) p. 48.

[6] Appadorea, op. cit., supra note 5.

[7] George Sabine and Thomas Thorson, op. cit., 5.

[8] Ibid.

[9] Bhattacharyya, First course of political science with constitutions of Indian Republic and Pakistan (1949) pp. 89–103.

[10] Ibid.

[11] Ibid. at pp. 348–385.

[12] Appadorae, op. cit., note 5.

[13] Ibid. at p. 48.

moral responsibility. Sovereignty, he maintained, is a supreme power over citizens or the ruled and this supreme power being the source of law is not bound by any laws of the realm'[14]

Bodin's theory, however, fell short of the mark when he postulated and admitted that the sovereign could not abrogate certain important entrenched laws dear to the hearts of the ruled, e.g., the Salic Law of France,[15] and that international law was outside the domain of the power of the Sovereign.[16] He further explained that the laws of God and nature are to be duly respected by the Sovereign and the citizenry, i.e., the subjects. However, he was careful in stating that the law of nations (international law) cannot influence or bind a sovereign any more than domestic laws legitimately enacted by the Sovereign, except the laws of God and nature.[17] Bodin's system as can be gathered implicitly favours or shifts somewhat towards the maxim: *Par in parem non habet imperium*, and this in the main can logically be supported insofar as sovereignty according to his system means a supreme power, wholly unlimited in its sphere of influence and thus will not bow or succumb to any other power, be it on the international plane or in its local spheres of operation.[18] This bent of thinking contributes greatly to the postulation that if a country or a sovereign state has its source of power controlled by another country, it cannot in the real sense of the meaning of sovereignty be designated as a state, because it lacks sovereign power or supreme power which as a matter of principle is a distinctive characteristic or mark of a state'[19] In this respect, Bodin laid the groundwork for others to develop the subject to such reasonable heights as to be received into international law'[20]

Many scholars from the period of Renaissance to Hume,[21] such as Thomas Hobbes (1508–1679), John Locke (1632–1704), Rousseau (1712–1778), Jeremy Bentham (1748–1832) and John Austin (1790–1859) contributed greatly to the development of the theory of sovereignty.[22] Grotius whom many regard as the father of international law, also made his mark as an exponent of political sovereignty. Grotius, as may be recalled, however, was the first to concentrate on explaining the importance of external sovereignty[23] and its implications with regard to state equality, which has much to do with the independence of states with respect to all other states in the international system.[24] But he was certainly not the original proponent of the concept of natural equality of states.

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[14] Ibid.
[15] Ibid.
[16] Edwin Dickinson, The equality of states in international law (1920) at pp. 56–57.
[17] Ibid.
[18] Ibid.
[19] Bhattacharyya, op. cit., note 9, at p. 80, pp. 90–92.
[20] Dickinson, op. cit., note 16 at pp. 55–99.
[21] Bertrand Russell, A history of Western Philosophy (1964), p. 491.
[22] Ibid.
[23] Appadorae, op. cit., note 5; Dickenson, op. cit., note 16 at pp. 56–60.
[24] Dickinson, op. cit., note 16 at pp. 60–98.

1.3 Thomas Hobbes

Thomas Hobbes made sovereignty absolute and aptly located it without any hesitation in the ruler, thus deriving his theory from the force and thrust of the social contact.[25] Professor Russell in his studies stated that:

"Hobbes holds that all men are naturally equal. In a state of nature, before there is any government, every man desires to preserve his own liberty but to acquire dominion over others; both these desires are dictated by the impulse to self-preservation. From their conflict arises a war of all against all, which makes life 'nasty, brutish and short.' In a state of nature, there is no property, no justice or injustice; there is only war and 'force and fraud are in war, the two cardinal virtues.'"[26]

For Hobbes, in order for men to escape from these evils, they must endeavour to form communities ready to delegate absolute power into the hands of a central authority[27] and this, according to him, must be based on the concept of the social contract.[28] This central authority, according to Hobbes, represents a source of power known as *superanus* which by all means shall put an end to the "universal war."[29]

Again Professor Russell explains that:

"Hobbes prefers monarchy, but all his abstract arguments are equally applicable to all forms of government in which there is one supreme authority not limited by legal rights of other bodies. He could tolerate Parliament alone but not a system in which governmental power is shared between King and Parliament. This is the exact antithesis to the views of Locke and Montesquieu. The English civil war occurred, says Hobbes, because power was divided between King, Lords and Commons."[30]

It is instructive to note that Hobbes prefers dictatorship to checks and balances and the purported golden notion of liberty. The powers of the sovereign in his view must be made unlimited.[31] Thus the ruled must surrender power to the Sovereign in order to have peace and tranquillity which shows clearly that the kernel of his thesis was predicated on achieving internal peace[32] Hobbes was also of the opinion that the worse despotism be preferred to anarchy since absolute power will create perpetual peace.[33]

The concept of absolute sovereignty also found favour with Rousseau but he was a bit careful to conclude that it belonged to the people rather than the ruler.[34]

The most authoritative restatement of the modern concept of sovereignty may be credited to John Austin (1790–1859).[35] In his words,

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[25] Russell, op. cit., note 21 at pp. 494–659.
[26] Ibid. at p. 550.
[27] Ibid.
[28] Ibid.
[29] Ibid.
[30] Ibid. at p. 551.
[31] Ibid.
[32] Ibid.
[33] Ibid.
[34] Appadorae, op. cit., n. 5 at p. 451.
[35] Ibid.

"If a determinate human superior, not in the habit of obedience to a like superior, receives habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society (including the superior) is a society political and independent. . . . Furthermore every positive law or every law simply and strictly so called is set directly or circuitously, by a sovereign person or body to a member or members of the independent political society wherein that person or body is sovereign or supreme."[36]

Austin also follows the notion that the sovereign's power is unlimited.[37] His system therefore accepts the precept that sovereign power is inalienable and that the sovereign has the authority to exact obedience from the ruled but his status is such that his authority cannot be affected by anybody in the world.[38] The truth of the matter is that Austin believes that law is the command of the sovereign and therefore according to his bent of reasoning, knows no internal or external superior.[39]

Austin's views at best were legalistic and therefore may require proper qualification with respect to the democratic doctrine of sovereignty, in order to contain criticism of his views being unrealistic.[40] These difficulties regarding the concept of sovereignty and its many other confused underlying principles prompted Professor Laski to argue that the whole notion of sovereignty be surrendered for the sake of political science.[41] It must be noted in passing, however, that Austin's views were vehemently opposed.[42]

It should, however, be noted that all these theories can be attacked from a standpoint of equitable maxims specifically associated with the writings of Locke[43] and Montesquieu,[44] but these equitable maxims can only be applied to put pressure to bear on the sovereign if the sovereign is willing to succumb to world public opinion. International law in its intrinsic nature, as derived from the practice of states, can be a source of limitation upon the absolute power of the state, but in reality there is no supranational power to enforce these laws.[45] International law, therefore, is obeyed by states out of courtesy and the need to promote the concept of comity with the hope of avoiding disrepute.

1.4 The Influence of the Philosophy of Thomas Hobbes

International law was not invented by magical powers. Its growth followed a route of gradual process singularly influenced by philosophical writings specifically de-

[36] Ibid., at p. 49.
[37] Bhattacharyya, op. cit., n. 9 at pp. 94–95.
[38] Ibid. at p. 95.
[39] Appadorae, op. cit. n. 5 at pp. 49–50.
[40] Ibid.
[41] Ibid., p. 50.
[42] See Laski, A grammar of politics (1967), pp. 44–45.
[43] Russell, op. cit., n. 21.
[44] Montesquieu, The Spirit of Law (1748).
[45] Somarayah, Problems in applying the restrictive theory of sovereign immunity (1982) 31 ICLQ 664.

rived from natural law as correctly stated by some prominent writers[46] on international law; one such writer was Professor Schwarzenberger who observed that:

"Although several systems of international law in various stages of arrested development existed in antiquity and simultaneously or subsequently, in other parts of the world, present–day international law has its roots in medieval Europe. It might be thought that the hierarchical order of the Middle Ages was incompatible with the existence of international law, which requires the coexistence of equal and independent communities. Actually, the pyramidal structure of feudalism, culminating in Pope and Emperor as spiritual and temporal heads of Western Christendom was hardly ever fully realized. It left ample scope for relations on a footing of equality between what were often in fact independent states."[47]

Professor Schwarzenberger seemed to indicate that the trend of inequality that existed in medieval period was not that markedly pronounced as to eclipse the development of international law which by its very nature supports the equality of states, as a special ingredient necessary for the harmonious existence of states. Secondly, the materialism of Hobbes, a naturalist disquisition, encouraged the essential nature of natural law, the quest for universal order and the equality of states.[48]

The introduction of the theory of natural equality into the law of nations was first developed by the naturalists who gathered inspiration from the singularly pragmatist views of Thomas Hobbes (an Oxford trained philosopher).[49] The works of Hobbes covered legal and political theory and this can be found particularly in his Elementa Philosophica de Cive and the Leviathan.[50] As a result of his influential work, he was able to revive the importance of juridical philosophy which covered a critical aspect of medieval theory of natural law, the state of nature, and natural equality.[51] Through his sagacious writings and influence these theories were not by any means relegated to the background but were rather explored in a new fashion as a way of encouraging philosophers and jurists of the 17th, 18th and 19th centuries. It is important to note, however, that the system of Hobbes was somewhat in antithesis to that of Grotius' teachings[52] and this ex–hypothesi cannot

[46] Nussbaum, A concise history of the law of nations (1962) pp. 35–44, 61–114; Appadorac op. cit., n. 6, pp. 35–99; Sanders, International jurisprudence in African context (1979) pp. 3–38. Brownlie principles of public international law (1992). Brierly, The law of nations, an introduction to international law and peace (6th ed. 1963); Kelsen, Principles of international law (2nd 1966); Lauterpacht, International law (general works) (1970) 4 volumes; O'Connell, International law (2nd ed. 1970) 2 vols.; Verzijl, International law in historical perspective (1968–1976) vols i–viii; Schwerzenberger, International law (vol. 1 3rd ed. 1957; vol. 2, 1962); Oppenheim and Lauterpacht, A treatise (1952) 2 vols; Hyde, International law chiefly as interpreted and applied by the United States (1947) 3 vols.

[47] Schwarzenberger, Manual of international law (4th ed. 1960).

[48] Dickinson, op. cit., n. 16 at pp. 69–75.

[49] Russell, op. cit., n. 21.

[50] Dickinson, op. cit., n. 16.

[51] Ibid. at p. 74.

[52] Ibid. at p. 70.

be disputed in view of the authoritative analysis of the works of Grotius and Hobbes by Dr. Edwin Dickinson.[53]

The teachings of Hobbes albeit did influence Pufendorf and the naturalists, and such prominent writers as Barbeyrac, Rutherforth, Burlamaqui and Vattel,[54] but it would appear that these successors were by no means all agreed as to the basic general applications of the naturalist theories advanced by Thomas Hobbes.[55] In sum "anthropomorphism" played a central role in the philosophical teachings of Hobbes which also leads to the conclusion that the law of nature and the law of nations in his system can appropriately be taken in philosophical terms to mean the same thing.[56] Hobbes, therefore, can be credited for the introduction of the notion of natural equality of states into juridical philosophy. And its after–effect on Vattel, by every estimation cannot be ignored in the light of his writings and the fact that the combined force of all these theories implicitly or explicitly have had effect on the development of the law of nations.[57]

One major influence of Hobbes as can be gathered from the writings of Vattel runs thus:

> "Since men are by nature equal and their individual rights and obligations the same, as coming equally from nature, nations, which are composed of men and may be regarded as so many free persons living together in a state of nature, are by nature equal and hold from nature the same obligations and the same rights, strength or weakness, in this case, counts for nothing. A dwarf is as much a man as a giant is; a small republic is no less a sovereign state than the most powerful kingdom.
>
> A nation is therefore free to act as it pleases, so far as its acts do not affect the perfect rights of another nation, and so far as the nation is under merely obligations without any perfect external obligation. If it abused its liberty it acts wrongfully; but other nations cannot complain since they have no right to dictate to it.
>
> Since nations are free, independent, and equal, and since each has the right to decide in its conscience what it must do to fulfil its duties, the effect of this is to produce, before the world at least, a perfect equality of rights among nations in the conduct of their affairs and in the pursuit of their policies. The intrinsic justice of their conduct is another matter which is not for others to pass upon finally; so that what one may do another may do, and they must be regarded in the society of mankind as having equal rights."[58]

The thrust and total effect of the above statement by Vattel in its philosophical and practical terms without doubt supports the maxim: *par in parem non habet imperium* which is derived basically from the principle of independence, equality and the dignity of states.[59] Although the classical writers of international law did not explicitly deal at length with the notion of immunity of foreign states from the jurisdiction of domestic courts,[60] at least in the main, their writings in one way or the other gave support to the idea of absolute sovereignty which in turn logically

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[53] Ibid. at pp. 35–100.
[54] Ibid. at pp. 68–100.
[55] Ibid. at pp. 76–89.
[56] Ibid. at p. 75.
[57] Ibid.
[58] Ibid. at p. 98.
[59] Badr, op. cit., n. 1, pp. 34–40; Lauterpacht, op. cit., n. 1.
[60] Badr op. cit., n. 1, p. 9.

gave foundation to the concept of state immunity in international law.[61] The weight of these historical records shows clearly that early philosophical writings on the concept of absolute sovereignty did influence individual states and their municipal courts to take the lead in opening the way for the development of the rules of state immunity.[62]

Further evidence of the influence of classical international law writers such as Grotius, Pufendorf, Bynkershoek and Vattel, who were all to some extent influenced by the writings of Hobbes on natural law, the state of nature and natural equality, found application in the decisions of municipal courts of the United States between 1789 to 1820.[63] And this is clearly supported by the statistical data below.

Table 1. Influence of Classical International Law Writers

Writers	Citations of Pleadings	Court Citations	Court Quotation
Grotius	16	11	2
Pufendorf	9	4	8
Bynkershoek	25	16	7
Vattel	92	38	22

Source: See G. Schwarzenberger, Manual of International Law (1960). This information was borrowed from Dr. Dickinson's work.

The above statistical data was prepared by Professor Edwin D. Dickinson, and it reflects citations and quotations from early writers to support international law cases which were decided by American courts from 1789 to 1820.[64] One therefore cannot underestimate the influence of early philosophical writers of Europe in view of the authority of the above statistics.[65] It is important also to take note of the fact that Bynkershoek and Vattel were specifically cited in Schooner Exchange v. McFaddon,[66] by Chief Justice Marshall and therefore lends support to the thesis that early philosophers and classical international law writers did affect the jurisprudence of municipal courts in developing the rule of sovereign immunity.[67] This

[61] Ibid., p. 12.

[62] The Schooner Exchange v. McFaddon (1812) 7 Cranch 116; The Prins Frederik (1820) 2 Dods 451; The Parlement Belge (1880) 5 PD 197; The Cristina (1938) AC 485; The Annette: The Dora (1919) p. 105 at p. 111. Mighell v. Sultan of Johore (1894) 1QB 149.

[63] Schwarzenberger, op. cit., n. 46.

[64] Ibid.

[65] Ibid.

[66] (1812) 7 Cranch 116.

[67] Badr, op. cit., n. 1 at p. 9.

is further supported by the fact that Justice Marshall relied on a combination of factors ranging from history, philosophy, and the U. S. Constitution, i.e., the Eleventh Amendment in his quest to find solutions to the issues regarding state immunity in the Schooner Exchange case.[68]

1.5 Claims and Counter Claims

The writings of Bodin, Hobbes, Hagel and Vattel set the pace for the understanding that immunity of states must be seen in a metaphysical sense as a theoretical derivation from local supreme power (*superanus*).[69] This doctrine gave foundation to the accepted notion that the state has a positive link with sovereign power. Thus without a state there will be no sovereign power.[70] Which means that in the absence of sovereign power and the power to enact or make laws backed by all the coercive forces it cares to employ, a state cannot be recognised in international law.[71] In logical terms, therefore, the former cannot exist without the latter. An intriguing result can hereby be discernible from the above proposition, and that is before a territory is recognised as a state, equal in status to other states, it must have a permanent population, a defined territory, and a determinable attribute of an autonomous juridical community ruled by a sovereign power.[72] If these factors are present within a community, statehood is achieved equal to all other states in international law.[73] Statehood in turn gives birth to international personality and thus breeds consensus among equals on the international plane rather than subjection.[74] Such is the essence of the concept of independence, equality and dignity among sovereign states, shaped by Pufendorf's doctrine of *quae invicem in statu naturali vivunt*,[75] coupled with perhaps Zouche's idea of *pax civilis*, i.e., "between equals as states"[76] and finally by Vattel's positive notion of state equality.[77]

The commitment of most states to the notion of immunity of states stems from the writings of modern scholars who followed Bodin and Hobbes, and their influence had laid the foundation for the determination of state equality based on the following factors in international law: (1) The independence of states; (2) The

[68] Ibid.
[69] Dickinson, op. cit., n. 16 at p.
[70] Bhattacharyya, op. cit., n. 9.
[71] O'Connell, International law for students (1971) pp. 49–63. See also Chen, The international law of recognition (1951). Compare the views of the above writers with Lord McNair's "The Stimson Doctrine of Non–Recognition" (1933) 14 BYIL. Lauterpacht, Recognition in international law (1947).
[72] I. Brownlie, op. cit., n. 46 at pp. 87–105.
[73] Ibid., at pp. 88–91.
[74] O'Connell, op. cit., n. 46, p. 842.
[75] Dickinson, op. cit., n. 16.
[76] Ibid.
[77] Ibid.

dignity of states; (3) The need for comity; (4) The legal nature of sovereign property; and (5) Diplomatic function qua international personality.

The literature on jurisprudence shows clearly as has already been stated elsewhere, that Hobbes's bent of reasoning was in antithesis to both Grotius and Montesquieu. Hobbes' notion of absolute sovereignty also runs counter to Locke's theory of legal and political sovereignty. In reality, therefore, the notion of absolute sovereignty has fallen out of favour with modern publicists.[78]

In fact, it is highly doubtful as to whether the views expressed by exponents of absolute sovereignty today would be allowed without criticism. The theory that sovereignty is unlimited, indivisible, inalienable, imprescriptible, ultra comprehensive and exclusive is open to question and therefore must be relegated to the background. Perhaps it was so before the 20th century,[79] when the sovereign had control over the police and army and was also at the same time the lawmaker, a judge and the executor.[80] Modern states will not accept the theory as it stands in view of Montesquieu's theory of separation of powers.[81] This is perhaps correct insofar as the sovereign has to conform to certain principles well entrenched and respected in modern democratic countries.[82] It may be contended, therefore, that in these modern times the argument in support of absolute sovereignty is *non sequitur* and perhaps anachronistic, given the changes that have taken place both in municipal law and international law.[83]

The sentiments expressed by modern writers against the absolute nature of sovereign power have been canvassed of late before domestic courts.[84] This tendency finds expression in both common law[85] and civil law countries[86] except in former Soviet Union. In Great Britain, for example, the Crown Proceedings Act, 1947, prepared the way for suits to be filed against the government.[87] Actions in contract in the United States against the state are possible as a result of the enactment of the Court Claims Act 1855.[88] And quite recently, legal proceedings with respect to the jurisdiction of U.S. courts have been flexibly extended and this culminated in the enactment of the Torts Claims Act of 1946.[89] It is possible therefore in these

[78] Laski, op. cit., n. 42.

[79] Ibid.

[80] George Sabine, and Thomas Thorson, op. cit., Laski. Op. cit.

[81] Montesquieu, op. cit., The Federalist Papers (American classics about government) (1981).

[82] A.D. Linsay, The Essentials of Democracy, Oxford (1935).

[83] The European Convention on State Immunity and Additional Protocol (1972); The U.S. Sovereign Immunity Act (1976); U. K. Sovereign Immunity Act (1978).

[84] Claims before U.S. courts and U.K. courts are on the rise and this I believe might have been influenced by modern writers on state immunity. But there is an absence of precise prescriptions as to the problem.

[85] Clive M. Schmitthoff, The claim of sovereign immunity in the law of international trade (1958) 7 ICLQ 456–457.

[86] Ibid. at p. 457.

[87] (1957) 3WLR 884, 910.

[88] Schmitthoff, at p. 457.

[89] Ibid.

modern times for a sovereign to submit to its own courts.[90] These trends of events and the call for limited immunity are gaining ground and have in fact, *sit venia verbo*, unhappily I may say, created a Pandora's box of difficulties and uncertainties in transnational business transactions.[91] It is submitted, however, that the above argument is eclipsed by the very fact that forum law is vertical and thus the creature of the sovereign and therefore cannot be applied to sovereign states in view of the popular concept of natural equality of states.

1.6 Final Remarks

At the onset of this study, a question was posited as to whether a sovereign state can possibly litigate a sovereign immunity claim successfully before a foreign court. To answer the question a journey was taken through the uncharted seas of the history of philosophy and law to find an answer to the question. The answer seems to be predicated on the principle that every sovereign state has the obligation to give due respect to each others' independence, equality and dignity,[92] a concept clearly borrowed by Chief Justice Marshall from the philosophical writings of the past to support his Schooner Exchange decision on state immunity regarding public ships. *Prima facie*, Justice Marshall's decision today, however, seemed to run counter to Lord Denning's observations in Rachimtoola v. Nizam of Hyderabad,[93] thus:

"It is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it, and his independence is better ensured by accepting the decision of a court of acknowledged impartiality than by arbitrarily rejecting their jurisdiction."[94]

Be this as it may, some leading countries are now modulating their positions on the question of state immunity,[95] and therefore, while successful litigation of immunity claim was fairly easy in the past, at least in recent years the trend has changed because the modalities of restrictive immunity are gaining currency.[96]

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[90] Ibid.

[91] Trendtex Trading Corp v. Central Bank of Nigeria (1977) QB 529 Court of Appeal I Congreso Del Partido (1988) AC 244 House of Lords. Alcom Ltd. v. Republic of Colombia (1984) 2 All ER6.

[92] O'Connell, op. cit., note 46 at pp. 842–845.

[93] (1958) AC 379.

[94] In Rachimtoola v. Nizam of Hyderabad (1957) 3 WLR 884, 910.

[95] This is very common in the Western Hemisphere, especially in countries such as the U.S., U.K., Canada, Australia, to mention the main ones.

[96] Report of the International Law Commission (1986) Yrbk ILC; see also Fitzmaurice (1957, 11) 92 Hague Recueil; Emanuelli (1984) 2 Canadian Yrbk; Foreign Sovereign Immunity Act, FSIA (1976). The State Immunity Act, SIA (1978) reproduced in (1983) ILR 64 p. 718; Canadian Sovereign Immunity Act (1982; South African Foreign Sovereign Immunity Act (1981); Pakistani Foreign Sovereign Immunity Act (1981); Foreign Sovereign Immunity Act of Singapore (1981); Australian Sovereign Immunity Act (1979).

In sum the sources of modern law of immunity of states can be traced back to the days of Bodin, Hobbes, Austin, Grotius and Vattel, to mention a few. And the desire of these great thinkers to ameliorate perhaps the problems of their days gave strength to the thought that because of the notion of equality of states, sovereign states be accorded absolute immunity in their dealings with other states, both public and private. For it will certainly be difficult to lord it over an "equal," i.e., another state, two or three hundred years ago in view of the ceaseless struggles between nation–states, hence the notion *par in parem non habet imperium* or *par in non habet jurisdictionem*.

2 The Development of Sovereign Immunity

2.1 France before American Courts and its Aftereffects

The doctrine of state immunity was not simply conceived overnight or *eo instanti*, but was rather gradually developed over a long period of time by municipal courts. In other words, the concept became law specifically through juridical evolution totally influenced by juridical philosophy.[1]

It all started when philosophical writings of the past found expression in an American municipal court decision of 1812.[2] This decision in due course became a *cause célèbre* and therefore turned out to be a source of strong influence on other municipal courts of the world.[3] Arguably, the proposition that the doctrine of state immunity is a product of municipal courts cannot ex–hypothesi be disputed in view of the fact that there is a considerable amount of municipal case law on this subject[4]

In fact, American courts were the first to express their thoughts and perhaps to give true meaning to the doctrine of sovereign immunity. It is indeed worth noting that Chief Justice Marshall's ruling focused on the *leges imperii* and borrowed heavily from Vattel's juridical philosophy.[5] In order to understand the reasoning behind Justice Marshall's decision, it is expedient that a thorough study of the case be done so as to lay bare the force and thrust of its authority and effects thereto, for one would not like to be accused of looking at flowers from a horseback.[6] Let us now consider *seriatim* the Schooner Exchange v. McFaddon, its effects and subsequent cases that followed its authority.

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[1] Fitzmaurice (1933) 14 BYIL; Sucharitkul, State immunities and trading activities (1959); Sinclair, (1980 II) 167 Hague Recueil 113; Badr, State immunity: An analytical and Prognostic view (1984).

[2] The Schooner Exchange v. McFaddon 11 US 7 Cranch, 116, 3 ed 287 (1812); Chief Justice Marshall as can be gathered from his reasoning per the issue of immunity, relied on the writings of the revolutionary era, particularly that of Vattel.

[3] See Sinclair, op. cit., n. 1, pp. 121–134; O'Connell, International Law (2nd ed 1990) vol pp. 844–845.

[4] See Sucharitkul, op. cit., n. 1, pp. 51–162; Sinclair, op. cit., n. 1, pp. 121–134.

[5] A careful reading of Chief Justice Marshall's thesis in the Schooner Exchange shows clearly in part that he relied on Vattel's thoughts or philosophy regarding the subject matter of sovereign immunity. See Badr, op. cit., p. 12.

[6] This is a Chinese saying regarding 'piecemeal attempts' or less thorough work.

2.2 Justice Marshall and His Groundbreaking Rule

The Schooner Exchange, by every estimation can be described as the *fons et origo* of the modern law of state immunity. That such an attribute is proper and must not be doubted had been well documented in the writings of modern international lawyers.[7] The case alluded to above can be related thus: Two American citizens named McFaddon and Greetham, the true owners of the Schooner Exchange, filed a libel suit in the United States District Court of Pennsylvania claiming that, based on equitable principles, they were entitled to the possession of the Schooner Exchange and that they had title to it when it left the port of Baltimore for Spain on October 27, 1809; they stated further that on December 30, 1810, the ship was seized on the orders of Napoleon, then the Emperor of France, in violation of international law, without due process or proper French prize court adjudication. In addition to all these, the two partners also intimated that the vessel was now docked in Philadelphia in possession of one Dennis Begon. It must be pointed out, however, that at this juncture a decree of condemnation had not been formally issued against the said vessel by any local court. They therefore prayed in their pleadings that they be allowed by the Court to take possession of the vessel for restoration since the vessel was damaged severely on the high seas. A process was issued, but Mr. Dallas, a U.S. attorney at that time for the District of Pennsylvania, appeared and filed a brief of suggestion stating inter alia that since peace existed between France and the United States, a public vessel of the Emperor which had been driven into the port of Philadelphia in distress cannot be attached. The District Court without any hesitation dismissed the libel. The decision, however, was thereafter reversed by the Circuit Court, and then appealed to the Supreme Court; the issues that fell before the Supreme Court for consideration were as follows:

Whether France being a sovereign country can be impleaded or sued in her own name in a foreign court, i.e., U.S. courts.

Whether based on absolute or classical doctrine of sovereignty immunity France could arrest suit or possibly resist if the need be an execution against her property.

Whether Napoleon having acquired title by force could be impleaded.

Marshall, Ch.J. Delivered the opinion of the Court as follows:

"A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

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[7] See Sucharitkul, op. cit. n. 1; Sinclair, op. cit.; O'Connell, op. cit.; J. Sweeney The International Law of Sovereign Immunity (1963); Brownlie, Principles of Public International Law, 4th ed. (1990) pp. 323–326; Hall, International law (8th ed. 1924). See also generally Lauterpacht, The problem of jurisdictional immunities of foreign states (1951) 28 BYIL; 220 Harvey, Immunity of sovereign states when engaged in commercial enterprise: A proposed solution, (1929) 27 Mich L Rev; Brandon, (1954) 39 Cornell Law Quarterly.

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him."

He concluded his judgment in the following words:

"If the preceding reasoning be correct, the Exchange, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country."

2.3 Analysis of Chief Justice Marshall's Thesis

There was no *lex scripta*, i.e., written law, on the question of state immunity to guide Chief Justice Marshall when the Schooner Exchange case was brought before him.[8] And in order to keep himself within the confines of reasonableness, he threw his efforts behind the authority of the writings of the past[9] but specifically on the philosophical writings of Vattel,[10] coupled with the inherited precepts of the social contract, cleverly adumbrated by Hobbes[11] and Rousseau.[12] Perhaps it would have been easier on him if there was in existence *cum sensu*, i.e., shared feeling, among judges at that time slanted towards a classical doctrine, according to which a sovereign is accorded absolute immunity irrespective of the subject matter at issue. Nevertheless, Justice Marshall was able to gather courage from the

[8] In fact, Schooner Exchange v. McFaddon can rightly be termed the locus classicus or the first of its kind to delve into the jurisprudence of sovereign immunity. And before this case was decided there was no literature on the subject, i.e., there was no *lex non scripta* on the subject. Marshall therefore relied on philosophical writings of the past: see Schwarzenberger, Manual of International Law 4th ed. (1960). but it appears clearly that Schwarzenberger got his information from the works of Professor Edwin D. Dickinson, a leading American legal historian. See supra chapter one for an insight into the statistical formulation prepared by Dr. Dickinson.

[9] Emmerich de Vattel, Le droit des gens, OU, Principes de la loi naturelle, applique a la conduite & aux affairs des nationes & des souverains (1758), translated by C.G. Fenwick, Classics of International Law (1916) 3 vols.; Bynkershoek, De foro legatorum appeared in 1721; and Quaestionum juris publici (1737).

[10] Vattel, op. cit., n. 9, and perhaps earlier writers.

[11] B. Russell, A History of Western Philosophy (10 ed. 1964) pp. 546–556.

[12] Ibid. at pp. 685–701.

political culture of his time[13] to set the pace for the evolution of the doctrine of absolute sovereign immunity.

For Marshall, a potentate's freedom from domestic judicial control or subjugation cannot be predicated upon the will or power of a local court. Thus in considering the immunity of a foreign state much depends upon the will of the local sovereign, in other words, the ability and freedom of a sovereign to arrest suit or resist jurisdiction must be derived from the express consent of the local sovereign and nothing else.[14] This immunity as can be gathered from his reasoning emanates from the notion of sovereignty arguably predicated on innate superiority. In a sense Justice Marshall was trying his best to postulate that sovereignty entails equality, independence and dignity which in turn gives meaning to common sense that equality breeds consensus and courtesy rather than subjection.[15] The reason offered by Justice Marshall in support of the sovereign's willingness or consent to the exclusion of sovereign states from the general jurisdiction of domestic courts can be stated as follows:

"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 these good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

This consent may in some instances be tested by common usage, and by common opinion, growing out of that usage."[16]

Chief Justice Marshall's bent of thinking in this respect takes us unto a higher level of reasoning, where he argues that the world which involves the interchange between ambassadors of different states detests an action not in consonant with accepted usage. Thus if a state goes to the extent of exercising its territorial powers in a manner that generates acrimony and disrepute, without any regard to the dignity of states, then such a state blatantly violates the terms of an implied agreement or faith not specifically stipulated.[17] His thesis also tells us that the power of one sovereign is not amenable to another sovereign[18] which in logical terms adds precision to the idea that sovereign states have the highest obligation to guard against being subjected to the jurisdiction of other states.[19] One important ingredient of Marshall's reasoning can be likened unto the proposition that states must endeavour always to protect their dignity from being damaged. There is therefore the presumption that the law of immunities of states in his days, although

[13] U.S. Constitution in whole or in part did influence Chief Justice Marshall's thesis in the Schooner Exchange. See also Lauterpacht with respect to his comments on this issue: op. cit., n. 7 at p. 230. The dignity of states concept seemed to have come from the Virginia Convention of 1788.

[14] Schooner Exchange v. McFaddon, 11 US 7 Cranch 116 3 Ed 287 (1812).

[15] Ibid.

[16] Ibid. at p. 136.

[17] Ibid.

[18] Ibid.

[19] Ibid.

not clearly or specifically stated in statute books, was reserved by implication and therefore must be respected so as to promote comity among states.[20]

The foundation of the reasoning behind the Schooner Exchange is that the essence of sovereignty must be seen within the context of an independent state's supremacy in its spheres of operation, putative or real, and given the innate supreme license of the state, it cannot be subjected to any other laws but its own, *suis legibus uti*.[21] Technically, therefore, a state which is independent in the eyes of the world is *ipso iure* sovereign and logically has overall authority *suprema potestas* in local matters, which according to Chief Justice Marshall gives support to the allowance of immunity to states from the jurisdiction of other states.[22] There is an element of logic and truism associated with his line of thought for such an approach will certainly not violate sovereign rights of states but rather enhance mutual intercourse and natural equality, which two centuries earlier had been introduced into juridical philosophy by Thomas Hobbes.[23] In reality, however, exemptions from the jurisdiction of a domestic court are truly derived from the concept of *suprema potestas* which by its very nature gives consent express or implied based on local authority in deference to the accepted doctrine of equality of states upon the necessity of promoting the needed indispensable ingredient of comity and good will among nations.

Without doubt there is certainly an element of *communis opinio doctorum* to support relative sovereignty, i.e., the limitation of international law on sovereign power,[24] however, it seems clear that at the time that Chief Justice Marshall wrote the said judgment, the idea of sovereign power and its attributes of absoluteness, inalienability and indivisibility had totally eclipsed the precepts of international law limitation upon sovereign power.[25] There was therefore no evidence at that historical epoch whereby any nation had been subjected to the jurisdiction of another state.[26] However, prior to the decision he handed down in the Schooner Exchange, it would appear that "Marshall C.J. himself in 1788 in the debates preceding the adoption of the Virginia Constitution had applied to the states of the Union the same doctrine that he was to apply later to foreign states."[27]

This shows clearly that not only was he influenced by the writings of early writers on sovereignty and the writings of classical international law scholars but was to some extent also influenced by American political culture and possibly an

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[20] Ibid.

[21] Ibid.

[22] Ibid.

[23] Edwin Dickinson, The Equality of States in International Law (1920) pp. 69–89. See also Thomas Hobbes classical works, The Leviathan, ed. by A.K. Waller, Cambridge, 1904.

[24] Korowicz, (1961 1) 102 Receuil des Cours pp. 27–29.

[25] See Bodin, The Six Books of a Common wealth, trans. by Richard Knolles, London (1606). See also generally Dickenson, op. cit.

[26] This is an implicit proposition, for every treatise on international law did mention the Schooner Exchange as the *Fons et origo* on the subject. See Briggs, The Law of Nations (2nd ed. 1962) p. 413.

[27] O'Connell, op. cit., n. 3, p. 844; Lauterpacht, op. cit., n. 7, p. 230.

affective cognition of the dynamics of American Constitutional debates, and more importantly, the U.S. Constitution.[28]

If this be true, then Chief Justice Marshall could not have ruled any other way in view of the influence of the Revolutionary era coupled with the popular maxim commonly known in England and America, that the King can do no wrong.[29] It was therefore not a surprise at all when he reasoned thus:

"In exploring an unbeaten path, with few, if any from precedents or written law, the court has found it necessary to rely much on general principles and on a train of reasoning, founded on cases in some degree analogous to this.

The jurisdiction of courts is a branch of what which is possessed by the nation as an independent sovereign power.

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They flow from no other legitimate source."[30]

There is inherent in the above contention a clever proposition of absolute immunity which must not be mistaken to be semantic as to mean anything other than a quest to offer a cogent explanation to support the reason why jurisdiction over a foreign state be declined or waived.

True, Marshall's argument can be construed to fall in line with the Roman Law Maxim–*jurisdictio inhaeret, cohaeret imperio par in parem non habet judicium.* Essentially, however, the overall thrust of his argument in the Schooner Exchange, be it theoretical or practical, seemed to follow the practice of the

"time when most states were ruled by person sovereigns who, in a very real sense, personified the state. . . . In such a period, influenced by the survival of the principle of feudalism, the exercise of authority on the part of one sovereign over another inevitably indicated either the superiority of overlordship or the active hostility of an equal. The peaceful intercourse of states could be predicated only on the basis of respect for other sovereigns. . . ."[31]

As a fundamental point of departure, it would appear as regards state practice that absolute sovereign immunity persists today because of Chief Justice Marshall's well reasoned judgment which seems to have found favour with many judges of his time.

Again, Marshall's deference for the supremacy of the sovereign is exemplified when he stated clearly as follows:

"Equally impossible is it to conceive, whatever may be the construction as to private ships, that a prince who stipulates a passage for his troops or an asylum for his ships of war in distress, should mean to subject his army or his navy to the jurisdiction of a foreign sovereign. And if this cannot be presumed, the sovereign of the port must be considered as

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[28] Lauterpacht, op. cit.

[29] See R. Dorsey Watkins, The state as a party litigant (Johns Hopkins, 1927), chapters 1, 11, 12; L. Van Praag, Jurisdiction et Droit International Public (1915); see also the Supplement (1935).

[30] (1812) 7 Cranch 116. p.136–137.

[31] Harvard research draft Convention on Competence of Courts in Regard to Foreign States (1932) article 7, p. 527.

having conceded the privilege to the extent in which it must have been understood to ask."[32]

In short, it can be argued that the principle of waiver on behalf of a foreign state is presumed as "given" in the light of the accepted legal and political usage of give and take in order to avoid a spectre of disrepute or tension. But this power of waiver of jurisdiction can also be denied at the discretion of the receiving sovereign. Thus the proposition stated above can easily be relegated to the background based on the whims and caprices of the local sovereign.[33]

Strictly speaking, therefore, one can appropriately postulate that Justice Marshall's thesis in the Schooner Exchange entails three interrelated exceptions to the exercise of territorial jurisdiction, and these exceptions are:

- The exemption of the person of the sovereign from arrest or detention within a foreign territory.[34]
- The immunity which all civilized nations allow to foreign ministers.[35]
- The cession of a portion of his territorial jurisdiction is where he allows the troops of a foreign prince to pass through his dominions.[36]

These principles if put together offer an enlightened theory that the source of immunities enjoyed by international political functionaries of states and sovereigns stem from the legal and international personality of the territory they represent.[37] Thus, diplomatic immunities in principle are derivative in nature and are therefore granted to ambassadors or diplomatic agents because they are representatives of a recognised state.[38] Thus, every state, small or big, irrespective of the circumstances must be accorded the same juridical and natural respect. These ideas perhaps existed before Marshall handed down his famous decision, however, it would not have been shaped into municipal law if countries of the world, and particularly other municipal courts, had challenged the authority of the Schooner Exchange. Prima facie, the heart of Marshall's decision was based on the concept of absolute immunity of states, if not more representative of it. But it is plausible to argue that he never envisaged his thesis will carry much weight into the 20th century as to create uncertainties.[39]

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[32] Schooner Exchange v. McFaddon 11 US 7 Cranch (1812).

[33] Ibid.

[34] Ibid. at p. 137.

[35] Ibid. at p. 138.

[36] Ibid. at p. 139.

[37] See Sucharitkul, op. cit., n. 1, p. 24.

[38] Ibid., Michael Brandon, Report on Diplomatic Immunity (1952) 1 ICLQ. 358.

[39] Schreuer, State immunity, some developments (1993); Feller, Procedure in Cases Involving Immunity of Foreign States in Courts of the United States (1931) 25 Am J. Int L. Pugh and McLaughlin, Jurisdictional immunities of foreign states (1966) 41 NYUL Rev 25; Carl, Foreign governments in American courts: The United States Foreign Sovereign Immunities Act in practice, (1973) 33 Southwestern LJ; Sornarajah, Problems in applying the restrictive theory of sovereign immunity (1982) 31 ICLQ 664; Fox, Enforcement jurisdiction, foreign state property and diplomatic immunity (1985) 34 ICLQ; Higgins, Certain unresolved aspects of the law of state immunity (1982) 29 NILR; Brower, Litigation of sovereign immunity before a state administrative body and the de-

Dr. Badr in his interesting and illuminating book declared that

"The Schooner Exchange can be rightly said to be the harbinger of the restrictive theory of immunity rather than, as commonly maintained, the starting point of absolute theory."[40]

He further stated that,

"It is nevertheless interesting to note that the said early decisions did distinguish, as we already pointed out, between a foreign sovereign's public acts on the one hand and his private acts on the other, stating in no uncertain terms that the latter enjoyed no immunity from the jurisdiction of the local courts. The continued citation of these early decisions in support of the absolute theory of state immunity is therefore a curious phenomenon, due perhaps to a hasty perusal of those decisions or to second-hand knowledge of them."[41]

Although Dr. Badr's contention in this light is well taken, I would beg to differ with respect to his statement that "the Schooner Exchange can be rightly said to be the harbinger of the restrictive theory of immunity." It is submitted that such a statement is too dramatic and not representative of Marshall's thesis. Dr. Badr, it would appear, arguably got his inspiration from a passing argument offered by Sir Ian Sinclair in his general course in 1980.[42] With the greatest respect, I venture to state that such a position is in error and the flowers on the way will soon be so beautiful as to entice scholars who follow the said reasoning to pause and dismount for a more careful reappraisal of the Schooner Exchange. It is true that the decision in the Schooner Exchange can be subjected to different interpretations but one must be careful not to overlook the cardinal principles of the judgment. Thus to unveil the realities behind the reasoning of Chief Justice Marshall, it is apposite not to be seduced by the current seemingly growing acceptance of the doctrine of restrictive immunity.[43] For there is always a dense fog of mystification associated with the semantic approach taken by Marshall with respect to his sagacious reasoning in the said case and this has given birth to occasional radical or dramatic interpretation of his decision[44] to mean many things.

As we all know the case was reversed in the circuit court, but affirmed on appeal, and the main issue was whether two American citizens could possibly implead a foreign sovereign state before U.S. courts and the answer that was offered gave deference to the absolute immunity of France carefully, derived from metajuridical thought in support of the notion that every state, small or big, weak or strong, is equal to every other nation in the society of nations.[45] This I believe might have prompted Professor O'Connell to conclude as follows:

"from this theory the deduction is made that all sovereigns being equal no one of them can be subjected to the jurisdiction of another without surrendering a fundamental right. This view reflects the doctrine which developed from Bodin through to Austin and Hegel

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partment of State: the Japanese Uranium Tax Case (1977) 72 AJIL; Markesinis, The changing law of sovereign immunity (1977) 36 Cambridge Law Journal.

[40] Badr, op. cit., n. 1, p. 13.

[41] Ibid. at pp. 18–19.

[42] Sinclair, op. cit., n. 1, p. 122.

[43] Ibid. at pp. 197–217.

[44] Badr, op. cit., pp. 17–18.

[45] See the analysis offered by Chief Justice Marshall in his celebrated ruling in the Schooner Exchange v. McFaddon.

that the law is the creature of sovereignty and that as between equals there can only be consensus, not subjection."[46]

These ideas in due course influenced other courts to follow the absolute immunity doctrine.[47] It will certainly be unfair to contend that Lord Stowell's reasoning in the Prins Frederik,[48] and many others who followed him to date, be taken to represent a hasty perusal and a secondhand knowledge of the Schooner Exchange. In fact the doctrine of absolute immunity was the main reason which prompted Marshall to rule in favour of France and it has remained supreme until recently.[49] It is therefore submitted that the contention by Dr. Badr that the Schooner Exchange gave birth to the restrictive theory rather than the absolute immunity doctrine is not helpful and therefore must be relegated to the background for his position simply runs counter to every scholar who had written on the subject. Perhaps he misconstrued Justice Marshall's *orbiter dicta* in the Schooner Exchange to represent the main issue of the case. Obviously such a position is *ex–facie* erroneous.

2.4 The Influence of Chief Justice Marshall's Decision

Before Justice Marshall handed down his most cited and celebrated decision, *lex non scripta* with regard to absolute immunity never existed.[50] By implication it appears that the international law principles of diplomatic immunities somewhere along the way might have influenced the development of the doctrine of immunities of states.[51] Thus, in view of the *cum sensu* as regards diplomatic immunities among judges, the birth of state immunity was inevitable and not by accident in so far as the legal position of the diplomatic agent is derivative of the sovereign state.

The philosophy behind Marshall's decision can be predicated on the following factors:

1. That state immunity can be traced to the Roman law maxim of jurisdiction inhaeret, cohaeret, adhaeret imperio par in parem non habet judicium.
2. That it is expedient to prevent the active hostility of an equal in order to promote peaceful coexistence of states.[52]

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[46] O'Connell, op. cit., p. 842.

[47] The Prins Frederik (1820) 2 Dods 451; The Parlement Belge (1880) 5 PD 197; The Cristina (1938) AC 485; see generally Strousberg v. Republic of Costa Rica (1880) 44 LT; Manning v. State of Nicaragua, 14 How Pr 517 (1857); Hassard v. Mexico, 29 Misc NY 511 (1899); De Haber v. Queen of Portugal (1851) 17 QB 171.

[48] The Prins Frederik (1820) 2 Dods 451.

[49] Sinclair, op. cit., n. 1, pp. 146–196.

[50] Sucharitkul, Immunities of foreign states before national authorities, (1976 1) 149 Hague Recueil. See generally Sucharitkul, op. cit., n. 1.

[51] Sucharitkul, op. cit., n. 1, pp. 24–50.

[52] Schooner Exchange v. McFaddon 1 Cranch (1812) pp. 136–132. See also Hicks, (1908), AJIL 11, 530–561; The ruling in Mighell v. Sultan of Johore, LR (1894) 1 QB, 149 is appropriate or in order since it laid emphasis on equality of states per the question of jurisdiction.

3. That the principle of equality of states is grounded on natural law, the state of nature and natural equality. Marshall was therefore influenced by both the naturalists and the eclectics, particularly Vattel.[53]
4. That the political culture of his country, i.e., the U.S., and the fact that the U.S. was only thirty–six years old, when the Schooner Exchange came up for adjudication prompted Marshall to follow state immunity in order to avoid serious disputes at diplomatic level (see the position of the Federalist, particularly that of Hamilton [Federalist paper No. 81]).[54]
5. That the writings of early writers on sovereignty (i.e., *superanus*) influenced Marshall cannot be disputed, in the light of the concept of *ipso iure sovereign* coupled with that of *suprema potestas*.
6. That the influence of the U.S. Constitution is noteworthy can be seen in terms of the principle that an individual cannot sue a sovereign without its consent, e.g., the 11th Amendment of the U.S. Constitution (1798).[55]
7. That his background as a diplomat, a Secretary of State and a lawmaker might have influenced his approach.

2.5 Influence of Marshall's Judgment on English Courts

2.5.1 English Courts and the Sovereign Immunity Question

Eight years after the decision in the Schooner Exchange, an English Court also had its first opportunity to deal with the question of jurisdictional immunities in the case of The Prins Frederik,[56] there a public warship lawfully owned by the King of the Netherlands embarked on a voyage from the coast of Batavia to Texel, carrying on board cargo of spices and other valuable goods. During the course of the journey it suffered damage off the rough waters of Scillies and therefore was brought to an English port for respite by the help of the master and crew of the British brig Howe who by an implied authority claimed salvage. The Court of Admiralty thus was faced with the issue as to whether it had jurisdiction to decide a claim of salvage against the property of the King of Netherlands. Having been influenced by the authority of the Schooner Exchange and the writings of Bynkershoek, the litigation produced very interesting arguments as to whether the property in question be given up for individual acquisition and this as a matter of logic was taken into a semantic domain, characterising the ship as *sacra, religiosa publica–publicis usibus destinata*, and therefore totally out of reach of private rights and individual claims and that if allowed to fall within the private rights of men,

[53] Emerick de Vattel, Le droit des gers (1758) Book IV, Chap. VII.
[54] See the classic American literature on the Federalist Papers (1961), No. 81 by Hamilton.
[55] Chisholm v. Georgia (1793) 2 Dall, 419.
[56] (1820) 2 Docts. 451.

will be diverted from its public use.[57] Although a clear determination with respect to the doctrine of immunity of state was not specifically stated, at least, the refusal by Sir William Scott (later Lord Stowell) to give a ruling on the question of jurisdiction appeared to take its authority from Chief Justice Marshall's thesis.[58] The case, however, was referred to arbitration for settlement. But the argument of Dr. Arnold,[59] on behalf of the Admiralty Court in support of absolute immunity, thus laid the groundwork for the allowance of immunity in the Parlement Belge.[60]

Admittedly, one can clearly see that the said groundwork followed the principle laid down by Justice Marshall in 1812 when he observed that

"a clear distinction is to be drawn between the rights accorded to private individuals or private trading vessels, and those accorded to public armed ships which constitute a part of the military force of the nation. It seems, then, to the Court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction."[61]

The logical power of reasoning behind the Schooner Exchange thesis apparently thus crossed the Atlantic unto the shores of the British Isles[62] because of its positive appeal and reasonableness. It therefore gave municipal courts in England a good working tool as to how to shape the development of the doctrine of state immunity.[63] It is worth pointing out, however, that an attempt was made by Phillimore J. to derail this movement towards the establishment of the doctrine of state immunity in England.[64] Although he took a position worthy of a man with conviction, his efforts, however, were defeated on appeal by Brett LJ in the Parlement Belge.[65] A similar preference for absolute immunity was promoted by Lord Campbell in De Haber v. Queen of Portugal[66] in a positive response and support of Sir William Scott's approach in the Prins Frederick.

Again, Phillimore J., in the case of the Charkieh,[67] made another attempt to contest the legitimacy behind the absolute sovereignty doctrine by espousing the restrictive immunity rule. There, a vessel owned by the Khedive of Egypt was refused immunity because of the contention that the prince was not endowed with sovereign power as to be accorded immunity at the time in issue. Phillimore J's famous position can be stated thus:

"No principle of international law, and no decided case, and no dictum of jurists of which I am aware, has gone so far as to authorize a sovereign prince to assume the character of a trader, when it is for his benefit; and when he incurs an obligation to a private subject to throw off, if I may so speak, his disguise, and appear as a sovereign, claiming for his

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[57] Ibid p. 468.
[58] See O'Connell, op. cit., p. 844.
[59] Sinclair, op. cit., n. 1, p. 123.
[60] (1880) LR 5 PD 197.
[61] (1812) 7 Cranch 116.
[62] The Prins Frederik (1820) 2 Dods 45; The Parlement Belge (1880) 5 PD 197.
[63] Sinclair, op. cit., n. 1, pp. 121–127; O'Connell, op. cit., at pp. 847–853.
[64] 1880 LR 5 PD 197.
[65] Ibid.
[66] (1851) 17 QB 171 at pp. 212–213.
[67] 1873 LR 4 and E 59.

own benefit, and to the injury of a private person, for the first time, all the attributes of his character."[68]

Furthermore, an authoritative expression of the rule of absolute immunity in English law occurs in the classic case of the Parlement Belge in which as already stated elsewhere Phillimore J took a bold step in denying immunity to a mail packet legitimately owned by the Belgian King and duly officered by the commissioned servants of the Belgian Navy on the ground that it somewhat took itself outside the domain of public acts into the domain of commercial activity. On appeal Phillimore's J decision was reversed[69] on the strength of independence, dignity and comity of states as follows:

"The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other state, 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, or over the property of any ambassador, though such sovereign ambassador or property be within its territory and therefore, but for the common agreement subject to jurisdiction."[70]

Thus, Parlement Belge established a forceful precedent which extends immunity to warships including *inter lia* public ships associated with public activities. Technically, the decision did not truly delve into specific questions regarding trading activities coupled with its public character and effect thereto. But arguably the kernel of the decision gave notice with respect to the acceptance of the rule of state immunity.

Prior to Brett LJ's decision in the Parlement Belge, there was somewhat an uncertainty[71] in respect of how to deal with issues relating to the exemption of the property of a foreign power from a local jurisdiction. Thus in the case of Duke of Brunswick v. King of Hanover,[72] the House of Lords took pains to exercise caution in dealing with the issues in the following formulated manner per Lord Cottenham LC.

"That a foreign sovereign coming into this country cannot be made responsible here for an act done in his sovereign character in his own country; whether it be an act right or wrong, whether according to the constitution of that country or not, the courts of this country cannot sit in judgment upon an act of a sovereign, effected by virtue of his sovereign authority abroad, an act not done as a British subject, but supposed to be done in the exercise of his authority vested in him as sovereign."[73]

The House of Lords' attempt to follow implicitly the thesis presented in the Schooner Exchange is amply demonstrated by a clear illustration of its deference for sovereign power and its attributes of dignity and equality.

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[68] Ibid pp. 99–100.

[69] (1880) LR 5 PD 197.

[70] At pp. 214–215 per Brett LJ.

[71] Sucharitkul, op. cit., n. 1, at pp. 56–57.

[72] 1851 17 QB 171.

[73] Ibid., pp. 212–213.

English case law shows that the Porto Alexandre[74] marks the final onward march to a complete acceptance of the doctrine of absolute immunity in English law.[75] In other words, the influence of the judgment in The Parlement Belge became well grounded when Hill J, declared himself totally bound by the reasoning behind its absolute immunity doctrine.[76] And his colleagues in view of other authorities on appeal followed his reasoning.[77] In the Porto Alexandre, a German privately owned ship was lawfully adjudged by the Portuguese prize court in 1917, as totally condemned in value. But prior to the decision of the court it was intimated that it had earlier on been requisitioned by the Portuguese government only to be relinquished later, and had since then been involved exclusively in commercial transactions. A writ in rem was filed against the ship, but Hill J, although exposed to some doubts regarding the case, declined jurisdiction by setting aside the writ, thus embracing an absolute view of immunity on the question of public ships.[78] Let us now turn to the consideration of an aspect of early jurisprudence on the continent of Europe.

2.6 Civil Law Countries and Sovereign Immunity

It is hard to say whether the classical thesis of Chief Justice Marshall ever found its way into the practice of civil law countries, but it appears somehow that its philosophy might have given these countries food for thought.[79] This contention is being made because while common law countries adhere to the principle of *stare decisis*, civil law countries, on the other hand, look up to the authority of the codified system for shaping their laws.[80]

Precedent therefore does not play any considerable role in the development of municipal laws in civil law countries.[81]

Originally French courts followed the doctrine of absolute immunity and this was clearly enunciated by the Cour de Cessation in 1849.[82] However, in a later case of Chaliapine v. USSR,[83] the Court of Cassation was quick in denying a plea for immunity with respect to an action for a breach of copyright. Again in Societe

[74] (1920) p. 30.
[75] Sinclair, op. cit., n. 1 at p. 126.
[76] (1920) p. 30.
[77] (1920) P at 34 per Bankes L.J.
[78] (1920) P at 31.
[79] Government Espagnol v. Casaux, 22 Jan., 1849 Dalloz; Hellfeld Case (1910) Zeitschrift fur Internationales Recht vol. 20. See generally Harvard Research Draft at p. 620; Militar–Liquidierungsamt (1922) Weekblad No. 10928; German Immunities in Poland Case, S Ct 31.8.1938 Clunet 66 (1939).
[80] See Lawson and Markesinis, tortious liability for unintentional harm in the common law and the civil law (1982).
[81] Ibid.; S.A. Bayitch, Codification in Modern Times, in Civil Law in the Modern World (ed. A.N. Yiannapoulos), Baton Rouge, Louisiana State University Press (1965).
[82] 22 Jan (1849) Dalloz, 1849, n. 5.
[83] Dalloz periodique 1937, Part i p. 63.

de Gostorget USSR v. Association of France Export,[84] the French court ruled that a state owned enterprise or a state instrumentality cannot be accorded immunity. France therefore adopted the practice of absolute immunity at one time and restrictive immunity at other times, but it appears that the move towards the restrictive doctrine is well nigh complete.[85] Holland is torn between the concept of absolute immunity and restrictive immunity.[86] In Weber v. USSR,[87] its courts affirmed the principle of state immunity, however, after the Second World War in 1947, it changed its position by jumping onto the bandwagon of the reasoning behind the theory of limited immunity. Its practice therefore is not clearcut. Civil law countries in which the restrictive doctrine is followed are Austria,[88] Germany,[89] Greece,[90] and Switzerland[91] whereas Sweden,[92] has remained steadfast in following the absolute immunity doctrine. Dr. Eleanor Allen after a thorough and learned study concluded in 1933 that

"a growing number of courts are restricting the immunity to instances in which the state has acted in its official capacity as a sovereign political entity. The current idea that this distinction is peculiar to Belgium and Italy must be enlarged to include Switzerland, Egypt, Rumania, France, Austria and Greece."[93]

It is instructive, however, to note that, before 1900, or perhaps the First World War, most countries of the world, one way or the other, might have followed the doctrine of absolute immunity,[94] except perhaps Italy Belgium and probably the Netherlands for before the First World War Dutch courts did not show any inclination of recognising state immunities.[95] Arguably, therefore, no one can say with much candour or exactitude as to precisely when all these countries adopted the absolute immunity doctrine and whether a formal change has been made towards the acceptance of the doctrine of restrictive immunity. Thus it is quite cumbersome to prove the end of the gestation of an old rule, i.e., customary law, and the birth of a new one. The difficulty is that the history on the practice of states is scanty and not at all easy or straightforward.[96]

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[84] Annual Digest, 1926–26 No. 125. See Hamson in (1950) BYBIL 27, 292–331.

[85] Schmitthoff, The claims of sovereign immunity in the law of international trade (1958) ICLQ 460.

[86] Ibid., at p. 461.

[87] Annual Digest, 1919–42 Supp. Vol., Case No. 74.

[88] Hoffmann v. Dralle (May 10, 1950, 3 Int. Law Q, 576–579). See generally Seidl–Hohenveldern, State immunity: (1979) NYBIL 74.

[89] Republic of Latvia Case (Restitution Chamber of Berlin) R2 W4 (1953) 358. See generally, Lauterpacht, op. cit., at p. 266.

[90] See Lauterpacht, op. cit., at p. 256.

[91] Sovereign Military order of Malta v. Societa Camaina, Nov. 18, 1953. See generally Lauterpacht, op. cit. at p. 257.

[92] The Rigmor, Annual Digest, 1941–42, Case No. 63.

[93] E.W. Allen, The position of Foreign States before National Courts Chiefly in Europe, New York (1933) p. 301.

[94] Ibid., Sucharitkul, op. cit.; Sinclair, op. cit.; Dunbar, op. cit., n. 85; Lauterpacht, op. cit.; but see generally Fitzmaurice (1933) 4 BYIL; Badr, State Immunity, op. cit.

[95] Sucharitkul, op. cit. at pp. 156–258, Lauterpacht, op. cit., at pp. 250–273.

[96] Lauterpacht, op. cit., at pp. 268–272.

Germany, before the First World War followed the precepts of the doctrine of absolute immunity without any problems,[97] but it is crystal clear of late, that its earlier position had been completely neutralized or abandoned when Germany gave its blessings to the Brussels Convention of 1926 by ratifying it accordingly.[98]

2.7 Russia and the Sovereign Immunity Question

The practice of courts in pre–revolutionary Russia was not that clear but with respect to its monarchical background, it is submitted that it started off with absolute immunity[99] before assuming jurisdiction over state actions characterised as commercial in nature, i.e., *jure gestionis*.[100] This continued for a while until the Communist Revolution changed the superstructure of the machinery of government and ushered in the absolute immunity doctrine.[101] The practice of absolute immunity thereafter by Russia was forced on former Warsaw Pact members and finally made the accepted practice of the Communist world (if this designation is appropriate). The official Russian position can be stated thus:

"The position of the Soviet State, expressed in normative documents, practice and doctrine, has always consisted of recognition for the State and its property of full jurisdictional immunity derived from the principles of international law concerning sovereignty, sovereign equality and non–interference in the affairs of other states."[102]

Recent trends show clearly that Russia and the Third World still steadfastly follow the doctrine of absolute sovereign immunity,[103] hence we are left with a world totally torn between adherents of absolute sovereignty and restrictive immunity. The ranks of the restrictive immunity are, however, swelling considerably.[104]

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[97] Ibid. at pp. 266–268. See generally Sinclair, op. cit., at pp. 130–132.

[98] See generally Seidl–Hohenveldern, State Immunity, Federal Republic of Germany (1979) NYBIL 66. Sucharitkul, op. cit.

[99] Dr. Allen, op. cit., where a good survey was made of European practice.

[100] Lauterpacht, op. cit., p. 259.

[101] See M. Boguslavsky, Foreign State immunity: Soviet doctrine and practice (1979) NYBIL 167; Osakwe (1982) 23 Virginia J.Int. 13.

[102] ILC Report, Fortieth Session, p. 82.

[103] Carl, Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice, (1979) SWLJ 33; Higgins, The Death Throes of Absolute Immunity, The Government of Uganda before English Courts (1979) 73 AJIL; The Asian–African Legal Consultative Committee 3rd to 17th Session; see also the ILC report YBILC 1982 11–1, etc., where the position of Third World Countries, including that of African countries, seems to move in the direction of absolute immunity.

[104] Sinclair, op. cit., at pp. 197–217, Dr. Allen op. cit.; Lauterpacht, op. cit.; Badr, op. cit.; Sucharitkul, op. cit.; Dunbar, op. cit.

2.8 Is Sovereign Immunity an International Custom?

2.8.1 A Controversy

For sometime now, writers have argued back and forth as to whether sovereign immunity is a binding *lex non scripta* or customary international law. But in reality it is expedient to lay bare the attributes of customary international law before an objective analysis can be made. The elements of custom comprises duration, uniformity, consistency of practice, generality of practice and *opinio juris sive necessitatis*.[105] What then is custom or customary international law? Roberto Ago defines customary law as "spontaneous law, emerging in the conscience of members."[106] Professor Tunkin says that

"A customary norm of international law arises in consequences of the repeated actions of states. The element of repetition is basic to the formation of a rule of conduct. In majority of instances the repetition of specific actions in analogous situations can lead to the consolidation of such practice as a rule of conduct."[107]

Customary international law therefore presupposes general practice or usage aided by *opinio juris* passed on from generation to generation based on good conscience and morality. Professor Josef Kunz explained that "custom–produced general international law is the basis; the customary principle of "*pacta sunt servanda*" is the reason for validity of all particular international law created by treaty procedure."[108] Judge Read in the Fisheries case explains that "customary international law is the generalization of the practice of states."[109] So by inference, any metajuridical concept shaped into general practice and aided by *opinio juris* can be regarded as customary law.[110]

If these explanations be expedient and convincing, then can it be said that sovereign immunity is a norm of general international law? Judge Lauterpacht answered in the negative by contending that sovereign immunity does not form part of international law and that the derivation of the notion of immunity of states from the principle of equality and independence of states be thoroughly reexamined.[111] His authority, however, according to Professor Lissitzyn, is offset by the position held by Judge Jessup.[112] Judge Jessup's position was further made known when he became the reporter of the restatement of the Foreign Relations Law of

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[105] I. Brownlie, op. cit. at pp. 4–I; Akehurst, Custom as a Source of International Law (1974–75) 4 BYBIL.

[106] Kunz, The nature of customary law (1953) 47 AJIL 664–65.

[107] Tunkin, Thcory of International Law (1976) translated by Butler, p. 114.

[108] Kunz, The nature of customary law (1953) 47 AJIL 665.

[109] ICJ Reports (1951), 191.

[110] See generally Kunz, op.; c;it.

[111] Lauterpacht, op. cit., at p. 228.

[112] Lissittzyn, in Friedmann, Henkin, and Liesitzyn, eds., Essays in Honour of Philip C. Jessup (1972) pp. 189–201.

the United States, in which he concluded that immunity of states forms part of international law.[113]

The notion that absolute sovereign immunity has become part of general international law is plausibly predicated on the fact that historically the rule became entrenched and was predominantly applied by municipal courts without any opposition[114] from other nation–states and secondly, it was on several occasions vigorously asserted in diplomatic circles without any problems of disagreement or acrimony.[115] Furthermore, it can be said that although some courts have in recent times made a momentous change to embracing the restrictive immunity, at least their reasoning wholly takes its authority from the concept of state immunity. Thus based on objective analysis one could possibly postulate that in reality absolute immunity never attained the heights of being accepted by all countries of the world as a canon of public international law or rule. However, it would appear it did attain a status of *opinio generalis juris generalis*. But the argument as to how well grounded the practice must be in order to become customary law is not clear-cut. International law, however, demands that it be only general not unanimous.[116] This notion then destroys the consent theory of *pactum tacitum*.[117] It is instructive therefore to note that a local court's decision, having in general attained an *eo ipso* function[118] *ex hypothesi* can serve as a good source of public international law. And this is correctly interpreted by Lammers as follows:

"It has further been maintained that principles generally recognized at the national level are not just principles of national law to be applied by analogy to interstate disputes, or incorporated in the body of international law, but actually constitute principles of law in general, of all law, national as well as international."[119]

If the statement above be correct or sound, then without doubt municipal court's decision could serve as formative and persuasive source of law to other courts and most likely the international community.

Indeed, if all are agreed that the doctrine of absolute immunity was the product of a municipal court, a product planted and harvested in the legal fields of the United States, which later found its way into the jurisprudence of other countries and had since remained on the international plane as a yardstick and a logical basis for current state of affairs, then it will not offend common sense to postulate that it is customary international law.[120] The thrust of this argument emanates from the plausible notion that sovereign immunity became a reality out of the interaction of

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[113] The American Institute Restatement of the Foreign Relations Law of the United States (1965).

[114] Sucharitkul, op. cit., pp. 355–359.

[115] Ibid. at pp. 285–304.

[116] Bin Cheng, International Law: Teaching and Practice (1982) at pp. 227–229, but see Kunz, op. cit., generally.

[117] Kunz, op. cit. at p. 666.

[118] Bin Cheng, (1965) 5, Indian Journal of International Law p. 251.

[119] Lammers in Kalshoven, Kuyper and Lammers (eds.), Essays in honour of Haro F. van Panhuys (1980), p. 61. See also Bin Cheng, op. cit.

[120] Jessup, Has the Supreme Court Abdicated one of its Functions? (1946) 40 Am J Int 168. Sucharitkul, op. cit., 355–359.

the precepts of private international law (conflict of laws) and public international law, and its legal inspiration and authority although had been challenged in recent times, at least its influence had not been abandoned but rather modified to move in abreast with time.[121] Dr. Sucharitkul's forceful argument is in consonant with the position alluded to above that

"the doctrine of state immunity, as far as can be ascertained, was sufficiently well established in the practice of states to justify its claim to become a principle of international law in the nineteenth century. The original version, as stated by Chief Justice Marshall in the Schooner Exchange v. McFaddon in 1812 is generally considered to be representative of absolute immunity.[122]

At this juncture it is appropriate to explore the criteria by which general international law can be said to subsist. A quest to devise a method this elusive will certainly be quite a difficult task and it is possible many may dismiss it as a question that should be relegated to the confines of metaphysics or jurimetrics. The literature, however, shows that leading scholars[123] are agreed that it is not necessary that there be a total unanimity among states before international law is made or created.[124] Thus the presumption is that the existence of *opinio generalis juris generalis* on a particular international law issue is sufficient as opposed to *opinio communis juris generalis*.[125] In the light of the force and strength of these concepts, one can possibly conclude that customary international law can grow overnight[126] or be generated instantly.[127] Judge Lauterpacht's approach therefore in the determination of the existence of customary international Law in respect of state immunity seemed too rigid and unorthodox. His admonition, however, that the doctrine of absolute immunity be reexamined[128] is well taken. While Judge Jessup's bent of reasoning, or 1946 thesis on the other hand falls in line with the majority that sovereign immunity is a norm of general international law[129] because of the fact that the rule was for some time accepted and predominantly applied by many municipal courts the world over.[130] Jessup's position therefore appears to

[121] The present trend where most leading industrialized countries are moving towards the restrictive immunity is indicative of the fact that they are not in actual fact doing away with absolute immunity but rather trying to adjust their policies to move in abreast with present–day demands. And secondly to foster transnational transaction. See Sinclair, op. cit., and Dunbar, op. cit., Markesinis, The changing law of sovereign immunity (1977) 36 Cambridge Law Journal.

[122] Sucharitkul, op. cit. at p. 355.

[123] Kunz, op. cit.; Bin Cheng, op. cit.

[124] Bin Cheng, op. cit. at p. 227.

[125] Ibid.

[126] Ibid.

[127] Ibid.

[128] Lauterpacht, op. cit., at p. 228.

[129] Jessup, op. cit.

[130] See generally Dr. Sucharitkul's thesis, op. cit., on the whole subject matter; see also Sinclair, for his thorough analysis of the practice of states both in the common law world and the civil law world; the present writer is of the view that sovereign immunity is an international norm because it has two constitute elements that is an objective ele-

carry the majority vote. Arguably, in the light of the multitude of literature on this subject, it will be fair and expedient to leave the verdict in the hands of the jury, i.e., the reader, for perfection is not human virtue, much less a virtue in judges. With the greatest respect, however, it is submitted that Judge Lauterpacht position (as he then was) on this particular subject rather found favour with the minority.

That there is a considerable weight of authority with respect to the position taken above can hardly be questioned. His Lordship once stated that

"The basis of the rule is that it is beneath the dignity of a foreign sovereign government to submit to the jurisdiction of an alien court, and that no government should be faced with the alternative of either submitting to such indignity or losing its property" (1954) 3 WLR 531, 533.

The spirit of Lord Jewitt's statement above appears not different from the thesis enunciated by Chief Justice Marshall in the Schooner Exchange in 1812. Thus after 142 years the persuasive force behind Justice Marshall's decision still found application in English law. There is therefore sufficiency of practice of this law as to persuade a reasonable person to conclude that sovereign immunity is an international norm. The acceptance of the absolute immunity doctrine by U.K. and U.S. courts and courts in many other countries e.g. USSR now Russia with remarkable inflexibility in the past cannot exhypothesi be challenged or disputed. And this supports the fact that sovereign immunity was well grounded in the practice of states before the Second World War. In other words it was supported by *usus* and *opinio juris*.

ment *corpus*, and a subjective element *animus*. See Bin Cheng, op. cit., supra note 148 at pp. 249–251.

3 The Privileges and Immunities of States

3.1 General Observations

Sovereignty denotes independence and coercive power, and, every State, whether large or small, powerful or weak, developed or developing, enjoys equality in international relations and even more so in international law.[1] A state once recognised by other states as having acquired political freedom or complete exemption from colonial control is independent and *ipso iure* sovereign, which means that such a sovereign state has what can be known as *suprema potestas* within its territorial boundaries.[2] The independence and sovereignty of states therefore cannot be compromised or given away, for internal sovereignty, in spite of certain limiting factors on its power in modern times, is believed to be absolute and perpetual within its spheres of influence. In the light of these theoretical pronouncements and the purported attendant consequences of these ideas, some countries of the world on record have refrained from the exercise of jurisdiction over other countries because of the principles of equality and the independence of sovereign states. The refusal therefore by a state to exercise jurisdiction or to persuade its local courts not to exercise jurisdiction without the consent of a foreign state presupposes the general acceptance of the concept of absolute immunity[3] which in the main takes its authority and strength from the maxim *par in parem non habet imperium*.

That there is a perceptible measure of relativity expressed more or less in the notion of sovereignty, independence and dignity of states in respect of state immunity cannot *ex hypothesi* be doubted.[4] For it gives force and authority to the true meaning of immunity and the logical justiciability of the practice whereby a state could plead for immunity or submit to jurisdiction if need be and may thus be al-

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[1] The Schooner Exchange v. McFadden and others (1812) 7 Cranch, Edwin Dickerson, The Equality of States in International Law (1920) pp. 68–187; Coleman Phillipson, The International Law and Custom of Ancient Greece and Rome, London (1911) Vol. 2, pp. 11–113.

[2] Marek Korawicz, (1961 1) 101 Hague Recueil 10–12.

[3] The Schooner Exchange v. McFadden and others (1812) 7 Cranch 116. The Parlement Belge (1880) 5 P D 197; Mighell v. the Sultan of Johore (1894) I Q B; Strousberg v. Republic of Costa Rica (1880) 44 L T 199; Manning v. State of Nicaragua (1857) 14, How Pr. 517; The Porto Alexandre (1920) p. 30.

[4] Sompong Sucharitkul, Immunity of State in International Law: Achievements and Prospects (1991) 327, 327–46. Edited by M. Bedjaoui.

lowed to arrest suit or if the worse comes, that is if immunity is denied, resist execution irrespective of the circumstances.

The ideas alluded to above can clearly be understood by making reference to what Joseph Beale said sometime ago, that

"The power of a sovereign to affect the rights of persons whether by legislation, by executive decree, or by judgment of a court is called jurisdiction."[5]

This power of jurisdiction arguably can be likened unto the making and enforcement of laws in a given country coupled with the need of the ruled or the citizenry to respect these laws and to give allegiance to the potentate or the sovereign. But one question that must be grappled with is whether an equal can exercise dominion over another equal. Certainly, no! A sovereign state, given its attributes, has jurisdiction over every individual living under its protection and over all acts that take place within its territorial boundaries.[6] However, according to the precepts of customary international law, it cannot in reality by license exercise jurisdiction in certain circumstances, that is, when a foreign state, its agents, and property are concerned or involved.[7] The non–assertion of jurisdiction in such circumstances may be due to courtesy, comity and the natural equality of states in international law.

The principle of state immunity is clearly stated by Judge Hackworth in his venerable digest as follows:

"The principle that, generally speaking, each state is supreme within its own territory and that its jurisdiction extends to all persons and things within that territory is, under certain circumstances, subject to exceptions in favour particularly of foreign friendly sovereigns, their accredited diplomatic representatives . . . and their public vessels and public property in the possession of and devoted to the service of the state. These exemptions from the local jurisdiction are theoretically based upon the consent, express or implied, of the local state, upon the principle of equality of states in the eyes of international law, and upon the necessity of yielding the local jurisdiction in these respects as an indispensable factor in the conduct of friendly intercourse between members of the family of nations. While it is sometimes stated that they are based upon international comity or courtesy, and while they doubtless find their origin therein, they may now be said to be based upon generally accepted custom and usage, i.e., international law."[8]

This view is the correct interpretation of international law, however, the accuracy of Judge Hackworth's position seemed to run counter to the 1951 thesis of Judge Lauterpacht.[9] Arguably, if what is declaratory of one scholar runs counter to the declarations of a multitude of scholars, then certainly both the minority declaration and the majority declaration cannot all be right. At least one must be well founded and convincing and the other not so weighty. Judge Hackworth's position thus can be described as representative of municipal court decisions and therefore

[5] See (1923) 36 Harvard Law Review 241.

[6] See J.H.C. Morris, The Conflict of Laws (1993) pp. 60–102.

[7] G.G. Fitzmaurice, State Immunity from Proceedings in Foreign Courts (1933) 14 BYIL. I.M. Sinclair, The Law of Sovereign Immunity, Recent Developments, (1980 II) 167 Hague Recueil 113.

[8] Digest of International Law (1946), Vol. II, Chap. VII, p. 393, 8.169.

[9] Lauterpacht, The Problem of Jurisdictional Immunities of Foreign States (1951) 28 BYIL.

corroborative, back then of the *cum sensu* of judges and scholars.[10] Logically, therefore, Judge Hackworth's position in this light is the correct representation of the law at that time, i.e., before 1900 and immediately after the great war.[11]

True, the trends which are already clear in the study of public international law with respect to the concept of sovereign immunity logically are not mere birth pangs of a new legal order. These trends in the real sense are the harbinger of fundamental problems which will arise one after another in search for a legal solution that perhaps will command the *opinio juris* the world over. It is submitted that any piecemeal attempt or halfway house attempt to resolve the problem of state immunities and commercial activities on the international plane, unrealistically but not eclectically, will consume so much time and resources that little will be left for other, some would say, equally pressing legitimate problems of concern in international law. This contention *ex hypothesi* cannot be disputed in view of the fact that only very few topics in public international law of recent memory have given rise to a multitude of literature and controversy more than the subject of sovereign immunity.[12]

Six years after the Second World War a leading English authority, Dr. Lauterpacht, published a learned and illuminating article on the above subject in which he offered an in–depth analysis as regards the difficulties associated with the application of restrictive immunity, the legal basis of state immunity and the practice of states coupled with an admonition as to how to deal with the problems of jurisdictional immunities of sovereign states.[13] So far it appears his admonitions were not allowed to pass away like an *ex–cathedra* gospel for it has prompted many countries either to modify the doctrine of absolute immunity[14] or to completely abandon it to embrace the relative immunity rule.[15] Arguably, however, there exists in the world non–uniformity in the practice of states as regards the doctrine of absolute immunity.[16] This dichotomy of policy between sovereign states did not solve the problem but rather brought uncertainties and difficulties in litigation.[17]

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[10] The Parlement Belge (1880), Mighell v. the Sultan of Johore (1894), IQB. The Porto Alexandra (1920) p. 20; The Cristina (1938) AC 485 per Lord Wright's Berizzi Bros. Co. v. SS Pesaro (1926) 271 US 562. Ex parte Peru (1943) 318 US 578. Republic of Mexico v. Hoffman (1945) 324 US 30. The notion of absolute sovereign cleverly enunciated by Chief Justice Marshall in 1812 seemed to have paved the way for the formation of cum sensu of judges in the common law world.

[11] See Sucharitkul, State Immunities and Trading Activities (1959). Sinclair, op. cit. N.C.H. Dunbar, Controversial Aspects of Sovereign Immunity in the Case Law of States (1971) 132 Hague Recueil 197.

[12] See I.M. Sinclair, European Convention on State Immunity (1973) 22 ICLQ 154.

[13] Lauterpacht, op. cit., pp. 220–272.

[14] Ibid. at 250–272. Specifically the Appendix to this article gives a good idea about the practice of states in some countries.

[15] I. Brownlie, Principles of Public International Law (1990). 4th Ed. p. 326–329.

[16] Ibid.

[17] Sucharitkul, (1976 1) 149 Hague Recueil 51–103. Cater, Sovereign Immunity: Substantiation of Claim (1955) 4 ICLQ 469–475; Cohn, Immunity of Foreign Trading Governments (1957) 73 LQR 26–40. B. Fensterwald, Sovereign Immunity and Society Trading (1949–50) 63 Harvard LR 614.

And this certainly could be attributed to the fact that in this century the functions of the state in terms of nation building, i.e., public economic management, developmental economics, shipping, airline services, postal services, banking, railway services, health care, road building, town planning, have undergone dramatic changes.[18] Thus while in some countries central planning is preferred, others follow decentralised planning based on free market economy. The manifestations with respect to central panning are clearly expressed in the former USSR where the public sector was given greater prominence in national economic planning.[19] This central planning idea is also common in the Third World or developing countries, where the elements of free enterprise can be said to be at their embryonic stage and therefore perhaps needed central panning until maturity or takeoff.

It is instructive to note that, before the coming into existence of the former USSR, as a result of the Socialist Revolution of 1917, governments of the various countries of the world in fact did not engage in commercial activities on any considerable scale or appreciable degree, hence states were ever ready to offer immunity in respect to all acts of sovereign states, be it *acta jure imperii* or *acta jure gestiones*. Thus prior to the advent of many centrally controlled economies, immunity was absolute.[20] State owned trading corporations thus grew rampantly in the Communist world and the Third World particularly after the Second World War, and this may have prompted some countries to embrace the restrictive doctrine of immunity. Be this as it may, Sir Fitzmaurice argued forcefully thus.

"It is submitted that the fact that judgments rendered against states cannot in practice be enforced without the consent of the state concerned and that they are, moreover, virtually without even a moral effect, indicates that there is a fundamental weaknesses in the doctrine which seeks to draw a distinction between various classes of state acts. The truth is that a sovereign state does not cease to be a sovereign state because it performs acts which a private citizen might perform. Consequently, any attempt to make it answerable for its actions, of whatever kind, in courts other than its own courts, is inconsistent with its sovereignty, and this inconsistency is made evident by the complete ineffectiveness of the judgments rendered."[21]

Sir Fitzmaurice is of the opinion that a state in reality cannot be effectively impleaded or indirectly impleaded against its will and this he eloquently attributed to the nature of sovereignty, as being perpetual and absolute and therefore cannot wither away irrespective of the nature of the act performed by the state.

Another English scholar in his exposition on absolute immunity and restrictive immunity offered the following explanation.

"The dissatisfaction which is a natural consequence of the effect of the rule of absolute immunity is compounded by the fact that states applying the rule of absolute immunity enjoy no corresponding immunity from the jurisdiction of the courts of other states which apply the rule of relative immunity. Although it might be thought that the existing position was more satisfactory for states which apply the rule of relative immunity, this is not neces-

[18] See I. Brownlie, op. cit., pp. 325–332.

[19] Osakwe (1982) 23 Virginia J Int Law 13; T.A. Peterson and H.W. Hoyt, Foreign Sovereign Immunity – Community and Socialist Organizations (1979) 9 Georgia Journal of Int and Comp., Law, 111.

[20] See Sucharitkul, op. cit., note 11; and Sinclair, op. cit., note 7.

[21] See Fitzmaurice, op. cit., note 7, pp. 120–121.

sarily so. States applying the rule of relative immunity of course enjoy an uncovenanted benefit in the sense that they are entitled to plead and to be accorded immunity from the jurisdiction of the courts of states applying the rule of absolute immunity in circumstances where the 'absolute immunity' state would not, in the mirror–image case, have been entitled to assert immunity from the jurisdiction of courts of the relative immunity state.[22]

It is observed that international law operates on a horizontal order without the presence of a legitimate supranational power or authority and the prospect of maintaining order by subjecting a sovereign state to the jurisdiction of a foreign court without its consent is likely to create attendant problems of political tension and possibly acrimony.[23] The horizontal nature of international law therefore gives countries the grounds to either ignore judgments or simply argue that they be accorded immunity. This can rightly be derived from the principle of independence, the equality and dignity of states.[24] These states are simply therefore claiming equal rights *ex hypothesi*, in the peer community of civilized states based on the principles of international law.

3.2 The Rational Foundation of State Immunity

A state having been endowed with coercive powers and recognised as an international person[25] enjoys immunity in respect of its property, from suit and execution of the courts of other states.[26] This means that a state cannot be impleaded in the courts of another state without its express consent. The state is a means to an end, hence state immunity exists as a veritable consequence of sovereignty, and for that matter, it is not dependent upon any tenuous conditions as to vitiate its absolute power both in its local setting and on the international plane.

[22] See Sinclair, op. cit., note 12, pp. 254–255.

[23] Sornarajah (1982) 31 ICLQ 664.

[24] De Haber v. The Queen of Portugal (1851) 17 QB 171; The Parlement Belge (1880) 5PD 197; Principality of Monaco v. Mississippi (1934) 292 US 313; The Cristina (1938) AC 485.

[25] Lauterpacht, Recognition in International Law (1947); Blix, (1970 11) 130 Hague Recueil 587; Chen, The International Law of Recognition (1951); Brownlie (1982) 53 BYIL 197.

[26] The Jupiter (1924) p. 236, No. 1; The Cristina (1938) AC 485.

Argument

The Supremacy of the Local Sovereign

Local sovereign power may be said to represent the power to make laws backed by all the coercive powers it cares to employ. This means that the sovereign has the *suprema potestas* in local matters and as such has superior authority over its powers of command. It is submitted that the Roman version of sovereignty did not offer any limitations on the *libertas* of the state,[27] but it would appear that Bodin in his studies subjected the power of the sovereign to certain important limitations.[28] Proculus, for example, offered an important definition as follows: "that nation is free which is not subject to any government of any other nation."[29] The Romans therefore expressed the essence of sovereignty by its endowed characteristic of independence subject only to the norms of the state, *suis legibus uti*. The Roman concept relating to sovereignty as the absolute power of the state over its people, territory, and governmental machinery, without any limitation from any earthly power can be likened unto the principle–*princeps legibus solutus*–or the English maxim, "The King can do no wrong," almost equally associated with the historical epoch in which most states were ruled by kings and queens or personal sovereigns who by every measure personified the state.[30]

These ideas give primacy to the supremacy of the local sovereign as follows:

(1) That constitutionally a king cannot be sued in his own court.
(2) That no organ of the state can exercise dominion over the crown through any judicial means.
(3) That impleading the King will be a difficult process where one would simply be throwing his or her efforts unto uncharted seas without any navigating force.

The rule of sovereign immunity is therefore the byproduct of constitutional and innate supremacy of the local sovereign.[31] And this is predicated on the implicit notion that if the sovereign cannot be sued locally, then its local determinate superiority be extended also unto the international plane for the sake of its dignity and independence.[32] Thus to implead an independent sovereign state amounts to reducing its absolute authority. There is therefore demand for the practical necessity of

[27] Korowicz, op. cit., note 2 at pp. 7–8.
[28] Ibid., pp. 8–9.
[29] Ibid., p. 6, cf. Korowicz.
[30] de Haber v. Queen of Portugal (1851) 17 QB 196; Mighen v. Sultan of Johore (1894) 1 QB; Kingdom of Rumania v. Guaranty Trust Co. (1918) 250 Fed. 341; Matsuyama and Sano v. The Republic of China (1928) Supreme Court of Japan. (1927–1928) 41LR 168.
[31] George Sabine and Thomas Thorson, A History of Political Theory (1973) pp. 348–385; Thomas Hobbes, The Leviathan London (1651); Bertrand Russell, A History of Philosophy (1964) pp. 546–557; Nassbaum, A Concise History of the Law of Nations (1962).
[32] L. Oppenheim, International Law (1912, 2nd ed.), p. 168; Dickinson, op. cit., pp. 100–188.

state immunity to avoid disrepute. These ideas *prima facie* were reinforced by Chief Justice Marshall in the Schooner Exchange and later on approved in English law.[33] A good illustration is clearly afforded by the dictum per Brett LJ in the Parlement Belge, as follows:

"It has been frequently stated that an independent sovereign cannot be personally sued, although he has carried on a private trading adventure. It has been held that an ambassador cannot be personally sued, although he had traded; and in both cases because such a suit would be inconsistent with the independence and the equality of the state which he represents."[34]

As can be gathered from the above passage, Brett LJ was arguing that immunity be granted to personal sovereigns and ambassadors because of the sovereignty of the independent state and the purported notion of transferred immunity in respect of ambassadors.

Again in De Haber v. Queen of Portugal, the rule of absolute immunity was strongly expressed by Lord Campbell CJ, thus.

"In the first place, it is quite certain, upon general principles, and upon the authority of the case of the Duke of Brunswick v. King of Hanover, recently decided in the House of Lords, that an action cannot be maintained in an English court against a foreign potentate for anything done or omitted to be done by him in his public capacity as representative of the nation of which he is the head; and that no English court has jurisdiction to entertain any complaints against him in that capacity. . . . To cite a foreign potentate in a municipal court for any complaint against him in his public capacity, is contrary to the law of nations and an insult which he is entitled to resent."[35]

The practice whereby a foreign state is impleaded before a domestic court in the 19th century did not find favour with statesmen and judges alike, for it was believed then to be an insult to the regal dignity of the sovereign.[36] There are therefore in the main adequate reasons founded on the attributes of sovereignty to justify immunity from suits, save where under special circumstances the sovereign in its own rights submits or waives the said immunity. The U.S. Constitution, i.e., the Eleventh Amendment, totally influenced by federal principles geared towards the protection of the States of the Union affords an indisputable foundation for the concept of immunity. And this is clearly supported by Hamilton when he asserted that

"It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent."[37]

Indeed, these ideas in respect of the supremacy of the sovereign can be traced to the writings of Bodin, Hobbes, Proculus, Grotius and Vattel.[38] Although the writings of these scholars did not cover specifically sovereign immunity, at least implicitly their philosophies cleared the unbeaten path for the maxim *jurisdictio inhaeret cohaeret, adhaeret imperio* to come to the fore, for serious consideration

[33] The Parlement Belge (1880) 5 PD 197; Vavasseur v. Krupp (1878) LR 9 Ch.D 351.

[34] (1880) 5 PD 197, p. 220.

[35] (1851) 17 QB 121, pp. 206–207.

[36] Ibid.

[37] See The Federalist Papers, no. 81 (a classic American theory on the science of government).

[38] See Dickinson, op. cit.

and analysis before municipal courts, and finally to be received into international law.[39]

3.3 Diplomatic Immunities and State Sovereignty

Necessity is the basis of diplomatic immunity and its true essence is to be found in the representative functions of an envoy. International law therefore confers on diplomats, immunity from the jurisdiction of another state, because of the consequence of state sovereignty. The principle of diplomatic immunities dates back to ancient times. Grotius may thus be credited with his thought–provoking expositions on the legal position of the embassy and the logical reasons for giving diplomats immunity.[40] This idea of diplomatic immunity logically can be predicated on the concept of transferred immunity. And Professor O'Connell in respect of this subject offers an insightful explanation thus.

"An alternative thesis, which appealed to the eighteenth century in particular, is that the immunity of a diplomat is a transferred immunity of his sovereign, and is to be explained as a manifestation of sovereign dignity. The diplomat stands for the sovereign, as his agent and substitute in the negotiation of acts of state, and hence is invested with the same degree of privilege as the prince whom he represents."[41]

O'Connell's thesis thus alluded to seemed not different from the argument posited by Dr. Sucharitkul in 1959, when he said that,

"The relation between these principles finds occasional expression in the theory that the immunities enjoyed by sovereigns and ambassadors belong ultimately to the states they represent which is further reflected in the case of diplomatic agents in the rule that diplomatic immunities can only be waived by an authorised representative of the foreign government and with the latter's authorisation."[42]

If the positions taken by these scholars be correct and logical, then common sense certainly will revolt if immunity is denied to sovereign states which, according to international law, are the source of the appointment of ambassadors. Thus if ambassadors of States were accorded immunity in their capacity as envoys of states or foreign sovereigns,[43] then by implication states also ought to be accorded or given the same degree of immunity for in reality these ambassadors are appointed by the sovereign and can therefore be removed, recalled or reappointed to other countries at the whim and caprice of the sovereign. A fortiori, immunity cannot be denied to the "power" that in the eyes of international law is the legitimate source of the appointment of ambassadors. This argument is being put forth because the rule of diplomatic immunity is well nigh settled.

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[39] The Schooner Exchange v. McFadden and Others (1812) 7 Cranch; The Parlement Belge (1880) 5 PD 197; Le Governement Espagnol v. Cassaux (22 Jan. 1849) D.P. 1849, 1–5, 7; The Constitution (1879) 4 PD 39.

[40] See O'Connell, International Law, Vol. 2 (1970) p. 888.

[41] Ibid.

[42] Sucharitkul, op. cit., note 22, at p. 24.

[43] Ibid.

Historically, the principles of diplomatic immunity precedes the concept of immunity of states[44] and although regulated by somewhat different principles, have had some influence on the development of the law of state immunity,[45] which in turn has given rise to the foundational argument of transferred immunity, singularly manifested by the accepted notion of sovereign dignity. By the weight of these arguments, it is submitted that the source of the law of sovereign immunity derives significantly from the decisions of municipal courts and partly also from the practice of states clearly derived from the law of diplomatic immunities.[46]

Lord Hewart CJ in an attempt to set the record straight in Dickinson v. Del Solar,[47] where a suit was brought against a foreign mission for personal injury caused by a car owned and driven by the Secretary of the Peruvian Legation, ruled that international law does not accord immunity from "legal liability" but only gives allowance of immunity from the local jurisdiction. And that the immunity accorded to a diplomat is a privilege, not of its own power but of the power of the sovereign by whom he is by law duly recognised and given accreditation.[48] The ambassador in this light is regarded as the representative of the sovereign and therefore impleading him by the rules of customary international law simply amounts to impleading the sovereign.[49] This theory finds expression in the 1815 Congress of Vienna (Annex XVII of the Acts of the Congress, 19 March 1915).

3.4 Comity of Nations, Reciprocity and Coexistence

The classical notion of the doctrine of sovereign immunity where immunity is given irrespective of the circumstances finds expression in the customary rules of international law and the patent rule of reciprocity backed by the need for peaceful coexistence of states.

Thus Chief Justice Marshall, when confronted with the questions relating to mutual benefit and peaceful coexistence of states, took a persuasive and appealing stance as follows:

"This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an exchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation."[50]

Justice Marshall's reasoning, *prima facie,* is in consonant with the quest for promoting peaceful and mutual intercourse among states, coupled with an appeal for mutual respect and *entente cordiale.* Thus the assumption of jurisdiction over a

[44] Ibid., p. 23.
[45] Ibid.
[46] Ibid.
[47] (1930) 1 KB 376.
[48] Ibid.
[49] O'Connell, op. cit., pp. 887–998; Sucharitkul, op. cit., note 11 at 24–29.
[50] Schooner Exchange v. McFaddon and Others (1812) 7 Cranch 136–137.

friendly nation amounts to a blatant disrespect or disregard for the dignity of the foreign state, which in political and legal terms could be construed to mean a violation of an established faith in comity or the relegation to the background of the rights of the state in question. While on the other hand, the principle of offering immunity to foreign states without doubt is absolutely grounded on the notion of comity with the hope of promoting friendly relations in order to avoid the possibility of confrontation or disrepute.[51] Furthermore, the obligation of domestic courts not to exercise jurisdiction over foreign states is a matter sufficiently respected and wholly derived from state practice, which has since then become customary international law.[52]

An important argument usually posited in support of the doctrine of absolute immunity is that according to the prevailing rules of public international law it is impossible to enforce execution by means of seizure against a foreign state, in which case the exercise of jurisdiction will be an empty attempt of doing the impossible, even if the reasons for taking jurisdiction are rationally conditioned on acts *jure gestionis*.[53]

Judge Lauterpacht, in offering an argument in support of the doctrine of immunity of states, had this to say.

"The main argument in favour of absolute immunity from jurisdiction has been the view that what has been considered the only alternative to absolute immunity, namely, exercise of jurisdiction based on the distinction between acts jure gestionis and acts jure imperii, is impossible of definition and therefore of application. Apart from the fact that it disregards the third alternative, namely, the general abandonment of immunity, that argument appears to be, and probably is, decisive. Courts of different countries and occasionally courts of the same country have treated the same kind of activity in different ways."[54]

It must be borne in mind, however, that the difference between the jurisprudence of states that adhere to absolute immunity and restrictive immunity is likely to be a breeding ground for making enforcement of judgments difficult and frustrating, and given the uncertainties regarding this subject matter, the defendant state will simply ignore the judgment in order to protect its dignity among the community of states. One positive impact, however, of such attempts could be likened unto the possibility of the whole matter giving way to a diplomatic negotiation, for the dispute to be resolved.[55] The notion of comity is conditioned upon the patent concept of reciprocity which in turn lends support to the rule of absolute immunity, whereby an atmosphere of give and take is promoted and preserved in the name of humanity. This ideal notion of peaceful intercourse among states, I presume, might have influenced Justice Marshall to rule in favour of France.

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[51] Ibid.

[52] The Porto Alexandre (1920), p. 30 (The Ingbert); The Pesaro (1926) 271 US 562; Sucharitkul, op. cit., note 11 at 355.

[53] Lauterpacht, op. cit., pp. 222–226.

[54] Ibid., p. 222–223.

[55] Ibid.

3.5 Equality of States in the Sphere of International Law

One viable rational foundation of sovereign immunity stems from the essential nature of state equality in international law. But in order for this concept to have any legal basis, it must coalesce with such factors or ideas as sovereignty, independence and dignity of states.[56] The fundamental attribute of the state as an international person cannot be attained without the presence of the above mentioned factors. Thus without sovereignty there will be no state and without an independent state there will be no sovereignty power. Hence for a state to achieve equality with other states on the international plane, it must be ultra–comprehensive with a determinate supreme power, which means there must be no higher power over the state both from within and without. In reality, it is by virtue of these attributes that a state is accorded an international personality or recognised by a community of states as equal to other states in the eyes of the law.[57]

True, an equal cannot put pressure to bear on another equal.[58] Any attempt by a state to downplay the validity of this proposition can lead to serious consequences of political embarrassment and political tension or protest, hence the maxim *par in parem non habet imperium.*

The theory of natural equality was first analysed in the writings of the famous English philosopher, Thomas Hobbes, in his book, The Leviathan, which thereafter was studied, followed and further developed by Pufendorf.[59] This historical fact appears to have been overlooked or misconstrued by some scholars who, having relied on a less authentic source attributed the origin of the principle to Grotius.[60] Any such conclusion is in error for although Grotius flirted with the idea, it will be historically untenable to postulate that he was the father of the concept. A careful reading of Hobbes as already stated elsewhere would show that his system was in antithesis to that of the system of Grotius,[61] as regards his methods and principles.

Pradier–Fodéré, a leading 19th century expert on Grotius, in his writings did not attribute the principle of state equality to Grotius,[62] but rather intimated that Grotius concentrated on the recognition of the rights of self–preservation, property and the legal position of the embassy of states. Ward, in his study of this subject, concluded that:

"This theory, though often stated, and beautifully amplified by the ancient poets, seems first to have been thought of as the foundation of a system of law, by Hobbes, in his famous

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[56] Sucharitkul, op. cit., note 17, p. 117.

[57] I. Brownlie (1982) 53 BYIL 197; Chen, International Law of Recognition (1951).

[58] Schooner Exchange v. McFadden and Others (1812) 7 Cranch; The Parlement Belge (1880) 5 PD 197; Mighell v. Sultan of Johore (1894) 1 QB; The Porto Alexandre (1920) p. 30 (The Ingbert); The Cristina (1938) AC 485; The Arantzazu Mendi (1939) AC 256.

[59] Dickinson, op. cit., pp. 75–84.

[60] Ibid. at pp. 35–67.

[61] Ibid. at p. 70, 69–75, 75–86.

[62] Ibid. at 51. (See particularly Dr. Dickinson's explanation in footnote 2 in respect of the controversy regarding the contribution of Grotius to the natural equality of state theory.)

book called The Leviathan, in which there is so much to admire and so much to condemn. It was adopted, and considerably enlarged by Pufendorf, and instantly approved of by writers without number."[63]

Professor Dickinson in a thorough study of the subject also concluded that:

"The translation of the theory of natural equality into the law of nations originated with and was first definitely stated by the naturalists, whose inspiration was found in the writings of Thomas Hobbes and whose leader in the seventeenth century was Samuel Von Pufendorf."[64]

The position thus alluded to is implicitly supported by Professor Dunning as follows:

"Pufendorf's system reveals most distinctly the influence of his two great predecessors, and in general it may be said to be directed toward a conciliation of their conflicting views. Where his philosophy is concerned with the concepts of ethics, he clearly leans to the principles of Grotius; where he takes up more purely political topics, the Hobbesian doctrine assumes the more conspicuous place.[65]

It is instructive to note that Pufendorf was greatly aided in the development of the principle of state equality as far as the law of nations is concerned by the Hobbesian premises or Hobbes' anthropomorphic description of the state.[66] For Hobbes arguably likened the concept of the state of nature, which in his system was presumed to exist in a community of men, unto the scientific reasoning based on the relationship between states which in turn logically or semantically uncovered the doctrinal precepts of equality of states.[67] Thus by substituting the words "states" for "men" in his system based on such theories as the state of nature, natural right and natural equality, Hobbes managed to lay the foundation of the doctrine of fundamental rights of states as follows:

"Which speaking of the duty of single men we call natural, being applied to whole cities and nations, is called the right of nations. And the same elements of natural law and right, which have hitherto been spoken of, being transferred to whole cities and nations, may be taken for the elements of the laws and the rights of nations."[68]

Arguably Hobbes' opinion appears to follow the idea that the law of nature and the law of nations were the same thing and this was absolutely subscribed to by Pufendorf. These ideas have markedly contributed to the development of international law, especially in the area of the practice of state as regards the rule of law in respect of equal treatment of states.

These principles were further developed by Wolff, whose theories found favour with Emerich de Vattel.[69] Like his predecessors, Vattel followed the same line of thinking but perhaps in a more forceful manner thus:

"Since nations are free, independent, and equal, and each has the right to decide in its conscience what it must do to fulfil its duties, the effect of this is to produce, before the

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[63] Ibid., 80–81 (refer particularly to footnote 2), cited from Dr. Dickinson's work.

[64] Ibid., p. 69.

[65] I.N.A. Dunning, A History of Political Theories from Luther to Montesquieu, New York, 1905, p. 318.

[66] Dickenson, op. cit., p. 79.

[67] Ibid. p. 75–76, 75–89.

[68] Dominion, pp. xiv, 4, in English Works, II 186 (cf. Dickenson), p. 75.

[69] Dickenson, op. cit., p. 97.

world at least, a perfect equality of rights among nations in the conduct of their affairs and in the pursuit of their policies. The intrinsic justice of their conduct is another matter which it is not for others to pass upon finally: so that what one may do another may do, and they must be regarded in the society of mankind as having equal rights."[70]

The contention that philosophical writings of state equality in the past found application in case law of the 19th or 20th centuries cannot *ex hypothesi* be disputed in view of developments in case law in America, England and other European countries. This is clearly evidenced by CJ Marshall's thesis in The Schooner Exchange v. McFaddon, where he followed partly or wholly the writings of the naturalist and eclectics of the past thus.

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

This perfect equality and absolute independence of sovereigns and this common interest impelling them to mutual intercourse, and an exchange of good offices with each other have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every state."[71]

Similar expressions regarding the equality of states in international law can also be found in Le Gouvernement Espagnol c. Cassaux in 1849[72] and thereafter also in the classic dictum of Brett LJ in the Parlement Belge of 1880.[73] Although ample traces of the concept can well be discerned in a considerable number of municipal court decisions,[74] it is appropriate to explain further that the concept cannot stand on its own without the support of the principles of sovereignty and independence. Thus all these principles must coalesce in logical terms in order to add support to the legal basis of absolute immunity. The said idea has two-dimensional consequences and that is, it attributes by every measure to sovereign states the same rights and in turn imposes upon these states the same measure of obligations and perhaps duties. Every state, according to these principles, therefore has equal rights, but these rights must be seen as a general limitation geared towards the preservation of orderly conduct of sovereign states. The immunity of sovereign states from suit is therefore a matter of give-and-take, technically and philosophically conditioned by law, usage and international political culture.

[70] Cf. Dickenson p. 98.
[71] (1812) 7 Cranch 136-137.
[72] 22 January 1849 Dalloz, p. 5.
[73] (1920) p. 30, The Ingbert.
[74] See Sucharitkul, op. cit., note 11; Sinclair, op. cit., note 7.

3.6 Beneficiaries of State Immunities

Having dealt with the rational foundation of sovereign immunity, it is in order now to explore the beneficiaries of these immunities, so as to lay bare under what specific conditions a foreign state be accorded immunity or be exempted from the jurisdiction of a local court.

Generally speaking, state immunities are considered procedural and therefore primarily fall within the confines of public and private international law. In other words, the power of a domestic court or a local forum to determine whether it has jurisdiction over a particular legal controversy is prima facie a question of private international law and this notion is wholly predicated on whether the subject matter at issue is properly associated with a foreign element.[75] Thus the plea for immunity which emanates from the principles of public international law would have to be explored with respect to the *lex fori*, a concept all too well associated with private international law. This then takes us unto another plane where attention must be drawn to immunity *ratione personae*, that is, when a foreign sovereign state is directly involved as regards suits and immunity *ratione materiae*, which refers to a process whereby a foreign state's property is at issue.

The *lex fori*, alluded to above, must be considered in regard to jurisdiction, since immunity in this light refers to the exemption of the person of the sovereign from the jurisdiction of another state,[76] hence the notion that immunity be granted to states specifically has nothing to do with local substantive laws. Which means that procedural and remedial rules of the state and public policy are rather very important factors to consider when confronted with issues in respect of sovereign immunity, i.e., private claims against foreign states in domestic courts.

Immunities rightfully accorded to sovereign states cover a wide but interesting spectrum of institutions and persons. These immunities technically are accorded especially, as already stated, due to the attributes of the state. For states *qua invicem in statu naturali vivunt*, in reality must have fundamental rights as regards equal treatment in foreign jurisdictions. And the enjoyment of equal treatment by states in foreign jurisdictions must be reciprocated, because in the absence of reciprocity the effect of comity will simply be relegated to the bottom or destroyed.

State immunity may be extended to states even if there is an indication that the state is being indirectly impleaded, i.e., when the state is not being sued in its own name. In this respect, one is alluding to suits against the government, its head of

[75]See Cheshire and North, Private International Law (12th ed. 1992); Dicey and Morris, Conflict of Law (12th ed. 1993); Beal, Treatise on the Conflict of Laws (1935).

"The conflict of laws is a necessary part of the law of every country because different countries have different legal systems containing different legal rules, while public international law seeks primarily to regulate relations between different sovereign states. Nevertheless, some overlap exists, for example, the topics of sovereign and diplomatic immunity from suits and government seizure of private property" by the late Dr. Morris, Conflict of Laws (1993) pp. 1–2. Edited by J.D. McClean.

[76] Porto Alexandre (1920) p. 30 (The Ingbert); The Cristina (1938) AC 485; United States of America and Republic of France v. Dollfus Mieg et Cie SS and Bank of England 1952 AC 582.

state, ministries, subsidiary organs, state agencies or instrumentalities, and other institutions that can be characterised as government entity in the performance of everyday governmental functions. It is worth noting therefore that personal sovereigns or heads of states enjoy the same degree of immunities normally extended to states, *ratione personae* and *ratione materiae.* In Mighell v. Sultan of Johore,[77] the defendant, a potente having been sued for a breach of promise to marry a young lady, prayed in his defence that immunity be granted to him because of his position as a Sultan of Johore, then a British protectorate. It was held that the conclusive certification by the foreign colonial office as regards the status of the sultan as a sovereign, precluded the court from exercising jurisdiction, although it was clear the territory referred to was not totally independent of the British crown. This decision shows in reality that a foreign sovereign cannot be impleaded in English courts. This same line of reasoning found application in the Duke of Brunswick v. the King of Hanover,[78] and was further extended in De Haber v. Queen of Portugal,[79] respectively. The law, however, of late has taken a different turn.[80] A careful reading of the Harvard Draft Convention shows it included sovereigns and heads of states under one rubric, that is, the "state." This aspect of the subject thus was made simple in respect of the classification of state functionaries, which means sovereign immunity and state immunity can appropriately be referred to interchangeably. But one must be eclectic in view of the concept of dual personality of the state, a concept clearly introduced into Italian practice[81] somewhere in 1882, which after the second world war had found favour with most judges and writers in Continental European countries.[82]

State immunity has also been extended to representatives of government. This aspect of the law is much older and might have attained uniformity of practice, and may have in many respects over the years exercised some influence on the development of state immunity.[83] Government representatives such as diplomatic agents, members of special missions, delegates representing the state on international organizations, consular officers and many other state institutions directly related to the conduct of foreign affairs, are therefore duly accorded immunities in respect of acts performed on behalf of the states they represent.

In this regard it would be apposite or appropriate to consider or explore the degree to which the concept of state immunity has been covered by the rules of international law, or more specifically, by conventions. The following are the areas so far covered by conventions.[84]

- Brussels Convention for the unification of certain rules relating to immunity of state–owned vessels (1926).

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[77] (1894) 1 QB.
[78] (1844) ch. 107 13 LJ.
[79] (1851) 17 QB 196.
[80] (1976) 2 IMLR 214.
[81] See Sucharitkul, op. cit., note 11 at 233.
[82] Ibid.
[83] Ibid., p. 23–24.
[84] See J. Bouchez (1979) 10 NYIL 3.

- The Vienna Convention on Diplomatic Relations (1961).
- The New York Convention on Special Mission (1969).
- The Vienna Convention on the representation of states in their relation to international organization of universal character (1975), and the European Convention on state immunity with additional protocol (1972), thereto.

It would appear that all these conventions referred to above, except the European Convention, give due regard to the use of state property situated in foreign states for the purpose of conducting foreign affairs, without any interference from the receiving state.[85] These representatives of government therefore enjoy state immunities in their personal capacity, which by custom is specifically predicated on the duration of their appointment.[86] These immunities remain intact unless it is officially waived by the sending state. In the absence of a waiver, a state representative cannot be made amenable to the jurisdiction of the receiving state. Furthermore, immunity *ratione materiae*, covering the performance of governmental duties by an envoy or government representative usually survives the tenure of their appointment.[87] In short, it is denoted or referred to as diplomatic immunity and thus derivative of the state.

One other area that deserves to be mentioned is jurisdictional immunities and this covers not only aspects of immunities from the judicial process of a state, but also covers such important areas as immunities from the exercise of all juridical powers of a domestic court in respect of official judicial review or examination of issues relating to the state or its representatives, for example, "a process," orders, appearance as a witness, and judgment of courts in violation of a local law.[88] What is being put across here is that the local court based on rules relating to sovereign immunity, be it transferred or not, cannot exercise jurisdiction over a foreign state. There is therefore a readily available immunity from the jurisdiction of domestic courts or local courts.

These immunities also cover immunity from arrest, immunity from execution, immunity from search and inviolability and tax privileges.[89] So in essence one can clearly argue that the submission to a local jurisdiction does not mean the property of a foreign state can be attached in anticipation of satisfying an adverse juridical decision, for such a process can be cumbersome and totally an affront to the dignity of the state being subjected to measures of execution.[90] Granted this, then no measure of execution against the properties of a foreign sovereign state can be allowed under international law, given the thrust and force of the doctrine of state immunity. But it would appear that some states are now modulating their posi-

[85] Ibid.

[86] Sucharitkul, op. cit., note 17, pp. 121–124.

[87] Ibid., O'Connell, op. cit., at pp. 887–938.

[88] Sucharitkul, op. cit., note 17, p. 122.

[89] Ibid., pp. 122–123.

[90] The law in this respect was maintained as an authority until recently when the Tate letter was issued in the United States followed by the 1976 FSIA, which in clear terms does not follow the said authority anymore. The ILC reports seemed not clear on this subject, but appear to have dealt with it in great detail. In short, however, member countries are not all agreed as to whether a foreign state's property be subject to execution.

tions, although there is no clear–cut authority in international law to support such actions.

Practice in the Matter of Sovereign Immunity

3.6.1 State Immunity – Claims in English Courts

Overview

Once upon a time English courts applied the rule of absolute immunity to the letter without any qualifications in respect of actions both in personam and in rem, respectively.[91] This means that at common law, a foreign state could not be impleaded directly or indirectly before English courts without its consent.[92] Thus in the 19th century and perhaps for almost the greater part of the 20th century the doctrine of absolute immunity became the order of the day whereby foreign states were accorded total immunity irrespective of whether the activities in question be governmental, non–governmental or commercial. In other words, what appears to be embraced by English courts stems from a reasonable and appealing stance that recognised states of equal status and standing cannot have their differences resolved or canvassed in the local courts of one or the other, hence the proposition that immunity be given to foreign states to avoid disrepute. These rules have since become part of English common law.[93] It is to be noted, however, that efforts in chartering the unbeaten path to establishing the absolute immunity doctrine was not clear–cut, but was rather met with doubts and uncertainties.

A Survey of Early English Practice

The two most well cited authorities in support of absolute immunity in English legal practice were The Parlement Belge and The Porto Alexandre. In The Parlement Belge, the court of appeals reversed Sir Robert Phillimore's decision at the first instance thus:

"As a consequence of the absolute independence of every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign."[94]

The court of appeals thus laid much emphasis on the equality of every sovereign in the association of civilised states as can be gathered from its ratio, but the decision in Parlement Belge to be sure was influenced by Lord Towell's decision in The Prins Frederik, which as a matter of principle got its inspiration from Chief Justice Marshall's thesis. The Porto Alexandre, as it is well known, laid the foun-

[91] See Sinclair, op. cit., note 7, pp. 121–127; The Porto Alexandre (1920) p. 30; The Cristina (1938) AC 485; Kahan v. Pakistan Federation (1951) 2 KB 1003.

[92] Duke of Brunswick v. King of Hanover (1848) 2 H.L. Cas 1.

[93] Cristina (1938) AC 485.

[94] (1880) 5 PD 197, p. 217.

dation for the triumph of absolute immunity.[95] The case concerned a German privately owned vessel previously named *Ingbert*, which by some means got lawfully adjudged by the Portuguese Prize Court and thereafter requisitioned by the Portuguese Government, but was later determined to be exclusively employed in commercial activities in the carriage of freight. In view of this evidence, Hill J, however, declared himself bound by the Parlement Belge authority and therefore declined jurisdiction by setting aside the writ in rem against the said ship. Absolute immunity in rem thus appeared to be clearly settled in English law.[96] It must, however, be explained that these two decisions were handed down by the court of appeals and therefore could be reversed by the House of Lords if need be. Furthermore, it would appear considerable scepticism loomed large in respect of the decision. In other words, the *ratio decidendi* in The Porto Alexandre did not find favour with the majority at large. In spite of the considerable doubts expressed, the principle of absolute immunity was made the order of the day or more readily confirmed on numerous subsequent occasions by English Courts, arguably slanted towards actions in rem than actions in personam.[97] The acceptance or adherence to the doctrine of absolute immunity continued or was more clearly debated and stated in the Cristina.[98] The Cristina dealt with issues concerning ownership, possession and control. Let us for a moment consider the facts of the case. There a ship called the Cristina, belonging to a duly constituted Spanish shipping company, Compañía Naviera Vascongado which had been registered and carrying on business at Bilbao, was soon to dock at the port of Cardiff. It so happened that shortly before the arrival of the said ship but after she had started her voyage from the port of Spain, a decree was passed by the Spanish Government requisitioning all vessels registered at the port of Bilbao. In the light of this decree, and acting on the express instructions of the Spanish government, the Spanish consul, resident at Cardiff at that time, went on board the Cristina and by the authority reposed in him by the said decree dismissed the master and put a new master in his place or in charge of the ship. The appellants thereupon issued a writ in rem challenging or claiming possession of the Cristina, as sole owners. The Spanish government in response thereto entered a conditional appearance as the rightful owner of the Cristina and gave notice that the writ be set aside for it impleaded a foreign state. The House of Lords having taken pains to review the issues ruled in favour of the Spanish government, thus setting aside the writ and all other subsequent proceedings thereof. Lord Atkin, in his judgment analysed the doctrine of absolute sovereignty of states, as follows:

"The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted into our domestic law which seem to me to be well established and to be beyond dispute. This first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him

[95] See Sucharitkul, op. cit., note 11, pp. 66–71.

[96] Porto Alexandre (1920) p. 20.

[97] See Higgins, Recent Developments in Law of Sovereign Immunity in the United States (1977) AJIL 71, p. 423.

[98] (1938) AC 485.

against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.

The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control. There has been some difference in the practice of nations as to possible limitations of this second principle as to whether it extends to property only used for the commercial purposes of the sovereign or to personal private property. In this country it is in my opinion well settled that it applies to both."[99]

This formulation of the law regarding sovereign immunity was accepted by the House of Lords as definitive and hence was applied in subsequent cases.[100] But it appears very clear that not all their lordships were ready to go as far as Lord Atkin in his exposition of the subject in issue. Lord Maugham, it would appear, was hesitant, while Lords Thankerton and Macmillan questioned the authority of The Porto Alexandre, whether it was based on adequate reasoning.[101] Lord Macmillan, in order to avoid allowing his heart to control his head, took issue with this elusive question as to whether the application of the precept of public international law relating to absolute immunity is justified or well settled in the practice of states. He then warned that

"It is manifestly of the highest importance that the courts of this country before they give the force of law within this realm to any doctrine of international law should be satisfied that it has the hallmarks of general assent and reciprocity."[102]

The decision handed down by Lord Atkin seemed not different from that of Hill J in the Jupiter, an earlier case adjudged most important in English practice in respect of absolute immunity. There, Hill J, in attempt to justify his decision, ruled thus:

"The motion to set aside the writ is based on the assertion that the Jupiter is the property of the Union...The writ is a writ in rem...it is a writ which compels the owner either to appear and submit to the jurisdiction or to allow judgment against his property to go by default. In these circumstances, the ship being Russian and the Russian Sovereign asserting property in her and being unwilling to submit to the jurisdiction of the court, this court has no jurisdiction to entertain proceedings against that property or to investigate the assertion that the ship is the property of the Russian Sovereign."[103]

On appeal the judgment of Hill J was duly affirmed. Bankes LJ (as he then was) supported the position taken by Hill J, thus

"Hill J has set aside the writ, in my opinion rightly, on the grounds which he expressed, I think accurately."[104]

Scrutton LJ also supported the said decision without question in the following formulated manner.

"It is agreed that the Union has been recognised *de jure* and *de facto* by the British Government. It appears to me without going any further, without investigating whether the

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[99] Ibid.

[100] See N.C.H. Dunbar, (1971 1) 132, Hague Recueil 203 258–350.

[101] Cristina (1938) AL 485.

[102] Ibid. at 497.

[103] The Jupiter (1924) p. 236, no. 1, cf. Dunbar, op. cit., p. 290.

[104] C.F. Dunbar, op. cit., p. 291.

claim is good or bad, that the court on hearing that statement made to it must decline jurisdiction."[105]

Thus in view of the fact that the Soviet Union has been recognised by the British government coupled with the fact that the USSR offered proof of ownership of the Jupiter, persuaded the court to decline jurisdiction. These cases illustrate the consistency of English courts in declining to exercise jurisdiction over foreign sovereign states based on the doctrine of absolute immunity earlier on established in the 1880 case of the Parlement Belge.

It is of the greatest interest to note, however, that the doctrine of absolute immunity became shaky after 1938 and has since that time been fighting a losing battle, but as can be recalled, it took some time before the relative or restrictive doctrine of immunity was given its rightful place in English law.[106]

A Look at Post–Second World War Cases

Britain did not give up its continued acceptance of the doctrine of absolute immunity after the war. However, it did not take long before the shortcomings of the doctrine of absolute immunity became apparent.[107] Many in fact started questioning the rationale behind the absolute immunity rule and whether its legitimacy could possibly be supported by cogent reasoning. This was followed by a gradual disquiet as regards the unchallenged rule of absolute immunity.

In order to clear the unbeaten path as regards these elusive issues, it is suggested that early post–war cases that still followed earlier authorities in English practice need to be considered.

The question as to whether a public corporation can be so incorporated as a public entity to be truly accorded immunity was the subject or the issue of contention in Krajina v. Tass Agency.[108] There the Court of Appeal after a careful review of all the evidence, ruled that immunity be accorded to Tass Agency. Cohen LJ, having been influenced by an American case law, argued that

"A sovereign government may so incorporate a particular department of state as to make it plain that it is to be an ordinary trading, commercial or business activity and not to be part of the state so that it can claim immunity, but I think it would be wrong to infer from these authorities, and I should not, without further argument, be prepared to accept the view, that it necessarily followed that, because a department of state was granted incorporation, it was deprived thereby of the right to assert its sovereign immunity in foreign courts."[109]

He further stated clearly that

"I think that turns upon what I have already said, that, in my view, the defendants do establish that Tass was, and in essence is, a department of state to the necessary extent to shift

[105] Ibid. at 292. See generally the decision handed down by Atkin LJ in the Jupiter dealing specifically with ownership control and possession (mere assertion was the watchword).

[106] The Philippine Admiral (1977) AC 373 JC; Trendtex Trading Corp v. Central Bank of Nigeria (1977) QB 529 (CA); I Congreso del Partido (1981) 3 WLR 329 (HL).

[107] The Philippine Admiral (1977) AL 373 JC.

[108] (1949) 2 All E R 274.

[109] (1949) 2 All E R 274.

the onus of proving that they were a separate legal entity to the plaintiff. That onus, in my opinion, he has failed to discharge. For these reasons I think that the decision of *Birkett J* was right and ought to be affirmed."[110]

In the light of the tone of the judgment, one is convinced to the fullest extent that the judgment herein stated appears to follow a well settled English law in respect of the law relating to domestic corporations, for nothing in the judgment seemed to be influenced by any other pertinent independent factors in ruling in favour of the Tass Agency except the authority of English Acts of Parliament or perhaps constitutional law and the internal laws of the country in issue, i.e., USSR.

Again in this case the shortcomings of the doctrine of absolute immunity were made known by Singleton LJ.

"I confess that I do not know what those words mean. They are not equivalent to saying that Tass is a legal entity. If they were, the position might be different. So far as I can see there is no precedent for extending immunity to a corporate body carrying on business in this country, and I should wish for further argument before deciding that it could be so extended."[111]

As can be gathered from the above passage, Singleton LJ simply appears to be taking issue with the existing authority earlier on established in The Porto Alexandre and other cases that followed its authority. His argument thus seemed to take a radical position.

Another important case worthy of consideration is the United States and the Republic of France v. Dollfus Mieg et Cie and the Bank of England.[112] There the heart of the issue before the court was whether France, the UK and the United States having set up a Tripartite Commission for the restitution of monetary gold for enforcing the terms of Part III of a purported agreement signed by the duly constituted representatives of the 18 Allied governments after the war could possibly assert immunity in view of the demand made by the plaintiffs that the 64 gold bars in issue be returned. Jenkins J., the judge at first instance, stayed all proceedings in order to avoid the interference with the right of possession and control of the choses in action of the three sovereign states involved. Dollfus Mieg thereupon appealed to the court of appeals where the judgment of the trial judge was reversed in view of the mistaken disposal of 13 of the 64 gold bars in question. On a further appeal to the House of Lords, Jenkins J's judgment was restored. Lord Jowitt took time to consider the issues in the following light.

"I agree with Jenkins J. in thinking that the fact that the foreign governments had the immediate right to possession of the 64 bars made it impossible, consistently with the established principle of English law relating to state immunity, for relief to be given in this action by ordering the delivery up of the bars or by granting an injunction restraining the bank from parting with their possession; for if either of these courses were taken it would be necessary for the foreign governments to take proceedings in this country if they wanted to recover the gold here.

The doctrine of immunity should not, I think, be confined to those cases in which the foreign sovereign was either directly in possession of property by himself or at least indirectly by his servants, for if it were so confined the doctrine would not be applicable to the

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[110] Ibid.

[111] Ibid. at 274, 279.

[112] (1951) ch. 33.

case of any bailment. I can find nothing in any decided case to support any such limitation. We have been referred to certain American cases, which I have considered with care, but I do not think that any of these cases affords any justification for such a limitation of the doctrine of sovereign immunity as is here sought to be introduced."[113]

He then went on by arguing thus:

"If it were so limited the result would be that if the foreign sovereign deposited his bag or his jewellery with the railway or with the hotel or with the bank, proceedings could be taken against the bailee, claiming the delivery of the article which had been deposited by or on behalf of that sovereign."[114]

Professor Dunbar in his collected course at the Hague analysed the Dollfus Mieg case and in conclusion said that "there seems to be no *tertium quid* for the granting of immunity."[115] In this respect who is right, Professor Dunbar or Lord Earl Jowitt? A debate on this issue certainly will give an interesting reading but that should not detain us at this juncture.

The English judiciary over the years have had the occasion to apply the doctrine of immunity without any qualifications, but it would appear that its authority in one way or the other was questioned in the case of Juan Ysmael and Co. v. Government of the Republic of Indonesia.[116] There the issue that fell to be considered by the Privy Council was what degree of substantiation of a foreign state's claim to title or interest in property be accepted or recognised in order to grant immunity. It was held that the Government of Indonesia failed to prove its interest in the Steamship Tasikmalaja as to warrant her being impleaded hence the appeal accordingly was stayed and the judgment of the Appeal Court of Hong Kong was set aside with an admonition that the other questions raised in the appeal be considered. Lord Jowitt in his judgment offered the following explanation.

"The view that a bare assertion by a foreign government of its claim is sufficient has the advantage of being logical, and simple in application, but it may lead to a very grave injustice if the claim asserted by the foreign government is in fact not maintainable and the view of Scrutton LJ has not found favour in subsequent cases."[117]

In a quest to explore the issues at stake Lord Jowitt cited Compania Naviera Vascongado v. SS Cristina in which Lord Wright had expressed his doubts obiter with the authority in issue, coupled with Lord Maugham candid rejection of the Scrutton thesis. In a further attempt to offer an exposition on the present issue Lord Jowitt referred to Haile Selassie v. Cable and Wireless Ltd.[118] where the Court of Appeal refused to stay the action, thus accepting the view candidly expressed by Lord Maugham in the Cristina,[119] requiring more proof as a prerequisite to claiming immunity. For Lord Maugham "a mere claim by a foreign government is not enough." This was carried a stage further in embracing Godden LJ's position in the Arantzazu Menaí case where the learned Judge (as he then was) stated more clearly that

[113] (1952) AC 605; at this instance the case was appealed (House of Lords).
[114] Ibid., p. 67.
[115] See Dunbar, op. cit., p. 333.
[116] (1955) AC 72 reported in ILR, 1954, p. 95.
[117] Ibid., p. 531.
[118] (1938) 1 Ch 545 No. 1.
[119] (1938) A 485.

"Where a claim for immunity is made by a foreign sovereign it is not enough that his claim should be a bare assertion of right or a mere claim."[120]

The judicial disquiet expressed in Juan Ysmael & Co. Ltd. v. Government of the Republic of Indonesia alluded to above clearly manifested itself in Baccus SRL v. Service National del Trigo.[121] In that case although a claim of immunity was upheld, Singleton LJ took issue with the judgment of Jenkins LJ and Parker LJ as follows:

"I cannot find that it has been almost universally recognised that if a government sets up a legal entity, something which may contract on its own behalf as a limited company does in this country, it can succeed in a claim for sovereign immunity in respect of the activities of that company or entity."[122]

Lord Denning in one of his sagacious legal reasonings, managed somehow to draw attention to the unreasonable reliance on the shaky authority of the doctrine of absolute immunity in English practice, although he arrived at the same result as the rest of his colleagues on the bench in respect of the issues before them. At least he was able to break the myth surrounding English authorities in regard to absolute immunity. Thus in Rahemtoola v. Nizam of Hyderabad,[123] the main issue was whether a beneficial title to a debt can be investigated by a local court, where the legal title to the debt is situated, that is, if the sovereign state in issue claims immunity even though it clearly does not purport to lay claim to the beneficial title to the debt. The House of Lords upheld the claim of immunity in respect of the fact that the appellant was an agent of the Government of Pakistan. Again, although Lord Denning reached the same conclusion, he offered a forceful and critical judgment questioning the legitimate basis of the English rule of absolute sovereignty in this well formulated manner.

"There is no agreed principle except this: that each state ought to have proper respect for the dignity and independence of other states. Beyond that principle there is no common ground. It is left to each state to apply the principle in its own way: and each has applied it differently."[124]

Furthermore, one finds great strength in Lord Denning's argument thus:

"In all civilized countries there has been a progressive tendency towards making the sovereign liable to be sued in his own courts notably in England by the Crown Proceedings Acts, 1947. Foreign sovereigns should not be in any different position. There is no reason why we should grant to the departments or agencies of foreign governments an immunity which we do not grant our own, provided always that the matter in dispute arises within the jurisdiction of our courts and is properly cognizable by them."[125]

For Lord Denning, he was trying to bring up some points which wiser heads in the future may attempt to settle.[126]

In Mellinger v. New Brunswick Development Corporation,[127] the court of appeal upheld a claim of sovereign immunity on the ground that the defendant cor-

[120] (1939) AC 256.
[121] (1957) 1 QB 438.
[122] Ibid., p. 461.
[123] (1957) 3 All ER.
[124] Ibid., p. 461.
[125] Ibid.
[126] Ibid., p. 464.

poration was duly proved to be an arm of the government in question, i.e., the province of New Brunswick.

In Thai–Europe Tapioca Service Ltd v. Government of Pakistan,[128] Lord Denning again continued his erosion of the authority of absolute immunity in respect of his obiter observations in which he explored the modalities of the restrictive doctrine. Although the court dismissed the appeal it did not speak with one voice. Lawton and Scarman LJ's it would appear clearly based their reasoning on conventional grounds that the claim or suit being one of action in personam cannot be canvassed in the courts of England. Lord Denning on the other hand took a more radical approach in dealing with the issues in the case; as he did in Rahimtoola v. the Nizam of Hyderabad as follows:

"If a foreign government incorporates a legal entity which buys commodities on the London market, or if it has a state department which charters ships on the Baltic Exchange, it thereby enters into the market places of the world, and international comity requires that it should abide by the rules of the market."[129]

Although Lord Denning did not offer any authority for the above statement, one will presume that he was again making points as he once stated, to be settled in the future by "wiser heads." By every measure, however, his observations appear to shift towards the doctrine of relative immunity.

The Philippine Admiral[130] in fact represents a fundamental departure from the doctrine of absolute immunity in English practice. The Privy Council in the Philippine Admiral decided to follow the restrictive or relative immunity because they believe it clearly appears "more in consonant with justice."[131] In that case the Privy Council was confronted with the issue of whether immunity be granted to a government owned vessel purely used for commercial purposes and secondly whether the breach of contract in issue could be designated or characterised as a commercial activity. It must be made clear in passing that when the case was first litigated and later brought before the chief justice of Hong Kong, the claim of immunity was allowed. A different result, however, was reached when it was litigated before the Privy Council. Lord Cross in reaching this result had to deal with both The Parlement Belge and The Porto Alexandre, which were earlier authorities handed down by the Court of appeal. The Privy Council was of the opinion that although the Court of Appeal in The Parlement Belge ruled that sovereign immunity be applied to public property of a recognised sovereign state, clearly destined for public use, it did not go as far as to conclude that a state owned vessel used wholly or substantially in the course of commerce must be duly taken to be properly destined for public use. A careful reading of the decision in the Philippine Admiral shows it clearly sided with the majority view expressed in the Cristina that the reasoning in Porto Alexandre had been wrongly interpreted per the authority of the Parlement Belge, and therefore thought it wise not to apply it in the present case. Lord Cross stated the position of the court thus:

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[127] (1971) 1 WLR 64.
[128] (1975) 3 All ER.
[129] Ibid., p. 966.
[130] (1977) AC 373 (JC).
[131] See Higgins (1982) 29 N Int LR 266.

"Lastly, their Lordships themselves think that it is wrong that it should be so applied. In this country – and no doubt in most countries in the western world – the state can be sued in its own courts on commercial contracts into which it has entered and there is no apparent reason why foreign states should not be equally liable to be sued there in respect of such transactions."[132]

In Trendtex Trading Corporation v. Central Bank of Nigeria,[133] the Court of Appeal had the opportunity to take stock of its earlier decisions regarding the doctrine of absolute immunity. There Lord Denning in a very thorough analysis ruled that,

"If a government department goes into the market places of the world and buys boots or cement as a commercial transaction, that government should be subjected to all rules of the market place. The seller is not concerned with the purpose to which the purchaser intends to put the goods."

He further ruled that

"The letter of credit was issued in London through a London bank in the ordinary course of commercial dealings. It is completely within the territorial jurisdiction of our courts. I do not think it is open to the Government of Nigeria to claim sovereign immunity in respect of it."[134]

Again Lord Denning explains that

"Many countries have now departed from the rule of absolute immunity. So many have departed it that it can no longer be considered a rule of international law. It has been replaced by the doctrine of restrictive immunity. The doctrine gives immunity to acts of a government nature, described in Latin as *jure imperii*, but no immunity to acts of a commercial nature *jure gestionis*."[135]

Both Shaw LJ and Denning LJ were substantially in agreement on the two *rationes decidendi*, namely, the place of international law in English municipal law and the question of whether the status of the Central Bank is one of an alter ego of the federal government of Nigeria. Stephenson LJ on the other hand took issue with the first ratio but equally accepted the second ratio in respect of the status of the Central Bank.

One important question that was, however, relegated to the background or not considered in the Trendtex seemed to be predicted on whether the act in breach of the cement contract can be regarded as an *acta jure imperii*, and if so whether immunity should have been granted to the Nigerian government. This issue was, however, raised in the I Congreso del Partido,[136] in which the House of Lords ruled that when faced with such difficult contractual problems regard be given to the nature of the contract and the nature of the breach.

After the 1978 State Immunity Act was passed, and given the decisions in Trendtex Trading Corp. v. Central Bank of Nigeria and that of I Congreso del Partido, many thought the whole question of sovereign immunity appeared settled or put to rest. However, the case of Alcom v. Republic of Colombia,[137] in 1983, re-

[132] (1976) WLR 232.
[133] (1977) QB 529 CA.
[134] Ibid., p. 558.
[135] Ibid., p. 555.
[136] (1983) 1 AC 244 (House of Lords).
[137] (1984) AC 580 (HL).

opened the 171 years Pandora's box of the doctrine of absolute immunity in which problems in respect of the scope of exceptions enunciated in the 1978 Act came up for serious consideration, e.g., Sections 13 (2) and 3 (3).[138] The main issue in Alcom was whether the bank account of a diplomatic mission used in the running of the mission can be attached. The Court of Appeal ruled that the account be attached while the House of Lords took the opposite view by reversing the decision of the Court of Appeals. The Law Lords thus followed a method whereby every issue in respect of Alcom was carefully considered in order to promote a modicum of fairness. Lord Diplock explained the position of the Law Lords as follows:

"Such expenditure will, no doubt, include some moneys due under contracts for the supply of goods or services to the mission . . ., but the account will also be drawn upon to meet many other items of expenditure which fall outside even the extended definition of "commercial purposes" for which Section 17(1) and Section 3(3) provide. The debt owed by the bank to the foreign sovereign state and represented by the credit balance in the current account kept by the diplomatic mission of that state as a possible subject matter of the enforcement jurisdiction of the court is, however, one and indivisible unless it can be shown by the judgment creditor who is seeking to attach the credit balance by garnishee proceedings, that the bank account was earmarked by the foreign state solely (save for de minimis exception) for being drawn upon to settle liabilities incurred in commercial transactions . . it cannot be sensibly brought within Section 13(4)."[139]

True, absolute immunity reached its peak in the Porto Alexandre and has since remained an authority until it was overruled in Philippine Admiral, and thus was reaffirmed both in Trendtex and the I Congreso del Partido, respectively. However, it is submitted that it has reincarnated in Alcom and could perhaps be seen in the guise of a "dead man walking."

3.6.2 State Immunity in American Courts

As already stated elsewhere, a careful review of American practice shows that it was initially influenced by Chief Justice Marshall's classic decision in The Schooner Exchange v. McFaddon as follows:

"One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication and will be extended to him."[140]

This often cited case thus established the absolute sovereign immunity doctrine in the practice of the United States. Exactly twelve years after the decision Chief Justice Marshall had the opportunity again to consider the same issues in the United States v. Planters Bank of Georgia,[141] but this time in a local setting thus.

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[138] See Fox (1985) 34 ICLQ 115, but see also Crawford (1983) 54 BYIL 75 for his reaction to the decision.

[139] (1984) AC 580, 604 (HL).

[140] (1812) 7 Cranch136–137.

[141] 9 Wheaton 904.

"When a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen, instead of communicating to the company its privileges and prerogatives."[142]

Justice Marshall handed down this decision in reaction to Planters Bank defence, that it be granted immunity because of the fact that the State of Georgia was a partner to the said transaction. Although the language in the case is obiter because it dealt with issues relating per se to interstate problems, at least it drew attention to a distinction between public and private functions of a quasi local sovereign in a federal setting.

It is instructive to note that quite apart from paving the way for the establishment of the absolute immunity doctrine, Chief Justice Marshall's thesis also laid down a tradition by which the executive branch was given the power to make decisions regarding sovereign immunity, although such a function traditionally falls into the domain of the judiciary. And the reason was to prevent or avoid political embarrassment. The Foreign Relations Law of the United States in support of the above alluded statement reads as follows.

"The immunity of states from the jurisdiction of the courts of another state is an established and undisputed principle of customary international law. Chief Justice Marshall found that it was rooted in the perfect equality and absolute independence of sovereigns. The Schooner Exchange, 11 US (7 Cranch) 116 136 (1812). Such immunity has been justified also as necessary for the effective conduct of international intercourse and the maintenance of friendly relations."[143]

The theory of absolute immunity prevailed until 1926 without question but came under attack at the trial court in the case of Berizzi Brothers v. Steamship Pesaro,[144] there a merchant ship registered by the name Pesaro was owned and operated by the government of Italy for the business of carrying merchandise for hire. It so happened that in the course of its commercial dealing, the vessel failed to deliver cargo from Italy to New York wherefore a libel in rem writ was filed against the said vessel for violating the terms of the delivery contract. As was the practice, the Italian government relied on the diplomatic channel with the hope that the writ would be dismissed. But to their surprise, the State Department recommended that the Pesaro be denied immunity. But on appeal the decision of Judge Mack was reversed by the Supreme Court on the ground that the Pesaro was an Italian government property used for a public purpose. The court reasoned as follows.

"We think the principles stated in the Schooner Exchange are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenues for its treasury, a government acquires, mans and operates ships in the carrying of trade, they are public ships in the same sense that warships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a Naval force."[145]

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[142] Ibid., p. 907.

[143] Restatement, Chapter 2, Introductory Note.

[144] (1926) 271 US 562.

[145] Ibid., p. 574, 46 S Ct at 612.

The Supreme Court thus established its position as the highest court of the land by applying the rules of international law, as considered proper at the time the said case came up for adjudication, although the State Department had argued that immunity be denied in view of the fact that the Pesaro was purely engaged in commerce.

Before the Second World War and subsequently thereafter, sovereign immunity issues in the United States were in the main treated or considered as a "political question." In this respect, a country is given immunity or denied immunity based upon a State Department recommendation, rather than through the formal traditional means of adjudicating legal issues before the courts. This does not, however, mean that the function of the judiciary was totally reduced in these matters. It only means a foreign government was given the option or opportunity first to litigate its claim for immunity before the State Department before canvassing its interest in the federal courts.[146] Thus in Ex Parte Republic of Peru,[147] the State Department offered a suggestion of immunity to the District Court, only to be rejected by the Court on the grounds that the Government of Peru had waived immunity. On appeal, the Supreme Court reversed the judgment of the District Court on the authority that the suggestion given by the State Department that immunity be granted was conclusive.[148]

In the Republic of Mexico v. Hoffman,[149] the Supreme Court denied immunity to a merchant vessel owned but not in possession of the Mexican Government. Here it was intimated that the vessel in issue was owned by the Mexican government but the vessel appeared somehow in possession or control of a private company, under a duly executed commercial contract. On normal circumstances, the State Department would have made a suggestion that immunity be granted, however, in this important case the State Department refrained from expressing any opinion in respect of the claim for immunity on the question of ownership without real possession of the said merchant vessel. The Supreme Court in the absence of express recommendation from the executive ruled as follows:

"It is not for the courts to deny an immunity which our government has seen fit to allow an immunity on new grounds which the government has seen fit to recognize. The judicial seizure of property of a friendly state may be regarded as such an affront to its dignity and so may affect our relations with it, that it is an accepted rule of substantive law governing the exercise of jurisdiction of the courts that they accept and follow the executive determination that the vessel shall be treated as immune. But recognition by the courts of an immunity upon principles which the political department of government has not sanctioned may be equally embarrassing to it in securing the protection of our international interests and for recognition by other nations."[150]

The Supreme Court also explained that

[146] The practice existed before the Second World War and it appears the decision in the Schooner Exchange might have influenced its creation and practice.

[147] (1943) 318 US 578.

[148] Ibid. at pp. 588–89.

[149] (1943) 324 US 30.

[150] Ibid., pp. 35–36.

"And that it is the duty of the courts in a matter so intimately associated with our foreign policy and which may profoundly affect it, not to enlarge an immunity to an extent which the government, although often asked, has not seen fit to recognize."[151]

It is instructive to note that the decisions in Exparte Republic of Peru and the Republic of Mexico v. Hoffman prompted the State Department to formulate a reasonable standard by which immunity to foreign states can be granted. Surprisingly, this standard of review was formulated through a letter, soon to be known as the Tate letter. The effect of the Tate letter undoubtedly thus changed the strict adherence to the doctrine of absolute immunity in American practice.

It could be said that after the Tate letter, courts in America have followed the relative immunity doctrine[152] but still in some clearcut cases allowed immunity based on good faith and good conscience. That is, when the transaction in issue is not purely commercial.[153] In Alfred Dunhill of London Inc. v. Republic of Cuba,[154] the Supreme Court, having taken cognisance of the import of the Tate letter coupled with earlier federal court decisions, denied immunity based on the fact that a large number of foreign states in the international community have now accepted the doctrine of relative immunity. While the modalities of the Tate letter was still being reviewed, the Supreme Court again in National City Bank v. the Republic of China,[155] ruled that immunity will not be allowed in a counterclaim by a foreign sovereign state duly limited to the exact amount in issue arising out of the same transaction.

One would therefore conclude that as a result of the effect of the famous Tate letter, the authority of the doctrine of absolute immunity has been substantially reduced. Sovereign immunity which has long been entrenched in the practice of the United States has now been rejected. But it remains to be seen as to whether the currency of restrictive immunity could stand the test of time.

3.6.3 State Immunity Issues and the Mixed Courts of Egypt

The jurisprudence of the Mixed Courts of Egypt as regards its jurisdiction qua the doctrine of absolute immunity *prima facie* was derived from the well established Belgian practice of the doctrine of relative or restrictive immunity.[156] Having made this preliminary observation, it is important to state more clearly that although the composition of the Mixed Courts was made up of five foreigners and three Egyptians, the jurisdiction of these courts were in reality essentially national and this *ex hypothesi* cannot be disputed in view of the fact that these courts rendered justice not in the name of any other sovereign state, but that of the Egyptian sovereign.[157] These judges as it may be recalled were qualified and specifically

[151] Ibid., pp. 34–36.
[152] See Sinclair, op. cit., Note 7, pp. 161–163.
[153] Ibid., pp. 163–170.
[154] (1976) 425 US 682.
[155] (1955) 348 US 356.
[156] Sucharitkul, op. cit., note 17, at pp. 137–140.
[157] Brinton, Suits Against Foreign States (1931) AJIL 50, 52.

drawn from leading western nations, preferably European and Anglo–Saxon nations. In trying to lay bare the composition of the mixed courts in 1931, Judge Briton said:

"The leading case in the Mixed Courts was decided by the Court of Appeal in 1921. At that time a chamber of the court was composed of eight members, five foreigners and three Egyptians. In this case the President of the Chamber was Judge Larger, a Portuguese, the other foreign judges being an American Judge Tuck, an Italian and a Swiss."[158]

The Mixed Courts in their deliberations regarding limitations on state immunity have always followed to the letter the practice of the Belgium and Italian courts.[159] The standard that was followed by these judges was predicated on the distinctions between public acts and commercial acts of states. Thus where the activities of a state appear crystal clear to be commercial, the court denied immunity. While on the other hand, if the activities in issue are not commercial in nature or appear to be *acta jure imperii*, immunity was allowed. The application of restrictive immunity by the Mixed Courts was thus done on case by case basis, where every available evidence brought before the court was carefully reviewed based on the statute of general proviso of the court backed by the precepts of international law.[160]

Serious litigation in respect of cases involving collision on the high seas between privately owned ships and government owned ships truly associated with the armed forces of a foreign state in Egypt, more often than not were duly accorded immunity.[161] This applies also to accidents which might occur between private cars and that of cars driven by foreign state officials in the exercise of their diplomatic duties or sovereign duties.[162]

Dr. Sucharitkul in his exposition on the Mixed Courts explained that

"The Mixed Courts have adopted every possible limitation of immunity as evolved through the practice of Italian and Belgium courts. These limitations include the various distinctions between state acts, commercial exploitation, implied submission and execution of judgment against foreign governments."[163]

A good example of engrafting the doctrine of the restrictive immunity onto Egyptian practice is to be found in Palestine State Railways Administration.[164] There the court held that the government of Palestine cannot be immune in view of the fact that it was performing a function of administration rather than an act of sovereignty. The court went on to conclude that the government of Palestine having signed a contract based on the principle of *consensus ad idem* had in fact taken itself unto the domain of *acta jure gestiones* and therefore cannot escape the jurisdiction of the Mixed Courts.[165]

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[158] Ibid., p. 52.

[159] Ibid.

[160] Ibid.

[161] Sucharitkul, op. cit., note 17, pp. 138–141.

[162] Ibid., p. 139.

[163] Sucharitkul, op. cit., note 11, p. 252. This is from his 1959 thesis which he presented for a D.Phil. degree (Oxon).

[164] C.F. Lauterpacht, op. cit., p. 255. [In re Palestine State Railways Administration, Annual Digest, 1919–42, Suppl. Volume, Case no 78].

[165] Ibid.

In 1927 the Court of Referees in Cairo denied immunity to the Sudanese Government on the grounds that the renting of a well furnished villa could not be designated as an act of government but rather falls within the confines of *acta jure gestionis*, although it would appear without question that the villa was to be used as government premises in the said receiving country.[166]

It is instructive on the other hand also to note that the mixed courts on some occasions have simply declined jurisdiction if there is clearcut evidence that the activities of the state in question are *acta jure imperii*.[167] Thus in the SS Costi,[168] the Russian Government was accused of seizing the SS Costi on the high seas and also for having taken it to the port of Odessa and confiscated. The owners of the said vessel in turn filed a writ against the Russian Government, so as to be afforded the right to seize the two ships belonging to the Russian Government then docked at the port of Alexandra. The Russian Government offered a plea that it be given immunity and the District of Court of Alexandra, having carefully reviewed the issues, ruled in favour of Russia by declining to take jurisdiction of the controversy at stake, without even delving into the issue of piracy in respect of the Costi.

True, there was an express acceptance of the doctrine of restrictive immunity by the Mixed Courts and this was influenced by the Italo–Belgian practice.[169] But nevertheless, jurisdiction at the same time was declined if the Mixed Courts could be convinced of a true case of sovereign act. Although the Mixed Courts of Egypt were abolished in 1947, its decision in accepting the Italo–Belgian practice of the doctrine of restrictive immunity had remained a lasting imprint on Egyptian practice to date.[170]

3.6.4 State Immunity Before South African Courts

South Africa prior to the enactment of its Foreign States Immunities Act on 20 November 1981, followed the traditional doctrine of absolute immunity in which a foreign state is accorded immunity from the jurisdiction of a local or municipal courts irrespective of the nature of the transaction.[171] The notion first found application in England in The Parlement Belge and later forcefully supported and confirmed in The Porto Alexandre, and thereafter extended in The Cristina and in the case of Baccus SRL v. Servico National de Trigo, respectively. These English authorities thus over the years became well entrenched in the jurisprudence of South

[166] C.F. Briton, op. cit., p. 56; Zaki Beyy Gabra Contre R.E. Moore ès qualité et autre. Feb. 14, 1927. Gazette Vol. XVII p. 104.

[167] Ibid., Sucharitkul, op. cit., note 11.

[168] C.F., Briton, op. cit., pp. 56–57; The National Navigation Co. of Egypt Contra Tavoularidis and cie–ès qualité et autres. Nov. 9, 1927. Gazette, Vol. XIX, p. 251; (1927–29) 4 ILR 173.

[169] Ibid., Sucharitkul, op. cit., note 11 and 17, respectively.

[170] See generally The International Law Commissions Report on Jurisdictional Immunities of States and Their Property (1983, 1984, 1986, etc.).

[171] See Botha, Some Comments on the Foreign State Immunities Act 87 of 1981, (1982) 15 The Comparative and International Law Journal of South Africa 334.

Africa until 1981.[172] In other words, South African courts followed a path albeit strikingly similar to that of the British practice.

Thus in De Howorth v. The SS India,[173] the South African court felt bound by the authority established by the Court of Appeal in England, upheld a plea for immunity in respect of a Portuguese merchant ship gainfully used for commerce. Gardiner J simply followed the *cum sensu* among judges at that time by reasoning that the use of the vessel in commerce was to specifically generate revenue for the state. The above authorities were again followed in the Ex Parte Sulman case.[174] Quite a similar reasoning can also be detected in Parkin v. Government of the Republique Democratique du Congo and another,[175] there the applicant entered into an oral agreement to fight as a mercenary for the Government of Congo. It so happened that while the applicant was on patrol in August 1966, he was seriously wounded. He therefore sued the Republic of Congo demanding that he be paid for a fixed sum of money as compensation. The court after carefully reviewing the contract of employment, ruled that (1) "The money held by the second respondent was held for public purposes which applied to all property of a foreign sovereign state provided for in Section 2 of the Diplomatic Privileges Act (NO 71 of 1951) for heads of state applied *a fortiori* to foreign sovereign states."

In Printice Shaw and Schiess v. Government of the Republic of Bolivia,[176] the applicant, a surveying company, was appointed in 1976 as a quantity surveyor for the construction of an Embassy for the Republic of Bolivia. The appointment, according to affidavits duly submitted to the court, showed the said appointment was made through its *charge d' affairs* in Pretoria. Before long, a dispute arose as to whether the work done on the project had received the prior approval of the Bolivian Government. The said government therefore denied any indebtedness to the applicant as regards the work already done, on the ground that the plan used had not been submitted for approval prior to the commencement of the project. The applicant, in an *ex parte* application, sought leave to sue the respondent for the 8,926 Rand already expended on the project, coupled with an order of attachment so as to be able to confirm the jurisdiction of the court. It was held that the activity in dispute falls within the confines of governmental act, i.e., *jure imperii*, and that the Government of Bolivia was immune from jurisdiction. The court even did not make any attempt to consider the restrictive theory of sovereign immunity. Thus, even if taken a stage further, it is possible the ambassador of Bolivia would have invoked the inviolability principle under diplomatic law to neutralise the effect of the law suit in question.

It would appear that South Africa started questioning the authority of the doctrine of absolute immunity when the echo of Lord Denning's crusade to expose or limit the doctrine of absolute immunity became known in South Africa.[177] Thus in

[172] Ibid., pp. 334–335.
[173] (1921) CPD 451.
[174] (1942) CPD 407.
[175] (1971) ISA 259 (W), (1983) 64 Int Law Reports p 668, 668–684.
[176] (1978) 3 SA 938 (W), (1983) 64 Int Law Reports, pp 685–689.
[177] Botha, op. cit., p. 335.

Inter Science Research and Development Services Pty Ltd v. Republic Popular De Mocambique,[178] the Colonial Government of Mocambique signed a contract with a company named ETLAL for the development of agriculture areas and the water resources in Mocambique. ETLAL, which happens to be a local company incorporated under the local colonial laws, subcontracted the purported contract to the applicant (Inter Science Research & D.S. Pty Ltd.). In September 1974 (RPM) the Independent Republica Popular de Mocambique "movement" came into power and in October 1975 took certain drastic measures that resulted in the nationalisation and the integration of ETLAL into the RPM government. In other words, ETLAL ceased to exist. So in essence RPM assumed the business activities of ETLAL. The RPM government further declared that the subcontract in dispute was null and void in the light of the force and thrust of Decree Law 27 of October, 1975. The applicant quickly sought leave to implead the RPM Government for damages suffered in respect of services rendered prior to the nationalisation of ETLAL. The court followed the doctrine of restrictive immunity by giving effect to the action to proceed in part, thus allowing an order of attachment. The court finally ruled that the doctrine of restrictive immunity applies in South Africa.[179] A careful review of the case, however, shows that it involves more complicated international law issues 'than miss the eyes'. These elusive problem areas range from act of state, state succession, state responsibility, state immunity, recognition and decolonisation. These concerns might have prompted Margo J to deny the applicant any claims respecting the expropriation in issue because the applicant failed to show cause why the said expropriation be considered *jure gestionis* instead of *jure imperii*. On the whole, however, the judgment seems to be unconvincing and unbalanced because so many important issues that cut deep into the heart of the dispute were simply treated casually, thus rather bringing to the fore the old argument posited by Lord Denning that there has been a change in international law. Again in Kaffraria Property Co. (Pty) Ltd v. Government of the Republic of Zambia,[180] the court confirmed the doctrine of restrictive immunity by ruling that immunity be denied for demurrage amounting to US $43,715 coupled with further damages of $20,000 for a delay occasioned by the Republic of Zambia for failing to speedily aid the process of furnishing the necessary letter of credit for the agreed–upon freight charges to be paid as provided in the agreement entered into with Westfield Shipping Company for the carriage of fertilizer from the United States to South Africa. It is submitted, however, that one important issue that was not analysed to its logical conclusion was whether the attachment *ad fundan dam jurisdictionem* as regards the fertilizer can be sustained by *usus* backed by *opinio juris*. The answer is certainly no.

That in South Africa, the history of the courts as regards the application of the doctrine of absolute immunity coupled with its momentous change at its zenith followed a journey truly similar to that of Britain is without doubt clearly exempli-

[178] (1983) 64 ILR 689–709.

[179] Ibid.

[180] (1980) 2 SA 709 (E), (1983) 64 ILR 708–717.

fied by the thrust and import of the Foreign States Immunities Act 87 of 1981.[181] In fact, the South African Act can appropriately be described as a true carbon copy of the English State Immunity Act of 1978, in so far as the Act can be seen as a true embodiment of the doctrine of relative or restrictive immunity, wholly conditioned on Section 4(1), of the 1981 Act.[182]

3.6.5 State Immunity in British Commonwealth States

There is without doubt scant evidence in the practice of African states as regards the doctrine of absolute immunity. While there is no direct information on municipal court rulings in these countries, at least those countries sued by private companies in foreign courts have protested and expressed their dissatisfaction with the currency of the doctrine of restrictive immunity.[183] Thus the modification in the principle of state immunity which is becoming well recognised in different degrees the world over has not been so far well received or embraced in Commonwealth Africa.[184] In other words, the principle appears to be standing on one leg as far as Commonwealth Africa is concerned and more so the whole Continent except in such countries as Togo, Egypt, Lesotho, Madagascar, and South Africa, which have totally jumped onto the bandwagon of the restrictive doctrine.[185]

Most Commonwealth African countries in principle have accepted the authority of the doctrine of absolute immunity and this in the main can be correctly predicated on the colonial relationship that existed between Britain and her former colonies now independent.

Judge T.O. Elias, while commenting on the true nature of English law in African courts, said that

"The received English law covers both civil and criminal laws as well as the rules of evidence and the procedure since, as Maitland once observed, 'the English Common Law rules are embedded in the interstices of procedure.' The rules of civil law exist both in judicial decisions and in statutes which have been reenacted with or without modifications, in local statutes which are to be found in every Commonwealth territory in a set of Revised Editions of the Laws published at periodic intervals. This set of publications of enacted law constitutes the statute book of each territory. In the fields of trade and commerce, English mercantile and commercial laws predominate. This company law, partnership, contracts and agency, sale of goods, carriage of goods by land and sea, shipping laws, negotiable instruments, banks and banking laws are the most important that we need enumerate here. Another area of civil law regulated by English Common Law principles are the law of tort, the law of trust and equity, industrial law and the conflict of laws (private international

[181] See generally Botha, op. cit.

[182] Ibid. at pp. 336–343.

[183] See N.A. Ushakov in International Law Commission Yearbook (1983), Vol. II at p. 55; The Nigeria envoy after the decisions regarding the Cement Contracts in the Courts of UK, USA and Germany did protest vehemently.

[184] See The ILC Report on Jurisdictional Immunities of States and Their Properties, 1983 and 1986, respectively; and the (1960) AALCC report.

[185] The ILC Report on Jurisdictional Immunities of States and Their Property, 1983 and 1986, respectively.

law). Although some of these laws are based upon the English Common Law and Statutes, there are yet local variations and peculiarities dictated by the prevailing circumstances of the time and place. The element of English law is less strong in the field of jurisprudence and legal theory as well, as of public international law, although the former is in its local orientation still haunted by the ghost of Austin and the doctrine of judicial precedent while in public international law the local practice is still based on the teachings of the Dualist School, despite the growing tendency towards independence which is discernible in the new concept and practice of contemporary international law, especially the law of international institutions."[186]

In the light of the above analysis one is prompted to conclude that the English Common Law, the doctrines of equity and statutes of general application in England perhaps at a named date or at a particular time applied and still apply in Ghana, Nigeria, Kenya, Uganda, Sierra Leone, Gambia, with some minimal modifications thereof, as far as local conditions may permit. This is clearly evidenced by the authority behind the Ghana Courts Act of 1971, Section III, thus:

"(1) Until provision is otherwise made by law, the Statutes of England specified in the first schedule to this Act shall continue to apply in Ghana as statutes of general application
  (a) to the extent indicated in the first schedule to this Act, and not further or otherwise; and
  (b) subject to such verbal amendment not affecting the substance as may be necessary to enable them to be conveniently applied in Ghana.
(2) The Statutes of England referred to in subsection (h) of this section shall be treated as if they formed part of the Common Law prevailing over any rule thereof other than a rule of customary law included in the Common Law under any enactment providing for the assimilation of such rules of customary law as are suitable for general application."[187]

The familiar echo or common feature of the earlier Ghanaian Act or the present one finds expression in the Kenya Judicature Act of 1967 which took its inspiration from the East African Protectorate Order in Council of 1902. The same can be said of the Act of Sierra Leone 1888, the Judicature Act of Uganda 1902, and the March 4, 1863 Act of the Old Settlement of Lagos S 45(1), S(2) and S(3), respectively.[188] The reception of English law in Commonwealth Africa therefore followed practically an invariable formula which supports the proposition that English law was established and applied in every colony that was created by the English Crown. English law in a way thus became the means by which laws were enforced as clearly supported by T.O. Elias in his analysis[189] regarding the reception of English law in Commonwealth Africa.

Granted this, then the doctrine of absolute immunity was received into Commonwealth States based upon the authority of the Anonymous Case,[190] which was decided by the Privy Council somewhere in 1722 thus . . .

"An uninhabited country newly found out and inhabited by the English to be governed by the laws of England. A conquered country to be governed by such laws as the conqueror

[186] T.O. Elias, The Judicial Process in Commonwealth Africa (1975) pp. 13–14.

[187] See The Ghana Courts Act of 1971, Section II.

[188] T.O. Elias, op. cit., pp. 1–6.

[189] Ibid.

[190] (1722) 2 PWMS 75.

will impose: but until the conqueror gives them new laws, they are to be governed by their own laws, unless where those laws are contrary to the laws of God or totally silent."[191]

This ruling simply confirms Holt CJ's decision in an earlier case of Blankard v. Galdy[192] in 1694, in which a clear authority on this subject was established. Thus if The Parlement Belge was decided in 1879 and was subsequently followed in The Porto Alexandre and The Cristina, then per the authority of the Anonymous, the doctrine of absolute immunity became part of the laws of all English Colonies as of 1879. Hence the practice of English law as regards the doctrine of absolute immunity became ex hypothesi part of the laws of Commonwealth African countries and other former British dominions[193] such as India, Pakistan, Australia, Canada, New Zealand, Jamaica, Ceylon, Bermuda, Barbados, Hong Kong, Singapore, Tonga, etc.

The above discussions warrant the following conclusions:

1. That sovereign immunity serves an important purpose in the inter–state system is without doubt well grounded.
   (A) Its application would avoid the harassment of sovereign states.
   (B) It would promote comity and the diplomatic functions of states.
   (C) Its application certainly will promote stability in international law.
2. That forum law is the creature of sovereignty and between equals, only what is understood and acknowledged as law among states must be applied.
3. The granting of absolute immunity to international organizations is expedient in the light of their special functions in international law.
4. That with respect to employment contracts and suits against states and/or embassies, the concept of ne imediatur legatio completely reduces the nature test, and for that matter restrictive immunity into an unworkable tool.
5. That the state never acts as a juridical or natural person can be supported by the argument that the Italian theory of dual personality of states is untenable for there is no evidence in international law to support the notion that the functions of states be divided into potere politico and persona civile.
6. Exécution forcée or saisie conservatoire in respect of state property lacks *usus* and thus may lead to serious disputes among states (i.e., at the diplomatic level).

[191] Ibid.

[192] (1694) 2 Salk 411.

[193] See J.E.S. Fawcett, The British Commonwealth in International Law (1963); and T.O. Elias, op. cit.

4 Restrictive Immunity in U.S. and U.K. Courts

4.1 A Move Towards a New Rule

True, hasty climbers have a sudden fall, and one does not relegate to the background an established authority for mere speculative reasons, hurriedly derived from a general theory or principle, nor is it wise to adopt a new law based on simplistic aspirations or generalisations. Hence there must be very convincing reasons deriving from well-known problems of state immunity and from the demonstrated superiority of restrictive immunity over sovereign immunity in resolving problems of jurisdictional immunities in respect of commercial transactions before countries of the world would be fully justified in throwing their efforts unto the uncharted seas of the purported currency of the doctrine of restrictive immunity. For unqualified generalizations are always dangerous and not at all helpful especially when considering a subject this elusive.

4.2 Background

Scholars are agreed that the concept of relative or restrictive immunity was planted and harvested in Continental Europe, first in Belgium and immediately thereafter in Italy.[1] However, it would appear Chief Justice Marshall was the first of judges to deal with the said subject obiter dicta in his long classic judgment of The Schooner Exchange v. McFadden in 1812, inasmuch as the central issue before the court was immunity in respect of a French public vessel damaged at sea.[2] On another occasion twelve years after the decision in the Schooner Exchange, Justice Marshall rendered a unique judgment in which he took a bold step in explaining the basic underlying principles behind the doctrine of restrictive immunity as follows:

"When a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character and takes that of a private citizen. Instead of communicating to the company its privileges and prerogatives, it

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[1] Sompong Sucharitkul, State immunities and Trading Activities in International Law (1959) pp. 233–251. See generally also his collected courses at the Hague Academy (1976–1) 149 Hague Recueil.

[2] (1812) 7 Cranch.

descends to a level with those with whom it associates itself, and takes the character which belongs to its associates and to the business which is to be transacted.[3]

Without doubt the fundamental principles relating to the doctrine of restrictive immunity are herein succinctly formulated, however, the case in point was of a local nature rather than a case with a foreign element, hence many on the international plane never took notice of the thrust and force of its legal reasoning and purported move towards the restrictive approach.

The preceding examination, although important, would not be complete without mentioning the names of Heffter and Gianzana, who were also early proponents of the doctrine of restrictive immunity.[4] It is believed that Gianzana was the first to formulate the distinction between *acta jure imperii* and *acta jure gestionis* in 1884 notwithstanding the fact that Heffter might have touched on the subject a little earlier in 1881.[5] Be this as it may, Gianzana's approach was well received in Italy and therefore laid the foundation for the development of the concept in Italian practice. It is instructive also at this juncture to take note of the fact that the doctrine of restrictive immunity was adopted by the Institut de Droit International in 1891, not long after early proponents had considered the subject in their writings.[6]

4.3 Early Practice in Belgium and Italian Courts

Belgian and Italian courts, having rejected earlier doctrinal precepts on absolute immunity developed a rather appealing but perhaps middle-ground approach in tackling the problems relating to state immunity and trading activities of states by offering a distinction between *acts jure imperii* and *acts jure gestionis*. The said approach although appealing to Belgian and Italian courts took a long time getting through the door in other European countries. It would appear some countries flirted with the notion but fell short of completely adopting it.[7]

The notion of restrictive immunity was first presented in 1840 before the Belgian Court of Appeal, by the *procureur general* but his argument did not find favour with the court.[8] It was, however, followed in subsequent cases after the myth surrounding the concept was broken in 1857.[9] The doctrine of restrictive immunity was first clearly established by the Court of Appeal in The Havre Case,[10] where the court was persuaded to assume jurisdiction based on a clearcut showing of commercial activity on the part of the state in question. The court, it would appear,

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[3] 9 Wheaton 904 at p. 907.

[4] Sucharitkul, op. cit., at p. 265.

[5] Ibid.

[6] Ibid.

[7] Ibid. at pp. 162–255; Sucharitkul (1976 1) 149, Hague Recueil, 126–183.

[8] Sinclair, The Law of Sovereign Immunity, Recent Development, (1980 II) 167 Hague Recueil 113 132.

[9] Ibid.

[10] C.F. Sucharitkul, op. cit., note 1 at p. 243 (PB, 1876–11–175).

rationalised the exercise of jurisdiction over the said matter from the forum data specifically derived from the objective test.

The doctrine of restrictive immunity was again extended in Government Ottoman c. Gaspari[11] and also in the famous case of Monroyer et Bernard c. Etal Francais.[12] Belgian courts in 1888 took a step further by making a distinction between public and private activities of the state. Thus in Société pour la Fabrication de Cartouches c. Col M. Ministre de la Guerre de Bulgarie,[13] the Tribunal Civil de Bruxelles was quick to assume jurisdiction over Bulgaria on the established principle that the sovereign act in issue was duly compatible with a civil transaction and the maxim *consensus ad idem*, (contract) in which parties to the stated obligation are strictly bound by its terms. The court further reasoned that Bulgaria took itself out of the domain of sovereign acts unto the domain of a private person and therefore cannot escape the jurisdiction of the court. Belgian case law as can be seen demonstrates in respect of its jurisprudence a high degree of consistency in the application of the doctrine of restrictive immunity.[14]

Italian courts also followed the doctrine of restrictive immunity to the letter and by its track record, one could simply argue that its courts have also been consistent in the application of the said doctrine. In 1882, the Corte di Cessazione de Torino in Morellet c. Governo Danese analysed the theory of dual personality of states thus:

"It being incumbent upon the state to provide for the administration of the public body for the material interests of the individual citizens, it must acquire and own property, it must contract, it must sue and be sued and in a word, it must exercise civil rights in like manner as 'un altra corpo moral o private individual qualunque.'"[15]

The logical implication of this thesis or literature seemed to be derived from the basic principle that a state has two separate identities, one being political and the other *"corpo moral."* This notion was applied in 1886 by the Corte di Cassezione de Firenze in Guttieres c. Elmilik[16] in which immunity was denied on the grounds that if a government descends unto the market place by signing contracts with private business entities, it thus relegates to the background its sovereign attributes and therefore must be treated as any individual in the market place and that "in such case it is a question solely of private acts and obligation to be governed by the rules of the *jus commune*."[17]

A similar distinction was again made in 1887 by the corte d'Appello di Lucca in a case relating to the commercial activities of the Bey de Tunisi (Tunisia).[18]

The same principles were also followed by the Corte di Cassazione di Napoli in Typaldos c. Manicomio di Aversa,[19] there it was held that:

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[11] PB 1911–111–1094, cf. Sucharitkul, op. cit., note 1 at p. 244.

[12] PB 1927–111–129, cf. Sucharitkul, op. cit., p. 244.

[13] 13 Jud 1889, Col 383; PB 1889–111–62, cf. Sucharitkul, op. cit., p. 244.

[14] Sucharitkul, op. cit., at p. 245.

[15] Cf. Sucharitkul, Collected Works, Hague Academy, at p. 127.

[16] Cf. Sucharitkul, p. 127.

[17] Ibid.

[18] C.A. Lucca, 1887, F. 1t 1887–9–474 at 485–486.

[19] Giu It. 1886–1, 1–223, 239.

"The state becomes subject to courts in so far as it operates within the sphere of civil transactions, and it has never been objected that the sovereignty of the state has been injured thereby; whereas the rationality of the law would suffer from the opposite theory whereby it would claim the power to pursue its rights as plaintiff, while remaining beyond the reach of such action on the part of others."[20]

In a somewhat recent case of Perrucchetti c. Puig y Cassauro (1928),[21] which involved a Mexican ambassador, covers a contract signed for the purchase of an immovable property in the form of a building duly designated to be used for the performance of diplomatic functions. The court followed its earlier decisions by assuming jurisdiction over the ambassador during his terms of office although logically the contract in question directly or indirectly touched on an *instrumentus legati*. It was later held that the contract in question falls into the precinct of private law transaction for the ultimate acquisition of private rights and therefore jurisdiction cannot be waived on behalf of the Mexican ambassador. The decision appears strange and out of line with the precepts of public international law because the cardinal principle in respect of diplomatic privileges and immunities is predicated on inviolability and this is well entrenched in the practice of states the world over.

In spite of the strict adherents of Italian, Belgian and Egyptian courts to the restrictive theory or rule, it would appear other leading countries such as the United Kingdom and the United States before the Second World War remained steadfastly in support of absolute immunity. It was, however, only recently that these countries have taken steps in making changes to their statute books, that is, in 1976 and 1978, respectively.

4.4 A Move Towards Restrictive Immunity

The tendency for countries to modulate the concept of absolute immunity is of recent development in common law countries, but seemed to have taken a long time coming. Some governments and courts, however, have now jumped onto the bandwagon of clearly accepting the doctrine of restrictive immunity.[22] In other words, the restrictive approach is gaining currency. In fact, the United States after the Second World War was the first of countries to officially express dissatisfaction with the idea of giving immunity to foreign governments and their agencies engaged in trading activities.[23] And this is evidenced by the strength and import of the Tate letter thus:

"It is thus evident that with the possible exception of the United Kingdom little support has been found except on the part of the Soviet Union and its satellites for continued full acceptance of the absolute theory of sovereign immunity. There are evidences that British

[20] Ibid. at p. 229.

[21] F. It. 1929–1–112 et seq.; Rivista 20 (1928) pp. 521–527 cf. Sucharitkul Collected Course, op cit. p. 129.

[22] See The ILC Report (1982, 1984, 1986).

[23] See The Famous Tate Letter of May 19 (1952), State Department, 26 BULL 984.

authorities are aware of its deficiencies and ready for a change. The reasons which obviously motivate state trading countries in adhering to the theory with perhaps increasing rigidity are most persuasive that the United States should change its policy. Furthermore, the granting of sovereign immunity to foreign governments in the courts of the United States is most inconsistent with the action of the Government of the United States in subjecting itself to suit in these same courts in both contract and tort and with its long established policy of not claiming immunity in foreign jurisdictions for its merchant vessels. Finally, the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons 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."

As a result of the Tate letter the restrictive doctrine was embraced and entrenched in American policy and this has since then been firmly confirmed by the enactment of the American Foreign Sovereign Immunities Act of 1976. The Supreme Court also gave its blessings to the Act in Alfred Dunhill of London Inc. v. Republic of Cuba,[24] in the same year that the Act passed through Congress. The modalities of this doctrine are directly or indirectly reflected in the recent policies of such countries as the United Kingdom, Canada, Australia, Pakistan, Singapore and South Africa.[25] However, it must not be forgotten that still other countries find it difficult to give up the old order and therefore have not abandoned the principle of absolute immunity.[26] It must also be remembered that at least before the historic landmark case of The Philippine Admiral, in which the Privy Council followed the restrictive doctrine, Britain in fact had in the past maintained a policy of absolute immunity and this policy of Britain seemed to have influenced some commonwealth countries to maintain the same position. Perhaps Britain's change of policy thereafter also had similar influence on the Old Commonwealth, notwithstanding the fact that some commonwealth African countries have remained conservative and still steadfastly support the doctrine of absolute immunity.[27]

Canada followed the United Kingdom in adopting the restrictive immunity doctrine in 1982,[28] but it appeared Canada struggled with the idea for some time before a formal change was made. The shift in policy by the United Kingdom paved the way for Britain to become a party to both the 1926 Brussels Convention and that of the 1972 European Convention on State Immunity, respectively.[29] The object of the Convention was to provide a uniform method in dealing with issues central to the problem of sovereign immunity.[30]

In the light of the move towards the doctrine of restrictive immunity and its attendant effect on the Communist world as well as the Third World, the former USSR, the United States and many other countries have resolved to accept by

[24] (1976) 425 114 682.

[25] See Brownlie, Principles of Public Int. Law (1990) at p. 328.

[26] Ibid. at pp. 329–336; ILC Report (1982, 1983, 1986).

[27] ILC Report (1982, 1984, 1986).

[28] Brownlie, op. cit. at p. 328; Rebecca Wallace, International Law (1986) p. 110.

[29] I. Brownlie, op. cit. at p. 337.

[30] Ibid.

treaty a genuine waiver of immunity in matters covering shipping and trading activities. In reality, however, it remains to be seen whether these positive policies based on compromise between the doctrine of absolute immunity and restrictive immunity would promote harmony in international commercial intercourse, in view of the fact that some countries have remained adamant or obstinate to the call by leading Western industrial countries, that immunity be restricted.[31]

4.5 Restrictive Immunity and its Implications

It is true that "an equal has no dominion over an equal." However, in the last twenty years and perhaps in much earlier times in Continental European countries the pendulum appears to be swinging towards the acceptance of the doctrine of restrictive immunity in the Western world and this particularly may be due to the pressing need of stability, equity, good faith and substantial justice in contemporary world of commercial transactions.[32] A considerable number of eminent writers, given this state of affairs, thus suggested that the practice whereby a distinction is made between *acta jure imperii* and *acta jure gestionis* be instituted as a prelude to establishing restrictive immunity. Thus a state acting as a private individual must not be accorded immunity and hence must be equally subjected to liability as would an individual under similar circumstances.[33] Although it appears that a majority of leading legal scholars in international law have all agreed that immunity be restricted, there is without doubt the problem of developing a uniform or acceptable means by which to promote a workable and practical criterion likely to command the acceptance of all and sundry.[34] The distinction between *acta jure imperii* and *acta jure gestionis*, although in theory may appear quite attractive and apposite, however, in reality it is difficult to define and perhaps very cumbersome to apply.[35]

The acceptance of the principle of restrictive immunity is to some extent predicated on the reasoning that states do not always act as a "public person" and that there are instances in which a state may act in its capacity as a private person, arguably falling completely outside the confines of traditionally acceptable govern-

[31] See ILC Report (1986) where Brazil, Bulgaria, China, Ecuador, Hungary, Japan, Poland, Portugal, Sudan, Syria, Thailand, Trinidad and Tobago, USSR, Venezuela have expressed their desire to still follow the doctrine of absolute immunity.

[32] The increase in state participation in commercial transactions throughout the world prompted the call for restrictive immunity in order to promote justice in the market place. See generally, Brownlie, op. cit., pp. 323–345; Higgins (1982) 29 NILR 265.

[33] See Mann, The State Immunity Act 1978 (1979) 50 p. 43; Brownlie, op. cit., pp. 332–345; Lauterpacht (1951) 28 BYIL; Reoovodd (1986) V. 200 Hague Recueil; Badr, State Immunity (1984).

[34] See ILC Report (1986); Sornarajah, Problems in Applying the Restrictive Theory of Sovereign Immunity, 1982 ICLQ 31 p. 661; ILC Report (1986), e.g., State Practice.

[35] Lauterpacht, op. cit.; Fitzmaurice (1933) BYIL XIV.

mental functions.[36] In reply to the above alluded theory, Professor Hyde although a proponent of the restrictive theory argues that,

"A state never acts in a private capacity, even when the activity in which it participates is one commonly confined to and carried on by the private individual."[37]

In view of the difficulties and uncertainties associated with the doctrine of restrictive immunity and the fact that scholars are not all agreed as to how to apply the concept, prompted De Paepe to propose the objective test which for want of proper direction was later restated by A. Weiss,[38] a prominent former judge of the Permanent Court of International Justice at the Hague of which he was appointed Vice President in 1922, as follows:

"It would seem a surer test to admit that the nature alone of the act should be taken into consideration. . . . Thus the distinctions just mentioned disappear; the judge need not consider intention; his duty becomes a simple on, since it involves merely a question of fact: An act performed by a government is presented for his judicial appreciation; to determine whether he may pass upon it, he has but one question to ask: Is the act by its nature such that in no case could it be performed by other than by a state, or in its name; in such a case it is an act of public authority (*puissance publique*); it is a political act which may not, without infringing upon the sovereignty of such a state, be submitted to the judgment of a foreign authority. There is a clear lack of jurisdiction. On the contrary, if the act is by its nature such as any private person could engage in, as, for instance, a contract or a loan, the act, whatever its purpose, is a private act, and the foreign court has jurisdiction. And thus we must conclude that jurisdiction may not be declined even if the contract is touched with an administrative character, as, for instance, if it concerns the purchase of a warship or an order of munitions, and arms for its arsenals. It is of no importance that a private citizen does not ordinarily make such contracts, or on such a scale or to the same purpose. If it is the question of a contract or an acquisition, that is enough. It is the nature and not the purpose that is to be considered."[39]

The objective test according to Judge Weiss' approach follows the principle by which issues regarding immunity are determined by reliance on the nature of the state activity that precipitated the litigation.[40] Thus whether the local forum will decline jurisdiction or not is predicated on the nature or form of the act and if need be, specifically on the commercial activity in dispute. The test, it is suggested, determines whether the transaction entered into by the state can possibly be denoted as one by its very nature or form to be a sovereign or non–sovereign act (i.e., private act). Thus if it is characterised as one of *acta jure imperii* then according to Judge Weiss immunity must be allowed.[41] While on the other hand, if the activity is one by its very nature an activity that any private person would undertake, then immunity be denied.[42] In this regard a distinction is simply being suggested between *acts jure imperii* and *acts jure gestionis*. But is such a distinction easy and

[36] The Philippine Admiral (1977) AC 373 (JC); Trendtex Trading v. Central Bank of Nigeria (1977) QB 529 (CA); I Congreso del Partico (1983) 1 AC 244 (HL).

[37] See Hyde, International Law 1945 (11–844, Vol. 1).

[38] Academie de Droit International, 1922 Recueil les Cours Vol. 1, pp. 545–6.

[39] Ibid.

[40] Ibid.

[41] Ibid.

[42] Ibid.

realistic? I think not, for such an approach would be quite confusing and likely to pose difficulties for the judge.

The most forceful argument in support of absolute immunity and the plea to abandon the distinction between sovereign and non–sovereign acts was clearly stated by Sir Geral Fitzmaurice (as he then was).

"The distinction between the sovereign and non sovereign acts of a state is arbitrary and unreal, and which is not easy to apply in practice and which might become much more difficult to apply if states care to take the appropriate measures; one which, moreover, must always leave a sort of no man's land of actions capable of being regarded as coming within either category. The conclusion seems to be that the only sound course is to adhere to the strict doctrine of complete immunity, any departures from it in specific cases being regulated by international convention."[43]

It is hard today to take issue with the argument posited by Sir Geral Fitzmaurice, for in reality the application of the restrictive doctrine is not at all easy given the attendant difficulties associated with modern–day activities of states and the question of indirect impleading. Twenty–four years later Lord Denning also made a similar observation in Rahimtoola v. Nizam of Hyderabad in which he expressed his doubts as regards the modalities of the restrictive doctrine. According to him the restrictive theory is "a most elusive test." But in the same judgment he also advocated that the law of absolute immunity had fallen into disfavour and therefore declared it unsatisfactory.[44] In fact, it did not take long before the shortcomings of the doctrine of state immunity became apparent. Many therefore started questioning the rationale behind this ancient concept and whether its legitimacy can possibly be supported by cogent reasoning.[45] Those having second thoughts, that is, judges and scholars, about the appropriateness of this doctrine started a new crusade[46] in support of the restrictive or relative theory of immunity.[47] First it appeared as though the proponents were throwing their efforts unto the uncharted sees. But of late as a result of the increase in commercial activities by sovereign states and the multitude of litigation before domestic courts the world over has given impetus to their call for a complete or partial abandonment of the doctrine of state immunity,[48] to avoid the problem whereby the rights of private companies are trampled upon while countries involved in commercial transactions hide behind the doctrine of absolute immunity to insulate themselves from liability.

The debate between adherents of state immunity and adherents of restrictive immunity is far from over and this may be due to the horizontal nature of the in-

[43] Fitzmaurice, op. cit., at pp. 101–122.

[44] (1957) 3 All ER 404.

[45] See Sinclair, op. cit., at pp. 113–284; ILC Report (1986).

[46] See Lauterpacht, op. cit.; Sinclair, op. cit.; Dunbar, Controversial Aspects of Sovereign Immunity in the Case Law of Some States (1971) 132 Recueil des Cours 203–351. A good example of the crusade can be seen in the English practice where Lord Denning mounted a crusade to challenge the English approach of absolute immunity.

[47] See Lord Denning's decision in Trendtex Trading v. Central Bank of Nigeria (1977) 1 All ER 881.

[48] Of late many companies have sued countries in English and American courts. Countries such as Nigeria, Zaire, Libya, Pakistan, Tanzania, Morocco, Uganda, etc., have been sued in foreign courts.

ternational order, which in the main also makes it difficult for the application of the restrictive immunity.[49] Thus even if a domestic court should rule that immunity be denied, the enforcement of the said judgment, i.e., *execution forcee*, would be difficult to execute and may in most cases create acrimony and disrepute among nation–states. Furthermore, it would appear state practice in respect of this area of the law is scanty and quite unsettled. There is therefore no *usus* in support of restrictive immunity.

4.6 The Change of Heart in American Practice

The United States after having struggled with the Supreme Court's decision of 1812 in the Schooner Exchange v. McFaddon, suddenly changed its position in 1952 when the department issued the famous Tate letter, thus abandoning the doctrine of absolute immunity.

That the import of the Tate letter found expression in Alfred Dunhill of London, Inc. v. Republic of Cuba cannot ex hypothesi be doubted when the Supreme Court, narrowly though it may appear, endorsed the doctrine of restrictive immunity, and ruled that the repudiation of a commercial debt cannot be characterised as an act of state and therefore such an action be denied immunity in view of the prevailing change in the practice of some states. The court went on to argue as follows:

"We decline to extend the act of state doctrine to acts committed by foreign sovereigns in the course of their purely commercial operations. Because the act relied on by respondents in this case was an act arising out of the conduct by Cuba's agents in the operation of cigar business for profit, the act was not an act of state."[50]

The court was also persuaded by the fact that an increasing number of Western industrialised countries have accepted the doctrine of restrictive immunity.

Further, the leading case in American practice that ushered in the method by which public activities were specifically distinguished from commercial activities under the restrictive theory was Victory Transport Inc. v. Comisana General de Abastecimientos y Transportes,[51] in which the court took a reasonable approach based on eclecticism to designate which public acts must be accorded immunity as follows:

1. Internal administrative acts, such as expulsion of an alien.
2. Legislative acts, such as nationalization.
3. Acts concerning the armed forces.
4. Acts concerning diplomatic activity.
5. Public loans.

[49] Sonarajah, op. cit.
[50] (1976) 425 US 682, p. 318.
[51] (1964) 336 F. 2d 354 2nd Civ.

This method of distinction has found favour with other courts[52] and therefore was followed without hesitation in subsequent cases.[53] The preference given to the doctrine of restrictive immunity presently in American courts, however, takes its authority from the 1976 Foreign Sovereign Immunity Act. Let us consider *seriatim* some of its modalities.

4.7 Sovereign Immunity Act of 1976: Current U.S. Law

The adoption of legislation to regulate the question of sovereign immunity in the United States simply cannot be questioned, in the light of the fact that such legislation was much needed to restore the competence of U.S. courts to adequately review cases dealing with commercial disputes between private entities and foreign sovereign states, a function clearly allocated to the State Department prior to the enactment of the FSIA.[54]

To be precise, the Foreign Sovereign Immunity Act of the United States in great detail codifies the restrictive theory of immunity according to American experience. The Act sets forth a federal long–arm statute and other procedures for adjudicating claims against foreign governments and their agencies before American courts (1608); it further provides or vests in the judiciary the overall authority in determining as to whether certain activities of foreign states are commercial or not (1602); the Act also in every respect gives legislative guidance in respect of venue provisions for taking legal action against foreign states and their agencies (1391(f)). The Act provides *inter alia* for the enforcement of judgments against foreign governments in certain clearcut cases adjudged unlikely to violate the principles of public international law, e.g., commercial property of a sovereign (1010); the Act in short generally provides through 1609–1611 a complete elimination of in rem and quasi in rem jurisdiction over foreign states,[55] but in turn allows jurisdiction over a foreign sovereign in respect of *in personam* jurisdiction.

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[52] See Von Mehlen, The Foreign Sovereign Immunities Act of 1976 (1978) 17 Colum J Transnational L 33.

[53] Rovin Sales Co. v. Socialist Republic of Romania (1975) 403 F. Supp. 1298, 1302 MD III; Isbrandtsen Tankers Inc. v. President of India 446 F.2d 1198 (2d Cir.) cert. denied, (1977) 404 US 985; Transp Corp v. T S/T Manhattan (1975) 405 F.Supp. 1244, 1246.

[54] See Sinclair, op. cit., at pp. 161–169; Carl, Foreign Sovereigns in American Courts; The United States Foreign Sovereign Immunities Act in Practice (1979) 33 SWLJ p. 1009 (now SMU Law Review); Feldman (1986) 35 ICLQ p. 302.

[55] 28 USC §§ 1609–1611.

4.8 Jurisdiction of the Federal Courts

Primarily Section 28 USC 1330 of the FSIA clearly confers jurisdiction on federal district courts without any limit whatsoever on the amount in dispute. Section 1604 specifically is the source of immunity to foreign states, however, exceptions leading to denial of immunity are set forth under Section 1605–1607, 1605 and 1606, respectively. Thus Congress succeeded in putting to rest questions regarding absolute sovereign immunity in American practice. Section 1330(a) for example grants subject matter jurisdiction in respect of a non–jury civil action against a foreign sovereign state where it appears without doubt that the state in question cannot claim or be granted immunity. Section 1330(b) gives allowance that personal jurisdiction be taken if the court *prima facie* has jurisdiction under Section 1330(a) and service of process is provided or allowed under Section 1608.[56]

A foreign state which by agreement or impliedly waived immunity will be subjected to jurisdiction. Thus once a waiver is made by a country it cannot be recanted or withdrawn except in a manner as required by the command of Section 1605(a) of the FSIA.

Given the strength of Section 1605, a foreign state may be sued in the United States, if a claimant can legitimately show that the activities of the foreign state in issue fall within such exceptions set out in 1605. Prior to the enactment of the FSIA there was no clearcut means of securing in personam jurisdiction.[57] However, the FSIA has now opened the gate for certain claims giving rise to damages in torts to be made within the meaning of commercial activities.[58] Arguably, however, sufficient minimum contact test must be followed or applied to determine the relationship between the foreign state's conduct in the United States, in order to satisfy the due process requirement under the U.S. Constitution.[59]

4.9 Issues with Respect to Commencement of Action

Section 1609 under FSIA eliminates totally prejudgment attachments and jurisdictional attachments of the property of a foreign state situated in the United States. Thus to attach the property of a foreign state, proper juridical methods must be followed; for example, to achieve this end, a complaint would have to be filed under Rule 3 of federal rules of civil procedure, and service of process regarding this matter must be effected by following one of the options enumerated under Section 1608(a). If by chance the defendant state is indirectly impleaded, regard must be

[56] See Gray v. Permanent Mission of People's Republic of Congo to the United Nations (1978) SDNY 433 F.Supp. 816, 821.

[57] Carl, op. cit. See also Pennoyer v. Neff (1877) 95 US 714 which deals in detail with the subject matter under consideration, i.e., jurisdiction.

[58] 28 USC § 1605(a)5.

[59] In this light, strict adherence to the due process of the U.S. Constitution is required; see generally the U.S. Constitution.

given to Section 1603(b) which means service can duly be made on an officer or manager of the instrumentality or agency in question, e.g., state–owned airline or possibly letters rogatory could be used as a means of serving the defendant state. 1608(b).

Section 1610(a) of the FSIA touches on matters relating to post judgment attachments of the property of the foreign state (defendant). Section 1610(a) permits execution only if there is a *prima facie* case that the property in controversy is used in commercial or trading activity in the United States, i.e., where as a matter of principle a linkage can possibly be proved between the claim and judgment. Section 1610(b), on the other hand, allows attachment where commercial activity in the United States is at issue without giving exception to its relation to the claim on which the judgment is to be determined.

4.10 Commercial Activity under FSIA

The foremost provision of the FSIA is Section 1605(a). It specifically deals with "commercial activity." And the term commercial, although difficult to define or explore in regard to sovereign immunity, is determined by the nature test rather than by the purpose test.[60] A commercial activity may thus be defined in respect of the nature of the activity in issue as follows:

"A commercial activity means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."[61]

The restatement, although in the real sense is not law, offers a definition that can be helpful to the courts thus:

"An activity is deemed commercial, even if carried out by a state instrumentality, if it is concerned with production, sale or purchase of goods; hiring or leasing of property; borrowing or lending of money; performance of or contracting for the performance of services; and similar activities of the kind that are carried on by nature or juridical persons. The fact that the goods, property, money or services may be used for public or government purpose does not alter the commercial character of the activity."[62]

Although it appears these definitions will certainly be helpful, a further reflection, however, shows that it cannot be adequately applied in certain difficult cases, especially where the public and commercial acts of a foreign state are intertwined and almost simultaneously directed to achieving a particular developmental goal. These problems are commonly associated with developing or East European countries where privatisation in promoting development is at its lowest level while the public sector assumes a dominant position.[63] The major problem with the restate-

[60] See Section 1605(a)2.

[61] See Section 1604(d) of FSIA.

[62] Restatement 3rd of the Foreign Relations Law § 453 [Comment B].

[63] See Friedman, Changing Social Arrangements in State Trading States and their Effect on International Law (1959) 24 Law and Contemporary Problems 350. See also generally Sornarajah, op. cit.

ment definition is that it is general and would not be able to stand the test of giving guidance as to how to adequately formulate a criterion that could best be used to distinguish between governmental and commercial acts of foreign states. The FSIA definition, on the other hand, is simply mechanical and therefore must be applied on case–by–case basis in order to avoid problems. Arguably, the horizontal nature of international order and the attendant parallel possibilities of the reasoning behind the doctrine of sovereign immunity in countries of the world are more intriguing issues to consider than the need to simply distinguish between *acts jure imperii* and *acts jure gentionis*.[64] The heart of the problem seems to be predicated on the proper identification of the dispute at hand and how best a local forum could possibly resolve or apply the restrictive theory based on the notion of state responsibility as derived from the principles of public international law.[65] The suggested method of determining the nature of commercial activity is not realistic and thus resolves the problem partly in respect of the criteria formulated under FSIA Section 1605(a()2). Arguably Section 1605(a)(2) is basically an American self–imposed limitation which may not carry weight on the international plane.

The approach followed in Victory Transport Inc. v. Comisaria General de Abastecimientasy Transportes, regarding the application of the doctrine of restrictive immunity where sovereign and non–sovereign acts were differentiated has now become a dead letter or perhaps insignificant in the light of the enactment of the FSIA legislation of 1976 which as a matter of its radical approach has totally eclipsed the Victory Transport authority.

4.11 Contacts and Direct Effect Approach

Suits against foreign sovereigns are now possible in the United States after the passing of the FSIA, especially when the subject matter in issue is related to activities considered commercial.[66] Thus three conditions must exist if such suits are to be entertained in the United States courts. The first is related to a situation where a foreign sovereign's commercial activity is carried on in the United States.[67] The second covers an act duly performed in the United States in connection with a trading activity of a foreign sovereign state in some third country.[68] The third may encompass a situation in which a commercial activity of a sovereign state has produced a direct or an indirect impact or effect in the United States.[69] In National American Corp. v. Federal Republic of Nigeria,[70] the defendant state, invoked the maxim *par in parem nom habet imperium* in order to avoid

[64] See Sornarajah, op. cit.
[65] Lauterpacht, op. cit.
[66] See Section 1603(d) of FSIA.
[67] Carl, op. cit.
[68] Ibid.
[69] Ibid.
[70] (1978) 448 F. Supp. 622.

liability, but the court ruled that the transaction in question and the central issue regarding letters of credit met the direct effect criterion under Section 1605(a)(2) of the FSIA. Hence the defence of sovereign immunity should be denied since the beneficiaries of the contract in dispute suffered a loss in the United States. It must also be noted that the minimum contact test then established in Shaffer v. Heitner gave strength to the decision. The same result was reached in Harris Corporation v. National Framenn Radio and Television.[71] However, it appears the Court turned deaf ears to the call that immunity be denied in the Exchange National Bank Case.[72] There the court simply ruled that non–payment of promissory notes did not in actual fact produce a logically sufficient connection with the forum as required by the 1976 FSIA. Again in Helicopteros Nationales de Colombia SA v. Elizabeth Hall,[73] the court took a more cautious approach by ruling that mere purchases in the United States should not be characterised as sufficient basis of jurisdiction in respect of a purported transaction totally unrelated to the cause of action.

An effective approach by which these apparently elusive problems could be resolved is to use the Act effectively by first defining and applying the provisions of the Act to the activity in issue so as to determine whether the activity falls within the domain of the act, and then characterise the activity in controversy whether it is commercial or governmental. Although the distinction between *acts jure imperii* and *acts jure gentionis* is not at all easy, it is believed that constant practice could bring the problem under control.

In Verlinden BV v. Central Bank of Nigeria,[74] a foreign company sued a foreign sovereign state in the United States, as a result of a failed cement contract, and the issue was whether an alien prima facie domiciled abroad could sue a foreign sovereign state in the United States. It was held that the plaintiff had the right to sue but failed to show sufficient direct effect of the commercial activity in the United States to command jurisdiction under Section 1605(a)(2) of the FSIA.

In Carey v. National Oil Corp.[75] the Libyan Government–owned oil company had violated the terms of a contract signed with a New York corporate entity. The court was quick to decline jurisdiction on the ground that the dispute did not fulfil the minimum contact test, but failed to go as far as to rule on whether the violation or the breach of the contract had any direct effect on the parent company in New York. It simply avoided the practice of piercing the corporate veil.

4.12 Arbitration Clauses

One other area worth mentioning or considering is the thorny question of arbitration clauses as regards the establishment of transnational contract between a plaintiff company and a defendant country. The United States law in this light does not

[71] (1982) 11th Cir 691 F.2d 1344.
[72] (1984) SDNY 595 F.Supp. 502.
[73] (1984) 104 S Ct 1868.
[74] (1983) 461 US 480.
[75] (1978) SDNY 453 Supp. 1099.

lay bare clearly the jurisdictional problem usually associated with waivers in transnational contracts. Earlier cases[76] so far decided in U.S. courts seemed to indicate by implication that the mere presence of an arbitration clause in a contract must be construed to mean that immunity had been waived, hence the domestic court could take jurisdiction.[77]

The reasoning alluded to may perhaps convince the minority, however, the majority simply would dismiss it as faulty and highly likely to bring about disrepute, for it appears given its total effect to run counter to *usus* and therefore not supported by state practice. American courts are, however, now moving away from their earlier positions[78] to embrace a new position quite similar to the State Immunity Act of U.K., 1978. Thus it is prudent to argue that the practice whereby courts take jurisdiction over a dispute automatically because of the existence of an arbitration clause in transnational contracts be discontinued or simply discarded for it compounds the problem.

4.12.1 Expropriation Claims

(a) A foreign state will not be accorded immunity if the issue is in respect of property rights blatantly expropriated in violation of international law. This may include property expropriated without cause or compensation and also takings that could be described as arbitrary and perhaps discriminatory. These situations are not that common, but if they do occur, a claim can clearly be allowed in United States courts. For this exception to apply, however, it must be borne in mind that the property must be present in the jurisdiction of the United States having a clear-cut or real connection with a commercial activity carried on in the United States by the foreign state[79] "or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of a foreign state and that agency or instrumentality is engaged in a commercial activity in the United States."[80] 1605(a)(3). This section is simply a means to redress nationalisation of property without prompt or adequate compensation as required by international law.

(b) Property rights are covered under 1605(a)(4). Under this section, a foreign state will not be given immunity if "rights in immovable property situated in the United States are in issue." In order to take advantage of the alluded provision, a plaintiff must have affective possessory rights or interest in the land located in the United States. In short, the *lex situs* must be U.S.

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[76] See Sornarajah, op. cit., at pp. 682–684.

[77] Ibid., pp. 682–683.

[78] Ibid., p. 684.

[79] See Section 1605(a) of the FSIA.

[80] Section 1605(a)(3) of the FSIA. Specifically the property and activity must all be substantially linked with the United States.

4.12.2 Non-Commercial Torts

Under Section 1605(a)(5), a foreign state is not immune in tort actions, as follows:

"in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to:

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."[81]

The total effect of this section seemed to follow the American Law Institute's Second Restatement of Conflict of Laws S.145 which is by every measure identical to the Foreign Torts Act prepared by Canadian commissioners. However, it would appear 1605(2) follows the reasoning behind the *lex loci delicti*. In sum, American courts must always be eclectic in applying this section of the act so as to avoid creating acrimony or political embarrassment.

4.12.3 Counterclaims

Immunity is not available if a foreign state initiates proceedings against a private entity in the courts of the United States, duly met with a counterclaim. Section 1607 of the FSIA, reads as follows:

"In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a state the foreign state shall not be accorded immunity with respect to any counterclaim

(a) for which a foreign state would not be entitled to immunity under Section 1605 of this had such claim been brought in a separate action against the foreign state or

(b) ensuing out of the transaction or occurrence that is the subject matter of the claim of the foreign state or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or different in kind from that sought by the foreign state."[82]

Given its broad import, if a foreign state or state agency is sued in the United States and the said defendant state answers the complaint without first raising the foreign sovereign immunity defence, the presumption is that the state has waived the defence of immunity. The decision in Aboydid v. Singapore Airline Ltd[83] bears a striking similarity to the position alluded to above. A proper review of the case of National City Bank v. Republic of China,[84] shows that its compromise outcome perhaps forms the basis of FSIA 1607(c), although Section 1607(c) seemed to limit an unrelated counterclaim as regards the principal amount sought or the

[81] See Section 1605(a)(5).

[82] Section 1607 deals with problems relating to counterclaims.

[83] (1986) 67 NY 2d 450, 503 NYS 2d 555, 494 NE 2d 1055.

[84] (1955) 348 US 356.

principal claim duly made by the foreign state.[85] One difficult lingering problem, however, with counterclaims under Section 1607 can clearly be seen in terms of unrelated counterclaims.

4.12.4 Attachment and Execution

Prior to the enactment of the FSIA, American courts had long held that the property of a foreign sovereign state be accorded immunity from execution, arrest and attachment.[86] Section 1610 of the FSIA has, however, changed the prior position held by American courts. Thus subject to certain conditions, immunity will not be available to a foreign state where the property is believed to be in the United States and used in commercial activity, or where the foreign state in the absence of any pressure thereof has taken leave to waive immunity.[87] Agencies, having attained independent juristic personality from the state, are not immune under the same conditions. The Act prohibits prejudgment attachment as a method by which jurisdiction is obtained, but it may, however, be perfectly used, if the need be, in the satisfaction of a claim likely to be successful or to protect the justified expectation of a litigating party if the state has explicitly waived immunity. 1610(d). Section 1611 on the other hand still accords absolute immunity to international organizations in respect of their property. Thus notwithstanding Section 1610, a foreign state shall be accorded immunity from attachment and execution if

"(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver or

(2) the property is or is intended to be used in connection with a military activity."[88]

(3) Many commentators have argued strongly in support of the U.S. legislation on sovereign immunity and this in all probabilities one would be hard put to challenge in the light of the fact that prior to the enactment of the Act, the U.S. was searching desperately in one way or the other to restore the needed competence of U.S. courts to adequately decide issues relating to private claims against foreign states before U.S. courts.[89] Four major problems, however, still remain unresolved, i.e., the political acts of states, execution forcee, jurisdiction and the thorny issue of Act

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[85] Section 1607(c) must be carefully considered and one must also be eclectic when applying it. See also Section 70 of the Restatement Second of Foreign Relations Law which also deals with some aspects of affirmative recovery. E.g., First National City Bank v. Banco Para el Comercia Exterior de Cuba (1983) 462 US 611 touches on very salient issues regarding counterclaims, waivers and affirmative recovery before U.S. courts.

[86] See Sinclair, op. cit., at p. 222.

[87] Section 1610 of FSIA deals with problems relating to execution which prior to the promulgation of the act never found favour with the State Department.

[88] See Section 1611(a) and (2) of FSIA.

[89] See Somarajah, op. cit., at p. 685.

of State. In sum the Act needs to be amended in respect of its approach to jurisdiction, arbitration and attachment and seizure in execution so as to be current with *usus* in international law.

4.13 The Change of Heart in British Practice

The practice whereby foreign states are accorded absolute immunity in domestic courts was clearly entrenched in English jurisprudence over a hundred and fifty years. That this practice prevailed in English courts with an inexorable inflexibility can truly be seen in the decisions handed down in The Parlement Belge, followed by The Porto Alexandre, The Cristina and Krajiner v. The Tass Agency to mention the main ones.[90] The judgment in the Krajina, treated the Tass Agency as a department of the Soviet Union without any independent juridical personality and allowed the claim for immunity. In fact, this decision was received with disfavour and thus prompted public disquiet on the problems associated with the continued adherence to the modalities of state immunity. Lord Chancellor Earl Jowitt, having taken cognizance of the shortcomings of the entrenched practice of state immunity by English courts, paved the way for the setting up of an Inter–Departmental Committee[91] to study the subject matter herein under consideration. Such great names in the law as Sir Donald Somervell (chairman), Sir Hersch Lauterpacht, Professor Hanson, Sir Eric Beckett, Sir Davis Dobson, Sir Kenneth Roberts–Wory and Sir Robert Speed were selected to study the sovereign immunity question.[92] The committee started work on July 13, 1951, and came out with its conclusion in 1953 that as a result of sharp differences in the practice of states, it would not be legally feasible to correctly determine its exact place in international law. The status of the committee thus was declared *functus officio,*[93] without any success.

It took Britain some time to make a momentous change after the failure of these imminent men (of the law) to clear the unbeaten path of the law. Then somewhere in 1977 the Privy Council in The Philippine Admiral resorted to the application of the restrictive immunity[94] by supporting the idea that a claim of sovereign immunity be denied to a foreign sovereign state if there is a clear indication that the activity in issue is commercially based.[95] The Privy Council thus decided to follow the restrictive doctrine as many will agree, because the concept clearly appears "more consonant with justice."[96] This radical idea as it may be recalled was previously well articulated in Ralumtoola v. Nizam of Hyderabad, by Lord Denning as follows:

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[90] See Sinclair, op. cit., pp. 121–128.
[91] Mann, The State Immunity Act 1978 (1978) 49 BYIL 45.
[92] Ibid., pp. 45–46.
[93] Ibid., p. 46.
[94] (1976) 1 AIL ER 78.
[95] Higgins (1982) 29 Neth Int LR 266.
[96] Ibid., p. 266 (1977) AC 373.

"If the dispute brings into question, for instance, the legislative or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so because it does offend the dignity of a foreign sovereign to have such a dispute canvassed in the domestic court of another country; but if the dispute concerns, for example, the commercial transactions of a foreign government (whether carried on by its own departments or agencies or by setting up separate legal entities) at it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity.[97]

Again Lord Denning reaffirmed his position in support of the restrictive doctrine in Thai–Europe Tapioca Services Ltd. v. Government of Pakistan, Ministry of Food and Agriculture, Directorate of Agriculture Supplies.[98] Lord Denning's dicta in this case, without doubt, continues to still have a compelling impact the world over and particularly in the Commonwealth. These ideas (i.e., Lord Denning's position) were further made known in Trendtex and also at the intermediate stages of the litigation in I Congreso del Partico (a more complex case).

The United Kingdom which up to 1970 was a leading exponent of the doctrine of absolute immunity has now given up the old order and thus embraced the restrictive doctrine. This position is firmly expressed in Trendtex and I Congreso del Partico, respectively. The question of sovereign immunity in the United Kingdom in respect of trading activities of states has primarily now become a statutory law.[99] Ever since 1978, however, the English courts have been made to take another hard look at the total import of the doctrine of restrictive immunity.[100]

4.13.1 The State Immunity Act of the United Kingdom (1978)

The law of sovereign immunity in the United Kingdom, as a matter of fact, was wholly or partly designed to ratify the European Convention,[101] but seemed to have gone as far as to cover other important areas of the law as to promote a modicum of justice or fairness to both the private litigant and foreign sovereign states. The Act, it would appear, goes further in many respects than the said convention in restricting immunity to foreign states,[102] but clearly follows its language and inspiration to a degree.

The Act lays down or provides albeit a general rule of immunity, which gives immunity to foreign states from the jurisdiction of English courts, subject, however, to a list of exceptions carefully drafted to promote the modalities of the doctrine of restrictive immunity. Section 1(1) for example reads as follows: "A state is immune from the jurisdiction of the courts of the United Kingdom except as pro-

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[97] (1958) AC 377, 422.

[98] (1975) 3 All ER.

[99] See The State Immunity Act (1978); Delaume (1979) 73 AJIL 185; Bird (1979) 13 Int Lawyer 619.

[100] Alcom v. Republic of Colombia (1984) AC 580 (HL); See also Fox (1985) 34 ICLQ 115.

[101] I. Brownlie, op. cit., p. 337.

[102] See Delaume, op. cit.; Mann, op. cit.

vided in the following provisions of this part of the Act."[103] The onus in this regard, however, is upon the plaintiff to show cause why the case by every estimation falls within the domain of one of the listed exceptions of the Act (SS 2–11). There are ten enumerated rules of exception to the general rule of immunity. Arguably, only the first exception of the Act confers jurisdiction in any meaningful way on English courts.[104] These exceptions in some respect only remove immunity which might logically otherwise exist in respect of foreign states. Which means that there is still the need to request leave in order to serve notice outside Britain under Order 11 of the rules of the Supreme Court, that is, if there is no other way available to serve the defendant or perhaps if the defendant in question refuses to submit to the jurisdiction of the courts of the United Kingdom. These exceptions in the Act strictly speaking are much "wider" than those approved generally under the European Convention.[105]

It may be recalled that the 1976 Sovereign Immunity Act of the United States purports to operate on the principle of a federal long–arm statute as a means of providing or making the process less cumbersome in respect of questions regarding adjudicatory jurisdiction. The British Act, on the other hand, follows a procedure quite different from that of FSIA, by simply following a method by which service of process is effected through diplomatic channels (Sec. 12(1)). Section 12(7), however, provides that service of process in respect of Section 12(1) "Shall not be construed as affecting any rules of court whereby leave is required for service of process outside the jurisdiction."[106] Order 11 is therefore not affected as far as the 1978 Act is concerned in view of the import of the sections alluded to.

The British Act does not completely eliminate the mechanical distinction between *acta jure imperii* and *acta jure gestionis* but technically purports to embrace common sense and flexibility in respect of interpreting Section 3(3) in connection with Section 3(1)(2).

4.13.2 Exceptions to Immunity Under the 1978 Act

The relevant portion of these exceptions likely to be contested in most courts can be stated as follows:

"(2) A state may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement that it is to be governed by the law of the United Kingdom is not to be regarded as a submission.

3 –(1) A state is not immune as respects proceedings relating to

(a) a commercial transaction entered into by the state; or

(b) an obligation of the state which by virtue of a contract (whether a commercial transaction or not) fails to be performed wholly or partly in the United Kingdom.

(2) This section does not apply if the parties to the dispute are states or have otherwise agreed in writing; and subsection 1(b) above does not apply if the contract

[103] The United Kingdom State Immunity Act 1978, Section 1(1).

[104] Ibid.

[105] 1978 Act S 3(1)a and also issues regarding exceptions.

[106] Ibid., Section 12(7).

(not being a commercial transaction) was made in the territory of the state concerned and the obligation in question is governed by its administrative law.

(3) In this section "commercial transaction" means
   (a) any contract for the supply of goods or services;
   (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and
   (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a state enters or in which it engages otherwise than in the exercise of sovereign authority; but neither paragraph of Subsection (1) above applies to a contract of employment between a state and an individual.

(4) A state is not immune as respects proceedings relating to contract of employment between the state and an individual where the contract was made in the United Kingdom or the work is to be wholly or partly performed there.[107]

The above stated provisions of the Act, as compared to other Acts, particularly that of the European Convention, can be said to be a little broader in respect of the corresponding provisions as regards commercial activities.[108]

Section 3(3) in every respect covers contracts and financial transactions of all kinds, hence the English courts will have no difficulties in determining questions relating to the exercise of sovereign power or authority. Thus such problems as the purpose and nature test associated with the Trendtex case will simply fall within the confines of Section 3(3)(a).[109] Again questions regarding letters of credit could be construed to fall under Section 3(3)b.[110] The decision handed down in the Krajina v. Tass Agency, for example, will not survive the statutory authority established by the Act, since a strong showing of governmental activity or authority in respect of the tort committed will be required. "Activity" is therefore well covered under 3(3)(c), as to neutralise these types of problems.

The combined effect of Section 391)(b) and Section 3(1)(a) can be carefully applied by the courts of United Kingdom to deny immunity to foreign states in respect of non–commercial transactions or activities, since it would appear Section 3(1)a will be left standing on one leg without any major impact. While Section 3(1)(b) given its clear import can in many respects be used to determine issues relating to obligation. A good example is the interesting case of Rayne, Ltd. v. Dept. of Trade[111] per Kerr LJ. The Act certainly will fall far short of providing the right answers in the I Congreso del Partido case, in view particularly of the thorny question regarding the Marble Islands and one wonders as to whether Section 10 of the Act could possibly produce the needed comfort and acceptable guidance.

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[107] See Section 3(1)(a)(b) 2, 3, and 4(1).

[108] See Section 3(1)a of 1978 Act.

[109] See Harris, Cases and Materials on International Law (1991) p. 308.

[110] Ibid.

[111] (1989) Ch. 72 195.

4.13.3 Indirect Impleading

At common law the doctrine of state immunity is invoked to protect a foreign state from both direct and indirect impleading in terms of proceedings against a property in its possession or in which it simply has a *prima facie* interest or claim.[112] Sovereign immunity, however, is not available to states under Section 10, and the relevant sections provide as follows:

"10(1) This section applies to
(a) admiralty proceedings and
(b) proceedings on any claim which could be made the subject of admiralty proceedings.
(2) A state is not immune as respects
(a) an action in rem against a ship belonging to that state; or
(b) an action in personam for enforcing a claim in connection with such a ship if, at the time when the cause of action arose, the ship was in use or intended for use for commercial purposes."[113]

Section 6(4) to some extent deals with one aspect of indirect impleading as follows:

"A court may entertain proceedings against a person other than a state notwithstanding that the proceedings relate to property
(a) which is in the possession or control of a state; or
(b) in which a state claims an interest, if the state would not have been immune had the proceedings been brought against it or in a case within paragraph (b) above, if the claim is neither admitted nor supported by *prima facie* evidence."[114]

The question to answer here is whether Section 6(4) could have prevented the plaintiffs in Dollfus Mieg from prevailing. No one can tell in retrospect as to how the court would have reacted if the 1978 Act had been in existence then, but it would appear the decision could have gone either way, in the light of its post–war flavour in respect of an action *in personam* against the three states who were the bailors. Some scholars[115] however are of the opinion that the plaintiffs would have failed if the said litigation took place today, because of Section 3(3c) of the Act.

The 1978 Act in general embraces or seemed to support the rejection of the state immunity rule or the denial of immunity in the Philippine Admiral case coupled with its clear support of the views expressed by Lord Denning in the Thai–Europe Tapioca case, as regards actions *in personam*.

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[112] The Parlement Belge (1880) 5 PD 197; The Jupiter (1924) p. 236; The Cristina (1938) AC 485; The Arantzazu Mendi (1939) AC 256.

[113] See The 1978 Act § 10(1) and (2).

[114] Ibid. 6(4) a, b. This aspect of the Act is well drafted and will certainly case tension and perhaps confusion.

[115] See Harris, op. cit., at p. 308; Mann, op. cit., n. 92.

4.13.4 Waivers of Immunity and Counterclaims

It is clear now that the rule in Kahan v. Pakistan Federation[116] will not stand today in view of the statutory direction of Section 2(2) of the Act, which means that submission to jurisdiction today can only be done before a court but not by any other means. Section 2(1) of the Act, for example, provides that "A state is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom."[117] The state in one way or the other is perceived to have submitted to the jurisdiction of U.K. courts if it has instituted the action or has intervened or taken any steps in the action in respect of making a claim known or by defending a claim on its merits. These provisions do clear the way for the courts to be in a position to make or draw inferences from the conduct of a state rather than its commercial activity. Section 2(3) subject to strict qualifications in respect of (a) subsection (4) and (b), Subsection (5) all correspond to the European Convention Articles 1(1), 3 and 13, respectively.

4.13.5 Execution

The Act in general as regards execution follows a principle similar to that of the European Convention. Section 13(2) clearly corresponds to Article 23 of the European Convention.[118] Thus even if a state can not qualify for immunity in respect of one of the exceptions, its property in real terms is not to be subjected to execution in satisfaction of a judgment or arbitration award.[119] This is, however, subject to such essential exceptions as to giving consent in writing and secondly if there is a clear showing that the property in issue is intended or being used for commercial purposes.[120] A central bank is, however, given a special protection under 14(4) as follows:

"Property of a state's central bank or other monetary authority shall not be regarded for the purposes of Subsection (4) of Section 13 above as in use or intended for use for commercial purposes; and where any such bank or authority is a separate entity Subsections (1) to (3) of that Section shall apply to it as if references to a state were references to the bank or authority."[121]

In practice, however, the property of a central bank will be subject to execution if there is a waiver evidenced by writing. This aspect of the act promotes a fair balancing of rights and a modicum of fairness to all.

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[116] (1951) 2 KB 1003 (CA).

[117] See Section 2(1) attempts to simplify the rules relating to exceptions to immunity in the U.K. and its dominions.

[118] Delaume, op. cit., p. 194.

[119] Ibid.; Section 13(2) clearly corresponds to the European Convention, i.e., Article 23, although it will appear the legal drafting style is different.

[120] See Section 13(4).

[121] See the supplementary provision of the 1978 Act, Section 14(4). Where a clear meaning of Subsection 4 of Section 13 is given to avoid confusion and misinterpretation.

It will be recalled, for example, that as a result of a careful interpretation of commercial purpose exception to the facts in the case of Alcom v. Republic of Colombia,[122] justice was allowed to prevail, thus preventing execution against the embassy bank account of the Republic of Colombia (Section 13(4)).

Supplementary Provisions: Persons Entitled to Immunity

Section 14(1) provides *inter alia* that

"The immunities and privileges conferred by this part of this Act apply to any foreign or commonwealth state other than the United Kingdom; and references to a state include references to

(a) the sovereign or other head of that state in his public capacity;
(b) the government of that state; and
(c) any department of that government, but not to any entity (hereafter referred to as a separate entity) which is distinct from the executive organs of the government of the state and capable of suing or being sued."[123]

States more often than not have used the protective shield under this Act to avoid being implcaded. In fact, it had successfully worked in favour of some countries but had failed to support the claim of other countries. In the Trendtex case, for example, the Federal Republic of Nigeria argued forcefully that the Central Bank, according to its domestic law, was part of the state and not at all an independent juridical person. The court, however, rejected the claim and thus ruled in favour of the plaintiffs without offering any convincing answers to the argument posited in respect of the status of the said Central Bank. This aspect of the Act arguably is bound to be a breeding ground for a more complex state immunity litigation in the future. Art. 27(1) of the European Convention and Section 14(1) of the U.K. Act seemed to follow the same principles but it would appear the U.K. Act is more tightly drafted.

4.13.6 Miscellaneous Considerations

A provision is herein made whereby the Queen (or Her Majesty) could through an Order in Council restrict or extend immunities to foreign states. The relevant portion of the Act provides as follows: 15(1).

"(1) If it appears to her Majesty that the immunities and privileges conferred by this part of this Act in relation to any state
  (a) exceed those accorded by the law of the state in relation to the United Kingdom; or
  (b) are less than those required by any treaty, convention or other international agreement to which that state and the United Kingdom are parties."[124]

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[122] In this case the court took to a road of eclectism with the aim of analysing the facts of the case objectively. Alcom clearly shows without doubt that the debate on sovereign immunity is far from over.

[123] See Section 14(1) of the Act 1978; this provision has the same import and effect as that of the European Convention but in some respects appears more explicit.

[124] Section 15(1) deals with the effect of the Order in Council, which can be used at any time given the circumstances.

It is worth mentioning Section 21(a) for it explicitly denotes a certificate from the Secretary of State as conclusive evidence on any question relating to

"(a) whether any country is a state for the purposes of part 1 of this Act, whether any territory is a constituent territory of a federal state for those purposes or as to the person or persons to be regarded for those purposes as the head or government of a state."[125]

Section 15(1), which allocates powers to Her Majesty to restrict or extend immunities, arguably seemed to resemble or follow some aspects of Chief Justice Marshall's thesis in the Schooner Exchange in respect of the power of the sovereign to limit or extend immunity.

The State Immunity Act of U.K. makes clear when a state is to be accorded immunity and the factors to consider to deny immunity. The British Act therefore does not confer jurisdiction on English courts explicitly.[126] Rule § 12(7) in a way requires a plaintiff to satisfy the command of order 11 which deals with territorial jurisdiction and service of process in litigation involving sovereign states.[127] The American approach, on the other hand, relies on the authority of the international shoe and Section 1603(e), respectively. Whether the English approach to the problem at hand would be more feasible than that of the United States is open to debate. However, it appears the British approach is more objectively based and will certainly minimize cumbersome jurisdictional problems and perhaps avoid resentment from other countries ever ready to challenge the direct effect approach clearly associated with the U.S. Act.[128]

For it is hard to find any rules in international law to support the direct effect approach clearly entrenched in American practice.

In sum, one can certainly detect some major differences between the U.S. Act and the U.K. Act. The U.S. Act in respect to many essential issues relating to state immunity appears less explicit and less forthright in terms of definitions of commercial activities of states and particularly problems likely to face the courts in respect of state property used for commercial purposes. The scorecards on the whole favour the English Act 1978. The English Act in many respects is therefore better drafted and covers more grounds than the U.S. Act and the European Convention.

In Verlinden BV. v. Central Bank of Nigeria, 488 F.Supp. 1284 (SDNY 1980) casually considered elsewhere, the District Court held that

"The Act imposes a single, federal standard to be applied uniformly by both state and federal courts hearing claims brought against foreign states. In consequence, even though the plaintiff's claim is one grounded upon common law, the case is one that 'arises under' a federal law because the complaint compels the application of the Uniform Federal Standard governing assertions of sovereign immunity. In short, the Immunities Act rejects an essential federal element into all suits brought against foreign states."

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[125] Section 21(a) although falls under a miscellaneous and supplementary rubric gives a clear explanation as to the meaning of a federal government in respect of part 2 of the 1978 Act.

[126] See Section 1(1) of the Act 1978; Sormarajah, op. cit., p. 680.

[127] (1957) 3 All ER 464. See also Lord Wilberforce's reaction in respect of the issues relating to the I Congreso (1981) 3 WLR at p. 345.

[128] See the U.S. Act § 1605(a)(2) where two aliens tried to have their differences resolved before the U.S. Federal Court.

The District Court ruled in favour of Nigeria and thus dismissed the complaint filed by Verlinden BV, a Dutch corporation with its principal offices in Europe – Netherlands.

The question to ask is whether a foreign company incorporated in Europe – The Netherlands – can sue a foreign state in the United States. Although the private claim was allowed against Nigeria, they made it clear that although the plaintiff had the right to sue as a result of the failed cement contract, it failed to show or offer evidence of sufficient direct effect of the commercial activity in issue in the United States to command jurisdiction under 1605(a)(2) of the FSIA. As can clearly be seen, the language of the 1976 Act appears too broad and could lead to uncertainties in respect of questions relating to jurisdiction where the plaintiff and the defendant all happen to be foreigners.

Lord Denning's test or approach in The Thai–Europe v. Government of Pakistan (1975) 3 All ER 966–67 seemed most appealing and convincing than the FSIA Section 1605(a)(2), thus

"This test would apply to all the exceptions which I have stated. I would stress particularly the necessity that the dispute should arise properly within the territorial jurisdiction of our courts. By this I do not mean merely that it can be brought within the rule for service out of the jurisdiction under RSC and 11, v. 1. I mean that the dispute should be concerned with property actually situate within the jurisdiction of our courts or with commercial transactions having a most close connection with England such that, by the presence of parties or the nature of the dispute, it is more properly cognisable here than elsewhere."

Anyone would be hard put in taking issue with the argument advanced by Lord Denning for he touched wisely on the difficult problems relating to jurisdiction qua sovereign immunity litigation. The 1978 Act clearly gives statutory effect to the views expressed by Lord Denning in the Thai–Europe Tapioca case.

4.14 Difficulties in Applying Restrictive Immunity

Sovereign immunity or state immunity denotes a process whereby immunity is granted to a foreign state from the prescriptive and enforcement jurisdiction of a national authority or a domestic court. In this respect a state is given absolute immunity from being impleaded without its consent before the domestic courts of another state. Before 1900 this law prevailed in many states without question, however, in recent times many have called for the relegation to the background the currency of state immunity,[129] thus suggesting in its place the theory of restrictive immunity. These proponents of the theory of the restrictive immunity, however, have failed to formulate a criterion by which judges can be aided in its application without deviating from general international law or the law of nations.

The major problem which the courts would have to face is that the restrictive theory depends wholly on a method whereby governmental and commercial acts of states are abstractly or mechanically distinguished to determine whether to accord immunity or not. So far the approach has become cumbersome and elusive.

[129] Lauterpacht, op. cit.; Sucharitkul, op. cit.; Feldman, op. cit.; Mann, op. cit.

Even domestic courts within a given sovereign state have differed in their reasoning or quest to formulate a reasonable standard likely to be acceptable to all and sundry. And some municipal courts in a great number of countries have not even had the opportunity to consider the subject. This state of affairs, one would argue, is rightly responsible for the persistent divergence in the practice of states. Most of the states that have recently followed the restrictive immunity surprisingly are leading industrialised countries from the West,[130] while on the other hand a large majority of developing countries follow or embrace the modalities of state immunity,[131] perhaps because of shared appreciation of the innate superiority of the state, underdeveloped economic systems and the value placed, on state organs and entities as regards legal authority, ownership and representation. In other words, to these developing countries where the public sector is totally controlled by the sovereign and given greater prominence in national economic planning, the distinction between *acta jure imperii* and *acta jure gestionis* is simply meaningless or inconsequential. If this be the case, then can it be said that the doctrine of restrictive immunity has attained *opinio generis juris generalis*? I think not, for I stand in support of Professor Brownlie's position thus:

"There is certainly a trend toward a restrictive principle, but the picture contains contrary elements. At least sixteen still accept the principle of absolute immunity, according to which immunity is granted except in cases in which the defendant state has consented to the exercise of jurisdiction. Many states, including the U.S. and U.S.S.R., agree by treaty to waive immunity in respect of shipping and other commercial activities, and it could be said that such treaties assume a broad doctrine of immunity or they are part of a contrary trend. Reference to treaty practice should include mention of the Brussels Convention of 1926, which subjected vessels engaged in trade owned or operated by foreign states to the local jurisdiction as if they were private persons. This Convention received only thirteen ratifications and cannot be regarded as of general significance."[132]

Lord Denning also argued forcefully in Rahimtoola v. Nizam of Hyderabad that "there is no uniform practice. There is no uniform rule. So there is no help there." Dr. Helmut Steinberger in his learned article also argued that

"Similar provisions, with some variations, in the United States, British and Canadian Acts (respectively, see 1605(a), Sec. 5 and Sec. 3), however, if applied to conduct *jure imperii* of the foreign state will meet objections under general international law. So far, despite lower court decisions under the United States Act in Letelier v. Republic of Chile, 488 F.Supp. 665, 688 DDC 1980 and De Sanchez v. Central Bank of Nicaragua, 515 F.Supp. 900, 914, such application does not have the support of state practice sufficiently universal to allow derogation from general international law."[133]

In view of the fact that the international order is horizontal in structure,[134] an imposition of state legislation couched in simplistic terms wholly influenced by sentiments lacking of sufficient state practice will prompt resentment and disrepute. In this respect there is bound to be a conflict between the horizontal order and the vertical order. If this persists, the ratification of an international agreement

[130] See I. Brownlie, op. cit., at pp. 323–45; ILC Report (1986).

[131] See generally the ILC Report (1982, 1984, 1986).

[132] I. Brownlie, op. cit., p. 329.

[133] Encyclopedia of Public International Law (1987) p. 440.

[134] Sornarajah, op. cit.

on sovereign immunity will become difficult.[135] The various legislation passed in the U.S., U.K., Canada, Pakistan, Australia, Singapore and South Africa in respect of the restrictive doctrine lack sufficient universal practice and therefore cannot be characterised as representing the new order or the law of nations by which all nations of the world could be bound, in as much as the doctrine lacks the two constituent elements of customary international law, that is corpus and animus.[136] The concept, arguably therefore lacks a hallmark of consensus on the international plane.

4.14.1 Difficulties Associated with Political Acts of States

Political acts of independent foreign sovereign states in terms of legislation and unilateral policies cannot be questioned or pronounced upon by domestic courts. These political acts of states fall under the rubric *act of state* and therefore preclude domestic courts from inquiring into the validity of these said acts done within the territory of foreign states. The Act of State, however, would not apply in respect of issues relating to crimes against humanity or serious violation of human rights where international jurisdiction or universal jurisdiction is readily assured. As it may be recalled, the Act of State doctrine was applied in Banco Nacional de Cuba v. Sabbatino[137] although it appeared Cuba violated international law. But in this light, the violation was not that serious as to be characterised as violating *jus cogens*. The court, however, changed its position in Alfred Hill, notwithstanding the fact that the two cases appear similar in many respects.[138] In spite of the fact that the restrictive doctrine is gaining ground, it cannot be applied in respect of issues relating to political acts of states. The growing demand on states to improve the quality of lives of their citizens has prompted most states in the developing world and in the centrally controlled economies to become state traders, where by some happenstance political and commercial decisions more often than not get intertwined. In this regard the concept of

Sovereign immunity interacts or merges with the act of state doctrine, thus weakening the effective application of the doctrine of restrictive immunity which is wholly based on the distinction between *acta jure imperii (actes de puissance publique)* and *acta jure gestionis (actes de gestion)*. Professor Fawcett explains the problem as follows:

"First imperium denotes legal capacity, under constitutional or international, to perform an act of state or conclude an international agreement; but the performance of a non–sovereign *act jure gestionis* may also be in the exercise of a public function."[139]

Here Fawcett is suggesting that the "demarcation between the political and economic activities of the state have become blurred."[140] Granted this, then can a

[135] So far it is becoming quite difficult for all countries to agree as to how immunity is to be restricted. The 1986 ILC Report supports this argument.

[136] See Bin Cheng (1965), 5 Indian Journal of Int. Law, pp. 249–250.

[137] (1964) 376 US 398, 428.

[138] (1976) 425 US 682.

[139] Fawcett (1948) xxv BYIL, p. 35.

state be sued before foreign courts if a policy taken in its territory was geared towards the protection of its citizens and therefore amounts to *acta jure imperii* but at the same time also amounts to a breach? The answer is in the negative but the House of Lords and the Court of Appeals seemed to rule otherwise. A careful reading of Trendtex shows that the letter of credit was *prima facie* a commercial act, however, the government policy to slow down the shipment of cement to Lagos in order to avoid the cement being destroyed by sea water and thus rendered useless was a governmental act. The issue raised herein was also brought up in the case of I Congreso del Partido; there the Cuban government argued that the dispute did not have any significant relationship with Britain and that the arrest in question was in fact prompted by an *act jure imperii* of the Cuban government which cannot be questioned in the courts of Britain.[141] The House of Lords ruled that immunity be denied to Cuba, but somehow looked beyond the nature of the contract or transaction,[142] which Dr. Mann had referred to as "a type of immunity *ratione materiae et personae*, a sancrosanctity of a foreign act of state in the guise of personal immunity."[143] But in reality as it may be recalled the House of Lords was just trying to be objective in its quest to offer cogent reasons for the judgment.

Arguably, in the absence of a coup d'etat in Chile, the Cuban government would not have interfered with the delivery of the cargoes. Similarly, without a coup in Nigeria against Gowan, perhaps everything would have gone very well with the cement contract. The decisions in Spacil v. Crowe[144] and in IAM v. OPEC[145] show how difficult issues relating to political acts of states can be. The position that was taken by Lord Denning in Rahimtoola v. The Nizam of Hyderabad, although followed the doctrine of restrictive immunity, but somewhat seemed at the same time to support invariably the decisions of Judge Choy and Wisdom J, respectively.[146] It is submitted that given the complex nature of these cases and the troubling question of political acts of states, the distinction between *acta jure imperii* and *acta jure gestionis* appears woefully inadequate for it is simply a halfway house legal doctrine which may require, some would say, albeit a high standard of judicial statesmanship.

4.14.2 Thoughts on Nationalization and Restrictive Immunity

It is cumbersome if not impossible to apply the doctrine of restrictive immunity to the act of taking PROPERTY by a sovereign state in its own territory, because the essence of the act of state doctrine is to prevent the making of an inquiry by one

[140] Ibid.
[141] I Congreso del Partido (1977) 1 Lloyds Rep 536.
[142] Ibid.
[143] Mann (1982) 31 ICLQ 573, 574.
[144] (1974) 480 F.2d 614.
[145] (1981) 469 F.3d 1354.
[146] Spacil v. Crowe (1974) 480 F.2d 614; IAM v. OPEC (1981) 469 F.3d 1354.

state into the validity of the public acts of another state.[147] Modern developments in this area of the law are far from certain and some courts have rendered conflicting decisions not in the least helpful. One important issue that must be carefully grappled with, however, is whether nationalisation by a foreign sovereign country can be characterised as commercial act or sovereign act in a foreign court. This problem, as a matter of fact, has given English and American courts food for thought but will certainly not fade away. An argument or theory which has failed to find favour with scholars[148] and perhaps some courts is that nationalisation be regarded as a commercial act[149] based on the presumption that the initial agreement giving birth to the investment or transfer of technology is the sole underlying factor that must be considered, since it entails the meeting of the minds rather than the political act in respect of the nationalisation.

The FSIA, for example, denies immunity to states "where rights in property in violation of international law are in issue."[150] A similar position was taken by Lord Denning in the I Congreso but in an earlier case of Uganda Co. Holdings Ltd v. Government of Uganda,[151] Donaldson J followed the modalities of the act of state by refusing to express any opinion specifically on the validity of the purported legislation passed in Uganda. And in 1978 Duff J dismissed a charge against Libya in Carey v. National Oil Corporation[152] in which the quest by the plaintiff was simply to characterise the Libyan action in issue as *acta jure gestionis*. These issues regarding nationalisation are therefore far from settled and there is no authority as to whether the doctrine of restrictive immunity can be of help to judges in respect of governmental actions of foreign states clearly taken within their borders. These difficulties, I believe, might have prompted Sornarajah to argue thus:

"American judicial opinion is divided on whether immunity should be attached to a foreign nationalisation decree. The FSIA's direction that a 'taking in violation of international law' should not be protected by immunity is not helpful for the obvious reason that there is little unanimity as to what amounts to such taking."[153]

The application of restrictive immunity in determining issues respecting nationalisation is simply inadequate and likely to create harassment, which means the nature test coupled with the distinction between sovereign and governmental acts have become totally redundant or ineffective. So far it appears that legislation in respect of resolving the problem of sovereign immunity has met with difficulties.[154] Thus, if all states resort to legislation without acceding to an international

[147] Brownlie, op. cit. at pp. 507–8; See also Munch, (1959 III) 98 Hague Recueil; R. Wallace, op. cit. at pp. 48–50; Starke, An Introduction to International Law 1994, chapter 4.

[148] Sornarajah, op. cit., pp. 671–676.

[149] Ibid., pp. 673–675.

[150] FISA: Section 1605(a)(3).

[151] (1979) 1 Lloyds LR 481, 488.

[152] (1978) 453 F.Supp. 1097 (SDNY).

[153] Sornarajah, op. cit., p. 673.

[154] See for example Senator Mathias' bill – S. 1071 [131 Cong Rec S 5370, 3 May 1985]. See also Mr. Glickman's bill on 31 July 1985. See also Fox (1985) 34 ICLQ 115

agreement, what then becomes of the world? The end result would be conflict of laws and perhaps its attendant problems of forum shopping. It is possible also that every country would develop a different method or approach in classifying governmental acts and commercial acts. In this regard, confusion would become the order of the day.

Furthermore, which of the many interrelated governmental organs or entities can be categorised into separate compartments to qualify for immunity and what about the thorny question regarding indirect impleading of states? It would be most expedient if municipal court judges are given a latitude of freedom to put their legal reasoning to work so as to allow the law to grow instead of limiting them by the effect of regional and locally couched legislation geared towards the protection of the individual trader or corporations. Arguably, the doctrine of restrictive immunity is in need of careful development and therefore not a panacea to resolving these complex problems apparently created by the increase in trading activities of states. The approach followed by Lord Denning in laying bare the shortcomings of absolute sovereign immunity[155] in English practice, particularly in Trendtex[156] will certainly help promote the development of the law of sovereign immunity. Given the difficulties associated with the application of the doctrine of restrictive immunity, common sense will certainly not be offended to conclude that restrictive immunity needs further in–depth study before states can be duly justified in throwing their support behind it.

In the United States, for example, there had been a call that the 1976 Sovereign Immunity Act be amended. Senator Mathias' bill, S 107 (131 Cong Rec S 5370, 3 May 1985) and Mr. Glickman's bill on 31 July 1985 are signs of the drawbacks or dissatisfactions associated with the said 1976 Act.

In the United Kingdom, the issue in Alcom undoubtedly prompted British judges and scholars to take another hard look at the prospects of legislation. And this in the main has been well analysed by Lady Fox, in her exposition on the problem. Furthermore it is on record that members of the International Law Commission have disagreed on the question whether the rule of absolute immunity be discarded or allowed to exist as a rule of customary international law. The draft articles therefore represent a compromise between absolute and restrictive immunity doctrines. In short, the legislative instruments passed on state immunity in the USA, UK, Singapore, Pakistan, South Africa, Canada and Australia represent in many respects how international law is understood in these countries. These legislative instruments which are now in place and wholly predicated on the doctrine of restrictive immunity cannot therefore be accepted as evidence of general international law. It is apposite, therefore, that a distinction be drawn between these national instruments and customary international law, thus while one is vertical in nature, i.e., domestic law, the other is *prima facie*, public international law, and therefore horizontal in nature. Thus to a candid mind, these national instru-

for her thorough analysis of the problem. See also generally (1986) Final Report of Dr. Sucharitkul.

[155] Sinclair, op. cit., pp. 150–159.

[156] (1977) QB 529 Court of Appeal per Lord Denning.

ments simply represent the *opinio individualis juris generalis* of each of the seven countries mentioned above. In sum, the doctrine of restrictive immunity is a doctrine of dubious provenance coupled with a lot of uncertainties. Certainly municipal courts will be better off without it.

5 Private Suits Against African States in Foreign Courts

5.1 Preliminary Observations

The currency of the concept of restrictive or relative immunity seemed not to have found favour with African countries, except the very few,[1] currently seduced by the seemingly growing appeal of the restrictive theory, which has now become well grounded in the practice of states in the Western world.[2] Most of these African countries have turned deaf ears to the call to cross carpet because of the fact that municipal courts in these countries have not had ample chance to consider the main issues relating to restrictive immunity and incidentally the jurisprudence of these countries remains silent or appears not to give room or allowance that the sovereign be sued in her own court.[3] Some private claims in these countries of late, however, have been preferred against sovereigns before their own courts specifically in the spheres of civil rights, tort claims and declaratory adjudication, but it would appear that such claims are not that popular in these countries since one runs the risk of being silenced by the coercive apparatus of the power of the sovereign,[4] which knows no internal or external superior. In fact, most African countries have a very conservative view of the traditional notion of state immunity because these countries believe steadfastly that international law is based on the patent principles of state equality clearly derived from the concept of sovereignty but not subjection.

The position of the Third World was well articulated by Venezuela in a reply to the questionnaire sent to its foreign ministry by the International Law Commission thus:

"Venezuela also expressed concern at the fact that the Commission had opted for a system which allows numerous exceptions to the sovereign immunity of states and their prop-

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[1] See The Current Practice of Egypt, South Africa, Malagasy and Togo: But it would appear Egypt was the first of countries in Africa to embark on the bandwagon of restrictive immunity.

[2] See the Report of The International Law Commission: From 1979–1988.

[3] J.H. Price, Political Institutions of West Africa (1975); Sanders, International Jurisprudence in African Context (1979); Nkrumah K., Class Struggle in Africa (1981): Premobilised authoritarian government became more pronounced in Africa coupled with military dictatorship: The Amin Regime, the Ethiopian Revolution, etc., are good examples; Dubois, W.E.B., The World and Africa (1972).

[4] Minogue, M., and Molloy, J. (ed), African Aims and Attitudes: Selected Documents (1974); T.O. Elias, Africa and the Development of International Law (1988), pp. 106–117; Nkrumah, Dark Days in Ghana (1967); J. Waddis, Armies and Politics (1977).

erty. This detracts from the general principle that states are immune among themselves and, in the opinion of Venezuela, is prejudicial to the developing countries, where owing to the lack of private capital the state has to undertake diverse and varied activities related to the international economy and commercial relations. In this connection, it was stressed that the developing countries should endeavour to ensure that, in the final text, the exceptions to or limitations on the sovereign immunity of states and their property are fewer in number or lesser in scope."[5]

Given the political changes that have taken place after the Second World War coupled with the radical change in the functions of the state particularity in the Third World, most of these states have taken to trading in the light of the paucity of finance capital in order to promote the welfare of their citizens. The position taken by Venezuela is therefore a correct representation or a true picture or characteristic of the Third World. These Third World countries have become state traders because governments in these countries are regarded as the sole providers of goods and services.[6] Indeed, one would argue that governmental functions in this connection are not limited to only military affairs, foreign affairs, administration of justice and matters of education but also encompass such functions as trading in goods and services, banking, shipping, airline services, postal services and other important commercial activities. These manifestations are clearly expressed in African countries where the government is given greater prominence in national economic planning except perhaps in South Africa, where capital is readily available and amply supported by her well established capital market and economic structure.[7] Efforts therefore to accelerate economic prosperity in order to promote political stability can be designated logically as the drive behind the reason why the Third World and particularly African countries have entered the market place. If this be logically tenable, then one will certainly be hard put to take issue with the reason why African countries have become very conservative in the call that sovereign immunity be restricted. It is worth noting, however, to point out that, in addition to the Third World, some countries in the West and the East have also taken to trading as a means of providing revenue for their treasuries. This is well explained in the words of Professor Friedmann when he argued thus:

"The principle of international law that foreign government cannot be held subject to the jurisdiction of any municipal court of another country, because such assumption of jurisdiction would violate the principle of sovereign equality of the nations, has increasingly been strained, as one government after another has proceeded to engage in commercial transactions with international ramifications. Such activities and responsibilities extend far beyond the Sino–Soviet bloc. For example, the major shipping lines of Italy are government-controlled; and it is almost forgotten that during and following World War I, the United

[5] International Law Commission's Report Vol. II part one 1988, p. 90.

[6] This is common with most Third World countries hence the position advocated by Venezuela is a correct representation of the situation in Third World countries. Lack of capital and the prevalence of premobilised political systems may be responsible for the dominance of the government in all spheres of commercial life.

[7] South Africa has a well established stock market and capital market and many countries have invested heavily in this country. The sanctions levied on South Africa and the number of countries with investments in the country could be taken as an example. See Dugard, International Law 1994 p. 20.

States Merchant Navy was state–owned. Certainly, the once prevalent theory that a state exercised government activities proper only as long as it did not enter trade has long been abandoned. Even in the United States, it has been repeatedly held that the exercise of economic and commercial operations is as much a proper governmental activity as any of the more traditional government functions."[8]

True, the doctrine of absolute immunity became an unchallenged jurisprudence in the courts of most Western countries until quite recently when its currency was challenged or thrown into doubt[9] in America, Britain, Canada, Australia, Canada, Pakistan, Singapore and South Africa, due perhaps to the great increase in commercial activities of nation states[10] and the need to create equity and fairness on the international plane in respect of transnational business transactions.[11] It is now clear from the jurisprudence of these countries that immunity is readily available or recognised only for sovereign acts while on the other hand, it is not recognised for non sovereign acts, essentially commercial in outlook.[12] Thus while the great wind of change had prompted the West to make a momentous change to embracing restrictive theory, the Third World had consolidated its conservative views in support of state immunity, although occasionally flexible and reasonable[13] in a quest to accommodate the self–generated preference for the restrictive theory by the Western industrialised countries. A good example of a Third World conservatism is well evidenced by China's reply to the ILC questionnaire regarding exceptions to state immunity in these carefully formulated words.

"The Chinese Government maintains that the jurisdictional immunity of states and their property is a long–established and universally recognized principle of international law based on the sovereign equality of states. The draft articles on the subject formulated by the Commission need to spell out the status of this principle in international law.

"The draft articles should affirm the principle mentioned above and, on the basis of a thorough study of the practice of states, including the socialist and developing countries, pragmatically identify those 'exceptions' whose necessity and reasonableness are borne out by reality of ownership, possession and use of immovable property, ship engaged in commercial service, so as to accommodate the present state and the development of international relations, particularly international economic and commercial links."[14]

Similar positions have been taken by Indonesia, Sudan, Nigeria, Ecuador, Syria, Thailand, Brazil, Trinidad and Tobago,[15] to mention a few. It should be observed, therefore, that according to the ILC report, several developing countries have expressed strong preference for the preservation of the rule of state immu-

[8] Friedmann (1959), 24 Law and Contemporary Problems, Vol. 24, p. 352.

[9] Lauterpacht (1951) 28 BYIL 200.

[10] Friedmann, op. cit.; Sinclair, (1980 11) 167 Hague Recueil 113.

[11] See Higgins (1982) 2a Neth Int LR, 265.

[12] See the U.S. Act 1976; The U.K. Act 1978; The Singapore Act 1979; The Pakistani Act 1981; The South African Act 1981; The Canadian Act 1982; respectively.

[13] See generally The International Law Commission's Report, 1980–1988.

[14] See ILC report Vol. II part one 1988 p. 63.

[15] I. Brownlie, Principles of Public International Law 1990 pp. 327–328. IL Commissions report from 1980–88.

nity.[16] And their views in this regard cannot be ignored since the impetus to proper effective change in international law in these modern times has come from the battalion of states from the Third World.[17] Thus the resort to legislation as a means of protecting the rights of the private trader by the advanced countries of the world had in recent times precipitated an avalanche of private claims against not only African countries[18] but other countries[19] as well before foreign national authorities.[20] However, in the light of the conservative views officially expressed by African states in support of absolute immunity, these said private suits or claims, as the record shows, have been fiercely fought or challenged in such countries as Britain, America, Germany, Canada, France, Italy and Belgium. Nigeria, for example, had been sued in America[21], England[22], and Germany[23], respectively.

It is the purpose of this study to delve into private suits or claims instituted against some African states in foreign courts with the view to exploring in general why all these countries resisted these private claims or refused to submit to the jurisdiction of these foreign authorities and the impact thereof on international law. Let us now consider *seriatim* these important cases.

5.2 Evidence of Resistance to the Restrictive Rule

Nigeria before English, American and German Courts

Having already considered the Trendtex case casually elsewhere, I shall attempt again to give it further attention in the hope that one can understand why Nigeria resisted all the private claims brought against it before national authorities, namely, the United Kingdom, the United States, and the Democratic Republic of Germany, and in so doing present a complete order of events logically leading to the said suits brought against Nigeria.

In 1975, an African nation having been greatly endowed with a high-grade oil decided to embark on a prestigious project of modernisation at a breakneck speed, and thus contracted to buy large quantities of Portland Cement, a product, albeit crucial or important to the development of the infrastructure of the country. But

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[16] See Materials on Jurisdictional Immunities of States and their Property. Part V replies to questionnaires, pp. 557–645.

[17] Higgins, op. cit., p. 265. A good example could be likened unto the role the Third World played generally and specifically in the drafting of the law of the sea.

[18] D.J. Harris, International Law (1991), pp. 286–319; Cater and Trible, International Law (1991), pp. 549–699; Sinclair (1980 II) 167 Hague Recueil 113; Sucharitkul, Immunities of Foreign States before National Authorities, (1976) Hague Recueil, 1, 91.

[19] Sinclair, op. cit.

[20] E.g., Cuba, Colombia, India, China, Indonesia, Pakistan, Canada, Iran, to mention a few.

[21] National American Corporation v. Federal Rep. of Nigeria (1978) 448 F.Supp. 622.

[22] Trendtex Trading Corporation v. Central Bank of Nigeria (1977) QB 529.

[23] Yousef Nada v. Central Bank of Nigeria, Dec. 2, 1975, Provincial Court of Frankfurt.

Nigeria, without first taking pains to consider the capacity of her harbours and docks, unfortunately overbought the Portland Cement in issue. Before long, the Lagos harbour became congested with ships in queue waiting impatiently to unload. This in fact affected other essential goods being imported into the country. Still more vessels were coming in every day with others hurriedly moving towards Lagos. The Nigerian government having been placed in this difficult position in regard to the congestion at the Lagos harbour technically repudiated its contracts. This led to an avalanche of private suits brought by many suppliers in several countries. According to the records of the said transactions, Nigeria bought a total of 20 million tons of cement priced at about $1.2 billions, coupled with a promise to pay demurrage which was merged with the main contract. In response to these private suits, Nigeria pleaded that being an independent state, it could not be impleaded before a national authority and therefore invoked the maxim – *par in parem non habet imperium* or *par in parem non habet jurisdictionem* to avoid liability. These suits may be characterised as among the most enormous commercial disputes in history.

5.3 Nigeria before English Courts

5.3.1 Trendtex Trading Corporation v. Central Bank of Nigeria[24]

In July 1975 an irrevocable letter of credit worth $14 million was established by the Central Bank of Nigeria in favour of a Swiss company for the payment of 240,000 tons of cement which the said plaintiff had negotiated in good faith with an English company. The cement, per the terms of the contract, was to be shipped to Nigeria for the sole purpose of building an army barracks. The plaintiffs shipped the cement as required by the terms of the sale contract but as a result of congestion in Lagos, i.e., the port of discharge, the new military government hastily introduced a system of import controls coupled with instructions to Midland Bank to refuse payments for any shipment of cement without prior authorization. This prompted Trendtex to sue for the price of the cement, and for demurrage, respectively. At the Court of First Instance, Mocaatta J. granted Trendtex the injunction it prayed for in the amount of $13,968,190, which must be retained in the jurisdiction until further notice. The Central Bank appealed that it be immune since it was a department of state without any independent juristic personality. Donaldson J. acceded to the pleadings of the Central Bank of Nigeria and thus set aside the writ because he was satisfied with proof that the bank was a department of the Republic of Nigeria. The plaintiffs, however, were successful on appeal to the Court of Appeal. Lord Denning MR (as he then was) ruled that immunity be denied to the Central Bank of Nigeria. In his judgment he made some interesting analyses which cannot be allowed to pass away like an *ex cathedra gospel*, one such analysis can be stated thus:

[24] (1977) QB 529.

"Seeing that the rules of international law have changed and do change – and that the courts have given effect to the changes without an act Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law. It follows, too, that a decision of this court – as to what was the ruling of international law 50 or 60 years ago – is not binding on this court today. International law knows no rule of *stare decisis*. If this court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to that change – and apply the change in our English law without waiting for the House of Lords to do it."[25]

All that Lord Denning was trying to put across was that the doctrine of absolute immunity had become obsolete and that a new regime, i.e., the restrictive theory or principle, has now gained grounds to such heights as to command the need for change. And that the restrictive immunity has become part of English law. His learned colleague Shaw LJ embraced this argument with full support thus giving way to the application of the concept of restrictive immunity. Stephenson LJ on the other hand, however, took issue with Lord Denning's argument, forcefully arguing that

"It is clearly difficult if not impossible to prove that governments have acted on the 'rule' of restrictive immunity by failing to plead immunity for ordinary commercial transactions. How do you prove that the gestation of new rule is over and that it has come to birth? Or that an old rule has grown and developed into a new form?"

He further asked,

"Have civilised states agreed that the doctrine of restrictive immunity shall be binding upon them in their dealings with one another? The answer is doubtful; many have. Is there evidence that Great Britain has ever assented to the doctrine? The answer must be no."[26]

The learned judge, as can be gathered from his judgment, was in favour of a cautious approach, i.e., until such time that the doctrine of sovereign immunity is changed by the House of Lords or affected by statutory means or if need be the new regime, i.e., restrictive immunity is aided by *opinio juris*.

Has there been a change, and if so, was Lord Denning right when he observed that there has been a change? Although the judgments handed down by Lord Denning and Stephenson LJ were highly commendable, arguably, Lord Denning's position that there had been a change in international law and that the change be automatically incorporated into English law simply invites criticism and therefore cannot be commendable *de lege ferenda*, unless perhaps he was referring to a well settled regional international law or the existence of a multilateral treaty, *droit spontane* or an instant customary international law. In the absence of such assumptions, then Lord Denning appeared to have been clearly trapped in relying on a selective approach to establishing customary international law. For at the time that Trendtex came up for adjudication, the United Kingdom had not yet ratified the European Convention.[27] If this be the case, then did Lord Denning base his argument on conjecture? The answer may be in the affirmative in so far as general customary international law is created by state practice backed by certain qualifi-

[25] Ibid.

[26] Ibid. at 570.

[27] This is a fact because the Act was enacted in 1978 and thus paved the way for the European Convention to be ratified.

cations duly supported by *opinio juris*.[28] Thus a new general customary international law is formed provided there is no practice in existence that conflicts with it.[29] Arguably, restrictive immunity in this connection is not a principle of international law but rather an emerging doctrine which does not command adequate state practice except in some leading countries of the West.[30] Hence the argument posited by Lord Denning that there had been a change in the existing customary international law from absolute sovereign immunity to restrictive immunity was *ex facie erroneous* in some respect and therefore cannot stand the test of objective analysis. Dr. Villiger in his exposition of this subject matter as regards the formation of customary international law argues that,

"All states participate as equals in the formative process of customary law, and the conditions for the formation of a customary rule are such that even a state's passive conduct has to be qualified to be of any significance. If a state opposes a customary rule from the early stages on wards, the state will not be bound qua persistent objector. And if many states object, the rule will never arise."[31]

At the time that Lord Denning handed down his judgment in Trendtex, many countries of the world did offer opposition to the restrictive immunity rule[32] and even in Western Europe some countries differ from others in the application of the said rule.[33] Stephenson LJ's position in respect to the place of international law in English practice appears commendable and accurate *de lege lata*, for he felt bound not only by the previous Court of Appeal ratio in the Thai–Europe case, but also with regard to whether there had been a change in customary international law per Lord Denning's position on the subject. Certainly answers sent back in response to the International Law Commission's questionnaires show that there had not been a change in this area of international law.[34] Stephenson LJ arguably therefore was correct in his exposition on this subject matter, i.e., the issue respecting a change in international law.

Without doubt the Trendtex decision will continue to evoke mixed or doubtful reactions from lawyers, text writers and judges. In the first place, the status of the Central Bank raised an unsettled issue which defies an easy answer. Secondly, it is equally submitted that the issuing of the letter of credit was *prima facie*, a commercial endeavour but the directive given by the *de facto* government in order to avoid a disaster or possibly to serve a public interest cannot *ex hypothesi* be dismissed without any cogent reasons. Arguably, the court chose an easy way out for the three judges would have been hard put to come up with a clear authority to support the characterisation of the governmental action that was taken to ease the

[28] Akehurst, 1974 XLVII BYIL pp. 1–53.

[29] Ibid., p. 53.

[30] See the International Law Commission Report 1988, but it would appear the Asian–African Consultative Committee might have expressed some limited desire in principle to embrace the restrictive principle. But these declarations are not representative of the Third World.

[31] Villiger, Customary International and Treaties (1985) p. 39.

[32] See the International Law Commission's Report 1980–1988.

[33] See Sinclair, op. cit.

[34] ILC report, op. cit.

congestion at the Lagos port as *acta jure gestionis*, let alone the policy argument in regard to paving the way for other essential commodities to be brought into the country. If the court had concentrated on the breach rather than the transaction as was postulated by Lord Wilberforce in I Congreso, the decision certainly could have gone either way. True, those who have long advocated that the doctrine of absolute immunity had become obsolete or simply become an empty relic of tradition will embrace Lord Denning's judgment without question coupled with a comforting applause. However, a careful analysis will show that he failed to offer any adequate support for the reason why he chose incorporation over transformation. The only argument he offered was that incorporation would pave the way for the courts to quickly recognise a change in international law.[35] With the greatest respect, such an argument is not convincing and therefore open to question. Quite apart from this, it is submitted that the incorporation theory in its absolute form is limited in reality by the operation of the concept of *stare decisis*, which although might not be accepted in international law is ex hypothesi accepted in English law.[36] Prior to the decision in Trendtex, for example Lord Denning had ruled in Thakrar v. Home Secretary[37] that, "in my opinion, the rules of international law only become part of our law in so far as they are accepted and adopted by us."[38] His position therefore in Trendtex simply contradicts his earlier position and that of Lord Atkin's judgment in Chung Chi Cheung v. The King,[39] that,

"The courts acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it, they will treat it as incorporated into domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals."[40]

Again, Lord Denning's position in respect of the doctrine of incorporation runs counter to Lord Macmillan's judgment in the Cristina,[41] where he held that municipal courts must be eclectic in acknowledging customary international law as part of domestic law, and that such a step must be undertaken only if there is adequate evidence to support the fact that the custom in issue had attained the hallmark of consent. Can it be said therefore that the rule of restrictive immunity had attained a hallmark of consent amongst civilised states of the world at the time the Trendtex decision was handed down? The answer is in the negative for no one can attest to the existence of a normative rule at the moment.

It is submitted that the Appeal Court in Trendtex was faced with two *rationes decidendi* and arguably the position taken by the said court on both the first ratio and the second ratio appears less convincing and intellectually unbalanced, for general international law, *ex abundanti cautela* does not lend support to some of the crucial arguments made in upholding the restrictive principle.

- That the status of the Central Bank was *prima facie* inconclusive.

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[35] Trendtex (1977) QB 548–557.

[36] See T. Ingman The English Legal Process, 5th Ed. (1994).

[37] (1974) IQB 684.

[38] Ibid., at 701.

[39] 1939 AC 160.

[40] Ibid. at 167.

[41] 1938 AC 485.

- That the Central Bank of Nigeria, be considered *pari pasu* to the status of the Bank of England is *non sequitur* for these banks operate in different political systems – one English – with high subsystem autonomy and the other Nigerian – with premobilised authoritarian system.
- That Lord Denning's argument in respect of the fact that international law has changed simply begs the question. Stephenson LJ's position on this very issue therefore appears to be the correct approach.
- That evidence is abound worldwide in support of the view that entities with independent juristic personality within a polity be duly entitled to immunity cannot be disputed. Thus the fact that an agency is a separate entity per se is not conclusive that it be denied immunity. Much therefore depends on the circumstances and the comparative data before the *lex fori*.
- That the court should have shed some light on the internal crisis which prompted the breach.

It is hard to tell as to what the outcome would have been if the case had been adjudicated before the House of Lords. Obviously, settling the case on the spirit of *entente cordiale* was preferred to the rigorous process of litigating the matter before the House of Lords. In the end Nigeria settled the suit by paying Credit Suisse $8 million. In the main, Lord Denning's application of the nature test and the argument in respect of a change in international law gave Trendtex the winning goal. In this respect, Lord Denning abandoned the state–voluntarist view and quickly embraced the universalist view.

5.3.2 Nigeria before German Courts

Nonresident Petition v. Central Bank of Nigeria District Court, Frankfurt, Judgment of December 2, 1975 – Docket No. 3/8 0 186/75.

In Youssel M. Nada Establishment v. Central Bank of Nigeria,[42] the petitioner entered into a sale contract to supply 240,000 tons of cement to the Ministry of Defence of Nigeria. The contract specified that an irrevocable, transferable, divisible and confirmed letter of credit be opened in favour of the petitioner. In 1975, the Central Bank of Nigeria, the respondent, opened an irrevocable letter of credit, as required per the terms of the said contract, duly payable in Austria at the plaintiff's bank. Furthermore a demurrage was agreed thereof "without any limit" upon proper presentation of validly specified commercial documents. The petitioner delivered more than half of the total consignment ordered, i.e., 140,000 tons of cement between the period of 17th April and 1st September 1975. The purchase price of this partial delivery was paid, as required by the command of the contract. But as a result of congestion at the Lagos harbour, the Nigerian Ministry of Transportation introduced a policy restricting the number of ships carrying cement into Nigeria, and this gave the Nigerian port authorities the power to deny suppliers the right to ship cement to Nigeria without first giving two months' prior notice. The plaintiff thus was not allowed to supply the rest of the consignment of cement

[42] Yousef Nada v. Central Bank of Nigeria, Dec. 2, 1975, Provincial Court of Frankfurt.

called for in the contract. This national policy prompted the plaintiff to sue the Central Bank for the demurrage that became due because of the delay at the Lagos harbour and any other future delays relating to the ten ships waiting to unload. The plaintiff also sued for incidental cost for selling the undelivered cement to other buyers below the contract price. In view of these infractions, the suit regarding the attachment of the respondent's funds was granted. The respondent, the Central Bank of Nigeria, challenged the attachment order on the grounds that the court lacked jurisdiction and that the venue of the court was an improper one. The district court was quick in rejecting the said defences based on the following formulated reasons:

"The German court has jurisdiction, and venue was properly laid for the attachment. Contrary to respondent's contention, the respondent is not immune from the jurisdiction of German courts. According to Section 20 of the GVG, German jurisdiction does not extend to persons who, in accordance with customary rules of international law or on the basis of treaties or other provisions of the law, are exempt from it. In the instant case, these prerequisites for an exemption are not present. We need not decide whether, based on the responsibilities assigned to it, the respondent discharges sovereign functions, and whether, under Nigerian law the respondent acts as a juristic person and carries out in whole or in parts the authority of the state in fulfilment of responsibilities under public law. The petitioner correctly points out that in accordance with general case law, legal publications, and writings on international law, separate legal entities of a foreign state enjoy no immunity."[43]

The German court followed the doctrine of restrictive immunity by making a distinction between governmental activities *acta jure imperii* and non–governmental activities *acta jure gestionis*, and concluded that there were no recognised rules of international law which precluded municipal courts from exercising jurisdiction over suits against a foreign independent state in regard to its non–governmental activity. The approach of the German court seemed to follow the current trend in the Western world which had been slanted towards the acceptance of the restrictive immunity without first delving specifically into the practice of states the world over as to whether there had been a change in customary international law. Secondly, Section 23 of ZPO should not have been applied to foreign states primarily because of historical reasons since in essence the said act was specifically enacted to accord immunity to foreign states from the jurisdiction of German courts.

Thirdly, a critical review of events relating to the formation of the sale contract would reveal that the case had no close connection with Germany since the contract in issue was concluded outside Germany by Liechtenstein Trust, with the request that payment be made in Austria. Subsequently, however, the letter of credit was amended in order to pave the way for payment to be made in Germany as well.

Fourthly, the court failed to consider in detail, in respect of international law as to whether a foreign creditor had the right to sue Nigeria in Germany, and if so, whether German public interest was at stake. In Verlinden BV v. Central Bank of Nigeria, a non–resident company sued Nigeria before U.S. courts out of the same cement contract in issue, the court ruled that the alien company failed to show suf-

[43] 1977 International Legal Materials, p. 502.

ficient direct effect as required under Section 1605(a)(2) of the FSIA. As matter of principle the U.S. court took into consideration the effect of due process and the specific command of the FSIA to deny jurisdiction.[44] On the other hand, however, the German court failed to take into consideration the internal crisis that prompted the breach and did not go as far as possible to examine the interest of the alien vis–à–vis the interest of the republic of Nigeria in respect of customary international law.

It ought also to be clearly emphasised that the argument posited on point of law as regards Nigeria's foreign reserve was inconclusive per the order of attachment in respect of the plea made for immunity by Nigeria. Furthermore, the exercise of jurisdiction does not mean that enforcement measures be taken. It would have been most prudent if the German court had taken pains to delve into what assets were available and whether as a matter of law these assets were dedicated to the *jure imperii* of Nigeria or not. Simply put, the Frankfurt court failed to cast light on these important issues and thus consecrated an anomaly that once an entity is characterised as independent it can never claim immunity. While on the other hand, if an agency is characterised as an alter ego of the state, immunity is readily available, without first determining as to whether the status of the said agency is conclusive or not. Certainly the overlap of international law and national laws complicates the whole issue of state immunity in this area of the law. It is submitted, however, that the court erred in attaching Nigeria's assets for such a measure lacked *usus* and therefore contrary to general international law.

5.3.3 Nigeria before American Courts: Part One

While in the United Kingdom and Germany the Central Bank was designated as the principal defendant, however, in the U.S., the plaintiff, a Delaware corporation, jointly sued or commenced legal action against the Republic of Nigeria and the Central Bank of Nigeria, with its principal place of business in Lagos, then the capital of Nigeria. In other words, in National American Corporation v. Federal Republic of Nigeria and Central Bank of Nigeria,[45] the Nigeria government and the Central Bank were jointly sued to recover in excess of $14,000,000, an amount representing an unpaid balance in consequence of a failed cement contract and unpaid demurrage charges due thereunder the said contract. The complaint alleged *inter alia* that Morgan Guaranty had been expressly notified by Central Bank to refuse payment for cement deliveries and demurrage charges unless plaintiff could prove that it had obtained two months advance notice of each ship designated to transport cement to the Lagos harbour, with valid documents confirming the express order in issue. The plaintiff thus construed Nigeria's actions as an anticipatory breach and therefore sued praying that funds of Nigeria government on deposit with Morgan Guaranty be attached. The defendant thereafter filed a cross

[44] See FSIA, 1605(a)(2).

[45] (1978) 448 F.Supp. 622. See the International Law Reports regarding the Calculation of the Demurrage, pp. 161 V,D)KID, Vol. 63.

motion that being a sovereign state, it cannot be impleaded and that the attachment be vacated. Weinfeld J held that

"The corporation had presented a prima facie case upon its claim and was entitled to an attachment that the fact of the agreement was signed by the Ministry of Defence on behalf of the Nigeria government did not automatically entitle the defendants to sovereign immunity; and that partial assignees of the corporation's claim were not indispensable parties."[46]

Many issues were raised in this important case, but it would be expedient to concentrate on the three most important ones, namely, the basis of jurisdiction, sovereign immunity defence and the act of state defence.

As may be recalled, Section 1330 of the FSIA clearly confers jurisdiction on federal district courts without any limit on the amount in controversy. Thus a foreign state is immune as provided under 1605–1607. But it would appear that the 1976 FSIA came into effect after the suit at hand was commenced, hence the Act cannot be applied. The judge therefore simply took jurisdiction of the case not on *in personam* basis but rather on *quasi in rem* basis.

Nigeria, in furtherance of the quest to challenge the suit, pleaded that it be accorded immunity on the grounds that the funds held by Morgan Guaranty belong to the government of Nigeria and that the funds were to be used for a governmental purpose, i.e., to satisfy governmental obligations. The court in reply relied on such authorities as Aero–Trade Inc. v. Republic of Haiti,[47] Aero–Trade Inc. v. Banque Nationale de la Republique D;Haiti,[48] to deny the request for immunity.

Furthermore, it was argued on behalf of Nigeria that the action taken as a result of the congestion at the Lagos harbour was an act of state in a form of public policy, in order to avoid a national disaster, in so far as the congestion had created shortage of other essential commodities in Nigeria. Arguably, this defence may stand the acid test, but this area of the law is most complicated for the relationship between state immunity and act of state is not at all clearcut.[49] All that the Nigeria government was trying to offer in support of immunity was the issue that was overlooked by the appeal court in Trendtex but fully analysed in the I Congreso Case. Thus in the National American case the defendant was trying to argue that although the letter of credit was a commercial act, the governmental order of two months prior notification in respect of shipment of cement to Nigeria ex hypothesi was a political decision taken in Nigeria and therefore cannot be reviewed before a foreign municipal court because the decision was taken to protect national interest. Should a novel approach be followed wholly different from the doctrine of restrictive immunity because the argument cuts into the heart of the whole controversy? The answer perhaps is yes. However, in spite of the Act of State argument, the judge ruled in favour of National American Corporation.

At the same time that the alluded case was being litigated Chenax and Nikkei alleged similar plights and therefore both made an application to seek an intervention under rule 24(b) Fed R Civ Proc. But both National American Corporation and the Republic of Nigeria opposed their intervention. Judge Goetted ruled that

[46] (1977) ILM, p. 505.
[47] (1974) SDNY 376 F. Supp. 1281.
[48] (1974) SDNY 376 F. Supp. 1286.
[49] Higgins, op. cit., p. 275.

"While the contracts all relate to the purpose of cement, their legal and factual disparity, the necessity of additional proof due to the separate documentation, and the potential prejudice to the existing parties combine to cause the court, in its discretion, to deny intervention under rule 24(b)."[50]

An intervention of this nature will certainly fail without first consulting with the original litigating parties in respect of any potential prejudice to their rights. The judgment leaves much to be desired because the attachment of Nigeria's foreign reserve was contrary to general international law. The judge simply ignored the issues respecting mixed activity of states that it was an internal crisis which prompted the import control.

Table 2. Calculation of the Demmurage

Vessel	Tonnage carried (MT)	Arrival	Departure	Number of Days on Demurrage	Total
Central Life	500	8/27/75	8/7/76	347 less 1 lay day = 346 days	$ 60,550
Naimbana	2,730	9/4/75	11/23/75	81 less 3 lay days = 78 days	$ 74,529
Jotina	5,600	9/12/75	1/25/76	136 less 6 lay days = 130 days	$ 254,800
Rio Doro	10,500	10/6/75	7/10/76	279 less 10 lay days = 269 days	$ 988,575
Cherryficld	10,800	10/8/75	6/12/76	249 less 10 lay days = 239 days	$ 903,420
Joboy	7,500	9/22/75	1/24/76	125 less 8 lay days = 117 days	$ 307,125
Total Demurrage Duc					$2,588,999

5.3.4 Nigeria before American Courts: Part Two

Texas Trading and Milling Corporation v. Federal Republic of Nigeria,[51] as it is well known also grew out of the 1975 Nigeria Cement Contract, and therefore deserves some attention. These four appeals appear remarkable in all respects and thus followed the same fact pattern already considered in National American

[50] (1977) ILM p. 514 cert.

[51] (1981) 647 F.2d 300, denied 71 LED 2d 301 1982.

Corp. v. Federal Republic of Nigeria. The four of the 109 contracts were negotiated with American companies and these companies were Texas Trading and Milling Corp., Decor by Nikkei International Inc., East European Import–Export Inc. and Chenax Majesty Inc. In simple terms these four plaintiffs were trading companies specifically involved in the business of "buy and sell," but were not industrial corporations. These four companies sued Nigeria because Nigeria repudiated the cement contract in question. And in response to the suits, Nigeria invoked the sovereign immunity plea. Judge Kaufman in a lengthy judgment rejected the plea for immunity as follows:

"Finally, current standards of international law concerning sovereign immunity add content to the 'commercial activity phrase of the FSIA. Section 1602 of the Act, entitled Findings and Declarations of Purpose,' contains a cryptic reference to international law, but fails wholly to adopt it."

He continued:

"Under each of these three standards, Nigeria's cement contracts and letters of credit qualify as 'commercial activity.' Lord Denning, writing in Trendtex Trading Corp. v. Central Bank of Nigeria 1977 2 WLR 356 369, 1 All ER 881, with his usual erudition and clarity, stated: 'If a government department goes into the market places of the world and buys boots or cement – as a commercial transaction – that government department should be subject to all the rules of the market place.' Nigeria's activity here is in the nature of a private contract for the purchase of goods its purpose to build roads, army barracks, whether is irrelevant. Accordingly courts in other nations have uniformly held Nigeria's 1975 cement purchase program and appurtenant letters of credit to be commercial activity and have denied the defence of sovereign immunity we find defendants activity here to constitute commercial activity."[52]

Nigeria therefore failed in her attempt to challenge the growing appeal of the rule of restrictive immunity which then had already become firmly grounded in American practice. The court simply chose to apply the FSIA to the facts of the case coupled with the well–known distinction between governmental and non–governmental activities. One important observation worth making, however, is that if the Central Bank qualified as a public entity without any independent juristic personality, then it may arguably claim immunity under customary international law *ratione personae* in respect of its activities qua Nigeria *acta jure imperii*. But here it would appear that both the Central Bank and the government of Nigeria were all joined in the suit and therefore the problem of delimiting the sphere of *acta jure imperii* vis–à–vis the conduct of the Central Bank never came up. No state can be forced to submit to the jurisdiction of a foreign court without its consent and the American concept of minimum contact[53] could be described as an *opinio individualis juris generalis*, an American self–imposed local international law concept earlier on developed by its courts which arguably runs counter to general public international law. The judgment on the whole was superficial and questionable without any convincing supporting authority. It would have been in order if the court had seriously considered the nature of the contract and the nature of the breach.

[52] (1981) ILM p. 630.

[53] (1945) 326 US 310.

5.4 Uganda before English Courts

In the Uganda Co. (Holdings) Ltd. v. the Government of Uganda,[54] the plaintiff, an English company, instituted a *mareva* injunction in order to prevent or enjoin the defendants from disposing a consignment of tea stored in a warehouse in London. This was followed by another application seeking leave to issue a writ for service out of the jurisdiction, on the defendants in Uganda. After further review both applications were allowed.

The plaintiffs, per the terms of the writs, claimed an indemnity in the amount of £240,185.48 which they had paid as guarantors of the Ugandan company (borrowers). The plaintiffs also demanded half the said amount as contribution due between co–guarantors – because their counterparts, i.e., the co–guarantors in this endeavour had failed to make half the contribution due. The defendants were sued because the plaintiffs claimed that the government of Uganda had succeeded to the liabilities of the Uganda subsidiary by virtue of the compulsory government acquisition decrees passed during the reign of Idi Amin. Consequently, the Ugandan government was impleaded. The defendants in turn sought to set aside the writ and all subsequent proceedings on the grounds that being a foreign government, they cannot be impleaded before English courts. Donaldson J ruled in favour of the Ugandan government thus:

"(1) The decisions of the Court of Appeal in Thai–Europe case and the Trendtex case were not reconcilable and the court had to elect which authority to follow, p. 486, col. 2.

(2) The decision in Thai–Europe would be followed since that was a decision which was based on at least one and possibly three previous decisions of the Court of Appeal and was a decision which asserted the doctrine of precedent and therefore had more weight as a precedent. See p. 486, col. 2, p. 487, col. 1. The decision in Trendtex case broke new grounds in two respects in that the first was the decision that the doctrine of restrictive sovereign immunity applied to actions *in personam* and the second was that there was an exception to the rule of stare decisis and therefore that decision carried less weight in that it denied or modified the doctrine of precedent. See p. 487, col. 1.

(3) The application would be determined in favour of the defendant. See p. 487, col. 1.

(4) Even if the decision in the Trendtex case had applied, the application would still have been determined in favour of the defendants since the litigation would have involved the court in expressing an opinion on the meaning and effect of the Ugandan legislation in a suit to which the government of that state was a party and it could not be held that the restrictive doctrine of sovereign immunity extended this far. P. 487, Col. 2, p. 488, col."[55]

The plaintiffs in this case chose a path clearly marked not to delve into the issue relating to Act of State, for if such a cause of action were taken the plaintiffs would be hard put to prove their case since domestic courts are precluded by general international law from inquiring into the validity of unilateral policies taken or legislation passed by foreign states within their territories. Quite apart from this, the Act of State doctrine is complicated and in all possibilities could create difficulties for the plaintiffs in their quest to implead the Ugandan government. Thus the case instead was pleaded only on the question of sovereign immunity without

[54] (1979) 1 Lloyd's Rep 481.

[55] Ibid., p. 481.

first inquiring as to whether the doctrine of restrictive immunity can be solely applied in respect of a political decision taken within the jurisdiction of a sovereign state. Although Donaldson J did not go as far as to explore the technical issues relating to Act of State, instead he decided rather to follow "Thai–Europe authority," because it was adequately clothed with the doctrine of precedent and therefore carried more weight than Trendtex which appears to be wrongly decided. But arguably, had Trendtex been applied it would run the risk of being challenged on many grounds and on the thorny question of Act of State which certainly would give the Ugandan government a well grounded defence on the merits. In short, such an approach would not have been a viable option because nationalisation per se is not illegal in international law. In any event, can it be conceded that Uganda violated international law for failing to pay compensation? Such an argument will certainly carry weight but again will the English court have jurisdiction since the Ugandan government had made promises of paying compensation to those affected by the compulsory acquisition decrees? The answer may be in the negative.

It is submitted that Donaldson was somewhat cautious because in Trendtex the status of the Central Bank was inconclusive for it would appear the Central Bank was an alter ego or department of the republic of Nigeria since the Central Bank acted as a stabilising agent in controlling the national currency, managing the exchange control, acts as a national treasury, pays foreign debts and finally issues notes.

Further, Donaldson J felt bound by Thai–Europe because he was doubtful as to whether the decision in Trendtex was in order without first providing evidence to support the purported change in international law. The basic problem of the case seemed to impinge on the conflict between *par in parem non habet jurisdictionem* and *princeps in alterius territorio privatus* and whether foreign decrees could be questioned in English courts. As was expected, the Uganda company holdings was appealed, but on the eve of the Court of Appeal hearing, the plaintiffs gave up their quest to pursue the suit and thus settled their claims with the new Uganda government.

5.5 Egypt before Indian Courts

In Ali Akbar v. United Arab Republic,[56] one Ali Akbah filed a suit against the United Arab Republic and the Ministry of Economy, Supplies, Importation Department of the Republic of Egypt for having violated the terms of a sale contract signed between the two of them, wherein the republic of Egypt had agreed to purchase tea from the appellant under certain delicate contractual terms. The defendant resisted the suit on the grounds that being a sovereign state, it cannot be impleaded before a national judicial authority. This was followed by a number of appeals which the appellant lost one after the other.

[56] (1966) HIR SC 230.

Finally Ali Akbah appealed to the Supreme Court of India in the hope to secure a judgment based on the currency of the doctrine of restrictive immunity. The Supreme Court, however, was not moved and therefore ruled that absolute immunity applied. The court after a careful construction of Sections 83–87B of the civil procedure code ruled that the suit was barred by Section 86 of the CCP, since the consent of Egypt must be procured before it can be sued in India.

The Supreme Court further offered the following explanations:

"Just as an independent sovereign state may statutorily provide for its own rights and liabilities to sue and be sued, so can it provide for the rights and liabilities of foreign states to sue and be sued in its municipal courts. That being so, it would be legitimate to hold that the effect of Section 86(1) is to modify to a certain extent the doctrine of immunity recognised by international law. When such consent is granted as required by Section 86 (1), it would not be open to a foreign state to rely on the doctrine of immunity under international law, because the municipal courts in India would be bound by the statutory provisions such as those contained in the Code of Civil Procedure."[57]

The court simply followed the command and effect of provision 86 subsection 1 of the CCP to uphold the decisions of the lower courts which had been based on the maxim, *par in parem nonhabet imperium*, although it would appear at that time that Egypt had already jumped onto the bandwagon of the doctrine of restrictive immunity.[58]

5.6 United Arab Republic before American Courts

In another case of Hill v. U.A.R.,[59] in which the United Arab Republic was sued for a specific legal infraction, an order was entered that the suit against U.A.R. be vacated. But for some other remaining issues relating to procedure, i.e., service of process on the U.A.R. Consul General, the case was continued where a request was made to the State Department as to whether immunity be granted. In reply the legal advisor of the State Department offered the following advice:

"It is contrary to the general policy of the Department to make a decision regarding sovereign immunity in a case the facts of which do not call for such decision. In this connection, it is noted that there is pending before the court an application for a holding that the purported service of process by the Marshal on April 24, 1959 is ineffective to bring the United Arab Republic within the jurisdiction of the court, and that decision on that question has been withheld pending further hearing by the court on May 17, 1961.

"Thus, it appears that any decision of the Department of State that it does not recognize immunity of the U.A.R. as a foreign sovereign in this case would apparently not prevent dismissal of the suit, if the court decided that under the rules of the forum there is no jurisdiction over the United Arab Republic because of ineffective service of process. See Oster v. Dominion of Canada, 144 F.Supp. 746."[60]

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[57] Cf. M.K. Nawaz, Essays on International Law, 1976, p. 323.

[58] See Sucharitkul, op. cit., pp. 251–255.

[59] (1961) SDNY No. 144–16.

[60] Ibid.

It is submitted that this aspect of the law is unsettled, hence one is burdened with the problem of determining the particular from the totality of writings on service of process as regards the person of the sovereign to resolve the problem. The main question to grapple with, however, is whether a sovereign state can be served by the mere presence of its political representative within the jurisdiction. And can the envoy or the foreign ministry refuse to accept the process? The envoy could exercise the privilege of refusing the service of process, and it would appear in English law that the authority in Duncan v. Cammell Laird and Co.[61] may still be regarded as persuasive notwithstanding the thrust and authority of the 1978 Act. But again it must be clearly stated that the Vienna Convention on Diplomatic Relations gives the diplomatic agent full immunity. Thus under general international law, a sovereign state is not under any obligation to cooperate with the forum state in respect of accepting a service of process.

5.7 Tunisia before United States Courts

In Hellenic Lines v. Moore,[62] a libel action *in personam* was filed against the Republic of Tunisia in the District of Columbia. Here, a duly filed summons was addressed to the Tunisian Ambassador to the United States, but Mr. Moore, the United States Marshal, refused to serve the Ambassador because of his diplomatic status. In a move to compel the Marshal, Hellenic Lines filed an action for mandamus in an appropriate Federal Court demanding *inter alia* that the United States Marshal be legally compelled to perform the duties of his office. The Court of Appeal in dismissing the action ruled as follows:

"Although we have held that diplomatic immunity is violated by joining a diplomatic officer as a defender to a suit, Carrera v. Carrera, 84 U.S. App DC 333, 174 F.2d 496 (1949), we have never decided whether it is violated by service of process on a diplomatic officer in an attempt to join, not him, but his sending state. There is little authority in international law concerning whether service of process on a diplomatic officer as an agent of his sending country is an attack on his person, freedom or dignity prohibited by diplomatic immunity. . . . We requested the views of the Department of State concerning the effect of service in this type of case on international relations and on the performance of diplomatic duties. The Department replied that service would prejudice the United States relations and would probably impair the performance of diplomatic functions. We conclude that the purposes of diplomatic immunity forbid service in this case. Therefore, the Ambassador is not subject to service of process and the return was adequate."[63]

It would appear in this case that the United States Department of State decided to resolve the matter by simply refusing to incur the burden of searching for the particular in an already scanty literature on the issue of service of process and discovery in international law. Again, a sovereign state has a perfect right to resist such an action because it militates

[61] (1924) AC 624.
[62] (1965) DC Cir 345 F.2d 978, 980–981.
[63] Ibid.

against the normative rules of international law. Perhaps the service could have been done through a public note.

5.8 Zaire before English Courts

In Planmount Ltd. v. Republic of Zaire,[64] the plaintiffs entered into an agreement to carry out repairs for the Republic of Zaire, on the residence of his excellency, the Ambassador of Zaire. The agreement started on a good footing only to be derailed by misunderstanding, whereupon the plaintiff Planmount Ltd. sought leave to issue a writ against the Republic of Zaire for the balance due on the contract of the said repairs. The Republic of Zaire forcefully resisted the claim by arguing that it be accorded immunity because of its status as an independent sovereign state. The plaintiffs replied that the doctrine of state immunity did not apply to private acts or commercial activities of states and therefore the request that the writ be set aside be denied. The court of first instance ruled in favour of the defendants, while on appeal the court took a different position by ruling for the plaintiffs. Lloyd J's judgment follows the restrictive approach thus:

"Assuming I am right that the defendants never had absolute immunity in English law, the only remaining question is whether, on the facts of the present case, the defendants were acting in a governmental capacity or whether they were acting in a private or commercial capacity. That is a question which often gives rise to difficulty, as it did in the Congreso case; but it gives rise to no such difficulty in the present case On the facts alleged by the plaintiffs this is a simple case of the defendants' 'mere refusal to foot the bill for the work done,' to use the language of Walter LJ in the Congreso case."

He continued:

"To my mind, it is hard to imagine a clearer case of an act or transaction of a private or commercial nature than the repairs to the ambassador's residence. The case is on all fours with the Empire of Iran case. It follows that the defence of sovereign immunity is not available. No other ground for setting aside service of the writ has been advanced in the evidence or relied on by counsel. In my judgment this is a proper case for service out of the jurisdiction under RSC Ord 11 § 1(f)."[65]

A careful reading of Lloyd J's judgment will show clearly that he was influenced by arguments posited by Lord Denning M.R. in Trendtex and Hispano American Mercantil SA v. Central Bank of Nigeria[66] and such others as I Congreso, and claims against the Empire of Iran.[67] The fact still remains that Zaire resisted the jurisdiction of the court because of its status as an international person and not because it cannot pay the balance due on the agreement.

[64] 1981 1 A 11 ER 1110.
[65] Ibid., p. 1114.
[66] (1979) 2 Lloyd's Rep 277.
[67] (1963) 45 ILR 57.

5.9 Somali Democratic Republic before American Courts

In Transamerican Steamship Corporation v. Somali Democratic Republic[68] (Somali Shipping Agency Appellants; an American shipper brought an action against Somali Democratic Republic and its shipping agency for declaratory and monetary relief, as a result of a dispute arising out of a delay in respect of a purported payment and its attendant consequences, wherefore Transamerican's ship, M.V. Klaus Leonhardt, was detained after the discharge of its cargo in Somalia, of which Transamerican alleged was costing the company about $10,000 a day. Although efforts were made to pay the amount due in question, but no action was immediately taken by the agency to release M.V. Klaus Leonhardt to avoid Transamerican incurring almost $100,000 in cost. When efforts to have this problem resolved proved unsuccessful, Transamerican sued SDR and the shipping agency in federal district court.

The court of first instance ruled that the Somalia Democratic Republic "had neither waived sovereign immunity nor engaged in commercial activities that would subject it to suit in the United States under the FSIA and therefore the Court lacked subject matter jurisdiction."[69] The court on the other hand, however, ruled that it had jurisdiction over claims against the Somalia shipping agency but not the person of the Somali republic. This prompted Transamerican to appeal against the suit joining the Somalia Democratic Republic, followed by a cross appeal by the Somali agency on the denial of its motion to dismiss.

On appeal Judge Tamm ruled that the Somalia Democratic Republic was not entitled to immunity and the argument regarding forum non conveniens and motion to dismiss filed on behalf of the agency all failed. He also stated that:

"We therefore conclude that the SDR has not sustained its burden of proving the inapplicability of Section 1605(a)(2) exception and that the Somali government has participated in commercial activity in the United States. The district court thus has subject matter jurisdiction over Transamerican's claim against the SDR under Section 1330."[70]

The republic of Somalia therefore lost her quest to challenge the jurisdiction of the court based on the doctrine of sovereign immunity which was at least walking on one leg in the practice of American courts. The judgment was of a doubtful authority since the issues were solely determined by what the *lex fori* perceived to be the law. The decision certainly was not based on *usus*.

5.10 Libya before American Courts

In Carey v. National Oil Corp.,[71] the Libyan government–owned oil company had entered into contracts for the sale of oil to foreign companies. The contract was

[68] (1985) 787 F.2d 998.
[69] Ibid.
[70] Ibid., p. 1003.
[71] 1982 International L Reports, p. 232 [(1979) 592 F.2d 673].

terminated as a result of political measures taken by the Libyan government. And the main issue was whether Libya and the Libyan government–owned corporation were entitled to immunity and secondly whether the Libyan action could be characterised to have had a direct effect within the United States, and thirdly, whether Libya per all the companies involved in this drama, and its oil company, could all be amenable to NOC's failure to deliver under the September 1973 contract coupled with the breaches of the 1974 contract and also for such other overcharges on the charter parties in this apparently difficult litigation. The damages sought were about $1.6 billion. The court ruled as follows:

"Appellants claim, most relevantly, that the events involved in this case come within the exception to immunity which allows us jurisdiction where a claim is based on 'an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States' 28 USC § 1605(a)(2). We find no direct effect in the United States here.

"We assume that Congress chose the language in the act purposefully. Section 1605(a)(2) speaks of acts which have a direct effect in the United States. The legislative history of this section makes clear that it embodies the standard set out in International Shoe Co. v. Washington, 326 US 310, 316 66 S Ct 154 158, 90 L Ed 96 (1945), that in order to satisfy the due process requirements, a defendant over whom jurisdiction is to be exercised must have 'certain minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantive justice.' That standard has not been met here."[72]

The judgment of the district court dismissing the suit against Libya for lack of jurisdiction was affirmed. One certainly would be hard put to take issue with the judgment since the political measures taken by Libya could be characterised as falling within the domain of Act of State and *ex hypothesi* therefore seemed not to have had a direct effect in the United States. After all, no one will blame the court for being eclectic when it ruled or postulated thus:

"PETCO is a Bahamian corporation. Though a subsidiary of NEPCO, it was a separate corporate entity, and we will not have 'pierce the corporate veil.' The cancellation of the contracts between NOC and PETCO, and the overcharge on the charters, had a direct effect on PETCO as a party to those contracts, but not in the United States."[73]

Quite apart from these, it would be hard to show cause as to the continuous and perhaps systematic commercial activities of NOC or Libya in the United States. The political measures may have had a direct effect on all the companies involved in this commercial transaction, however, its direct effect in the United States was far from settled and therefore logically inconclusive. Jurisdiction in this case, therefore, could not be procured under the FISA.

[72] Ibid., p. 234.
[73] Ibid.

5.11 People's Republic of Congo before Canadian Courts

In Venne v. Government of the Democratic Republic of Congo,[74] the Republic of Congo pleaded that it be accorded immunity at first instance but the plea was rejected because according to the Quebec Court of Queen's Bench, "The absolute theory of sovereign immunity had now been superseded by the restrictive theory, so that a foreign state was entitled to immunity only in respect of public, sovereign acts." Is such a position correct or was it merely based on conjecture? Such a position seemed to run counter to state practice and the ILC report on the subject. On appeal, however, the Supreme Court of Canada took a different position, thus ruling in favour of the Republic of Congo (Government of Democratic Republic of the Congo v. Venne).

The case can shortly be related as follows: the plaintiff was employed as an architect to prepare plans for the construction of the national pavilion of the Republic of Congo. The purported agreement for the services in question was made through an accredited diplomatic representative of the Congo as well as by an envoy of the Congo Foreign Affairs. Soon a dispute ensued between the two parties, whereupon the plaintiff prayed in his suit that he be paid for the services rendered. As already stated, the plea for immunity at the trial level was rejected but on appeal the Supreme Court ruled in favour of the sovereign state i.e., Congo, as follows, with Laskin J and Hall J dissenting.

"(1) The Democratic Republic of the Congo had acted in a sovereign rather than a commercial capacity in securing the services of Mr. Venne and was therefore entitled to sovereign immunity. The fact that the government had acted through its diplomatic representatives in Canada and its Department of Foreign Affairs was evidence of the sovereign nature of the act.

"(2) Since the government was thus entitled to sovereign immunity even under the restrictive theory it was unnecessary to determine whether that theory had become part of Canadian law.

"(3) The question whether a contract was a purely private and commercial act or public act done for sovereign purposes should be determined, in so far as it might be relevant, by the court in the light of all the evidence without placing on either party the burden of rebutting any presumption about the nature of the transactions."[75]

This case seemed identical to Planmount Ltd. and that of the Empire of Iran case, however, it would be presumed that the four justices who ruled in favour of the Republic of Congo might have been persuaded by the force of evidence submitted in the quest for immunity. The English court and the German court have, however, *mutatis mutandis*, denied immunity based specifically on the commercial element involved in Planmount Ltd., and the Empire of Iran cases, respectively. But the argument posited by Laskin J with whom Hall J agreed that "the absolute theory of sovereign immunity was no longer accepted by most states and could not be regarded as part of international law" is simply *non sequitur*, unless, of course, the learned judge was also referring to a regional international law because evidence of state practice the world over in respect of customary interna-

[74] (1983) IL Reports, p. 1.

[75] Ibid., p. 24.

tional law does not support such a view.[76] To the contrary, the practice of states in regard to the restrictive approach is far from settled and many countries of the world have not had the chance even to deal judicially with the subject matter herein under consideration. It is not the purpose of the present writer, however, to conclude that the thrust and total import of Judge Laskin's dissent was not commendable. Certainly he offered a good insight in respect of the subject for there was *consensus ad idem* in respect of the agreement signed between the Republic of Congo and Venne, which as a matter of principle must be honoured except where the sovereign rights of the state will be affected or if the dispute could better be resolved amicably through some other means.

5.12 Arbitration, Default Judgment and Enforcement

5.12.1 Nigeria before Switzerland and American Courts

In Ipitrade International S.A. v. Federal Republic of Nigeria,[77] the Federal Republic of Nigeria and Ipitrade International, S.A. duly entered into a contract for the purchase and sale of cement. Under the terms of the contract, Nigeria agreed that the validity and the performance of the said cement contract shall be governed by Switzerland law and that in case of any dispute arising thereunder, the dispute would be submitted to arbitration in Paris, France, for resolution. Soon thereafter various disagreements arose with respect to the contract. Ipitrade therefore followed the command of the contract calling for arbitration proceedings. The Federal Republic of Nigeria declined to participate, arguing that it be granted immunity. In view of this plea, the arbitrator nonetheless proceeded with the arbitration, ruling *inter alia* that under Swiss law Nigeria was bound by the terms of the cement contract thus granting Ipitrade's claims against Nigeria. Further, it was stated in clear terms that under Swiss law an arbitrator's word was final and therefore cannot be reversed. Having been intimated that Nigeria had some assets in the United States, "Ipitrade filed in the United States District Court a petition to confirm arbitration award under the provision of the convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which the award was subject." And the main issue at this juncture was whether Nigeria could be amenable to the jurisdiction of the courts of the United States in this very instance. The court ruled in favour of Ipitrade as follows:

"The award is subject to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards to which the United States, France, Nigeria, and Switzerland are each signatories. Article V of the Convention specifies the only grounds on which recognition and enforcement of a foreign arbitration award may be refused 9 USC § 201. None of the enumerated grounds exists in the instant case. The Foreign Sovereign Immunities Act, which codifies existing law with respect to suits against foreign states in the United States courts, gives Federal district courts original jurisdiction against a foreign

[76] I. Brownlie, op. cit., 327–328; I Law Commission Report 1980–1988.

[77] 1982 International Law Reports, p. 196 [(1978) 465 F.Supp. 824].

state as to any claim for relief *in personam* with respect to which the foreign state is not entitled to immunity under Sections 1605–1607 of this title or any applicable international agreement. 28 USC §1330."

The court further ruled that:

"The legislative history of this section expressly states that an agreement to arbitrate or to submit to the laws of another country constitutes an implicit waiver. H Rep No. 94–1487, 94th Cong., 2nd Sess. reprinted in 1976 U.S. Code, Cong. and Admin. News at 6604, 6617. Consequently, Respondent's agreement to adjudicate all disputes arising under the contract in accordance with Swiss law and by arbitration under International Chamber of Commerce rules constitutes a waiver of sovereign immunity under the Act. This waiver cannot be revoked by a unilateral withdrawal."[78]

In the final analysis a default judgment was entered against Nigeria. True, Nigeria without question agreed per the cement contract that in case of any disputes arising under the contract, both parties must submit their differences to arbitration. There was therefore evidence of party autonomy in respect of what law must apply. A further reflection, however, of the argument that an agreement to arbitrate or submit to the laws of the country of the locus of the arbitration, i.e., the *lex voluntatis*, constitutes an implicit waiver is simply *non sequitur* for such an argument cannot stand the test of any critical analysis, and it is highly possible that such an approach would run counter to general international law[79] in view of the fact that the waiver theory lacks *usus* and *opinio juris*.[80] Hence the "waiver" argument could be described as an individual *opiniones juris* of the United States arguably lacking of consensus from other subjects/law makers of the international community, i.e., other subjects of international law. Nigeria could therefore challenge the decision of the Federal district court as of right in respect of the erroneous conclusion that, once a country has acceded to the course of arbitration, there is an implicit waiver of jurisdiction and therefore immunity is consequently waived. Nigeria, however, should have agreed to the arbitration, unless the arbitral agreement was procured through fraud, which actually was not what happened in this case.

5.12.2 Tanzania before American Courts

In Birch Shipping Corporation v. Embassy of the United Republic of Tanzania[81] the plaintiff, a Birch Shipping Corporation entered into a contract with the United Republic of Tanzania for the shipment of a load of corn from New Orleans to Tanzania. In fact, the purchase of the said corn was duly financed by the United States Department of Agriculture. The parties after negotiations agreed in clear terms that any dispute arising out of the shipping contract be submitted to arbitration and that a "court judgment could be entered upon any award rendered pursu-

[78] Ibid., p. 198.

[79] See H. Steinberger, State Immunity in Encyclopedia of Public International (1987) pp. 428–466.

[80] See I. Brownlie, op. cit., pp. 7–9; Villiger, op. cit.

[81] I L Reports 82 p. 524 [(1970) 507 F.Supp. 31].

ant to the arbitration agreement."[82] Soon thereafter a dispute arose, which in fact was arbitrated in New York, resulting in an award against the Republic of Tanzania. The Plaintiff then filed a petition in the United States District Court of the Southern District of New York, to have the said monetary award confirmed pursuant to Section 9 of the United States Arbitration Act 9 USC § 9. And the court having carefully considered the issues in this case confirmed the petition on August 21, 1980, in the amount of 89,168.56, notwithstanding the fact that the defendant failed to enter an appearance. This was followed by a writ of garnishment which was again confirmed and served upon American Security Bank, where the defendant state maintains a bank account for the operation of her embassy. Tanzania quickly moved to quash the writ based on the principles of sovereign immunity. However, the court denied the motion by ruling that

"The legislative history makes clear that activity of this type is within the statutory definition of 'commercial activity' set forth in 28 USC § 1603(d).

"As the definition indicates, the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical."[83]

The defendant state argued further by submitting an affidavit that the funds in the attached account were purposely used to "pay the salaries of the staff, pay for incidental purchases and services necessary and incident to the operation of the Embassy in its diplomatic activity as the official representative of the government of the United Republic of Tanzania in the United States."[84] But the court refused to accede to the argument advanced by Tanzania, thus ruling that

"The only significant question, then, is whether it is proper to attach an account which is not used solely for commercial activity. Certainly the statute places no such restriction upon property which may be attached, nor is there anything in the legislative history indicating that Congress contemplated such a limitation. Central Bank accounts are exempt, but that exception is not applicable to accounts used for mixed purposes. See H Rep No. 94–1487."[85]

The question in respect of waiver of immunity is not clearcut. And over the years this thorny issue has in one way or the other created difficulties and uncertainties in the law. Courts in the United States, for example, have always ruled that any state that agrees by the meeting of the minds to submit to arbitration in the forum state, in reality had implicitly waived its right to immunity. This was clearly followed in Ipitrade International S.A. v. Federal Republic of Nigeria and in the Birch Shipping Corporation v. Embassy of the United Republic of Tanzania case, respectively. But the question to grapple with is whether such a decision is in line with general international law. Although scholars in America may answer the question in the affirmative, their views arguably are in the minority, for a majority of international law scholars will challenge the authority of such a decision as lacking of general practice or USUS. Under general international law, a state is not presumed to have waived its right to immunity based on the mere fact that it

[82] Ibid., 525.
[83] Ibid., pp. 526–528.
[84] Ibid., p. 526.
[85] Ibid., p. 527.

has acceded to a provision in an arbitration contract with its private partner that the contract be governed by the law of the forum state or some other state. The law in this connection has been clearly stated in the United Kingdom State Immunity Act, 1978, Section 2(2). The decisions in Ipitrade International S.A., and Birch Shipping Corporation in respect of waiver of immunity therefore leaves much to be desired. Thus for a waiver to be valid it must be expressly given by the competent organ of the foreign state.

Another important question to consider is whether a bank account of a diplomatic mission can be attached. Undoubtedly this question poses difficult problems which must be approached with care. In 1977 the West German Constitutional Court, while considering issues in respect of the general bank account of the Philippine Embassy, ruled that:

"A general bank account of the embassy of a foreign state which exists in the state of the forum and the purpose of which is to cover the embassy costs and expenses are not subject to forced execution."[86]

Again in Alcom v. Republic of Colombia, it was held that an embassy account which has been created for the day to day expenses of the Colombian Embassy cannot be attached by virtue of Section 13(2(b).

Lord Diplock stated that:

"The credit balance in the current account kept by the diplomatic mission of the state as a possible subject matter of the enforcement jurisdiction of the court is, however, one and indivisible – unless it can be shown by the judgment creditor who is seeking to attach the credit balance by garnishee proceedings that the bank account was earmarked by the foreign state solely (save for de minimis exceptions) for being drawn upon to settle liabilities incurred in commercial transactions."[87]

The argument advanced by Lord Diplock seemed more persuasive than the one offered in the Birch Shipping Corporation. For the practice of states in respect of execution has been quite uniform in granting immunity from enforcement measures even where the plea for immunity had been denied by the forum state. It was only of recent legislation and practice that immunity to enforcement measures seemed to be restricted in the U.S., e.g., 1610(a), the U.K. Sec. 13(4), Canada Sec. 11(1), Pakistan, Singapore and South Africa, respectively. But still a greater number of countries would normally grant immunity in respect of enforcement measures, e.g., China, Soviet Union, Brazil, Syria, Sudan, etc. Again, still others arguably would support the view that immunity be accorded to foreign states from enforcement measures only with regard to property designated for a public purpose – *acta jure imperii*. This, however, leaves open the question as to how a bank account is to be characterised as regards enforcement measures. Is it to be done by the *lex fori* or by the standards of general international law? Simply put, the evaluation of the bank account of Tanzania in Birch Shipping Corporation was simply inadequate and the issue regarding the waiver simply runs counter to state practice, i.e., general international law. Legislation per se is therefore not a pana-

[86] B Verf GE, Vol 46 p. 342, or see U.N. Materials on jurisdictional immunities of state and their property (1982) St Leg. Ser B/20 p. 297.

[87] (1984) AC 580; 640.

cea to resolving this thorny question of waiver. Hence courts must be eclectic in considering this elusive subject matter.

5.12.3 The Republic of Guinea before American Courts

In Maritime International Nominees Establishment v. the Republic of Guinea,[88] the petitioner a Liechtenstein corporation and the Republic of Guinea entered into an agreement for the establishment of a company geared towards the shipment of bauxite mined in Guinea to the U.S.. The agreement contained a clause which stated that all disputes were to be resolved amicably through arbitration which must be conducted "by arbitrators selected by the President of the International Centre for Settlement of Investment Disputes (ICSID)."[89] It so happened that ICSID is located in the capital of the United States, Washington, D.C., "and in conformity with Rule 13 of ICSID's Rules of Procedure for Arbitration Proceedings, sessions of its tribunals are held in Washington unless another suit is agreed upon by the parties and approved by ICSID."

The company that was formed was known as Societe d'Economie Mixte de Transports Maritimes (SOTRAMAR) and it was to have a "civil personality and financial autonomy." A dispute arose between the two parties, i.e., the Republic of Guinea and the petitioner Liechtenstein. The petitioner thereupon asked the Republic of Guinea that it be given an approval to have the dispute settled through arbitration. But the humble request fell on deaf ears. This prompted the petitioner to seek an order to compel arbitration pursuant to the U.S. Arbitration Act 9 USC § 1 et seq 1976. Although adequate notice was given to Guinea as to the date and place of the arbitration, Guinea never "showed up" at the hearing. After two years of extensive arbitration proceedings, an award nevertheless was duly made in favour of the petitioner. A petition was thereafter filed to confirm the award and to enforce the judgment. Shortly before the motion, Guinea asked for continuance, which was granted. At a scheduled date, after the continuance, Guinea surprisingly raised the objection that the court did not have jurisdiction over the person of the republic of Guinea. The court after relying on several authorities ruled against the Republic of Guinea.

The counsel for Guinea, in order to neutralise the odds against its client, offered the following argument in defence of Guinea:

"A waiver should be found only where there is both an agreement to arbitrate in another country and the agreement to be bound by the laws of another country."[90]

The court replied that such an argument was "too constricted a view." And therefore went on to conclude that "by agreeing to arbitration that could be expected to be held in the United States, Guinea waived its immunity before this

[88] (1982) IL Reports 535.
[89] Ibid.
[90] Ibid., p. 538.

court within the meaning of 28 USC § 1605(a)(1) 1976."[91] This part of the ruling is contrary to general international law because it clearly lacks *usus*.

The court simply followed earlier authorities such as Verlinde B.V.V. Central Bank of Nigeria, Libya American Oil Co. v. Socialist People's Libyan Arab Jamahiriya[92] and of course Ipitrade International S.A. v. Federal Republic of Nigeria to support its decision. Similar arguments offered by the present writer elsewhere against the American approach to waivers in the main could also rightly be made in Maritime International Nominees Establishment. It appears, however, that Guinea waited for far too long before challenging the jurisdiction of the court. Which means that the plea for sovereign immunity should have been made at the outset, i.e., when the arbitration question came up, but not at the stage where a confirmation measure was being demanded by the plaintiff through a motion. Again it is submitted that the sanctioning of enforcement measures against Guinea was contrary to general international law because this part of the law is unsettled, and that is why some leading courts have refused to sanction writs for enforcement measures as in Alcom and the Philippines Embassy cases.

5.12.4 Is Resistance by African States Legally Justified?

Having taken pains to review these cases, one common trend appears discernible in the pleadings of all these African states, and that is they all offered in their defence the absolute immunity rule. How is it that such a defence appears common? And where can the practice be designated to have come from? Many believe it came from Europe and therefore was received through colonialism, but others believe that the concept of *princeps legibus solutus*, i.e., the King can do no wrong, had existed in Africa long before the coming of Europeans to Africa,[93] but was rather passed on from generation to generation through oral tradition rather than through judicial means, i.e., case law. A careful review of legal history, however, shows that the concept might have been well developed by Europeans with its modern version clearly adumbrated by Chief Justice Marshall in his classic judgment in the Schooner Exchange. If this be the case, then do these African states have the right to plead that they be accorded immunity in foreign courts? The answer would have to be in the affirmative and nothing else. For before 1900 the immunity of a state from the judicial process of another state was absolute and this in the main was rooted in two cardinal principles and that is the notion of sovereignty and the equality of states.[94] This 19th century idea of sovereign immunity

[91] Ibid.

[92] (1980) DCC 1175 F.Supp. 482; (1982) 62 ILR 225.

[93] Rodney, How Europe Underdeveloped Africa (1982) pp. 31--73; Sanders, op. cit., T.O. Elias – Africa and Development of International Law (1988); Basil Davidson, The Search for Africa (1994).

[94] Sucharitkul, op. cit; Sinclair, op. cit.; Lauterpacht, op. cit; I. Brownlie, op. cit.; Riesenfeld, Sovereign Immunity in Perspective, 1986 Vanderbilt J of Transnational Law, Vol. 19, 1.

thus came into being before the new states of Africa gained independence from European colonial powers.

In 1914, for example, there existed in the world only 51 states. Europe had 24 countries followed by America with 21 countries. Asia had 4, while Africa had 2, i.e., Ethiopia and Liberia.[95] Egypt became independent in 1922 and South Africa became a country shortly after the war in 1926.[96] But over the years many countries have gained independence in Africa, and one important issue that must be confronted head–on is whether these new African states are automatically bound by all the rules of customary international law, i.e., in existence before self–determination was attained. There is unanimous consensus that these states must be bound by all these laws.[97] Although this notion had been criticised by Professor Tunkin,[98] his position seemed to be in the minority. Granted this, then can these states, after having gained independence, challenge the legitimacy of any new emerging customary international law, i.e., the concept of restrictive immunity? The answer is yes with some exceptions. And this is clearly explained by Dr. Akehurst as follows:

"Provided that the state opposes the rule in the early days of the rule's existence (or formation) and maintains its opposition consistently thereafter."[99]

Thus any opposition that comes after the rule had been established will not count. This is further supported by Dr. Villiger in the following formulated words:

"A customary rule does not arise and exist at once and for all. Rather, the rule has to be confirmed repeatedly by instances of state practice meeting certain qualifications and accompanied by *opinio juris*. Now state practice not only creates and confirms the rule, but also constantly defines its content. If the substance of state practice changes, so will the content of the customary rule."

He concluded by saying that "if a state opposes a customary rule from the early stages onwards, the state will not be bound qua persistent objector. And if many states object, the rule will never arise."[100]

In the light of the writings of these leading scholars, one may not be wrong in arguing that these African states have the right to challenge any emerging customary international law that in one way or the other affects their general interest. The concept of restrictive immunity appears to be emerging but has not yet been well grounded in the practice of states.[101] Professor Brownlie, in making his position known as to the practice of states in respect of the restrictive principle, carefully observed that although there is currently a trend toward the restrictive principle, at least many countries still accept the doctrine of absolute immunity.[102] In other

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[95] Price, op. cit.; J. Dugard, International Law – A South African Perspective, 1994, pp. 41–56.

[96] Dugard, op. cit., p. 62.

[97] See Akehurst, op. cit., p. 27. See also Waldock (1962) 106 Recueil des Cours 1, 52.

[98] Tunkin, Remarks on the Juridical Nature of Customary Norms in International Law (1961) 49 Calif L Rev 419, 428.

[99] See Akehurst, op. cit., p. 24.

[100] Villiger, op. cit., pp. 38–39.

[101] See Ushakov, op. cit.

[102] I. Brownlie, op. cit., p. 328.

words, the restrictive principle does not have sufficient support of nation states the world over, as to be generally considered customary international law. There is therefore an already established practice that conflicts with the restrictive principle, and this gives dissenting states the right to challenge its legitimacy wherever it may be applied. These African states and many other states, therefore, could resist the restrictive principle as of right because the doctrine of absolute immunity is not dead accurate. It would not serve any good purpose, therefore, to make predictions by simply relying on conjecture, as many scholars have done in predicting the demise of the doctrine of sovereign immunity, without first taking pains to seriously delve into the practice of states the world over.

A Russian scholar, Dr. Ushakov, in his studies of this subject and in respect of the argument alluded to above, took issue with Dr. Sucharitkul, the Special Rapporteur, as follows:

"The position and practice of states are thus by no means uniform. No conclusion whatsoever can be drawn from them as to any emerging trend in favour of the concept of limited immunity. At the very least, the matter calls for further in-depth study."[103]

Many African countries have voiced their opposition to the principle of restrictive immunity and inexorably moving to challenge its legal basis and there is no evidence of a trend where these countries have taken steps to codify the said rule except South Africa, which of late had followed the footsteps of the West by enacting the rule into her statute books. And those African states sued by private entities in foreign courts have asserted their claims to the existence of a legal right[104] or rule derived from the doctrine of sovereign immunity. Can these acts, assertions or pleadings concretely made by these African states before national authorities be characterised as state practice? Some leading scholars[105] have answered yes, for interest articulation in respect of state practice can be inferred from the conduct of states. Inevitably, however, the issue as to whether a state has acceded to a particular custom by its conduct creates difficulties and uncertainties and over the years had featured well in transnational litigation. These African countries seemed to resist the restrictive principle because it lacks *usus* and therefore felt not obligated to follow it. In other words, the psychological element of *opinio juris sive necessitatis* is lacking.

The resistance of African states to private suits in foreign courts warrants the following conclusions.

- The purpose of the state is to enable its citizens to develop to become their bestselves, so in a sense, the end of the state is both ethical and political (public), thus promoting a 'surplus of pleasure over pain'. The main functions of the state therefore comprise, the maintenance of security, stability welfare and economic growth. The state, for that matter

[103] Ushakov, op. cit., p. 56.

[104] See supra the private claims instituted against Nigeria, Tanzania, Guinea, Congo, Libya, Uganda, Egypt, Tunisia, Zambia, and Mozambique, etc.

[105] D'Amato, The concept of Custom in International Law (1971); H.W.A. Thirlway, International Customary Law and Codification (1972); Villiger, op. cit.; M. Akehurst, op. cit.

never acts as a private person because it is endowed with *potestas imperii* to promote the public good.

- The relations between Sovereign states in International Law are based on *pax civilis* (ie between equals as states). Thus a state certainly will surrender a fundamental right if it is subjected to the jurisdiction of a foreign court or forced by a private suit to defend itself before national judicial authorities.
- Restrictive immunity is not an International Law because it lacks *usus* – settled practice and *opinio juris*, hence African states and other developing states, directly affected by the said rule, have a perfect right as subjects of International Law to argue that they be accorded immunity. And these arguments are state practice and thus could prevent the *animus* of restrictive immunity from germinating.
- Most African states are therefore saying that the *corpus* and *animus* of Sovereign immunity survived because no general practice has emerged to support restrictive immunity. In other words, restrictive immunity could rightly only be regarded as an emerging principle.
- The privileges and immunities of Diplomatic agents and missions under the Vienna Conventions have become *leges speciales*, and thus were derived from the principle of *ne impediatur legatio*. This means that by license the ambassador is not amenable to the laws of the forum and therefore not under any obligations to accept a service of process, that is, if the sending state is being sued in the receiving state.
- That before the doctrine of restrictive immunity is applied in a given case by a national Judicial authority, the local arbitre must prove that restrictive immunity is binding on the defendant state, and that it has attained a hallmark of consent among sovereign states – i.e. *opinio generalis juris generalis*. The Norway argument in the Fisheries case is relevant in this respect i.e. the 'persistent objector' rule. This is rightly so in view of the fact that International Law is not a Supranational Law but rather *jus inter gentes* – ie Law among nations.

These ideas will be explored in detail in the next chapter.

6 African States and the Practice of State Immunity

6.1 Is it Still State Immunity or Restrictive Immunity?

Many would no doubt be wondering as to the current position of African states on the state immunity controversy. Their curiosity is understandable, because state practice is quite scanty in the region. And this is due to the fact that there is paucity of national legislation and municipal court decisions on the subject. It is therefore the purpose of this study to explore the rule of state immunity and the practice of states in Africa and possibly to lay down a framework of legal theories to support the fact that resistance to private suits brought against African states before foreign courts or foreign national authorities can arguably be construed to represent state practice in as much as these African states in one way or the other appear to be making claims duly derived from general international law, i.e., the maxim *par in parem non habet imperium* or *par in parem non habet jurisdictionem*. But before we delve into the above mentioned issues, it is apposite first to explore the fact that sovereign immunity had existed in Africa in a form of oral customary traditional law long before Europeans set foot on the Continent.

6.2 Pre–Colonial Africa and Early African Dynasties

Africa is an old world and its civilization precedes many ancient civilizations. The history of famous indigenous African states from 300–1500 A.D., incidentally however, has not been well documented and fully unravelled by historians. But over the years some historians eager in search of knowledge on Africa have indeed uncovered very important historical events hidden in the archaeological remains of such ancient indigenous African states as Egypt, Ethiopia, Ghana, Kenem–Bornu, Mali and Songhai. Basil Davidson, in his exposition on African history, offered a forceful explanation thus:

"And kingdoms in Africa are, indeed, among the oldest political institutions anywhere. They emerge in Africa from times even before time began. They loom out of the mists of antiquity like the unknown ghosts of ancestral nations that have no certain place or name, and yet are not to be denied. And the deeper the probings of modern scholarship, the more these 'ghosts' of royal authority acquire fact and presence, for we live happily in a period when old prejudice begins to give way to new understanding, to an understanding, perhaps

above all, that the history of humankind is a single great river into which a myriad tributaries flow."[1]

Davidson's position has been supported by R. Maury,[2] R.S. Smith,[3] Walter Rodney,[4] Henri Labouret,[5] to mention a few.

T.O. Elias also tells us that:

"Examples of some famous dynasties are that of Kanem–Bornu in north–eastern Nigeria which has had rulers in unbroken succession for 1,000 years until the middle of the nineteenth century; again, Songhai dynasty lasted some 800 years."[6]

It is true that neolithic African dynasties have had tremendous influence on the rest of Africa. But this era or epoch soon gave way to the development of new ideas which spread southward and westward, crystallising into different social and political philosophies which were wholly conditioned on kinship bonds of union. Some of these societies developed along horizontal political structures while others developed along centralised political structures.[7] These kinship groups soon grew into powerful dynasties ruled by chiefs, kings and emperors, whose positions were held sacred. The king or emperor of these societies served as the axis of the political unity, identity and strength of the ruled. There was therefore a sacred relationship between the king or emperor and its subjects.

6.2.1 Some Concrete Examples of Personal Sovereigns

Ancient Egypt, according to recorded history, had the oldest culture in Africa. According to historians, it was one of the oldest cultures in the history of mankind.[8] The civilization of pharaonic Egypt could thus be traced back to 3500 B.C.,[9] but its continued growth was destroyed by the Romans when they extended their hegemony to the northern part of Africa. The legal position of the pharaohs, as we all know, was sacred and absolute.[10]

Egypt had powerful dynasties, e.g., the Fatimid dynasty (969 A.D. to 1170 A.D.), had an unbroken succession of leaders who established a powerful central government. The political power of the Fatimid dynasty was absolute and its decrees were such that it cannot be challenged or controverted. It appointed members of the dynasty to collect taxes and to supervise land ownership. The dynasty

[1] Basil Davidson, The Search for Africa (1994) p. 19. This book is very important to the understanding of African history.

[2] R. Maury, Bulletin d'l Institut Francaise d'Africa Noire IX (1947).

[3] R.S. Smith, The Kingdom of Yoruba (London, 1969).

[4] See Walter Rodney, How Europe Underdeveloped Africa (1982).

[5] See Henri Labouret, Africa Before the White Man (1962). See also USSR Institute of History, A History of Africa (1918–1967).

[6] T.O. Elias, Africa and the Development of International Law, op. cit., p. 13.

[7] See Walter Rodney, op. cit., pp. 33–71.

[8] See Basil Davidson, op. cit., p. 19–25. See also Walter Rodney, op. cit., pp. 33–71.

[9] See Basil Davidson, op. cit., p. 319, where he was able to trace the history of Egypt in detail.

[10] Basil Davidson and Walter Rodney have all confirmed the powerful position of the Pharaoh in their writings: Basil Davidson, op. cit.; W. Rodney, op. cit.

thus acted as the executive, legislature and a judge. The succeeding dynasties of Ayyubids and the Mameluks also wielded absolute powers which were greatly used in the building of "canals, dams, bridges and aqueducts and in stimulating commerce with Europe."[11]

The civilization of Ethiopia can also be traced back to the first century A.D.,[12] when the Kingdom of Axum was founded. Feudal Ethiopia was therefore born out of Axum dynasty which had a Sabean origin. According to Walter Rodney,

"The Emperor of Ethiopia was addressed as 'Conquering Lion of the Tribe of Judah, Elect of God, Emperor of Ethiopia, King of Kings.' In practice, however, the 'Solomonic' line was not unbroken."[13]

Feudal Ethiopia was ruled by a royal family[14] whose position was absolute. The emperor appointed judges and had control over the army and many other governmental institutions. Again the relationship between the emperor and the ruled was sacred and absolute. The emperor was "King of Kings" and therefore his powers were not limited by any other power from within or from without. The Amharic dynasty had overall control over the empire by consolidating its power base through Christianity and literate culture.[15] Everything within the kingdom thus was done to glorify the emperor and its royal family.

The Ghana Empire, according to historians, existed from 300–1087 A.D.[16] According to Dr. Rodney, it was made up of strong lineage kings or chiefs, and competent commanders of the army. The emperor appointed sub–chiefs of the provinces, who were men of great learning and of God. Besides these powerful offices there were also other offices ranging from that of a judge, traditional communication personnel who were responsible for the dissemination of the law or the command of the king or chief. Dr. Rodney says,

"The Western Sudanic empires of Ghana, Mali and Songhai have become by words in the struggle to illustrate the achievements of the African past. That is the area to which African nationalists and progressive whites point when they want to prove that Africans too were capable of political, administrative and military greatness in the epoch before the white men."[17]

Under the Ghana Empire, the king was endowed with absolute power and the members of his ruling council were also respected and therefore were beyond reproach. The position of the head of the empire was very powerful and thus knows no other superior. The power of the king was inalienable, imprescriptible, invisible and exclusive. By virtue of these attributes the king of ancient Ghana was entitled to obedience from every citizen. Although there were other sacred authorities

[11] See Walter Rodney, op. cit., p. 49.
[12] Ibid.
[13] Ibid., p. 50.
[14] Ibid.
[15] Ibid., p. 50.
[16] T.O. Elias, op. cit., pp. 6–7, 7.
[17] Walter Rodney, op. cit., p. 56.

within the empire, however, all these institutions of power derived their authority directly from the king.[18]

These said characteristics of absolute power were commonly associated with the Pharaonic era, the Ethiopian dynasties, the Mali Empire and the Songhai Empire. The local sovereign therefore wielded enormous power and thus could not be impleaded. Historically the principle of *princep legibus solutus* or the king can do no wrong, or the king is above the law, or the law is the command of the king, represents the absolute authority of the king. This legal idea existed in Africa long before Europeans took over Africa.[19] But the idea did not develop into substantive law backed by case law. It, however, existed in a form of a legal oral tradition passed on from generation to generation.[20] In fact, during the epoch of pharaonic Dynasty, Ethiopian dynasty and the Ghana Empire, an individual would certainly be risking his life if he ever tried to implead the king or the emperor in his own court. And it was simply impossible for an individual in another kingdom or empire to dare implead the leader of the Empire of Ghana in the local court of his jurisdiction. Such actions could lead to war and therefore were never encouraged or contemplated.[21]

The introduction of European jurisprudence into Africa, as a result of colonialism, however, reinforced the idea. The history of Ethiopia, for example, shows that the principle of *princeps legibus solutus* could be traced back to ancient times.[22] Thus certain African peoples did have their own concept of absolute sovereignty before the establishment of colonies in Africa by Europeans. The introduction of the English common law, French civil law, Spanish law, Roman–Dutch law and Portuguese law into Africa, however, redefined the classical modern notion of sovereign immunity, which has so far become entrenched in the practice of African states until today.[23] J.E. Casely Hayford in order to put the record straight succinctly postulated in 1922 that

"Before even the British came into relations with our people, we were a developed people having our own institutions, having our own ideas of government."[24]

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[18] Henri Labouret, op. cit., where a thorough historical analysis is presented of old Africa, detailing the position of kings and chiefs.

[19] Basil Davidson, The African Past, Chronicles from Antiquity to Modern Times (1964).

[20] A.F.C. Ryder, Benin and the European (1485–1877) London (1969).

[21] Bruce Williams, Forebears of Menes in Nubia: Myth or Reality? Journal of Near Eastern Studies 46 No. 1 (1987); Basil Davidson, op. cit.; W. Rodney, op. cit.

[22] The histories of Egypt, Ethiopia, Ghana, Mali, Songhai support the said principle.

[23] See T.O. Elias, Judicial Process, op. cit., for a clear analysis of the process of how European laws were introduced into Africa.

[24] Cf., Walter Rodney, op. cit., p. 33; Casely Hayford was a leading Ghanaian activist or nationalist.

6.3 The Colonial Era

The scramble for Africa and the period of colonial rule in Africa witnessed a wholesale introduction of European law and international law into Africa.[25] These took the form of treaties signed between European powers and the indigenous leaders of Africa, i.e., the chiefs and other traditional leaders.[26] The English and the French, in fact, as the history shows, took greater share of the colonised territories of Africa and therefore had greater spheres of influence in economic, legal, commercial, social and political matters that affected these overseas dependencies.[27]

The rule over African territories was established primarily by annexation and conquest but also by cession.[28] This then gave the various European powers the authority to manage the affairs of the colonies that came under their sway.

The Spanish and the Portuguese also had overseas dependencies in Africa, but their spheres of influence dwindled when the other European powers entered the "scramble for Africa." Thus between 16th and 18th centuries the sphere of influence of Spain and Portugal became somewhat minimal, for it would appear these two countries had a divided attention.[29] Spain, for example, had to deal with her interest in Latin America while Portugal expended some of her energies on Brazil and other areas of interest around the globe, even though history attests to the fact that the first voyage to the African Continent was undertaken by the Portuguese.[30]

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[25] T.O. Elias, Africa and Development of International Law (1988) pp. 17–23; same author, The Judicial Process in Commonwealth Africa (1977) pp. 1–24.

[26] T.O. Elias, Africa and the Development of International Law, pp. 3–18; George Padmore, Africa, How Britain Rules Africa (1936).

[27] Rodney, How Europe Under–Developed Africa (1982); Joseph Anane and Godfrey Brown, Africa in Nineteenth and Twentieth Centuries (1970).

[28] See T.O. Elias' article in African Law: Adaptation and Development, edited by Hilder Kuper and Leo Kuper (1965) pp. 184–196.

[29] Ibid.

[30] See Dr. Nkrumah, The Challenge of the Congo (1974) pp. 1–6; see Also F.D. Lugard, The Portuguese Africa, Harvard University Press (1959).

The Pattern of Balkanization of Africa According to Colonial Power Boundaries

Table 3.

Former British Colonies	
Ghana	Lesotho
Nigeria	Sudan
Sierra Leone	Swaziland
Botswana	South Africa
Egypt	Uganda
Cameroon/British	Tanzania
French	Zambia
Malawi	Zimbabwe
Kenya	Mauricius
Gambia	

Table 4.

Former French Colonies	
Algeria	Niger
Benin	Mauritania
Burkina Faso	Morocco
Senegal	Seychelles
Cameroon/French	Djibouti
British	Togo
Central African Republic	Gabon
Madagascar	Guinea
Mali	Ivory Coast
Chad	Congo
Camoros	Tunisia

Table 5.

Former Spanish Colonies
Spanish Sahara
Spanish Guinea or Equatorial Guinea
It appears the French and Spanish ruled Canary Islands and Madagascar one time or another. (This may apply to other French territories.)

Table 6.

Former Portuguese Colonies	
Angola	Guinea Bissau
Cape Verde	Mozambique

Table 7.

Former Belgian Colonies
Zaire – now the Republic of Congo
Rwanda
Burundi

Table 8.

Former Italian Colonies
Somalia
Brief occupation of Ethiopia by force of arms
Libya

Table 9.

Former German Colonies
(1) Namibia – later given to South Africa under the mandate system
(2) Tanzania for some time before it was given to the British as mandate territory
(3) Transvolta Togoland – for some time before being given to the British as a trust territory

Table 10.

American and British/Dutch Colonies
Liberia – former American colony
South Africa – former British/Dutch colony
Eritrea – formerly part of Ethiopia is snow independent (state succession)

6.4 English Sovereign Immunity Law in African States

The British colonial policy created room for the principles and practices of English common law to be introduced into her colonies. And the principles of international law grounded in the practice of the UK were also introduced into these colonies.[31] The British Crown was quite eclectic in its approach and therefore gave deference or due recognition to African law and such immemorial customs and usages that appear not to run counter to her colonial policy. English law therefore was introduced into such countries as Ghana, Nigeria, Sierra Leone, Gambia, Botswana, Malawi, Kenya, Lesotho, Sudan, Swaziland, Uganda, Tanzania, Zimbabwe, Mauricius, and Zambia through indirect rule.[32] The recognition given to African law or customary law in British colonial territories somewhat created what some would simply regard as "parallel possibilities," which in turn gave birth to problems of conflict of laws,[33] e.g., internal conflict of laws and private international law.

With respect to foreign affairs, the British Crown represented these colonies as best as it could. As Judge Elias puts it succinctly:

"Once the various powers had parcelled out the Continent and consolidated their boundaries by international treaties, the existing sovereignties of the old kingdoms and city states became submerged under the new sovereignties of the metropolitan powers. . . . In view of the substituted sovereignties of the European states for those of the territories grouped into the new political aggregations, the historical modes of international intercourse were closed to these indigenous states and kingdoms. The new external relations became a matter of international law, identified with those of European rulers. Boundary and trade agreements were concluded between the metropolitan powers based in Europe."[34]

Thus save a few territories, namely, Southern Rhodesia and later Nigeria,[35] which were allowed or given some limited latitude to act in respect of external affairs based on powers specifically delegated from the British government, external affairs in one way or the other remained exclusively in the hands of the said colonial power.[36] Thus British policy on international law applied with the same force and validity in the colonies as in Westminster (in UK).[37] This means that whatever position Britain took in respect of international law was received into municipal laws of these colonies *en block*,[38] that is, whether these colonies be settled, ceded or annexed. The doctrine of sovereign immunity was truly introduced into com-

[31] T.O. Elias, The Judicial Process in Commonwealth Africa (1977) pp. 1–18, 59–78; T.O. Elias, British Colonial Law (1962); A.N. Allott, Essays in African Law (1960); Elias, The Adaptation of Imported Law in Africa, Journal of African Law 1960 vol. IV no. 2.

[32] See Elias (judicial process) (1974) pp. 1–18.

[33] Ibid.

[34] See Elias, Africa and Development of International Law p. 19.

[35] See Sanders, International Jurisprudence in African Context (1979) p. 70.

[36] Ibid.

[37] Ibid.

[38] Elias, Judicial Process pp. 1–18.

monwealth Africa through indirect rule (i.e., through the Crown Colony System of government) thus:

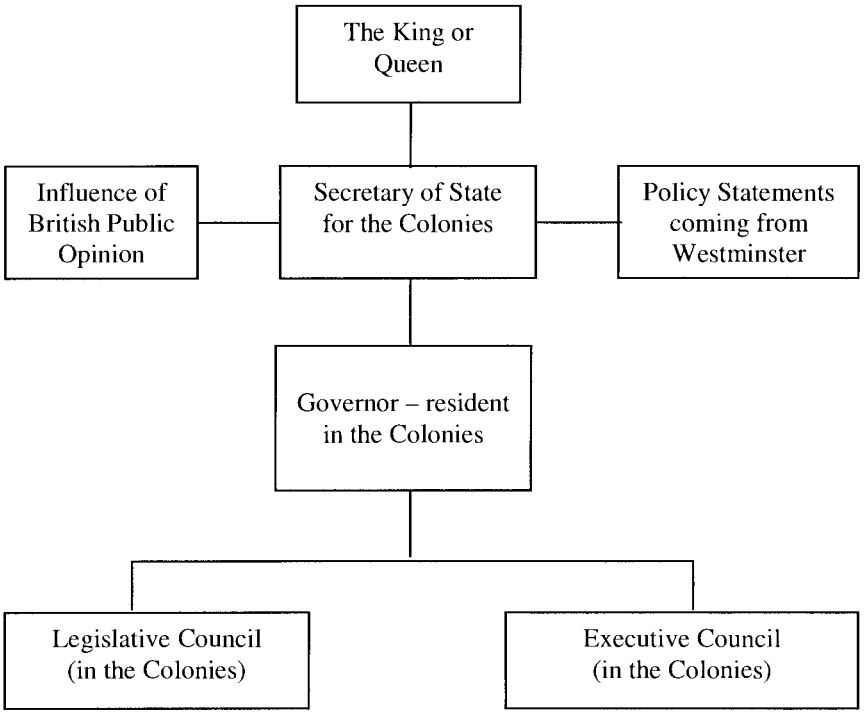

Fig. 1.

In other words, the doctrine of sovereign immunity found its way into commonwealth Africa through the structure of government which was instituted in these territories. It was also introduced into Africa through order in council or through the common law, i.e., through *stare decisis*.

The Secretary of State for the Colonies, normally a Cabinet minister, was responsible for the everyday running of all colonial territories. He was given supervisory powers and therefore had the responsibility of informing Parliament about the conditions of the Colonies. His legal position also gave him powers to advise the King or the Queen on the appointment of governors (who were in actual fact appointed in the name of the King).

The governor represented the Crown in matters of government. His duties were to formulate and execute policies; the appointment and discipline of civil servants; and if need be, the dismissal of these civil servants, including judges and other officers of the judiciary. These civil servants as a matter of British tradition held office in British Commonwealth at the pleasure of the Crown. The governor presided over both the legislative and executive councils and therefore in most cases had overall control over these two bodies. The enactment of laws in the legislative

council was subject to the assent of the governor which could be withheld at the governor's freedom of choice or action.[39] The governor according to English constitutional law was bound to seek the advice of the executive council in matters relating to the administration of the colony. But in fact, he had the discretion either to follow the advice or reject it, or simply follow whatever policy he thought appropriate in a given case. However, he must inform the Secretary of State if he went beyond the powers granted to him. The position of the governor, as can be seen, was absolute and since he represented the interest of the Crown he was immune from suit before the local courts,[40] as well as the government of the Crown Colony.

One important common feature of the reception of these English laws into Commonwealth Africa follows an invariable formula thus:

"The common law, the doctrine of equity and statutes of general application in England at a named date shall be applicable in the particular territory so far as local circumstances permit and it is not modified by express local legislation.[41]

Thus, quite apart from local legislation English law and international law applied with full force provided these laws do not conflict with local legislation.

The "received English law," i.e., English common law which was introduced into commonwealth Africa, covered such areas of the law as civil and criminal law as well as procedure and evidence and any other branch of English law that would be useful in the administration of the colonies. The element of English law seemed less strong in jurisprudence and public international law but it would appear the teachings of the Dualist School of International Law was preferred to the Monist School of International Law.[42] This practice continued even after these countries were granted independence.

In the light of the preceding observations it is submitted that the subject and content of international law as practiced in England during colonial times were about the same in the colonies.[43] Thus before independence all the institutions of government in Commonwealth Africa *ex hypothesi* followed the doctrine of absolute immunity which was then well accepted and entrenched in British practice.[44]

It is instructive to note that with the exception of Egypt, the doctrine of absolute immunity was never challenged in Commonwealth Africa until quite recently

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[39] J.H. Price, Political Institutions of West Africa (1975) pp. 14–20.

[40] Ibid.

[41] Elias, Judicial Process, p. 1.

[42] Elias, Judicial Process, op. cit., p. 14.

[43] See The Gold Coast Courts Act of 24th day of July (1874) now repealed, Ghana Courts Ordinance: Chap. 4, Section 83 reads as follows:

"Subject to the terms of this or any other ordinance, the common law, the doctrines of equity and the statutes of general application which were in force in England on the 24th day of July, 1874, shall be in force within the jurisdiction of the courts."

[44] Most former English Colonies still follow English principles of law and the practice of international law. Perhaps some countries of late might be changing their positions in respect to English authorities. Ghana, Nigeria, Sierra Leone, Gambia, Kenya, Tanzania, Zambia, Swaziland, Botswana, Zimbabwe, The Sudan, etc., before independence followed English law to the letter.

when South Africa changed her position by embracing the restrictive immunity.[45] The rule of absolute immunity in fact has remained the practice of African countries to date because the post–independence republic constitution of these new African states did not give any allowance that the sovereign be sued in its own court. The various republican constitutions in place simply were silent on this matter since the doctrine of absolute immunity was well entrenched in the said colonies prior to gaining independence.

This is even more so because these new African states are more interested in preserving their hard–won independence or statehood than in throwing their weight behind an emerging international law which seems highly likely to adversely affect it. And those African states sued in recent times before foreign courts have all vigorously resisted as of right the jurisdiction of the foreign court based on sovereign immunity, i.e., *par in parem non habet jurisdictionem.*[46] In Trendtex Trading Corporation v. Central Bank of Nigeria, the Federal Republic of Nigeria resisted the jurisdiction of English courts on the grounds that the Mareva injunction issued against its Central Bank in respect of the failed cement contract was contrary to international law in as much as the Central Bank's funds were immune, by general international law, i.e., from execution. The said plea found favour with Donaldson J who ruled that the injunction be set aside. However, on appeal the plaintiff was granted leave to appeal to the House of Lords. In this respect was Trendtex decided *per incuriam*? Some are likely to agree, but if the said argument is carried to its logical conclusion it would appear clearly that Trendtex was not decided *per incuriam* since the appeal court could not reconsider the same issues over again. Again in the Uganda Co. Holdings Ltd. v. Government of Uganda, the plaintiffs instituted a claim of indemnity against the Government of Uganda as a result of the compulsory government acquisition decrees passed by the Amin government and also for the subrogation of the said government to all the liabilities of the two companies in issue. The Ugandan Government quickly challenged the writ, arguing that being a sovereign state, it cannot be sued before English courts. Donaldson LJ found for the Ugandan Government, thus declining to follow Trendtex, because in his view there was a conflict between Trendtex and Thai–Europe.

In the light of these decisions, can it be argued that pleadings based on customary international law duly presented as a legal position before foreign courts be

[45] See W. Bray and M. Benkes, Recent Trends in the Development of State Immunity in South African Law (1981) 7 SAYIL 13 (Foreign States Immunities Act 1981).

[46] Planmount Ltd. v. Republic of Zaire (1981) 1 AIL ER 1100 64 ILR p. 268; Birch Shipping Corp. v. Embassy of the United Republic of Tanzania (1980) 507 F.Supp. 311; The Kingdom of Morocco v. Societa Immobiliare Forte Barchetto (1979) 65 ILR; Democratic Republic of Congo v. Venre (1971) 22 ILR 669, 684; Libya American Oil Co. v. Libya (1980) 482 F.Supp. 1175; TransAmerican Steamship Corp. v. Somali Democratic Rep. (1985) 767 F 2nd 988, 767 R.2d 988 1004; Trendtex Trading Corp v. Central Bank of Nigeria (1977) 2 WLR 356 (Court of Appeal); Libyan Arab Socialist People's Jamahiriya v. Rossbeton SRL (1992) 103 ILR 63 Italy Court of Cassation 1989; Texas Trading and Milling Corp. v. Fed. Rep. of Nigeria, US Court of Appeals, 647 F2d 300 Cert (2nd Cir. 1981).

designated as state practice? Many will no doubt take issue with the above supposition. However, a further reflection will show that claims or assertions made in concrete terms or *in abstracto* in regard to a legal right or legal rule can be referred to as state practice.[47]

Dr. Akehurst in considering this subject offers the following explanation:

"Customary law is created by state practice. State practice means any act or statement by a state from which view about customary law can be inferred. It includes physical acts, declarations in abstracto (such as general assembly resolutions, national law, national judgments and omissions."[48]

His argument or explanation is equally shared by such scholars as Dr. Villiger,[49] Dr. Thirlway,[50] and Professor Wolfke.[51] Dr. Danileko, for example, also argued in support of the supposition as follows:

"It was assumed that a custom–generating practice should be made up of concrete manifestations of actual conduct involving assertions of a right or claim which is enforced against other states. The concept of actual practice encompasses not only active practice but also negative practice consisting in habitual abstentions from specific actions."[52]

Furthermore, the writings of these learned publicists have equally been confirmed by the ICJ in its judgment in the Asylum Case[53] and the Continental Shelf Cases.[54] If this be the consensus of the day, then the said pleadings which were submitted by Nigeria and Uganda as claims before English courts represent state practice or legal position, or what these countries believe to be the law since the said assertions were reflective of customary international law. The doctrine of absolute immunity therefore can be seen from the practice of the following countries, because the said claims show how international is understood. Countries from Commonwealth Africa and Francophone countries have all argued that they be accorded immunity.

[47] Thirlway, op. cit., p. 58; Akehurst, op. cit., p. 4.
[48] Akehurst, op. cit., p. 53.
[49] Villiger, op. cit.
[50] Thirlway, op. cit.
[51] Wolfke, op. cit.
[52] Danileko, op. cit., pp. 85–86.
[53] (1950) ICJ Reports 277.
[54] (1985) ICJ Reports 29.

Table 11.

These countries have expressed *opinio non juris* in respect of restrictive immunity.	
Nigeria	Uganda
Libya	Zambia
Zaire – now Republic of Congo	Guinea
Ethiopia	Mozambique
Tanzania	Ivory Coast
Morocco	Rep. Democratique du Congo
Congo	Tunisia
Somalia	Algeria

*Egypt did challenge the jurisdiction of foreign courts but it follows the restrictive immunity.

It should be observed, on the other hand, that several governments in Africa have in clear terms expressed some preference for more absolute rule of sovereign immunity.[55] Ghana, Sierra Leone, Botswana, Gambia, Malawi, Kenya, Sudan, Swaziland, Zimbabwe, Mauricius and Cameroon, for example, have republican constitutions in which the local sovereign is accorded absolute immunity in its spheres of operation.[56] And the declarations made by these countries before the OAU suggest that they all support a regional agreement wholly predicated on the charter. Parts of Article 3 can be stated as follows:

"(1) The sovereign equality of all member states
(2) Non–interference in the internal affairs of states
(2) Respect for the sovereign and territorial integrity of each state and for its inalienable right to independent existence
(3) Peaceful settlement of disputes by negotiations, mediation, conciliation or arbitration."[57]

It must be stated unequivocally that African countries having successfully rid themselves of colonial rule and desperately faced with the task of nation building are not ready to compromise their sovereignty and the equality they enjoy among

[55] See Blaustein–Flanz,(eds.) Constitutions of the Countries of the World; (1974–2001) the work deals with the Constitution of African states. For complaints see Doc No. AALCC/IM/87/2, a paper entitled Jurisdictional immunities of states prepared for a meeting of legal advisers of these countries but see generally Ibou Diaite, Les Constitutions Africaines et le droit International Annales Africaines (1971–72), 33–51.

[56] See P.F. Gonidec, Les droite Africains (1968); the independence constitutions of these countries also support the position taken by the present writer.

[57] See OAU Charter Article 3.

the community of states. Article 3 Section 1 to 3 undoubtedly represent settled universal rule among nation–states and therefore, *ex hypothesi*, could be regarded as rules of general international law. Article 3 Subsection 1[58] clearly restates the classical notion of equality of states, i.e., the independence and equality of states which in some instances implicitly derives its force from the maxim *par in parem non habet imperium*. Article 3 Section 1[59] is therefore a corollary of sovereign immunity. African states, having signed the charter, are ready to adopt an internal as well as external nationalism specifically geared toward the promotion of their legal sovereignty. The sovereign state, according to African leaders, is one and indivisible and therefore there is no distinction between its public law capacity and private law capacity. This idea was borrowed from national liberation movements, in view of the fact, that these radical groups during the Cold War days totally leaned toward the Marxist–Leninist teachings of the former USSR, now Russia. For African states, a state is not amenable to the jurisdiction of municipal courts for the mere fact that it has ventured into commerce because it is legitimately invested with *potestas imperii*, in order to promote the public good for the betterment of its citizens in economic, social and national building.

Certainly, the introduction of common law into Commonwealth Africa could be singled out as one of the reasons why these African countries adhere to the principle of state immunity. Although European countries are modulating their positions respecting state immunity, it would appear, however, that most African states have turned a deaf ear to the call that immunity be restricted.

The following countries as of now, however, follow the doctrine of restrictive immunity.[60]

Table 12.

These countries support restrictive immunity.
(1) South Africa, e.g., has a legislation in place
(2) Togo
(3) Madagascar
(4) Lesotho
(5) Egypt
(6) Malawi, e.g., has a legislation in place

Prior to 1981, however, South Africa did follow the classical notion of sovereign immunity,[61] a concept clearly borrowed from English practice.

[58] Ibid.
[59] Ibid.
[60] I. Brownlie, op. cit., pp. 327–328.
[61] See Dugard, op. cit., pp. 151–158.

6.5 French Sovereign Immunity Law in African States

The French colonial policy in Africa followed about the same pattern as that of the British. However, the French policy differed somewhat in that while the British followed a policy of indirect rule, the French, on the other hand, followed the principle of direct rule.[62] In other words, the French policy did not give any recognition whatsoever to African law in the territories that came under their domination. This means in real terms that no room was given to the flowering of African law alongside French law.[63] Hence there were no parallel possibilities created within the legal systems of these colonised territories as to create problems of conflict of laws.[64] Thus any citizen within these colonies who qualifies as *evolves* or *assimilados* was considered a French citizen and therefore directly "placed" under French law.[65] It is instructive to note that these French overseas territories were legally regarded as an integral part of metropolitan France and therefore governmental policies and international law designed for France applied with the same force and validity in these overseas territories of France. The French also without exception adopted not only the machinery, but the procedures of the Code Napoleon to the letter in these colonies.[66] And this is exemplified by the force and effect of the policy of assimilation and direct rule.

"Almost all the post–independence agreements with these territories as members of the French community concluded with France having retained some form of judicial association with the Conseil d'etat and the Cour de Cassation of France, thus establishing a system of references and appeals, from their highest local tribunals to those of France.[67]

Thus any legal controversy that crops up within these overseas territories which defies solution is always referred to France for resolution. This arguably means that the civil law of France was applied to the colonies as though the litigating parties were before a French court. Thus international law as understood in France undoubtedly followed the same pattern in these colonised territories.[68]

It may be recalled that it was through the pleadings which were made on behalf of France in the Schooner Exchange that prompted Chief Justice Marshall to the rule that immunity be granted to France based on the maxim *par in parem non habet jurisdictionem*.[69] Ever since that day, France, it would appear, might have taken the view that immunity be granted to foreign sovereign states irrespective of whether the activities of the state in issue be private or public, although there is evidence to support the fact that Bodin's philosophical writings might have had an

[62] T.O. Elias, Adaptation and Development, op. cit.
[63] Ibid.
[64] Ibid.
[65] Ibid.
[66] Ibid.
[67] Ibid., p. 191.
[68] See Sanders, op. cit., pp. 227–232.
[69] Sucharitkul, op. cit., p. 207.

earlier influence on the practice of France in the area of the law of sovereign immunity.[70]

It is submitted that before the First World War France followed the doctrine of absolute immunity without any reservations.[71] The Moroccan Loan Case[72] and that of the Hanu Krew v. Minister del'Afghanistan 1922,[73] which were litigated before French courts, firmly followed the principle of absolute immunity.[74] However, after the First World War, the position of France became somewhat ambivalent. France thus followed state immunity at one time, while at the same time threw its support behind the restrictive approach at other times.[75]

The argument alluded to above is essential to the understanding of the attitude of former French colonies in respect of international law. And given the French policy of assimilation and direct rule, it is plausible to state more clearly that whatever international law applied in the municipal courts of France also applied with the same weight in the local courts of these dependencies. Thus when the rule of state immunity was upheld in France, it also found its way into Africa as a result of French colonial policy. However, no one can tell what might have happened to this rule after independence was gained by these French-speaking countries. Thus when France embraced the doctrine of restrictive immunity, most of these African countries might arguably have done the same, since the legal system of these African countries were structured to follow the procedures of the Code Napoleon. Although the argument advanced herein may be open to debate, there is the tendency of some French-speaking countries still willing to follow today the same principles of international law adhered to by the Cour d'appel de Rennes. Thus, logically, any authority coming out of this court is likely to carry weight in French-speaking Africa.[76] It is important to note, however, that the position of French-speaking countries as at now is obscure. Evidence forthcoming so far indicates that only Togo and Madagascar have decided to follow the restrictive principle.[77] Again the position of Tunisia and Cameroon appears obscure and not at all clear-cut,[78] but it would appear that these countries in the past have followed absolute immunity.

In fact, the French-speaking countries of West Africa are somewhat reserved in these matters but appear, however, not to be against the traditional notion of state immunity because evidence attests to the fact that those French-speaking countries sued in foreign courts have also fiercely resisted the jurisdiction of the foreign court.

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[70] T.O. Elias, op. cit., Africa and the Development of International Law, p. 63; George Sabine and Thomas Thorson, op. cit.; A. Appadorae, op. cit.

[71] Sucharitkul, op. cit., p. 208.

[72] S. 1935-1-103.

[73] Cass. reg., Jan. 23, 1933, S 1933-1-249.

[74] Sucharitkul, op. cit.

[75] Ibid., pp. 203-218.

[76] Sanders, op. cit., pp. 227-232; Elias, op. cit., Africa and the Development of International Law.

[77] Brownlie, op. cit., p. 328.

[78] Ibid.

In the light of the Charter of the OAU, i.e., Article 3 Subsection 1, and the declarations made by African states, one would not be wrong in saying that countries such as Algeria, Benin, Burkina–Faso, Central African Republic, Djibouti, Gabon, Republic of Guinea, Ivory Coast, Mali, Mauritania, Morocco, Niger, Seychelles, Chad, Camoros and Congo Brazaville would rather prefer that the rule of absolute sovereign immunity be maintained.[79]

The Portuguese and Spanish colonial policies in Africa followed the same direction as that of France. But it would appear that the Portuguese approach was more stringent. Thus Spain and Portugal as a matter of conviction followed a theory where their overseas dependencies were simply considered albeit an integral part of the land mass of metropolitan Europe. In fact, whatever law applied in Spain and Portugal at that time applied with equal force and validity in their overseas dependencies as though these colonies were entirely occupied by Iberians of Europe. Again, it is clear from this analysis that in so far as Portuguese and Spanish countries were concerned, no room was given to customary African law to flourish. The attempt here to study the relationship between these African states and their former colonial master is to precisely determine how the doctrine of absolute immunity got into Africa during the epoch of colonialism.

6.6 Africa, Self–Determination and International Law

Africa is a very vast continent stretching over 12 million square miles, i.e., 30.3 million square kilometres. In fact, it forms about one–fifth of the total surface mass of the earth. By every estimation, it is the second largest continent, second to Asia in total "land surface." The late Osagyfo Dr. Kwame Nkrumah having taken cognizance of the size of Africa, its people, diversity in culture and language, offered the following pieces of advice.

"In Africa where so many different kinds of political, social and economic conditions exist, it is not an easy task to generalise on political and socio–economic patterns. Remnants of communalism and feudalism still remain and in parts of the continent ways of life have changed very little from traditional past. In other areas a high level of industrialisation and urbanisation has been achieved. Yet in spite of Africa's socio–economic and political diversity, it is possible to discern certain common political, social and economic conditions and problems. These derive from traditional past, common aspirations and from shared experience under imperialism, colonialism and neo–colonialism. There is no part of the continent which has not known oppression and exploitation, and no part which remains outside the process of the African revolution."[80]

In view of the above advice, it would be most expedient to approach the subject before us with utmost eclecticism. In 1945, only four African states were independent. And these countries were Ethiopia, Liberia, Egypt and South Africa. The war, however, changed everything. Thus those countries under bondage started

[79] This is so because there is no evidence of the practice of restrictive immunity in Africa, except some few countries such as South Africa, Togo, Egypt, Lesotho and Madagascar.

[80] Dr. Kwame Nkrumah, Class Struggle in Africa, 6th Ed. 1981 p. 9.

questioning the legitimacy of colonialism, although it would appear such demands had been made earlier on, but the surge in nationalism which came to the fore after the Second World War was considerable and probably on account of the change from classic international law to modern international law.[81] And also perhaps because of the abolition of the concept of *jus ad bellum*, i.e., the right of a state to resort to war whenever such a measure serves its best interest.

The change from classic international law to modern international law was also aided by the Briand–Kellog Pact of 1928, which prohibited the resort to aggressive war as a means of settling disputes between states.[82] According to Professor Tunkin, it was classic international law which gave birth to colonialism and imperialistic domination of Africa and Asia,[83] while modern international law paved the way for countries of Africa and Asia to fight for independence. Professor Tunkin further argues forcefully thus:

"The international law in force before the October Revolution comprised principles and norms legitimating colonial domination in its different forms. The right of acquisition of 'no man's territories' (the coloured inhabitants of these territories were not taken into consideration, the right of conquest, imposed treaties, spheres of influence, colonies, protectorates, etc.) belonged to such institutions of classic international law. They existed side by side with democratic principles of classic international law, being in conflict with them.[84]

Although Professor Tunkin over the years has been criticised for having introduced propaganda into international law,[85] the above argument thus stated in respect of classic international law cannot *ex hypothesi* be disputed. True, Dr. Akehurst seems to take issue with Professor Tunkin on this matter,[86] but in his own book, he seems to have followed the same line of argument in order to discern certain peculiar attitudes of the Third World towards international law.[87]

The quest for self–determination or decolonisation became the *cri de guerre* of African states immediately after the Second World War. The war in fact had a great effect on everybody and therefore attitudes quickly changed.[88] This continued in a more well organised manner after the founding of the U.N. The catalytic force and impetus for decolonisation thus took root when the 1960 General Assembly Resolution 1514 XV was adopted. Ever since the adoption of this resolution the rules of engagement regarding international law have never been the same.

Dr. Anand in explaining the force behind the attitude of Asia and Africa states towards international law explains that

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[81] See Tunkin in Essays on International Law in Honour of Krichna Rao (edited by M.K. Nawaz) (1976) pp. 48–52.

[82] Ibid.

[83] Ibid.

[84] Ibid., p. 51.

[85] See Akehurst, op. cit., p. 496.

[86] Ibid.

[87] See M. Akehurst, A Modern Introduction to International Law (1987) pp. 19–22.

[88] The evidence is clearly manifested in the number of countries that became independent after the war. Perhaps Dr. Tunkin was right in his argument in favour of contemporary international law as opposed to classic international law. (See the Charter of the United Nations.)

"International law is no longer the almost exclusive preserve of the peoples of European blood by whose consent it used to be said, 'exists and for the settlement of whose differences it is applied or at least invoked' R. Pal (1957) 176k of ILL 158. As it must now be assumed to embrace other peoples, it clearly requires their consent no less. Second, at least part of this law, created by, and for, a few prosperous industrial nations, with a common cultural background and strong liberal individualistic features, is hardly suitable for the present heterogeneous world society. The majority in this expanded world community consists of small, weak, poor, vulnerable, technologically and industrially underdeveloped former colonies filled with resentment against their colonial rulers and needing and demanding the protection of the international society. This new majority has new needs and new demands and they want to mould the law according to their needs."[89]

The explanation offered by Dr. Anand can objectively be construed as an adequate assessment of the attitude of Third World countries towards modern international law. Thus the adoption of the self–determination clause into Article 1 of the two international covenants on Human Rights, although well diluted by some reservations from a few Western states, did not slow down the speed at which African states gain independence from their colonial masters. The General Assembly further adopted Resolution 2625 (xxv). The adoption of this resolution thus destroyed the concept of colonialism for good. Many African countries shortly thereafter took control of their destinies and therefore affected the pace of international law. Professor Falk in his exposition on the question of decolonisation offers the following explanation:

"The new states are being asked to accord respect to a system of law used in prior decades to legalize the colonial structure of authority that held their societies in protective custody. It is natural that hostility of the new states towards colonialism spills over to influence their attitudes towards international law. O'Connell's logical contention that the new states cannot question the binding quality of the rules of international law without undermining their own claims to statehood must be balanced against socio–historical consciousness that the new states are being asked to show respect for the same international legal system that was used by European powers to suppress and exploit them."[90]

Professor Falk's position is amply supported by the impact of the Berlin Congress of 1884 and the resultant Berlin Act of 1885 and its imperialistic effect on the peoples of Africa and elsewhere, which in a way gave blessings to the Balkanisation of Africa according to colonial power boundaries irrespective of family ties and tribal groupings. In spite of these difficulties and injustice African and Asian countries have all accepted the force and command of these laws which were in existence before the attainment of independence.[91] However, the presence and solidarity of these developing countries were felt during the quest by the international community to ratify the new international law of the sea.[92] International law before the Second World War thus was primarily European law, but as a result of the formation of the U.N., and the subsequent attainment of independence by Asian and African countries, the structure of international law has as-

[89] See Anand, Attitude of Asian–African States towards Certain Problems of International Law in F. Snyder and Sathurather (1987) pp. 10–19.

[90] Falk (1966) Recueil des Coures Vol. 2 pp. 16–17.

[91] Akehurst, op. cit., p. 27.

[92] T.O. Elias, New Horizons in International Law (1979) pp. 21–35.

sumed a global horizontal expansionist order in many respects. There is therefore a conflicting balance of claims and reactions between the old order and the new order.

6.7 Reflections on State Practice and Its Implications

International law scholars[93] are agreed that customary international law is formed or created through state practice or settled practice, i.e., *usus* qualitatively aided or accompanied by *opinio juris*. It can also be formed if *usus* is clearly accepted by states as rightly tenable, coupled with an unqualified feeling on the part of states to be bound (*opinio juris sive necessitatis*).[94] What then constitutes state practice? What factors must be taken into consideration to determine the raw materials of state practice? How long must the practice be in existence to command acceptance as forming customary international law? Should it be rigidly construed that it be always consistent as a prerequisite to forming international law? How many states must be clearly associated with the practice to crystallize into law? And how important is *opinio juris* in this regard? These are important questions, and they are being asked in the hope that answers given in reply to these questions would help clear the unbeaten path to understanding the difficulties associated with the practice of African states in respect of state immunity.

In order to see our way clear in this endeavour, it is apposite that the questions posed or alluded to above be first explored as a navigational compass or tool to support the said proposition that the practice of states can clearly be inferred from the unilateral action taken by a state or subjects of international law, before municipal courts or international tribunals. This may take the form of a legal claim, clothed in legal arguments or concretely expressed in pleadings or legal action, duly effected on behalf of a government by a lawyer or a group of lawyers, before a national judicial authority.

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[93] Michael Akehurst, Custom as a Source of International Law (1974–1975) XLVII BYIL p. 53; Thirlway, International Customary Law and Codification (1972); G.M. Danilenko, Law-Making in the International Community (1992); Mark Villiger, Customary International Law and Treaties (1985) pp. 3–37; H. Meijers, How Is International Law Made (1978) ix NYIL pp. 3–26; A.A. D'Amato, The Concept of Custom in International Law (1971); L. Gould, An Introduction to International Law, New York 1957; Korol Wolfke, Custom in Recent International Law (1994) pp. 52–95; D.P. O'Connell, International Law (1970) pp. 3–35; I. Brownlie, Principles of Public International Law (1990) pp. 4–11; J. Dugard, International Law, A South African Perspective (1994) pp. 23–35; Kopelmanas, Custom as a Means of the Creation of International Law (1937) xviii BYIL p. 127–151; Macgibbon, Customary International Law and Acquiescence (1957) xxxiii BYIL pp. 115–145.

[94] See Dugard, op. cit, pp. 24–25.

6.7.1 What Do We Mean by State Practice?

State practice may encompass the sum total of actual manifestation of state action or conduct which may directly or indirectly affect or have a bearing on international law.[95] The conduct may take the form of assertions in support of a claim or an action against a state on specific international law issue or against other states where a historical right or a prescriptive right is at stake.[96] Furthermore, evidence of state practice can be found in national and international court decisions, diplomatic correspondence, policy statements by senior state officials, statements by foreign ministers before international organisations, national legislation, replies to questionnaires and draft reports of the International Law Commission, treatise and resolutions of international bodies, e.g., the UN.[97]

Professor McDougal says that the constituent elements of state practice represent a "Process of continuous interaction, of continuous demand and response."[98]

Professor Brierly in dealing with the above subject said that state practice is "what states do in their relations with one another."[99]

Dr. Villiger in his exposition on what is state practice explained that

"State practice on the international plane may include diplomatic correspondence (notes *aidés–memoires*, letters, etc.), general declarations of foreign or legal policy, opinions of national legal advisers, and instructions given to state representatives. Practice can also be found in the positions taken by governments before international tribunals. The decisions of tribunals and the work of the ILC, while *ex hypothesi* unable to create law, provide important evidence of customary law."[100]

The position taken by Dr. Villiger seems to run somewhat counter to that of Professor Crawford thus.

"The arguments of counsel before international tribunals are still state practice, and the consistent use of estoppel arguments, fortified by adoption (even if only orbiter or in a subsidiary way) by tribunals, have led to the acceptance of estoppel as customary international law."

He argued further that:

"It is, however, difficult to accept this argument. The notion of 'customary case law' seems to involve, at least, a confusion or conflation of elements in the formation of international law which are, and ought to be, distinct. Counsel for a state before an international tribunal may well be agents of the state for the purpose of admissions, declarations and the like (cf. p. 284), but it is difficult to accept that their juridical arguments are an autonomous form of custom or state practice. They are, after all, attempting to persuade a tribunal whose decision is only 'subsidiary' source of general international law. It would be odd if argument, which is subordinate to decision, could somehow rise above the latter in its formal status as a law–creating agency."[101]

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[95] See Villiger, op. cit., pp. 4–39.
[96] Ibid.
[97] Ibid. at 5.
[98] (1955) 49 AJIL 357.
[99] The Law of Nations (1963) p. 59.
[100] Villiger op. cit. p. 5.
[101] (1980) 51 BYBIL 271.

Dr. Villiger whilst commenting on Professor Crawford's arguments offered the following explanation.

"With respect, this view possibly overlooks the fact that one instance of practice, such as would be found in the position taken up before the ICJ cannot create law. Whereas an ICJ judgment has *eo ipso* a function."[102]

Although Professor Crawford's argument is well taken, it would appear that the expressions or assertions of subjects of international law before international tribunals or perhaps before municipal tribunals for the sole purpose of making a claim which is well grounded and reflective of customary international law can be designated as representing state practice and therefore has the potential of becoming a "law–creating agency." In this respect, state practice is seen as a political and legal conduct legally ascribed to states in their capacity to express their own views on international law issues. And given the fact that international law is horizontal in structure, subjects of international law in this respect are positively seen as law makers and policy makers at the same time.[103] Thus assertions made by sovereign sates *in abstracto* with the positive aim of making their positions known before an international or municipal tribunal in respect of a legal dispute in support of a legal right *de lata* arguably is state practice and therefore may in all the appropriate circumstances positively contribute to the understanding of how states behave and the means by which their obligation to a rule is determined. Dr. Villiger therefore has a point,[104] in as much as actions and reactions from sovereign states in respect of an international issue technically shapes and redefines state practice, whether it be a legal argument or judgment.

A similar argument seemed to have been made by Dr. Thirlway as follows.

"The occasion of an act of state practice contributing to the formation of custom must always be some specific dispute or potential dispute. . . .

The mere assertion *in abstracto* of the existence of a legal right or legal rule is not an act of state practice; but it may be adduced as evidence of the acceptance by the state against which it is sought to set up the claim, of the customary rule which is alleged to exist, assuming that that state asserts that it is not bound by the alleged rule. More important, such assertions can be relied on as supplementary evidence both of state practice and existence of *opinio juris*, but only as supplementary evidence, and not as one element to be included in the summing up of state practice for the purpose of asserting its generality."[105]

Dr. Thirlway's position undoubtedly will be accepted by most international law scholars, except the point he made regarding the distinction between mere assertion *in abstracto* and real assertion in respect of legal rights.[106] According to Dr. Akehurst, "The distinction between acts which are constitutive of practice and acts which are only confirmatory of it is singularly thin. Indeed the distinction between assertions made in context of some concrete situation and assertions made *in abstracto* is also unrealistic, because it emphasizes appearances at the expense of re-

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[102] Villiger op. cit. p. 40 (specifically see footnote 22) in respect of his position on what constitutes state practice. He clearly disagreed with Prof. Crawford.

[103] Bin Cheng, International Law, Teaching and Practice 1982 p. 223.

[104] See Villiger op. cit. pp. 3–39.

[105] Thirlway op. cit p. 58.

[106] Ibid. p. 58.

ality."[107] Although a debate of this nature would promote a philosophical understanding of the subject, it should not derail our quest to lay bare the essential elements of state practice in international law.

6.7.2 Municipal Courts and Legal Arguments of Defendant States

International law is normally referred to as the relations between sovereign states in their everyday dealings with each other, i.e., in respect of certain duties, rights and obligations. However, evidence abounds to show that in some instances the interaction between an individual and the state can also give rise to state practice.[108] Thus a claim made by a state as of right before a national authority in respect of an international law issue certainly can be denoted as state practice, and thus may clear the path for customary international law to be made. As it may be recalled, it was through a claim of immunity duly presented on behalf of France in the Schooner Exchange before a national authority that led to the creation of the sovereign immunity rule.[109]

Thus if a private entity in country Z sues country Y before a court in country Z, the most relevant issue, as a matter of procedure, would be centred on the competence of the courts of country Z. And the main question to ask is whether the court has jurisdiction to entertain the suit. As a matter of principle anybody can be sued. However, exceptions do exist under international law, respecting acts of state in the exercise of sovereign rights, *acta jure imperii*. These exceptions were absolute at one time but of late some states have taken steps to have the rule limited in scope. Further, if country Y submits to the jurisdiction of country Z without question, it means country Y has given up its alleged right in respect of absolute immunity without protest or the inclination to assert a claim of immunity and thus embrace the restrictive rule of sovereign immunity. If, on the other hand, government lawyers of country Y took pains to legally challenge the jurisdiction of country Z, that being a sovereign country, Y cannot be impleaded against its will, then in real terms one may be prompted to argue that country Y still prefers the old order, i.e., the concept of state immunity, which means that country Y has expressed in concrete terms the existence of a legal right or legal rule which can be inferred from public international law, e.g., *par in parem non habet imperium or par in parem non habet jurisdictionem*. In this respect the pleadings offered on behalf of Y in terms of actual claim may be clearly construed as to how international law is understood in country Y and therefore arguably represent state practice.[110]

It is submitted therefore that although there are differences between an international tribunal and municipal courts, in terms of composition and the order of operation, the latter refers to the same international law principles and "case law" in making judgments and the issues likely to be litigated before these courts more of-

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[107] See Akehurst op. cit. p. 4.

[108] Macgibbon, (1957) xxxii BYBIL p. 120.

[109] The Schooner Exchange v. McFaddon (1812) 7 Cranch 116.

[110] See Villiger, op. cit., 5, 40.

ten than not are sometimes limited to controversies with a foreign element. Thus while international courts may as a matter of law entertain controversies only between subjects of international law, i.e., states, municipal courts on the other hand may entertain controversies between states and private entities such as juridical persons and natural persons. This arguably, however, does not limit the effect of claims made before these municipal courts from attaining the same status as one made before an international tribunal in respect of state practice.[111] It is further submitted that any controversy or dispute associated with a foreign element, be it before a municipal court or an international tribunal in which a state asserts a claim or challenges a claim being made by the other party, represents in every respect state practice.[112] What therefore constitutes the element of state practice can be determined by what states do and in most cases what states may say in respect of their interest and what they perceive as their rights as subjects of international law.[113]

The heart of the matter is whether the argument posited above can be sustained. Although a confusion seems apparent as regards the broad interpretation of the element of state practice, there is at least some consensus in support of physical deeds and verbal acts as constituting the element of state practice. The watchword, therefore, must cover acts and claims of states, hence one can argue that one of the most convincing evidence of state practice is the positive manifestation of a legal claim concretely made or effected before a national authority or an international tribunal.

As a matter of principle, international law is primarily concerned with the rights, duties, obligations and interests of states, and given the fact that it is horizontal, supports the notion that whatever is said or done in the form of a claim, both real or putative, in support of a position respecting a real dispute is bound to produce state practice. This is even more so because every state is a subject/law maker and therefore logically has its own particular views in respect of its interests and rights in international law which may or may not actually command *opinio juris*, but somehow affects the balance of law making within the international system.[114] A good example in this light could be likened unto the claims made by Nigeria before municipal courts in America, United Kingdom and Germany, respectively, where Nigeria asserted its claims of immunity as a matter of legal right properly derived from an established customary law, which supports the view that a state may not be impleaded without its consent and that jurisdictional immunities be accorded to all nations irrespective of whether the act of state in question be private or public.[115] Some other African states have also been sued

[111] Lauterpacht, (1929) BYIL x; R.A. Falk, The Role of Domestic Courts in the International Legal Order (1964).

[112] Thirlway, op. cit.; Villiger, op. cit.

[113] Wolfke op. cit., pp. 41–51; Villiger, op. cit.

[114] Bin Cheng, op. cit., pp. 216–229.

[115] Trendtex Trading Corp v. Central Bank of Nigeria (1977) Q B 529; Youssel M. Nada Establishment v. Central Bank of Nigeria, District Court of Frankfurt, Judgment of 2 December 1975, Docket No. 3/80 186/75; National American Corporation v. Federal Republic of Nigeria and Central Bank of Nigeria, 76 Civ. 3745 GLG (1979); Texas

in recent times before national authorities and the pleadings or arguments advanced before these foreign municipal courts on behalf of these African countries without doubt represent in many aspects state practice.[116] No argument for that matter can be made to dilute the legal significance of such claims made before municipal courts, since such judicial decisions are regarded as sources of international law. Marshall C.J. of the United States of America S.C. argued that

"The decisions of the courts of every country show how the law of nations in a given case is understood in that country, and will be considered in adopting the rule which is to prevail in this."[117]

If Justice Marshall's argument be convincing then claims made by subjects of international in respect of real disputes before municipal courts certainly can serve as a medium of balancing claims in the process of making international law. Such claims are therefore state practice whether they be made before municipal courts or international tribunals, because the underlying claim indicates how customary law is understood *qua* the dispute in issue by the defendant state.

At the risk of belabouring a proposition or an argument in international law, for which there is perhaps recognition or disagreement among scholars, certainly calls for more evidence in support of the proposition or the argument herein submitted. Thus in a quest to clarify the confusion associated with state practice, Professor Wolfke's explanation would be quite helpful thus:

"In order to avoid misunderstandings, it seems, then, advisable to apply the term "practice" only in its broadest sense – that is, as the conduct of all organs, even of private persons, which might have any bearing on international law."[118]

Hence all things being equal, claims or pleadings made before municipal courts by subjects of international law or states which are likely to have a bearing on international law can therefore be referred to as state practice, since these states have an interest to protect.

Pleadings offered by litigating parties in the Paquete Habana,[119] the Scotia,[120] the I Congreso del Partido, Victory Transport Inc. v. Comisna General del Abastercimentos y Transportos[121] and Alcom Ltd. v. Republic of Colombia[122] are all

Trading and Milling Corp. v. Republic of Nigeria, 647 F2d 300 Cert, 2nd Cir 1981, 20 Int'l Leg Mat'ls 620 (1981); Verlinden BV v. Central Bank of Nigeria, Supreme Court of the United States, 1983 461 US 480. In this light one important issue to explore is whether Nigeria is bound by the restrictive approach to sovereign immunity. The answer may be inferred from how the said law affects the interest of Nigeria. Nigeria, however, as of right can oppose the restrictive rule since it is an emerging rule of international law. In order to effectively oppose the restrictive rule, Nigeria must oppose "the rule in the early days of the rule's existence or formation and maintains its opposition consistently thereafter." See Judge Jessup's argument in the South West Africa Cases ICJ reports, 1966 pp. 3, 441; in respect of the issue raised.

[116] Villiger, op. cit. p. 5; Akehurst op. cit. 1–10; Thirlway op. cit., p. 58.

[117] C.F. Starke, International Law (1994) p. 42.

[118] Wolfke op. cit. p. xvii. Thus a state's behavior on the international plane reveals its concept of international law and what it expects of other states.

[119] (1900) 175 U.S. 677.

[120] (1871) 14 Wallace 17, 188.

[121] (1981) 3 WLR 328 House of Lords.

clear expressions or claims made in respect of state practice at the very time or period when these said controversies came up for litigation before municipal courts. The variables and presumptions of state practice herein explored in this analysis can be used as a guidepost in determining the practice of states in respect to specific international law issues, particularly if the practice in issue seems scanty in the area of national legislation, diplomatic correspondence, reply to questionnaires on draft reports of the International Law Commission and, of course, policy statements by senior policy makers of governments.

6.7.3 Summary of Rules

At some point of this study certain pertinent questions were asked and specific responses to these said questions can now be summarised as follows.

1. State practice represents the raw material of customary international law and it specifically means physical acts, general declarations in terms of foreign and domestic policies, claims and omissions of states, and pleadings offered by nation states before international and municipal courts. Customary international law is [therefore] created through uniform state practice and the practice of international organizations.[123]
2. The existence of customary international law can be inferred from two main requirements, i.e., settled practice (*usus*), backed by the psychological element of *opinio juris sive necessitatis*.[124] State practice in this respect thus reshapes, creates, defines the character and the contents of the law.
3. For practice to have any meaningful impact in respect of the formation of customary international law the ICJ in the North Sea cases offered the following explanation.

   "Within the period of time in question, short though it might be, state practice, including that of states whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked."[125]

   Thus evidence of major inconsistency or conflict in the practice of states will prevent the creation of customary international law. Scholars are agreed that the duration of practice is also important in the creation of international law, while some scholars believe that the duration must be continuous from time immemorial, others have in fact taken the view that the law can be created "instantly," i.e., *droit spontane*. The ICJ, however, has only mentioned "constant practice" without going as far as to postulate that time be desig-

[122] (1984) 2 WLR 70 House of Lords.
[123] See Akehurst op. cit.; Villiger op. cit.; Danilenko op. cit.
[124] Dugard op. cit.; Wolfke op. cit., p. 30–36.
[125] ICJ reports 1969 43 para 74.

nated as an essential factor[126] or prerequisite for the creation of customary international law.

4. A small number of states could create international law, provided that the practice in issue does not conflict with a rule of international law. Furthermore, the quantity of state practice is equally important in the creation of international law than the frequency and duration of practice, sometimes advanced by scholars of international law. Thus for international law to be created the number of states participating in the practice must be significant.[127]
5. Professor Bin Cheng says that "the essence of general international law is *opinio juris generalis* of states." *Opinio juris* is therefore an important element in the creation of international law. Thus, for a state practice to become law it must be accompanied by a constitutive element, i.e, *opinio juris*.[128]
6. International law is horizontal in structure and therefore a state cannot be made to comply or be bound by a rule that it has opposed from the early days of the creation of the rule. However, it is important to state more clearly that all new states, whether ex–colonies, as for example Asia and African states, or those created by state succession, are bound by the rules of international law that existed before these countries became subjects of international law or simply became independent.[129]
7. A settled practice without any sense of obligation on the part of states cannot create customary law. Thus there must be shared feeling of understanding based on *consensus omnium*, i.e., there must be a general practice in support of a particular rule.[130]
8. A treaty is an important law creating agency in modern times.[131] It forms part of state practice and it is created through the meeting of the minds of state officials, i.e., by *consensus ad idem*. With the aid of these salient rules, one is in the position now to analyse the issues relating to state immunity and the practice of states in Africa.

6.8 Custom and the Concept of Persistent Objector

It is proposed under this rubric to deal with some interrelated international law issues covering custom, *opinio juris*, and the persistent objector rule in respect of the doctrine of restrictive immunity.

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[126] 1950 YBILC 11 26; PCIJ 1927 Series B No. 14 105; Akehurst op. cit. pp. 15–16.
[127] See Akehurst p. cit., pp. 16–18.
[128] Ibid., pp. 31–37, 53.
[129] Ibid. pp. 23–28.
[130] See I. Brownlie op. cit. pp. 7–9.
[131] See Fitzmaurice, 1953 30 BYIL 24–26; Sorensen, 1960 III 101 Hague Recueil 43–47.

6.8.1 Are African States Bound by Restrictive Immunity?

At the outset, it was shown that the concept of sovereign immunity had existed in Africa long before European rule was established on the continent. European rule in Africa as the evidence shows, however, redefined and shaped the modern rule of state immunity. Now, these same European countries and the United States of America are modulating their position on state immunity and thus calling on other states to do the same in order to promote justice in the market place. Certainly their demands cannot be ignored. First, the question that must be asked is whether new states are automatically bound by all the rules of customary international law in existence before independence was attained. Secondly, whether the current change of position by some states from state immunity to restrictive immunity can be imposed on other states, and thirdly, whether a state having consistently objected to a rule during its process of development could be bound by the said rule once it becomes law?

It would be in order to answer the first question before getting on to the others. A great majority of scholars have answered the first question in the affirmative and their positions are reflective of customary international law. Professor Lauterpacht says a new state "cannot repudiate a single rule."[132] Professor Waldock also maintains that

> "The generally held view on the point undoubtedly is that established customary rules do automatically extend the orbit operation to a new–born state nor has any state ever argued before the court that it was exempt from a general customary rule simply because it was a new state that objected to the rule. In the Right of Passage case, for example, it never occurred to India to meet Portugal's contention as to a general customary right of passage to enclaves by saying that she was a new state; nor did Poland – new–born after the First World War – ever make such a claim in any of her many cases before the permanent court."[133]

Professor O'Connell has also given his support[134] to the position advanced by Lauterpacht and Waldock. Traditional international law follows the position advocated by Professor Lauterpacht and Professor Waldock. Thus, new states are automatically bound by the existing rules of international law, hence they cannot repudiate any rule of customary international law which came into existence before the attainment of independence.[135] Communist countries have, however, resisted this rule on the grounds that "custom is an implied agreement between states and that the new states are not bound without their consent."[136] The leading exponent of this "consent theory," Professor Tunkin, however, seemed to compromise his position when he said that

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[132] Lauterpacht, Private Law Sources and Analogies in International Law 53 (1927).

[133] General Course on Public Internal Law (1962) 106 Recueil des Cours 1, 52.

[134] See P. Falk (1966) Recueil des Coures Vol 2 pp. 16–17.

[135] C.F. Akehurst, op. cit., p. 27.

[136] C.F. Akehurst, op. cit., p. 27; but see generally Bokor–Szengo, New States and International Law, Chapter 2 for clear exposition.

"If a new state enters without reservations into official relations with other states, that means that it recognises a certain body of principles and norms of existing international law, which constitute the basic principles of international relations."[137]

In the light of the above observations, it is submitted that in reality new states do follow norms of existing customary international law without question. And this certainly includes those states which might have been created either by partial or universal succession, as for example the new states of former Yugoslavia and the former USSR. But it is on record that in some instances, Asian and African countries have taken issue with certain laws which appear to affect their interest adversely. This is in order for these Third World countries also have a perfect right to change the law as well as the old states. The process, however, is cumbersome and not that easy. Furthermore, it is possible these new states could express their *opinio non juris* in respect of an already established rule by destroying its generality of practice. For example, after 1960, developing states on many occasions have influenced or attuned the law to contemporary needs of mankind through interest articulation, interest aggregation, exchange of diplomatic notes, negotiations and protests. To be precise, international law appears to have been greatly influenced by developing states through such important organizations as Asian–African Legal Consultative Committee, the Latin American Group, the Non–Align Movement, the OAU, the UN General Assembly, the International Court of Justice, and the International Law Commission, to mention a few.

If the preceding arguments be sound and well grounded in international law, then can restrictive immunity which appears grounded in the practice of the Western world be imposed on other states? The answer is in the negative in as much as custom is formed or predicated on the adjustment or the balancing of conflicting interests of sovereign states in the international community. The statute of the International Court of Justice, Article 38(1)(b), explains clearly that the two important elements of customary international law are settled practice and *opinio juris*. This shows that for custom to be formed it must be supported by *usus* and *opinio juris sive necessitatis*. *Opinio juris sive necessitatis* is important in this respect, in so far as it distinguishes ordinary rules of comity from rules concretely supported by legal obligations. In Oppenheim's International Law, Jennings and Watts defined custom as

"a clear and continuous habit of doing certain actions, which has grown up under the aegis of the conviction that these actions are according to international law, obligatory or right."[138]

These issues were explained in the Asylum case (Columbia v. Peru) where the court ruled that the Colombian government had failed to prove the existence of a custom to support her quest for asylum to be granted to Victor Raul Haya de la Torre, a Peruvian national who had been involved in a rebellion to topple the then Peruvian government. The court ruled that

"The party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other party. The Colombian government must prove that the rule invoked by it is in accordance with a constant and uniform

[137] (1961) 49 Cal L Rev 419, 428.

[138] Oppenheim, International Law (eds.) Jennings and Watts (1992) p. 27.

usage practised by states in question and that this usage is the expression of a right appertaining to the state granting asylum and a duty incumbent on the territorial state. This follows from Article 38 of the Statute of the Court, which refers to international custom 'as evidence of a general practice accepted as law.'"[139]

In the North Sea Continental Shelf cases,[140] the court again tried to shed light on the relationship between custom, state practice and *opinio juris* by carefully rationalizing doctrine and facts. The issue was whether Article 6 of the Geneva Convention embody or crystallise any existing customary law which could be applied to bind FRG (Federal Republic of Germany). The court ruled that

"The essential point in the connection – and it seems necessary to stress it – is that even if these instances of action by non–parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute *opinio juris* for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to settled practice, but they must also be such, or be carried out in such a way as to be evidence of a belief that this practice is rendered obligatory by the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The states concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts, is not in itself enough."[141]

In Nicaragua v. United States of America,[142] which relates to military and paramilitary activities against Nicaragua, the court reaffirmed its earlier decisions thus:

"The mere fact that states declare their recognition of certain rules is not sufficient for the court to consider these as being part of customary international law. . . . Bound as it is by Article 38 of its Statute . . . the court must satisfy itself that the existence of the rule in the *opinio juris* of states is confirmed by practice."[143]

The ICJ in these cases relied on the thrust and force of Article 38(b) to support the underlying principles respecting the formation of customary law. Thus according to the court, state practice must be consistent and general to constitute customary international law. So in essence custom is made up of two important elements, and these are the 'material fact,' which specifically relate to the behaviour of states and the 'psychological element' which is implicit in whatever rule is perceived by states to be obligatory. This is known or referred to as *opinio juris sive necessitatis*, because it gives an indication as to which actions of states are rendered obligatory by the very essence and requirement of the rule of law. *Opinio juris* or belief of states is therefore one important factor which transforms *usus* into custom. According to Jennings and Watts in Oppenheim's international law,

"This subjective element may be deducted from various sources, including the conclusion of bilateral or multilateral treaties, attitudes to resolution of the United Nations General Assembly and other international meetings and statements by state representative."[144]

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[139] (1950) ICJ Rep p. 266.
[140] (1969) ICJ Reports p. 3.
[141] Ibid.
[142] 1984 LCJ Rep p. 392.
[143] 1986 ICJ Rep p. 97.
[144] See Oppenheim's International Law, op. cit., p. 28.

In view of the attendant requirement for the formation of customary international law, it would be incautious to conclude that restrictive immunity has attained the status of customary international since the doctrine lacks *usus* and *opinio juris* and therefore cannot be imposed on other states, if these African states have expressed an *opinio non juris* in respect of the doctrine, which they believe is unfair and thus may work hardship on them. In this respect, any state which is not comfortable with restrictive immunity and it is of the belief that it will affect its interest adversely could resist the doctrine as of right. And its expression of *opinio non juris* in respect of the doctrine of restrictive immunity could be regarded as state practice and therefore can be added on to similar expressions which have already been made by other dissentient states in preventing restrictive immunity from becoming a universal rule. Based on scholarly writings and the judgments of the ICJ, an emerging rule cannot be imposed on dissentient states since it has not reached a point of being well received and albeit recognised as binding juridically as law.

Professor Brierly in his writings offers the following explanation in respect of the above issue

"that in the absence of any international machinery for legislation by majority vote, a new rule of law cannot be imposed upon states merely by the will of any other states."[145]

Brierly's position is well founded and therefore falls in line with the idea that international law is a process of reconciling conflicting claims which involves action and reaction of states *qua* their interests. This, however, detracts from the position of those international lawyers who regard rules of international law as immutable and therefore wholly based on power politics. Having made all these observations, one is now in the position to postulate that the practice of a great majority of states is very crucial in determining what is law and what is not, and whether a new law has developed and an old law has been rejected or declared obsolete. Thus new rules would have to be supported by settled practice and *opinio juris*, before they can be denoted as customary international law. Consent to a rule by a state in the international community therefore can be inferred from what states say, i.e., through their conduct, acquiescence or failure to contest the legitimacy of a rule in its formative stages. Most states it would appear are more concerned with legal sovereignty, i.e., their independence and equality in respect to other states and therefore will not sit idle to have other states impose their common will on them.

In Trendtex, where the court was faced with the distinction between *acta jure imperii* and *acta jure gestionis*, Stephenson LJ took issue with Lord Denning on his position respecting the change in international law. His reasoning was in order in view of the fact that such points on the formation of international law were made by the ICJ in the Asylum case, the North Sea Continental Shelf cases and the Anglo–Norwegian Fisheries case, respectively. Thus in the formation of a new international law, all sovereign states whether powerful or weak participate as equals in shaping the rule. It is important also to note that in the development of international law conflicting claims and interests of states are brought to bear on

[145] See Brierly, The Law of Nations 1963 at p. 52.

the formative process of a given rule. At a further stage of the process, states are free again to express their *opinio juris* or *opinio non juris* on the legal status of a given rule. Where it appears many states object to the rule, the process comes to an end with the said rule being rejected. The consent of states to a rule thus can be determined from the belief that an activity is obligatory. Stephenson LJ, thus, was right in his reasoning in Trendtex because he was able to shed light on the difficulties usually associated with the change from one customary law to another.[146] Courts therefore can identify customary law by reference to the existence of two important ingredients and that is *usus* (settled practice) and *opinio juris sive necessitatis*. Professor Bin Cheng and Judge Ago have all talked about instant customary law, i.e., *droit spontane* which may only come about as a result of *opinio juris* without the aid of state practice. This phenomenon is rare and only happen in uniquc cases, in the light of the attendant rigorous process respecting the formation of customary law. African states such as Nigeria, Libya, Zaire (now Rep. of Congo), Ethiopia, Tanzania, Morocco, Congo, Somalia, Uganda, Zambia, Mozambique and Angola therefore have a perfect right to resist the doctrine of restrictive immunity, in as much as the said rule is not well settled in the practice of states. And these opposing claims clothed in legal arguments in support of state immunity specifically tailored in response to private suits before foreign courts are undoubtedly state practice, which in reality shows how international law is understood in the above mentioned countries. In this respect African countries are simply expressing their *opinio non juris* as to the underlying principle behind the doctrine of restrictive immunity.

6.9 Some Thoughts on the Persistent Objector Rule

A majority of scholars are agreed that any state which opposes a rule right from its inception before it becomes law may not be bound by it.[147] Furthermore, a state whose practice is not in favour or against the said law is still bound by the law, i.e., the emerging rule if it finally becomes law. In other words, once a state has subscribed to the thrust and force of this emerging rule, the state cannot subsequently oppose the rule or abrogate its obligations to the emerging rule when it becomes well accepted as law[148] in the international community by sovereign states. The said law thus remains binding on the state until the customary law is changed.[149]

Although justification for the theory in respect of case law is scanty, at least the ICJ had touched on the concept *obiter dicta* in the Asylum Case and that of the

[146] Stephenson LJ's judgment in Trendtex 1977 2 WLR 356.

[147] Fitzmaurice (1957 II) Hague Recueil 92 99–100; Sorensen (1960 II) 101 Hague Recueil; Waldock (1962) 106 Hague Recueil; Akehurst, op. cit., note 93.

[148] Akehurst, op. cit., p. 24.

[149] Akehurst, op. cit., p. 13; the argument is carried a stage further by Judge Jessup in the Southwest African case (1966) ICJ. This point was also explained by Judge Sorensen in the Anglo–Norwegian Fisheries case ICJ Rep 1966 p. 291.

Fisheries case. It was further taken up in the Anglo–Norwegian Fisheries case in which Norway argued that it was not bound by UK's argument that its territorial sea be measured from the low water point of its coastal line. The court ruled that

"Norway can justify the claim that these waters are territorial or internal on the ground that she has exercised the necessary jurisdiction over them for a long period without opposition from other states, a kind of *possessio longi temporus*.[150]

The court further reasoned that

"In these circumstances, the court deems it necessary to point out that although the ten–mile rule has been adopted by certain states both in their national law and in their treaties and conventions, and although certain arbitral decision have applied it as between states, other states have adopted a different limit. Consequently, the ten–mile rule has not acquired the authority of a general rule of international law.

In any event, the ten–mile rule would appear to be inapplicable as against Norway in as much as she has always opposed any attempt to apply it to Norwegian Coast."[151]

The judgment of the court in many respects seems to be highly slanted in the direction of the voluntarist or consensual theory of international law by which states are held responsible or bound by their consent to a given rule. Thus, according to Judge Sorensen, a single dissenting state cannot by itself obstruct a custom from becoming law, however, it will not be bound by the rule if the said state maintains a consistent objection to the rule through its formative stages until maturity. So far the persistent objector rule has found favour with the drafters of the restatement of foreign relations law of the United States[152] and some leading scholars.[153] Brownlie in his exposition of the subject explains that

"The way in which, as a matter of practice, custom resolves itself into a question of special relations is illustrated further by the rule that a state may contract out of a custom in the process of formation. Evidence of objection must be clear and there is probably a presumption of acceptance which is to be rebutted. Whatever the theoretical underpinnings of the principle, it is well recognised by international tribunals and in the practice of states."[154]

If the concept has gained validity and thus reflective of customary law because of consistency in state practice, then Professor Charney's belated forceful argument against the concept of persistent objector would not have any effect since such a position falls into a minority category. And given the fact that international relations is predicated on majorotarian principles, the concept is likely to gain support since most states resent majorotarian dictatorship within the international community. Charney's thesis thus ignores the drawbacks usually associated with the majorotarian tendencies in the formation of customary international law and he further also sweeps the effect of the horizontal nature of international law under the carpet. Most states are sensitive to the notion of legal sovereignty which is a

[150] United Kingdom v. Norway (1951) ICJ Rep 116, 118.

[151] Ibid.

[152] See Stein, 1986 13 Harvard Int Law Journal at p. 470–473, and particularly his neutral position on the persistent objector rule.

[153] See D.J. Harris, Cases and Materials on International Law (1998) (5th ed) pp. 42–43. See also generally Brownlie, op. cit. But Professor Charney has taken issue with the underlying rationale behind the persistent objector rule (1985) 26 BYIL 1.

[154] Brownlie, op. cit., p. 10.

corollary of the concept of equality of states, and therefore ready to press their claims against any rule which militates against their independence.

Professor Charney's thesis also invites criticism in so far as the basic underlying principles governing treaties are based on the maxim *pacta tertiis nec nocent nec prosunt*, i.e., a treaty cannot confer obligations or benefits on a state which has refused to be a party to it. In this respect, the persistent objector rule gives sovereign states the right to express reservations to treaties if certain treaty rules run counter to their interest. Further, the example given by Charney in respect of Apartheid is simply *non sequitur* because persistent objection is not applicable with respect to norms of *jus cogens*. Apartheid was *delicta juris gentium* or a crime against humanity and therefore should legitimately have attracted *obligations erga omnes* of all states. Unfortunately the issues respecting Apartheid were sensitive because it involved race relations and if it had not been the vetoes of Britain, France and the United States, South Africa would have been expelled from the United Nations long ago.[155] The issue of Apartheid falls into a different category and cannot therefore be used as a good example in debunking the persistent objector rule. Apartheid violated *jus cogens*, and therefore could not be regarded as a right or a legitimate claim of national policy.

The rule of persistent objector is relevant in the case of African States because these countries have always supported absolute immunity and thus have in turn opposed the doctrine of restrictive immunity.[156] The position of African states is equally shared by former Eastern European states and Latin American states. So far as a result of interest articulation of these countries the universal development of restrictive immunity has been prevented or blocked. These countries have been able to block the development of the doctrine of restrictive immunity because their interests are directly affected by this emerging rule and secondly because the number of these dissenting states appears quite significant. Thus although the doctrine of restrictive immunity is emerging and would soon become well grounded in the practice of states in the West, it is not binding on these African countries because they have been persistent in expressing *opinio non juris* in respect of restrictive immunity. As a consequence we are left with a situation where there is a persistent divergence in the practice of states in respect of these two competing doctrines. In other words, a normative rule does not exist and therefore national judicial authorities are left to fill in the gaps through their powers to prescribe and apply local law. This in effect had prompted municipal courts to rely on local data in the characterisation of the activities of states which, to a greater extent, had rendered judgments not in the least reflective of customary international law.

Dr. Akehurst, while exploring the issues raised above, argued thus:

"Provided that the state opposes the rule in the early days of the rule's existence or formation and maintains the opposition consistently thereafter. Opposition which is mani-

[155] See Dugard, op. cit., p. 298; and the various Security Council Resolutions on South Africa.

[156] See the Asian–African countries' recent protest against the U.S. 1976 Sovereign Immunity Act; Nigeria and Libya have all overtly protested the application of the restrictive immunity to them. And most African states sued abroad have protested the jurisdiction of the foreign court.

fested for the first time after rule has become firmly established is too late to prevent the state being bound. conversely, when early opposition is abandoned it loses its effectiveness to prevent the rule becomng binding on the State."[157]

According to Brownlie, the persistent objector rule is recognised by international tribunals and thus reflective of state practice. Hence if Akehurst and Brownlie be right in their expositions of the subject, then can it be said that African countries have the right to resist the rule of restrictive immunity or are African countries bound by the emerging rule of restrictive immunity? The answer to the first question is in the affirmative while an answer to the second question is in the negative since evidence abounds in international case law to prove that such countries as Nigeria, Tanzania, Zambia, Zaire (now Rep. of Congo), Libya, Uganda, Morocco, Ethiopia, the UAR (Egypt), Somalia, Mozambique, Angola, as already shown, have all challenged the restrictive immunity in American, English, German, South African, Netherlands, Italian and Indian courts, respectively. This means that even if restrictive immunity finally crystallises into customary international law, African countries would not be bound by it if the number of African countries which resisted its application had remained the same. But if in case the number of dissenting African states reduces to a bare minimum, then their expression of *opinio non juris* would become *ex hypothesi* inconsequential and therefore would be overwhelmed by the majority of states in favour of restrictive immunity. This is simply so because it is *opinio genaralis juris generalis*, that is required to determine the existence of custom but not *opinio communis juris generalis*. It, however, remains to be seen whether governments of great majority of states would be willing to support the "rule" of restrictive immunity by giving up the right to plead that they be accorded immunity for venturing into commerce, which in most cases, at least according to Third World countries, is geared towards the betterment of their citizens.

6.10 The Position of African States on State Immunity

Ever since the Tate letter, was written and became a notional policy of the US, most Western countries have thrown their support behind the restrictive immunity. And this as the evidence shows was due to increase in commercial activities of states. So far African countries have remained steadfast in support of the classical notion of sovereign immunity because of the fact that restrictive immunity adversely militates against them. And those sued before foreign judicial authorities have fiercely challenged the jurisdiction of these courts. Nigeria and Libya, for example, have officially protested the application of the restrictive immunity to them. The response therefore by African states to the emerging doctrine of restrictive immunity is not favourable. Countries such as Egypt, South Africa, Madagascar and Togo, however, follow the doctrine.

One interesting development that must be taken into consideration is that the attainment of independence, although, gave many African countries the unfettered

[157] See Akehurst, op. cit., p. 24.

control over whatever laws they chose to follow, but surprisingly enough, almost all these states, especially Commonwealth African states, still continue to follow the law of absolute state immunity.[158] This attitude is also discernible in French–speaking countries of Africa except Togo and Madagascar.[159]

It is plausible also to argue that the quest for self–determination gave root to nationalism and ideological influence from Eastern Europe, particularly the former USSR.[160] Thus radical dialectical teachings covering the function of the state and its instrumentalities in the field of commerce and international law[161] greatly influenced the policy of many states of Africa in the direction of the classical notion of state immunity.[162] This was intensified between 1960 and 1990 as a result of the Cold War. In fact, such countries as Guinea, Ghana, Niger, Benin, Tanzania, Ethiopia and Zambia were almost converted into following the path of Socialism immediately after attaining full independence.

The restrictive immunity, as already shown elsewhere, is the product of civil law countries of Western Europe. There is no evidence, however, to support its existence in Africa during colonial times or in this modern era, although it would appear some countries in Africa are trying to imitate the West in modulating their positions.[163]

There is a great conviction in Africa that state immunity is permitted by international law and this has been stated *expressis verbis* in a form of positive claims clothed in legal arguments before national judicial authorities. The absence of tolerance on the part of these African states presupposed a regional agenda geared towards the protection of their interest against those states favouring the restrictive immunity. The attitude of African states in fact exemplifies that of Norway in the Anglo–Norwegian Fisheries case and Peru in the Asylum case, respectively. Thus based on the principle of *aud et alteram partem* (meaning both sides must be heard) African states have the right to protect their interests in the international community by pressing their claims before national authorities. It is instructive also to note that there is no evidence of restrictive immunity in the following

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[158] This can be inferred from Article 3 paragraph 1–3 of the OAU Charter, coupled with the various statements made by these states on international organisations and particularly on the International Law Commission (and also on such organisations as EAEC (1967); UDEACO (1962); OCAM (1965) and ECOWAS (1967)).

[159] Sanders, op. cit., p. 221–227. It must be submitted that there is no evidence of practice in respect of the doctrine of restrictive immunity in French–speaking countries except a few.

[160] Guinea, for example, after independence was encouraged by the theory of historical materialism (Marxist–Leninist ideas) and therefore followed the Socialist block. This was followed by Mozambique, Angola, Mali, Tanzania and Ghana. This was further enhanced by the Cold War or the concept of bi–polarity of power.

[161] Bokor–Szego, New States and International Law (1970) Chapter 2; Tunkin, op. cit., Theory of International Law.

[162] OAU debates on sovereignty and nationalism; I Law Commission's reports on Sovereign Immunity. Recent AALCC complaints of November (1987).

[163] These countries are South Africa, Togo, Egypt, Lesotho and Madagascar, e.g., in 1970 only Egypt followed the restrictive immunity in Africa.

documents or treaties signed by African states, e.g., the East African Economic Services Organisation (1962), the East African Economic Community (6 June 1967), the West African Common Market (1967) made up of Dahomey, now Benin, Ghana, Ivory Coast, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo and Burkina Faso; the Consei de l'Entete (1959); West African Monetary Union, consisting of Dahomey, Ivory Coast, Mali, Mauritania, Niger, Senegal and Upper Volta (now Burkina Faso) with the object of retaining the CFA Franc; Central African Custom Union (1966); Organization Commaine African et Malgach Ocam (1965); West African Custom Union UDEAD, to mention a few.[164] Thus given the force and thrust of the Charter of the OAU, particularly Article 3 Section 1, which embraces the sovereign equality of all member states, a main corollary of the maxim *par in parem non habet imperium*, coupled with the above mentioned treaties or agreements signed by Africa States, affords a conclusion that the restrictive immunity does not appear to find favour with African states except Egypt, Togo, Lesotho, Madagascar and South Africa, currently influenced by state practice in the Western world.

One credible or a logically grounded argument that has always been made by African countries and other developing states is that, given the fact that developing countries are poor and weak economically, and thus lacking of private capital, it has become incumbent on governments of these countries to undertake or venture into commerce in order to promote economic development. These varied and diverse activities undertaken by these states are very important in the promotion of economic growth and political stability. Thus in the absence of such diverse activities, the economy of these countries would become stagnant which in turn creates poverty, instability and chaos. Most African countries in fact control all means of production and distribution and this has slowed down the growth of private enterprise. The Trendtex litigation as may be recalled came about because of the Import Controls that were instituted to create room for other essential commodities to be brought into the country, to avoid acute shortages. This is a good example of the varied activities which must be undertaken by a developing country in order to keep the economy on good footing. These countries therefore prefer state immunity in order to avoid being open to suit.

Quite apart from this there is no evidence of juridical persons or natural persons suing America, Britain, Canada, Germany, France, etc., in Africa. So in essence these African states are of the opinion that the dice have been loaded against their interest in respect of the application of restrictive immunity to them in Western industrialised countries. These sentiments again have been expressed in a form of protest by the Asian–African Legal Consultative Committee against the U.S. (1976) Sovereign Immunity Act in November 1987. Thus African states arguably motivated by a strong desire to protect their interests have joined other developing nations to limit proceedings against the person of the state *eo nomine*, in order to destroy the universal appeal of the doctrine of restrictive immunity. This undoubtedly has created a situation where one could simply argue that, as of now, there is no normative rule. In that sense, the theoretical paradigms or conflict between

[164] See generally Sanders, op. cit.

states will certainly continue and this can clearly be seen within the legitimate context of the differences that exist among states in respect of ideology, administrative and political organization, economic management and the status of state organs and state trading companies.

Based on international economic relations of states and its legal implications, what benefits could African states or developing countries possibly derive from restrictive immunity? The answer must be none, since these countries have very small private sectors and large public sectors. Thus countries with large private sectors are more likely to reap the benefits of restrictive immunity while those with large public sectors or centrally controlled economies would be faced with an avalanche of private suits. The high probability of these said suits in the main has created a sense of insecurity and apprehension in most African states. For some in the Western world, the doctrine of restrictive immunity wields a spectre of justice, but to others, i.e., African countries and other developing countries, the doctrine gives an unfettered discretion to national authorities to prescribe and enforce laws which have dubious provenance of validity and weight in respect of general international law. In short, the *raison d'etre* of restrictive immunity runs counter to the aspirations and objectives of developing countries. And according to these African states, in so far as government is regarded as an agent of the state, and thus legally endowed with authority to make laws and to promote justice, it should not by any measure be subjected to the same liabilities and penalties of juridical persons or natural persons. And that since states still continued to be the basic subjects of international law without any dispute, it would be legally untenable to impose a vertical order on their legal sovereignty, and thus subject them forcibly to the jurisdiction of municipal courts without their consent.

Restrictive immunity simply works hardship on Third World countries and this has been put forth *expressis verbis* before the International Law Commission and national judicial authorities. There is the need therefore to create a compromise where the conflicting claims of these developing states can be balanced with that of the private trader. Certainly the application of the restrictive immunity is not the answer,[165] in view of the fact that most developing countries consider the doctrine of restrictive immunity as a Trojan gift horse from the West.

6.11 Preceding Observations and Conclusions

(1) The practice of states in Africa in respect of sovereign immunity is scanty. A careful review however of diplomatic correspondence, general declarations and positions taken before international organisation by most African states suggest their preference for absolute immunity and the call that disputes of this nature be solved through arbitration.

[165] I. Brownlie, op. cit., p. 333. Sornaraja (1981) 31 ICLQ 661–85; Hersch Lauterpacht, op. cit., BYIL (1951) 222–7; Molot and Jewett (1982) 20 Canadian Yrbk 96–104; Fitzmaurice (1933) 14 BYIL 101–121; O'Connell, op. cit., p. 355.

(2) Many African countries have not had the chance to consider the issues relating to sovereign immunity in their local courts. Hence the traditional notion of absolute immunity still appeals to these countries.

(3) The fact that most African countries have premobilised authoritarian governments with low sub–system autonomy and premobilised democratic governments or de facto military governments supports the notion that the local sovereign is absolute and therefore highly likely to resist the restrictive approach. Thus countries with high sub–system autonomy such as Britain, the U.S.A. and other industrialised countries, although may take some time to consider their positions on sovereign immunity, as have been demonstrated so far, are likely to embrace the restrictive approach. And this is supported by the fact that almost every leading industrialised country with high sub–system autonomy has now embraced the restrictive approach, because there is a high level of differentiation and secularisation in respect to the political and economic systems of these countries of the West.

(4) Most African countries control all means of production and distribution and given the new economic order coupled with the Charter of Economic Rights and Duties of States, there is bound to be a conflict between the above alluded ideas in respect of state contracts and the notion of restrictive immunity. Hence, since finance capital is very limited in African countries, these states have ventured into commerce in order to replenish their national treasury and therefore arguably prefer the notion of state immunity in order to avoid being sued in foreign courts.

(5) Commonwealth Africa still follows the notion of sovereign immunity. It would appear the decision handed down by the Privy Council in the Philippine Admiral did not affect the jurisprudence of these countries, since it was not considered an authority but only persuasive in its entirety.

(6) The preceding position warrants a proposition that there is a general practice of absolute immunity in Africa, except of late such countries as South Africa, Togo, Lesotho and Madagascar have jumped unto the restrictive immunity band wagon, with Egypt leading the way. And this is amply supported by the recent complaints mounted by the Asian–African Consultative Committee in November 1987 against the restrictive principle in respect of the 1976 U.S. Sovereign Immunity Act.

(7) The doctrine of absolute immunity is a product of municipal court decisions, principally developed through the aid of comparative jurisprudence in America and Europe. Its evolutionary process shows prima facie that it was sufficiently grounded in the practice of states to be accepted as a principle of international law.[166] The original version of the law of absolute immunity

[166] See Sucharitkul, op. cit., p. 355. The present writer is not at all advocating that the rights of the private trader be relegated to the background but only arguing against the application of the doctrine of restrictive immunity because it is a doctrine "quite impractical when tested by the actualities of life." Change comes through a spectre of enlightenment but not by facile theories wholly lacking of reality. It is therefore submitted that practicality and well grounded reasoning be allowed to triumph over theory and uncertainty.

was first stated in the Schooner Exchange v. McFaddon in 1812, by Chief Justice Marshall. Arguably, therefore, African countries did not affect or contribute to the crystallization of the modern development of the said law in view of the fact that these countries became independent in the early fifties and early sixties and thereafter. These countries therefore accepted the classical law of absolute immunity without question, as required by the principle of international law. But one question worth considering is whether absolute immunity has been abandoned by African states and the restrictive rule in turn has been accepted in its place? The answer certainly is in the negative. It is therefore submitted that since some countries in Africa have resisted the modalities of the restrictive immunity before foreign courts by pleading immunity as of right, then the only plausible assumption to make is that these new countries in Africa would rather prefer that state immunity be preserved. And these claims normally clothed in legal arguments before foreign courts in support of state immunity are undoubtedly state practice.

(8) Before the Second World War only four countries were independent in Africa, namely, Ethiopia, Liberia, Egypt and South Africa. And all these countries except Egypt followed the principle of absolute immunity until South Africa broke ranks with other African countries in 1981.

(9) It is submitted *de lege ferenda* that the rule of state immunity would continue to appeal to the Third World because of the new economic order and the global horizontal expansionist order. These factors in practical sense would in no time create a conflicting balance of claims geared towards the protection of the interest of the Third World.

(10) It is submitted that since international law is based, or emanates from the collective will of independent states, African states have the right to resist any law which militates against their interests. And this is evidenced by the fact that some African states in recent times have challenged the jurisdiction of national authorities as of right in respect of absolute sovereign immunity, thus arguing that they be accorded immunity. The underlying rationale of such actions is to limit the impact of the changing phase of modern capitalism on the authority of the state.

(11) The consistent expression of *opinio non juris* by African states against restrictive immunity is likely to obstruct the growth of the said rule by destroying the generality of practice required to support its *corpus* and *animus*. A true general international law is said to exist if there is a consensus of *opiniones individuales juris generalis* of states within the international community.

(12) So far *desuetude* has not occurred, so in essence there is a persistent divergence of practice between adherents of state immunity and restrictive immunity. A normative rule therefore does not exist. And this gives African states a perfect right to challenge the legitimacy of the doctrine of restrictive immunity, if the charge of it being a Trojan gift horse from the West is well founded.

7 The ILC Report On Jurisdictional Immunities of States

The work of the International Law Commission on the jurisdictional immunities of states and their property has been concluded, after over 13 years of trying to create an equitable balance between the right of the private trader and that of the right of the foreign state before national authorities or municipal courts.[1] In fact, the task in reality was not an easy undertaking at all. Many thought the Commission was simply throwing its efforts unto the uncharted seas without any navigating force, and the prediction was that the underlying spirit behind the whole effort would be drawn at sea. Such a prediction in some respects has a logical force to it, in so far as there were a battalion of countries radically opposed to the principle of restrictive immunity.[2] Soviet Union, now Russia, right from the outset of the work of the Commission voiced its opposition to the idea of limiting immunity.[3] This was supported by the People's Republic of China, African states and some Latin American countries.[4] For some time, one was convinced that the ideological force of China and Russia would derail the attempt of codifying this area of the law. However, the breakdown of the Soviet Union gave way to reforms in Russia which over the years had softened the Russian position on a number of international law issues, and thus had given room for the ILC to proceed with its work without much delay and lengthy arguments in respect of Russia's interest articulation and the collective interest aggregation likely to emanate from the Warsaw Pact members. The purpose of this study is to explore those aspects of the Draft Articles, likely to create controversy and uncharted chaos.

7.1 Composition of the International Law Commission

The ILC is a law–creating agency which was established on 21 November 1947, by virtue of General Assembly Resolution 174(11).[5] Its creation was made possible after the Second World War in respect of the interests expressed by governments to promote a rapid growth and the progressive development of international law, with the ultimate aim of codifying the said law.

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[1] International Legal Materials (1991) pp. 1565–1574.

[2] See The International Law Commission Report from 1980–1988.

[3] Ibid.

[4] Ibid.

[5] Sinclair, The International Law Commission 1987, p. 1.

It started off with limited membership, but over the years there had been a steady expansion of the membership of the Commission. And this in fact was due to the gaining of independence by many countries after the Second World War. The term of office in regard to individual members is five years. In fact, in 1981 the membership of the International Law Commission was enlarged to thirty–four. These thirty–four members may be elected according to the following method:

"(a) Eight nationals from African states
(b) Seven nationals from Asian states
(c) Three nationals from Eastern European states
(d) Six nationals from Latin American states
(e) Eight nationals from Western Europe or other states
(f) One national from African states or Eastern European states in relation, with the seat being allocated to a national of an African state in the first election held after the adoption of the present resolution.
(g) One national from Asian states or Latin American states in rotation, with the seat being allocated to a national of an Asian state in the first election held after the adoption of the present resolution."[6]

The pattern of election and the composition of the ILC without doubt clearly strengthens Judge Higgins' position when she argued sometime ago that "Much of the Third World from whom so much of the impetus for change today comes, has very conservative views about state immunity."[7] The learned judge's position is further supported by the views that were expressed by the Third World in response to the purported exceptions offered in respect of absolute immunity in terms of commercial activities of state, vis–à–vis the proposal that both the nature and the purpose tests be considered or taken into account when considering whether to grant immunity or not.[8] Coupled with the Third World's opposition to the idea of subjecting state property to execution or attachment by municipal courts or local courts. The increase in the number of nationals from the developing countries on the International Law Commission has given these nations immense strength to ventilate their grievances in respect of those laws which militate against their interests, and to shape the development of international law.

7.2 Some Preliminary Observations

The mandate given to the International Law Commission in 1978 to codify the law of state immunity was declared *functus officio* some few years back and the draft articles are being reviewed or considered as at now by the Sixth Legal Committee of the U.N. General Assembly with a view towards its ratification into a treaty. But a noteworthy question to ask from the outset is whether the draft articles in its present form would be acceptable to all and sundry? Perhaps no, however, Lady

[6] Ibid., p. 15.
[7] See Higgins, op. cit., p. 265.
[8] See ILC report, 1980–1988: The evidence of the influence of the Third World can be seen in the final Draft Articles reproduced in the I L Materials (1991), pp. 1565–1574.

Fox has observed that "the departure of the Soviet Union from the international scene has increased the chances for successful adoption of a treaty text."[9] Whether there is an element of truth to her position is yet to be seen, for the Soviet Union was not the only country radically opposed to the restrictive immunity, thus arguing that the doctrine of absolute immunity be maintained. In fact, according to the ILC reports, almost all Third World countries have expressed the zeal to have the absolute immunity doctrine preserved. Certainly the breakdown of the Soviet Union might be one factor, but it cannot be designated as the only reason why the draft articles on jurisdictional immunities of states and their property be near adoption.

The draft articles cover five major subjects. Part I covers preliminary matters relating to state immunity; Part II explains the general principles behind absolute immunity; Part III covers instances in which a foreign state cannot be immune before a municipal court; Part IV explores state immunity from measures of constraint in regard to proceedings before a municipal court; Part V covers miscellaneous provisions geared toward the filling of the gaps in the whole endeavour of codifying this area of the law.[10]

The Draft Articles, under general principles, i.e., Article 5 in real terms follows to the letter, the doctrine of absolute immunity, and then by following the principle of restrictive immunity in Part III, the Commission clearly detracts from the doctrine of absolute immunity. Articles 10 to 17, therefore, follow the principles of limited immunity thus concentrating on the distinction between *acta jure imperii* and *acta jure gentionis*.[11] It is important to stress that certain activities of the state are not immune and these are employment contracts, i.e., Article 11; activities or acts causing damage to property or injury to persons fall under Article 13; intellectual property is covered under Article 14; and arbitration proceedings fall under Article 17. One distinctive feature, however, of the Draft Articles can be found under Article 10, which covers commercial transaction, *mutatis mutandis*, while Article 2(2) gives prominence to both the nature test and the purpose test.[12] Article 2(2) of the Draft Articles therefore appears to take a different route from the UK State Immunity Act of 1978, the U.S. 1976 FSIA and the 1972 European Convention on State Immunity, insofar as no room appears to have been given to the purpose test in the parlance or domain of these Acts or the said 1972 European Convention.

[9] (1994) 43 ICLQ 193.
[10] I L Materials, op. cit., note 1.
[11] Ibid., pp. 1568–1569.
[12] Ibid., p. 1565.

7.3 Specific Exceptions to Immunity of States

7.3.1 Commercial Elements and Jurisdictional Competence

In order to detract from the principle of absolute immunity the ILC designated commercial transactions as the underlying factor in determining whether to take jurisdiction or not, coupled with certain important exceptions: Article 10, for example, can be stated thus:

"(1) If a state engages in a commercial transaction with a foreign natural or juridical person, and by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another state, the state cannot invoke immunity from the jurisdiction in a proceeding arising out of that commercial transaction.

(2) Paragraph 1 does not apply: (a) in the case of a commercial transaction between states or (b) if the parties to the commercial transaction have expressly agreed otherwise.

(4) The immunity from jurisdiction enjoyed by a state shall not be affected with regard to a proceeding which relates to a commercial transaction engaged in by a state enterprise or other entity established by the state which has an independent legal personality and is capable of (a) suing or being sued; and (b) acquiring, owing or possessing and disposing of property, including property which the state has authorized it to operate or manage."[13]

The position advanced by the ILC under this section of the draft articles is not new, although one can discern some drafting changes, for it would appear its teachings fall in the same domain as that of the Immunity Act of 1978, the U.S. Sovereign Act of 1976 and the European Convention, respectively,[14] and therefore open to some earlier criticisms (supra), already offered by the present writer against these legislative provisions placed into these Acts. However, the ILC appears to have made some improvements.

The purpose of Article 10 is to limit the activities of states by laying bare the specific meaning of commercial transactions. Thus if a state signs a contract with a foreign national or juridical person and by virtue of the nature of the transaction *qua* the rules of conflict of laws or private international law, the law of another state applies other than that of the state involved with the transaction, then such a state cannot plead that it be accorded immunity. Article 10, paragraph (3) covers some aspects of the controversy respecting political subdivisions of states, but specifically follows an approach where the position of these state organs is considered *pari passu* on the same footing as the state in respect of according or denying immunity. The approach of the Draft Articles in this respect seems to draw on the rules of private international law in as much as the applicable law is determined by reference to the *lex fori* as the basic rule in the characterisation of the activity of the state. This means that a state party to an agreement which is commercial and not significantly connected with the jurisdiction of the state but to some other jurisdiction may not qualify for immunity if sued in that other court in case

[13] Ibid., pp. 1568–69.

[14] See the U.S. Act 1976, The U.K. Act 1978, and the European Convention of 1972.

of non–performance or breach. By following this seemingly neutral approach the commissioners were trying to avoid being trapped by the abstract test of distinguishing between *acta jure imperii* and *acta jure gestionis*. But again such an approach cannot be completely used to avoid the thorny problem of determining whether a given state activity or transaction was concluded on a private law relationship or not. This then brings to mind the plain fact that some states actually control the means of production and distribution within their territories and thus have very small private sectors and therefore could not gain by the thrust and force of Article 10 of the ILC draft articles. This also applies to countries with state trading companies and central planning economies, e.g., Third World countries. Thus it can be argued that the attempt by the commissioners to state the general rule of state immunity and thereby listing some important limitations to it, follow about the same reasoning behind the national legislation already in place in the US, UK, Singapore, Australia, Canada, Pakistan and South Africa, respectively. The commissioners, however, followed on the whole a slightly different approach in dealing with the sovereign immunity controversy. The force of Article 10 undoubtedly favours countries with large private sectors, however, the public/private law distinctions cannot be determined by a simple reference to the very language of Article 10, that is, if the draft articles are accepted as a treaty text. Furthermore, in practice Article 10 could give rise to different interpretation since the jurisprudence of states more often than not seemed to be influenced by different socio–political considerations. Thus the *lex fori* would have to take into account not only Article 10 but also certain constitutional and statutory administrative laws which must be interpreted against the background of whether a country follows a monist or dualist approach to international law. Furthermore, even if the Draft Articles are passed into a treaty, there is the possibility that some countries would be influenced by their constitutions and economic policies to reject those aspects of the Draft Articles likely to adversely affect their interests by registering their reservation to it.

As regards state enterprises, it is submitted that the draft Article 10 paragraph 3 is purely functional and thus does not purport to address the specific problems relating to the determination of the independent legal personality of state organs. This approach might have been followed in so far as every country in one way or the other appears to have its own rules respecting incorporation and rules relating to publicly held corporations and closely held corporations *qua* their relations to governmental functions. These different rules of incorporation, however, have created an elusive problem in view of the fact that such subsidiary organs perform different and concurrent functions specifically geared towards the public good, hence it would be less helpful to simply rely on a functional approach as suggested by the commissioners in determining whether these organs have performed a governmental function or not. Is it legally feasible that a domestic court must accept the conclusions of a foreign law? Or regard be had to some other law which is

germane to the issues in a given case? The majority of the court in Baccus concluded that foreign law was decisive.[15] Parker J argued that

"Whether or not it is such a department is clearly a matter of Spanish law. I see no ground for thinking that the mere constitution of a body as a legal personality with the right to make contracts and to sue and be sued is wholly inconsistent with it remaining and being a department of state."[16]

He concluded that Spanish law be applied. In Trendtex, Lord Denning appeared to follow to some extent the same reasoning thus:

"I would look to all the evidence to see whether the organisation was under government control and exercise government functions."[17]

Shaw LJ in the same case, that is, Trendtex, also declared that "the constitution and powers of Nigerian corporation must be viewed in the light of the domestic law of Nigeria."[18] But on the whole the status of the Central Bank was misconstrued and this in the main simply casts doubt on the decision in Trendtex. The existing case law by every measure is inconsistent and thus does not give any clear indication of *usus* on the legal position of state agencies. The Draft Articles as already stated follow a functional approach as does the European Convention (Arts. 27 and 28). Arguably, however, this functional approach is fraught with some difficulties and uncertainties in view of the fact that state agencies are normally endowed with public function to help in the process of nation building and particularly in executing certain important public policies. This phenomenon is prevalent in developing countries or countries with a small private sector. Article 10 is quite essential in aiding the process by which a distinction is made between governmental and commercial activities of states, but its legal force as a yardstick in the determination of jurisdictional competence is hampered by the fact that the distinction between *acts jure gestionis* and *acts jure imperii* is difficult of definition and application and therefore unlikely to find favour with many developing states.

A proper balance between the interest of the sovereign state and that of the private entity seemed, however, to have been achieved under the Draft Articles by the various exceptions adopted in relation to employment contracts[19] and questions of torts involving injury to persons or damage to property.[20] The Draft Article 10, in some respects, took a much different turn in respect of limitations on commercial transactions as already shown, and therefore if it is accepted as a treaty text, Section 3(a) and (b) would have to be carefully construed for there is no easy method of determining the independent status of subsidiary organs of states. Mel-

[15] Baccus Sr L v. Servicio Nacional del Trigo (1957) 1QB 438; 23 ILR p 160. The position in Arriba Limited v. Petroleos Mexicanos (1992) 103 ILR p. 490 is not that different from Baccus because the plaintiff bears the onus of rebutting the existence of an agency relationship.

[16] Ibid. at p. 471, 472 and 473: Jenkins in giving his blessings to immunity in the case admitted the inherent problems associated with the political subdivisions of states.

[17] Trendtex Trading Corp v. Central Bank of Nigeria (1977) 2 WLR 356, 370, must be distinguished from Walter Fuller Aircraft Sales Inc. v. Republic of Philippines (1992) 103 ILR p. 503.

[18] Ibid. at p. 385.

[19] ILM, op. cit., p. 1569.

[20] Ibid.

lenger v. New Brunswick Department Corporation case[21] and that of the Yousef Nada Establishment case are good examples. Perhaps courts could follow the effective control test to resolve these problems.

7.4 Principles of State Immunity under the Draft Articles

Article Five in Part Two of the Draft Articles runs thus:

"A state enjoys immunity, in respect of itself and its property from the jurisdiction of the courts of another state subject to the provisions of the present article."[22]

This provision is without doubt more of a compromise than it might appear, since there was a doctrinal dispute between those countries who prefer absolute immunity and those in favour of restrictive immunity. The commissioners thus followed an approach whereby state immunity is stated as a primary rule without negating the rights of the private trader to sue. This means that Article 5 does not in real terms follow the general immunity approach but in certain instances lends itself to its general import and interpretation. It would have been apposite if the commissioners had laid much emphasis on connecting factors, that is, between a given transaction or state activity and the foreign jurisdiction or forum where the natural or juridical person would have his or her rights redressed. Thus the implied consent to grant immunity would be better realised if the said provision is conditioned on certain settled principles of conflict of laws, i.e., connecting factors backed by the precepts of public international law.

It is important to stress that the question of immunity arises only if a foreign state refuses to submit to the jurisdiction of domestic courts and this right to resist the jurisdiction of national authorities is clearly derived from the position of the state in international law coupled with the rule in the Schooner Exchange, and the writings of distinguished publicists in early 19th century. The International Law Commission in respect of the above issue recommended that for jurisdiction to be exercised by a national judicial authority over a sovereign state, there is the need that consent be procured from the defendant state. This recommendation, however, is not new and over the years had produced difficulties in litigation.

It is instructive to note also that the inclusion of the purpose test in Draft Articles 2 paragraph 2 at the behest of the Third World certainly has endowed defendant states with powerful tools to counter the effect of restrictive immunity. This aspect of the draft is not on the same plane as that of other acts passed in other jurisdictions. The English Act of 1978, as well as the US Act, for example, rejected the purpose test.[23] And this restrictive approach, as a matter of principle, has also

[21] (1971) 1 WLR 603. But see the decision in, In Re Estate of Ferdinand Marcos Human Rights Litigation Hilas and Others v. Estate of Marcos U.S. Court of Appeals, 9th Circuit (16 June 1994) ILR 103, p. 52 ILR 104, p. 119.

[22] ILM, op. cit., p. 1566; Draft Articles: General Principles, Part II Article 5.

[23] Mann, The State Immunity Act, 1978, (1979) 50 BYIL 43. See Delaume, The Foreign Sovereign Immunities Act of 1976, Clunet (1978) 105 p. 187.

been incorporated into the national legislation of other countries or jurisdictions.[24] The combined effect of Article 2 paragraph 2, Article 5 and Article 6 has the tendency of equally balancing the rights of the individual and that of the state in a meaningful way. Which means that in order to implead a foreign state, domestic courts under the draft articles would have to grapple with such factors as the nature test, purpose test, consent and the said enumerated exceptions. The clash therefore between the category of the territorial aspect of the sovereign state and the personality of the sovereign state simply then becomes severe and uncertain.

Article 7, paragraph (1) a to c in absolute terms touches on the will of the parties and its legal relations to the competence of domestic courts. To some extent this part of the draft articles seems to follow English practice.[25] Article 7 paragraph (2) reads as follows:

"Agreement by a state for the application of the law of another state shall not be interpreted as consent to the exercise of jurisdiction by the courts of that other state."[26]

This part of the draft articles thus clarifies the thorny issue respecting arbitration clauses and the deep–seated misconception that once a state has entered into an arbitration agreement there is a presumption that it has waived its right to immunity. The draft article in this regard is different from the European Convention where the principle of *forum prorogatus* is liberally construed. A defendant state specifically under Part 2 paragraph 2 and Article 5 has more tools now to fight the private suits of litigating parties in foreign courts. The draft articles in many respects, however, make it difficult to determine what is an exception and what is a rule.[27] To some extent, one is persuaded to argue that cases such as the Empire of Iran, I Congreso del Partido and the New Brunswick Development Corporation would still remain relevant in view of the effect of draft articles 3, 5, 6, 18 and 21.

7.5 Execution against a Foreign State

A careful study of the practice of states in respect of enforcement measures against state property shows a considerable degree of uncertainty.[28] Even those countries which have fully accepted or subscribed to the underlying principles of the restrictive principle have been wanting as to how to deal with the specific question of execution. Many countries believe that enforcement measures be taken

[24] See generally International Legal Materials; Foreign Sovereign Immunity Act (1976); State Immunity Act (1978); State Immunity Act of Singapore (1979; The Austrailian Sovereign Immunity Act (1985); The Canadian Sovereign Immunity Act (1982; The Pakistan Sovereign Immunity Act (1981); The South African Sovereign Immunity Act (1981).

[25] See generally the Sovereign Immunity Act 1978.

[26] 1 Legal Materials, op. cit., p. 1567; Article 7(2) ILC Draft A.

[27] 1 Legal Materials, op. cit., 1567, 1571, Articles 2(2), Articles 5, 16 and 22, respectively.

[28] See generally (1979) Neth YBIL 3–289; O'Connell, op. cit.; Sucharitkul (1985) Yrbk Int Law C II Part 1; Johnson, (1974–75) 6, Australian Year Book of Int. Law pp. 2–3.

only against state property used in commercial activities.[29] While there is a lingering unanswered question in respect to whether state property under the threat of being subjected to execution be directly related to the private action brought against the defendant state or not. In fact, this is not an easy task for judges. For the sake of justice, the Draft Article 18 is in order, in view of the fact that it separated prescriptive jurisdiction from enforcement jurisdiction. In other words, it followed the perception that sovereign immunity is twofold, by separating the public activity of the state *acta jure imperii* and that of activities respecting the use of state property *res publica publicis usibus destinata.* The said article provides as follows.

"(1) No measure of constraint, such as attachment, arrest and execution against property of a state may be taken in connection with a proceeding before a court of another state unless and except to the extent that . . .

(c) the property is specifically in use or intended for use by the state for other than governmental non–commercial purposes and is in the territory of the state of the forum and has a connection with the claim which is the object of the proceeding or with the agency or instrumentality against which the proceeding was directed.

(2) Consent to the exercise of jurisdiction under Article 7 shall not imply to the taking of measures of constraint under paragraph 1, for which separate consent shall be necessary."[30]

Although there are differences between §1610 of the U.S. Act and Section 13 of the U.K. Act, in reality, however, all these provisions under these different Acts simply run counter to paragraph 2 of Article 18, which requires two sets of consents, thus one for jurisdictional purposes and the other for enforcement measures or execution. Paragraph 2 of Article 18 is quite effective and weighty and may prevent or make it difficult for interlocutory relief to be procured. Such measures as interim and final relief would be hard to come by since a second consent is needed before enforcement measures can be taken, thus even if the property in issue happens to be involved in commercial activity.[31] The U.K. Act, §13(2)(a) and the U.S.Act §1610(d) all cover these pertinent issues regarding enforcement measures, but if the current draft articles are adopted as a treaty text, it would be cumbersome to take *execution forcée* against state property.

True, when the decisions in Philippine Admiral, Trendtex and I Congreso del Partido were handed down by English courts, many thought the hegemony of the concept of state immunity had been totally broken, but before one could take some respite for reflection on the subject, Alcom Ltd. v. Republic of Colombia came up for litigation. The issue in Alcom was whether monies kept in the defendant state's bank can be characterised as "property" used for commercial purposes within the specific meaning of Section 13 of the English Act 1978. Lord Diplock ruled in favour of the defendant state thus rejecting the plea by Alcom Ltd. that enforcement measures be allowed against the Republic of Colombia. A similar po-

[29] Crawford, Execution of Judgments and Foreign Sovereign Immunity (1981) 75 AJIL 820; Sinclair (1980 II) 167 Hague Recucil II.

[30] See ILM p. 1567; ILC Draft Articles, Article 18, Part IV 1.

[31] See Part IV of the ILC Draft Articles (2).

sition was taken in the Philippine Embassy case[32] by the German Constitutional Court. Again in the light of these authorities, coupled with the force and thrust of Article 2(2) of the Draft Articles; it would appear the position of the foreign state before a domestic court is considerably strengthened. Which means that under the present Draft Article 18 it is the nature test and the purpose test that would have to be applied in determining whether state property be subjected to execution or not, and this seemed somewhat to have been made clear in Lord Diplock's decision in Alcom. Thus the denial of immunity does not mean that enforcement measures be taken.

7.6 Personal Injury or Damage to Property

Article 12 of the draft articles is not new and appears to cover certain issues relating to diplomatic and consular privileges.[33] And its underlying force follows some aspects of private international law in respect to torts.[34] Article 12 reads as follows:

"Unless otherwise agreed between the states concerned, a state cannot invoke immunity from jurisdiction before a court of another state which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property caused by an act or omission occurred in whole or in part in the territory of that other state and if the author of the act or omission was present in that territory at the time of the act or omission."[35]

Article 12 is quite similar to Article 11 of the European Convention except that the European Convention took into consideration as to whether "the facts which occasioned the injury or damage, occurred in the territory of the state of the forum."[36] Thus in real terms these two provisions follow the same approach in limiting immunity to sovereign states. The national legislation passed in other countries such as the US, UK, Singapore, Pakistan, South Africa and Canada, however, laid much emphasis on the place where the harm occurred, i.e., the *lex loci delicti* rather than the causative act or the specific reasons for the injury. And this seems to be influenced by the fact that the place of injury rule provides certainty and predictability, notwithstanding its shortcomings in respect to certain unique cases.

A thorough examination of Article 12 shows that its purpose is to enable the victim of a traffic accident to sue the sending state of the diplomat. The fact, however, still remains that the diplomat is accorded full privileges and immunities under the Vienna Convention on Diplomatic Relations,[37] and therefore cannot be

[32] B Verf GE Vol. 46 p. 342 (1982), St Leg Ser B/20 p 297. But was also extended in Third Avenue Associates and Another, 1993 U.S. Court of Appeals 2nd Circuit 767 (ILR 99 p. 193).

[33] See I. Brownlie, op. cit., pp. 355–361.

[34] Dicey and Morris on Conflict of Laws (1993) pp. 1480–1550.

[35] See Int Legal Materials p. 1569.

[36] European Convention (1972) Article 11.

[37] (1961) 500 UMTS 95; (1963) 596 UMTS 261.

sued unless consent is procured from the sending state. How, then, can the suit against the state be determined? The principles of vicarious liability could provide the answer, but then again it must be borne in mind, however, that a foreign state would only be held liable if there is a clear evidence to attest to the fact that the diplomat was acting within the confines of his or her diplomatic duties or employment. Professor Brownlie says that

"In the case of official acts the immunity is permanent, since it is that of the sending state. In respect of private acts the immunity is contingent and supplementary and it ceases when the individual concerned leaves his post."[38]

This means that in order to determine the liability of the state one must distinguish between official acts and non–official acts or private acts, taking into account immunity which is permanent and that which is contingent and supplementary. Thus in exploring these issues, it is important to have regard to the force of Article 37(2), Article 38(1) and Article 32 of the Vienna Convention. This area of the law undoubtedly involves difficult interrelated issues which must be approached with care.

In a recent case where Mr. Gueargui Markaradze, a diplomat of the Republic of Georgia, caused the death of Joviane Waltrick in a serious car accident,[39] a request was made to Georgia, a former Republic of the USSR, that immunity be waived. Although such a request was acceded to by the officials of the sending state, however, it would appear the government of Georgia became apprehensive about the fate of Mr. Markaradze and therefore suggested that if Mr. Markaradze is convicted in the United States he be allowed to serve his prison sentence in Georgia (i.e., in the former Soviet Republic); and the reason being that Mr. Markaradze was drunk when the accident occurred and if tried in the United States he may be charged with a second–degree murder, which carries a prison term between ten to twenty years. Although a sentence of this nature would be too severe, Georgia did allow the said diplomat to be prosecuted in the United States, i.e., where the accident occurred. Amid diplomatic negotiations, Georgia finally paid the expenses of Joviane Waltrick's funeral. It would appear the family had since then negotiated with the insurance company of Georgia for death benefits to be paid.

In Letelier v. Republic of Chile,[40] the court was not persuaded that Chile be granted immunity for claims arising out of the assassination of a Chilean citizen who was revealed at the trial to be against the government of Chile. It was also held in Skeen v. Federated Republic of Brazil,[41] that Brazil cannot be vicariously held responsible for the tortious act caused by the grandson of the Brazilian ambassador to the United States because such an action falls outside the confines of governmental activities.

One other case worth considering is John McElhinney v. Anthony Ivor John Williams and Her Majesty's Secretary of State for Northern Ireland,[42] there a charge of assault, trespass to the person, negligence and breach of duty was sought

[38] See I. Brownlie, op. cit., p. 358.
[39] See U.S. News and World Report, Jan. 20, 1997, p. 14.
[40] (1980) 488 F.Supp. 665; 671–3.
[41] (1983) 566 F.Supp. 1414.
[42] (1995) ILR 104 p. 691.

against each of the defendants. The facts can be related thus: the first respondent was a professional British soldier in the Royal Military Police stationed in Northern Ireland. At about 11:30 p.m. on the 4th day of March, 1991, while he was guarding a checkpoint at Culmore Road County Londonderry, on the border between Northern Ireland and the Republic of Ireland, the plaintiff drove through the check point and the first defendant was involuntarily carried across the border into the jurisdiction of the republic of Ireland, and in reaction to the behaviour of the appellant, the first respondent attempted to fire a gun at the appellant. The appellant brought charges against the second respondent, the Secretary of State for Northern Ireland, on the ground that being the representative of Her Majesty's Government, he was responsible for the soldiers' tortious action. The Secretary of State prayed in his pleadings that the service on him be set aside on the ground of sovereign immunity. The High Court ruled that sovereign immunity applied.

The appellant thereafter appealed to the Supreme Court of Ireland, arguing *inter alia*, that sovereign immunity did not apply in respect of claims clearly arising from the tortious conduct of the servant of a foreign state within the jurisdiction, and that such a conduct constituted an exception to the rule of sovereign immunity. The appellant further claimed that recognition of sovereign immunity would infringe his constitutional right to bodily integrity. The appeal was dismissed based on the force of sovereign immunity. In reaching its conclusion Hamilton CJ reasoned thus:

"I am satisfied that the proper question is as stated by Lord Porter, what is the law of nations by which civilized nations in general are bound, not how individual nations may treat one another."

He continued by saying that:

Distinction must be drawn between the provisions of legislation in a number of states and the provisions of public international law and the principles set forth in individual state legislation cannot be regarded as establishing principles of public international law.

The provisions of statutes cannot be used as evidence of what international law is: statutes are evidence of domestic law in the individual states and not evidence of international law generally."[43]

The Irish court took issue with the underlying principle respecting restrictive immunity by arguing that the mere fact that a tortious act was committed in the forum state (*lex loci delicti*) is not sufficient or justified by any measure of general international law that immunity be denied or restricted. Thus if a state decides to enact laws respecting the conduct of sovereign states, that law (statutes) cannot be applied to sovereign states unless there is copious evidence to attest to the fact that states are willing to accept the limits of the said statute. In other words, the underlying consequence of the statute would only be accepted by states if it has attained the hallmark of custom, i.e., settled practice duly supported by *opinio juris*. But one fundamental question that must be addressed is why should a state be granted immunity if its action or the tortious conduct of its servant has caused damage to a juridical or natural person? The answer stems from the fact that torts or contracts cannot be the proper subjects of international disputes (public) since international law does not have rules covering these subjects. Perhaps municipal law analogies

[43] (1995) 104 ILR p. 703.

would be helpful, but here again one is burdened as to whether a sovereign state can be subjected to a vertical law. The answer must be in the negative because municipal law is the creature of sovereignty and as such cannot adequately form the basis of general international law, hence it is submitted that it be clearly distinguished from the principles of general international to avoid the difficulties that faced the International Law Commission. The British Act, 5(a) and (b), the U.S. Act 1605(a) 5.3, the Canadian Act 6(a) and (b) and other individual state legislation respecting tortious conduct of foreign sovereign states all lack evidence of *usus* and thus not reflective of general international law and therefore sovereign states have a perfect right to challenge restrictive immunity whenever it is applied to them. This argument is being put forth because restrictive immunity is premised on questionable assumptions wholly derived from municipal law values, and therefore runs counter to the stable intercourse between sovereign states. The appellant failed in his quest to claim damages because Hamilton C.J. was more concerned with the law of nations by which sovereign states in general are bound, but not individual state legislation respecting restrictive immunity.

The draft article 12 appears to be neutrally construed with much emphasis placed on the *locus* test or connecting factors and the aim one would presume was to establish a normative criteria in linking the action of the foreign state to the forum. This arguably is a deviation from general international law but one is encouraged to argue that reasonableness would prevail in the Sixth Committee and that the delegates would differ constructively on the issue of tort claims.

The four cases alluded to above show that further difficulties surround the meaning of diplomatic privileges vis–à–vis Section 12 of the Draft Articles *qua* tortious acts and it would have been most helpful if the commissioners had given more attention to its drafting for it leaves some important and sensitive issues unaddressed. Arguably, international arbitration would be a better approach in resolving these intractable problems.

7.7 Effects of Draft Article 2.2 on Restrictive Immunity

The principle of restrictive immunity certainly lacks *usus* but in reality gained its strength or prowess from the nature test. However, the inclusion of the purpose test into the present draft article 2 will undoubtedly throw the restrictive doctrine into a state of stupor – which means that its effect will be greatly reduced in respect of protecting the rights of the private trader. And litigation before municipal courts involving sovereign states and private litigating parties will certainly become complicated without any easy way out. This would ultimately create an atmosphere of bitter litigation, since it is highly likely the purpose test would serve as a factor in converting[44] the commercial acts of the state into *acta jure imperii* thus paving way for the state to qualify for immunity. While conversely, if the op-

[44] See what L.A. Forest J. said in United States v. The Public Service Alliance of Canada (1993) 32, ILM 1 Canadian Supreme Court.

posite or the competing concept of the nature test is applied, thus by excluding the purpose test completely, these governmental activities of states would in turn be characterised as *jure gestionis*. Rigid adherence, therefore, to both of these two concepts, i.e., the nature test and the purpose test, could perhaps offer an attractive solution to the controversy at hand, i.e., promoting justice in the market place.

A mixed application of both the nature and purpose tests may be cumbersome and tricky but in good conscience will bring about a fair balancing of rights between the sovereign state and the private trader. However, it may conflict with all the national legislation in operation which have *ab initio* rejected the purpose test (e.g., the U.S. Act, the U.K. Act, Pakistani Act, the Singapore Act, the Canadian Act, the Australian Act, and the South African Act. This applies also to the 1972 European Convention on state immunity. Will it be appropriate to allow the purpose test to compliment the nature test? Lord Wilberforce in I Congreso argued that such an approach will be helpful but far from decisive. Or will the "contextual approach" followed by Lord Wilberforce be useful? In some respects such an approach will help throw light on the whole underlying issue respecting state immunity vis–à–vis the nature and purpose tests. But no one can guarantee its general force and effectiveness, for while it may be useful in some cases, it may fall far short of being effective in other cases. Take, for example, the case of Sengupta v. Republic of India,[45] where as a result of being dismissed from his employment, the plaintiff sued for unfair dismissal. Although the case was dismissed for lack of jurisdiction, *prima facie*, the court was faced with difficulties in trying to characterise the main issue according to private and public law distinctions. Thus similar problems were also encountered in the case of Littrell v. The United States.[46] There the authority in I Congreso del Partido was used as a yardstick in construing the underlying principles followed in the case. Hoffman L J ruled that "In my judgment, however, the standard of medical care which the U.S. affords its own servicemen is a matter within its own sovereign authority. In my judgment, therefore, the act of which Mr. Littrell complains was clearly on the *jure imperii* side of the line and the judge was right to dismiss the action."[47]

An issue of similar kind also came up in the United States v. the Public Service Alliance of Canada.[48] There, the court was faced with the difficulties of defining a commercial transaction within the domain of an employment contract, the court held that in the strictest sense the contract of employment at a military base was a sovereign activity although from all indications the nature of the transaction was commercial in outlook. Undoubtedly, L.A. Forest J took some lessons from the judgment of Lord Wilberforce in the I Congreso. These cases support the view that the term commercial transaction and sovereign authority (i.e., *acta jure imperii*) need some further clarification or elucidation in order to prevent confusion. On the whole it is doubtful as to whether legislation or an international convention

[45] (1983) ICR 221 (Employment Appeal Tribunal).
[46] (1994) 2 All ER 203 (Court of Appeal).
[47] Ibid.
[48] (1993) 32 ILM 1 Canadian Supreme Court.

can be designated as the only panacea to promoting equity and justice in transnational business transaction *qua* state rights.

Judges therefore as a matter of fairness must be given a degree of freedom to explore these issues without being limited by national legislation sentimentally or selectively couched to protect the rights of the private trader. The United Kingdom, for example, does not need a legislation on state immunity, for its courts are capable of developing this area of the law, i.e., state immunity without any difficulties. Alcom, and the Australia and New Zealand Banking Group Ltd. v. Australia[49] decisions undoubtedly offer a good illustration of the considerable problems left unanswered but at the same time also provided a good road map for this uncharted journey with respect to resolving the sovereign immunity controversy.

7.8 Third World Influence on the ILC Deliberations

Dr. Sucharitkul in one of his expositions on state immunity argued that

"It should be observed, on the other hand, that several governments expressed certain preference for a more absolute rule of state immunity. The USSR and Eastern European countries as well as some developing Asian, African and Latin American states would like to see the rule of state immunity upheld and maintained rather than eroded by large exceptions. Their views cannot be ignored."[50]

The observation alluded to above warrants a proposition, if not a conclusion, that there is a general practice of state immunity or that the majority of states of the world rather prefer that absolute state immunity be maintained. And since the Western industrialised countries happened to be in the minority, the views respecting the narrowing of commercial exceptions won the day. Third World countries, therefore, in a concerted effort to limit proceedings instituted against the person of the state *eo nomine* or against the subsidiary organs of sovereign states mounted a forceful attack on the principle of restrictive immunity which has found favour with the West. The Venezuela argument that Third World countries are venturing into the market place to satisfy the needs of their citizens because of lack of finance capital and that limiting immunity will be prejudicial to these countries is a genuine concern that cannot be dismissed, challenged or relegated to the background. It would appear such an argument might have received enormous support from a majority of states from the developing world, and this *ex hypothesi* seemed responsible for the introduction of the purpose test into the draft articles,[51] thus satisfying the forceful interest articulation coming from the Third World. Certainly the articulation of the Third World interest did crystallise into a forceful unity of aggregation that could not be defeated. It may be recalled that it was due to the aggregation of Third World interests that prompted the incorporation of

[49] Cited from (1990) 39 ICLQ 950.

[50] See Mohammed Bedjaoui (ed.) International Law, Achievements and Prospects (1991) p. 333.

[51] See International Law Commission's Report 1980–1988 and the forceful role that was played by the Third World.

Arts. 61 and 62 among many other provisions respecting the "conservation and utilization of the living resources of the exclusive zone" into the law of the sea convention of 1982.

Similar pressure has been applied by the Third World again in their quest to affect changes in the draft articles, and so far these countries have been successful.

Mr. Balanda, a member of the Commission from Zaire, now Republic of Congo, argued that:

"Major interests were the cause of a disequilibrium that was all too well known and one for which a remedy was constantly being sought. Contrary to what some people might believe, in most developing countries the burden of development lay largely with the state. Hence major attention should be paid to the way in which the activities of those states were conducted, since it was not always easy to distinguish between acts *jure gestionis* and acts *jure imperii*. The interests of the developing countries therefore called for the best protection possible."[52]

Chief Akinjide, a member of the Commission from Nigeria, also said:

"Far from attempting to maintain an equilibrium between those competing interests, the main thrust of the two articles appeared to be to bring international practice as a whole into line with the U.S. and the U.K. Acts [he had already mentioned]. The meaning of Article 19 was in effect that, unless otherwise agreed, a state dealing with a private or public company in another state would enjoy no immunity whatsoever. The resulting situation would have very serious implications. His own experience of commercial litigation in various European countries led him to doubt that any government of a developing country would sign, still less ratify, either of the two articles now before the Commission."

He further said that

"The issues involved were so fundamental that the articles would, in his view, have to come back to the Commission for further discussion. To accept them would be to subscribe to the proposition that the rich should continue to be rich and the poor should continue to be poor."[53]

Similar sentiments were expressed by Mr. Ahmed of Sudan and Mr. Mahious of Algeria, respectively.[54] While the position of Mr. Ushakov, the Soviet, now Russian, member of the International Law Commission took a more radical approach towards the preservation of the doctrine of state immunity thus:

"The state engages in economic activities not as does a private individual, but precisely as a state, sovereign, invested with public power."

He argued further that:

"The same is apparent from the discussion on the pertinent section of the Commission's report in the Sixth Committee of the General Assembly, which shows that a large group of states are opposed to the above mentioned concept."[55]

He again argued forcefully further in support of the doctrine of state immunity and finally concluded that:

"The foregoing demonstrates that codification based on concepts of limited sovereignty would be clearly unsound and unfruitful.

The problem requires, at the very least, further study in great depth."[56]

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[52] See The International Law Commission's Report (1985) p. 244.

[53] See 1985 ILC Report p. 242 (1917th meeting) Vol. 1.

[54] Ibid.

[55] 1983 ILC Report p. 55 (Vol. II Part 1).

[56] Ibid., p. 65, Vol. II, Part 1.

The impetus for arguing that Third World interests be specially considered in the matter of Article 2 paragraph (2) into the draft articles, coupled with the effect of Article 5 and the changes therein made in respect of Article 18 paragraph 2 reflects the impact the developing world had managed to exercise in the drafting of the said articles, respectively.[57] It must be pointed out in passing also that the role of Russia in this endeavour cannot be underestimated in the light of the support it had generated in trying to have state immunity preserved as a rule of international law.

The draft articles embrace a considerable number of exceptions to state immunity but the inclusion of Article 2 paragraph 2 into the draft articles has limited the scope of these exceptions to such heights as to create an equitable balance. The effect of Article 2 paragraph 2 would greatly influence the course of litigation and it is highly possible that it will eclipse the effect of Article 10 which specifically deals with commercial transactions under the draft articles. The distinction therefore between *acta jure imperii* and *acta jure gentionis* will undoubtedly be predicated on the battle of ideas which in all probability will not be an easy task for the modern judge. The difficulties encountered by municipal courts in respect to political or diplomatic activities, however, would somewhat be made easier since the purpose test has now been made relevant under the draft articles.[58] These problems are illustrated by the decisions in Prentice Shaw and Scheiss v. Government of the Republic of Bolivia[59] where a contract for the erection of an embassy was characterised as *acta jure imperii*, whereas in the English case of Planmount Ltd., the Republic of Zaire's plea for immunity was rejected on the grounds that the issue regarding the repairs to the ambassador's residence was *acta jure gestionis*. The decisions in Shaw Scheiss and Planmount Ltd. clearly support the argument that was advanced against the application of restrictive immunity by Judge Lauterpacht in his well cited 1951 article,[60] in which he pointed out that courts of different countries and indeed courts of the same country, have treated similar activities in a different manner.[61] What then can be done to improve the present draft articles? On the whole, the draft articles may be open to criticism from the standpoint of drafting, i.e., some of the articles are generally construed without exploring the differences that exist between the legal and political systems on one hand, *qua*, the needs and the continuing change in activities of the modern state. A good study in this direction would show why countries with premobilised authoritarian political systems and premobilised democratic political systems[62] have ventured into the market place and why countries with high subsystem autonomy such as Britain, Germany, U.S.A., Canada, France, etc., have not ventured into the market place on a considerable scale as compared to the Third World. Such studies would show

[57] See generally The ILC's Report 1980–1988.

[58] See Article 2 Subsection or Paragraph 2 of the Draft Articles (1991), also in Int Legal Materials p. 1565.

[59] (1978) 3 SA 938 W. at 9404.

[60] See Lauterpacht, op. cit., pp. 222–223.

[61] Ibid. p. 222.

[62] See generally the analysis of political systems in Almond and Powell, Comparative Politics – A Developmental Approach 1966.

that trading is the life blood of the Third World. Furthermore a study of this nature would also uncover issues relating to low subsystem autonomous countries such as Mexico, Brazil and the intermediate subsystem autonomous countries such as South Africa. Indeed, such studies must also be carried into the domain of subsystem control or radical totalitarian systems in such states as the former USSR (now Russia) or China in order to determine the economic needs of states and why some of these states venture into commerce in respect of national economic management. The Venezuela reply to the International Law Commission's questionnaires is a good example of the situation in a premobilised authoritarian or democratic system,[63] e.g., Cuba, Nigeria, Libya, North Korea, etc., and a premobilised democratic system, e.g., Zimbabwe, Zambia, Ghana, Lesotho, Jamaica, India, Kenya, etc.

Another drawback worth pointing out in respect of the draft articles is in the areas of theory and residual rules, i.e., the draft articles were based on a less convincing civil law concept, for there is no credibility in the concept of the state acting as a private person. In other words, a state does not become a private person because it has ventured into the market place.[64] For the state in reality always acts as a "public person" for the betterment and the welfare of its citizens. The International Law Commission's central purpose for relying on the theoretical underpinnings of the distinction between commercial activities and purely governmental activities, singularly based on restrictive principle, must be relegated to the background for a more objective test. It is not the purpose of this study to deal with the whole draft articles but rather to explore those areas likely to bring about difficult jurisdictional problems.

7.8.1 Disagreement Over the Draft Articles

The Sixth Committee and the Draft Articles on Jurisdictional Immunities of States and Their Property

After Mr. Sucharitkul completed his terms of office in 1988, Mr. Ogiso of Japan was appointed to continue where the first rapporteur left off. The task albeit was not easy but as was expected, Mr. Ogiso gave a good account of himself by coming up with a preliminary report which contained important proposals for minimizing the differences that exist between member states. With his able leadership the International Law Commission adopted a set of 22 draft articles on jurisdictional immunities of states and their property which was submitted to the General Assembly in 1991 with a recommendation that an International Conference be convened to consider the topic. And the General Assembly having realised the desirability of a convention on state immunity decided to establish an open–ended

[63] Int. L. Commission's Report (1988) p. 90. See a similar position advanced by USSR now Russia, pp. 82–84; Thailand, pp. 81–82, Brazil, p. 58 Bulgaria, pp. 59–60; and the position of the former Republic of Czechoslovakia, pp. 63–64, respectively.

[64] Lauterpacht, op. cit., p. 224; Hyde, op. cit.

working group of the Sixth Committee with a recommendation that it be also opened to participating state members of the specialised agencies, to examine issues relating to the draft articles and recent developments in state practice, as well as comments submitted by sovereign states on the subject. Although there is still disagreement about certain aspects of the draft articles, member states have expressed support in the Sixth Committee for the Codification of the Law. In 1991 members such as Mr. Al–Bharna of Bahrain, Prince Ajibola of Nigeria, Mr. Calero Rodrigues of Brazil, Mr. Guillaume of France, Mr. Al Khassuanah of Jordan, Mr. Guevoguian of the USSR (then), Mr. Al Quysi of Iraq, Mr. McKenzie of Trinidad and Tobago, Sir John Freeland of U.K., Mr. Abdel Khalik of Egypt, Mr. Mahiuw of Algeria, Mr. Hayes of Ireland, Mr. Laceleta of Spain and Badr of Qatar, did voice out their objections to certain aspects of the draft articles but were without doubt generally in agreement on the importance of sovereign immunity and the need for getting a treaty text in place.[65]

Ever since the draft articles were adopted in 1991, informal consultations within the Sixth Committee between 1992–1994, gave states the opportunity to reflect on the differences of opinion that exist among developed states and developing states. This then cleared the way for states to further consider the subject. The spirit of cooperation thus brought about General Assembly Resolution 49/61 of 9 December 1994, which was followed by Resolution 52/151 of 15 December 1997. The General Assembly by "reaffirming that the codification and progressive development of international laws contributes to the implementation of the purpose and principles set forth in Article 1 and 2 of the Charter of the U.N.,"[66] and having considered the Secretary General's report, adopted Resolution 48/413 by inviting the ILC to present its preliminary comments regarding the draft articles by 31 August 1999.

At the latter part of 1998, the Sixth Committee took further steps to consider the proposal for an international convention on jurisdictional immunity of states and their property. But its efforts again met with difficulties in the light of the great controversy regarding the definition of the term commercial transaction. In view of these difficulties, members of the Sixth Committee suggested that a working group be established to consider the draft articles during the Fifty–Fourth Assembly session. But before we consider the work of the said group it is apposite to touch on some of the views that were expressed on the subject in the fall of 1998, so as to get some idea about current state practice. Mr. Duan Tielong of China, for example, stated that

"In the first place, when determining the nature of a transaction it was necessary to take into consideration the purpose of the transaction, because transactions of a state were often conducted not for profit but for the public interest; treating all international transactions of a state as commercial transaction without regard to their purpose could lead to an abuse of national jurisdiction that would adversely affect relations between states."[67]

Ms. Cueto Milián of Cuba expressed the view that

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[65] (1986) 41 UN GAOR C6 (38th mtg) 62 UN DOC A/C 6.41/SR 38 A/C 6.41/SR 37, A/C/41/SR28, A/C 6/41/SR 41.

[66] (1998) Fifty–Third Session, Agenda Item 148 A/53/629 p. 2.

[67] A/C 6/52/SR 26 p. 5 (GA) Sixth Committee 20th meeting.

"her government had had recent direct experience of its property being subjected to a unilateral interpretation by some states of the principles governing the jurisdictional immunities of states and their property. Any harmonization of rules would have to reconcile the principle of *par in parem imperium non habet* and recent developments in international law, with current policy of states and the conceptual philosophy of the issue."[68]

Mr. Lavalla Valdes of Guatemala said:

"After endorsing the statement by the representative of Panama on behalf of the Rio Group, said that the jurisdictional immunities of states and their property effectively belong to the body of customary international law cases where states acted *jure imperii*. Outside such specific cases, however, and despite the importance of the issue for international relations, international law played a passive role; no regime of what had been termed 'ordered freedoms' had been established. The reason for that was that, despite the growth of international activity by states and the development of ideas, no new customary rules relating to jurisdictional immunities, nor a treaty of universal scope had come into being."[69]

Mr. Saguier Caballera of Paraguay said that

"Paraguay supported the basic concept that states enjoy immunity from the jurisdiction of the courts of other states and the measures of constraint which they might adopt. While there might be exceptions, they should be fully justified and in conformity with the convention."[70]

Mr. Robert Rosenstock of the United States said

"A growing number of delegates shaped that view, he said. He was aware that other delegations had different views, hence the lack of consensus. The U.S. was not aware of any development which suggested a likelihood of agreement today. The paucity of comments from governments and the three comments received by the Secretariat did not suggest any narrowing of differences. Attempting to force the issue would lead to the hardening of positions."[71]

Mr. Verweij of Netherlands said that

"differences of substance still remain" and that "there were three key issues: Firstly, it was necessary to clarify the distinction between *acta jure imperii* and *acta jure gestionis*: secondly, it was necessary to determine which entities could, from the legal standpoint, enjoy jurisdictional immunity and lastly, it was necessary to establish the extent of immunity from execution."[72]

Evert Marechal of Belgium expressed the view that

"only non–standardized jurisprudence existed on jurisdictional immunity. Most disputes in Belgium involved diplomatic missions which were not covered by the Vienna Convention's – he therefore supported the establishment of a working group to study the most important aspects of jurisdictional immunity."[73]

Delegates[74] from Japan, France, United Kingdom, Greece, Bangladesh, Czech Republic, Panama, Italy, Austria, Ukraine, Panama and Slovakia, although were

[68] A/C 6/53/SR 23 p. 4 (GA) 23rd meeting.

[69] A/C 6/53/SR.23 p. 4 (GA).

[70] A/C.6/52/SR.26 p. 6 (GA).

[71] (1988) CA/L 30al, Sixth Committee p. 4.

[72] A/C 6/52/SR.26 p. 5 (GA).

[73] (1998) GA/L/3091: Sixth Committee p. 4.

[74] Mr. Nagaoka and Fukushima (Japan), Mr. Alabrune (France), Ms. Dickson (U.K.), Ms. Telahan (Greece), Mr. Morshed (Bangladesh), Mr. Smejkal (Czech Republic), Judith Maria Cardoza (Panama), Mr. Politi (Italy), Ms. Suchanpa (Austria), Mr. Kachurenko (Ukraine), Mr. Varso (Slovakia).

not agreed on the substantive issues relating to the draft articles, did suggest that a working group be established to help rework or consider the outstanding issues respecting state immunity. Thus on 7 May 1999, the said working group[75] was established to study five main problems and these are (1) concept of state for purpose of immunity; (2) criteria for determining commercial character of a contract or transaction; (3) the concept of state enterprise or other entity in relation to commercial transactions; (4) contracts of employment; and (5) measures of constraint against state property.

Article 2 of the draft articles, paragraph 1(b)ii has been a subject of disagreement between federal states and non–federal states, specifically with respect to the problem relating to the dual capacity of a province, "states" or constituent units, to exercise governmental power on behalf of itself or for the central government, pursuant to the constitutional distribution of powers between the central government and the constituent units. The main controversy here is whether component units of a federal state be considered *pari pasu* to the federal state in enjoying full immunity without any additional requirements, i.e., when these units are acting within the confines of the powers granted to them and in their name. The attempt by some states to shift the emphasis placed on the status of the state to its activities or functions in granting immunity is responsible for this problem, since the granting of immunity is wholly predicated on the nature test, i.e., the commercial activity in issue.[76] However, Mr. Ogiso's commentary on the said article, "that constituent units of some federal systems, for historical or other reasons, enjoyed sovereign immunity without the additional requirement that it be performing sovereign authority of the state,"[77] is a well reasoned answer to the problem. Many federal constitutions in fact are based upon centripetal and centrifugal forces and therefore the rights, duties and obligations of these component units are well defined and entrenched. Thus a careful reference to the U.S. Constitution, i.e., the

[75] The working group is made up of the following scholars: Mr. A. Hafner, Chairman; Mr. C. Yamada, Rapporteur; Mr. H. Al Baharna, Mr. I. Brownlie, Mr. E. Candioti, Mr. J. Crawford, Mr. C. Dugard, Mr. G. Gaja, Mr. M. Elaraby, Mr. Q. He, Mr. M. Kamto, Mr. I. Lukashuk, Mr. T. Melescanu, Mr. P. Rao, Mr. B. Sepulveda, Mr. P. Tomica, and Mr. R. Rosenstock (ex officio). The working group worked on the unresolved issue relating to state immunity from 1 June 1999 to 5 July 1999. It is proposed here to consider (1) concept of state for purposes of immunity; (2) criteria for determining the commercial character of a contract or transactions; and (3) measure of constraint against state property. Such other topics as the concept of state enterprise or other entity in relation to commercial transactions and contracts of employment have been considered *infra*. The suggestions, however, of the working group are in order and therefore would likely find favour with some countries; see Document A/C.6/49/62 para. 88; see also summary records of the meetings of the Forty–Third Session, 2218th meeting, Yearbook of the ILC Vol. pp. 68–72.

[76] A Limited v. B. Bank and Bank of X, Court of Appeal U.K. (1988) III ILR 590.

[77] See (1991) Vol. II Part II p. 6, Yearbook of the Int. Law Commission.

Tenth Amendment[78] and the Supremacy Clause shows how power is shared between the states and the federal government.

The proposal by Mr. Carlos Calero–Rodrigues which was based on Article 28 of the 1972 European Convention was meant to pave way for a compromise to be reached. Germany and Austria supported the compromise proposal while Argentina argued that constituent units be replaced by "autonomous territorial governmental entities."[79] Whether Argentina's suggestion would find favour with other federal countries, or members of the Sixth Committee, is open to debate. Court decisions at state level, however, have relied on such parameters as defined territory, permanent population, and the formal obligations that are normally associated with participation in the international community to determine what is a state. That the above approach by municipal courts is logically tenable and therefore likely to find favour with some states cannot be disputed. It is submitted that leaving the burden on the entity to prove whether it falls under the definition of a state or not as can be detected in the decision of some courts[80] would be in order if reference is made to the constitution of the federal state of a given component unit. The suggestion that parallelism be established between the "concept of state for purpose of immunity" and "the state responsibility draft" for purposes of defining the conduct of component units in respect of exercising government authority is not clearcut, and therefore was dismissed as unnecessary. The suggestion by the working group to the General Assembly that paragraph 1(b)ii of Article 2 of the draft articles could be deleted and the element, "constituent units of a federal state" would join "political subdivisions of the state" in present paragraph I(b)iii, will certainly be helpful, but again in a bitter dispute reference to a given federal constitution coupled with its legislative history and statutes would be most appropriate and adequately plausible in determining the legal position of component units, for the purpose of granting immunity. Federal constitutions may differ in respect of the allocation of powers to the component units and its agencies, but the legal position of these component units do not differ markedly from country to country as to create any difficulties in finding an acceptable solution to the problem.[81] The said problem is not too severe as many would think it to be, for the in-

[78] The 10th Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states respectively, or to the people." The process is even made easier by the Supremacy Clause.

[79] Transaero Inc. v. La Fuerza Aerea Boliviana (1994) Court of Appeals, Dist. of Columbia Circuit (11–12 107 p. 308); (1997) 107 ILR 308.

[80] Drexel Burnham Lambert Group Inc. v. Committee of Receivers for Galadari et al.. Refco: (1993) U.S. Dist. Court Southern Dist. of N.Y. (ILR 103 p. 532).

[81] The state includes both the government and the governed and it is concerned in most cases with those social, political and economic relationships that could be expressed through the government of the day: a federal state is made up of the central government that represents the whole and represents the whole in external affairs and such internal affairs clearly considered to be of common interest: J. Bryce, Studies in History and Jurisprudence, Vol. 1 Essay III Oxford (1901); Laski, op. cit. See, e.g., Article 118 of the Constitution of Australia, Article 121 of the Constitution of Canada.

dividual federal constitutions currently in place could serve as a valuable source material in resolving the problem.

The 1991 ILC draft articles approached the state immunity problem by relying on the view that states be denied immunity if they venture into the market place, i.e., immunity would not be granted to a state if it undertakes a commercial activity which has nothing to do with *jure imperii*. To many, this appears appropriate, but how is the commercial transaction for the purpose of determining jurisdiction to be defined? And this has been a source of disagreement over the years.[82]

Current state practice shows that some Western states are insisting that only the nature of the activity be taken into consideration when determining whether a state activity is commercial or not.[83] While others argued that sovereign states should not be allowed to canvass their interests before a national authority, still some states, on the other hand, argued that the nature test alone does not always aid the judge in determining whether an activity is commercial or not.[84] And therefore the purpose test must also be considered. Thus in order to avoid further radical interest articulation or controversy, the two approaches were integrated. This, however, met with resistance in the Sixth Committee.[85]

A careful review of comments submitted by governments shows that Brazil supported absolute immunity. Yugoslavia, on the other hand, expressed a positive view of the draft articles. While such countries as Canada, Mexico, Qatar, Spain, United Kingdom, Sweden, Norway, Denmark, Finland, and Iceland strongly objected to the inclusion of the purpose test[86] in the determination of the commercial activities of states.

Mr. Ogiso, in order to promote a common understanding in the Sixth Committee, stated in his preliminary report thus:

"With regard to paragraph 2, in the light of the fact that many countries support the nature criterion in determining whether a contract is commercial or not and criticize the purpose criterion, which in their view is less objective and more one–sided, the Special Rapporteur has no objection to deleting the purpose criterion. At the same time, it should be recalled that several governments, both in their written comments and in their oral observations in the Sixth Committee, have supported the inclusion of the purpose criterion."[87]

Since the development of international law or the making of law in the interstate system is based upon the conflicting claims of states, it would have been defeatist if Mr. Ogiso had rejected the purpose test as was suggested by some leading states. The inclusion of the purpose test, for example, did produce very insightful comments. Mr. Ogiso, for example, suggested that the reason for taking into account the purpose test arose from the need to provide for cases relating to

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[82] See the work of ILC (1978–1991). And the issues that were debated in the Sixth Committee: Resolutions 46/55, 49/61 and 52/51, respectively.

[83] Document A/CN 14/410 and Add. 1–5 Yearbook of the ILC 1988, Vol. II, Part 1, pp. 51 et seq.

[84] Ibid.

[85] See the work of the Sixth Committee and the completion of the 2nd Reading: Forty–Third Session YBILC 1991 Vol. II Part 2.

[86] (1988) Yearbook of the ILD, Vol. II, Part 1 p. 51.

[87] See Document A/CN/4/415 YBILC, 88 Vol II Part 1 p. 102.

natural disasters,[88] e.g., famine. Although the reason he offered was a good one, he did not go as far as to consider the pressing needs of the developing world, that in these countries, the state is forced to perform diverse and varied activities in order to promote the welfare of its citizens[89] because of lack of finance capital, and therefore deleting the purpose test would load the dice against developing countries, for these countries would be left at the mercy of national judicial authorities. Thus in order to avoid being harassed by private suits, many developing states are expressing strong views in support of the purpose test in the Sixth Committee.

In 1991, the ILC managed somehow to complete its second reading which was thereafter sent to the Sixth Committee, but in spite of its compromising approach, the distinction between commercial and non–commercial activities of states continued to pose difficult problems and this is amply reflected in the comments that were submitted by states.[90]

The position of governments since 1992 in respect of state immunity falls into two categories. Brazil and France, e.g., clearly supported the inclusion of the purpose test, while other countries such as Australia, Austria, United Kingdom, United States, Germany, Italy, Netherlands, Belgium and Bulgaria insisted that the nature test be designated as the sole test. The only newcomer in the latter group is Bulgaria, for it appears to take a position quite different from its earlier position of 1988 thus:

"The principle of jurisdictional immunity of states is universally recognised in international law as being a logical consequence of the principles of sovereignty and sovereign equality of states, which provide for the non–submission of one state to the authority of another (*par in parem imperium non habet*).[91]

Bulgaria's 1988 position thus runs counter to its current position but it is hard to tell as to whether it has completely abandoned its support for the non–submission of one state to the jurisdiction of another. Perhaps Bulgaria is modulating its position in order to join the European Union.

Disagreements respecting the distinction between commercial and non–commercial activities of states continued between delegates in the informal consultations that were held in 1994, pursuant to the decision of the General Assembly, 48/413; but in order to bring about a common understanding the chairman suggested the following:

"A greater measure of certainty could be achieved by giving states the option of indicating the potential relevance of the purpose criterion under their national law and practice either by means of a general declaration in relation to the convention or a specific notification to the other party by whatever means in relation to a particular contract or transaction, or a combination thereof. This would clarify the situation not only for a private party who is so

[88] A/CN/4/L 443 p. 6 [44th Session].

[89] (1988) 41 UN GAOR C.6 (37th mtg.) 73 UN DOC. A/C.6/41/SR.37; Prince Ajibola of Nigeria said: "Jurisdictional immunities of states and their property could not be underestimated in the light of increasing economic development and interdependence and varying state practice among industrialized, socialist and developing countries such as Nigeria which engaged in state trading as a means of economic survival."

[90] Resolution 46/55, 49/61, 52/52, respectively.

[91] (1988) Vol II, YB ILC 40th Session; Bulgaria from the beginning did support the concept of sovereign immunity.

informed when entering into a contract or transaction with a state but also for a court which is called upon to apply the provisions of the convention."[92]

Given the above compromise suggestion, article 2 paragraph 2 was duly approved, although some states still believe that its continued inclusion in the definition of commercial transactions would introduce an element of circularity into its application to concrete cases. One important fact that has been overlooked however, by these states is that it is difficult in some cases to separate the nature test from the purpose test, and further more, it is not that easy to determine the *nexus* between a commercial activity and the cause of action. Which means that the relationship between the commercial activity of states and the cause of action must not be merely presumed but must have both causal and legal connections. Thus the nature test alone is insufficient in the determination of judicial jurisdiction.[93] Courts in some jurisdictions have either followed the contextual approach or simply resort to an approach where the location of the activity is considered as the appropriate test.[94]

The current working group which was established by General Assembly Resolution 53/98 concluded that reference to Article 2 only to "commercial contracts or transactions without further explication" must be accepted as the preferred approach to resolving the controversy after having considered other alternatives as well. Whether the suggestions of the said group would be acceptable to states is far from certain, in view of press release, GA/L/3091 which evidenced the continuing disagreement among states. Goa Feng of China, for example, stated that "The time had not yet come for the convening of a diplomatic conference to conclude a convention."[95] One can also detect similar sentiments expressed by Mr. Robert Rosenstock of the United States. The problem, unfortunately, therefore remains unresolved.

Issues in respect of measures of constraint against state property over the years have been hotly contested before national judicial authorities and in the Sixth Committee.[96] Prior to the adoption of the draft articles in 1991, the comments of governments fall into two different groups. While one group argued effectively on the importance of the principle of sovereign immunity from measures of execution,[97] other states such as U.K., Federal Republic of Germany (then), Belgium, Australia, Canada, Qatar, Switzerland, Sweden, Norway, Finland, Iceland and Denmark[98] argued that there be proper clarification as regards the scope of Article

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[92] Para. 6; Informal Consultations held pursuant to General Assembly decision 48/43, A/C.6/49/L2 p. 3: Courts in Zimbabwe and in Malaysia have followed the nature test, while the Supreme Court of Philippines took into consideration the intention of the purchase of land by rejecting arguments in respect of the commercial character of the agreement.

[93] See (1999) General Assembly A/CN AL.576, Fifty–First Session, pp. 21–54.

[94] Ibid.

[95] (1998) GA/L/3091 pp. 3 of 5.

[96] See Paras. 67–80, Report of the Working Group, A/C.6/48/L.4, pp. 13–15.

[97] These countries were USSR (then), Byelorussia, GDR (then).

[98] Preliminary report on jurisdictional immunities of states and their property A/CN4/415 YB ILC 1988 Vol II part 1 p. 117 [paras. 211–213]. The working group,

18 so as to avoid unnecessary limitations on state property that could legitimately be subjected to execution. The comments of government, however, did not affect the fundamental structure of the proposed articles. The discussions in the working group which were established pursuant to General Assembly Resolution 46/55 were quite encouraging and constructive but no compromise was reached in regard to any of the proposals.[99] Further discussions were held again as a result of General Assembly decision 48/413, but in view of the sensitive nature of the subject the Sixth Committee could not formulate a compromise. Delegates were simply divided as to whether the denial of immunity means that enforcement measures should be taken against state property.[100] And this one would suggest could be balanced against the inalienable rights of sovereign states to minimise the interference with state property which might be subjected to the coercive measures of the forum state in order to satisfy a private claim. Many states have forcefully debunked the suggestion that measures of constraint be instituted against state property in view of the consequences of the United Nations Charter, the United Nations–United States Headquarters Agreement and the force of the Vienna Convention, and their views on this matter cannot be ignored if consensus is to be reached. Thus even if measures of constraint against state property are allowed, difficulties would still remain as to which state property is to be levied upon. States are again deeply divided on this issue because of the fact that the only property that may be available to the forum court would be monies and other assets, be it movable or immovable, in the forum state, which might have been directly or indirectly used in promoting diplomatic activity.

In view of the complexity of the above issue, the chairman of the working group suggested that:

"It may be possible to lessen the need for measures of constraint by placing greater emphasis on voluntary compliance by a state with a valid judgment. This may be achieved by

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however, suggested that: "As regards prejudgment... these should be possibly only in the following cases: (a) measures on which the state has expressly consented either ad hoc or in advance; (b) measures on property designated to satisfy the claim; (c) measures available under internationally accepted provision."

[99] See The Report of the Working Group, A/C.6/48 L.4 pp. 13–15. The Chairman's proposal reads as follows: "No measures of constraint shall be taken against the property of a state before that state is given adequate opportunity to comply with the judgment."

[100] See Document A/C.6/49 L 2 para. 11: The U.K. Act 1978, and other municipal courts have refused to support measures of constraint against sovereign states: e.g., Third Avenue Association and Another v. Permanent Mission of the Rep. of Zaire to the United Nations (1993) U.S. Court of Appeals 2nd Cert, ILR 99, p. 195; Foxworth, ILR 99, p. 138. In the Italian case of Condor and Filvern v. Minister of Justice (ILR 101 p. 394), however, the court ruled that "the foreign policy interest of the executive in preserving good relations with other states no longer justified a rule of absolute immunity from attachment and execution where the property was not destined specifically for the fulfillment of sovereign functions; if the executive wished to avoid possible embarrassment it remained possible for it to intervene in the proceedings to offer to pay off a creditor seeking enforcement against the property of a foreign state or guarantee payment of a debt in return for the creditor's withdrawal of a request for attachment against such property." This certainly is an interesting suggestion.

providing the state with complete discretion to determine the property to be used to satisfy the judgment as well as a reasonable period for making the necessary arrangements. Second, it may be useful to envisage international dispute settlement procedures to resolve questions relating to the interpretation or application of the Convention which may obviate the need to satisfy a judgment owning to its invalidity."[101]

Although the above suggestion is logically grounded, there is still one problem that must be addressed, and that is, technically no court would exercise jurisdiction over a state if the possibility of enforcing the judgment is linked with the discretion of the defendant state, as to when state property would be made ready for the satisfaction of the judgment and which specific state property would be given up for the satisfaction of the private claim. Unless there is a treaty in place, such suggestions would indeed be difficult to put into effect given the complex nature of the interstate system. Furthermore, the reasonable time of three months that was suggested may be flouted and therefore the forum state would arguably be forced to attach the state property in issue or the state property located in the situs of the suit, which appears not to be used for government purposes. The difficulty here is that the working group in the Sixth Committee failed to come up with answers as to how state property within the forum state is to be characterised. And does the local court have the authority to inquire into the assets of a sovereign state? The answer certainly is no. Any attempt to do that will be a complete deviation from the positive normative rules of international law. State representatives, e.g., diplomats, ambassadors, are not required by international law to answer such questions for it amounts to unnecessary intrusive scrutiny into the assets of sovereign states. The suggestion, however, in respect of envisaging an international dispute settlement procedures would be welcomed by a great majority of states, but again there is the need to develop specific equitable rules to streamline the process.

The suggestions by the working group chaired by Mr. G. Hafner were not that different from the suggestions which were offered by the chairman of the informal consultations held pursuant to General Assembly Decision 48/413. The suggestions of the Geneva group may, however, be stated as follows:

"Alternative 1. (i) Recognition of judgment by state and granting the state a 2–3 months grace period to comply with it as well as freedom to determine property for execution; (ii) If no compliance occurs during the grace period, property of state [subject to Article 19] could be subject to execution.

Alternative 2. (i) Recognition of judgment by state and granting the state a 2–3 months grace period to comply with it as well as freedom to determine property for execution; (ii) If no compliance occurs during the grace period, the claim is brought into the field of inter-

[101] See Document A/C. 6/49/L2 paras. 12 and 13: The crucial issue before the Sixth Committee appears to be the nature of the state property before the forum court, and whether in clear terms it is specifically destined for political functions. It is not always easy to come up with clear answers to these issues. State practice, therefore, is fragmented. Thus while some states are willing to grant immunity, others are not convinced that there is still in existence a rule of customary international law which precludes enforcement measures against state property. But one important fact that has been ignored is that there is no rule of customary international which supports enforcement measure against the property of a sovereign state.

state dispute settlement; this would imply the initiation of dispute–settlement procedure in connection with the specific issue of execution of the claim."[102]

Alternative 3 simply suggested that the matter be left to state practice since it involves delicate and complex issues.

Alternative 1 lacks focus and there is the possibility that the forum state could take the law into its own hands by violating the rights of sovereign states. Furthermore, there is every indication that the defendant state could frustrate the forum state by transferring their assets somewhere out of reach of the forum court. Alternative 2 has promise, but would have to be carefully studied in the light of the delicate nature of the issues. It is suggested by the present writer that all these problems could be solved if the international community is willing to subscribe to the idea of establishing a special international court or tribunal to handle private suits against foreign sovereign states. Or a dispute settlement procedure based upon the rules of international arbitration could be put in place to deal with these delicate issues. The said suggestions are being put forth because an international convention per se cannot be accepted as the only means by which all the intractable problems normally associated with jurisdictional immunities of states and their property could be resolved. Thus, even if a convention of the said subject is concluded, it is doubtful as to whether all the grey areas of the subject would be covered, hence it would be most appropriate if sovereign states are encouraged to place emphasis on the role of bilateral treaties in order to provide additional stable basis for international business transaction.

7.9 The Uncertainty of State Practice

One is persuaded to argue that prior to 1900 the immunity of a state from the judicial process of another sovereign state irrespective of the nature of the transaction in question was absolute and this was derived from the innate supremacy of the local sovereign. Over the years, however, there is certainly a quest to limit the concept of state immunity. Many believe the move towards the total acceptance of the doctrine of restrictive immunity is almost complete, but a careful review of state practice shows that is not the case.[103]

For in spite of the demand by many leading countries that immunity be limited in the market place, at least before 1990 and perhaps to date, countries such as Russia, Indonesia, Tanzania, Venezuela, Trinidad and Tobago, Uganda, Syria, Sudan, Thailand, Portugal, Japan, Kuwait, China, Poland, Hungary, Ecuador, Brazil, Libya, Ethiopia and the rest of the Third World (or developing nations) have turned deaf ears to the call or have in short become reserved.[104] The German Democratic Republic (GDR), although in 1990 embraced the concept of absolute immunity, has since then been united with West Germany and therefore automati-

[102] General Assembly; Fifty–First Session (1999) July: A/CN.4/L.576 pp. 54–55.

[103] The ILC Report, op. cit; (1998) Sixth Committee, GA/L/3091; (1998) General Assembly, Fifty–Second Session, A/C.6/52/SR.26; (1999) A/CN/4L.576.

[104] Ibid.

cally lost its independent voice in these matters, in view of the fact that West Germany acceded to the European Convention of State Immunity and the Brussels Convention of 1926 on the immunity of state–owned ships coupled with its 1934 Protocol thereto.[105]

The position in 1990 in respect of Czechoslovakia was a clear acceptance of the concept of state immunity, but ever since its breakup, the position of the republics of Czech and Slovak have become unclear.[106] Countries such as Mexico, Iceland, Madagascar, Togo, Barbados, Finland, Norway, Qatar, Chile, Suriname, Yugoslavia, Lesotho follow the doctrine of restrictive immunity.[107] The position in respect of Tunisia, a former French Colony, Burma, Philippines and Cape Verde seemed not clear, but appear oscillating towards the preservation of the concept of absolute immunity of states. In fact, the practice of states the world over is simply far from consistent and it would appear that Russia as well as Asia, Africa, and a majority of Latin American states would prefer that the rule of state immunity be maintained rather than discounted.[108] It would therefore be premature and certainly careless to simply state the current position of customary international law in respect of state immunity since there is ample evidence of the paucity of states in embracing the restrictive immunity.[109] It is submitted that this state of affairs in regard to inconsistent state practice might have prompted Lord Denning to conclude obiter thus.

"Some have adopted a rule of absolute immunity, which if carried to its logical extreme, is in danger of becoming an instrument of injustice. Others have adopted a rule of immunity for public acts but not for private acts which has turned out to be a most elusive test. All admit exceptions. There is no uniform practice. There is no uniform rule. So there is no help there. Search now among the decisions of the English courts and you will not find them consistent."[110]

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[105] East Germany, before 1992, was an independent socialist state which followed the principles of absolute immunity. But as a result of state succession, such a practice had been abandoned in view of the fact that it was absorbed by West Germany, a country although ambivalent in its practice, had in recent past embraced the modalities of restrictive immunity. See The ILC report on Jurisdictional Immunities of States and Their Properties. See Sucharitkul, op. cit. See also the research papers prepared by the Australian Law Reform Commission 1983, under the direction of Professor Crawford; and that of GAOR 46th Session, Supp. 10 (A/46/10) p. 9.

[106] The breakup of Czechoslovakia means we now have two independent countries with two independent legal systems. It is not clear these two countries have embraced the restrictive doctrine, but in the past the evidence supports the fact that Czechoslovakia did support absolute immunity. Without doubt almost all members of the Warsaw Pact did support the modalities of state immunity. But see (1998) GA/L 13091 Committee work programme; (1998) GA, Fifty–Second Session, A/C6/52/SR.26.

[107] See ILCR, op. cit., 183, 184, 186, respectively. See also (1999) GA, Fifty–First Session A/CN.416 576.

[108] See Part V of the ILCR. See also R. Higgins, Problems and Process, International Law and How We Use It (1994) p. 81; GAOR 46th Sess., 10 (!/46/10) p. 9.

[109] Ushakov, op. cit., Vol. II, p. 55; Brownlie, op. cit., at pp. 329–336.

[110] Rahimtoola v. Nizam of Hyderabad (1957) 3 All ER 461.

Professor Brownlie's position on this subject seemed not different from Lord Denning's obiter, when he argued as follows:

"It is far from easy to state the current legal position in terms of customary or general international law. Recent writers emphasize that there is a trend in the practice of states towards the restrictive doctrine of immunity but avoid firm and precise prescriptions as to the present state of the law. Moreover, the practice of states is far from consistent and, as the comments of governments relating to the draft articles produced by the International Law Commission indicate, there is a persistent divergence between adherents of the principle of absolute immunity and that of restrictive immunity."[111]

Is there a current law? The answer is in the negative since customary international law is formed when settled practice is aided by *opinio juris*. It is clear, however, that many countries are modulating their positions and therefore we are left with a divided opinion in respect of the law of state immunity. In any event, the practice of states in the direction of restrictive immunity is not uniform and municipal courts of late have exacerbated the problem by giving conflicting judgments. It is expedient, however, that the concept of sovereign immunity be maintained and thoroughly studied rather than have it relegated to the background. The rule of state immunity as formulated by the ILC in its 38th session, however, is subject to a careful qualification as regards its application wherever possible. It is indeed important to conclude that what may perhaps be accepted by some countries as the objective evidence for so improbable a claim in support of the doctrine of restrictive immunity must be thoroughly examined in its entirety as space may permit for it will certainly be less helpful to accept its authority based only on its popular appeal. It now remains to be seen how venerable is the doctrine of restrictive immunity, but for the sake of objectivity one is persuaded to argue that restrictive immunity is an incomplete doctrine and hence does not command sufficient support from the majority of states in the world to be considered a rule of international law, i.e., the law of nations by which civilised nations in general are bound. It is simply elusive but heavily supported by industrialised countries[112] where finance capital is well established unlike in developing countries where there is paucity of capital.[113] In reality, the quest to limit state immunity is fraught with difficulties and uncertainties for it would appear that even countries with the inclination of accepting, or countries which have accepted the doctrine of restrictive immunity have differed as to how the various draft articles of the International Law Commission be applied.[114] Nikolai Ushakov, a Russian scholar, in his contribution to the debate on sovereign immunity argued as follows:

"A number of the Special Rapporteur's conclusions do not seem to us to be well–founded. More particularly, this applies to the Special Rapporteur's view concerning an

[111] I. Brownlie, op. cit., pp. 329–330.

[112] See generally the ILC Report 1982–1986; UN Doc. A/CN.4/410, 1–5, 40th Session, 2 YB INT'L. COMM'N Part 1 (1988).

[113] See Kwame Nkrumah, Neo Colonialism, The Last Stage of Imperialism (1965). This book shows the distribution of capital amongst nations and how it is normally manipulated to the advantage of Western countries; Measures for the Economic Development of Under–developed countries: United Nations Dept. of Economic Affairs (May 1951).

[114] See ILC Report, 1982, 1983, 1984, 1985, and 1986. See also (1999) GA Fifty–First Session, A/CN.4/L.576.

emerging general trend in favour of the concept of "limited" or "functional" state immunity.

This concept or theory runs counter to the basic principles of international law and it is rejected by many states, a fact to which we have repeatedly drawn the attention of members of the Commission in our statements. Consequently it cannot, in our view, form the basis for the codification of rules on the immunities of states and their property."[115]

Again, Ushakov clearly delves into an uncertain aspect of the doctrine of relative or restrictive immunity, by explaining that it runs counter to the principles of public international law, and that the concept does not command support from very many countries of the world except western industrialised countries.[116] Dr. Ushakov, in trying to support his position, argued further that,

"Many states, possibly a majority, do not subscribe to or reject, the concept of functional immunity. Hence it is clearly mistaken to speak of any general trend emerging in favour of that concept.

Thus, of the 29 states which, in accordance with the Commission's request, sent information and documentation in reply to the questionnaire, 14 grant full immunity and four have no legislation or practice in this area."[117]

If this be the case, then one will certainly be hard put to argue for the replacement of absolute immunity (wider principle) by a relative or restrictive immunity which is less grounded on the whole in the practice of states.[118] It is sufficiently obvious from the reading of the International Law Commission's report that a great majority of countries of the world oppose the doctrine of restrictive immunity.[119] In real terms, however, it would appear that courts in recent times have followed the doctrine of restrictive immunity in Continental European countries, Britain, Canada, South Africa, Australia and the United States, to mention the main ones.[120] But it is equally clear from the foregoing analysis that the doctrine of restrictive immunity is associated with legal contradictions and therefore could rightly be designated as a creature of sovereignty wholly lacking of *usus*. Its utility arguably was simply consecrated in the Western world without any support from the Third World.[121] And since there are about 190 nations as of now in the world, it would be far from conclusive to make an a priori or sweeping generalisation on the current state of the law as regards the doctrine of restrictive immunity without having regard to the overall practice of states in the world. Certainly the restrictive doctrine stands or falls on its intrinsic merit but not on the popular appeal of some few countries.[122] Indeed, having offered these arguments, it is apposite also to say that the shortcomings of state immunity have become apparent, and the solid ring that was once built around this almighty doctrine of immunity is *prima facie* now broken in the major industrialised countries of the West, in view of recent legisla-

[115] Ushakov, op. cit., at p. 53.
[116] Ibid., pp. 54–55.
[117] Ibid., p. 55.
[118] Ibid.
[119] Ibid.
[120] Ibid.
[121] See I. Brownlie, op. cit.
[122] See ILC Report (1978–1990); see also (1999) GA, Fifty–First Session A/CN.4/L.576; (1998) Press Release (Sixth Committee) 9A/L/3091.

tion in these countries. However, it remains to be seen how viable the doctrine of restrictive immunity would be in a quest by municipal courts to resolve private claims against foreign sovereign states in domestic courts, for the restrictive or relative approach has in one way or the other made litigation in this area of the law more complex.

For an international convention on state immunity to be acceptable to all and sundry the following principles must be considered. These principles may be stated as follows.

1. First and foremost, the standard of general international law must be the focal point of the convention. And this must be carefully supplemented by connecting factors, e.g., the role of the *lex fori* must be clearly explained.
2. The distinction between *acta jure imperii* and *acta jure gestionis* must be eliminated or neutralised by giving equal prominence to the nature and purpose tests. Although such an approach will not be decisive, at least it will open a floodgate of insights and ideas in exploring the state immunity controversy, thus helping to promote an equitable balancing of rights.
3. The activities and interests of states do differ and therefore must be characterised according to the legal, economic and political systems[123] of countries of the world, e.g.:
   (a) Democratic systems
      a. Britain, for instance, has a high subsystem autonomy.
      b. While Mexico has a low subsystem autonomy.
   (b) Authoritarian systems
      a. USSR had subsystem control and subject participant culture. This is changing and Russia as at now might have a quasi conservative subsystem control, and China still follows a subsystem control. And this includes North Korea.
   (c) Premobilised modern systems
      a. Newly independent states, with limited secularisation and low middle class participation.
      b. Premobilised authoritarian systems, e.g., Cuba, Syria, Iran, Burma, Libya, etc.
      c. Premobilised democratic systems, e.g., Nigeria, Zimbabwe, Egypt, India, Pakistan and Ghana since 1992.

      This option may involve an extensive study which ultimately would reveal to members of the Commission as to how states behave and the attendant needs to which their interests are directed. The distinction alluded to above undoubtedly destroys the concept of "assimilation" once suggested by Professor Lauterpacht. For as can be seen, each state is unique in its sphere of authority with minimal similarities.
4. The legal position of governmental instrumentalities of states can be characterised according to the system suggested in option 3.

[123] See Almond and Powell, op. cit.

5. It could be possible to incorporate the approach followed by Lord Wilberforce, i.e., the contextual analysis in the I Congreso de Lapido case into the draft articles, i.e., by making reference to the central issue,124 upon which the suit is based, i.e., the nature of the transaction and the nature of the breach.
6. An alternative model rule should have been established, thus encouraging international arbitration.
7. Failing all these, then the only viable approach left is to propose that a special international court or tribunal be established to handle private suits against foreign sovereign states.

These recommendations are being made in view of the fact that so many countries of the world have not as yet had the chance to consider the sovereign immunity question before their local courts and evidence of state practice seemed to be scanty and quite obscure in the Third World, since the crusade for change started in the West.[125]

In spite of the above observations, it is submitted that the ILC draft articles did bring to the fore some new ideas and these are

1. The inclusion of the purpose test in Article 2 paragraph 2.
2. The rejection of the structurist approach entirely.
3. The distinction between prescriptive and enforcement jurisdiction of the state, i.e., Article 18. Thus there is a requirement for two sets of consents, i.e., one for jurisdiction and the other in respect of enforcement measures.
4. The commissioners somewhat deemphasised the abstract test of distinguishing between *acts jure imperii* and *acts jure gestionis.*

In sum, the rift between developed countries and developing countries still remains. But the draft articles and the work in the Sixth Committee certainly represent a great contribution to the understanding of this elusive subject.

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[124] See the judgment of Lord Wilberforce in the case of I Congreso del Partico (1981) 3 WLR 328 (House of Lords) where he made an excellent effort to apply the contextual theory.

[125] E.g., Italian practice, Belgium practice, French practice, German practice, American practice, to mention a few. General Assembly, Fifty–First Session, A/CN.4/L.576; Research Papers prepared by the Australian Law Reform Commission (1983), under the direction of Professor Crawford.

8 State Immunity and Certain Unresolved Problems

8.1 Some Lingering Problems

In the logical and objective Freudian psychoanalytic realms of the subconscious and unconscious mind, no one worries or resigns himself to death for an already dying concern, and faith is more powerful than doubt and despair. But over the years the doctrine of sovereign immunity has been attacked by leading scholars[1] and it would appear that all leading text writers who have specifically studied the subject, although did not speak with one voice, are agreed that immunity be restricted. And interestingly enough, one leading scholar,[2] on record even went as far as to proclaim from the "mountaintop" that sovereign immunity be abandoned for the sake of justice and his persuasive thesis seemed to have perhaps influenced the learned Thai jurist Dr. Sucharitkul to also call for a complete abandonment of absolute immunity of states in his well cited 1959 work.[3] So far, however, it would appear sovereign immunity is holding steady and therefore arguably here to stay, for it would take more than juristic writings to destroy the *corpus* and *animus* of sovereign immunity. Hence it would be expedient to put on a lantern for this uncharted journey rather than curse the darkness. And it will certainly be defeatist to pray in our pleading for *deus ex machina*, in view of the fact that in these modern times, such unexpected hidden or spiritual powers have in reality ceased to be forthcoming when called to save a difficult situation.

All that is being put across is that after 186 years, the doctrine of sovereign immunity has become more entrenched in the pleadings of states before foreign

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[1] Lauterpacht H., The Problems of Jurisdictional Immunities of Foreign States (1951) 28 BYIL, 220; Weiss, Traite de droit International prive, LV pp 94; Allen, The Position of Foreign states before national courts (1933); Watkins, The State as a Party Litigant (1927); Hyde, op. cit., Int Law Vol II; Friedman, The Growth of State Control (1938) BYIL XIX; Mann, The State Immunity Act, 1978 (1979) BYIL 50, p. 43; Lowenfeld, The Doctrine of Sovereign Immunity, 44th Report of the ILA 1950 pp. 204–217 and 45th Report 1952 at p. 215: See also Lord Denning's position on the subject in Rahimtoula V. Nizam of Hyderabad (1957) 3 WLR 884; and Trendtex and I Congreso del Partido; Cater, Sovereign Immunity: Substantiation of Claim (1955) 3 ICLQ Vol IV part 3 p. 469; Sucharitkul, op. cit., 1959 work – State Immunities and Trading Activities in International Law.

[2] See Lauterpacht, op. cit., pp. 220–224.

[3] See Sucharitkul, op. cit., pp. 355–359.

courts[4] and although some countries have passed legislation in order to block its appeal, arguably such unilateral legislative provisions or executive regulations have been less helpful and thus not reflective of customary international law. To some extent such actions have rather exacerbated the already thorny problem by giving conflicting signals.

So far, one would be hard put to conclude that there is a normative rule in this area of the law in so far as state practice is unsettled and there are certain unresolved problems still associated with the subject.[5] As far back as 1978, the International Law Commission was given the mandate to embark on the codification of the law of sovereign immunity, and it would appear some progress had been made, notwithstanding the conservative position of a great number of countries that state immunity be maintained.[6] Thus if codification is to be successful as an attractive proposition, then certainly the continuing or unresolved problems currently associated with the effort to limit state immunity must be carefully explored with the view to resolving them adequately by having regard to state practice and the fundamental principles of international law particularly enshrined in the charter of the UN.[7] It is the purpose of this study to attend to some of these thorny problems.

8.2 The Problems of Territorial *Nexus* or Connection

State jurisdiction may be defined as the power to prescribe rules and to enforce these rules. Under the traditional rules, jurisdiction is comprised of three important issues; (1) whether a given court has the power to hear the case; (2) whether the court will exercise jurisdiction or decline jurisdiction, or if need be, stay the proceedings; and (3) whether there are any limitations on the exercise of jurisdiction.[8] The third issue is relevant to the sovereign immunity controversy because it deals specifically with a situation where a court may have to grapple with certain under-

[4] Littrel v. United States of America (No 2) (1994) 2 All ER 203 Court of Appeal; Van Der Hurst v. United States 94 ILR 374, The Netherlands Supreme Court; John McElhinney v. Anthony Ivor John Williams and Her Majesty's Secretary of State for Northern Ireland, Supreme Court decision 15th Dec 1995 per Hamilton CJ.

[5] R. Higgins, Certain Unresolved Aspects of the Law of State Immunity (1982) 29 NILR 265; Sucharitkul, Immunities of Foreign States before National Authorities: Recueil des Cours (1976 1); C. Schreuer, State Immunity: some Recent Developments (1988).

[6] See generally The International Law Commission's Report, 1981–1988 for detailed analysis of the position of the Third World and Russia (formerly USSR), Part V: Replies to Questionnaires Sent to Sovereign States, pp. 557–645 Togo at p. 607; Venezuela at p. 638; Syria at p. 605; Sudan at p. 605; and USSR at p. 617.

[7] The Asylum Case ICJ Reports (1950) p. 266; North Sea Continental Shelf Cases ICJ Reports 1969 p. 3; Villiger, Customary International Law and Treatise (1985); Wolfke, Custom in Present International Law (2nd ed 1993); Kunz (1953) 47 AJIL 662; Thirlway, International Customary Law and Codification; (1972) Akehurst (1974–75) 47 BYIL 1 D'Amato, The Concept of Custom in International Law (1971).

[8] Cheshire and North's Private International Law (12th ed 1992) pp. 179–219, 223.

lying limitations respecting competency. The effect of these limitations usually becomes apparent when a sovereign state is impleaded before a foreign court[9] or if the limitation relates to a specific subject matter, e.g., a case involving a foreign element *qua* commercial transaction or a foreign legislative or executive action *qua* private rights.

The law respecting limitations upon the exercise of jurisdiction over sovereign states may be derived from the rules of public international law and the maxim *par in parem non habet jurisdictionem*, which means no state would be subjected to the jurisdiction of another state without its consent. The most commonly quoted statement of the law of sovereign immunity can be found in the Schooner Exchange v. McFaddon. This was extended in English law by Brett LJ in Parlement Belge in the following words:

"It has been frequently stated that an independent sovereign cannot be personally sued, although he has carried on a private trading adventure. It has been held that an ambassador cannot be personally sued, although he has traded; and in both cases because such a suit would be inconsistent with the independence and equality of the state which he represents."[10]

Classical international law therefore discounted the dual personality of the state and its ambassador. The law of sovereign immunity thus existed until quite recently when its authority was called into question in some leading Western nations.[11] Thus in an attempt to limit the absolute immunity of states, the doctrine of restrictive immunity was developed and had since then become a statute law in USA, UK, Singapore, Pakistan, South Africa, Canada and Australia.

Ever since restrictive immunity gained some currency, issues regarding jurisdiction have become confusing and difficult because of the simple fact that emphasis has been shifted from the status of the state to its activities. The problem has now become deep–seated in view of the fact that municipal courts, having resigned to the acceptance of the distinction between *acta jure imperii* and *acta jure gestionis*, side–stepped or overlooked the difference between immunity and jurisdiction. Jurisdiction as a matter of law encompasses actions *inter partes* or action *in personam*, geared towards the resolution of disputes between litigating parties while immunity can appropriately be referred to as an affirmative defence. Thus one must come first before the other but not the two concepts at the same time. One striking feature of actions *in personam* is that it is undoubtedly procedural in every respect, and therefore any person living within the jurisdiction of a state

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[9] Juan Ysmach Co. Inc. v. Indonesian Government (1954) 3 WLR 351; Trendtex Trading Corp v. Central Bank of Nigeria (1977) IQB 529; claims against the Empire of Iran (1963) BV erf GE 16: 45 ILR 57; I Congreso del Partido (1981) 3 WLR 328 per Lord Wilberforce; The Pesaro (1926) 271 US 30; Republic of Mexico v. Huffman (1945) 324 US 30; State of Netherlands v. Federal Reserve Bank (1953) 99 Fed Supp 655; National American Corporation v. Federal Rep of Nigeria (1978) 448 S.Supp 622; Alfred Dunhill of London v. Republic of Cuba (1976) 125 US 682.

[10] (1880) 5 PD 197.

[11] Trendtex Trading Corp v. Central Bank of Nigeria (1977) IQB 529; Claims against the Empire of Iran (1963) BV erf GE 16; National American Corporation v. Federal Republic of Nigeria (1978) 448 F.Supp 622; The Philippine Admiral (1977) AC 373.

could become amenable to it provided a proper writ is served on the defendant.[12] Thus in the absence of a clearly defined method of serving sovereign states, suits against sovereign states became a source of acrimony and protest, because of the legal requirement that the person being served (that is, the defendant) must be present in the jurisdiction. This requirement is not necessary as regards *actions in rem*, i.e., *jus in re aliena*, since it involves an acquired right of ownership by one over the *res* of another.[13] A good example may take the form of a lien and therefore could be regarded as a privilege claim. The legal difference between *action in personam* and *actions in rem* in English law was not seriously considered or regarded as important during the epoch where immunity was completely absolute, but became essential during the period when the courts had to grapple with the issue of distinguishing between *acta jure imperii* and *acta jure gestionis*.[14] And the rationale behind the distinction, one would suppose, was to prevent a constant conflict between the principle of *par in parem non habet jurisdicionem* and that of the principle *princeps in alterius territorio privatus, qua suits eo nomine*. This conflict can also be seen in the context of private law and property law relations,[15] which over the years had given birth to prodigious conflicting judicial decisions on the subject.

A thorough examination of public international law will show that it has little to offer as regards problems with civil suits,[16] which means that contemporary problems respecting civil jurisdiction, specifically associated with a foreign element, can be resolved by reference to the principle of private international law. In other words, private international law or conflict of laws offers a better guidance to the understanding of civil jurisdiction in international law in so far as the relevant legal relationship would have to be classified by the *lex fori* coupled with some reference to the precepts of public international law. This means that when dealing with the question of sovereign immunity, one is bound to be faced with difficult international law issues inextricably intertwined with public and private law precepts.[17] It is therefore important to note that the study of private international law is essential to the understanding of the sovereign immunity controversy and also to the study of public international law. And this is so because these two branches of law – one private and the other public – grew out of the same philosophical thinking but do, however, follow different teachings and learning, but still in one way or the other could be applied in certain circumstances to resolve general problems of jurisdiction.

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[12] Cheshire and North, op. cit., pp. 183–184; McDonald v. Mabee (1917) 243 US 90, at 91.

[13] See Cheshire and North, op. cit., pp. 214–215.

[14] See Higgins, Recent Developments in the Law of Sovereign Immunity in the United Kingdom (1977) 71 AJIL; and Schreur, Some Recent Developments in the Law of State Immunity (1978) 2 Comparative Law YB 215.

[15] Tani v. Russian Trade Delegations in Italy (1948) Annual Digest 15 pp. 141–144.

[16] Jennings, 32, Mordisil Tidscrift For Int., Reg. (1962); Mann, Studies in International Law (1973) pp. 1–140.

[17] Lowenfeld, A.F., (1979 11) Recueil descours pp. 321–330.

The word jurisdiction must be eclectically used because it has a technical connotation and therefore could simply be interpreted to mean different things in many countries and thus can be misleading in many respects. But in general, jurisdiction refers to the powers exercised on the basis of law by a sovereign state over its territory, citizens and events.[18] In Compania Naviera Vascongado v. Steamship 'Cristina,' Lord Macmillan offered the following definition of jurisdiction:

"It is an essential attribute of the sovereignty of this realm, as of all sovereign independent states, that it should possess jurisdiction over all persons and things within its territorial limits and all causes, civil and criminal, arising within these limits."[19]

Although the above definition is in order, it is doubtful as to whether such a definition could generally be applied without difficulties. Certainly, problems may be encountered since jurisdiction appears to have varied connotations. How, then, can jurisdiction be determined? Conflict scholars are agreed that the *lex fori* must be the starting point, for it is only through the *lex fori* that connecting factors can be determined.[20] In France the connecting factor is referred to as *pointe de rattacheement*, while in Germany it is known as *aknupfungspunkt*.[21] Thus for the *lex causae* to be effectively applied there must be a connecting factor and that is why some scholars have concluded that the basic rule of the conflict of laws is the *lex fori*.[22] In the Empire of Iran case, the court seemed to explore the issue raised above as follows:

"It is still today generally recognised that foreign states are not subject to the municipal jurisdiction at least as regards their sovereign activities. This principle of international law would be devoid of content, and could not lay claim to the nature of a legal principle, if the question as to what acts were to be regarded as acts *jure imperii* were to be determined solely by the formal criterion whether the relevant legal relationship is to be classified by the *lex fori* as public or as private law. Were one to proceed in this way, it would in practice depend on the opinion of the state whose courts are dealing with the matter, whether it desires to grant immunity; one would come to different results in different states, and moreover, fail to take account of the grounds that have led to the distinction between acts *jure imperii* and *jure gestionis*."[23]

In the light of the neutral position of international law on these issues, some courts have, however, of late openly resorted to the application of restrictive immunity *qua* the *lex fori* to determine *forum arrest* or *forum patrimonii*. The neutrality of international law or the fact that international law has no criteria for the distinction between *acta jure imperii* and *acta jure gestionis* in this regard has also given rise to diversity in state practice and conflicting judicial decisions in respect

[18] Michael Akehurst, Jurisdiction in International Law (1972–73) XLV BYIL 145–259; Mann, The Doctrine of Jurisdiction in International Law, (1964 1) Recueil des Cours III; Ehrenzweig (1956) 65, YLJ 289; Dicey and Morris, Conflict of Laws (1992); Cheshire and North, op. cit.

[19] (1938) AC 485 House of Lords.

[20] Morris, Conflict of Law (1993) pp. 7–11.

[21] Ibid., p. 7 (footnote note 32).

[22] Ehrenzweig, The Lex Fori—Basic Rule in the Conflict of Laws (1960) 58 Mich L Rev 637; A Proper Law in a Proper Forum. A Restatement of the Lex Fori Approach (1965) 18 Okla L Rev 340; B. Currie, Selected Essays on the Conflict of Laws (1963).

[23] Claims against the Empire of Iran (1963) BVerfGe 16, 45 ILR p. 59.

of jurisdictional competence. The problem can be resolved if the *lex fori* classifies state activities by having regard to *usus* and the legal position of states in international law.

In the case of Rahimtoola v. Nizam of Hyderabad, Lord Denning explained the law respecting territorial connection thus:

"Applying this principle, it seems to me that at the present time sovereign immunity should not depend on whether a foreign government is impleaded, directly or indirectly, but rather on the nature of the dispute. Not on whether 'conflicting rights have to be decided,' but on the nature of the conflict. . . . But if the dispute concerns, for instance, the commercial transactions of a foreign government (whether carried on by its own departments or agencies or by setting up separate legal entities), and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity."[24]

Lord Denning carried his views a stage farther in Thai Europe Ltd. by arguing that jurisdiction be exercised if there is evidence to attest to the fact that the commercial transaction in dispute has "a most close connection with England such that by the presence of the parties or the nature of the dispute it is more recognizable here than elsewhere."[25] Lord Denning seems to be following one of the traditional rules of jurisdiction, that is the primary test of whether the court will decline jurisdiction or stay the proceeding. But would such an approach be acceptable to a majority of states? Certainly no, because the state is a special subject of international law, hence it will be difficult to liken its acts to juridical persons as a prelude to determining jurisdiction. The practice where foreign states were subjected to the law of the forum was derived from municipal law analogies, and therefore arguably a deviation from general international law since one sovereign acts as a *de-facto arbitre* in a dispute between an equal and a private trader. E.g., commercial activities as defined in the FSIA undoubtedly have a varying connotation and therefore must be supplemented by specific rules respecting connecting factors to avoid difficult jurisdictional problems. No activity can be considered *invacuo* for every activity; whether it be commercial or non–commercial must have some purpose or reasons behind it. Thus for a state activity to be meaningful it must have a purpose extraneous to the commercial act in order to influence its result. The attempt therefore to determine jurisdictional nexus through commercial activity or minimum contact wholly based upon the nature test encounters theoretical and practical problems. The theoretical aspect of the problem stems from the fact that the state to a greater extent has an abstract characteristic and therefore must be separated from its concrete manifestations. While on the other hand, the practical aspect of the problem hinges on how best to delimit the activities of the modern state, and this, one would argue, is the bane of linking the conduct of the state to a foreign court, i.e., the forum state. The difficulty in separating these two constitute elements of the state gave currency to sovereign immunity. And since the law is the creature of the sovereign, one encounters difficulties in subjecting an equal to a vertical order, i.e., the procedural and remedial law of the forum (the *lex fori*). The myth of justice or fairness to the plaintiff does not therefore eclipse the needs of the inter–state system. The concept of jurisdictional connection falls or stands

[24] (1958) AC 379 p. 422.
[25] (1975) IWLR at p. 1492.

on the intrinsic value placed on specific rules linking the activities of the state with the forum. But again this approach is fraught with uncertainty because of the consequence of state sovereignty, and the fact that it cannot be practically subjected to transitory conditions as regards commercial activities or the varied modern functions of the state.[26]

The U.K. act did not talk of a specific requirement respecting territorial connection but Section 3(1)b touches on "whether a commercial transaction or not falls to be performed wholly or partly in the United Kingdom." The link here is somewhat predicated on the *lex loci solutionis*, which is thereby contrasted with the objective nature of the activity rather than the subjective purpose of the activity. The said provision, however, is broadly cast and therefore not particularly helpful.

Jurisdiction refers to the concrete manifestation and the patent expression of sovereignty and it is in many respects territorial. Thus until such time that the principles of private and public international law are applied concurrently to contain the problem of territorial connection, the principle of *par in parem non habet jurisdictionem* and the principle of *princeps in alterius territorio privatus* will continue to conflict, thus somewhat giving validity to the judicial pronouncements in such cases as the claims against the Empire of Iran, I Congreso del Partido and the Kuwait Airways Corporation v. Iraq Airways Company and Another.[27]

8.3 Problems of the Nature and Purpose Tests

It is apposite to state *expressis verbis* at this juncture that the Italian theory of dual personality of states[28] is *ex facie* erroneous. The state cannot be simply divided into *'potere politico'* and *'persona civile'* without first taking into consideration the abstract nature of the state. Perhaps the government of a given state could be divided into *potere politico* and *persona civile* but not the state, because juridical philosophy tells us that the state is "both an abstract conception and concrete manifestation."[29] The abstract nature of the state is philosophically grounded and thus may be regarded as having an ethical and natural personality quite different from the concrete state which could aptly be denoted as the government. The concrete state as already stated elsewhere is the agent of the abstract state and therefore may change from time to time depending, of course, upon the will of the people. The abstract state is inanimate, ultra–exclusive and a determinate superior,

[26] Zernice K. V. Brown and Root Inc. and others (1993) 92 IL Reports p. 442; Nelson v. Saudi Arabia (1992) 88 IL Reports p. 189.

[27] (1995) 1 WLR 1147 House of Lords.

[28] Morellet v. Governo Dencse (Giu. It. 1883–I–125); Guttieres v. Elmilik, F. It. 1886–1–913, 920, 922; Sucharitkul, op. cit., pp. 233–242.

[29] See B. Bhattacharyya, First Coure in Political Science (1949) p. 10, but see also, George Sabine and Thomas Thorson, A History of Political Theory (1973); A. Appadorae, The Substance of Politics (1968); Laski, A Grammar of Politics (1967); Dunning, W.A., A History of Political Theories, Ancient and Medieval (New York) 1902; Holland, T.E., The Elements of Jurisprudence 12th ed. Oxford 1916.

hence it cannot be regarded as having a *'potere politico* and *persona civile'* because its domain is *ex hypothesi* political, i.e., the provision of the public good on behalf of the ruled. Any attempt therefore to divide the state into a political entity and a *'corpo morale'* is fundamentally flawed. It is only the concrete state which could perhaps be amenable to suit in the light of the fact that it is made up of the elected representatives of the people. The relationship therefore between the people and the abstract state is permanent, absolute, exclusive and sacred than many would think it to be. The abstract state cannot commit a tort or violate a contract or get into trading activities because in reality it does not have a *'persona civile'* as was suggested by Italian jurisprudence.[30] The concrete state derives its sovereign personality from the abstract state just as political subdivisions derive immunity from the concrete state. Thus any action which is taken by the concrete state is done on behalf of the abstract state and therefore represents the personification and aspirations of the people. A state therefore never acts as a private person.[31] The act of a state signing a contract is political because it is done on behalf of the abstract state, i.e., the ruled, and this also applies to the act of violating it. There is therefore no conclusive evidence that a state has a *corpo morale*, hence such a theory was simply presumed without any foundation. That the Italian theory was based upon a misconception has since been proven by the difficulties that judges would have to face in distinguishing between private and public law and also between commercial and non–commercial activities of the state. The Italian theory in short consecrated the anomaly that whenever a state descends into the realm of buying goods or signing a contract it has behaved as a private person and therefore could be sued. Is the problem that simple? I think not, for there is more involved in respect of the said issue 'than miss the eyes'.

In Berizzi Brothers v. The Steamship Pesaro, the U.S. Supreme Court stated the difficulties that may be associated with restrictive immunity in the following words:

"an international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance or training of a naval force."[32]

The import of the said dictum shows clearly the difficulties that one may have to face in trying to develop a uniform test that could be applied in characterising governmental and non–governmental activities of states. Professor Brownlie in his exposition on the problem carefully pointed out that an adequate analysis of the issue "requires value judgments which rest on political assumptions as to the proper sphere of state activity and of priorities of state policies.[33] While Lord Denning in I Congreso argued that "sovereign immunity depends on the nature of the action; not on the purpose or intent or motive, use whichever word you like, with which it

[30] Fitzmaurice (1933) 14 BYIL 101 at 121; Lauterpacht, op. cit., note 1.

[31] B. Bhattacharyya, op. cit.; Dunning, W.A., A History of Political Theories from Luther to Montesquieu (NY) 1905; Bryce J., Studies in History and Jurisprudence (NY) 1901; Lauterpacht (1951) 28 BYIL; Fitzmaurice (1933) 14 BYIL.

[32] (1926) 27 U.S. 562.

[33] See Brownlie, op. cit., p. 331.

is done."[34] As has already been shown, the doctrine of relative immunity was first developed by civil law countries, namely, Belgium and Italy, and in order to promote the validity of restrictive immunity, the purpose test was dismissed by continental scholars because it appears to be subtle and less rule–specific. The reliance on the nature test was influenced by the writings of De Paepe and particularly that of Judge Weiss.[35] And it would appear in many respects that these scholars were in turn also influenced by the theory of the dual personality of states. But one important weakness in respect of the application of the restrictive approach is that its validity depends wholly on the nature test and that without the advantage of the nature test the concept of restrictive immunity would simply become a 'paper tiger' without any teeth whatsoever. As it may be recalled, before the Second World War most common law countries did not consider the concept of restrictive immunity as a viable option until the famous Tate letter was written in 1952. This was followed by the 1976 U.S. Act which did confirm the nature test in § 1603(d) as follows:

"The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction, rather than by reference to its purpose."

A careful reading of this portion of the Act shows that the inclusion of the nature test was misconceived without first taking pains to study the shaky continental jurisprudence from which it was borrowed. Furthermore, the drafters failed to inquire into the legal basis of applying the nature test, and whether it can be applied in all cases without defeating the course of justice. The drafters also failed to determine whether the nature test can adequately be applied to political decisions of nation–states in respect of their dealings with private traders. The private and public law distinctions were also overlooked, for it would have been most rewarding, as was suggested by Professor Higgins, if common law countries had taken steps to familiarise[36] themselves with this all–embracing civil law concept, which as a matter of principle has now become the cornerstone in the application of the concept of restrictive immunity.[37] The distinction in question is patently defective because it totally ignores the fact that one of the parties to the agreement is a recognised person in international law and that whatever decision is taken by a state is always influenced by political considerations. Secondly, most Latin American states and Asian–African states are poor and therefore any economic decision which is taken is geared towards the betterment of the whole society. And this is particularly so because in these developing countries the sole provider of goods and services is the state, hence the state in this regard ventures or is forced to perform varied economic activities in order to keep the economy going. This involves state planning, hence the proposed distinction by leading Western states, where the purpose test is rejected or ignored simply sacrifices justice for a failed theory. The signing of a contract by a state for the supply of goods may appear commercial but the decision in signing the contract is without doubt publicly based and

[34] (1981) 1 All ER p. 1102.

[35] Academie de Droit International, (1922) Recueil des Cours Vol. 1 pp. 545–6.

[36] Higgins, Unresolved Problems, op. cit.

[37] Trendtex Trading Corp v. Central Bank of Nigeria (1977) 2 WLR; I Congreso des Partido (1981) 3 WLR 328.

whatever decision is taken thereafter respecting the performance or breach of the contract is more often than not political and nothing else. This does not mean, however, that the right of the private trader be sacrificed for the betterment of the people or for the public good.[38] Quite apart from these drawbacks it is hard to tell as to whether there is any consensus in international law as to how to determine the general scope of state activities. If this be the case, how will a court be able to delimit the scope of the activities of a given state in order to determine whether the activities in issue are governmental or non–governmental? At best the whole exercise is left in the hands of the *lex fori* to characterise the issues as it sees fit. And it is possible the judge may be tempted to only follow the *cum sensu* in the West to simply resort to conjecture. There is the likelihood also that the results could easily be manipulated to prevent the defendant state from seeking justice in a given case in as much as the *lex fori* rather than the *lex causae* in practice would have to be applied as an important tool in defining the issues and thus linking the activity of the defendant state to the forum. It is suggested that emphasis be rather laid on the breach or infraction so as to offer the judge the opportunity to put his legal reasoning to work, in order to avoid a situation where cases with similar facts and issues are decided differently. Given these difficulties, would it be proper for the *lex fori* to follow only local data in applying the doctrine of restrictive immunity without having regard to the standard of international law? The answer must be no, if persistent divergence in state practice is to be avoided. After all, the distinction between commercial and non–commercial activities of states at best could only have a presumptive currency since every decision of the state is arguably influenced by politics and the economic welfare of the ruled. And quite apart from this, the borderline between the nature and purpose test is fraught with uncertainties. Even courts in the same country have on many occasions reached different conclusions on similar issues respecting the distinction between *acta jure imperii* and *acta jure gestionis*. In France, for example, a court[39] ruled that the procurement of goods to be sold later to nationals cannot be accorded immunity because the act was not sovereign–based. While another French court, faced with similar facts and issues, thereafter ruled that immunity be granted on the ground that the act falls within the confines of *jure imperii*. Courts in different countries have also reached different conclusions on similar facts, e.g., U.S. courts,[40] Italian courts,[41] U.K. courts[42] and Canadian courts.[43]

The Court of Appeal in England, for example, in Kuwait Airways Corporation v. Iraqi Airways Company and another ruled that Iraq be accorded immunity but on a further appeal the House of Lords in a 3–2 ruled that immunity be denied.

[38] See Higgins, Problems and Process – International Law and How We Use It (1994) p. 85.

[39] The State of Romania v. Pascalet, AD, 2 (1923–24) No. 68 must be carefully contrasted with Lakhowsky v. Swiss Federal Government, AD, 1 (1919–1922) No. 85.

[40] Kingdom of Romania v. Guaranty Trust Co. of New York (1918) 2nd 250 Fed 341, 343.

[41] Governor Rumeno v. Trutta, Giurisprudenza Italiana (1926) (1) p. 774.

[42] Planmount Ltd. v. Republic of Zaire (1981) 1. All ER 1110.

[43] Govt. of the Democratic Rep. of the Congo v. Venne, (1983) ILR 64 24–46.

This tendency also became apparent in Trendtex and Alcom. What is being put across here is that the theory of restrictive immunity is so unclear and open–ended that it has often created a situation where courts of the same country have differed markedly on the issue in according or denying immunity to defendant states. And this is made more difficult because of the fact that in most developing nations the public sector is inherently large, hence the application of the distinction between *acta jure imperii* and *acta jure gestionis* solely based on the nature test becomes onerous and uncertain and thus in the end works hardship on developing states.

While it is perfectly clear that the U.S. has embraced the nature test and thus rejected the purpose test,[44] in the U.K., however, it would appear the drafters were silent on the purpose test although it was in fact rejected in an earlier draft.[45] No one, however, can tell with much candour or exactitude as to whether the purpose test had totally been rejected in the practice of English courts. Current trends, however, in the practice of countries of the West in fact show a clear rejection of the purpose test.[46] A good illustration of the difficulties and uncertainties associated with the private and public law distinctions can be detected in the judgment of Lord Wilberforce in I Congreso del Partido, where he said:

"Everything done by the Republic of Cuba in relation to Playa Larga [one of the two vessels involved] could have been done and so far as evidence goes, was done, as owners of the ship. . . . It acted, as any owner of the ship would act, through the managing operators. It invoked no governmental authority.[47]

In this respect, can it be said that the application of the private and public law distinction was proper in view of the fact that the instructions that were given by the Cuban government could be qualified as an Act of State coupled with its ideological and political implications, and therefore amounted to mixed governmental acts which in practical terms defies easy solution and therefore could not easily be resolved simply through the proposed distinction? The truth of the matter is that although comparative case law on state immunity is growing in the West toward the recognition of restrictive immunity, the reasons advanced in its support appear weak or totally misconceived for municipal court judges and publicists seemed to have erected an imaginary target to debunk as a means of justifying the distinction between *acts jure gestionis* and *acts jure imperii*, coupled with the theoretical and elusive private and public law distinctions well entrenched in the practice of states on the continent of Europe.

One important development in recent times is that the purpose test has been introduced into the present draft articles of the International Law Commission, which are currently being considered by the 6th Legal Committee of the U.N.,

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[44] See FISA (1976), generally.

[45] Higgins, op. cit., p. 268.

[46] Yousef Nada v. Central Bank of Nigeria, Dec. 2, 1975, Provincial Court of Frankfurt; National American Corp. v. Fed. Republic of Nigeria (1978) 448 F.Supp. 622; I Congreso del Partido (1981) 3 WLR 328. All the national legislation currently in place also rejected the purpose test.

[47] I Congreso del Partido (per Lord Wilberforce) House of Lords (1983) AC 244, p. 268. Here it would appear the learned judge was trying to argue the private/public law distinction.

with the ultimate goal of being accepted as a treaty text. The reason for the inclusion of the purpose test seemed to be based on Third World interest articulation respecting the varied activities that would have to be performed by governments in Africa, Asia and Latin America in order to promote economic development. But it would appear this development towards the application of the purpose test is not an isolated phenomenon. Thus although civil law countries such as Belgium and Italy must be credited for the introduction of the restricted immunity into international law, however, in recent times countries such as France and Italy which have accepted the nature test and rejected the purpose test because it is more viable and rule specific, have all at least taken a walk backwards to reconsider the merits of the purpose test in certain unique cases. France, for example, took the lead in Guggenheim v. State of Vietnam[48] in which the Court of Cassation ruled that immunity be granted on the strength of the purpose test because the sale of cigarettes to the defendant state, which was used by its defence forces, falls into the domain of *acta jure imperii*. A similar rule was again followed in Enterprise Pengon v. Government des Etats–Uniis[49] in which the same court ruled that immunity be accorded to the defendant on the authority of the purpose test. However, in Spanish State v. Societe Anonyne del Hotel George V,[50] which involved similar issues, the court rejected the purpose test argument, thus this time embracing the nature test as the appropriate test in the said case. France, therefore, as can be gathered from the above decisions, seemed open to the application of the purpose test where it is clear such a test will be the best way of promoting justice.

Italian courts in recent times have also followed the French example where as a matter of principle, though perhaps for different jurisprudential reasons, have considered the purpose test,[51] in some unique cases in deciding whether to grant immunity or not. It would be argued, however, that this trend of applying the purpose test as a prelude to determining as to whether to grant immunity or not, has not found favour with other European countries.[52] It is submitted that no one would enter into a contract, be it a natural person or a state, without first thinking of the objectives and purposes of the agreement and what in concrete terms can be achieved out of the said agreement. The purpose of an agreement, as a matter of logic, may be singled out as the reason why individuals and states enter into agreements duly predicated on *consessus ad idem*. But here the most important question to consider is whether the scope of state activities can reasonably be narrowed down and properly categorised for the nature test analysis. This task is not

[48] (1961) 44 ILR 74.

[49] (1973) 45 ILR 82.

[50] (1973) 65 ILR 61. In 1991 French courts reiterated their position in Société Euroéquipement v. Centre European de la Caisse de Stabilisation et de Soutien des productions agricoles de la Côte d'Ivoire, Tribunal of Instance, Paris France: Feb. 1991, by A. Mahiou in 118 JD1 408 (1991); Sieur Mouracade v. Yamen in 119 JD1 398 (1992).

[51] Association of Italian Knights of the Order of Malta v. Piccoli (1974) 65 ILR 308.

[52] Empire of Iran Case (1963) 45 ILR 57, 80; Arab Republic of Egypt v. Cinetelevision International Registered Trust (1979) 65 ILR 425 431; A Limited v. B Bank and Bank of X, 31 July 1996, Court of Appeal U.K. (1992) Constitutional FCourt, Candor v. Filvern v. Minister of Justice, ILR 101 p. 394.

easy and the court in the Empire of Iran case had some difficulties in determining whether repairs to an embassy building be characterised as falling within the domain of private law. Again in Yousef Nada Establishment v. Central Bank of Nigeria,[53] the court reasoned along the same line that the opening of a letter of credit by the Central Bank was not a public act but a prive law activity but failed to offer an adequate analysis respecting the legal status of the Central Bank. In fact, the decision was based on conjecture because the status of the Central could not be determined but simply presumed or derived from local data, not the least reflective of state practice or customary international law. In I Congreso de Partido, the Law Lords made the attempt to follow the private law and public law distinction in order to determine the issues therein presented, but had difficulties and therefore differed constructively on issues respecting the Marble Islands. The Law Lords had difficulties in dealing with the Marble Islands because as may be recalled, Cuba and the cargo owners did not have any contractual relationship as to warrant the public and private distinction. In explaining the issues surrounding the Marble Islands, Lord Wilberforce argued thus:

"The Republic of Cuba never entered into these operations. The captain did not purport to act on its behalf. Its actions were confirmed to directing transfer of the sugar to North Vietnam, and to the enactment of Law No. 1256 (which froze and block Chilean assets. All of this was done in a governmental capacity: any attack upon its actions must call in question its acts as a sovereign state. . . . I cannot agree that there was ever any purely commercial obligation upon the Republic of Cuba or any binding commercial obligation."[54]

In Congreso, provided a good example where the act of state doctrine overlaps with the doctrine of state immunity thus giving rise to mixed activities of states which in reality are not easily amenable to the commercial and non–commercial distinction of state activities. It is important to note that general international law does not support any distinction between immune and non–immune transactions, thus the whole idea is theoretically based and highly arbitrary without any foundation. That is why for some time now courts have found it difficult to grapple with the issue of distinguishing between *acta jure imperii* and *acta jure gestionis*.

The most important question to ask at this stage of the study is, when does a state stop acting as a public person and thus resigns itself unto the market place clearly clothed with the status of a private trade? In other words, has the state acted as a private person because it has embarked on the management of an industry, or entered into an agreement to buy goods, or have its embassy repaired? The Constitutional Court of the German Federal Republic in the Empire of Iran case ruled that:

"This court has therefore examined the argument that the conclusion of the contract for repair is to be regarded as a non–sovereign function of the foreign state, and has accepted this proposition as correct. It is obvious that the conclusion of a contract of this kind does not fall within the essential sphere of state immunity. It does not depend on whether the conclusion of the contract was necessary for the regular transaction of the embassy's affairs

[53] Dec. 2 (1975), Provincial Court of Frankfurt.

[54] I Congrego del Partido (1983) AC per Lord Wilberforce, pp. 271–72.

and therefore stood in a recognisable relationship with the sovereign functions of the sending state."[55]

The German court in its reasoning clearly followed a test where emphasis was laid on whether the act in issue could be performed by an individual or such an act only falls within the domain of public authority. This test appears to have been followed elsewhere,[56] and in I Congreso del Partido, but Lord Wilberforce in his judgment did not totally reject the utility of the purpose test as was earlier on indicated in the claim against the Empire of Iran case. The aim of the private and public law distinction is to help identify which act is governmental or non–governmental. Is the said approach satisfactory? The answer is in the negative. Perhaps it could be applied with success in simple cases where the distinction is straightforward, while in a more complicated case the test would simply fall apart thus sacrificing the need for justice. States perform varied and interrelated activities and therefore their activities cannot simply be derived from an incongruous set of events, one commercial and the other governmental. In other words, it is hard to simply compartmentalise the activities of states as a prelude to determining whether to grant immunity or not. The weakness in characterising the activities of states became apparent in the Uganda Co. (Holdings) Ltd. v. the Government of Uganda,[57] when the doctrine of act of state overlapped with the doctrine of relative immunity. Donaldson J in his judgment offered the following explanation:

"Even if the decision in the Trendtex case had applied, the application would still have been determined in favour of the defendants since the litigation would have involved the court in expressing an opinion on the meaning and effect of the Uganda legislation in a suit to which the government of that state was a party and it could not be held that the restrictive doctrine of sovereign immunity extended this far."[58]

Donaldson, it would appear, simply did not find persuasive the passing of judgment on Ugandan legislation. A somewhat similar problem was also encountered in Czarnikow Ltd. v. Rolimpex,[59] where a Polish government policy adversely affected a contract purportedly signed with a foreign private entity. These problems show that the underlying fundamental building block on which the concept of *corpal civile* was premised appeared to be flawed *ab initio* because a state in reality does not operate like a natural person. Judge Lauterpacht in his studies, although took issue with the doctrine of absolute immunity argued that:

"The state nevertheless acts as a public person for the general purpose of the community as a whole. This applies not only to the states with a Socialist economy where trading or management of industry have become a public function of the state, for the state always acts as a public person. It cannot act otherwise."[60]

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[55] (1963) B Verf GE 16, 45 ILR 57.

[56] Trendtex Trading Corp v. Central Bank of Nigeria (1977) IQB 529; Hispanio America Mercantil SA v. Central Bank of Nigeria (1979) 2 LLR 277; Consorzio Agrario di Tripolitania v. Federazione Italiana Consorzi Agrari Guistizia Civile (1985) 65 ILR 265; Ditta Companione v. Ditta Peti Nitrogenmuvek (1972) n. 3368 1st Sess.

[57] (1979) 1 Lloyds Rept 481.

[58] Ibid. at pp. 487–488.

[59] (1979) AC 351 House of Lords per Lord Wilberforce.

[60] Lauterpacht, op. cit., p. 137.

Judge Fitzmaurice also says "The truth is that a sovereign state does not cease to be a sovereign state because it performs acts which a private citizen might perform.[61] O'Connell also argues that

"Although there is a marked tendency towards rejecting the absolute rule as one of international law, there is still cogency in the argument that it is impossible to distinguish between sovereign and non–sovereign activity, and that the attempt to do so leads into a jungle of legal contradictions."[62]

Fawcett in his study of the legal aspects of state trading came to the same conclusions that

"The various distinctions made between *acts jure imperii (actes de puissance publique)* and *acts jure gestionis (actes degestion)*, sovereign acts and non–sovereign acts, and the public and the private capacity of the state, are not adequate for classifying state trading contracts, for the lines of demarcation between the political and economic activities of state have become blurred and it is in this borderland that state trading flourishes."[63]

The arguments posited by these scholars have equally been shared by Professor Fairman,[64] and Professor Hyde.[65] The position of these distinguished scholars, however, run counter to the position advocated by Lord Denning in Trendtex and also in I Congreso at the Court of Appeal level thus:

"When a sovereign chooses to go into the markets of the world – just like an ordinary private ship owner for commercial purposes – then he clothes himself in the dress of an ordinary ship's captain. He is liable to be sued on his contract or for his wrongs in the court of any country which has jurisdiction in the cause. He cannot renounce the jurisdiction by a plea of sovereign immunity.[66]

Weller, LJ, the other member of the two–man court respecting the Cuban case, however, ruled otherwise by according immunity to Cuba. Although Lord Denning's approach is well taken, he failed to look beyond the nature of the contract as was done by Lord Wilberforce in I Congreso at the House of Lords, and the difficulties normally associated with unilateral political decisions taken within the territory of a sovereign state which in turn has affected the contractual obligation of the state. The heart of the argument is that the classification of commercial activities of states based on the *lex fori* patently conditioned only on the distinction between *acta jure imperii* and *acta jure gestionis* is ill–conceived and misleading and therefore does not purport to promote equity and stability as proponents of the restrictive immunity have advanced or made us to believe. In other words, the current approach followed by some courts is not reflective of customary law and therefore could lead to injustice. After all, sovereign states do not venture into the market with the ultimate aim of blatantly violating the terms of a given commercial agreement.

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[61] Fitzmaurice, op. cit., p. 121.

[62] See O'Connel, op cit., p. 846: Even today, one would be hard put to take issue with Professor O'Connell's argument.

[63] See Fawcett, op. cit., p. 35. Professor Fawcett's arguments are weighty and very convincing.

[64] (1928) 22 AJIL, pp. 569–74.

[65] Hyde, op. cit.

[66] (1980) 1 LLR 39.

The concern of most Third World countries is that the approach used in distinguishing commercial activities from non–commercial activities of states simply exceeds the acceptable requirement of jurisdictional competence and therefore may leave the defendant state at the mercy of domestic courts. This reason, as already stated elsewhere, prompted the Asian–African Legal Consultative Committee to vehemently air their grievances against the United States and its courts for exceeding the acceptable bounds of jurisdictional competence.[67]

Experience so far has proved the above scholars right, thus if the whole issue respecting restrictive immunity is approached with regard to the realities of life, one would be surprised to find out that state activity is conditioned on ideology and the level of political and economic development in a given country, hence the suggested single test in resolving the problem is woefully inadequate. Thus the throwing of support behind the doctrine of restrictive immunity with all its drawbacks or demerits is not justified and therefore likely to create disrepute or acrimony among states and this has been clearly shown in recent cases which were litigated before English courts, i.e., Alcom v. the Republic of Colombia; I Congreso del Partido; Trendtex Corp. v. the Central Bank of Nigeria; Littrell v. United States of America (No. 2). Given the bent of thinking of both Lord Denning and Lord Wilberforce on the doctrine of restrictive immunity, it is instructive to note that these judges have all expressed some doubts about the cogency of restrictive immunity. Simply put, the application of the doctrine of restrictive immunity requires the highest standards from the judiciary. Anything short of that could simply disturb the balance of justice and thus create hardship and injustice wholly detrimental to the defendant state.

8.4 Mixed Activities of States Involving Private Traders

Is it expedient, or indeed fair in international law, for municipal courts to unilaterally impose a vertical rule of law upon sovereign states? Some would possibly answer in the negative and thus may advise that municipal courts' decisions be based on customary international law and certain sensitive political issues involving the state could better be resolved through diplomatic channels.[68] If this approach be logically grounded, then certain sensitive activities of states must be carefully characterised and singled out for diplomatic consideration. Goff J's argument in I Congreso del Partido in this direction can therefore be rightly described as weighty.[69] But as it may be recalled, his cautionary note came in a little late.

Thus the main issue before the House of Lords in I Congreso del Partido was whether Cuba could claim immunity for a purported breach of contract adversely affected by its executive order or political action – *acta jure imperii*, even though the initial contract in question falls into the domain of *acta jure gestionis*. The

[67] See Doc No. AALCC 1M/87/1 Nov. 1987 for details respecting the protest.

[68] I Congreso, per Goff J (1978) 1 All ER p. 1192.

[69] Ibid., p. 1192.

case can shortly be related thus. In 1973 a Cuban state enterprise entered into an agreement to sell sugar to a private company in Chile. The sale contract directed that the sugar be delivered to the Chilean company between the months of January and October 1973, respectively, and payment was to be made in U.S. dollars under a letter of credit. Both parties agreed per the terms of the contract that English law must apply in case of dispute. While the Marble Islands and the Playa Larga were in the process of delivering the sugar in issue, a right–wing group of soldiers took over power in Chile, thus toppling the government of President Allende. At that time Playa Larga was about to discharge its cargo at Valparaiso, while Marble Island was in the middle of the high seas. The government of Cuba abrogated the contract by ordering that the sugar be delivered elsewhere. Playa Larga thus brought its cargo back to Cuba while the Marble Islands was ordered to deliver its cargo to North Vietnam. The story did not end here; the plaintiffs who were the rightful owners of the sugar in question instituted a suit against I Congreso, a ship owned by Cuba, then docked in England for conversion and detinue.

A careful analysis of I Congreso shows it has a lot in common with Trendtex, De Sanches v. Banco Central de Nicaragua[70] and Banque Central de la Republique de Turquie v. Weston Compagnie de Finance et d'Investissement S.A.,[71] for all these cases involved mixed state activities specifically related to private traders. In I Congreso, Cuba was successful at the trial level, however, Lord Denning and Waller L.J. were deadlocked on the issue of whether to grant immunity to Cuba or not. This was not an easy case, but on appeal the House of Lords found for the plaintiffs, the owners of the sugar. Can it be said that Cuba blatantly repudiated the contract? Or was the plain repudiation of the contract influenced by political ideology? Certainly one may not be wrong in thinking in those terms, since the coup d'etat was allegedly supported by CIA agents in which Allende was killed. The House of Lords avoided certain crucial issues in the case and thus lost the chance of clearing the unbeaten path in resolving this difficult problem respecting mixed activities of states. Perhaps the most important question that the Law Lords should have considered was which activity of Cuba in regard to the contract should be given more weight in respect of according immunity. Is it the breach or the nature of the transaction which must be considered? Or should one ask whether the activity in issue was politically inspired? And whether a state having entered into a commercial transaction can be immune by a subsequent political decision which might have been prompted by an unexpected event which cuts deep into the initial transaction?

It is submitted that the activities of states are numerous and while some may be directly governed by international law, others arguably fall outside the confines of international law and therefore, in order to be in a better position to resolve the problems that were associated with I Congreso del Partido, a concerted effort should have been made to carefully delimit the scope of the power of the state enterprise *qua* the political decision that was taken by Cuba. For it is hard to come up with reasons why Cuba would enter into a commercial transaction with the ul-

[70] (1985) 770 F.2d 1385.

[71] (1978) BGE 1104 1a, (1984) 65 ILR 417.

timate aim of breaking it with impunity just to punish the private trader. Thus there must be a hidden motive behind the order requesting that the sugar be delivered elsewhere and this motive *prima facie* was politically based, for Cuba, being a socialist country, was not ready to work with a private entity operating under a right–wing military government of Chile. After all, any flagrant disrespect of its obligations would destroy its credibility. Thus if there had not been a coup d'etat in Chile the sugar would have been delivered without any problems inasmuch as Allende's government was also socialist. These underlying facts might have prompted Goff J. to rule that

"The claims would be more appropriately dealt with through diplomatic channels than through the courts of another country. Such an act is an *actus jure imperii*; it is not just that the purpose or motive of the act is to serve the purposes of the state, but that the act is of its own character a governmental act, as opposed to an act which any private citizen can perform."[72]

Furthermore, it should be borne in mind that Cuba would not do anything out of the blue just to flout the said commercial agreement, for such a decision will certainly have a negative repercussion on its trade relations with private traders and possibly other states. And it is possible a decision of that nature would invite condemnation and protest from many states. Thus Cuba, mindful of the painful U.S. embargo in place,[73] would not go to the extent of destroying its ability and reputation in obtaining credit from financial institutions in other Western nations. Thus, in the light of the Cold War, it would appear the political decision in question was taken in the national interest of Cuba and nothing else. For during the course of the coup d'etat the Chilean military officers instituted a diplomatic, consular and commercial blockade, thus carelessly interrupting the maritime transport link between Chile and Cuba and for that matter, the world, in order to firmly consolidate their newly won power. If these arguments be well founded, then will it be proper to question why Cuba behaved the way it did? It is submitted that although Lord Wilberforce was not totally impressed by the currency of the restrictive immunity, it would appear some aspects of the said principle found its way into the judgment he handed down in I Congreso. True, the contextual approach appears all–embracing and appealing, but seemed to fall far short of providing the right answers to the problems raised in this complicated case.

First, the initial agreement for the sale of the sugar of which payment was to be made in U.S. dollars under a letter of credit was *prima facie* a commercial endeavour. But the decision of the Cuban government to abrogate the sale contract by an executive order because the Allende government was toppled was purely a political act, which *ex hypothesi* cannot be disputed. But the quest to characterise these activities according to the principles of restrictive immunity, i.e. whether the activities in dispute are, *acta jure imperii* or *acta jure gestionis*, is defeated by the

[72] (1978) 1 All ER, p. 1192.

[73] The U.S. during the cold war period put in place an embargo against Cuba in order to bring down the socialist government of Fidel Castro. It must be also stated that Cuba is a civil law country but refuses to have anything to do with Capitalism since 1958. Its position respecting the events which occurred in Chile is understandable given its Socialist policies.

fact that these activities were inextricably intertwined without one or the other arguably having an independent direct effect on the initial transaction. In this case, are we talking about the breach or the nature of the initial transaction which, if carefully analysed, creates an unseemingly hidden consequence in respect of restrictive immunity, meaning "that once a trader, always a trader." Can it therefore be argued that once a state has entered into a commercial arena, it cannot get itself out of it by genuinely claiming immunity? And if so, which state activity can be designated as more important? Is it the initial activity which must be characterised or the subsequent political decision in respect to the breach? Lord Wilberforce, as it may be recalled, did not go as far as to consider some of the issues herein presented, but at the same time provided an argument, if carefully read, detracts from Lord Denning's position in the Trendtex, thus exposing the fallacy in the arguments made in rejecting Nigeria's plea for immunity in that case.

"If one state chooses to lay down by enactment certain limits, that is by itself no evidence that those limits are generally accepted by states. And particularly enacted limits may be (or presumed to be) not inconsistent with general international law – the latter being in a state of uncertainty – without affording evidence what that law is. I shall make no further reference to this English statute, nor for similar reasons to the analogous United States statute passed in 1976."[74]

The argument advanced in the above passage is not at all dissimilar to the argument made by Stephenson LJ in Trendtex.[75] Thus although Stephenson LJ's argument appears seemingly in some respects to have been overlooked, it undoubtedly in reality throws light on the place of restrictive immunity in international law, which he analysed as less grounded in the practice of states and therefore lacks *opinio juris*, and that the doctrine be applied only if there is evidence to attest to the fact that its currency is not doubtful in the practice of states.

Lord Wilberforce in fact started on a good footing, thus following the contextual approach. It would appear, however, that he finally rejected Cuba's plea that it be granted immunity in respect of the Playa Larga, by reasoning that the decision by Cuba to order Playa Larga not to deliver the remainder of the cargo although could apparently be construed as political and non–commercial, the said action did not qualify as *acta jure imperii* because in reality the Republic of Cuba had acted as the owner of the ship, rather than an independent state making a sovereign decision. Such an argument, however, is far from clear. The learned judge thus followed the nature test instead of the purpose test in arriving at this decision. If he had followed the purpose test, the result certainly would have been different as far as the Playa Larga was concerned.

Lord Wilberforce and Lord Edmund–Davies, however, took a more conservative approach in respect of the Marble Islands, because the cargo owners never entered into any commercial agreement with Cuba.

"The claim against the Republic of Cuba in respect of the Marble Islands was not a claim in contract, since the Republic was not a party to any of the contracts in question as it had only acquired ownership of the vessel after the bills of lading had been negotiated to the Chilean purchasers. Unlike the case of the Playa Larga, the Republic had not entered

[74] (1981) 3 WLR 328, 334.

[75] (1977) 2 WLR 356; Court of Appeal per Stephenson LJ.

into any commercial transaction at all. Its involvement was confirmed to ordering Mambisa, not to deliver the cargo, and then disposing of the cargo in North Vietnam, both of which acts were of a governmental character."[76]

The other three law lords, on the other hand, however, were not persuaded by the specific issues respecting the Marble Islands and Cuba's plea for immunity. But at least it would have been appropriate if the law lords had considered the character of the contract in its primary and absolute terms vis–à–vis Cuba's activities which in essence cannot be singularly construed as representing a commercial activity, at least in the case of the Marble Islands and secondly, because the decision by Cuba not to deliver the cargo was an act of state which takes us unto another unsettled area of the law.

The judgment of the law lords seemed open to criticism on many fronts inasmuch as their withholding or granting of immunity was predicated on the modalities of restrictive immunity and on how the Cuban government went about politically in abrogating the initial contracts for the carriage and the sale of the sugar, thus first starting off on the concept of restrictive immunity and then moving the argument into the contextual domain. Furthermore, one may also argue that the approach was flawed in some respects because in reality not all state activities can be conditioned on a hybrid nature of events – one commercial and the other governmental.

In Trendtex, for example, there was sufficient evidence to support Nigeria's action, that it was because of an internal crisis which prompted the federal government to institute the import controls. Thus if this evidence be well founded and credible, then was it fair when immunity was denied to Nigeria? Or were the justified expectations of the private trader much greater than the welfare of the citizens of Nigeria? The answer logically must be in the negative since there was a genuine crisis of shortage of essential commodities in Nigeria because the ports were congested with a multitude of ships unloading large quantities of cement which severely limited the importation of other essential commodities into the country.

A similar argument could also be advanced on behalf of Cuba, since the right–wing military rulers of Chile did close the ports and severed diplomatic relations with Cuba because of the late President Allende's fraternal relationship with President Castro. And it is also possible that if the sugar were delivered it could have been looted by soldiers or other right–wing coup supporters.

It is not that easy to deal with mixed activities of states as regards commercial transactions with the private trader. And the application of the doctrine of restrictive immunity to these problems simply confuses and exacerbates the already thorny sovereign immunity controversy. The Law Lords, as can clearly be seen, were trapped in proving too much by their willingness to follow the manifestly deficient doctrine of restrictive immunity which has so far gained ground in the practice of Western countries.[77]

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[76] I In Congreso per Lord Wilberforce and Edmund–Davies, International Legal Rep. (1983) p. 308.

[77] Lauterpacht, op. cit.; Sinclair, The Law of Sovereign Immunity – Recent Developments (1980) Hague Recueil op cit.

A somewhat similar case involving mixed activities was decided by an American court in which immunity was granted in view of the fact that a private right was violated. Thus in De Sanchez v. Banco Central de Nicaragua,[78] Mrs. Josefine Neyarro de Sanchez, a payee of a cheque issued by General Somozo's government, i.e., its Central Bank, brought an action against the new government that toppled Somozo's government for having placed a stop–payment order on the said cheque. The Nicaraguan Central Bank thus sought to challenge the suit, pleading that it be granted summary judgment. Morey L Sear J granted the Central Bank the motion it prayed for. On appeal Goldberg J ruled that the bank's issuance of a cheque to its national was *acta jure imperii* and not *acta jure gestionis* and that FSIA [28 US CH 1605 (a)(2)] did not apply. It was further stated that Mrs. Sanchez, being a Nicaraguan national, negated the effect of the FSIA exception. The payee's conversion claim was also *mutatis mutandis* dismissed.

It is not clear as to whether public international law principles do govern disputes between the state and its own nationals regarding the issues alluded to above, unless, of course, there is evidence of reckless disregard for human rights. Thus if an injury is caused by a state to its own national beyond its own borders, e.g., if the injury occurred in another state, the state in which the injury occurred certainly will have an interest if there is a *prima facie* evidence that the said injury affected its interest or territorial sovereignty. In this respect, the *lex loci delicti* would be more important than the nationality of the injured person. So in essence the fact that Mrs. Sanchez claimed that her injury occurred in the United States seemed not to help her case since the decision to stop payment on her cheque was taken in Nicaragua in order to prevent a critical shortage of foreign exchange during a period of political instability in the country. The position of the court would have been different if Nicaragua had attempted to take Mrs. Sanchez's real property in the United States, which as a matter of international law simply amounts to blatant interference with the authority of the United States.[79] This, however, is not the case, for the decision to put a stop on the payment of the cheque in question is clearly a discretionary power which falls within the domain of the sovereign authority of Nicaragua. Thus Banco Central had the authority as a subsidiary organ of the state to take decisions in preserving Nicaragua's foreign exchange reserves by stopping payment on the cheque, in the light of the acute shortage of foreign currency in the country. Certainly the problems of mixed activities of states in respect of state immunity is far from settled and the only way of giving states some latitude of freedom to adequately deal with emergency situations without being open to suit is to allow what some may refer to as "discretionary function exemption" to sovereign states.[80] Thus the decision by Nicaragua to stop payment on Mrs. Sanchez's cheque could simply be characterised as a national policy which is immune from suit because it was made at the highest level of government in order to avoid economic chaos in Nicaragua. Thus, it appears that the court was right in

[78] (1985) 770 F.2d 1385.

[79] Akehurst, op. cit.; Mann, op. cit. (on the question of jurisdiction).

[80] Association de Reclamantes v. United Mexican States (1983) DDC 561, F.Supp. 1190, 1198; Frolova v. USSR (1983), 559 F.Supp. 358, 363.

ruling in favour of the republic of Nicaragua. Mrs. Sanchez should have therefore relied on local remedy.

Can the same argument, i.e., the "discretionary function exception," be made in Trendtex, Yousef Nada, and perhaps in Behring International Inc. v. Imperial because of internal crisis (i.e., emergency situations)? Or can a sovereign state simply plead frustration, or *force majeure* to avoid liability? In fact, the courts have not been clear on these matters and until such time that these issues are clearly dealt with, the sovereign immunity controversy will remain, thus making it difficult for the goal of codification to be achieved.

The International Law Commission's draft articles on jurisdictional immunities of states and their property currently being considered by the 6th legal committee simply did not consider these issues, i.e., in regard to mixed activities of states. The said argument can also be made against all the national legislation currently in place.[81]

8.5 The Continuing Problems of Arbitration

Arbitration may be designated as one of the best options in resolving the controversy regarding private suits against foreign states before domestic courts. But before this method would be acceptable to litigating parties, certain essential principles respecting arbitration must be clearly laid down in order to promote a modicum of fairness and substantial justice in a given case. It is, however, appropriate to consider certain preliminary issues before considering these principles.

The attempt at codification has so far produced in some sense a considerable degree of uncertainty as regards arbitration proceedings. And incidentally, state practice is far from settled.[82] It is instructive, however, to note that arbitration is not a new phenomenon nor a new approach in settling disputes.[83] But it would seem that in spite of its long history, many arbitrators and judges still have an uncertain grasp of the said subject.

The role of domestic courts in the enforcement of foreign arbitral awards may differ from case to case, depending, of course, however, on the exact terms incorporated into the arbitral clause. In some cases a national law would be controlling and therefore the local court as a matter of law must neutrally aid the process if, for example, the arbitration falls clearly under the framework or the auspices of an agreed–upon regime, e.g., the International Chamber of Commerce in Paris, ICSID and perhaps the American Arbitration Association.[84]

The most difficult aspect of arbitration is the problem of enforcement, indeed, the enforcement of arbitral awards poses more difficulties than the enforcement of

[81] See for example the U.S. Act 1976, the U.K. Act 1978, and the Canadian Act 1982.

[82] Schreuer, State Immunity – Some Recent Developments (1995) pp. 63–91.

[83] Morris, op. cit., p. 132; International Law in a Changing World (UN Pub 1963) p. 83.

[84] See Schreuer, op. cit.

foreign judgments[85] because certain interrelated principles do come into play and these are: the validity of the agreement to arbitrate, the law that must govern the proceedings relating to the arbitration, the validity of the award and the factors to consider to determine the finality of the award.[86] These principles, however, cannot be applied without taking into consideration certain essential rules relating to the concept of jurisdiction in private international law which must also be applied to aid the process.

The jurisdiction, for example, of an arbitrator is determined by the *lex voluntatis* or the agreement of the parties to arbitrate.[87] This may take two distinctive forms because the parties can either agree that their present or future disputes be referred to arbitration. Thus a contract may be formulated in which an arbitration clause is inserted to cater for any disputes that may arise. In such a case, arbitration will be the ultimate end result in the resolution of any differences which may arise between the parties.

An important question worth considering is whether the mere agreement by a state to arbitrate with a private trader simply amounts to waiver of immunity in which case a domestic court could exercise jurisdiction over the matter on the merits. Many courts in fact differ on this issue,[88] perhaps because there is no *usus* on the whole subject matter. So in essence the fact that a foreign state has in principle agreed to arbitration does not mean that immunity is automatically waived or abandoned which could thus give the plaintiff the power to sue before the local court without first considering the terms of the initial contract to arbitrate.[89] Thus any rejection of the arbitration agreement amounts to a violation of the *lex voluntatis* and this gives the defendant state a viable defence especially when the agreement to arbitrate is valid and the parties have made a good effort on the meeting of the minds to choose the law that will govern the arbitration proceedings. Parties therefore to arbitration have the right to choose the law that governs the agreement and the law that governs the arbitration proceedings,[90] which means that it is possible that the law which is selected to govern the arbitration proceedings may be different from the law which governs the agreement to arbitrate. Thus if parties from country A agree to arbitrate in country B, the law of country A would in a technical sense govern issues relating to the validity, interpretation, and the effect of the arbitration clause and in all probabilities the arbitrator's jurisdic-

[85] Morris, op. cit., pp. 131–143; Richard B. Lillich and Charles N. Brower (eds.), International Arbitration in the 21st Century towards Judicialization and Uniformity 1994. Mann, State Contracts and International Arbitration (1967) XLII BYIL 1; Carlston, The Process of International Arbitration (1946); Steyn, Arbitration Law Reform – Towards a New Arbitration Act (1991) 6 Int L Arb, Report 27; Lalive, The First "World Bank" Arbitration (Holiday Inns v. Morocco) Some Legal Problems (1980) 51 BYIL 123.

[86] Morris, op. cit.; Lillich and Brower, op. cit., pp. 3–49.

[87] Morris, op. cit., 131–139.

[88] Schreuer, op. cit., pp. 70–71; G. Sullivan (1983) 18 Texas ILJ, 329; Simpson and Fox, International Arbitration (1959) pp. 40–55.

[89] Schreuer, op. cit., p. 70.

[90] Morris, op. cit., pp. 131–139.

tion,[91] but the supervisory jurisdiction falls under the domain of country B. Similarly, on the other hand, if a sovereign state and a private entity fail to agree on the law respecting the proceedings, then the locus or the country in which the arbitration is to take place automatically applies in the absence of any objections thereto. In this respect the law of the country with the most significant or close connection would be designated as controlling, thus rekindling the thorny sovereign immunity controversy.

A careful study of national legislation currently in place shows, however, that the subject of arbitration seemed to be casually treated. Under the U.K. Act of 1978, for example, arbitration is covered under Section 9, thus:

"(1) Where a state has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the state is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration.

(2) This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between states."[92]

The South African Act Sec. 10, the Pakistan Ordinance Sec. 10 and the Singapore Act Sec. 10 all follow in principle the modalities of the U.K. Act of 1978. These acts are therefore almost the same,[93] with minor linguistic differences. The Australian Act Sec. 17 covers more ground in respect of supervisory jurisdiction of a local court. Surprisingly, the United States 1976 Act does not specifically refer to arbitration but rather refers to the question of waiver of immunity, either explicitly or by implication. Section 1605, for example, can be stated thus:

"(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the states in any case:

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect in accordance with the terms of the waiver."

The Canadian Act, incidentally, does not contain any reference to arbitration.[94] Thus the general formulation of arbitration provisions in national legislation without considering in detail certain salient issues regarding the process of arbitration has led to difficulties in litigation.[95] In Ipitrade International SA v. Federal Republic of Nigeria, the court followed the command of the FSIA, § 1605(a)(2), by ruling that an agreement to arbitrate amounts to waiver of immunity. The same argument was made in Maritime International Nominees Establishment v. The Republic of Guinea, but this time, the argument was carried a stage further in respect of the fact that because the ICSID has its headquarters in Washington, there was an intended nexus duly contemplated by the parties that U.S. courts must exercise jurisdiction over the dispute without first taking steps to consider whether the parties are agreed that the same law must govern the arbitration proceedings

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[91] Ibid.

[92] See The 1978 UK Act § (9).

[93] A careful review of all these national legislation shows that they do not differ at all on this very issue. A good comparison would be helpful (e.g., the U.K. Act 1978 and that of Section 10 of the South African Act).

[94] See generally the Canadian Act 1982.

[95] See Lillich and Brower, op. cit., pp. 61–115; 223–275.

and the agreement to arbitrate, since one of the parties to the arbitration is a private entity domiciled in the U.S. and the other party, a sovereign state having absolute authority within its spheres of operation. Thus, in this case although the law respecting the agreement to arbitrate might be clear, arguably, however, it would appear there was no agreement as regards which law must apply to the arbitration proceedings. The reasoning followed by the court in this respect therefore can be deprecated as faulty and unbalanced.

In Verlinden BV v. Central Bank of Nigeria,[96] Texas Trading and Milling Corp., and the Chicago Bridge and Iron Company cases,[97] however, it would appear U.S. judges seemed to be showing some clear grasp and appreciation of the difficulties associated with arbitration and therefore ready to rethink their positions respecting the inferring of waiver of immunity from the agreement to arbitrate and thus moving to embrace the English practice in this area of the law, e.g., the U.K. Act of 1978. The change of position by American courts is clearly evidenced in Practical Concepts Inc. v. The Republic of Bolivia, where the court ruled that:

"The effectiveness of this arbitration clause does not depend upon this court's assumption of jurisdiction over a suit on the merits. On the contrary, an initial determination of the parties' rights by the court would be destructive of their intentions to have the dispute resolved by neutral arbitrators. Bolivia cannot therefore be said to have implicitly waived its immunity from this suit."[98]

The foregoing discussion is a clear manifestation of the difficulties usually associated with arbitration, which as a matter of urgency must always be recommended to resolve certain sensitive state immunity issues, for it is one of the viable means of containing the problems relating to the sovereign immunity controversy. Thus in order to get these difficulties contained, the following methods are herein suggested:

1. That international arbitration should be conducted such that it is not impeded by local arbitration laws because of the principles of equality of states in international law;
2. That to promote justice the inference of waiver from the existence of an arbitration clause must be discarded;
3. That enforcement measures in aid of arbitral awards must be carefully studied thus giving deference to state property, e.g., see Alcom and the Philippines Embassy case;
4. That a clear distinction must be made as to which law governs the agreement to arbitrate and which governs the arbitration proceedings in view of the position of the sovereign state in international law;
5. That a distinction must also be made between the main contract and the specific issues that must be referred to arbitration, in order to avoid difficult jurisdiction problems beyond what is required in a given arbitration process;

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[96] (1980) SDNY 488 F.Supp. 1284.

[97] Texas Trading and Milling Corp. v. Fed. Rep. of Nigeria, 2d Cir (1981) 647 F.2d. 300; Chicago Bridge and Iron Company v. The Islamic Republic of Iran, (1982) 62 ILR 511.

[98] (1985) DDC F.Supp. 613, 863.

6. That a foreign arbitral award, for example, can be enforced if the agreement to arbitrate is unquestionably valid by the proper law of the contract, while the finality and the validity of the award must be determined by the law which the parties have agreed, *consensus ad idem*, to govern the arbitration proceedings.[99] But here there is one serious problem and that is, countries are not agreed that enforcement measures be taken against them.

Any misguided attempt by municipal courts to sidestep the above mentioned suggestions would simply lead to difficulties and uncertainties in transnational litigation specifically associated with arbitration. Failing all these, then it is suggested that arbitration be delocalised so as to pave way for the application of the general principles of *lex mercatoria*. Although these suggestions may not solve all the attendant problems relating to arbitration, at least it would help the judge to see his way clearly in the resolution of certain problems specifically associated with arbitration.

8.6 Central Banks and Certain Unsettled Problems

The extent to which a Central Bank of a sovereign state can claim immunity is unsettled.[100] The existing case law is not at all clearcut and valiant attempts at codification have exacerbated the problem by shifting the emphasis from the structuralist approach to resolving the problem to the functionalist approach. The increasing reliance on the activity of the bank and its status therefore may arguably be designated as the bane of the problem. It is also important to stress that subsidiary organs of states such as Central Banks more often than not perform varied interrelated functions, encompassing both commercial and political functions. Thus in view of these problems, it is not that easy to determine the precise functions of Central Banks. William Blair in his attempt to study the legal status of Central Banks in English law stated their functions as follows:

"The term 'central bank' is descriptive of a bank's functions, rather than its legal status. These functions include note issue, monetary policy the efficient operation of the national financial system including payment systems, banking regulation and supervision, the provision of banking services for the government, the management of gold and foreign exchange reserves, debt management, exchange controls and development and promotional task. Not all central banks conduct all of these functions. And sometimes the functions change."[101]

Although the functions which are suggested above are impressively exhaustive, and thus may be helpful in developing the functionalist approach to solve the problem, however, the legal status of central banks can appropriately only be de-

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[99] Morris, op. cit., p. 137.

[100] Schreuer, op. cit., pp. 137–167; I. Brownlie, op. cit., pp. 341–342; Sucharitkul, Second Report, Yrbk ILC (1980); O'Connell, op. cit., pp. 877–8; and case law respecting this subject is fraught with uncertainties; Montefiore v. Belgian Congo, ILR 44, 72; Mellenger v. New Brunswick Development Corporation (1971) 1 WLR 603 CA.

[101] W Blair, The Legal Status of Central Bank Investment under English Law (1998) Cambridge Law J. 374, p. 375.

termined by having regard to the national law[102] of a given country, i.e., the law by which it was created. And this over the years may be responsible for the uncertain grasp of the underlying principles behind the legal status of central banks. And the problem further becomes quite elusive in so far as the functions and legal status of these banks differ from country to country. In Baccus SRL v. Servicio Nacional del Trigo,[103] the court accepted the affidavit of the Spanish ambassador and a Spanish legal expert in determining as to whether the defendants were in Spanish law a department of state. Parker LJ in his ruling suggested clearly that Spanish law be applied in the determination of the status of the Servicio Nacional del Trigo. Thus Jenkins, having also been convinced by the evidence therein presented, ruled that immunity be accorded to the defendants although the contract contained an arbitration clause designating English law as the applicable law in case of dispute. Does this mean that national law be applied over the will of the parties because of the status of the political subdivision? I think not, unless there is evidence to attest to the fact that the contract was fraudulently concluded and thus against public policy or circumstances respecting the status of the litigating parties have changed considerably. The effect of the judgment in Baccus seemed quite striking, but one must understand that at that time English practice was wholly predicated on absolute sovereignty, where immunity was granted irrespective of the activity in issue.[104] Ever since that time, however, the position of English courts has gradually changed considerably.

In Trendtex, the Court of Appeal having been overwhelmed by a multitude of evidence presented in respect to the status of the Central Bank, decided to consider Nigerian Law in part and the functions of the Central Bank in its relationship with the Federal Republic of Nigeria, i.e., the government, in order to accord immunity. Lord Denning in exploring the issues regarding the status of the Central Bank relied on the following reasoning.

"I Confess that I can think of no satisfactory test except that of looking to the functions and control of the organisation. I do not think that it should depend on the foreign law alone. I would look to all the evidence to see whether the organisation was under government control and exercised governmental functions."[105]

The same approach was followed in an earlier case of Mellenger v. New Brunswick Development Corp.,[106] where immunity was granted on the strength of the argument posited therein, that the corporation in issue was an arm or alter ego of the government of a sovereign state and therefore duly entitled to immunity. Such a result was not, however, reached in Trendtex. Lord Denning in his final

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[102] Schreuer, op. cit., pp. 121–124; W. Blair, op. cit., pp. 385–386; Baccus SRL v. Servicio Nacional del Trigo (2957) 1 Q 438; Trendtex v. Central Bank of Nigeria (1977) QB 529, ILR 64 1983 p. 111.

[103] (1954) 1QB 438.

[104] Sinclair, The Law of Sovereign Immunity – Recent Developments (1980) Hague Recueil 119; Sucharitkul, State Immunities and Trading Activities in International Law (1959) pp. 162–182; Annuaire Year Book (Institute de Droit Int.) Cairo 1987; Annuaire Yearbook (Basle, 1991).

[105] Trendtex v. Central Bank of Nigeria (1977) Q.B. 560.

[106] (1971) IWLR 604 CA.

analysis ruled that "In my opinion the plea of sovereign immunity does not avail the Central Bank of Nigeria. I would allow the appeal accordingly."[107] The Central Bank *inter alia* was denied immunity because it was not an alter ego or organ of the government of Nigeria. Is the functionalist and structuralist determination of the position of the Central Bank conclusive? A careful examination of the legal status of the Central Bank does not warrant such a conclusion. It would appear Lord Denning and his colleagues misconstrued the internal laws of Nigeria because the Federal Government of Nigeria did have overall control over the said bank and thus appointed its officers and paid their salaries. The officers of the Central Bank were more or less civil servants. What these judges failed to appreciate was that the Central Bank of Nigeria performed varied functions and therefore seemingly appeared independent but in reality derived its powers from the federal government, which means it was not at all independent. Central Banks in developing countries perform very important functions on behalf of the state and therefore do not operate independently of governmental control. In other words, these banks normally perform public functions and therefore must always be distinguished from commercial banks.

Before the enactment of the State Immunity Act of 1978, English courts were resigned to following the structuralist approach, where all that mattered was the status of the political subdivision or state agency, with its attendant complexities.[108] The State Immunity Act of 1978, however, follows the structuralist and functionalist methods in granting immunity to central banks. Article 14 proceeds undoubtedly from a structuralist standpoint but equally also gives prominence to the activity of the subsidiary organ or the functionalist approach. This is not different from Article 27 of the European Convention. Again the English legislative approach incorporating both the structuralist and functionalist approaches is almost identical to Sections 1(2) and 15 of the South African Act, Section 16(1) and (2) of the Singapore Act and that of Section 15 of the Pakistani Ordinance. In spite of the shift in emphasis as regards the above mentioned statutory provisions, it would appear the problem still remains in so far as the judge is called upon to deal with the usual thorny issue of sovereign authority *qua* the underlying unsettled problems of the legal status of political subdivisions and state agencies. The ILC Draft Articles on the other hand follow the functionalist approach to the letter and nothing else.[109] The U.S. legislation follows about the same approach as those of the U.K. Act, South African Act, Singapore Act and the Pakistan Ordinance. The only distinguishing feature of the FSIA is that it grants immunity to entities with an independent legal status. Its approach, therefore, in granting immunity to political subdivision and state agencies is liberally or moderately construed.

With respect to central banks, the U.K. Act appears more liberally construed in every respect than that of the U.S. Act. Article 14(4) reads as follows:

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[107] Per Lord Denning (1977) QB 560.

[108] See Sinclair, op. cit.; see also Sucharitkul, op. cit, pp. 113–120.

[109] See ILC Draft Articles 3(a) I, II, III, IV and Article 7. See also recent cases on this matter: Walter Fuller Aircraft Sales Inc. v. Republic of the Philippines (1992) 103 ILR p. 503; Arriba Limited v. Petroleous Mexicanos (1992) 103 ILR p. 490.

"Property of a state's central bank or other monetary authority shall not be regarded for the purposes of Subsection (4) of Section 13 above as in use or intended for use for commercial purposes; and where any such bank or authority is a separate entity Subsection (1) to (3) of that Section shall apply to it as if references to a state were references to the bank or authority."

Article 14(4) is imperative because it fully protects the property of central banks from enforcement measures and also affords these banks similar procedural privileges normally extended to sovereign states under Article 13 of the 1978 U.K. Act. In the Trendtex case, the Court of Appeal granted the plaintiffs a *mareva injunction* ordering that assets of the Central Bank be held within the jurisdiction until the outcome of the litigation. This will not be possible any more in view of the effect of Article 14(4). Thus in the main, even if the property of a central bank is used for commercial purposes, it cannot be subjected to execution. The U.S. Sovereign Immunity Act 1976, § 1161 also follows the same principle as the other national legislation in place, thus creating confusion and doubtful *modus operandi*. The whole process therefore becomes complex since it would not be easy to apply the structuralist test and the functionalist test at the same time without reducing the effectiveness of the process. And the reason being that the structuralist test undoubtedly will still require an examination of the concept of sovereign authority, i.e., *superanus*, which may leave us in the middle of the ocean without any clear-cut destination in the light of the difficulties associated with the determination of the legal status of central banks which wields a multifaceted characteristic in the legal parlance or jurisprudence of states.

The effect of Article 14(4) became somewhat apparent in Camdex v. Bank of Zambia,[110] there a written deposit agreement was concluded between the Central Bank of Kuwait and the Central Bank of Zambia in 1982, where the Central Bank of Kuwait agreed to deposit a sum of 15 m dinars at an agreed rate of interest into the Bank of Zambia. The said agreement was duly renewed in subsequent years without any problems. The two parties also entered into two other agreements which dealt specifically with the bank of Zambia's interest liability. Later the defendant paid a sum of KD 616,098 in 1990 but somehow failed to honour the 1988 agreements. In 1995 when it became clear that the defendant would not be able to pay the debt due without a threat of suit or litigation, the Central Bank of Kuwait assigned the debt to Camdex, a Bahamian company, at a discount of 11 per cent of the value of the total debt. This was duly communicated in a written notice to the defendant. It must be made clear that the Bank of Zambia had in an earlier agreement also given an express waiver of sovereign immunity, with the understanding that the agreement in issue was subject to English law in case of dispute. The plaintiff having acquired a legitimate right to the assignment, made an application under R.S.C. ord. 14 for summary judgment. This was challenged by the defendant on the ground that the order had been brought pursuant to a champertous "dealing." The court ruled against the defendant state by arguing that "an assignment of a bona fide debt in accordance with the provisions of Section 136 of the Law of Property Act, 1925, was valid and no question of maintenance or cham-

[110] (1996) 3 WLR 759.

perty arose even if the necessity for litigation to recover the assignment debt was contemplated."[111]

Having obtained a summary judgment in the amount of $80 million, Camdex then sought to enforce the debt against the assets of the Central Bank of Zambia in England. This became possible because at that very moment the Bank of Zambia had entered into another contract with an English company to print a large quantity of its currency, the Kwacha, for use in Zambia in replacement of the existing lower denomination notes. And the reason for the new notes was to counter the severe effect of the devaluation of the Kwacha. Camdex in a quest to force the Bank of Zambia to pay the said debt refused to allow the notes to be sent to Zambia as planned. The plaintiff, as a matter of law, was exercising its rights under the *mareva* injunction granted to him as a judgment creditor, but when the case was brought before the court of appeals, the injunction was accordingly discharged in the following formulated words:

"Of course one agrees with the judge, without qualification, that a judgment debt should, in the ordinary way and in any ordinary situation, be paid. It is, however, relevant that the defendant is a body to whom the ordinary procedures of bankruptcy and winding up are not available. The situation is one in which, on the evidence, severe national hardship to the people of Zambia would follow if the state defaulted in its international obligations."[112]

Sir Bingham continued:

"It must be a legitimate concern of the defendant to try and ensure that the repayments due to the World Bank and the International Monetary Fund are not the subject of default. This seems to me a setting so unlike that in which the ordinary Mareva jurisdiction fails to be exercised, that the learned judge did fall into error in failing to recognise this new dimension of the problem with which he was confronted.

With regard to ZCCM I agree with Philips LJ and would wish to associate myself with what he is to say about that.

I would for my part, grant leave to appeal and would allow the appeal directing that there be a variation of the existing Mareva injunction so as to exclude from its scope the bank notes currently held by De La Rue plc."[113]

The judgment of the court seemed to acknowledge the fact that although debts generally are to be paid, there are certain instances in which it would be reasonable to allow some exceptions, and that is when a central bank of a sovereign state is involved, and there is a clear indication that the plaintiff's demand would work hardship on the defendant as was *prima facie* revealed in the Camdex case. The judge, as can clearly be gathered from his judgment, allowed his head to take control over his heart by balancing specifically the plight of the people of Zambia as against the rights of Camdex in respect of not allowing enforcement measures against the Central Bank of Zambia. And the rationale behind the said approach can be predicated on the fact that "a central bank does have important responsibilities of its country and the people who live there and in appropriate circumstances this fact can affect the legal result."[114] The judgment makes good sense in that,

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[111] Ibid. at p. 760.

[112] Camdex International v. Bank of Zambia (No. 2) 1 All ER 728, 722 per Sir Bingham M.R.

[113] Ibid.

[114] Blair, op. cit., p. 389.

even if the Zambian bank notes were to be kept in the jurisdiction as a result of the Mareva injunction, it would be of no value to the plaintiff in view of the fact that the notes would not fetch much on the open market. After all, the Kwacha was specifically printed for use in Zambia but not to be traded on the open market. Certainly, common sense would revolt if the injunction was allowed, since the probable effect would more than likely destroy the economy of Zambia thus making it difficult for the country to operate efficiently.

The court simply did not consider the much discredited distinction between *acta jure imperii* and *acta jure gestionis* but rather allowed sound practical reasoning to triumph over abstract rationalisation which over the years had led us nowhere. It is submitted that given the problems associated with the application of restrictive immunity, the court still would be faced with a mammoth task if it had followed an approach where the status of the sovereign is considered vis–à–vis *res publica publicis usibus destinata* i.e., the property used in carrying out the activities, for such methods have simply compounded the problem rather than solve it.

The finale or the impressive climax of this controversy occurred in January 1997, where the Court of Appeal was faced with the issue of whether moneys held in hard currency by the Central Bank of Zambia in respect of copper receipts could possibly be attached. The Court of Appeal again after a careful consideration of the issue ruled in favour of the Central Bank by arguing that "In the present case, the bank's duty to use receipts of foreign exchange for public purposes would defeat any claim to attach such funds."[115] The court again seemed to follow an approach where the purported force of immunity is varied *qua* the subject matter. Thus where there is a *prima facie* incompetence *ratione materiae*, then immunity would have to be accorded. And the court, having determined that the money held by the bank would be used for the betterment of the people of Zambia or for governmental duties, declined to allow Camdex to attach the money. This again shows that central banks occupy a special position and the sensitive and delicate nature of their roles must not be ignored when issues respecting *saisie conservatoire* and *saisie execution*, come before a court for consideration. It is instructive at this juncture to state more clearly that the denial of immunity from jurisdiction does not automatically mean that immunity from execution is also denied. So far state practice is unsettled respecting this issue, but the judgments in Alcom and the Philippines Embassy case show that courts are not ready to sanction that the property of sovereign states be subjected to forcible measures. There is wisdom obviously in such an approach since it would prevent acrimony among nation–states.

The application of the structuralist and functionalist principles of state immunity to the various subsidiary organs of states or state entities breeds confusion and obstructs any attempts at developing a consistent and acceptable principle. The European Convention Article 27 and the ILA Draft Convention of 1982, Article 1, all adopt a test of distinct legal personality coupled with a clear reliance on the activity of the entity in the performance of its public functions, to determine whether to grant immunity or not. This is a familiar recipe of facile principles which do not

[115] Cited from Blair, op. cit., p. 389. This must be compared to the decision in Walter Fuller Aircraft Sales Inc. (1992) ILR 103 p. 503.

in real terms mean what they appear to convey. And it is hard to simply rely on logic since it lacks force to prescribe the interpretation of terms or in the classification of particulars. Indeed, any reliance on the status and activity of these subsidiary organs, both real and putative, would be susceptible to different interpretations and therefore lead to a penumbra of doubt in the application of the doctrine of restrictive immunity. It is important to stress at this point of our discussion that the applicable law in the determination of the legal status of state entities is the law of their creation or the law by which they were instituted. Hence it is suggested that national law be applied by taking also into consideration the precepts of general international law.

Difficult problems of classification and construction would still remain or arise if the *lex fori* relies specifically or wholly on local data or forum data which perhaps requires further refinement of restrictive immunity as regards the status and functions of central banks or political subdivisions. Arguably, such problems would overburden this area of the law which is already bristling with difficulties and uncertainties. In an *obiter dictum*, the German Constitutional Court in the claims against the Empire of Iran case explored the above stated problem as follows: (ILR 45, p. 57)

"The qualification of state activity as sovereign or non–sovereign must in principle be made by national (municipal) law, since international law, at least usually, contains no criteria for this distinction. . . . It is not unusual for rules of international law to refer to national law. Acquisition and loss of nationality are, however, determined in principle by national law.

Finally, it cannot be of decisive importance that reference to national law theoretically gives the national legislature the possibility of influencing the scope of the rule of international law through a corresponding formulation of the national law. . . . An improper form of the law by the national legislature could be opposed by the recognized international law principle of good faith.

It must be admitted that the application of general international law is made more difficult, and the desired uniformity of law is hindered, if the nature of state activity determines the distinction between sovereign and non–sovereign acts and national law determines their qualifications" (ILR 45, p. 57).

Thus, until such time that scholars and municipal courts are ready to reconsider the definition of the state in terms of its varied modern functions, and to balance the effect of the *lex fori* and the *lex causae*, this area of the law would continue to be unsettled and fragmented. Perhaps a definition encompassing the changing scope and functions of the modern state as was attempted under the OAS Draft Convention, Article 2, and that of ILC Draft Articles, Article 3, would be helpful provided the definition does not have a varied connotation or points to different directions.

8.7 Some Problems Relating to the Act of State Doctrine

8.7.1 National Courts and Foreign Acts of States

The position of countries on the doctrine of act of state differs markedly and therefore it is difficult to give a water–tight definition of what the act of state doctrine means. Incidentally, all the national legislation currently in place avoided the subject and the International Law Commission's draft articles never touched on the underlying principles respecting the subject and its relationship with the doctrine of sovereign immunity. So far the existing case law is not clearcut[116] and state practice appears less consistent. Thus until such time that a clear distinction between these two areas of the law are carefully explored and brought to the fore for critical analysis, judges would continue to be faced with a mammoth task in dealing with the intractable problems of act of state.

The doctrine of act of state is somewhat related to the principle of sovereign immunity.[117] In England it would appear that the scope of the act of state doctrine was delimited as a prelude to setting forth the English Crown's adoption of private citizen's act in foreign countries against civil suits, thus in the main protecting the subject of the Crown retroactively from being sued abroad.[118] In A.M. Luther v. James Sagor and Co.,[119] Scrutton LJ rejected the plaintiff's claim against Russia for nationalising his woodwork mills which was wholly incorporated under imperial Russian laws in the following words:

"But it appears a serious breach of international comity if a state is recognized as a sovereign independent state, to postulate that legislation is 'contrary to essential principles of justice and morality.' Such an allegation might well with a susceptible foreign government become a *casus belli*; and should in my view be the action of the sovereign through his ministers, and not of the judges in reference to a state which their sovereign has recognised."[120]

Scrutton LJ's judgment may be considered as a pre–Sabbatino classic British statement of the law in respect of the doctrine of act of state.

The real meaning of the doctrine of act of state in American jurisprudence is the preclusion of domestic courts from inquiring into the validity of public acts or

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[116] For a clear exposition of the subject see Singer, The Act of State Doctrine of the United Kingdom: An Analysis with Comparison to the United States Practice (1981) 75 AJIL, 283. See also Dr. Mann, The Sacrosanctity of the Foreign Act of State (1943) 59 LQ Rev 42. Wade, Act of State in English Law: Its Relations with International Law (1934) 15 BYIL 98, 104.

[117] T. Buergenthan and H. Maier, Public International Law (1989) p. 233 [The Nutshell Series].

[118] Johnson v. Peddlar (1921) 2 AC 262 [House of Lords]/ Luther v. Sagor (1921) 3 K.B. 532 CA.

[119] (1921) 3 KB 532 CA.

[120] Ibid.

decisions taken by sovereign states within their own borders.[121] The classic definition of the law was clearly stated in Underhill v. Hernandez[122] by Full CJ, thus:

"Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means opened to be availed of by sovereign powers as between themselves."[123]

The reasoning behind the decision in A.M. Luther and Underhill are about the same and therefore presupposes a clear restraint on courts from passing judgment or inquiring into the validity of actions taken by sovereign states within their territorial boundaries. Strict adherence to this notion was followed in Banco Nacional de Cuba v. Sabbatino,[124] in which the court gave effect to a Cuban decree, although it *prima facie* violated international law. Ever since that time, however, the position of the Supreme Court has changed.[125] It is important to stress that the act of state doctrine and the doctrine of sovereign immunity have similar underpinnings, however, they differ on one or two important points and these have been clearly stated in Braka v. Bancomer, that "While the effect of sovereign immunity is to shield the person of the foreign sovereign, and by extension, his agents, from jurisdiction, the act of state doctrine shields the foreign sovereign's internal laws from intrusive scrutiny."[126] One other distinguishing feature of the act of state doctrine, as already stated elsewhere, is that it is available to natural persons, whereas such a defence is not available under the doctrine of state immunity (which is exclusively developed to protect the person of the sovereign and its political subdivision or state entities).

The doctrine of act of state, if carefully examined, will show that it overlaps with both private international law and public international law and English courts on some occasions have simply applied the principles of private international law as an alternative approach to the act of state doctrine. Civil law countries such as Germany, France, Italy, Spain and other countries on the Continent with similar civil law tradition have for different jurisprudential reasons also followed the principles of private international law in determining issues respecting expropriation and state debts, thus specifically relying on the *lex fori* to characterise the rights of the litigating parties. There is therefore the problem of confusing the precepts of private international law with the act of state doctrine. American courts have also in the past given conflicting signals by regarding the act of state doctrine more of a constitutional law wholly predicated on the principle of separation of powers.[127] American courts, however, have now changed their position by considering the said subject within the purview of public international law. Certainly opinions dif-

[121] R. Wallace, International Law (Student Introduction) 1986 p. 48–50.
[122] (1897) 168 US 250.
[123] Ibid., 250.
[124] (1964) 376 U.S. 398, 428.
[125] Banco Nacional de Cuba v. First National City Bank (1967), 270 F Supp. 1004
[126] (1984) SDNY, 1465, 1470, 589 F.Supp. SA.
[127] Banco Nacional de Cuba v. Sabbatino (1964) 376 US 398, 84, S Ct 923, II L Ed 2d 804.

fer from country to country as to whether the act of state doctrine be considered a rule of public international law or not. So far the current English approach is quite different from that of the United States.[128] The difference of opinion as regards the subject may be due to the fact that the act of state doctrine covers four controversial situations and these are (1) nationalisation or expropriation,[129] (2) the situs of debts and public loans,[130] (3) a commercial act exception, i.e., when sovereign immunity overlaps with the act of state doctrine[131] and (4) non–expropriation context, i.e., conspiracy and slander actions.[132] The subject undoubtedly has a varied connotation and therefore must be approached with care. Thus for some it is purely a private international law problem whilst others simply argue that it falls within the domain of public international law.

8.8 The Overlap of Act of State and Sovereign Immunity

The overlap of the act of state doctrine and the doctrine of sovereign immunity has always created problems of mixed activities of states.[133] Thus can immunity be granted for a breach of contract, if the reason for the abrogation of the contract is prompted by an unexpected event or crisis within the territorial boundaries of the defendant state? This is not an easy question, and it would appear the House of Lords had difficulties in dealing with the I Congreso de Partido case. The I Congreso case is a good example where the mere distinction between *acta jure imperii* and *acta jure gentionis* proved woefully inadequate in deciding the issues which came up for contention. The court in order to avoid being completely trapped into following the abstract underpinnings of restrictive immunity reasoned that when faced with the problems of sovereign immunity courts must not only resign their inquiry to the nature of the contract, but attention be also paid to the nature of the breach, which means that a state could still succeed in pleading for immunity if the activity in breach of the agreement is a governmental act. Courts are also called upon to consider whether in the course of the performance of the contract the state has performed a sovereign act in which case immunity could be accorded.

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[128] See Akehurst, International Law, Sixth Ed (1991) p. 47 but see the 7th edited by Peter Malanczuk (1997) pp. 118–121.

[129] Banco Nacional de Cuba v. Sabbatino (1964) Supreme Court of the U.S. 376 US 398, 84 S Ct 923 II L Ed 2 804.

[130] Garcia v. Chase Manhattan Bank NA, U.S. Court of Appeals 2nd Circuit (1984) 735 F.2d 645; Allied Bank Int. v. Banco Credito Agricola de Cartago, U.S. Court of Appeals 2nd Circuit 1985, 757 F.2d 516.

[131] Alfred Dunhill of London Inc. v. Republic of Cuba (1976) 125 US 682; Czarnikow Ltd. v. Rolimpex (1979) AC 351, ILR 64 (1983).

[132] Kirkpatrick & Co. Inc. v. Environmental Tectonics Corp. International Supreme Court of the United States. 1990, 493 US 400, 110 S Ct, 701 L Ed 2s 816.

[133] Trendtex v. Central Bank of Nigeria (1977) QB 529, Czarnikow Ltd. v. Rolimpex (1979) AC 351; I Congreso del Partido (1983) 1 AC 244; De Sanchez v. Banco Central de Nicaragua (1985) 5th Circuit 770 F.2d 1385; The Uganda Co. v. The Government of Uganda (1979) 1 Lloyds Rep 481.

Are these recommendations in reality adequate to solve all the intractable problems which had to be considered in the I Congreso case? The answer must be in the negative in so far as Cuba did not enter into any contractual relationship with the cargo owners in respect of the Marble Islands and the decision not to deliver the cargo was prompted by political consideration because of the right-wing coup which took place in Chile at that time. The decision by Cuba not to deliver the cargo therefore was an act of state which for some obvious reasons destroyed the sugar contract. It is submitted that the government of Cuba's instructions in this respect cannot be disobeyed and anyone who dares to disobey it will certainly be visited by punishment. In sum, the Cuban action was *acta jure imperii* and it would have been apposite as was suggested by Goff J, at first instance if the controversy were referred to arbitration for the said Cuban action could be characterised as a "taking," and therefore was not *per se* violative of international law. The House of Lords, it would appear, relied on the claims against the Empire Iran case and other important cases without taking into consideration the practical actualities of life and thus lost the opportunity of bringing to the fore all the complicated issues which were associated with the I Congreso case.

In C. Czarnikow Ltd. v. Rolimpex,[134] a Polish state trading organisation adequately adjudged of having an independent legal personality and thus free of governmental control entered into a contract for the sale of 200,000 metric tons of sugar with an English company. The contract terms incorporated rule 18(a), "of which the *force majeure* clause provided that if delivery was prevented *inter alia*, by 'government intervention . . . beyond the seller's control' the contract would be void without penalty." Rule 21 made the seller responsible in respect of obtaining the necessary export licence and that failure to procure such licences should not be construed as a defence under the *force majeure* doctrine. Due to flood and heavy rain in 1974, the expected yield of sugar harvest fell below expectation and therefore the government intervened by issuing a decree banning all exports from the country in order to prevent serious shortages of sugar in Poland. Rolimpex thereupon in reliance on the *force majeure* clause in the contract expressly communicated to Czarnikow Ltd. that as a result of governmental intervention beyond its control, it cannot fulfil the contractual obligation of selling the 200,000 metric tons of sugar previously agreed upon. Czarnikow was not persuaded by the argument posited by Rolimpex and therefore argued that Rolimpex by every measure was very close to the Polish government and that it was simply untenable for it to hide behind the activity of the Polish state in order to avoid liability. The dispute was referred to arbitration in London, but after a careful consideration of the issues, the arbitrators unanimously found for Rolimpex on the strength of Article 18(a) which provided *force majeure* as a defence. On an appeal Lord Denning reasoned as follows:

"that no 'governmental intervention' is beyond the seller's control: because the seller, being the government, can always exercise control over its own intervention. It can intervene or not, as it pleases. This is a telling argument when the government itself is a party: at any rate when it intervenes so as to escape its own obligations under the contract. It cannot

[134] (1979) AC 351.

rely on a self–induced 'intervention' any more than it could rely on a self–induced frustration."[135]

He continued by ruling in favour of Rolimpex thus:

"I would say the same also, as a matter of English law, by which these contracts are governed.

I am of opinion, therefore, that Rolimpex can rely on the ban on exports as 'government intervention' beyond seller's control."[136]

Rolimpex again won the case on the strength of its argument that it had an independent legal personality totally free from government control. Thus anything short of that could defeat its quest that it be relieved of liability.

On a further appeal before the House of Lords, Lord Wilberforce as was expected ruled in favour of Rolimpex because of the said decree banning export of sugar from Poland.

"The independence of Rolimpex from government is in my opinion amply demonstrated by the facts set out at length in the award. Together with all four learned judges who have considered this point, I find the conclusion clear, and I therefore hold that the seller makes good the contention that there was governmental intervention within rule 18."[137]

What is discernible in the Court of Appeals' judgment and that of the House of Lords' judgment is that Rolimpex was without doubt an entity clearly independent of Polish governmental control and therefore could not possibly be held responsible for a self–induced intervention since it was not part of the Polish state. And it would simply be untenable to argue that Rolimpex might have conspired with the Polish state to institute the export control. After all, what would Rolimpex gain by getting involved in such a collusion? Since it became clear from the outset that it entered into the sale contract in order to make profit which in all probabilities would help promote its financial standing. Certainly any findings of conspiracy between Rolimpex and the Polish state will completely destroy its chances of winning the case. But the dilemma here is that even if there were a conspiracy it would be very difficult to prove in view of the sensitive nature of such an offence and the state involved would do whatever it takes to avoid being placed in false light by covering up.

Lord Denning in the Court of Appeal offered an excellent analysis of the law by laying bare the essential distinction between governmental activity and what constitutes public good in the eyes of the law and those which may be prompted by the ulterior motive of the state, but in the end, the learned judge shifted his emphasis by having regard to the underlying relationship between Rolimpex and the Polish state, thus diverting attention from the general method by which to identify the subject matter in regard to the determination of the competence of municipal courts. Perhaps it would have been expedient if Rolimpex was distinguished from Cubazucar v. Iana,[138] since the facts of these cases do not differ in any measure. Such an approach, one would suppose, would in effect bring to the fore certain salient issues that could help shed light on instances where the act of state doctrine

[135] (1978) 1 QB 194.
[136] Ibid., p. 195.
[137] (1979) AC 364.
[138] (1983) ILR 64.

interacts or overlaps with the doctrine of state immunity. The heart of the matter is that any time the act of state doctrine intersects with state immunity the problems of mixed activities of states are created where political and commercial activities become inextricably intertwined, arguably giving rise to difficulties respecting the delimitation of the scope of state activities.

The application of restrictive immunity to mixed activities of states has created a lot of difficulties for judges, in as much as the activities in issue were taken within the borders of the defendant state.[139] How is the scope of such activities to be delimited so as to afford municipal courts the opportunity to classify state activities? Will the municipal court be persuaded to follow the two–part conditions of having regard to *immunity ratione personae* as well as *immunity ratione materiae*, or be trapped by other relevant political reasons to only consider the underlying force of *immunity ratione materiae*? Any misplaced attempt to consider one or the other factor independently would create confusion in respect of identifying the nature of the transaction to the person of the sovereign state if, for example, the activity in question may have been performed by a political subdivision or a central bank of the sovereign state.[140] Or where there is a clear indication in the sequence of events that a private person or an entity with an independent legal personality with a *de jure* authority might have been involved and therefore could be impleaded. The problem becomes more complicated since the issue more often than not would have to be considered *qua* an executive decree or a legislative action which might have adversely affected a given commercial agreement. In this case can a defendant state or state entity argue the act of state doctrine to avoid being liable? In many cases officials of foreign states have argued that as a result of internal crisis or the discretional function exception, municipal courts cannot review executive policy decisions of states. Can a foreign state therefore be impleaded for a planned policy decision which has violated the terms of a contract signed with a private entity? What if such pubic policies have adversely affected a contract which has duly been concluded by a state agency with an independent legal personality, e.g., the Rolimpex case or the Ugandan Co. (Holdings) Ltd. case? The answer may be no.[141] What about an operational decision taken by a central bank or a subsidiary organ of the state? To answer a question of this nature, one must first determine as to whether there was any room for public policy analysis or judgment at the executive level.[142] Thus if there was room, then the decision can wholly be characterised as discretionary and therefore duly occasioned by the

[139] Uganda Co. (Holdings) Ltd. v. The Government of Uganda (1979) 1 Lloyds Law Reports 481 at 488; IAM v. OPEC (1981) 649 F.2d at 1359; Spocil v. Crowe (1974) 480 F.2d 614; I Congreso (1983) 1 AC 244; De Sanchez v. Banco Central de Nicaragua (1985) 5th Circuit 770 F.2d 1384.

[140] (1960) 7 Netherlands Int. Law Reports 399. However, on appeal a different decision was handed down. Med. Jurisprudence 1959 o. 164.

[141] Recent decisions seemed to be gravitating in according complete immunity. Rolimpex, Uganda Holding and De Sanchez cases are good examples.

[142] Association de Reclamantes v. United Mexican States (1983) DDC 561 F.Supp. 1190, 1198; Dalehite v. United States (1953) 97 LED 1427; De Sanchez v. Banco Central de Nicaragua (1985) 5th Cir. 770 F.2d 1385.

need to promote public good,[143] in which case the doctrine of act of state or sovereign immunity can be offered as a defence or the defendant state could plead that the domestic court has no jurisdiction. Where the act of state doctrine overlaps with the doctrine of sovereign immunity such as in Rolimpex, it is appropriate or legally feasible to first consider the sovereign immunity issues in the case before tackling the act of state problems. And the rationale behind such a suggestion is that sovereign immunity is not merely an affirmative defence but jurisdictional in some respects as well. Thus the issue respecting jurisdiction must first be considered before regard be had to the act of state doctrine which precludes or shields the internal laws or executive policy decisions of a foreign state from intrusive judgment or scrutiny. Such an approach would allow the judge to determine whether the activity of the state was operational or a discretionary (planning) decision, and this would remove an important hurdle of making the issues clearer thus paving the way for the judge to ask the right questions. In Rolimpex, a Polish state trading organisation which was adjudged independent of the Polish state was sued for failing to honour its contractual obligation because of an unexpected unilateral decision taken by the Polish state at a higher executive level on November 5, 1974. The resolution of the Council of Ministers to ban sugar export did not violate international law because the decree was passed in order to prevent shortage of sugar in Poland since there was a shortfall of the projected amount required to satisfy local demand. The resolution of the Council of Ministers was taken pursuant to the critical executive function of allocating limited resources, i.e., the sugar in question. The Polish decree therefore made export of sugar illegal and thus destroyed the contractual relationship between Czarnikow and Rolimpex. In these circumstances any attempt by Rolimpex to export sugar would simply amount to the violation of the November 5, 1971, decree and it would be logically untenable to sue or deny justice to Rolimpex for having been adversely affected by the Polish decree, i.e., when there is evidence to attest to the decree being put in place for the public good. At this point Rolimpex could argue the act of state doctrine since the decree was lawful but made the export of sugar illegal. Thus in the absence of the decree, Rolimpex would have honoured its contractual obligations. Both the Court of Appeal and the House of Lords relied on the relationship between Rolimpex and the Polish state to dismiss Czarnikow's claim and their rationale for doing so seems to be predicated on the ground that Rolimpex being an independent Polish state organisation, sufficiently free from governmental control, could rely on the ban, i.e., *force majeure*, as a protective shield to avoid being liable. Lord Denning in his judgment touched on the governmental intervention thus:

"I cannot think they should be made liable in that situation – when there was absolutely nothing they could do. They had done everything that the contract required them to do. It was only the ban – that is, the governmental intervention – which prevented the shipment. It was a clear case of force majeure. They were excused from liability for it by rule 18(a)."[144]

[143] DeSanchez v. Banco Central de Nicaragua (1985) 770 F.2d 1385.
[144] (1978) QB 197.

Lord Wilberforce also followed about the same argument.[145] But the question worth asking is what becomes of the case if Rolimpex were a department of the Polish state? The result could have been the same since Rolimpex could hide behind the act of state doctrine to avoid liability. Or the Polish Government could invoke the discretionary function exemption as a defence in as much as the decision to pass the decree was taken at the highest level of government, with the ultimate aim of arresting the shortage of sugar in Poland. This means that Rolimpex could either put forth the act of state or the sovereign immunity defence if there is evidence to prove that it is a subsidiary organ of the Polish state. It cannot, however, argue that it be accorded immunity if it is not a state entity in view of the fact that sovereign immunity is not available to a private party.

A careful consideration of the preceding argument would show that it would be difficult if not confusing to carry the distinction between *acta jure imperii* and *acta jure gestionis* into the domain of an act of state, thus applying the concept of restrictive immunity to defeat the attempt by defendant states to plead the act of state doctrine as a protective shield. And it is equally confusing if a private party argues the act of state doctrine because an executive order or decree has affected or prevented its ability to perform. In National American Corporation v. Federal Republic of Nigeria,[146] the Republic of Nigeria and the Central Bank were jointly sued for a failed cement contract. Nigeria in turn fiercely challenged the jurisdiction of the federal court by offering sovereign immunity and the act of state defence on the merits. Can it be said that the court was right in dismissing Nigeria's defence? A careful examination of the issues shows clearly that the court erred on certain important issues, i.e., the decision taken in Nigeria to avoid congestion at the Lagos Harbour and the fact that the court concentrated on the nature of the transaction instead of the breach. National American Corporation and Trendtex to some extent were wrongly decided, for it is not easy to come up with an adequate reason why immunity be denied to Nigeria for introducing a system of import control to ease the congestion at the Lagos harbour. It would have been expedient if the executive order was characterised as representing the implementation of Nigeria's domestic economic policy and therefore qualifies as a discretionary function exception because it was not operational but rather taken for the public good. To deny immunity to such high-level policy decisions will certainly be doing injustice to the people of Nigeria and simply undermining the thrust and purpose of the rule of state immunity and "discretionary function exemption." It could have been appropriate if the controversy were referred to arbitration.

It is instructive to stress that although sovereign immunity and the act of state doctrine are somewhat interrelated, they certainly operate on different planes wholly influenced by different political and legal factors which cannot be ignored or swept under the carpet for it would appear the act of state doctrine is more slanted towards private international law than public international law. The sug-

[145] (1979) AC 364.
[146] (1978) 448 F.Supp. 622.

gestion in Alfred Dunhill of London Inc. v. Republic of Cuba[147] that the abstract distinction between commercial and non–commercial activities of states be carried into the domain of act of state with the underlying rationale that the act of state doctrine like the sovereign immunity should not free the foreign sovereign if there is evidence it has acted in a commercial capacity, thus justifying the commercial exception argument, is fundamentally flawed since such distinctions have varied connotations and fraught with difficulties. It is suggested by the present writer that such attempts to engraft the concept of sovereign immunity on the doctrine of act of state are ill conceived and therefore must be discouraged. It would rather be meaningful and rewarding if the relationship between these two concepts is periodically reviewed and analysed as a prelude to resolving some of the intractable problems associated with the doctrines of act of state and sovereign immunity.

8.9 Final Remarks

In order to promote the uniformity of state practice and thereby aid the process of codification, the above issues must be thoroughly explored and carefully analysed, taking into consideration the views of every state on the subject. Although such an approach or aspiration is of a tall order, at least it would create a common ground for other elusive issues in respect of state immunity, such as the ownership, possession and control,[148] execution of state property,[149] the act of state doctrine, and such other issues relating to rules and exceptions,[150] to be adequately studied, for codification is frustrating and time consuming and therefore must be approached eclectically so as to avoid the difficulties normally associated with the principle *pacta tertiis nec nocent nec prosunt* – meaning a treaty cannot confer obligations or benefits on a state which has refused to be a party to it. The above observations are being made because the current law is unsettled and the application of restrictive immunity simply lacks practical possibilities.

[147] (1976) 125 U 682. In this case Cuba specifically offered in her defence the act of state doctrine.

[148] Haile Selassie v. Cable and Wireless Ltd. (1938) 1 Ch 545 No. 1; Juan Ysmael (1955) AC 72.

[149] Arab Republic of Egypt v. Cinetelevision Int. (1983) ILR 65 430; Alcom Ltd. v. Republic of Colombia (1984) AC 580; Hispano Americana Mercantil SA v. Central Bank of Nigeria (1979) 2 Llords Rep 277; Philippine Embassy Case (1977) B Verf GE 46, 342, 399.

[150] See R. Higgins, Certain Unresolved Aspects of the Law of State Immunity, op. cit., pp. 270–77.

9 State Immunity and Violation of International Law

9.1 Preliminary Matters

The international community over the years and most recently has witnessed instances where minorities or communities have been displaced and driven into the wicked arms of deplorable, substandard and unsafe conditions. So far evidence abounds to support the fact that there are power struggles in every continent, coupled with the deadly pangs of destablilization, interference in civil strife, encouragement to rebels and the collapse of governments where individuals are left at the mercy of war lords, extremists, genocide perpetrators, "Intera–hamwe", death squads, and other hidden egregious mountebanks, e.g. Somalia, Sudan, Former Yugoslavia (Kosovo), Angola, Iraq, Sierra Leone, Congo, Indonesia, Rwanda, East Timor and the bloody Khmer Rouge's purge of Cambodia, – to mention a few.

In most cases, or in every case, crimes against humanity and genocide were committed, e.g. opposition is suppressed or thrown into exile, in other cases people are raped, tortured, killed and buried in mass graves; still others are forced to leave their birthplace for fear of being starved to death or forced to live under substandard conditions. Quite apart from these, many are also displaced by national policy or often placed behind bars without any good reasons, except the unacceptable words of hate, genocide, ethnic cleansing, and intolerance, which after the collapse of the USSR had become a deep–seated problem in Eastern Europe, Asia, Africa and Latin America. In recent times, terrorism has become a way of life and amorphous terrorist groups are using it as a political weapon to settle old scores.

9.2 Private Suits Against States for Violating Human Rights

The passing of resolution 53/98, prompted the General Assembly to request the ILC to present comments on certain unresolved issues relating to jurisdictional immunity of states and current state practice. Resolution 53/98, in this respect, thus seeks only to cover issues specifically considered in document A/C.6/49/L.2. But surprisingly it was discovered that there has been additional recent development in the law which the ILC did not contemplate or expect to come to the fore for serious consideration,[1] e.g., claims to recover war damages;[2] a warrant against

[1] See A/CN.4/L.576, Annex III p. 56.

a Congo foreign minister,[3] criminal prosecution against former and serving heads of states,[4] issues of state immunity and the power of international tribunals to exercise jurisdiction and other issues relating to *jus cogens, obligation erga omnes*, and universal jurisdiction.[5] These developments primarily cover the relationship between immunity and acts contrary to International Law. The argument increasingly being advanced before National Judicial Authorities is that although restrictive immunity is still evolving and has not yet attained the character of customary international law, immunity should be denied[6] in the case of death or personal injury resulting from blatant disrespect for human rights norms which have attained the character or status of *Jus Cogens* and thus may attract *Obligation erga omnes*, e.g. the prohibition of torture, crimes against humanity and genocide.[7] It is true that these matters are not specifically addressed by the ILC draft articles (i.e. the 2003 revised text), but they are important developments relating to state immunity and therefore cannot be relegated to the background or swept under the carpet.

In recent case law, a number of civil and criminal claims have been brought before National judicial authorities in the United States[8] the UK,[9] Belgium,[10] Netherlands,[11] Germany,[12] Greece,[13] Senegal,[14] France[15] and also before the ECHR,[16] the

[2] Princz v. Federal Republic of Germany, 26 F3d 1166 (PG Ar 1994), Joo v. Japan 172 F Supp. 2d 52 (DDC 2001).

[3] Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium) Preliminary Objections and Merits, Judgment, ICJ Reports, 2002, p. 3.

[4] SOS Attentat and Castelnau d'Esnault v. Qadaffi, Head of State of the State of Libya, France, Court of Cassation, Criminal Chamber, 13 March 2000, No. 1414; Habre, Senegal Court of Cassation, Dakar, 20 March 2001; LeMonde, 21 March 2001.

[5] R.V. Bow Street Metropolitan Stipendiary, ex Parte Pinochet Urgarte (Amnesty International Intervening (No.3) [2000] IAC 147).

[6] See A/CN.4/L.576, Annex III p. 56.

[7] J. Bröhmer: State Immunity and the Violation of Human Rights (1997); Report of International Law Association Committee on State Immunity (1982); Reimann: A Human Rights Exception to Sovereign Immunity: Some Thoughts on Princz v. Federal Republic of Germany, (1995) 16 Mich J Int L.

[8] Saudi Arabia v. Nelson, 100 ILR 544; Rein v. Libya (1999) 38 ILM 447; Joo v. Japan 332 F3d 679 (DC Cir. 2003); Sampson v. Federal Republic of Germany 250 F3d 1145 (7th Cir. 2001).

[9] R.V. Bow Street Metropolitan Stipendary Magistrate: ex Parte Pinochet Ugarte (No. 3) [1999] 2 WLR 872 (HL).

[10] H.A.S. v. Ariel Sharon, Belgium Court of Cassation, (2003) 42 ILM 596.

[11] Bouterse, Netherlands Supreme Court, 18 September 2001.

[12] Distomo Massacre Case, Germany Supreme Court 2003 BGH–1112R/248/98.

[13] Prefecture of Voiotia v. Federal Republic of Germany, Case 11/200, Areios Pagos Hellenic Supreme Court, 4 May 2000 – see Gouvaneli and Bantekas, (2001) 93 AJIL 198, for details.

[14] Habre, Senegal Court of Cassation, Dakar, 20 March 2001.

[15] LeMonde, 21 March 2001; SOS Attentat and Castelnau d'Esnault v Qadaffi, Head of State of Libya, Court of Cassation 13 March 2000, No. 1414.

[16] Kalogeropoulos v. Greece and Germany, ECHR No. 0059021/00 Judgment on Admissibility. 12 Dec 2002.

ICTY[17] and the ICJ,[18] arising out of acts of torture, crimes against humanity and genocide committed in the defendant state, i.e. the *lex loci delicti*, which may have had direct or indirect effect in the forum state, i.e. (the *lex fori*).[19]

The plaintiffs in the above stated cases have argued that sovereign states are not entitled to immunity if there is a clear showing that these states are in violation of *delicta juris gentium*,[20] i.e. where there is every indication to prove that such violations attract *obligation erga omnes* from states. But it is important to postulate that there is an agenda of problems in respect to how to characterize these acts as crimes in violation of norms of *jus cogens*.[21] Some national judicial authorities in recent times have however expressed their sympathy in respect of the above stated argument.[22] But in the light of the support for the said argument, it appears that in a majority of these cases, a plea for immunity was upheld.[23]

9.3 The State, Recognition and Juridical Equality

One important characteristic of the state is that it must be able to produce a determinate human superior.[24] The determinate superior represents the concrete manifestation of the state, whereas the *superanus* of the state is legally derived from an abstract conception and a concrete manifestation.[25] Sovereignty is derived from the Roman law concept of *suprema potestas*, meaning supreme.[26] Thus, a determinate superior, who is accorded legitimacy, has the power to make laws and to enforce these laws, backed by the required coercion in order to maintain order. A state as a matter of *traditio* must be endowed with sovereign power and this innate authority must also be free from internal and external control.[27] The international

[17] Milosevic, ICTY decision preliminary motion: Trial Chamber 111 8th Nov 2001, para 226–233.

[18] Arrest warrant of 11 April 2000 (Democratic R Congo v. Belgium) ICJ Reports 2002.

[19] J. Bröhmer – State Immunity and the Violation of Human Rights (1997).

[20] Ibid. at pp. 50–144.

[21] Al–Adsani v. Government of Kuwait 100 ILR 465 at 471; Princz v. Federal Republic of Germany, 26F3d 1166 (DC cir 1994) at 1176–1185; Argentina Republic v. Amerada Hess Shipping Corp., 109 S. Ct. 683 at 688. (1990) 81 ILR 658.

[22] Al–Adsani v. Government of Kuwait, 100 ILR 465 at 471; Controller and Auditor General v. Sir Rondal Davidson (1996) 2 NZLR 278.

[23] Siderman de Blake v. Republic of Argentia 965 F2d 699 (9th cir 1992). Princz v. Federal Republic of Germany 26F3d 1166 (DC cir 1994).

[24] B. Bhattacharyya, First Course of Political Science with constitution of Indian Republic and Pakistan (1949) pp. 94–95; T.E. Holland, The Elements of Jurisprudence 12th (ed) Oxford 1916; Laski op. cit. pp. 45–88; J. Austin, The Province of Jurisprudence Determined (1832).

[25] Marek Korawicz, (1961–1) 101 Recueil des Cours, 10–12.

[26] Ibid. at pp. 10–40; see also J. Austin, op. cit. for further analysis.

[27] Lassa Oppenheim, International Law: A Treatise 107–15 (2nd ed 1912) see also later editions: B. Broms, states, pp. 41–66 in Mohammed Bedjaoui (ed) Achievements and Prospects (1991). B. Broms, The Doctrine of Equality of States as Applied in Interna-

personality of the state therefore is derived from the "internal acceptance of the legitimacy of acts by a few on behalf of the many."[28] Thus any state which has a determinate human superior with a functional capacity to act as a government on behalf of the ruled from within and from without has acquired a legitimate capacity of statehood which must duly be recognized.[29] Harold Maier explains the above subject as follows.

"Recognition of a state by other members of the international community is nothing more than the acknowledgement that this centralized conduit for communication exists and that acceptance of obligation through that conduit is an act recognized as legitimate by the population group on behalf of whom the central communicator's speak."[30]

The consequence of state sovereignty therefore is a prerequisite for equal participation in the international legal system and since international law is based upon the common consent of states,[31] any state which is recognized and becomes a member of the international community is juridically equal to other states,[32] but not in terms of power, size and economic resources.[33] The charter of the United Nations is based in part upon the juridical equality of states and this was carefully introduced into the Declaration on Principles of International Law concerning friendly relations and cooperation among states.[34] This is further affirmed in the charter of the African Union[35] and in the charter of the OAS.[36] These principles are in order because a consensual international legal system cannot survive without the principles of comity, equality and non–discrimination.[37]

9.3.1 Immunities of Heads of States and Senior State Officials

The position of states in international law is predicated on the concept of *unus inter pares*, i.e. one among equals. This concept is technically synonymous to the maxim *par in parem mon habet imperium*, which represents the traditional justifi-

tional Organizations. Vammala 1959 (xxxl + 348p) J. Bodin, "Dela Republique" (1577).

[28] Harold Maier, Principles of Sovereignty, Sovereign Equality and National Self–determination in Paul B. Stephan III and Boris M. Klimenko (eds) International Law and International Security: Military and Political Dimensions 241 (1991) pp. 243–44.

[29] Ibid.

[30] Ibid. at pp. 243–44. See generally C. Warbrick, States and Recognition, in Malcol D. Evans (ed) International Law (2003).

[31] Oppenheim: International Law (eds) Sir Jennings and Sir Watts, Vol 1 (1992) p. 339.

[32] Oppenheim: International Law (eds) Sir Jennings and Sir Watts, op. cit. pp. 339–355; C. Warbrick, The Principle of Sovereign Equality in Lowe and Warbrick (eds), The United Nations and The Principles of International Law (1994).

[33] Gerhard Von Glahn, An Introduction to Public International Law, (1981) pp. 128–130.

[34] GA Res. 2625 (xxv) (1970).

[35] Article 111.1, ILM, 2 (1962) p. 766.

[36] Article 6 (UNTS, 119, p. 49).

[37] Gerhard Von Glahn, op. cit. p.129.

cation for state immunity.[38] It is however arguable that this might have been misconstrued to some extent in the current practice of states. But what it really means is an equality before the law, of all states in the international community.[39] This is quite different from equality in fact.[40]

True, the conceptualisation of state equality is losing its irresistible force and the concept of sovereignty is not as compelling as before.[41] The world is changing and complicated issues in respect of immunity of states are bitterly being litigated before national courts.[42] The utility of state immunity to the international community, however is that it promotes stability, avoids acrimony and prevents the harassment of foreign states,[43] e.g. heads of states and foreign ministers.

Private suits against serving heads of states and former heads of states have increased in recent times and to this issue we now turn.

The central issue, then is what is the legal position of heads of states, foreign ministers and other positions of power within the modern state? A head of state is accorded absolute immunity because of the privileges he enjoys as holder of the highest office of a recognized sovereign state.[44] The recognition by other states of this special office is undoubtedly crucial since it guarantees the head of state inviolability and special privileges when traveling abroad and before foreign courts.[45] These privileges and immunities also protect heads of states or heads of governments from coercive measures and harassment.[46]

It is now becoming clear that heads of government, heads of states and serving foreign ministers enjoy the same degree of immunity from jurisdiction, *ratione personae*, since they perform interrelated political functions in the name of the state or in the representation of the state.[47] Thus, in the absence of these privileges, states would not be able to carry out their official duties *ne impediator legatio*.[48] Many therefore are of the opinion that since the norm is not discriminatory but rather operates on the principle of reciprocity, state officials would not protest its

[38] Oppenheim op cit. pp. 341–354; I. Brownlie, "Principles", (2003) op cit. pp. 319–325.

[39] Gerhard von Glahn op. cit. pp. 128–129; Oppenheim, op. cit. p. 339–341.

[40] Minority Schools in Albania, Advisory Opinion P.C.I.J., 1935, Ser. A/B No. 64.

[41] See generally J. Bröhmer, op. cit.; H. Fox op. cit.; I. Brownlie, "Principles", (2003), L. Henkin, (1989-v) 216 Recueil des cours 19, pp. 319–324.

[42] I. Brownlie, "Principles" (2003) op. cit. pp. 319–340; H. Fox: The Law of State Immunity (2002); Jurgen Bröhmer, State Immunity and the Violation of Human Rights (1997); Oppenheim, op. cit. pp. 341–370.

[43] See generally Sir Arthur Watts, The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers, (1994–111) 242 Recueil des cours 13; Oppenheim, op. cit. Vol parts 2 to 4, pp. 1034–1044.

[44] Sir Arthur Watts, op. cit., pp. 31–67.

[45] Ibid. at pp. 51–55.

[46] Ibid. at pp. 54–55; See generally Res 2530 (XXIV) (1969), Art. 29; See also Res 3166 (XXVII) 1973.

[47] Res., 2530 (XXIV) (1969), Article 31(I) The Convention on Special Missions; See generally Sir Arthur Watts, op. cit. p. 54 (1974); See also Rozakis (1974) 23 ICLQ 32–72.

[48] Arrest Warrant of 11 April 2000 (DRC v. Belgium), Preliminary Objectives and Merits, Judgment, ICJ Reports 2002 p. 3.

application, but would rather be content with the norm. And this has been proven to be true.[49] Evidence of case law and state practice confirms that a head of state's immunity from criminal prosecution is absolute[50] as it is for the diplomat, i.e. the ambassador.[51] The immunity of the head of state, however is not absolute as regards international crimes.[52] That means any crime which pricks the conscience of "mankind" must fully be qualified to determine whether it has violated *jus cogens* or not. The legal position of the head of state as regards civil and administrative proceedings is not clear–cut; however, there is evidence to attest to the fact that a majority of courts would be willing to grant complete immunity to heads of states.[53] One important issue which must further be explored is whether there is any exceptions to the general rule in terms of civil suits? The answer is Yes. In fact, there are three recognized exceptions to the privilege.[54] The issue in respect to the immunity of a foreign minister was put to rest in the arrest warrant case of 11 April 200. There, the ICJ ruled that a foreign minister in the light of the special position he occupies as chief diplomatic officer, enjoys absolute immunity and complete personal inviolability from criminal prosecution *ratione personae*. Thus a foreign minister can only be criminally prosecuted if the state he represents is willing to waive his immunity. In fact, this is rare, but in unique circumstances it could be done through diplomatic communication or treaty.[55]

9.4 Recent Case Law on International Law Crimes

Contemporary International Law is rapidly changing and embracing new legal principles or norms which no longer accepts that nations treat their citizens with impunity, without any regard to human rights norms.[56]

The writing of the charter of the United Nations was followed by the Universal Declaration of Human Rights and ever since that day, efforts to conclude multilateral treaties became quite fruitful through the United Nations. There are for example, four human rights treaties in force at the regional level. Further, some human

[49] L. Henkin, (1989–V) 216 Recueil des cours 19, p. 319.

[50] See Sir Arthur Watts, op. cit. p. 54; e.g. Re Honecker (1984) 80 ILR p. 365; Duke of Brunswick v. King of Hanover (1848) 2 HLC 1, Lafontat v. Aristide (1994), WL 20798 (EDNY).

[51] Sir Arthur Watts, op. cit. p. 54; The Schooner Exchange v. McFaddon. 11 U.S. 67 Cranch 116, 138 (1812); Wash. Post, Feb 18, 2001 A85, (Suite Against Mugabe), Kim v. Kim Yong Shik, CIV No. 12565 (Cir. Ct.; 1st Cir. Hawaii [1963]).

[52] See J. Bröhmer, op. cit. pp. 142–188; 189–215: see also Fox, op. cit. pp. 518–540.

[53] See Satow, Guide to Diplomatic Practice (5th ed. 1979).

[54] Vienna Convention on Diplomatic Relations 1961, Art. 31 (I). See generally Sir Arthur Watts, op. cit. pp. 54–55; I. Brownlie, op. cit. p. 351.

[55] I. Brownlie, "Principles", op. cit. pp. 355–336; 351–352; H. Steiberger, "State Immunity", in Bernhardt Rudolf (ed), Encyclopedia of Public International Law 10 (1984) p. 435.

[56] See Fox, op. cit. pp. 441–460; See also J. Bröhmer, op. cit. p. 188–214; W. Schabas, Introduction to the International Criminal Court (2001).

rights norms have attained the character of *jus cogens*, that their violation by elected officials or heads of states amounts to an international crime which may not attract immunity.[57]

The issues raised above are illustrated by the Pinochet case, and in other cases, forcefully litigated before courts of established reputation for impartiality.[58]

9.4.1 General Pinochet Before English Courts

Let us consider the Pinochet case.[59] There, a former head of state of Chile who was brought to power by a coup d'état and thereafter ruled with an iron hand, sending many people to prison and to their deaths, was arrested in London, England while undergoing medical treatment. General Pinochet, as the records show, was placed under arrest on the execution of two warrants issued by Judge Baltasar Garzo, a Bow Street Magistrate, dated 16th and 22nd October 1998. The charges range from the coordination of repressive and secretive police action under the code name "Operativo Candor" against the citizens of Chile, Argentina, Spain and other countries, which involved the murder, kidnapping, torture and disappearance of thousands of people who did not agree with his dictatorial policies.

General Pinochet's lawyers quickly filed briefs on his behalf before the divisional court for judicial review and on the second ground that the warrants were unlawful since U.K. courts did not have jurisdiction over a former head of state. Lord Bingham CJ and his colleagues Collins and Richards JJ ruled in favour of the General, that he was immune from criminal and extradition proceedings, as alleged in the provisional warrants. General Pinochet was therefore released on bail.

The Spanish Government and the Commissioner of Police, perfectly aware of the fact that the second warrant was stayed pending appeal, quickly took advantage of their rights, by appealing to the House of Lords. After six days of arguments, the Court ruled by a majority of three to two, on 25th of November 1998, that the crimes which General Pinochet committed while in office did not fall within the confines of the functions of a head of state and therefore the General cannot be protected under the law of state immunity. (Lords Nichols, Stey and Hoffman were in the majority while Lords Slynn and Lloyd ruled that immunity be granted. After the decision, it was discovered that Lord Hoffman did have close links with Amnesty International which had intervened as of right in the proceedings. As a matter of justice, Lord Hoffman should have recused himself from the bench, but since he failed to do so, the judgment was consequently set aside, and a new judgment was given in its place.

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[57] Prefecture of Voiotia v. Federal Republic of Germany – reported in 54 Revue Hellenique D1 (2001) pp. 592–593; Milosevic, ICTY, Trial Chamber III (2001);R v. Bow Street Metropolitan Stipendiary Magistrate Ex Party Pinochet Ugarte No. 3 (1999) 2 WLR 872 HL.

[58] The House of Lords (UK); Court of Cassation (France); ECHR.

[59] R v. Bow Street Metropolitan Stipendiary Magistrate, Ex party Pinochet Ugarte (No. 3) (1999) 2 WLR 872 (HL).

In its final judgment on 24 March 1999, the House of Lords again ruled that General Pinochet can not be granted immunity, by six to one. The House of Lords, in every respect took a realistic position by substantially reducing the numerous charges, for which Pinochet might be extradited to Spain, by reasoning that the principle of "double criminality rule required the conduct to be criminal under English law at the conduct date and not at the request date." Thus in short, the law lords were of the opinion that extradition must be precluded since the said acts of torture were committed before 1988, i.e. the cut–off date when UK incorporated the torture convention into the corpus of English municipal law. The court further ruled that a former head of state must be denied immunity for acts of torture since such an act is an international crime with the status of *jus cogens*.

In support of his judgment, Lord Brown–Wilkinson offered the following explanation:

"If that applied to the present case, and if the implementation of the torture regime is to be treated as official business sufficient to found an immunity for the former head of state, it must also be official business sufficient to justify immunity for his inferiors who actually did the torturing. Under the convention the international crime of torture can only be committed by an official or someone in an official capacity. They would all be entitled to immunity. It would follow that there can be no case outside Chile in which a successful prosecution for torture can be brought unless the state of Chile is prepared to waive its right to its officials' immunity. Therefore the whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive and one of the main objectives of the Torture Convention—to provide a system under which there is no safe haven for torturers—will have been frustrated. In my judgment all these factors together demonstrate that the notion of continued immunity for ex–heads of state is inconsistent with the provisions of the Torture Convention.

For these reasons in my judgment if, as alleged, Senator Pinochet organised and authorised torture after 8 December 1988 he was not acting in any capacity which gives rise to immunity ratione materiae because such actions were contrary to international law. Chile had agreed to outlaw such conduct and Chile had agreed with the other parties to the Torture Convention that all signatory states should have jurisdiction to try official torture (as defined in the convention) even if such torture were committed in Chile.

As to the charges of murder and conspiracy to murder, no one has advanced any reason why the ordinary rules of immunity should not apply and Senator Pinochet is entitled to such immunity." (1999) 2 All ER, p.115.

The case requires serious management and analysis of the complicated international law principles involved and the law Lords who were in the majority must be commended for their judgment and for having avoided the temptation of withdrawing into nebulous platitudes. The judgment is long and it has prompted prodigious commentaries and writings on the subject. It would therefore be apposite to only make general comments. The issues in the case were complicated and seemingly intertwined and evidently there were no clear cut treaty rules and customary international law rules to aid the law Lords; hence they were forced unto the uncharted seas without any navigating force.

In order to get a complete grasp of the case, one must consider whether a former head of state is entitled to immunity *ratione materiae*? Efforts must also be made to determine whether torture has attained the character of *jus cogens* and therefore could be used as a credible legal principle to determine universal juris-

diction.[60] Further, it is crucial to determine the distinction between *immunity ratione personae* and *immunity ratione materiae* in relation to the privileges and immunities of heads of states, quite apart from the above issues, it is important to determine whether the nature of an act can adequately be characterized as determinative of *immunity ratione material* under the principle of *jus repraesentationis omnimodae*, and finally whether the act of state doctrine is an appropriate defence?

The approach which was followed in the Pinochet case is open to question and therefore may be contested. First, customary law does not support some of the pronouncements made in the case.[61] Furthermore, customary international law is not clear on subjecting former heads of states to criminal proceedings, where the act in question was committed in the defendant's state but had effect in the forum.[62] The courts distinction between *immunity ratione personae* and *immunity ratione materiae* was not that helpful and the analysis in respect of jurisdiction was fraught with confusion and incomplete analysis of international law principles central to the issues of the case.[63]

As we all know "power corrupts and absolute power corrupts absolutely," and more often than not, the coercive powers of the state in developing countries and low subsystem autonomous countries are applied in a dictatorial manner without any regard to human rights norms. Thus, crimes of torture by their very nature can only be committed by heads of states, chief police officers, senior military officers and the like.[64] International law therefore recognises torture as an official act.[65] The question which ought to be answered at this juncture therefore is what legal principles are to be applied if an official conduct of a head of state is *prima facie* violative of international law? e.g. *jus cogens*.

Sir Arthur Watts, offers the following explanation:

"The critical test would seem to be whether the conduct was engaged in under colour of, or in ostensible exercise of, the head of state's public authority. If it was, it must be treated as official conduct, and so not a matter subject to the jurisdiction of other states whether or not it was wrongful or illegal under the law of his own state. The difficulty of distinguish-

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[60] J. Dugard, International Law – A South African Perspective (2000) pp. 141–154; M. Cherif Bassiouni and E.M. Wise, Aut Dedere Aut Judicare, the duty to extradite or prosecute in International Law (1995) M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law (1999). I. Brownlie, "Principles", op. cit. pp. 485–492, 568–575; D.J. Harris, Cases And Materials On International Law (1998) pp. 265–306, 288–294. Randal, (1986) 66 Texas LR 785.

[61] Craig Barker, the future of Former Head of State immunity after ex Parte Pinochet, (1999) 48 ICLQ 937–49: Fox, The Pinochet No. 3 Case (1999) 48 ICLQ 687.

[62] J. Bröhmer, op. cit. Report of International Law Association Committee on State Immunity (1994); Dugard, op. cit. pp. 202–204; Monroe Leigh (1997) 91 AJIL 187; Fox, op. cit. Note 42.

[63] See Fox, The Pinochet No. 3 Case (1999) 48 ICLQ 687; see also generally Sir Arthur Watts, Hague Lectures op. cit. for clear expositions on the subject.

[64] See G. Barker, (1999) 48 ICLQ 937–943. See also The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (1984) 23 ILM 1027.

[65] G.A. Res, 217 (111) A (Dec. 10, 1948); G A Res, 2625 XXV Oct. 24, 1970; see generally Sir Aurthur Watts, op. cit. pp. 58–70.

ing between official and private conduct, and the particular difficulty raised by the possibly criminal character of the conduct, can, of course, be avoided if the view is taken that in proceedings against a Head of State in person, he enjoys an absolute immunity. This was the conclusion reached earlier this year, in *Lafontant v. Aristide*. In that case a United States District Court considered a Head of State (in fact, a still recognized Head of State in temporary exile in the United States) to be, apart from any waiver of immunity, "absolutely immune from personal jurisdiction in United States courts", and accordingly held him to be immune from suit in respect of an unlawful killing in Haiti. The conduct alleged against the President was official or private, because his immunity as Head of State barred the exercise of all personal jurisdiction over him." [66]

State practice on this subject is scanty and the law Lords were divided on the said crucial subject of whether General Pinochet was acting in an official capacity or not.

Again Sir Arthur Watts in trying to analyse the above issue argued in his Hague Lectures that:

"Heads of state tend to conduct themselves with discretion, and relevant judicial decisions and publicly-known state practice are relatively scarce."[67]

This explains the unbeaten path which must be cleared in order to arrive at a well reasoned decision, and incidentally Section 20 of the State Immunity Act, somewhat influenced the law Lords to consider Article 39.2 of the Vienna Convention on Diplomatic Relations which in turn uncovered the technical issue of torture and the troubling characterization of official and unofficial acts of heads of states. Article 39.2 is well settled and over the years has been applied and followed by states without any difficulties.

Those law lords who came to the conclusion that General Pinochet was acting outside the confines of his functions as head of state, took comfort in the force and import of Section 134 (CJA of 1988) which provided the necessary argument for jurisdiction.[68] At any rate it is quite striking to exercise jurisdiction on the "official torture" of an offense and then turn around to dilute the effect of the crucial element of that argument in order to block the plea for immunity. Thus, if the fundamental factors conditioning Pinochet's immunity are "official torture" and special status as head of state, *acta imperii*, then it is logically appropriate to determine whether a head of state can treat nationals of his country as he pleases, because exercising jurisdiction *per se* over Pinochet is not enough for there is a further

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[66] Sir Arthur Watts, op. cit. pp. 56–57: True, there are no clear-cut rules on the rights, duties and obligations of heads of states. What we have is a sketchy literature on the subject. The House of Lords, thus was left with meagre resources to deal with the case.

[67] Sir Arthur Watts, op. cit. p. 19. The political infrastructure in modern states can be complicated, while some states have subsystems autonomous political systems, others have authoritarian systems, still other states have premobilised democratic and authoritarian systems and others are influenced by subject-participant culture. Many leaders are therefore prone to be dictatorial and abusive in the developing world.

[68] See G. Baker, op. cit. p. 948; see also Sir Arthur Watts, who argued that "Apart from such particular internationally relevant powers often conferred on heads of states, there is more generally a quality possessed by heads of states which is seldom expressly conferred on them by their state's constitutions but which is an integral part of their international role."

need to prove as to whether his actions violated *delicta juris gentium* or whether there is evidence of *dolus*. Granted this, then any act, whether it be official or not would not be accorded immunity if it violates *jus cogens*.[69] The crux of the matter is that, if immunity is allowed, then the Torture Convention would not apply, which logically means that the official torture at issue would be declared void. A careful examination of the judgment shows that Lord Browne–Wildinson was right to some extent,[70] but the difficulties in respect of these issues can be resolved if one can prove that the official torture at issue violated *jus cogens* and that the normative force of this ethical code attracted *obligation erga omnes*.[71] The *jus cogens* argument, *ex–hypothesi* would eclipse the legal effect of immunity *ratione materiae*. Furthermore, one must also be equally reminded of the well known principle of *ex injuria non oritur jus*. These arguments are being made because acquiring jurisdiction over Pinochet is not enough since one would have to over come the thrust and force of Section 134 and Article 39(2) of the Vienna Convention on Diplomatic Relations and perhaps the Act of State Doctrine[72] or what some may simply term *non–justiciability*.

9.4.2 Ex–President Habre before the Courts of Senegal and France

Another case, almost similar to the Pinochet case, was litigated before the Court of Appeal of Dakar (*chamber d'accusation*).[73] There, Hissere Habre, a former president of Chad from 1982 to 1990, sought refuge in Senegal after he was removed from office. In 2000, complaints were filed against ex–president Habre by different groups of people alleging *inter alia*, that they were the victims of crimes against humanity and torture.[74] After a careful review of the charges, an indictment was issued where the Ex–President was placed under house arrest. Habre

[69] Jennings, Cambridge Essays in International Law (1965); I. Brownlie, op. cit. pp. 488–450.

[70] Pinochet No. 3 p. 847. Lord Browne–Wilkinson's position is well taken, but it would appear there are gaps in the reasoning in respect to the application of customary international law and criminal jurisdiction of states.

[71] See H. Kelsen, Principles of International Law (1967) p. 483. See also E. Suy – The Concept of *Jus Cogens* in International Law (1967) pp. 17–77.

[72] Convention on Diplomatic Relations Apr. 18, 1961, 23. UST 3227,500. UNTS 95: Convention on Consular Relations Apr. 24, 1963, 21 UST, 77 596 UNTS 261; Agreement Relating to the Headquarters of the UN, June 26, 1947, US–UN 61 Stat. 3416, 11 UNTSU Convention on Privileges and Immunities of the UN, Feb. 13, 1946, 21 UST 1418, 1 UNTS 16; B. Carter and P. Trimble, International Law (1991) pp. 675–697.

[73] Habre, Senegal Court of Cassation, Dakar, 20 March 2001. (Ct of Appeal of Dakar and Court of Cassation). This case is almost similar to that of Pinochet case – where thousands of people, i.e. the opposition to his government – were murdered and killed. Those in power were also engaged in systematic torture in order to silence the opposition.

[74] See Article 5(2) of the Torture Convention, whether Senegalese Courts could procure or exercise Universal Jurisdiction. For jurisdiction to be exercised "the convention required Senegal to take prior legislative measures." p. 570.

appealed, arguing that the Senegalese courts lacked jurisdiction to prosecute him since the charges in question were committed in Chad. The court carefully analysed the issues of the case and concluded that it did not have jurisdiction and therefore quashed the indictment. An appeal to the Court of Cassation was quickly filed on behalf of Souleymane Guengueng and others and the "Association of the Victims of Crimes of Political Repression in Chad." The Court of Cassation ruled that jurisdiction was appropriate and admissible but annulled the indictment on the merits as follows:

"(1) Article 5(2) of the Torture Convention required states parties to take such measures as might be necessary to establish jurisdiction over the offenses referred to in Article 4, where the alleged offender was present in any territory under their jurisdiction. It followed that Article 79 of the Senegalese Constitution was inapplicable since the enforcement of the Convention required Senegal to take prior legislative measures.

(2) There was no procedural legislation which recognize that the Senegalese courts had universal jurisdiction to prosecute and punish alleged offenders or accomplices found on Senegalese territory and accused of committing acts of torture within the meaning of Article 4 of the Convention, where the alleged offences were committed outside Senegal by foreigners. The presence of the accused in Senegal could not, but itself, provide a basis for the exercise of jurisdiction."[75]

The Court of Cassation, having carefully analysed the technical issues in the case gave an indication that would seem to converge with the decisions in the arrest warrant case [76] and that of SOS attentat and Castelnau d'Esnault v. Gaddafi.[77]

9.4.3 Colonel Qadaffi before the Courts of France

Let us now consider briefly the judgment of the Court of Cassation with respect to the charges lodged against Colonel Gaddafi of Libya.[78] In 1989 a DC 10 aircraft was brought down while flying over the Sahara desert, killing everybody on board, including some French nationals. Perceptible sign of explosives were detected in the wreckage, and this prompted official French investigation. Evidence revealed that Libya was involved. It was further determined that six Libyan nationals who happened to be members of the Libyan Secret Police and the brother–in–law of Colonel Gaddafi were involved in this terrorist act and therefore were tried *in absentia* by the special court of Assizes of Paris. In 1999 these said individuals were found guilty of murder and for the destruction of the aircraft, and

[75] 125 ILR p. 570.

[76] Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium) Preliminary objection and Merits, Judgment, ICJ Reports 2002, p.3: Where the court was unequivocal in that "the immunity from jurisdiction enjoyed by incumbent Ministers of Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed."

[77] France, Court of Cassation, Criminal Chamber, 13 March 2000 No. 1414. The court quashed an earlier or prior ruling of the Paris Court of Appeal. All these cases appear to follow generally the authority of the Schooner Exchange on Immunity.

[78] SOS Attentat and Castenau d'Esnaul v. Qadaffi, Head of State of Libya, France, Court of Cassation, Criminal Chamber, 13 March 2000, No. 1414.

were sentenced to life imprisonment. On the foundation and force of this judgment, SOS Attentats and relatives of the victims of the plane crash, filed criminal charges against Colonel Gaddafi, that he had knowledge of the terrorist attack. The magistrate in charge of the case then started a criminal inquiry into the charges, but the *Ministere Public* appealed against the inquiry on the basis that Gaddafi was entitled to immunity.[79] The appeal was dismissed on the ground that "immunity could not cover acts of complicity in murder and the destruction of property by terrorist action where a head of state ordered the destruction of a passenger aircraft carrying civilians."[80]

The *procureur general* of the Court of Appeal, of Paris, then appealed to the Court of Cassation against the judgment of the *Chambre d'Accusation.*

Part of the submission of the *procureur general* reads as follows:

"Equally, the proceedings before the British and American courts brought against General Pinochet and Noriega respectively did not provide evidence for any general practice regarding the non–recognition of the immunity of heads of states since neither Pinochet nor Noriega were heads of state in office at the time the proceedings were brought. Furthermore, the Pinochet case was based on the application of the 1984 Torture Convention to which both the United Kingdom and Chile were parties. The indictment issued against President Milosevic at the time when he was still the Head of State of Yugoslavia in office was based on a straightforward application of the provisions of the statute of the International Criminal Court rather than any general rule of international criminal law. Furthermore, proceedings instituted against President Laurent Kabila before the Courts of France, whilst he was on an official visit to the country, were terminated precisely because of the immunity enjoyed by heads of state in office."[81]

He further argued successfully that:

"It was true that certain peremptory norms of international law, such as the prohibition of genocide and certain "cardinal principles" of international Humanitarian Law, had been recognized by the International Court of justice as rules of *jus cogens*. But France did not recognize the concept of *jus cogens*, as defined in Article 53 of the Vienna Convention on the Law of Treaties, 1979, and had so far not acceded to that convention.[82] He concluded that the principle of the jurisdiction of Immunity of heads of state in office was still regarded as a general and absolute rule of customary international law."[83]

The court of Cassation allowed the appeal and all proceedings against Colonel Gaddafi were terminated.

The summary of the judgment can be stated thus:

"International custom precluded heads of state in office from being the subject of proceedings before the criminal courts of a foreign state, in the absence of specific provisions to the contrary binding on the parties concerned. In the current state of international law, complicity in a terrorist attack, however serious such a crime might be, did not constitute

[79] 125 ILR p. 491.

[80] 125 ILR p. 492.

[81] 125 ILR p. 492–493.

[82] 125 ILR p. 493. At the outset, France refused to sign the said treaty but has since that day become a party to the Vienna Convention on the Law of Treaties and has accepted the concept of *jus cogens*.

[83] 125 ILR p. 493.

one of the exceptions to the principle of the jurisdictional immunity of foreign heads of state in office."[84]

A careful examination of the judgment of the *chamber d'accusation*, would show that it took up certain difficult subjects in international law which were central to the issue of the case, but failed to argue correctly as to whether these principles are adequately supported by *usus* and *opinio juris sive necessitates*. It failed also to prove whether the treaties in force provide specific exception to absolute immunity of heads of states in respect of criminal proceedings before national judicial authorities. Further the judgment of the Chamber d'Accusation emphasized that "a state can not be bound by custom unless it has accepted it."[85] This line of reasoning is not entirely correct, unless of course the court was perhaps trying to semantically explore the persistent objector rule, which tells us *inter alia*, that a state may not be bound by custom if it openly maintains its objection throughout the formative period of the (rule) custom, or in the words of Brownlie, "a state may contract out of a custom in the process of formation"[86] but a state cannot prevent the formation of a custom by withholding its consent. It is instructive also to note that a persistent objector can not avoid being bound by a new law that has attained the character of *jus cogens*, even though international law is based on consent. The *Chambre d'Accusation* appeared to have simply misconstrued that the jurisdictional immunity of foreign heads of states remains absolute[87] and France can not relegate to bottom, its obligation under international law to follow it. The Pinochet case is not a good authority. Since the UK, Spain and Chile were parties to the New York Convention of 1984 while incidentally Libya has not yet ratified the Rome Convention, and it is not clear whether Libya is a party to the NY Convention (1984). The Noriega Case is not helpful because he was not a head of state and the unlawful use of force which brought him under the custody of US officials violated Article 2(4), which according to the charter system, is the corollary to the right to sovereignty, political independence and territorial integrity.[88]

Again, in 2000, several citizens of Zimbabwe filed a civil action against President Robert Mugabe and the Foreign Minister Stan Mudenge, under the "Torture Victim Protection Act,[89] seeking $68.5 million in compensatory and punitive damages." The plaintiffs alleged in their suit that under the orders of Mr. Robert Mugabe, they were subjected to torture and other acts contrary to international law and that they were also representing their deceased relatives who were murdered by the Mugabe government. The service of process was served when President Mugabe and Mr. Mudenge were attending a meeting at the United Nations. On Feb. 23, 2001, the US government, following its long standing practice of filing a "suggestion", sent in a "Suggestion of Immunity" to the district court stating in part that:

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[84] 125 ILR p. 494.

[85] 125 ILR p. 496.

[86] See I. Brownlie, "Principles", op. cit. p. 11.

[87] 125 ILR p. 495; Convention on Special Missions (1969) Article 29 and Article 31; See Sir Arthur Watts, op. cit. pp. 104–110.

[88] See Oppenheim's International Law – Jennings and Watts (eds) (1991) pp. 425–438: I. Brownlie, International Law and the Use of Force by States (1963).

[89] Tachiona v. Mugabe, OO Civ. 6666 vm (SDNY): 95 AJIL p. 874.

"Under customary rules of international law recognized and applied in the United States, and pursuant to the Suggestion of Immunity, President Mugabe, as the head of a foreign state, is immune from the court's jurisdiction in this case." See, e.g., First American Corp. v. Sheikh Zayed Bin Sultan Al-Nahyan, 948 F.Supp. 1107, 1119 (D.D.C. 1996); Alicog v. Kingdom of Saudi Arabia, 860 F.Supp. 379,382 (S.D. Tex. 1994), aff'd, 79 F.3d 1145 (5thCir. 1996); Lafontant v. Aristide, 844 F.Supp. 128, 132 (E.D.N.Y. 1994). In addition, Foreign Minister Mudenge also is immune from the Court's jurisdiction in this case. See The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 138 (1810) (Marshall, C.J.) (recognizing that, under customary international law, "the immunity which all civilized nations allow to foreign ministers" is coextensive with the immunity of the sovereign); Kim v Kim Yong Shik, Civ. No. 12565 (Cir. Ct., 1st Cir., Hawaii 1963), cited at 58 Am. J. Int'l L. 186 (1964) (recognizing immunity of foreign minister)..."[90]

The State Department in this instance, was trying as a matter of policy to follow the prevailing customary international law respecting the immunity of heads of states. Thus on the strength of the Executive Branch's forceful suggestion of immunity on behalf of President Mugabe and his Foreign Minister Mudenge, the suit was dismissed, for customary international law requires that immunity be granted in such cases. Which means the court must surrender jurisdiction since it is duty-bound to do so. The call therefore in such cases as, Siderman de Blake v. Republic of Argentina,[91] Argentine Republic v. Armerada Hess Shipping Corporation,[92] Saudia Arabia v. Nelson,[93] Princz v Federal Republic of Germany,[94] that immunity be denied to foreign governments for human rights violation, has at least fallen on deaf ears and in all these cases, the plea for immunity has been successful.

9.4.4 A Brief Study of Jus Cogens and the Obligations Erga Omnes

In the light of the preceding analysis, it is expedient to explore in outline the general character of *jus cogens* and *obligation erga omnes*, so as to throw light on certain salient issues that a judge might be called upon to consider if faced with suits against heads of states or states in criminal proceedings. Let us deal first with *jus cogens* and then consider *obligation erga omnes* briefly anon.

The concept of *jus cogens* can be traced to the writings of natural law scholars.[95] In the heyday of the naturalist, it was equated to morality. The naturalists

[90] AJIL 95, p. 874.

[91] 965F 2d 699 (9th Cir. 1992).

[92] 488 US 428 (1989).

[93] 100 ILR 544.

[94] 26F 3d 1166 (DC cir. 1994).

[95] See Akehurst's, Modern Introduction to International Law 7th edition (1997) pp. 15–17, 57–60; For a comprehensive exposition of the subject, see also the following: J.A. Frowein, *Jus Cogens,* (1984) EPIL 7; L. Hannikainen, Peremptory Norms (*jus cogens*) in International Law: Historical Development, Criteria, Present Status (1988); J. Kasto, *Jus Cogens* and Humanitarian Law (1994); E. Suy, The Concept of *Jus Cogens* In International Law (1967); H. Kelsen, Principles of International Law (1967); A. Verdross, "*Jus Dispositivum* and *Jus Cogens* in International Law. (1966) LX AJIL, 55–63; Tunkin, "*Jus Cogens* in Contemporary International Law" (1971) 3 Univ. of Toledo

were of the opinion that any treaty which runs counter or contrary to a moral code or principle be declared void. The rule persisted for a while but was later sidelined.[96]

The concept of *jus cogens* was revived after the second world war[97] and has now been clearly cast under Article 53 of the Vienna Convention on the Law of Treaties. It reads as follows:

"A treaty is void if, at the time of its conclusions, it conflicts with a peremptory norm of general international law. For the purposes of the present convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[98]

The drafters of the treaty thought it wise to insert an addendum under Article 64, in order to adequately give clear meaning to the emergence of a new peremptory norm thus:

"If a new peremptory norm of general International Law emerges, any existing treaty which is inconsistent with that norm becomes void and terminated."[99]

Jus cogens is a rule of law which sets a well grounded novel feature or standard "from which no derogation is permitted," thus in a sense any treaty which conflicts or runs contrary to this norm is void *ab initio*. *Jus cogens* may be regarded as an international public policy and code of ethics,[100] and Article 53, is a guiding light or formular which must be applied to determine the true nature of *jus cogens* norms. *Jus cogens* is a higher customary law, and although somewhat controversial has been accepted on the international plane as a norm of superior value.[101] Examples of the content of peremptory norms of international law are unlawful use of force, contrary to the spirit of the UN Charter, genocide, serious criminal acts under international law, slave trade, piracy, violating human rights, racial discrimination, crimes against humanity and treaties violating self-determination and laws of war.[102] Further, examples of the content of *jus cogens*, however carry less weight than the true category of the norm. The application of the *jus cogens* norm

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Law Rev. 107–118; Oppenheim, op. cit. pp. 7–13. Schwarzenberger criticized the concept of *Jus Cogens,* see his Manual of International Law 5th ed. (1967) pp. 23–30; Schwarzenberger, International *Jus Cogens,* (1965) XLIII Texas Law Review pp. 445–478; I. Brownlie, op. cit. pp. 485–492.

[96] Akehurst, op. cit. p.57.

[97] Ibid. at 57, The USSR was the leading proponent of the concept: see the works of Sir Gerald Fitzmaurice, (1955–1960) and that of Sir Humphrey Waldock who took over from Fitzmaurice.

[98] See Article 53 of the Law of Treaties (1969).

[99] See Article 64 of the Law of Treaties (1969).

[100] T.O. Elias, New Horizons in International Law (1979) pp. 47–51; T.O. Elias, Africa and the Development of International Law (1988) p. 85; see also his book on treatise: T.O. Elias, The Modern Law of Treaties (1974).

[101] See I. Brownlie, "Principles", op. cit. pp. 488–490, 492–493.

[102] J. Werksman and R. Khalastchi – Nuclear Weapons and *Jus Cogens*, Peremptory Norms and Justice Pre-empted in L. Boisson de Chazournes and P. Sands (eds), International Law, The ICJ and Nuclear Weapons (1999).

has therefore remained problematic, in so far as there is no super legislature where laws with an imperative character can be enacted. Thus, *jus cogens* is primarily derived from custom and treaty law and inextricably connected to *obligation erga omnes*.[103]

The growing acceptance of the concept of *jus cogens* can be detected in a number of judgments of the ICJ. [104] In the Barcelona Traction Light and Power Company Limited case, although the court ruled that Belgium lacked *locus standi* to pursue the claim, offered an *orbiter dictum*, which has become a *cuase célèbre*. And it reads as follows:

"by their very nature, the former are the concern of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligation *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."[105]

The judgment as may be recalled specifically also referred to the preamble to the UN Charter as containing the concept of *jus cogens*.[106] The dictum clarifies one important point, and that is, *obligation erga omnes* basically requires that the violation of a "higher law" must not be considered as an offense only against the affected state but also against the "world" or every member of the international community.[107] Hugo Grotius, indeed discussed the concept of *obligation erga omnes* in his book "DeJure Belliac Pacis" in 1625, but the concept gained recognition in the 19th century, through the writings of European publicists.

The concept of *erga omnes* means towards everybody. In other words, any crime which attracts *obligation erga omnes* has no territorial restriction.[108] In a sense, any crime which shocks the conscience of the human race, violates *jus cogens* and therefore *exhypothesi* attracts *obligation erga omnes*. In the genocide case of Bosnia and Herzegovina v. Yugoslavia,[109]e.g. the court explained that

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[103] Akehurst op. cit. p. 58.

[104] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide – Advisory Opinion ICJ Reports (1951) p. 15; Barcelona Traction, Light and Power Company Ltd. (Belgium v. Spain) ICJ Reports, (1970) p. 3; Legal Consequences for States of the Continued Presence of South Africa in Namibia (Southwest Africa) Not Withstanding Security Council Resolution 276 (1970) Advisory Opinion, ICJ Reports 1971 pp. 16, 72; Portugal v. Australia ICJ Reports 1995; Nicaragua v. United States (Merits) ICJ Reports 1986 p. 100.

[105] Belgium v. Spain, ICJ Reports 1970 p.3, p. 32.

[106] See the Separate Opinion of Judge Ammoun, p. 304.

[107] The Genocide case (Bosnia and Herzegovina v. Yugoslavia) ICJ Reports (1996) 615–16; Trial Chamber of the ICTY in Furundzija, explored the concept of *erga omnes* 121 ILR 260–2 (Judgment of 10th December (1998): A.J.J. de Hoogh – The Relationship between *Jus Cogens,* Obligation *Erga Omnes* and International Crimes: Peremptory Norms In Perspective, (1991) AJPIL 42.

[108] See I. Brownlie, op. cit. p. 568.

[109] ICJ Reports (1966) 615–616.

rights and obligations which have attained the status of *obligation erga omnes*, may give rise to universal jurisdiction.[110]

In the Pinochet case already discussed, the presiding judge Lord Browne–Wilkinson, argued with force, that the justification for universal jurisdiction can be derived from or predicated on a clear showing that the international crime of torture has attained the status of *jus cogens*.[111] The trial chamber of the ICTY, in Furundzija, having followed almost similar jurisprudential reasoning adopted the view that the prohibition of torture in a treaty text consequently acquired the character of *jus cogens* and *obligations erga omnes*.[112] These important issues have been equally explored in such cases as legal consequences for states of the continued presence of South Africa in Namibia (South West Africa) 1970, Advisory Opinion;[113] the case concerning East Timor (Portugal v. Australia,[114] the judgment in the Nicaragua case[115] and the Advisory Opinion in the genocide case.[116]

A further issue which ought to be explored is what formula is to be employed in determining the character of *jus cogens* which must attract *obligations erga omnes*.

9.5 UK and Ireland before the European Court of Human Rights

In 2001, the Grand Chamber of the European Court of Human Rights, having carefully considered the issues involved in Al–Adsani v. United Kingdom,[117] Forgarty v. United Kingdom,[118] and McElhinney v. Ireland and the United Kingdom,[119] held that the application of the doctrine of absolute immunity did not violate the rights of the petitioners to sue foreign governments under the European Convention of Human Rights. In other words, Article 6, was applicable notwithstanding the force of the doctrine of state immunity.

McElhinney v. Ireland and the United Kingdom arose out of an earlier suit brought before the Irish courts[120] against the UK Ministry of Defence, where the plea for immunity was upheld. Mr. McElhinney, became disappointed with the

[110] Cowles, (1945) 33 Cal L Rev. pp. 177–218; but see generally A.J.J. de Hoogh – *Obligations Erga Omnes* and International Crimes: A Theoretical Inquiry Into The Implementation and Enforcement of International Responsibility of States (1996); I. Brownlie, op. cit. pp. 303–305.
[111] (1999) 2 WLR 827, 841.
[112] 121 ILR 260–262.
[113] Advisory Opinion, ICJ Reports, 1971 pp. 16, 72.
[114] ICJ Reports 1995, para. 29.
[115] ICJ Reports 1896 p. 100.
[116] Advisory Opinion, ICJ Reports 19751 p. 15.
[117] App. No. 35763/97 (Eur. Ct. HR. Nov. 21, 2001).
[118] App. No. 37112/97 (Eur. Ct. HR. Nov. 21, 2001).
[119] App. No. 31252/96 (Eur. Ct. HR. Nov. 21, 2001).
[120] 3 (1995) I.R. 382.

judgment of the Irish Supreme Court and therefore impleaded both Ireland and the United Kingdom for alleged violations of his Article 6 rights.

In Al–Adsani v. United Kingdom, Sulaiman Al–Adsani, who then happened to be a dual citizen of the UK and Kuwait alleged that after the Gulf War, he was taken at a gun point to a prison where he was detained and tortured for several days. He managed somehow to escape and quickly returned to Britain where he filed suit against the government of Kuwait and the individuals who tortured him in 1992, for physical and mental injury which he sustained as a result of the torture. The English High Court found for the Government of Kuwait on the grounds that Mr. Al–Adsani had failed to show "on the balance of probabilities that the Kuwaiti Government was not entitled to immunity."[121] On appeal, the Court of Appeal upheld the decision of the English High Court and a subsequent appeal to the House of Lords was rejected in 1996.

In Fogarty v. United Kingdom, Miss Mary Fogarty, was dismissed from her employment as an administrative assistant to The United States Embassy in 1995. She then impleaded the United States before the Industrial Tribunal in London for sexual discrimination. The Tribunal having taken pains to consider the issues of the case, ordered the United States in 1996 to pay compensation to Miss Fogarty. She sought and was employed while the sex discrimination case was still pending. Unfortunately, she was unsuccessful in applying for further posts. She then brought a second suite alleging unlawful discrimination because of the consequences of her successful sex–discrimination claim. This time, the United States claimed immunity under the SIA of 1978. Counsel to Fogarty, after further consideration of the issues of the case persuaded her to give up her claim. She then impleaded the UK before the European Court of Human Rights for Article 6 infringement.

The court undoubtedly followed a pragmatic approach in examining the issues.[122] In each case, the court analysed the import of Article 6(1) and found Article 6 applicable in all the three cases.[123] The court further ruled *inter alia* that the application of national law rules of state immunity to block access to the court was patently legitimate and that sovereign immunity is a settled principle of international law which was duly derived from the maxim *par inparem non habet imperium*.[124] It also stated that "the grant of sovereign immunity to a state in civil proceedings pursues the legitimate aim of complying with international law to

[121] 103 ILR 420 (Court of Appeal 1994) but see also Michael Byers (1996) 67 Brit Y B Int'l Law 537.

[122] See Magdalini Karagiannakis – State Immunity and Fundamental Human Rights 11 Leiden J. Int. L. 9 (1998).

[123] McElhinney judgment, para. 23; para 24.

[124] Since sovereign states are judicially equal on the international plane, no state can "lord it over" the other or exercise jurisdiction over the other. See Kuhn, (1927) 21 AJIL; Fitzmaurice, (1933) 14 BYIL pp. 101–124; The Schooner Exchange (1812), 7 Cranch 116; Klein, Sovereign Equality Among States (1974).

promote comity and good relations between states through the respect of another state's sovereignty."[125]

9.6 State Immunity and World War Two Damage Claims

The generally accepted practice is that if a state commits a serious infraction which amounts to an international crime, that state incurs international responsibility and therefore must be made to pay reparation.[126] Reparation is a process where by a delinquent state releases itself from an international responsibility.[127] The principles of responsibility and reparation were initially suggested by Grotius and clearly stated by the Permanent Court of International Justice in the Chorzow Factory indemnity case thus...

"The essential principle contained in the actual notion of all illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[128]

The above judgment is a good authority of what some may regard as *restitutio in integrum*, and thus can judiciously be applied to restore the position of an injured person *status quo ante*.[129]

The general principle of reparation was firmly confirmed in the United States diplomatic and consular staff in Tehran case: (United States v. Iran). The court ruled that:

"by committing successive and continuing breaches of the objectives laid upon it by the Vienna Conventions of 1961 and 1963, the 1955 Treaty, and the applicable rules of general international law, has incurred responsibility towards the United States. As a consequence, there is an obligation on the part of the Iranian State to make reparation for the injury caused to the United States."[130]

The fact that international law is horizontal and thus predicated on the maxim *par in parem non habet imperium* reinforces the non–justiciability concept that issues arising out of war damage cannot be canvassed before national courts since there is already a well established diplomatic process in settling such damages. Further, such legal proceedings are always forcefully met with a plea of immunity, since such acts by their very nature *prima facie* qualify as *jure imperii*.

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[125] David Lloyd Jones, Article 6 ECHR and Immunities Arising in Public International Law, (2003) 52 ICLQ 463, 468.

[126] See generally I. Brownlie, System of the Law Of Nations, State Responsibility Part 1 (1983).

[127] The Chorzow Factory (Indemnity Case) PCIJ, Series A. No. 17.4 at 29 (1928). A violation of a general obligation to the international community, requires that a reparation be paid.

[128] PCIJ Series A No. 17 (1928).

[129] These are not damages but in fact, a restoration *in natura*. (Roman law).

[130] ICJ reports para. 90–92. The court as a consequence of the finding said the Iranian State must pay reparation to the United States for the unlawful detention of its nationals.

The vigorous enhancement of human rights law at the regional level and the global awareness of international humanitarian law have however given injured individuals a formidable weapon[131] to implead states for war damages before national courts.

9.6.1 Germany before Greek Courts

In the recent case of Prefecture of Voiotia V. Federal Republic of Germany,[132] the plaintiffs, Greek Nationals, sued Germany for hideous murders, false imprisonment, destruction of property and other despicable crimes, (atrocities), committed by German soldiers when they occupied the Village of Distomo in 1944. The court ruled in favour of the Greek nationals and awarded damages of $30 million, which is equivalent to 9.5 billion drachmas.

The Greek court, in a quest to justify its judgment against the German government, relied on Article 43, Fourth Hague Convention of 1907, respecting the laws and customs of war on land, i.e. regulations covering the conduct of hostilities. The Greek court further stated that the acts of the German occupying force were "in breach of rules of peremptory international law (Article 46 of the Hague IV Convention Regulations), and they were not acts *jure imperii.*"[133] The court then argued that the violation of *jus cogens* norms amounts to tacit waiver of immunity and therefore jurisdiction had properly been procured. This argument was supported by the force of Article 11 of the European convention of State Immunity.

Greek courts however, refused to enforce the judgment and the attempt to enforce it in Germany, met with similar difficulties, since the German government earlier on refused to recognize the judgment in view of the fact that Greek courts lacked jurisdiction over Germany, and that the violation of the law of wars amounts to *acta jure imperii.* The claimants having been unsuccessful in enforcing the said judgment, brought legal proceedings against Greece and Germany for alleged violation of Article 6(I), before ECHR.[134] The court after careful consideration of the controversy rejected the application as inadmissible on the ground that Greece and Germany did not violate Article 6(I).

The Greek court, having resigned itself to following restrictive immunity, i.e. the abstract distinction between *acta jure imperii* and *jure privotourum*, lost the opportunity of offering a convincing reason for exercising jurisdiction over the purported subject of war damage. It also lost the international legitimacy to prescribe and enforce its laws in view of the fact that the doctrine of restrictive immunity lacks *usus,* and arguably, uncertainty appears to persist in the asserted

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[131] See Meron, The Humanization of Humanitarian Law, (2002) 94 AJIL 239. See also J. Pictet, Development and Principles of International Humanitarian Law (1985).

[132] Prefecture of Voiotia v. Federal Republic of Germany: Case No. 1, 11/2000 Areios Hellenic Supreme Court, May 4, 2000.

[133] Ibid. at p. 15.

[134] Kalogeropoulous v. Greece and Germany, ECHR No. 0059021/00, 12 December 2002 (Admissibility Judgment).

reach and application of the said doctrine.[135] Furthermore, it is true that the German occupation forces violated *jus cogens* and the fact that the use of force technically constitutes *jure imperii* does not exonerate Germany from making reparation to the plaintiffs, i.e. the Greek nationals. Hence, Germany, being the delinquent state in this respect, incurs international responsibility.[136] The whole controversy would have been better resolved through diplomatic means or arbitration, so that the injured Greek nationals would have whatever they had lost during World War two, restored to them *status quo ante*.[137] The argument by the court that the government of Germany impliedly waived its right to immunity because of the violation of *jus cogens* is not well founded and therefore may run counter to state practice or *repititio facti* which requires express waiver from the defendant state.[138] These arguments are being made because a default judgment was awarded against the Republic of Germany, and also because of the fact that the court relied on the emerging rule of relative immunity which has a varied meaning in international law. The Greek court as a matter of principle should have taken pains to determine as to whether there is any settled expectation duly created on the part of Germany.[139]

In Joo v. Japan,[140] which was vigorously litigated before US courts, the issue was whether victims of sexual slavery and torture during the Second World War could implead Japan before US Federal Courts and whether FSIA can judiciously be applied retroactively? The court ruled in both cases that the claims did not fall within the confines of the FSIA exceptions and that the so called "comfort station" can not be characterized as a commercial activity. The court, it would appear, took into account current state practice and the prevailing view that restrictive immunity can not be applied in all contexts. The court also relied on the well settled "expectation argument." Thus given, the difficult issues which have been canvassed recently before municipal courts[141] in regard to war damages, it would be expedient to explore the particulars of *jus cogens* and its relations to state immu-

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[135] Singer, "Abandoning Restrictive Immunity: An Analysis in Terms of Jurisdiction to Prescribe." (1985) 26 Harvard LJ; Sornarajah, Problems in Applying the Restrictive Theory of Sovereign Immunity, (1982) 31 ICLQ 661.

[136] Opinion in the Lusitania Cases (1923) 7RIAA 35, 35–36; C. Gray, Judicial Remedies in International Law (1987), pp. 10–11.

[137] Barcelona Traction Light and Power Comp. Ltd. (Belgium v. Spain), 1970 ICJ, p. 3.

[138] I. Brownlie, op. cit. pp. 335–336. See generally Fox, State immunity op. cit. pp. 262–271; Crawford, (1981) 75, AJIL 860–861; Cohn, Waiver of Immunity (1958) 34 BYIL 260.

[139] J. Bröhmer, op. cit. pp. 76–82; Uniform Federal Compensation Law of Oct. (1953).

[140] 332 F 3d 679 (DC cir. 2003). The same issues were first litigated in (2001) 172 F supp. 2d 52 (DDC 2001).

[141] See J. Bröhmer, op. cit. pp. 76–82; M. Karagiannakis, 11 Leiden Journal of Int. Law (1998); See also Zimmerman, Sovereign Immunity and Violation of International *Jus Cogens*, Some critical remarks, (1995) 16 Mich J of Int. Law; Joo v. Japan 332 F 3d 679 (DC cir. 2003), Sampson v. Federal Republic of Germany 250 F 3d 1145 (7th cir. 2001); Princz v. Federal Republic of Germany 26 F 3d 1166 9th 1174 (DC cir. 1994).

nity and the concept of *non–justiciability*, so as to clear the way for a better understanding of the law.

9.7 Some Salient Legal Issues before the ICJ

9.7.1 The Legality of Use of Force before the ICJ

The unconscionable atrocities committed in the war in Yugoslavia (now "Serbia and Montenegro"), prompted the Security Council to pass two important resolutions on Kosovo, so as to put the world on notice that there was a humanitarian catastrophe that clearly threatened international peace and security, and that immediate measures must be taken to bring the crisis under control.[142] At that crucial time, the Security Council should have taken steps to authorize collective measures, but unfortunately it failed.[143] Thus, when it became certain that Russia would veto any proposed resolution to use force against Yugoslavia, NATO quickly took a military action without Security Council authorization, arguing *inter alia* that it used force because of humanitarian necessity.

The bombing campaign went on for seventy eight days in response to ethnic cleansing, murder and other egregious crimes which were committed by the Yugoslavia Secret Police. In the middle of the air campaign, Yugoslavia brought an action against the ten NATO member states before the ICJ for illegal use of force under the charter system.

The ten cases[144] were filed on 29 April 1999, and in its memorial, Yugoslavia sought a declaratory judgment in respect of acts allegedly committed by the ten states. Yugoslavia further argued that by taking part in the bombings each state:

"has violated its international obligation banning the use of force against another state, the obligation not to intervene in the internal affairs of another state, the obligation not to violate the sovereignty of another state, the obligation to protect the civilian population and certain objects in war time, the obligation to protect the environment, the obligation relating to free navigation on international rivers, the obligation regarding fundamental human rights and freedoms, the obligation not to use prohibited weapons, the obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a natural group."[145]

Yugoslavia also applied for provisional measures under Article 41 of the statute of ICJ, which was followed by a direct demand that "if the proposed measures

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[142] Resolutions 1199 (1998) and 1203 (1998). The Security Council was thus trying to show cause that this was a threat to international peace and security in respect of Chapter VII of the Charter.

[143] The UN failed because some members of the Security Council were against the use of force: Russia, a permanent member opposed the idea of using force against Yugoslavia.

[144] I.C.J. report (1999), Yugoslavia brought proceedings against Belgium, Canada, France, Germany, Italy, Netherlands, Portugal, Spain, United Kingdom and the United States.

[145] ICJ Reports (1999) para. 1.

were not to be adopted, there will be new losses of human life, further physical and mental harm inflicted on the population of the FR of Yugoslavia."[146] The court was also asked to indicate that each state "shall cease immediately the acts of use of force and shall refrain from any act of threat or use of force against the Federal Republic of Yugoslavia."[147]

These charges *prima facie* were serious, but the ten states were able to neutralize the force of the above stated charges by offering in their defence adequate reasons as to why a military action was taken in disregard to absolute prohibition of the use of force under Article 2(4). The ICJ however did not specifically address the issue of use of force but was candid in expressing its concern with respect to the crisis thus:

"Whereas the court is deeply concerned with the human tragedy, the loss of life, and the enormous suffering in Kosovo which form the background of the present dispute, and with the continuing loss of life and human suffering in all parts of Yugoslavia: whereas the court profoundly concern with the use of force in Yugoslavia, whereas under the present circumstances such use raises very serious issues of international law; whereas the court is mindful of the purposes and principles of the United Nations Charter and of its own responsibilities in the maintenance of peace and security under the charter and the statute of the court."[148]

Having made the above pronouncements, the court went on to consider issues respecting *prima facie* jurisdiction, jurisdiction under the Genocide Convention, and jurisdiction under the Optional Clause, i.e. the validity of the declaration of Yugoslavia with specific analysis of the application of Yugoslavia's declaration. The court was eclectic and therefore did not condemn Yugoslavia on the issue of manipulating the process. But nevertheless, denied the request for provisional measures on the ground of lack of *prima facie* jurisdiction.[149] As regards the argument respecting the Genocide Convention, the ICJ ruled that as a matter of law and fact, it did not provide the required *prima facie* jurisdiction over the subject matter which according to Yugoslavia's memorial, must be derived from the import and effect of the Genocide Convention. The court also explored the issues respecting the optional clause and concluded that Yugoslavia's reservation *ratione temporis* did not promote its interest but rather prevented the court from exercising a *prima facie* jurisdiction, since the reservation deprived the court of that power. The court finally 'removed from the list the cases against Spain and the United States of America'.

The use of force is specifically prohibited by the UN Charter. Article 2(4) in this respect undoubted has attained the character of *jus cogens*, i.e. peremptory norms of international law.[150] And the prohibition of the use of force over the

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[146] ICJ Reports (1999) para. 7.

[147] ICJ Reports (1999) para. 7.

[148] ICJ Reports (1999) paras. 15 to 17.

[149] Yugoslavia's request for provisional measured was turned down in all the ten cases, because the court was not sure the case could proceed to the merits. In fact, Yugoslavia's arguments were not well grounded. Certainly it came before the court with unclean hands.

[150] See Oppenheim, op. cit. pp. 428–430.

years has been embodied in a considerable number of treaties.[151] Although Yugoslavia's argument on the above subject is fertile,[152] the application of Article 2(4), however, must carefully be balanced against the venerable argument that certain human rights laws have also attained the status of *jus cogens*. But the crucial question that one ought to ask is whether human rights laws which have attained the character of *jus cogens* supersede the force of Article 2(4)?; and therefore states are at liberty to use force, where there is evidence of humanitarian necessity. Certainly, there is no state practice to support the said argument[153] since it would appear humanitarian intervention lacks *usus* and therefore not truly compatible with the spirit of the charter.[154] The only legitimate means of using force under the charter system is through a *de jure* authorization from the Security Council and the right of collective self-defence under Article 51. It would have been proper if the ICJ had gone a little further to examine such controversial issues as the "alleged right of forcible intervention to protect nationals,[155] and "hegemonial intervention on the basis of regional arrangements in the absence of explicit security council authorization."[156] It is instructive to note that an international norm, whether it be restrictive or operational can positively serve as a catalytic force in promoting cooperation among sovereign states. The *finis ultimus*, i.e. the ultimate aim of Article 2(4) is to guarantee at least *summum bonum*, i.e. the greatest good in the inter state system, hence it is incumbent on all states to always respect Article 2(4) without fail. There is therefore the urgent need to reform the security council so that it would be decisive in resolving these problems.

On 15th of December 2004, the ICJ finally gave a judgment on the case concerning the legality of use of force (Serbia and Montenegro v. Germany, Belgium, Canada, France, Italy, Uk, Portugal, and the Netherlands). Preliminary objection:

As was traditionally expected, the President of the court held a meeting with the representatives of the litigating parties on the 12th of December 2003. This was followed by public sittings between the 19th April to the 23rd of April, 2004 on all the eight cases covering the legality of use of force. The parties were then allowed

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[151] Military and Paramilitary Activities Case, ICJ Reports (1986) 106–7. Art. 8 of the Montevideo Convention on Rights and Duties of States 1933 (LNTS, 165, p. 19); Art 15 of the Charter of Organization of American States 1948 (UNTS, 119 p. 49); The Charter of the OAU, Art. 3 (1963); G.A. Res, 3281 (xxix) 1974; Art 8 of the Charter of the Arab League of Arab States 1945 (UNTS, 70 p. 327); but see generally, C. Gray, International Law and the Use of Force (2000).

[152] See ICJ Reports (1999) (paras. 4–8), Yugoslavia v. United States of America.

[153] See I. Brownlie and C. Apperley, Kosovo Crisis Inquiry, Memorandum on the International Law Aspects (2000) 49 ICLQ 878 pp. 886–894.

[154] Ibid., see also Brownlie, op. cit. pp. 699–700; Bruno Simma, EJIL 10 (1999).

[155] I. Brownlie, op. cit. p. 707; ICJ Summary of Judgment (Judgment of 15 December 2004) (paras. 1–22), (paras. 43–89).

[156] See I. Brownlie, "Principles", op. cit. p. 707; For a clear exposition of the subject see also I. Brownlie – International Law and the use of force by States (1963); For an alternative version on humanitarian intervention – see C. Greenwood (2000) 49 ICLQ 926 pp. 929–934. The attack on Iraq in 2003 by the US and the coalition of willing was illegal. It was a blatant violation of Article 2(4) of the UN Charter, in view of the fact that weapons of mass destruction were not found in Iraq.

to make a final submission on 22nd April 2004. The final submission of Germany may be stated thus:

"Germany requests the court to dismiss the application for lack of jurisdiction and, additionally, as being inadmissible on the grounds it has stated in its preliminary objections and during the oral pleadings."[157]

On 23rd of April 2004, a final submission was made on behalf of Serbia and Montenegro, and it reads as follows:

"For the reasons given in its pleadings and in particular in its written observations, subsequent correspondence with the court, and at the oral hearing, Serbia and Montenegro requests the court:

~ to adjudge and declare on its jurisdiction *ratione personae* in the present cases; and

~ to dismiss the remaining preliminary objections of the respondent states, and to order proceedings on the merits if it finds it has jurisdiction *ratione personae*."[158]

The final submission of Germany appears to converge rather than diverge from the final submission of the other seven states, since all these submissions were based upon lack of jurisdiction and inadmissibility of claims. The ICJ having examined all the issues presented therein, rule *inter alia* that

"The court finds that from the vantage point from which it now looks at the legal situation, and in light of the legal consequences of the new development since 1 November 2000, it is led to the conclusion that Serbia and Montenegro was not a member of the United Nations, and in that capacity a state party to the statue of the International court of justice, at the time of filing its application."[159]

The ICJ further observed that

"For all these reasons the court concludes that at the time when the present proceedings were instituted, the applicant in the present case, Serbia and Montenegro, was not a member of the United Nations and consequently, was not, on the basis, a state party to the statute of the international court of justice. The applicant not having become a party to the statute on any other basis, it follows that the court was not then open to it under Article 35, paragraph 1 of the Statute."[160]

The issue relating to the Genocide Convention was semantically considered, but again, the court concluded that the Genocide Convention did not provide jurisdiction *ratione personae* and *ratione material*, and therefore consequently, Article 35 paragraph 2, of the Statute of the court could not possibly grant Serbia and Montenegro, access to litigate before the ICJ.[161]

Many scholars and leading commentators will no doubt be disappointed on reading the judgment since the grounds or reasons offered in support of the judgment were *non sequitur* or *obscurum per obscurius* i.e. (an explanation that is more obscure than what it is trying to explain). Granted this, then it is crucial to determine whether the Federal Republic of Yugoslavia was a member of the UN when the case was filed? Further, can it be said that the court's interpretation of Article 35, paragraph 2 was logical and well reasoned? Or could it be regarded as

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[157] Judgment of 15 Dec. (2004) ICJ Rep. Summary of Judgment, (para. 17).

[158] Judgment of 15 Dec. (2004) ICJ Rep. Summary of Judgment (paras. 20–22).

[159] Judgment of 15 Dec. (2004) ICJ Rep. Summary of Judgment (para. 58).

[160] Judgment of 15 Dec. (2004) ICJ Rep. Summary of Judgment (para. 60).

[161] "Article 35, paragraph 2 of Statue of the Court relates only to treatise in force when the statute of the court entered into force, i.e. on October 1945."

too restrictive? Can the issue of state succession be brought into the fore in the analysis of the case? Is it possible to argue that the Genocide Convention was derived from a pre–existing customary law? And is it apposite to argue that some of the provisions in the Genocide Convention have attained the character of *jus cogens* and therefore a logical basis for jurisdiction or the expression "treaty in force" should be construed to mean any treaty in regard to peace settlement after World War II, and finally whether the court did have both jurisdiction *ratione personae* and *ratione materiae*? These are important questions which can not be ignored if the said judgment is to be totally embraced without any lingering doubt.

Succession may be defined as "the replacement of one state by another in the responsibility for the international relations of a territory." State practice, in respect of state succession is however at best equivocal in respect to succession to treaties and almost all leading scholars who have done some research on the subject did not speak with one voice.[162]

History shows that, in spite of war time difficulties, Field Marshall Tito, was able to hold the Socialist Federal Republic of Yugoslavia together until his death. His death left a vacuum and instability which consequently led to civil strife and dismemberment of Yugoslavia. Indeed, the partial disintegration of SFRY consequently led to the break away of Slovenia, Croatia and Bosnia–Herzgovina. Thus on 27th April 1992, Serbia and Monenegro, having carefully reconsidered their position, made a formal claim of continuing solely as the former socialist Federal Republic of Yugoslavia, but the security council denied the request.[163] Member states of the European union also found the request unacceptable.[164] Serbia and Montenegro were therefore asked to make a formal application so as to be readmitted into the United Nations.[165] This however, did not affect its rights and duties, as a party to the statute of the ICJ. It may be asked as to whether between 1991 and 2000, Yugoslavia – i.e. (Serbia and Montenegro) was a member of the UN? The answer is in the positive, although the UN prevented Yugoslavia from exercising its rights as a member of the organization.[166] Yugoslavia remained a member of the UN, in so far as it did not denounce the treaty, and it would seem its legal position was arguably compatible with the principle and object of the treaty. Hence it was unclear when the ICJ concluded that it was not a member of the UN. At least it is logical to postulate that the FRY was a *sui generis* member of the UN, until it reapplied as a new member.[167] Article 35 paragraph 1 therefore

[162] I. Brownlie, op. cit. p. 622; Stark's International Law 11th ed by I.A. Shearer, (1994) pp. 291–306; O'Connell, State Succession in Municipal Law and international Law (2 vols, 1967); R. Mullerson, The Continuity and Succession of States by Reference to the Former USSR and Yugoslavia (1993) 42 ICLQ 473; Oppenheim's Int. Law, op. cit. pp. 211–217.

[163] See UN Doc. S/Res. 757. 30 May 1992; UN Doc./Res 777 (1992).

[164] See 92 ILR 203. i.e. Opinion 9, Conference on Yugoslavia, Arbitration Commission.

[165] See Akehurst, 7th (ed) by Peter Malanczuk, op. cit. p. 167; See also I. Brownlie, op. cit. pp. 639–640.

[166] See I. Brownlie, op. cit. p. 640; see also UN Doc. S/Res 757. 30 May 1992.

[167] Thus, until these resolutions were passed, Yugoslavia remained a member of the United Nations but can not be regarded as constituting SFRY because the "whole of the

would probably not affect Yugoslavia's rights and duties; and moreover, Yugoslavia was never expelled from the UN.

As regards Article 35 paragraph 2, it would appear that the court followed a restrictive approach which was not helpful, at least in respect to "treatise in force at the time the statute of the court entered into force." However, the thoughtful argument put forth by Judge Elaraby that a flexible approach be followed was in order and it reads as follows:

"even if the court's reading of "treatise in force" were adopted as a general rule, there should be an exception for treaties intended to remedy violation of *jus cogens*. These he wrote should be subject to a broader interpretation so that any state seeking access to the court on the basis of a treaty that addresses a *jus cogens* violation, could do so as long as the treaty were in force when the application was filed."[168]

The above argument, albeit is persuasive and adequate, since there was a clear indication per his argument, of allowing a broader interpretation of any treaty that addresses the violation of *jus cogens* so as to give deference to the right of any state seeking to gain access to the ICJ. In a sense, if the provisions of the Genocide Convention were derived from customary international law *de lege lata*, then even non–parties to the Genocide Convention would be bound by it. Logically, therefore a signatory to the treaty should be able to seek access to the court in so far as the treaty in question was still in force when the case was filed. Certainly this is a forward looking and desirable approach.

It is arguable also to observe that since FRY in principle succeeded to the treaty obligation of SFRY, the court can not simply rule that it did not have jurisdiction *ratione personae*, under Article IX of the Genocide Convention without any credible legal reasons, for there was no verifiable evidence to support the court's position as to whether FRY had in fact denounced the treaty in question. Again, the court did not clearly delve into what happens to a treaty if there is partial or universal succession,[169] nor what happens if a state succeeds in part or solely to the legal personality of another territory or possibly if there happens to be a dissolution of a state into three or four states or the merger of different states into one. And as one may recall, the issues of pragmatic continuity[170] or the clean state rule,[171] were simply not examined. Further, since FRY did not have any intentions of giving up its rights, duties and obligations under the treaty, one would argue that it remained a party to the convention, in the light of the fact that, the survival of such treaties depended on a number of factors, which ought to be carefully ex-

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territory of state A forms the basis of several new states, state A, becoming extinguished, and the law is not clear whether it could possibly succeed to treaty rights and obligations": Starke's Int. Law, op. cit. note 162, pp. 294–279; Oppenheim op. cit. pp. 211–215.

[168] ICJ Judgment of 15 December (2004) p. 11 of 12 (Summary of Judgment), per Judge Elaraby. Separate opinion.

[169] Starkes, International Law, op. cit. pp 292–294; Dugard, International Law, op. cit. p. 342; D.P. O'Connell, State Succession in Municipal Law and International Law 2 vols. (1967); Oppenheim, op. cit. pp. 219–222; I. Brownlie, op. cit. pp. 632–633, 621.

[170] Dugard, op. cit. p. 342; see generally O'Connell, op. cit. note 169.

[171] Dugard, op. cit. p. 342; (1978) 71 AJIL 971.

amined,[172] with specific reference to Article 34 of the Vienna Convention on the Succession of States to Treaties.

A further analysis of the issues, however, shows that the court (ICJ) did not have jurisdiction *ratione materiae* and therefore based upon established jurisprudence, it can not proceed to the merits of the case.

On the whole, the judgment would be well received, but the legal reasons on which the court based its judgment were fraught with inconsistencies. Understandably, it was difficult to characterise accurately all the issues and events which led to the controversy.

9.7.2 Congo v. the Kingdom of Belgium

9.7.3 The Immunity of a Foreign Minister in International Law

(The Arrest Warrant of 11 April 2000) Democratic Republic of Congo v. Belgium (Preliminary Objections and Merits)[173]

Many human rights advocates will undoubted be taken aback or probably shocked by the arrest warrant judgment of the ICJ on 14th Feb. 2002, which was wholly derived from the force of customary international law.[174] That the court was influenced by *vox populi* is yet to be fully assessed.

Now, let us consider the facts of the case, *in limine*. On 11 April 2000, the magistrate of the Brussels Tribunal de Premiere instance, having been convinced that serious international law crimes have been committed, issued an international arrest warrant against Mr. Abdulaye Yerodia Ndonbasi, *in absentia*, for the incitement of racial intolerance (hatred), which in part caused serious instability, leading to the senseless massacre of Tusti's. The warrant *inter alia*, contained charges of "grave breeches of the Geneva Convention of 1949 and of the Addition Protocols thereto, and with crimes against humanity." According to the court, the warrant was "circulated internationally through *Interpol*. And the charges preferred against Mr. Yerodia were punishable under the Belgian Law of 1993, which was thereafter amended on the 10th of Feb. 1999.[175]

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[172] I. Brownlie, "Principles", op. cit. pp. 633–636; Oppenheim, op. cit. pp. 215–223 state practice on these issues is scanty and problematic.

[173] Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), ICJ, Feb 14, 2002.

[174] Ibid. para 52: Customary International Law may be defined as *usus* or *repetitio facti*, duly aided by *opinio juris sive necessitatis*. Thus "the views of the generality of states, *opinio generalis juris generalis* is sufficient" to prove the existence of a custom, one can also talk about Instant Custom, but it is not relevant in analyzing the above case.

[175] The Belgian law is an example of exercising Universal Jurisdiction over "the crime of genocide and grave breaches of humanitarian law" (10 Feb 1999), Art 1(1) and 7 (38 ILM 918 1999). See the judgment of the ICJ and its analysis of the said law. According to the Princeton Principle on Universal Jurisdiction "Universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime

It is important to note that at the time that the alleged egregious crimes were committed, Mr. Yerodia, was a *chef de cabinet* in President Kabila's newly formed government. But subsequently became a foreign minister of the DRC when the arrest warrant was issued by the investigating judge of Brussels. No one could tell with exactitude whether there was a cabinet reshuffle or not, because after the DRC filed its application on 17 October 2000, Mr. Yerodia was transferred from the post of Foreign Minister to the post of Minister of Education. When the cabinet reshuffle and the change in the ministerial position of Mr. Yerodia became known to the court, the provisional measures being sought by the DRC were refused on a note of technicality.[176]

In its application to the court, Congo claimed that

1. "The universal jurisdiction the Belgian state attributes to itself under Article 7 of the law in question" constitutes a "violation of the principle that a state may not exercise its authority on the territory of another state and of the principle of sovereign equality among all members of the United Nations."
2. That "the non–recognition, on the basis of Article 5 of the Belgian Law of the immunity of a Minister for Foreign Affairs in office constituted a "violation of the diplomatic immunity of the Minister for Foreign Affairs of a Foreign state."

In its final submission, Congo, however relied only on its second argument,[177] which was based upon 'the absolute inviolability and immunity from criminal process of incumbent foreign ministers.' Belgium in its objections, put forth four reasons as follows: (1) that there is no longer a legal dispute between the parties; (2) that the case is without object and therefore the 'court must decline to proceed to the judgment on the merits'; (3) that the case is now materially different and hence the court lacks jurisdiction and therefore the application is inadmissible; (4) that the case has now become one of diplomatic protection and therefore Mr. Yerodia Ndombasi 'failed to exhaust local remedies'. These objections were followed by a subsidiary argument respecting the concept of *non ultra petita* rule.

The court rejected the four objections, including the subsidiary argument and further decided by 13 votes to 3 – that Belgium failed to respect the well settled customary law of immunity from criminal jurisdiction and inviolability which every foreign minister enjoyed under international law.[178] The court, thus for the first time, took pains to analyse and clarify the nature and scope of immunity from criminal jurisdiction and the inviolability enjoyed by an incumbent Minister of Foreign Affairs. Part of the judgment on the merits reads thus:

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was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising jurisdiction." Principle 1.

[176] Arrest warrant of 11 April 200 (Democratic Republic of Congo v. Belgium – Provisional Measures, order Dec 8, 2000, ICJ Rep. (2000) p. 182.

[177] ICJ Reports (2002) (paras. 13–21).

[178] Ibid. at para. 53, see also paras. 51–61 for the specific argument in respect to criminal jurisdiction and inviolability, i.e. freedom to travel the world without any restraint of arrest: paras. 53–54 also talks about the fact that efficient performance of the Foreign Minister's work would be hindered by his arrest and possible trial in a third state.

"In customary international law, the immunities accorded to ministers for foreign affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective states. In order to determine the extent of these immunities, the court must therefore first consider the nature of the functions exercised by a Minister for Foreign Affairs. He or she is in charge of his or her Government's diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings. Ambassadors and other diplomatic agents carryout their duties under his or her authority. His or her acts may bind the State represented, and there is a presumption that a Minister for Foreign Affairs, simply by virtue of that office, has full powers to act on behalf of the State (see, for example, Article 7, paragraph 2 (a), of the 1969 Vienna Convention on the Law of Treaties). In the performance of these functions, he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise. He or she must also be in constant communication with the Government, and with its diplomatic missions around the world, and be capable at any time of communicating with representatives of other States."[179]

Having made these bold pronouncements, the court further observed that:

"no distinction can be drawn between acts performed by a minister for foreign affairs in an official capacity and those claimed to have been performed in a 'private capacity' or, for that matter, between acts performed before the person concerned assumed office as minister for foreign affairs and acts committed during the period of office. Thus, if a minister for foreign affairs is arrested in another state on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office."[180]

As regards the remedy being sought by Congo, on account of its rights being violated under international law, the court, by 10 votes to 6, concluded that... "Belgium must, by means of its own choosing, cancel the warrant in question and so inform the authorities to whom it was circulated."[181]

That the judgment was based on a conceptual analysis wholly derived from custom, sovereign immunity and diplomatic immunity can be traced to the concept of *jus reraesentationis*, which in the main is a special attribute of heads of states. And since the head of state and the serving minister of foreign affairs are public servants of the state *sui generalis,* with endowed powers from the ruled and for that matter, perform basically comparable and complimentary functions in the representation of the sovereign state, custom requires as already intimated, that these offices be accorded to some extent similar immunities under international law.[182] In the heyday of Greek civilization, for example, diplomats were accorded or enjoyed personal inviolability and immunity from criminal prosecution.[183] Ancient Greeks followed these principles because of the very fact that such immunities are indispensable in the performance of diplomatic duties.[184] In the classical period, for example, the famous Roman jurist Gauis, stated in his comprehensive concept

[179] Ibid. (paras. 53–55).
[180] Ibid. (para. 54).
[181] Ibid. (para. 76).
[182] Sir Arthur Watts, op. cit. pp. 31–32, 52–54.
[183] A. Nussbaum, A Concise History of the Law of Nations (1962), pp. 5–9.
[184] Ibid.

of the philosophy of *jus gentium*, the necessity of the inviolability of envoys.[185] The personal immunities of heads of states, the foreign minister and the ambassador, are derived from custom and the *superanus* of the state.[186] In other words, the privilege is not granted specifically for the personal benefit of the person occupying such positions of authority, but rather for the benefit of the sovereign state.[187] The widely adopted Vienna Convention on diplomatic relations 1961, over the years, has remained one of the main sources of the law of diplomatic relations.[188]

The court in its judgment was correct in considering the foreign minister as the chief spokesman and representative of the state in world affairs, as well as head of the diplomatic mission, and that since the immunities at issue are not that of Mr. Abdulaye Yerodia but that of the state of Congo, absolute immunity be accorded to him from criminal jurisdiction. The majority concluded therefore that the arrest warrant violated immunity from criminal jurisdiction and inviolability, which is accorded to an incumbent foreign envoy under customary international law.

The court also concluded that since the foreign minister must travel freely in the capitals of other states and thus fully responsible for negotiating and representing the state at important meetings, it is prudent that the minister of foreign affairs be allowed to enjoy full immunity so as to be able to perform his or her functions diligently and efficiently.

In respect to whether there is an exception to immunities of an incumbent foreign minister, where there is an alleged violation of crimes of *jus cogens*, the court found that customary international law does not allow such exceptions.[189] The court further observed that after having examined "the Charter of the International Military Tribunal of Nuremberg Act 7; Charter of the International Military Tribunal of Tokyo, Art 6; Statute of the International Criminal Tribunal for the former Yugoslavia, Act 7, para. 2; Statute of the International Criminal Tribunal for Rwanda, Art. 6, para. 2; Statute of the International Criminal Court, Art. 27,"[190] It did not find these important sources clothed with authority in order to conclude that an exception exists in customary international law in regard to municipal courts. The court also stated that there was no state practice[191] including national legislation and decision of higher courts, eg the Pinochet case, and the Qadaffi case to support an exception to absolute immunity from criminal jurisdiction and inviolability of an incumbent foreign minister, and therefore Belgium's objections were *non sequitur* and untenable.

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[185] Ibid. at pp. 13–16, Professor Arthur Nussbaum mentioned the work of Gaius, and how the stoic philosophy influenced the great Roman scholar Cicero: Cicero may be credited for popularizing natural law in Rome.

[186] Under Roman civilization, the state was regarded as *superanus*, and there was no exception to the doctrine of state immunity and envoys were highly regarded as the personal representative of the Emperor.

[187] Sir Arthur Watts, op. cit. pp. 36–37; Oppenheim, op. cit.

[188] Convention on Diplomatic Relations, Apr. 18, 1961, 23 UST 3227, 500 UNTS 96.

[189] ICJ Reports (2002) para. 58.

[190] Ibid at (para. 58).

[191] Ibid. (paras. 56–58).

One would be hard put to take issue with the court on how the above issues were examined and the reasons offered therein, in so far as there was no clear evidence of "international custom, being evidence of a general practice accepted as law" in support of the arrest warrant that was issued by the Belgium Magistrate. In reality, the Belgian law of 16 June 1993 as amended on 19 February 1999, can only be regarded as *opinio individualis juris generalis*[192] and therefore may not apply to Congo, in so far as it *prima facie*, lacks *repetitio facti* or *diuturnitas*.[193] The Belgian law can not be applied to Mr. Abdoulaye Yerodia Ndonbasi, until there is adequate evidence that it has attained the status of *opinio generalis juris generalis*[194] or the required *opiniones individuales* has been attained. So in a sense, the court was right in following a unilinear approach in its judgment.[195]

As regards to jurisdiction, the court was eclectic[196] in observing that

"the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction."[197]

The position of the court on jurisdiction was appropriate in view of the fact that state practice on the subject is still unsettled and there is the tendency for one to be misled by its seemingly hidden complexities and vagueness.[198]

In order to avoid being accused of closing its eyes to blatant violations of international law, the court emphasized that:

"the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.

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[192] The Statute of the International Court of Justice requires the court to apply Article 38.1(a)(b)(c)(d) e.g. (b) International custom, as evidence of a general practice accepted as law.

[193] The reach of the Belgian law was controversial and thus may be contested – in other words, it lacked *usus* or *repetitio facti*.

[194] I. Brownlie, "Principles", op. cit. pp. 6–12; Wolfke, Custom in Present Int. Law, 2nd edn. (1993); H.W.A. Thirlway, International Customary Law and Codification (1972); Cheng, in MacDonald and Johnson (eds) The Structure and Process of International Law, (1983) pp. 513–550; J. Kunz, The Nature of Customary International Law (1953) 47; AJIL 662–669; Akehurst, (1974–1975) 47; BYIL pp. 1–53; Cheng, (1965) 5 Indian JIL, 28–48.

[195] This is in order because of the thrust and force of Article 38.1 (a)(b)(c)(d).

[196] ICJ Reports (2002) (paras. 41–43); (paras. 47–55).

[197] Ibid. (para. 59).

[198] I. Brownlie, op. cit. pp. 297–318; see generally Mann, (1964) 111 Hague Recueil, 9–162; Akehurst, (1972–3) 46 BYIL 145–257; Jennings, (1967 II) 121 Hague Recueil p. 156; Federal Jurisdiction, Human Rights and the Law of Nations: Essays on Filartiga v. Pena–Irala, (1981) II Ga JICL 305–341; Oppenheim, op. cit. pp. 456–488; Lotus Judgment 9, 1927 PCIJ, Service A. No. 10, p. 28.

Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.

First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.

Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.

Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minsiter of Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.

Fourthly, an incumbent or former Minsiter for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that "immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."[199]

This will no doubt put egregious violators of international law on notice, that those entrusted with power can not treat their citizens as they think fit and that the law must be respected. In other words, no one is above the law and liberty is the faculty of willing and doing what has been willed without any force from within or from without. The exercise of power by leaders therefore must duly be conditioned by law in the light of the fact that "rights are those conditions of life that are considered necessary to enable the individual to develop to become his best self."

Now, although the Republic of Congo, gave up on pursuing the first part of its argument, how can the arrest warrant under Belgian Law, Article 7, be applied to determine universal jurisdiction *in absentia*? In the light of the force of the dissenting opinions, it would seem, if Congo had pleaded the first limb of its argument, the judges would have been markedly divided as to whether universal jurisdiction is permitted in international law.[200] While President Guillaume, Judges Ranjeva and Rezek were of the opinion that universal jurisdiction is not permissible in international law except in case of piracy.[201] Judge Koroma in a separate opinion supported the judgment of the court, while Judge Al–Khasawneh's dissent, appears to converge with that of *ad hoc* Judge Van den Wyngaert's opinion, which in sum, states that international law permits states to assert universal jurisdiction in order to punish individuals who violate war crimes and crimes against

[199] ICJ Reports (2002) (paras. 60–61).

[200] Ibid. at para. 21.

[201] Ibid. at para. 12, see their separate opinions.

humanity, and that the majority decision lacks *usus* and *opinio juris*.[202] Judge VanDenWyngaert forcefully argued further that universal jurisdiction will close the door on suspects trying to find safe havens. The ad–hoc judge also criticized the court for ignoring the theory of restrictive immunity. The learned Judge also argued that universal jurisdiction does not run counter to the principle of complementality in the Rome Statute. Judge Bula Bula, was quite emotional but fully supported the judgment of the court, which according to him, "upholds the rule of law against the law of the jungle." He also followed customary international law and carefully explored Belgium's colonial policies in the Congo, which led to the assassination of Prime Minister Lumumba in January 1961.

In practice however, *quasi delicta juris gentium*, i.e. universal jurisdiction, is fraught with uncertainty and therefore states rarely exercise it.[203] The dissenting opinion of Judge Van den Wyngaert, is well taken but a careful analysis of the case shows that the explanation she offered against the judgment of the court was *obsercurum per obsurius*, since there was a clear evidence to conclude that the international reach of the Belgian law lacks *usus* and clearly controversial and therefore could create acrimony or serious dispute in international relations. Judge Ad–hoc Van den Wyngaert's reaction also to the judgment may be characterized as one sided and emotionally slanted, for she failed to give any clear guidance as to how universal jurisdiction is to be determined in international law. Are we to distinguish between *jus strictum* and *jus dispositivum* as our starting point? Or which rules are to be classified as having ethical and unimpeachable quality? Certainly, it would be untenable in international law to rely on rules with varied meaning[204] in determining universal jurisdiction. As it may be recalled, the ILC wisely relegated to the background the suggestion that there be a catalogue of peremptory norms introduced into the draft articles at the Vienna Conference.[205] It is submitted that such an approach was rejected in order to avoid abuse and possibly to devalue the quality of *jus cogens* norms.[206] In determining universal jurisdiction a judge must first consider the sources of peremptory norms, and which norms are most likely to attract an obligation *erga omnes*, i.e. which crime can be characterized as egre-

[202] Ibid., see her dissenting opinion: Judge Bula Bula in his judgment said "By conducting itself unlawfully, the Kingdom of Belgium, a sovereign state, committed an international wrongful act to the detriment of the Democratic Republic of the Congo, likewise a sovereign state."

[203] W. Schabas, An Introduction to international Criminal Court (2001) p. 61, I. Brownlie, op. cit. pp. 299–305; J. Bröhmer, op. cit. pp. 34–50.

[204] Rules of varied meaning should not be applied, whether it be on the international plane or in municipal law. This is arguably so because it could blind the judge from promoting justice, and it could also create relativity into international law.

[205] T. Meron, (2003) 301Recueil des Cours 1, 3, p. 418.

[206] Ibid., but see generally, Verhoeven "*Jus Cogens* and Reservations or Counter–Reservations to the Jurisdiction of the International Court of Justice In International Law: Theory and Practice, Essay in Honor of Eric Suy 195, 196 (Karel–Wellens ed. 1998).

gious as to attract the jurisdiction of all states.[207] Thus, *lato sensu, jus cogens* must first attain the character of customary law and be further aided by the concretalization of *opinio juris sive necessitatis* (i.e. a higher law). Peremptory norms, according to Sir Fitzmaurice, must be based on "considerations of morals and international good order." It is essential however to note that the identification of *jus cogens* norms is not clear–cut and this makes it quite difficult to adequately explore the parameters or specific factors in determining universal jurisdiction. Universal jurisdiction technically is an enforcement jurisdiction, which must be exercised on behalf of mankind.[208] Scholars are agreed that it can be created by customary international law, and also by a multilateral convention.[209] The universal authority in this regard may be referred to as *forum deprehensionis*, i.e. "the court of the country in which the accused is actually held in cutody", apply without regard to the *lex loci delicti*, i.e. where the crime was committed.[210]

Judge Higgins, Kooijmans and Buergenthal agreed with much of the judgment of the court, but argued that the court should have addressed the issue of universal jurisdiction since the issue in respect of state immunity is conceptually linked to a pre–existing jurisdiction and that the *non ultra petita* rule "bar only a ruling on universal jurisdiction in the dispositif, not its elucidation" is a well grounded observation. The argument, however that the arrest warrant did not as such violate international law is open to debate and may be vigorously contested. A war crime however, is a viable justification for universal jurisdiction, and it is defined in the British Manual of Military Law as follows:

"War crimes are crimes *ex jure gentium*, and thus triable by the courts of all states. British Military courts have jurisdiction outside the United Kingdom over war crimes committed ... by persons of any nationality ... it is not necessary that the victim of the war crime should be a British subject."[211]

And in the United States v. Ramzi Ahmed Yousef[212] the Federal Circuit Court followed in part Demjanjuk in exploring the concept of universal jurisdiction thus:

"Universal jurisdiction arises under customary law only where crimes are universally condemned by the community of nations, and by their nature occur outside of a state or where there is no state capable of punishing or competent to punish the crime."[213]

The court, however, concluded that terrorism is not subject to universal jurisdiction. In Yunis v. Yunis, the court observed that under universal jurisdiction, states may prosecute "certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of air-

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[207] J. Paust, The Reality of *Jus Cogens* (1991) 7 Conn JIL pp. 81–85; G.A. Christenson, *Jus Cogens*: Guiding Interest Fundamental to International Law, 28 (1988) VJIL p. 584.

[208] Randall, Universal Jurisdiction Under International Law, (1988) 66 Texas L. Rev., p. 785.

[209] Dugard, op. cit. pp. 141–154.

[210] Attorney–General of the Court of Israel v. Eichmann, (1961) 36 ILR 5 District C.J.

[211] CF, DJ. Harris op. cit. p. 289.

[212] 327 F 3d 56 (2nd Cir. 2003).

[213] Ibid. at 105.

craft, genocide, war crimes and perhaps certain acts of terrorism, 'even absent any special connection between the state and the offense.'"[214]

Universal jurisdiction may be procured when an egregious crime recognized under customary international law is violated. The underlying principle is that such serious crimes are albeit limited to piracy, and slave trade, e.g. traffic in women and children.[215] Furthermore, it is possible to characterize certain crimes for auxiliary competency.[216] It is however not clear whether customary international law recognizes drug trafficking, "threats to air travel", nuclear safety, terrorism, hijacking, violation of diplomatic law and apartheid; but on the other hand, it is now clear that war crimes, torture and genocide are recognized by multilateral treaties, which may not have been derived from pre–existing customary international law *de lege lata*. There is therefore limited practice on the subject.

The ICJ, thus was prudent in not going as far as to consider the concept of universal jurisdiction because it was not raised in the final memorial of the Democratic Republic of Congo, and the reach of the Belgian law was draconian and intimidating.[217] A new Belgium law however has been adopted on the 1st of August 2003, where the Federal Prosecutor has been given a final authority in exercising jurisdiction over serious crimes committed abroad without any link to Belgium.[218]

Having considered these issues, it is important to note that the judgment clearly overrules the decision in the Pinochet case, in as much as the majority accorded full immunity to Mr. Yerodia, without specifying any exception to his immunity *ratione materiae*. As regards to the remedy, the court followed the holding in the Factory of Chorzow case,[219] thus restoring the position of the injured foreign minister, *status quo ante* or restoration *in natura*. In sum, the judgment was based on common sense and custom.

9.8 Immunity, International Crimes and American Courts

As already considered elsewhere, the aim of the restrictive doctine is to curtail the privileges and immunities of states. The underlying principle of the doctrine is to prevent states involved in trading activities from hiding behind the *maxim par in parem non habet jurisdictionem*, as a protective shield in order to ward off private suites.[220] For reasons not well articulated, the doctrine of restrictive immunity has

[214] (1991) 30 ILM 403, US Ct. App. DC Circuit.

[215] D.J. Harris, op. cit. pp. 264–306, 288–294; W. Schabas, op. cit. pp. 59–62; I. Brownlie, op. cit. pp. 303–305; Akehurst 46 (1972–3) BYIL, 161–162.

[216] I. Brownlie, op. cit. p. 303, Harvard Research, 29 (1935) AJIL.

[217] The law does not command the *opino juris* of states. See Meron, op. cit. p.144.

[218] C–2003/21182, Moniteur Belge, 7 août 2003, Ed 2 p. 40511.

[219] Germany v. Poland (Merits) (1928) PCIJ (Sect. A.) No. 21 at 28.

[220] I Congreso del Partido (1983) IAC 244(HL); Trendtex Trading Corp v. Central Bank of Nigeria (1977) Q 529 CA at 554 G–H; but see generally, Lauterpacht, The problems of jurisdictional immunities of foreign states (1951) 28 BYIL, p. 220; I. Brownlie, op. cit. pp. 328–332; Fox, op. cit. pp. 101–118.

been applied in the United States and other Western states[221] in all contexts,[222] e.g. commercial transactions, serious violations of international law (human rights, violation of *jus cogens*), torts, contract of employment, war damages, murder of political opponents and torture and this in fact has *sit vernia verbo*, created an uncertainty in the current law. National courts have legitimate right to exercise jurisdiction over international crimes,[223] but certain delicate principles would have to be carefully observed. And it is important to note that restrictive immunity can not be applied as a panacea in solving issues respecting international crimes. Thus, serious violation of international law by states should rather be resolved through the diplomatic process in view of the fact that states are ready to raise the defence of non–justiciability or the act of state doctrine. There is a call however that the law be re–examined in the light of the recent development in humanitarian law.[224]

9.8.1 USSR Before American Courts

Now, let us consider how these issues have been handled in US courts. In von Dardel v. USSR,[225] the plaintiffs, a half brother of Wallenberg and a legal guardian, both citizens of Sweden, brought suit against the Soviet Union for the violation of diplomatic law, which involved the illegal seizure, imprisonment and the possible death of a Swedish diplomat named Raoul Wallenberg. The USSR turned deaf ears to the complaint, but later on sent in a note to the US Embassy, arguing that it be accorded absolute immunity.[226] The court ruled that it had jurisdiction under the FSIA and the Alien Tort claims, and that the USSR had violated US law, Soviet law and international law. The USSR refused to appear and therefore a default judgment was 'handed down'. The court further ruled that "a foreign government defendant could not claim immunity for acts which violated treaty obligation with the United States. Fourthly, the Soviet Union had impliedly waived sovereign immunity in this action by subscribing to treatise, including the UN Charter which codified principles of diplomatic immunity and human rights."[227]

The court was wrong[228] in following the waiver doctrine in so far as the doctrine is nebulous and lacks *usus*. Arguably, the court should have relied on the

[221] Fox, op. cit.; Sompong Sucharitkul, op. cit.; C. Schreuer, op. cit.
[222] See D.J. Harris, op. cit. p.339.
[223] I. Brownlie, op. cit. pp. 555–575; W. Schabas, op. cit.; D. J. Harris, op. cit. pp.264–294.
[224] See Meron, The Humanization of Humanitarian Law, (2000) 94 AJIL 239.
[225] 77 (1988) ILR p. 258.
[226] Ibid.
[227] Ibid. at p. 259.
[228] The waiver doctrine is controversial and "The essence of general international law is *opinio juris generalis* of states.

principle of state responsibility where the plaintiffs could make a claim through the United States (i.e., the diplomatic process).[229]

In the case of Frolova v. USSR,[230] however, the court was not convinced that the waiver exception to 28 USC & 1605(a)1, can be read broadly, and therefore refused to consider it as the basis for jurisdiction, even though the USSR had blatantly refused Frolova an exit visa. The quest therefore to claim damages for the violation of the UN Charter and the Helsinki Accord of which the defendant state, the USSR, was a signatory failed. The claim also failed in as much as the acts in issue were committed in the USSR and the FSIA requires that the acts be committed in the US.

An almost similar issue came up for consideration in Sidermande Blake v. Republic of Argentina.[231] There, the Ninth Circuit stated generally that "the fact that there has been a violation of *jus cogens* does not confer jurisdiction under the FSIA". This *prima facie* converges with what the Seventh Circuit said in Frolova that: "Since the FSIA became law, courts have been reluctant to stray beyond these examples when considering claims that a nation has implicitly waived its defense of sovereign immunity."[232]

Thus, for US courts to exercise jurisdiction, there must be a territorial nexus, i.e., the foreign state's acts or omission must cause damage in the forum,[233] or the act be committed in the forum, i.e., the *lex loci delicti.*

9.8.2 Hugo Princz v. Germany, before American Courts

Again in Hugo Princz v. Federal Republic of Germany,[234] the US Court of Appeals ruled in favour of the Federal Republic of Germany, although there was a clear evidence of the violation of *jus cogens*. Let us consider briefly this important case. In 1942, when the United States of America declared war against Germany, Hugo Princz, an American Jew and his family were living in what is now known as Slovakia. The Slavok police in collaboration with the Nazi SS, arrested the Princz family as enemy aliens, and handed them over to the German officials. His parents and sister were murdered at Treblinka, while the rest of the family, including Mr. Princz, were sent to Auschwitz and then later to Birkenau. There, Mr. Princz's brothers were starved to death, but luckily for him, he was sent to Dachau where he worked in a factory. When the Allied Forces won the war in 1945, Mr. Princz was liberated and sent to an American military hospital for medical care.

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[229] I. Brownlie, State Responsibility (Part 1 1983) M.E. Borchard, (1929) IZAORV 223, K. Marek, Criminalizing State Responsibility (1978–9); J.G. Starke, Imputability in International Delinquencies, (1938) 19 BYIL p. 164; I. Brownlie, op. cit. pp. 419–455.

[230] (1991) 85 ILR p. 236.

[231] 965 F 2d 699 (9th Cir. 1992).

[232] 761 F 2d 370 at 377 (7th Cir. 1985).

[233] FSIA – 1605(a)(5).

[234] 26 F 3d 166 (DC Cir. 1994). This involves a war damage claim or acts which were committed in Europe during the Second World War, i.e., *delicta juris gentium.*

After the Second World War, Mr. Princz requested for reparation under a special programme established for Holocaust survivors. Mr. Princz's request for reparation in 1955 was however turned down in view of the fact that he was not a German citizen at the time of imprisonment nor a refugee under the Geneva Convention. In 1965 the West German Government surprisingly changed the eligibility criteria for reparation, but it would appear Princz did not take advantage of the new criteria. Consequently in 1969 the statute of limitation expired. In 1984, Princz made another attempt by instituting this time a formal claim through the U.S. Government for reparation. The Clinton Administration did its best in negotiating the claim with the German government, but nothing came out of the negotiations. This prompted Princz to sue the German government before the Federal District Court. At first instance, the German government lost its plea for immunity.[235] However, on Appeal, the US Court of Appeals dismissed the suit with Judge Wald, delivering a blistering dissent[236] which can not be allowed to pass away like an *ex–cathedra* gospel, and therefore may be considered *anon.*

It should be mentioned at this stage that the court was faced with three important issues, i.e., the commercial activities exception, treaty exception and the controversial implied waiver exception, and in response to these issues, the Court of Appeals was eclectic and practically focused on the applicable law by observing as follows:

"In sum an implied waiver depends on the foreign government's having at some point indicated its amenability to suit. Mr. Princz does not maintain, however, that either the present government of Germany or the predecessor government of the Third Reich actually indicated, even implicitly, a willingness to waive immunity for actions arising out of the Nazi atrocities. We have no warrant, therefore, for holding that the violation of *jus cogens* norms by the Third Reich constitutes an implied waiver of sovereign immunity under the FSIA."[237]

The majority of the court accepted unequivocally that the German government violated *jus cogens*, but refused to subscribe to the view that the violation of *jus cogens* amounts to an implicit waiver of immunity.[238] The court's approach is in

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[235] 813 F supp. 22 26 (DCC 1992) The District Court held that the FSIA "has no role to play where claims alleged involved undisputed acts of barbarism committed by a one–time outlaw nation which demonstrated callous disrespect for the humanity of an American citizen, simply because he was Jewish" and that it is incumbent upon the court to exercise jurisdiction.

[236] 26 F 3d 1116, 1176–1184 (DC Cir. 1994). It is important to state more clearly that such serious crimes be settled through the diplomatic process and judges should take pains to distinguish between criminal responsibility of states, individual criminal responsibility, and the criminal jurisdiction of states.

[237] Ibid. at 1174. The pronouncement of the court is in line with customary international law. This is so, in so far as *usus* does not support the waiver argument. Thus where *acta jure imperii* violated *jus cogens*, e.g. German atrocities, the executive of the state directly affected must take up the case, and demand reparation from the state responsible for the international delict. See the Chorzow Factory Case; The United States diplomatic and consular staff in Tehran (1980) ICJ Reports 3 at 44, and the Corfu Channel Case 1949 ICJ Reports 4, Merits and 1949 ICJ Reports 44, (Compensation).

[238] 26 F 3d 1116 (DC Cir. 1994): 1166–1176.

line with the principles of general international law, in that no nation has an unfettered right to prescribe norms to regulate the behaviour of other states.[239] Thus only norms that are well grounded in the practice of states and duly aided by *opinio juris* can rightfully be applied to states.[240] The implied waiver principle clearly lacks *usus* and therefore the court was right in rejecting it. Furthermore the juridicial equality of states in international law is universally acknowledged and each state has the right to participate equally in the making of new norms.[241] The US can not therefore, impose the FSIA on Germany since the FSIA can not be considered as an international law but rather an *opinio individualis juris generalis*.

With respect to the issue of commercial activities exception, the court allowed law and logic to triumph over municipal law analogies by ignoring the cognate argument that "leasing prisoners as slave labour constitutes a commercial activity under the FSIA," thus even if Mr. Princz's labour is characterized as "commercial" within the meaning of US law (FSIA), it can not logically be applied, since it did not have a "direct effect" in the United States. In considering the issue in respect of the treaty exception, the Court of Appeals was persuaded to rely on the Supreme Court decision of Amerada Hess[242] by concluding that "none of the exceptions to sovereign immunity provided in the FSIA applied to the facts alleged by Mr. Princz. Therefore we need not decide whether the FSIA applies retroactively to the case."[243] The fact that the activities at issue were committed in violation of *jus cogens* in Europe and arguably could be characterized as *acta jure imperii*, reinforces the argument that the case be taken out of the jurisdiction of the court, for FSIA as matter of international law does not cover the case[244] which logically means that the Federal District Court lacks subject matter jurisdiction.

Judge Ward's dissenting opinion may be received with great joy by human rights advocates and Holocaust survivors, but it would appear she failed to distinguish between the primary rules governing criminal jurisdiction of national courts and those governing jurisdictional immunities or the privileges and immunities of states in international law in respect to the management of multilateral public order. Jurisdictional immunity is undoubtedly procedural while the criminal responsibility of a state falls within the domain of state responsibility which is regulated entirely by different international law principles.[245] Judge Wald's dissenting opinion was predicated *inter alia* on universal jurisdiction and the implied waiver ex-

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[239] Schooner Exchange v. McFadden (1812) 7 Cranch 116; The Antelope US, Supreme Court, 1825, 10 Wheaton 66l, Gerhard von Glahn, Law Among Nations – An Introduction to Public International Law 4th (edn) (1981), pp. 124–158; Oppenheim, op. cit. pp. 339–410.

[240] H.W.A. Thirlway – International Customary Law and Codification (1972); Degan, Sources of International Law (1997).

[241] Villinger, Customary International Law and Treaties (1985) p. 39.

[242] 109 S.Ct. 683 at 688, (81 ILR 1990) 658.

[243] 26 F 3d 1166 (DC Cir. 1994) p. 1175.

[244] Ibid. at pp. 1175–1176.

[245] I. Brownlie, System of the Law of Nations. State Responsibility, Part 1 (1983); C. Eagleton – The Responsibility of States in International Law (1928); International Law of State Responsibility for Injuries to Aliens (ed) R.B. Lillich, (1983).

ception to foreign sovereign immunity. And it would seem Judge Wald was forced unto an unbeaten path to press her opinion, in view of the fact that she relied on nebulous concepts which appear wholly conditioned on questionable assumptions without carefully considering whether states are agreed that the said law be applied to their inter–state relations.[246] The argument in support of implied waiver exception is simply unfounded and therefore not required by contemporary international law and the argument she offered in support of universal jurisdiction is quite weak. On the whole, the dissenting opinion may be considered as *petitio principii*, for the author of the dissent simply misconstrued the principle of state responsibility which arises where an obligation owed by a state under international law is breached. The said claim therefore could have been resolved through a bilateral diplomatic settlement,[247] without forcing Germany to canvass its defence before a national authority.[248] Thus, Germany committed an international wrongful act against the US and therefore incurred responsibility which should not have been litigated before US courts, but rather through diplomacy.[249]

According to the principles of international law, Germany incurred direct responsibility for World War Two atrocities and therefore must pay reparation. Such serious violation of the law could be satisfied by invoking the principles of Restitution in Kind or *restitution in intergrum*.[250] The Rainbow Warrior Case,[251] the Corfu Channel Case,[252] and the Iran Hostage Case[253] are good examples of how direct responsibility is incurred by states.

Luckily for Princz, on the 19th of September 1995, the US and the German government, through a compromis or bilateral diplomatic negotiations, came to an agreement whereby the German government agreed to pay 2.1 million dollars to US citizens who had not been compensated since the statute of limitations barred further applications for compensation after 1969.[254]

The suggestion by Judge Wald that "because the Congress has not expressly excluded suits from the violation of *jus cogens* norms from the scope of 1605(1)(1), international law requires that we construe the FSIA to encompass an implied waiver exception"[255] so as to procure jurisdiction over Mr. Princz's claim

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[246] I. Congreso del Partido (1983) AC 244 per Wilberforce; T.O. Elias – Modern Sources of International, in Transnational Law in a Changing Society, Essays in Honour of Philip C. Jessup (1972) pp. 34–69.

[247] See Oppenheim, op. cit. pp. 499–536, 503, 157.

[248] These cases require proper management and diplomacy and it is suggested that the injured state must be eclectic in negotiating the reparation. Arguably these cases do not belong in national courts.

[249] See I. Brownlie, op. cit. pp. 445–459, 458, Witenberg – 41 (1932 111) Recueil des Cours 22–6; Garcia Amandor, Yrbk ILC (1961).

[250] Factory at Chozow Case (Germany v. Poland) Merits, 1928 PCIJ (Sert. A) No. 21 at 28, i.e. restoration of the injury *ex ante*.

[251] 26 (1987) ILM 1346.

[252] (1949) ICJ Reports, 4 (Merits) and 1949, ICJ Reports 244 (Compensation).

[253] (1980) ICJ Reports, 3 at 44.

[254] J. Bröhmer, op. cit. p. 82.

[255] 26 F 3d 1166, 1174–1175, (DC Cir. 1994).

is without foundation and thus not supported by customary international law. The dismissal of the case by the Court of Appeals was thoughtful, in order to avoid serious dispute and possible retaliation from other states. International law principles must therefore be strictly followed, so as to maintain stability in international relations.

9.9 Ammendments to US FSIA of 1976

In recent times, the United States has amended the FSIA by introducing a novel exception to immunity. This exception is related to the Anti–Terrorism and Effective Death Penalty Act of 1966. Specifically, Section 221 of the exception provides that immunity will not be granted in any case:

"In which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extra political killing, aircraft sabotage, hostage–taking"[256]

Thus, a US court would not entertain a claim if the foreign state has not been specifically listed by the Secretary of State as a "state sponsor of terrorism under Federal legislation" or if there is credible evidence that the victim was a citizen of another state when the terrorist act occurred. So in principle, for a claim to be successful, the claimant must be a US national at the time of the terrorist act. If the act occurs within a terrorist state, USCS 1605(a)7, requires that the claimant must be ready to negotiate, by affording the state "a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration." The AEDPA, under the FSIA, permits a claimant to take enforcement measures against a state–owned property which is used for commercial activity in the United States, irrespective of whether the property is a subject of the claim or not.[257] This aspect of the FSIA is not reflective of customary international law and may run counter to the Vienna Convention on Diplomatic Relations,[258] the Vienna Convention on Consular Relations,[259] and the General Convention on Privileges and Immunities of the United Nations.[260]

Plaintiffs such as Alejandre,[261] Flatow[262] Cicippio[263] and Rein[264] were successful in suing Cuba, Iran and Libya under the amended FSIA, however, enforcing these

[256] Pub. L. No. 104–132, 221, 110 Stat. 1214–1243 (1996); A/CN 4/L 576, 6 July (1999), Annex III at pp. 56–58. The change in the law is likely to bring about acrimony in International Relations.

[257] 28 USCS {{1610(a)(7),(b)(2).

[258] Apr. 18, 1961, 23 UST, 3227, 500 UNTS 95.

[259] Apr. 24, 1963, 21 UST 77, 596 UNTS 261.

[260] Apr. 13, 1946, 21 UST 1418, 1 UNTS 16.

[261] 996 F Supp. 1239 (SDF. Fla 1997).

[262] 999 F Supp. I. (DDC 1998).

[263] 18 F Supp. 2d 62 (DDC 1998).

[264] 995 F. Supp 325 (EDNY 1998) Here, the defendant state made some attempts to have the suit thrown out, but to no avail. Arguably, the enforcement process is quite another matter.

judgments became a Herculean task. In fact, there is more involved in the enforcement process than miss the eyes, and state practice over the years has been obscured by conflicting municipal court decisions,[265] and it would appear that those states which have totally embraced the restrictive immunity are hesitant and apprehensive in having it applied at the enforcement phase,[266] for fear of retaliation or similar action from other states.[267] The FSIA amendment, i.e. USCS 1610(a)(7),b(2), and specifically, 28 USCS 1610(F)(4)(A) are draconian in many respects and therefore may vigorously be contested by defendant states. The fact, however, that the statutory amendments can be neutralized or made ineffective by a Presidential waiver,[268] would be welcomed by most states.

Further attempt by Senators Connie Mack and Frank R. Lautenberg to amend the FSIA did not materialize before Congress adjourned in the fall of 1999. The introduced bill, entitled "Justice for Victims of Terrorism Act", was opposed by the Clinton Administration. The Treasury Deputy Secretary Stuart E. Eizenstat who representated the administration in opposing the bill argued that:

"Second, it could cause the US to violate our obligations to protect diplomatic property of other nations, and would put our own diplomatic property around the world at risk."[269]

The Clinton Administration's opposition to the said bill is justified since the bill "sought to allow the attachment of, and execution against, any assets of a foreign terrorist state, including moneys due from, or payable by, the United States, even if held by a subdivision or instrumentality of the state", and also because it violates diplomatic law and customary international law.

The attempt recently to execute a judgment of $27 million[270] against a state property, where the Russian Federation waived "any rights to immunity with respect to enforcement of any arbitration sentence issued against it in relation to this agreement", met with manipulation and cover up. It is strange to note that although there was party autonomy, Russia was not deterred or restrained in resisting the enforcement action.[271] Arguably, under the ILC Draft Convention – Part IV, Articles 18, 19, 20 and Article 17, NOGA has a legitimate right to enforce the arbitral judgment. What emerges from the above cases is that although states might be willing to go before municipal courts to argue that they be granted immunity, a great majority of states are ready to move heaven and earth to resist en-

[265] M. Shaw, International Law 4th (ed) (1997) pp. 517–523; I. Brownlie, op. cit. pp. 338–339.

[266] I. Brownlie, op. cit. p. 326; O'Connell, op. cit. p. 864.

[267] See S.D. Murphy, Contemporary Practice of the United States Relating to International Law (2000) 94 AJIL 117, 123–124.

[268] Ibid. at p. 122; see particularly Section 117 respecting the President's waiver.

[269] Ibid. at p. 123.

[270] NOGA v. State of Russia, 10 August 2000, (The Court of Appeal Paris); NOGA v. Murmansic State Technical University and Association Brest 2000 Tribunal de Grande Instance Brest, 24 July 2000 (unreported); C.F. Fox, op. cit. p. 411.

[271] See H. Fox, op. cit. pp. 411–413.

forcement measures against state property.[272] Certainly governments are sensitive and apprehensive in respect to coersive enforcement measures.

9.10 Final Remarks

The Thirty Years War led to the destruction of western Christendom under the Holy Roman Empire, and in order to promote international justice, peace and tranquility, the Treaty of Wesphalia was signed in 1648, which in the main led to the creation of a decentralized public order system, in which states gained sovereignty and equality before the law. Grotius, in his work on the law of war and peace, postulated that all states are independent and equal and that the jurisdiction of every state is absolute within its sphere of operation, i.e. within the territory of the state. He died three years before the Treaty of Wesphalia was signed. His writings, however, have had a positive effect on public international law. This historical epoch undoubtedly marked the beginning and steady growth of what we now know as international law.

Vattel, in his exposition of the subject said that "the law of nations is the science of the rights which exist between nations or states and of the obligation corresponding to these rights." Vattel's definition is valid today, in as much as modern international law is patently horizontal.

The international legal system is horizontal because sovereign states are juridically equal and this equality is predicated on the well established principle of *civitates non recognoscunt superem*, i.e. states do not recognize a higher power or sovereign authority than their own. The horizontal nature of international law stems from the principle that the international society is made up of an association of states, and these states having been influenced by the utility of comity and state equality, decided to form a peaceful international community based upon their own volition without any organic *superanus* to enact laws, act as a final arbitre, or possibly enforce the law, except through diplomacy and the coordination of the wills of states.

States albeit do have conflicting interests, and conflicting ideas about certain laws on the international plane. And quite apart from these conflicts, the subjects of international law, in reality, are technically law–makers in their own rights and law enforcers at the same time. Thus whenever there is a concensus among the subject–law makers on a subject matter, i.e. *opiniones individuales juris generalis*, a well grounded general international law is formed.

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[272] S.D. Murphy – Contemporary Practice of the United States Relating to International Law (2000) 94 AJIL p. 117; Kuhn, Immunity of the Property of Foreign States Against Execution (1934) 28 AJIL p. 119; City of New Rochelle v. Republic of Ghana, 255 NYS 2d 178 (1964); New York and Cuba Mail SS So. V. Republic of Korea, 132 F Supp. 684 (1955); but see also the arrest warrant case of 11 April (2002) in respect to coercive measures: Case concerning the arrest warrant, Democratic R. of Congo v. The Kingdom of Belgium, (2002) paras. 69–71.

The Second World War created two super powers; hence, there was a bipolarity of power from 1945–1989. We now have a unipolarity of power as a result of the collapse of the USSR (1991–....), and many thought that the end of the cold war would make the UN more effective and swift in tackling the difficult problems of the world. This however did not happen in the light of the fact that the five permanent members of the Security Council have repeatedly failed to agree on how best to solve these pressing global problems.

The massive violation of international law in Yugoslavia and Rwanda could have been stopped if the Security Council had been swift and decisive. The world is rapidly changing with difficult humanitarian problems and nationalism is giving way to terrorism and amorphous terrorist organizations are being formed in the Middle East and many other regions. States are failing and dictatorial regimes and war lords are committing genocide, war crimes, torture and crimes against humanity. Heads of states, heads of governments and former heads of states have recently been prosecuted for violating international law (*jus cogens*). But it would seem national courts have been hard put to effectively deal with the subject and most of these courts did not speak with a clear voice. This may be due perhaps to the *polysemous* nature of international law. In other words, the law is not univocal, since the subject–law makers of the system have their own *opinio juris*, which more often than not conflict with general international law.

True, international law is based upon the consent of states, but not every rule in international law requires, *stricto sensu*, the consent of states, and unanimity is not required. Consent, however is crucial in the effective running of the international legal system, e.g. the signing of treaties whether it be bilateral or unilateral; the resolution of disputes, etc. It is instructive to note that, although consent is the ultimate basis of international law, the persistent objector can not refuse to obey norms of *jus cogens*.

Thus, for courts to be able to deal effectively with the violations of human rights laws, i.e. laws which have attained the character of *jus cogens* and customary human rights, there is a pressing need to rethink or explore some basic concepts of international law so as to be able to meet some of the new challenges of the 21st century.

1. That, the principle of Equality of States is universally well established, Paragraph 1 of Article 2 of the UN Charter, reads as follows:

   "All states have equal rights and duties and are equal members of the international community, not withstanding differences of an economic, social, political or other nature."

   The said article, must however be balanced against the effect of such articles as Article 23 and Article 27. In this respect, the essential note to remember is that we are specifically referring to equality in law but not equality in fact.
2. That, a court faced with the violation of international law must first distinguish between jurisdictional immunities and the rules governing criminal jurisdictions of municipal courts and it must further be determined whether there is *usus* in support of state crimes in international law, since it is not

clear as to whether international responsibility of states can be characterized as criminal or civil. Perhaps it could rather be considered as *sui generis* (atypical).

3. That, *jus cogens* is an international public policy and an unimpeachable code of ethics of a high order and its sources must be carefully explored.
4. That, a distinction be made between obligation *erga omnes* and obligation *erga omnes contractantes*, and it is also important to note that the concept of *obligation erga omnes* and humanitarian intervention can be traced to the writings of Hugo Gortius, i.e. in his *Dejure Belliac Pacis,* (Bk 11 Chapter xxv – Whewhel translation Vol. Vii) 438–440, or F.W. Kelsey et al; translation London (1925).
5. That, obligations *erga omnes* have been wedded to international human rights and treaties on humanitarian law, but the subject has an abstract connotation and therefore must be applied with care. (Barcelona Traction Case) ICJ Report 1970 p.3 at p. 32, para. 34.
6. That, Universal Jurisdiction may be exercised if a norm which has attained the character of *jus cogens* is breached and there is a clear showing that the breach specifically attracts obligation *erga omnes*. Thus, where an *acta jure imperii* violates *jus cogens*, then judicial recourse be discouraged, but it is suggested that political protest and diplomatic settlement must be used as a weapon in demanding reparation.
7. That, jurisdiction to adjudicate in matters respecting criminal liability or criminal law is primarily territorial, which means that the accused must be present in the forum. The fact that a state has jurisdiction to prescribe does not necessarily mean that it can exercise jurisdiction to adjudicate. This is arguably so, because international standard of justice must be respected, e.g., the universal declaration of human rights, the covenant on civil and political rights and humanitarian law. A state can only lawfully enforce what it can lawfully prescribe on general principles. And it is critical to determine whether obligations *erga omnes* and human rights *"tout court"* are of the same quality or there are differences.
8. That, international law may accurately be regarded as *jus inter genes*, i.e. law among nations. Hence, in order to preserve the public order of the international legal system and to avoid retaliation from other states, coercive enforcement measures be discouraged and rather resolved amicably through well established institutions of international law.
9. That, in a quest to determine what is state value and human value, it is noteworthy to consider the normative force of state immunity and the normative force of *jus cogens* and *obligations erga omnes*, and the elements of international crimes must be thoroughly explored.
10. That, Article 2(4) has attained the character of *jus cogens* can not *ex hypothesi* be disputed, and its breach had in fact attracted obligations *erga omnes*, e.g. the invasion of Kuwait by Iraq; the use of force against Iraq by the US and the coalition of the willing, undoubted violated Article 2(4) i.e. *jus cogens* and was vigorously condemned the world over, coupled with constant demonstrations against President Bush II, wherever he visited.

History shows that powerful states have used force, but in turn paid a high price for violating the law. This reinforces the utility of Article 2(4). The international community is faced with serious humanitarian problems in this century, which requires new solutions and new strategies; hence it is apposite that the process of making decisions in the Security Council be reformed. But these may require a special degree of collaboration from all states.

11. That, state immunity is crucial to the smooth running of the international legal system and therefore must be carefully balanced against individual rights, e.g., human rights law.
12. That, the creation of the ICTY, ICTR, the international criminal court and the recent Ad–hoc court in Sierra Leone, will certainly put restraint on immunities, and the call to embrace such principles, as *aut dedere aut judicare punier, mullum crimen sine lege, non bis in idem* and *complementarity* is in order.
13. That, international law without states has no fruit and states without the advantage of international law have no root and individual rights would have to be adequately protected throughout the world in order to avoid global conflagration. The blatant violation of international law in the Sudan must be stopped. The situation is getting out of hand and the international community must put pressure to bear on the Sudanese government to stop the human madness. Certainly, egregious international crimes are being committed and the time for diplomacy has not passed; hence, the Security Council must take the necessary step to resolve this serious problem in the shortest possible time and the leaders of Sudan must be held responsible or punished.
14. That, customary or general international law plays an important role in the resolution of disputes, and it remains one of the most prominent and valuable pillars of the international legal system, e.g., the resolution of disputes in the law of the sea, title to territory, the use of force, the creation of states and boundary disputes.
15. That, the state is a centralized public order system; it has a vertical infrastructure.
16. That, international law is a decentralized public order system; it has a horizontal infrastructure.
17. That, the obligation of states to prevent or neutralize the violation of *jus cogens* by positive action is limited by the consequences of such factors as – consent of states, competence, functional co–operation, *locus standi*, sovereignty, temporality and the fact that the International legal system is decentralized. States, however, have the right to take lawful measures against any state to vindicate the violation of peremptory norms (*jus cogens*).
18. That, the penal or criminal responsibility of states is patently odd and not clear cut, and under current International Law, states can not be subjected to criminal sanctions, similar to those normally devised to promote order under domestic criminal law systems. See, e.g., the Blaškic case (ICTY

Appeals Chamber; judgment 29 October 1997, para. 25). But states owe humanitarian obligations to the International community.

19. That, the penal or criminal responsibility of states has an unimpeacheable moral force, but the concept is not well grounded in international law. In other words, it has a varied connotation within the international community and there is no credible state practice to support it. Professor Crawford's recent report on state responsibility, is however helpful.
20. That, the Roman law concept of *actio popularis* 'is not known to international law as it stands at present', but international law in certain unique cases has accepted and acquiesced in situations in which states are allowed to take action to vindicate the interest of the world or the interest of 'mankind'. Thus to promote and preserve peremptory norms (*jus cogens*), by international organs, e.g., GA, SC, ICJ, etc, *actio popularis* by states be allowed for the vindication of *jus cogens* norms. In the southwest African cases (Phase two), the ICJ in 1966 rejected the claims of the Empire of Ethiopia and the Republic of Liberia, thus "moreover, the argument of 'necessity' amounted to a plea that the court should allow the equivalent of an actio popularis, or right resident, in any member of a community to take legal action in vindication of a public interest. But such a right was not known to interntaional law as it stood at present: and the court was unable to regard it as imported by 'the general principles of law' referred to in Article 38, paragraph 1(c) of its statute". ICJ reports 1966, p. 47. The court did not support the concept of *actio popularis*, and Sir Gerald Fitzmaruice, as he then was, appeared hesitant as to whether there is *actio popularis* in international law. Judge Jessup, in his well-known separate opinions on *actio popularis*, in the Southwest Affrican case, however argued convincingly that although *actio popularis* is not 'generally established in international law', such a right has long been recongnized by states in matters in regard to the violation of *jus cogens* norms, e.g., slave trade, atrocities against people, mandates, and issues respecting the regime of the high seas; (ICJ reports 1962, pp. 425-431, ICJ reports 1966, pp. 387-388). Dr. Mann was bold and concluded that there is the possiblity that customary international law supports *actio popularis*, where there is an alleged violation of peremptory norms of international law (*jus cogens*). But as we all know, Professor Schwarzenberger remains skeptical and arguably a leading critic of the concept of *jus cogens*.
21. That, the *obligations erga omnes* are created by *jus cogens* norms or by treaties and in unique cases permit no derogation, i.e., absolute obligation towards 'mankind', e.g., the nuclear test cases.
22. That, in contemporary international law, *actio popularis* right can best be promoted through lawful claims before international judicial authorities and the United Nations, e.g., the GA and the SC. Thus, crimes duly listed under Article 19 of the State Responsibility Regime, if violated by a state may warrant Security Council action under Chapter VII. Further it is arguable to postulate that international crimes undoubtedly cause injury to all states and therefore these crimes are the concern of every member of the international community.

23. That, states have the right and legal interest to expose the 'illegality of crimes *contra humanum genus*'.
24. That, states owe an obligation to the international community for the maintenance of international peace and security, and a rule which prohibits an international crime can not always be referred to as having the character of *jus cogens* norms.
25. That, gross violation of human rights laws or *jus cogens* norms is highly possible or certain in a promobilized authoritarian political system, premobilized democratic system, radical totalitarian system, modernizing authoritarian system, and low subsystem autonomous system, than in high sub system autonomous political system, e.g., Britain, Canada, USA, France, Australia, etc. China and North Korea, for example, have a radical totalitarian political system, while Rwanda has a premobilized democratic system. Nazi Germany, on the other hand, had a conservative totalitarian system, and it would appear Yugoslavia – under Field Marshall Tito – had a radical authoritarian system. Thus the political infrastructure, level of differentiation, and secularization within a given country, shape and determine the behaviour of states and how human rights norms are protected or citizens are treated.
26. That, the purpose of *jus cogens* norms is to protect the vital security interests of the world and it is based on the good conscience of 'mankind'. Furthermore, it is instructive to note that, *actio popularis*, although an independent concept, is legally related to the principle of *obligations erga omnes*.

10 UN Draft Convention on State Immunity

10.1 Acceptance of the Proposed Draft Convention

The recent publication of the finalized text on jurisdictional immunities of states and their property, which was prepared by the UN Ad–Hoc Committee on 27th February, 2003, under the chairmanship of Dr. Gerhard Hafner, has now been adopted by respective governments[1] and ready for signature at the United Nations Headquarters on 17 January 2005.[2]

The Ad–Hoc Committee was established by resolution 55/150 of 12 December 2000, and since its establishment, it has operated on the spirit of *entente cordiale*.[3] Prior to submitting its final report, the Ad–Hoc Committee held three important sessions, starting from the 4th of February to 28th of February, 2003, and was immediately followed by a third session which was held from 1st to 5th of March 2004.[4] Thus, on 5th March 2004, the Ad–Hoc Committee finalized its report on the United Nations Draft Convention on Jurisdiction Immunities of States and Their Property, and a set of annexed understandings.[5] Although the draft convention is still associated with some difficulties[6], one is hopeful that the hidden uncertainties, ambiguities, and gaps would not derail it from being accepted as a treaty, because

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[1] See A/59/508, Fifty–Ninth Session: Agenda 142.

[2] See A/59/508, see also the official records of the General Assembly, Fifty–Ninth Session, Supplement No. 22 (A/59/22).

[3] The work of the Ad–Hoc Committee on jurisdictional immunities of states and their property at its Third Session can be found in document A/59/22; at it's 2nd plenary meeting on 19th September 2003, the General Assembly on the recommendation of the General Committee, decided to include the item in its agenda. At the 20th Meeting on Nov. 2003, 31 countries introduced resolution A/G.6/58L.20. And at that meeting, the said committee adopted the draft resolution A/5.b/58/L.20, without a vote: Para 9, Press Release GA/L/3259. See also UN. Doc. A/AC 262/L.4/Add.1.

[4] "Paragraph 2 of General Assembly 58/74 of 9 December 2003" paved the way for a special meeting to be reconvened from 1st to 5 March 2004. – with a clear mandate 'to formulate a preamble and final clauses with a view of completing' the work of the Committee on Jurisdictional Immunities of States and their Property.

[5] See A/59/22 (E, F, S, R, C, A).

[6] See UN Press Release #206 (04): October 25, 2004; See generally I. Brownlie, Principles of Public International Law, Sixth Ed. 2003, p. 326; See also the 40th Session Ass., Gen. Ass. Off. Recs, 43rd Session, Supplement No. 10(A/43/10) pp. 258–259.

as we all know, too much energy, resources and time have already been expended on this elusive and controversial subject matter.[7]

True, amendments were made to the 1991 Draft Articles and these amendments were specifically directed at Articles 10, 11, 16 and to part IV respectively, with the hope that a compromise can be reached.[8] It is important to note that these amendments were carefully made in order to achieve the long awaited agreement in respect of the five main issues which have been identified as major problem areas,[9] namely:

1. "the concept of the State for the purpose of immunity."
2. "concept of State enterprise or other entity in relation to commercial transaction,"
3. criteria for determining the commercial character of a contract or transaction;
4. contracts of employment and
5. measures of constraint against state property[10].

Let us consider *seriatim*, the above stated problems under the recently adopted Draft Convention on Jurisdictional Immunities of States and Their Property, and the annexed understanding therein provided.

10.2 The Concept of the State for Purpose of Immunity

The General scope of state immunity primarily has always produced uncertainty and difficulties in both civil[11] and common law[12] jurisdictions. Hence the ILC and the Ad–Hoc Committee decided as a matter of principle to favour a broad defini-

[7] See generally the work of the I.L.C. under Prof. Sucharitkul and Mr. Ogisio. The said work is cumbersome and time consuming.

[8] See Hazel Fox – The Law of State Immunity, Oxford University Press, (2002) pp. vii – xiii; see also A/C.6/58/L20.

[9] A/C.6/49/L2; A/CN.4/L.576 6th July 1999.

[10] See The General Assembly "resolution 55/150 of 12 December 2000." See also the work of the Open–ended Group of the Sixth Committee and the Compromise that was reached: After having taken pains to consider the unresolved issues, the committee adopted the draft resolution A/C 40/58/L.20, which was supported. The committee of Nations present at the meeting adopted the Draft Resolution without a vote see (Para.9). See also Fox, op. cit. note 8, at p. viii; see, generally the Ad–Hoc Committee's Report A/C.6/58/SR–12.

[11] S. Sucharitkul, State Immunity and Trading Activities in International Law (1959) pp. 162–255; Lauterpacht, The Problem of Jurisdictional Immunities of Foreign States (1951) 28 BYIL pp. 220–272; Badr, State Immunity, An Analytical and Prognostic View (1984).

[12] Lauterpacht, op. cit., Badr, op. cit., Sinclair, op. cit., (Recueil des Cours 113); "Encyclopaedia of Public International Law (1991) under the direction of Bernhardt, 2nd Edn. Vol. 1.

tion of the state,[13] which covered Unitary states and Federal States. The definition also covered constituent unites of Federal states and other agencies or instrumentalities of states.[14] The state in this respect, is clearly characterized as having indispensable institutions or organs, but the drafters added a qualifier which required that these institutions be allocated a sovereign task in order to be granted immunity.[15] And it is quite clear that no exceptions to immunity in specific cases are allowed.[16] Thus, according to Article 2(b), any action attributable to the state must be accorded immunity. But again, for an entity to enjoy immunity, the structural and functional tests, however, would have to be satisfied.[17] Article 2(b)(ii),(111), has been expanded and this in many respects appears to have solved the problem in regard to the definition of the state.[18] It would have been expedient, however, if the definition of the state is further expanded to cover National Liberation Movements,[19] e.g. the PLO, Protectorates and Micro states, e.g. Liechtenstein and Manaco.[20]

In short, the introduction of a qualifier in respect of the various organs of government would go a long way to resolve the problem. The force of 2(b)(iii) is quite essential and logical because the state is an abstract conception with varied functions.[21]

10.3 State Enterprise and Commercial Transactions

Article 10(3) under the Draft Convention has undergone a minor change,[22] but did not go as far as to clarify *in toto* the legal position of state enterprises. Article 10(3) may be stated as follows...

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[13] See A/59/508 in which a state is defined to cover various organizations of state and the definition is expanded to cover Federal states.

[14] Ibid. at p. 5.

[15] Ibid: reference must be made to 2(b)(11)(iii).

[16] See Article 2(b) under the Draft Convention 2004.

[17] See Fox, op. cit. p. ix; and pp. 231 and 350. Thus to enjoy immunity, the court would have to apply the Qualifier test, which means the functional test and the structural tests must be applied.

[18] Fox, op. cit. pp. 323–67; previously state practice was unsettled in respect to Federal states and their provinces. But now it would appear the problem has been brought under control by the Sixth Committee; see generally A/CN.4/L.576 (1999).

[19] In the USA, for example, the PLO has been sued and the late Yasser Arafat was sued: 92 Corte di Cassazione, 69 (1986) RDI 884.

[20] Bengt Broms – states in Mohammed Bedjaoui (ed) International Law, Achievements and Prospects (1991) pp. 41–66; pp. 55–56.

[21] Ibid. at pp. 48–56.

[22] Fox op. cit. pp. ix–x; A/CN.6/49/L.2 see: the original consultations held pursuant to General Assembly Decision 4/413. Some recent case law relating to the issue – Kuwait Airways Corp v. Iraqi Airways Co. (1995) 3A11 ER 694; Central Bank of Yamen v. Cardinal Financial Investment Corp. (2001) Lloyd's Rep. Bank 1. CA; Kuwait Airways Corp. v. Iraqi Airways No. 2 (2001) 1 WLR 439; (2003) EWHG 31 (Comm), 24 Jan.

"where a state enterprise or other entity established by a state which has an independent legal personality and is capable of

(a) suing or being sued and

(b) acquiring, owning or possessing and disposing of property, including property which that state has authorized it to operate or manage, is involved in a proceeding which relates to a commercial transaction in which that entity is engaged, the immunity from jurisdiction enjoyed by that state shall not be affected."[23]

The main thrust of Article 10(3) is that the immunity of the state will not be affected even if a state enterprise, which has been established by the state, is involved in a commercial transaction. It would have been apposite if the drafting of state enterprise specifically referred to under Art. 10(3) is well focused so as to create a simple and clear relationship between political divisions and state agencies and instrumentalities, as defined in Article 2.1(b)(ii) and (iii).[24] Perhaps the explanation offered under Article 18 in respect to "entity", could have been carefully explored to explain the specific meaning of a state enterprise,[25] or possibly, Article 10(3) could be brought under Article 2, or be specifically subsumed under the sub–rubric, C. – "commercial transaction means"; Article 10(3) is likely to have a varied connotation, if its relationship to Article 2.1(b)ii, (iii) – is not harmonized[26] or clearly explained. The question that must be asked is what is the difference between political subdivisions, state agencies and Article 10(3), which was drably drafted? Perhaps such an approach might have been influenced by civil law principles.

As it may clearly be recalled, it was at the behest of the former USSR and other socialist states that the ILC included Article 10(3) into the draft article on second reading.[27] This article provided *inter alia* the exclusion of the "piercing of the corporate veil" of state enterprises, even where there is evidence of commercial transaction.[28] But fortunately, the annex to the Draft Convention appears arguably

2003, these IAC dealings were held to be of commercial nature: Antares Aircraft LP v. Federal Republic of Nigeria and Nigerian Airport Authority (1LR 107, p. 225); Walker et al., v. Bank of New York Inc. (ILR 104 p. 277).

[23] See Supplement No. 22 (A/59/22) 59th Session Agenda Item 12 p. 8.

[24] See Fox, op. cit. pp. ix–x; See also Year Book of the ILC, (1990), Vol 1, pp. 78–94. Walter Fuller Aircraft Sales Inc. v. Republic of Philippines (ILR 103 p. 503). Arriba Limited v. Petroleos Mexicanes (ILR 103 p. 490); Hilao and Others v. Estate of Marcos (ILR 103 p. 52); ILR 104 p.119.

[25] Fox, op. cit.

[26] See I. Brownlie, op. cit. p. 337; Schreuer State Immunity op. cit. p. 95; see generally Fox, op. cit. pp. 335–352; For a court to be able to promote justice, it is expedient to follow current approach and the applicable law. See generally Annuaire del' Inst. 62 p.101, Article IV; In order to consider an entity as part of a sovereign state for purposes of immunity, there must be a well established legal relationship between the state and the entity concerned.

[27] Byelorussia SSR and USSR. Para 112, Preliminary report on Jurisdictorial Immunities of States and Their Property. A/CN.4/415. Yearbook of the ILC, 1988, Vol. 11. Part 1, p. 109; A/NC.4/410 and Add. 1–5.

[28] See A/CN.4/410 and Add. 1–5: The Socialist states were then arguing that a provision be made to cover segregated state property which was well recognized under Socialist principles. Thus according to this principle: "a state enterprise, as a legal entity, pos-

to allay fears that Art.10(3) would be used as a cover–up to under–capitalize enterprise data. The said accompanying annexed understanding reads thus:

"Article 10, paragraph 3, does not prejudge the question of 'piercing the corporate veil,' questions relating to a situation where a state entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim or other related issues."[29]

But it is instructive to note that the question in issue is not primarily a matter of jurisdictional immunity of states but rather to some extent has much to do with conflict of laws or private international law. As a matter of principle, however, one can envisage the "piercing of the corporate veil" in certain trial proceedings and enforcement measures, and national courts over the years have not been clear on the above issue.[30] On the whole, it would appear Article 10(3) lacks clarity and since the law is polysemous, great care should have been taken in drafting it.

10.4 Commercial Character of a Contract or Transaction

Article 10(1) under the 1991 ILC Draft has been retained under the 2002 revised text of the Draft Convention.[31] Article 10(1) represents the central exception to state immunity. Jurisdiction of a given claim thus, could be determined through the underlying principles contained in Article 10(1). But in classifying the transaction as to whether it is commercial or non–commercial, the *lex fori* would have to rely on Article 2(2) for guidance.[32] Article 2(2) of the Draft Convention, however, has undergone some changes and it reads as follows:

"In determining whether a contract or transaction is 'commercial transaction' under paragraph 1(c), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or trans-

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sessed a segregated part of national property." These states, e.g., Byleorussia (SSR) laid emphasis on the *primordial interest of the state.*

[29] See A/59/508; Supplement No. 22 A/59/22 p.8, i.e. Convention on Jurisdiction Immunities of States and Their Property.

[30] Baglab Ltd. v Johnson Helthy Bankers Ltd. 66 (1987) F Suppl. 289; Benvenutti Bonvant v. Banque Consumer Ciale Congolaise 77 (1988) RGDIP 347 (Couride Cassation); First National City Bank v Banco Para el Commercio Exterior de Cuba (BanCeC) (1983) 462 US 611.

[31] Article 10(1) is used as a "connecting factor", but the explanation given is so vague and thus not helpful. Thus, although Private International Law was specifically mentioned, the drafters did not go further to explain the role of the *lex fori* and the *lex causae* and how these terms can be applied to determine the competence of the court. Is the *lex fori* required to apply international law or it could rely on local data to determine whether a given case is commercially based or not?

[32] There is a lack of terminology in construing Article 2(2), and the aim of codification is to provide in simple terms a satisfactory definition of commercial transaction, but to date, neither doctrine or case law seems to have provided an adequate definition of commercial transaction: The UK Act is quite helpful, e.g. See 3(3) 1978 Act; but see generally Australian Act 1985 Section 11(3).

action have so agreed, or if, in the practice of the state of the forum, that purpose is relevant to determining the non–commercial character of the contract or transaction."[33]

The quest to include the purpose test in the Draft Articles was particularly supported by developing countries, while western industrialized countries opposed it.[34] This drama is likely to continue during the ratifying phase of the Draft Convention since there is no accompanying understanding to clarify the varied import of Article 2(2).[35] The classification of the original version of Article 2(2) entails a two–fold test, whereas the classification of Article 2(2) under the Draft Convention entails a four–stage test which must at the same time, be balanced against the import of Article 2 1(c)(iii). In order to avoid confusion, there is the need for a further clarification of the relationship between Article 10(3) and Article 2.1(b)(ii), (iii). A careful review of Article 2(2), under the Draft Convention shows that it has become open ended and therefore would make litigation more complicated.[36] It would have been helpful if the drafters had taken pains to touch on the principles of Private International Law by explaining the role of the *lex fori* and the *lex causae* in respect to the legal effect of Article 2(2),[37] under the Draft Convention. It is essential to note that, Article 2(2) whether in its original or present form would force the judge to make reference to the law of both states and the characterization of the issues in a given case by and large would have to be analysed with specific reference to Article 2(1)(c), thus carefully taking into account the law of the forum (the *lex fori*) and the law of the defendant state.[38] The fundamental problem that one has to grapple with is to determine whether *the lex fori* is still the basic law, or regard be also given to the *lex causae*.[39] Be this as it may, the

[33] See Article 2003 text (which has now been adopted); A/59/22) p. 5; see also (A/C.6/59/SR.25).

[34] See ILC comment, A/46/10 Suppl. 10, Article 2(25), but see also UN Doc. A/47/326; The purpose test was opposed by Great Britain, Australia, Austria and France. The position of France now is not clear; France is ready to follow both the purpose test and the nature test; USA, Italy, Netherlands and Federal Republic of Germany still oppose the purpose test.

[35] Fox, op. cit. p. xi; Lady Fox, having carefully studied Article (2)(2) under the revised Draft Convention (2003) text concluded that it is highly unsatisfactory. She is not alone; the present writer shares her views on the subject.

[36] The four–stage verification approach is not going to make litigation straight–forward and easy. For example, how can the supply of medicine to Aids patients in Zimbabwe be determined in case there is a contract dispute between a Plaintiff in the forum and the state of Zimbabwe? Perhaps Article 2(2) may be applied in simple cases, but would fall far short of producing the desired result in a complicated case.

[37] See the excellent reasoning that was put forth by the court in the Empire of Iran case 4 ILR 57; Jurisdiction must be determined by taking into account international law; see also (1938) AC 485, House of Lords; (1958) AC 379 p. 422 per Lord Denning.

[38] There is the need to determine whether there is a special connection between the subject of the dispute and the Forum: relying only on the *lex fori* would not be helpful; see the Empire of Iran case; (1963) Bverfge 16; (1963) 4 ILR 57.

[39] The *lex causae* is a "shorthand expression denoting the law which governs the question"; see Morris, The Conflict of Laws (Ed) by J.D. McClean, 1993 p. 7.

bargaining position of the defendant state has been enhanced considerably.[40] Further, a careful analysis of Article 2(2) in its present form shows that "connecting factors" were totally ignored.[41] At least, there should have been a forward–looking method whereby the dispute can be linked to the Forum state. This problem was overlooked in 1991 and it has again been swept under the carpet.

10.5 Contracts of Employment

The disagreement over employment contract exceptions to state immunity appears to have been resolved to a greater extent,[42] in view of the fact that immunity is duly extended to cover diplomatic agents as defined under the Vienna Convention on Diplomatic Relations of 1961,[43] and also under the Vienna Convention on Consular Relations of 1963.[44] The drafters also limited the exercise of jurisdiction over certain class of employees who may be recruited to promote or aid the diplomatic functions of the sending state. Article Eleven, under the revised text, i.e., 2003 Draft Convention,[45] covers much ground than the original Article Eleven under the ILC Draft Articles.[46] Specific changes were broadly made to the said article and the state appears to have been well protected in view of the force of the Vienna Convention on Diplomatic and Consular Relations.[47] Article Eleven does not guarantee the application of the laws of the receiving state in matters relating to labour disputes and hence, immunity is accorded where there is a *prima facie* evidence that the embassy employee is a national of the defendant state, unless it can be proven otherwise that the employee has become a permanent resident or citizen of the forum state.[48] For the forum state to exercise exclusive jurisdiction over a dispute between the employer state and the employee, Article 11(f) requires that there must be an agreement in writing.[49]

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[40] See Articles 2(2); Part II, Article 5, Article 6, and Part IV in respect to enforcement measures.

[41] The Draft Articles or the Draft Conventions 2003 (text) did not cover criminal proceedings and jurisdiction is determined if the subject of the dispute is *prima facie* commercial. Here it is important to devise connecting factors as a means of linking the dispute to the Forum, the Commercial element is simply inadequate, e.g., the *lex situs*, the *lex contractus*, the *lex loci delicti*, etc.

[42] See Fox, op. cit. p. x.

[43] A/59/508; No. 22 (A/59/22).

[44] A/59/508; A/C.6/59/L.16.

[45] (A/59/508) p. 8–9.

[46] Yearbook of ILC 1991 Vol. 11(2); see generally the report (A/46/10); (Article 11 of the ILC Draft Articles).

[47] I. Brownlie, Basic Documents in International Law, 5th Edition 2002, pp. 162–174; Apr. 18, 1961, 23 UST, 3227, 500 UNTS 95; Apr. 24 1963, 21 UST 77, 596 UNTS 261.

[48] See Article 11(2)(e) of the U.N. Convention on Jurisdictional Immunities of States and their Property: (A/59/508).

[49] Article 11(2)(f) may entail a separate negotiation – where the sending state will have an advantage.

Furthermore, in the annex to the convention, Article 11(2)(d) is directly limited "to the security interests of the employer state" and further covers sensitive "matters of national security and the security of diplomatic missions and consular posts."[50] This certainly is an important addition to the UN draft convention.

The amendments which were made to Article 11 may be considered adequate, but somewhat lacks coherence which is crucial to the whole exercise of getting the draft convention acceptable to all and sundry. Perhaps the drafters were in this case trying to follow *usus* or *repititio facti*, but rather sacrificed coherence for the sake of *usus*,[51] which although may not offend common sense, seems to create ambiguities. Again, there is the need for further clarification in respect of issues relating to party autonomy since Article 11(f) requires that certain agreements must be put into writing in advance.

10.6 Measures of Constraint Against The State

Scholars are agreed that there be a clear distinction between procedural immunity and immunity from measures of constraint.[52] This is equally supported by some states.[53] Professor Brownlie in his exposition of the said subject succinctly stated *inter alia* that:

"the distinction between 'immunity from jurisdiction' and 'immunity from execution' reflects the particular sensitivities of states in face of measures of forcible execution directed against their assets and measures of execution may lead to serious disputes at the diplomatic level."[54]

Thus, although the rights of the plaintiff must not be violated, it is also equally important to bear in mind that when enforcement measures are taken against the

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[50] See the Annex to the Convention with respect to Article 11 at p. 17.

[51] See Article 41 of the 1961 Vienna Convention – on Diplomatic Relations; see also Article 55 of the 1963 Vienna Convention on Diplomatic Relations, and Article 71 of the 1963 Vienna Convention on Consular Relations, the receiving state has the right to exercise jurisdiction, but such rights must be exercised with care in order not to interfere with the diplomatic function of the sending state. For a clear exposition of the subject see I. Brownlie, "Principles" (2003) pp. 341–358; Denz, Diplomatic Law (2nd Ed. 1998); see also Fox, op. cit. pp. 460–473.

[52] I. Brownlie, "Principles", op. cit. p. 338; Malcolm Shaw, Int., Law 4th Ed 1997, p. 518.

[53] Most developing states support the dichotomy between ("immunity from jurisdiction" and immunity from executions); see Sinclair, Hague Recueil, Vol. 167 pp. 218–220: Judge Bedjaoui, also did express some reservations in respect of the relationship between "immunity from jurisdiction" and "immunity from execution". See also Annuaire de 1' Inst. 62 I.88.

[54] I. Brownlie, op. cit. p. 338; True, nobody claims perfection and perfection is not a human virtue, but the "Brownlie Approach", if carefully studied, could be of help to modern judges. This is rightly so because he was eclectic in his approach to the study of the subject, i.e. state immunity; see his work "Institute of International Law: (Yearbook); 'Annuaire" vol. 62, Part 1 Session of Cairo 1987.

state through the forced sale of its assets, it amounts to interference with the regal authority and the sovereignty of the defendant state,[55] and a clear obstruction of its functional diplomatic capacity.[56]

The Draft Articles of 1991 offered a clear distinction between immunity from jurisdiction and immunity from enforcement measures,[57] and this has been retained in the 2003 version of the Draft Convention.[58] Immunity from execution under the Draft Convention has been carefully drafted and therefore one can conclude that it has been greatly improved.[59] The requirement that there be a connection with the claim that is the object of the suit has been deleted, but 19(c), requires that post–judgment measures be only taken against property that has connection with the entity that is being impleaded.

Part IV of the Draft Convention[60] in respect to attachment and seizure in execution, covers such articles as (18) – state immunity from pre–judgment measures of constraint; Article (19) – state immunity from post–judgment measures of constraint; Article (20) – Effect of consent to jurisdiction to measures of constraint and Article (21) – specific categories of property.

On the whole, the position of the defendant state in respect of defending against measures of constraint has considerably been strengthened,[61] and the principal provision of interest can be stated thus:

"No pre–judgment measures of constraint, such as attachment or arrest, against property of a state may be taken in connection with a proceeding before a court of another state unless and except to the extend that:

(a) the state has expressly consented to the taking of such measures as indicated in (i), (ii), (iii) and (b)."

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[55] The Schooner Exchange v. McFaddon. (1812), 7 Cranch 116; Fitzmaurice, 92 Hague Recueil (1957,11); Fitzmaurice (1933) 14 BYIL 101; I. Brownlie, "Principles", op. cit. pp. 322–328.

[56] Arrest Warrant of 11 April 2000 Democratic Republic of Congo v Belgium, Preliminary Objections and Merits, judgment, ICJ Reports 2002 p. 3; see Introductory Comments to Section 11, of the ILC Final Draft Articles 1958 YBILC Vol. 11 pp. 94–95.

[57] See A/45/10, Article 18(2) where it was explained that "consent to the exercise of jurisdiction under Article 7 shall not imply consent to taking of measures of constraint under paragraph 1."

[58] A/59/508; Art. 20.

[59] Fox, op. cit. p. x.

[60] This part of the Draft Convention has been expanded considerably. See A/59/508, p. 11.

[61] Part IV has been improved, Article 18 and Article 19 are specifically influenced to a greater extent by the consent of the defendant state. This is further extended under Article 21 with reference to Article 7; coercive orders against the state or its officials are prohibited in International Law, Prosecutor v. Blaskic, Trial Chamber II, 18 July 1997, 110 ILR 608; Fusco v. O'Dea, the Supreme Court of Ireland (1994) 2 ILRM 389; where a discovery order was denied; Alcom Ltd v. Republic of Columbia (1984) AC 580; Flatow v. Republic of Iran 999 F Supp. 1 (DDC 1998) default judgment; Alejandra v. Telefonoca Larg a Distancia e Puerto Rico 183 F 3d (11th Cir. 1999) 1277; Cicippio v. Islamic Republic of Iran, 18 F Supp 2d 62 (DDC 1998); see generally Murphy (ed) Contemporary Practice of the United States Relating to International Law, (1999) 93 AJIL 161 pp. 151–186; AJIL (2000) pp. 117–124.

(b) "It has been established that the property is specifically in use or intended for use by the state for other than government non–commercial purposes and is in the territory of the state of the forum, provided that post–judgment measures of constraint may only be taken against property that has connection with the entity against which the proceedings was directed."[62]

The fear of serious acrimony among states at the diplomatic level has been contained in the light of the force of Articles 18, 19, 20, 21, and the annexed understanding, respecting the above articles.[63]

There is however a problem associated with Article 19 (1)(c), in so far as it requires that it be clearly established that the property be in use for non–commercial purpose in the forum state and enforcement measure can only be taken if the property at issue is connected to the entity being sued.

Part IV of the Draft Convention is well drafted and somewhat goes beyond the legislation passed in the USA, UK, Singapore, Pakistan, South Africa, Canada and Malaysia, in every respect.[64]

As of now, it would appear developing countries are becoming a little comfortable with the Draft Convention, in view of the careful and objective amendments which have been made to the ILC Draft Articles, and therefore, interest articulation has been minimized to some extent.[65] The Draft Convention as it stands, however, does not provide a panacea or a final solution to all the intractable problems likely to be brought before the Forum court (the *lex fori*).[66] The fact still remains as Professor Brownlie rightly stated that:

"What emerges in reality is an agenda of problems which cannot be approached effectively in terms of a simple focus on the dichotomy between absolute and restrictive immunity. Thus even those states which have accepted the restrictive principle are in general un-

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[62] Convention on Jurisdictional Immunities of States and their Property: A/59/508; see generally No. 22 (A/59/22). Art. 18 and 19.

[63] Professor Brownlie's argument on the "sensitivities of states in face of measures of forcible execution," is well taken and a good example is the Nigerian cement case, where creditors attached Nigeria's foreign assets in European countries and in the US. This in turn brought about a vehement protest from the Federal Government of Nigeria. See N.W. Nwogugus's comments: Immunity of State Property – The Central Bank of Nigeria in Foreign Courts (1979) 10 NYIL 179.

[64] The current U.N. Convention on Jurisdictional Immunities of States and Their Property: A/59/508 has taken a long time coming, and the discussion over a decade in the UN in respect to the Draft Articles, although was associated with disagreement and division, at least some wiser heads in the Sixth Committee and the Ad–Hoc Committee have brought in new ideas. The changes which were finally made and accepted and the annexed understanding, arguably went beyond all the National Legislation currently in force. See Arts. 4, Part III, e.g. Art. 11, Part IV, 18, 19, 20 and 21; see also UN Doc A/A.262/L.4A.

[65] See the Debates in the Sixth Committee and the comments of states' members of the specialized agencies: A/53/274 and Add–1; A/52/294; A/47/326 and Add.1 to 5; A/48/313.

[66] I. Brownlie, op. cit. pp. 323–325.

willing to apply it at the level of actual enforcement by means of seizure of assets of the debtor state."[67]

The only consolation however is that the Draft Convention on Jurisdictional Immunities of States and Their Property does not follow an abstract test as is commonly found in domestic legislation and court decisions in which the distinction between *acta jure imperii* and *acta jure gestionis* is applied in all cases[68] without regard to whether the case involves a commercial transaction, or the violation of international law. Thus Articles 3, 5, Part IV, i.e. 18, 29, 20 and 21, as already stated elsewhere, would continue to reinforce the authority of municipal court decisions in the US, UK and other continental countries.

Again, in the light of Article 18 of the Draft Convention, it will be difficult or cumbersome to apply the restrictive principle at the critical phase of the enforcement process,[69] in view of the fact that the defendant state must expressly give consent to measures of constraint before actual post–judgment measures can be taken.

Professor Brownlie, in his well acclaimed treatise,[70] again adequately argued the above point to its logical conclusion, in the following formulated words:

"Thus even those states which accepted the restrictive principle are in general unwilling to apply it at the level of actual enforcement by means of the seizure of assets of the debtor state."[71]

This is arguably so because enforcement measure which is in violation of state rights could lead to protest and retaliation from other states. The literature also shows that there is considerable evidence to attest to the fact that even if a state submits to the jurisdiction of a national authority, it may in turn frustrate the enforcement of the judgment[72] – and may as of right, demand that the subject matter be removed. This could lead to acrimony between states, hence the changes which

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[67] Ibid at p. 326; One other problem that must be mentioned is that in order to determine whether a foreign state's conduct is *jure imperii* or *jure gentionis* International law took a back seat, thus allowing the *lex fori* to determine the dichotomy which is more often predicated on local data because public international law does not have substantive rules in order to make such determinations. According to a leading commentator – "This implies that the final limits for the qualification of a conduct as *jure imperii* of necessity are governed by autonomous substantive criteria of international law (Iamaw v. Opec 477 F Supp. 553 (DC Cal 1979), not varying from one national *lex fori* to the next." H. Steinberger, State Immunity in Bernhardt Rudolf (ed) Encyclopedia of Public International Law 1987 p. 438.

[68] D.J. Harris – Cases and Materials on International Law 5th Ed. (1998) p. 339, pp. 306–340; J. Bröhmer, op. cit.; Joo v. Japan, 332 F 3d 679 (DC Cir. 2003); Princz v. Federal Republic of Germany 33 ILM 1483 (1994).

[69] I. Brownlie, "Principles", op. cit. p. 326.

[70] Principles of Public International Law, 6th Ed. 2003.

[71] Ibid. at p. 326.

[72] City of New Rochelle v. Republic of Ghana, 255 NYS2d 178 (1964); New York and Cuba Mall SS Co. v. The Republic of Korea 132 F Supp. 684 (1955); Weilamann and McCloskey v. the Chase Manhattan Bank 192 NYS 2nd 469 (1954); Banamar v. Embassy of the Democratic and Popular Republic of Algeria, 84 1990 AJIL, p. 573; Iraq v. Dumez, Belgium, Civil Court of Brussels (Attachment) 27 February 1995.

have been made to the U.N. Convention on jurisdictional immunities of states and their property, are thoughtful and desirable. Further, the provision of non–retroactivity under Article 4 of the Draft Convention is a plus, because the said convention will not apply to any claim instituted against a state prior to the ratification of the U.N. Draft Convention.

10.7 A Perspective Sketch of Possible Future Problems

At this point, it is appropriate to explore as to what problems are likely to crop up after the entry into force of the U.N. Convention on Jurisdictional Immunities of States and Their Property. But first, one must grapple with the issue of whether the Draft Convention as it stands, is a true reflection of customary international law? An objective answer to the above question is in the negative, but such articles as 3, 5, 6, 11(2)(a)–(f), and Part IV, i.e., 18, 19, 20 and 21, are supported by *repetitio facti* or *usus*. The state immunity element, which is introduced into the Draft Convention is supported by *traditio*, e.g., diplomatic practice and international agreements. This is logical because these provisions are widely respected,[73] and arguably also command *opinio juris*.

Secondly, if the convention is ratified, can it be considered as an authoritative expression of customary law?[74] Or can it be regarded simply as a *concensus ad idem* between states? And what about the position of non–signatory states? Or the issues of reservations and denunciations?

Third, what becomes of all the national legislation in place? Are these national laws rendered dead–accurate? Or states such as the U.S., U.K. Singapore, Pakistan, South Africa, Canada, Australia, and Malaysia would have to make changes to their laws in order to bring it in conformity with the treaty text.[75] Can these issues be easily resolved? And what would be the time limit? The issues raised above are legitimate and therefore could be a breeding ground for further disagreements and it appears the future is uncertain.

Let us assume for example, that some states decided not to ratify the convention or initially became a party to it but later decided to withdraw their consent to be bound by the U.N. Draft Convention on State Immunity. Are these states bound by the treaty? From the generally held view,[76] these states would remain bound by the treaty provisions[77] if only these said provisions have attained the character of customary international law, *de lege lata*[78], i.e., *usus* adequately supported by

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[73] Vienna Convention on Diplomatic Relations 1961; 177 states have signed it; UNTS: 95; (1961).

[74] See Fox, op. cit. p. XII.

[75] Ibid.

[76] H.W.A. Thirlway – International Customary Law and Codification (1972) pp. 80–94; pp. 84–86; Tunkin – Theory of International Law 1974 pp, 133–147; Higgins, Problems and Process (1994) pp. 28–32.

[77] Yearbook of ILC, 1959, Vol. 1 p. 91.

[78] Ibid.

opinio juris. This conclusion may be reached whenever a convention is derived from a pre–existing customary international law or if there is an overlap between custom and treaty.

Another problem worthy of consideration is a situation whereby some of the provisions in the treaty are novel in substance as in the present U.N. Convention of State Immunity, and thus have not been wholly derived from a pre–existing customary law, but then customary international law thereafter develops to embrace these provisions in the treaty.[79] Can a non–party to the present convention disencumber itself from the thrust and effect of the U.N. Convention on Jurisdictional Immunities of States and Their Property? The answer is in the positive,[80] but much may depend primarily on treaty form and the principle of *pacta tertiis nec nocent nec prosunt*.[81] This issue was brought before the ICJ in the North Sea Continental Shelf cases where lawyers for Denmark and Holland argued before the court and demanded that

"The delimitation as between the parties of the said areas of the Continental Shelf in the North Sea is governed by the principles and rules of International Law which are expressed in Article 6, paragraph 2, of the Geneva Convention of 1958 on the Continental Shelf."[82]

The court after a careful analysis of the issues, ruled that:

"Article 6 of the Geneva Convention did not embody or crystallize any pre–existing or emergent rule of Customary Law. Therefore, the equidistance principle for delimiting jurisdiction over the Continental shelf could not bind those states, such as the Federal Republic of Germany which had not ratified the 1958 Convention."[83]

The court concluded that Article 6 of the Geneva Convention did not embody customary international law *de lege lata*[84] and therefore does not have a binding effect on Germany.[85] Let us assume further that a state is not *prima facie* bound by all the particular provisions of the Genocide Convention, can this non–ratifying state argue that it is free from liability and therefore could commit genocide because it is not a party to the treaty? The answer is in the negative insofar as the underlying provisions in the Genocide Convention have attained the character of *jus cogens*.[86]

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[79] See Higgins Argument, op. cit. "Problems and Process", pp. 29–30; see also the interesting and valuable discussion by Professor Thirlway, (1990) 51 BYIL pp. 87–102.

[80] Tunkin, op. cit. pp. 133–140; Thirlway, op. cit.; Jennings in Mohammed Bedjaowi (ed) International Law: Achievements and Prospects 1991, pp. 135–177, pp. 146–148.

[81] I. Brownlie, "Principles", op. cit. pp. 598–600. Jennings, op. cit. pp. 146–148.

[82] (1969) ICJ Rep. p. 3.

[83] (1969) ICJ Rep. p. 3.

[84] Ibid; see also the Yearbook of the International Law Commission, Vol. 11 (1959) p. 91; Thirlway, op. cit. pp. 85–88.

[85] T.O. Elias, New Horizons in International Law 1979 pp. 49–51; I. Brownlie, "Principles", op. cit. pp. 488–490; Jennings op. cit. pp 154–156.

[86] Higgins, op. cit. Problems and Process, pp. 29–32. Tunkin, op. cit. "Theory" p. 142; Yearbook of the ILC 1960 11, pp. 72–107; Rousseau, Droit International Public (Paris – Sirey 1970).

It may be further stated that it is possible for customary international law to be changed by a treaty[87] and by the same logical reasoning, a treaty can be changed by subsequent practice which has given birth to a new customary norm.[88] This however, would be possible if the change in issue concerns the same contracting parties backed by a tacit agreement, which in reality supersedes the previously accepted recitals drafted into the treaty text.[89] According to contemporary international law, if the parties to the agreement are not identical and the purported modified norm has attained an imperative character, the whole process would have to come to an end or possibly be precluded altogether.[90] But in some unique instances, such modifications to a treaty or custom, could take place whether the parties to the agreement are identical or not.

The present U.N. Convention of Jurisdictional Immunities of States and Their Property, could create problems because of the divergent views expressed in the Sixth Committee,[91] and the unresponsive attitude of some states.[92] Although the recent development is encouraging, one must not forget that the work of the U.N. Ad–Hoc Committee was based on a shaky compromise, i.e., "to each a crumb of right, to neither of them the whole loaf." Certainly there is wisdom in such an approach.

10.8 Conclusion

The original proponents of restrictive immunity were accorded a veritable hagiocracy, when commercial activities of states became severely problematic and plaintiff rights were ignored because of the force of absolute immunity, after the great war. Thereafter, commentators, scholars, judges and legislators were all influenced by the great appeal of the restrictive immunity. Many therefore simply withdrew into nebulous platitudes, thus resigning to a complete acceptance of the shaky doctrine of restrictive immunity.

Soon when the head took control of the heart, it was discovered that the fundamental factors conditioning these intractable problems can not simply be resolved by applying restrictive immunity, which over fifty–nine years has forced us into a zone of confusion. Now, it is becoming clearer that a simple dichotomy between absolute immunity and restrictive immunity is not a complete answer or panacea in resolving the controversy. It would have been helpful if the particulars of Sir

[87] Tunkin, op. cit. "Theory", p. 142; see generally Virally, "The Sources of International Law", in Sorensen M (ed) Manual of Public International Law, (1968) pp. 116–184; p. 129; see generally, the U.N. Yearbook of the ILC 1964, 11 198; case concerning the Temple of Preah Vihear (Cambodia v. Thailand) Merits, judgment of 15 June 1962; H.W.A. Thirlway, (1990) 61 BYIL pp.87–102.

[88] See Tunkin, op. cit. "Theory" p. 142.

[89] Ibid.

[90] Ibid.

[91] I. Brownlie, op. cit. at p. 326; Press Release GA/L/3091.

[92] I. Brownlie, op. cit., see generally the Press Release GA/L.

Fitzmaurice's article of 1933 in the British Year Book of International Law[93] had been carefully studied because that article contained venerable admonitions, and it is still valid today.

The recent adoption of the Convention on Jurisdiction immunities of States and their property is to be welcomed with great joy after 27 years of trying to get a treaty text in force. The UN Ad-Hoc Committee chaired by Dr. Gerhard Harner must be congratulated for a job well done.

[93] (1933) 14 BYIL 101.

11 The Current Law of State Immunity

11.1 Some Thoughts on the Law

It is far from clear as to the current state of the law in respect of customary international law. This may be partly due to the fact that some writers who have written on the subject were rather too eager to "take the helm while tossing overboard the compasses, sextants, and other navigational aids which centuries of effort have devised,"[1] without first developing a suitable method for resolving the problem. While others simply overloaded the doctrine of restrictive immunity with a multitude of conflicting theories to such heights as to completely transmute the said subject into a 'dismal swamp' of competing dogma and failed theories far removed from the realities of life.

The theoretical solutions devised by Belgian and Italian courts to curtail the immunity of states in the past were imperfect, and wholly conditioned on *ad hoc* basis. And although this hidden flaw might well have been detected somewhere along the line,[2] no efforts were expended in removing this inherent difficulty, which to the present writer has caused so many difficulties, thus taking the development of the whole subject as a hostage. Certainly, no condition is permanent, things do change and it is expedient that a concerted effort be made to resolve new problems with new solutions, thus discounting the use of obsolete incomplete theories in the resolution of intractable problems of today. There ought therefore to be emphasis properly placed on areas of conflicting doctrine, the changing scope of state immunity, and evidence of state practice respecting customary international law rather than the distinction between commercial and non–commercial activities of states.

11.2 The Current State of the Law

The maxim *rex gratia dei*, although patently obsolete, gave albeit a forceful justification to the concept of sovereign immunity and this somewhat prepared the way for sovereign immunity to flourish into a meta–juridical philosophy, i.e., "the

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[1] See Alfred Hill (1960) 27 University of Chicago Law Review, p. 485.

[2] Lauterpacht, op. cit. (the 1951 article in the British yearbook).

King can do no wrong."[3] Each of these concepts, however, has an independent existence and therefore must not be confused in respect to the present–day development of the concept of sovereignty. *Rex gratia dei* was arguably an internal phenomenon which gave power to the King to interpret God's law. In short, sovereign immunity is the modern version of *rex gratia dei.*

As already stated elsewhere, the doctrine of absolute immunity "obtained a foothold" into American law in 1812, through a private claim duly preferred against Napoleon before American courts.[4] Ever since that day the position of the sovereign state was elevated unto a higher plane where it cannot be sued without its consent before municipal courts. Thus before the beginning of this century sovereign immunity was absolute where immunity was granted irrespective of the activities of the state in issue. After the First World War onwards, however, the currency of absolute immunity has been reduced and thrown into question. This in the main seemed to have prompted some common law countries to resort to legislation in order to curtail the immunity of states before domestic courts. Although the doctrine of restrictive immunity is the brain child of civil law countries, it is surprising to note that none of these countries to date has embarked on introducing the doctrine of restrictive immunity into its statute book. A careful review of European practice simply shows that almost every Western European state now follows the restrictive rule to some extent.[5] Recent trends also show that restrictive immunity or relative immunity is reflected in the statute books of the United States, the United Kingdom, Australia, Canada, Pakistan, Singapore, and South Africa.[6] There are certainly similarities between the various national legislation where primacy is given to the nature test in every case whilst the purpose test is totally rejected. This arguably is unfortunate because the rejection of the purpose test in reality deprives the judge from asking the right questions likely to uncover the main issues and answers in a given sovereign immunity controversy. Earlier doctrinal developments in Belgium and Italy[7] mistakenly relegated to the background the purpose test thus blocking one aspect of the development of sovereign immunity, because the suggestion that the nature test be accepted as the only criterion in classifying commercial and non–commercial activities is *ex hypothesi* flawed since any serious consideration of the purpose test *qua* state activities seemed to provide a more positive means of removing the attendant web of confusion in explaining the nature of a given transaction. For no one enters into an agreement without first seriously considering the object and purpose of the act or fact of agreeing.

[3] Leon Hurwitz, The State as a Defendant—Governmental Accountability and the Redress of Individual Grievances (1981), pp. 8–24.

[4] Schooner Exchange v. McFaddon (1812) 7 Cranch116.

[5] Sinclair, The Law of Sovereign Immunity – Recent Developments, (1980 II) RC 167.

[6] Brownlie, op. cit., pp. 323–345.

[7] Ibid. at 327.

11.3 The Changing Scope of Sovereign Immunity

After the Second World War the concept of absolute immunity came under attack from many fronts. While Continental European states led the move in promoting the crystallisation of restrictive immunity, the common law countries in the West took a more conservative view about the call for change until the Tate letter was written and made known to the world.[8]

The current practice of states seemed to be gravitating towards a rule whereby foreign states are allowed to enjoy some degree of state immunity as regards certain activities *acta jure imperii* while state activities *prima facie* commercial in outlook are denied immunity. Thus for a local court to take jurisdiction over a foreign state a distinction must be made between what is a commercial activity and what activities fall within the confines of *acta jure imperii*. Although the said approach leaves much to be desired, at least for now, most Western countries have resigned to following it, coupled with the clarion call that the restrictive immunity be accepted, without first taking pains to consider its merits. So far the restrictive immunity has been embraced by courts in more than twenty countries.[9] And it would appear some other states are also willing to follow the restrictive immunity in principle.[10] Although the number of countries moving towards this principle seemed not that clear, at least some eleven more countries appear to support the said doctrine.[11] The current legal position of some states as regards restrictive immunity can be stated thus:

1. Any activity of a state that could be characterised as *acta jure gestionis* would not be accorded immunity.
2. A contract of employment signed between a sending state and a natural person to be performed in the territory of the receiving state may not be accorded immunity. That is, if the work in question is wholly or partly to be performed within the receiving state.
3. Any interest clearly discernible in the possession or the use of immovable property by a foreign state, e.g., in the United Kingdom would not attract immunity (UK Act 1978 Section 6(1)(a)).
4. Any act or omission respecting death or personal injury caused by the officials of a sending state in the jurisdiction of a receiving state shall be denied immunity.
5. Any obligation arising out of an agreement respecting interest in or possession and use of property in the receiving state would not be accorded immunity (UK legislation Section 6(1)(b), see Intpro Properties UK Ltd v. Sauvel (1983) QB 1016).

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[8] (1952) 984 Dept. State Bull. 26. This letter in fact influenced many countries to also modulate their positions, e.g., common law countries.

[9] Brownlie, op. cit., 326–328.

[10] Ibid. at 328.

[11] Ibid.

6. An infringement by a foreign state in the forum state of any patent, trademark and copyright laws would not attract immunity in the forum state.
7. An important exception to state immunity can be found in Section 3 of the 1978 UK Act: Section three, for example, reads as follows:

   "A state is not immune as respects proceedings relating to (a) a commercial transaction entered into by the state or (b) an obligation of the state which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom."

8. A state cannot claim immunity if it enters into an agreement in the formation of a company with a natural person or legal entity having its seat at the forum state. Thus Section (3) of the 1978 UK Act, for example, defines commercial transaction as follows:
   "(a) Any contract for the supply of goods and services.
   (b) Any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and
   (c) Any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character into which a state enters or in which it engages otherwise than in the exercise of sovereign authority."

   The 1972 European Convention also confirms the restrictive immunity and the principal provision of interest runs as follows (i.e., Article 6):

   "(1) A contracting state cannot claim immunity from the jurisdiction of a court of another contracting state if it participates with one or more private persons in a company, association or other legal entity having its seat, registered office or principal place of business on the territory of the state of the forum, and the proceedings concern the relationship, in matters arising out of the participation between the state on the one hand and the entity or any other participant on the other hand.
   (2) Paragraph 1 shall not apply if it is otherwise agreed in writing."

   Section 28 USC 1330 of the FSIA, for example, clearly confers jurisdiction on federal courts respecting matters concerning suits against foreign sovereign states. Section 1604 covers instances where immunity could be claimed by sovereign states, while exceptions to immunity are set out under sections 1605–1607, 1605 and 1605 with some flexible reference to jurisdictional issues *qua* the position of foreign states, e.g., the due process clause.

   Section 1605(a)2 under the FSIA, for example, defines commercial activity thus:

   "A commercial activity means either a regular course of commercial con-

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

The United States legislation is not dissimilar to the UK State Immunity Act, in respect of Section 5, which provides that "(a) death or personal injury; or (b) damage to or a loss of tangible property caused by an act or omission in the United Kingdom" may not be accorded immunity. Section 13 of the Australian Foreign States Immunities Act (1985); Section 6 of the Canadian State Immunity Act (1982); Section 7 of the Singapore State Immunity Act (1979); and Section 6 of the South African Foreign State Immunity Act (1981) all follow about the same principles laid down both in the American legislation and the United Kingdom legislation, respectively.

9. The current state of the law, however, is not settled in the areas of waiver of immunity and the *execution forcée* as regards the property of a sovereign state. It is submitted that under general international law, a provision made in a contract based on the meeting of the minds (*consensus ad idem),* with a private entity specifying that the contract be governed by a particular law cannot be construed as a waiver of immunity (§ 2(2) the UK Act 1978). The current law therefore supports a method whereby a waiver is formerly procured through competent organs of a state. Thus immunity from *execution forcée* and *saisie conservatoire*, must be distinguished in clear terms as regards the person of the state and the adjudicatory procedures respecting state property in order to avoid confusion. But it would appear this web of confusion still remains thus creating a flood of conflicting state practice.[12] True, state practice since the 19th century up to the First World War seemed to be fairly uniform but ever since the doctrine of restrictive immunity found its way onto the international plane, some countries have refused to grant immunity from enforcement measures, while others entertain the view of according absolute immunity, thus still willing to follow the old order. A careful review of all the national legislation currently in place shows that the 1976 immunity acts of the US, i.e., Section 1610(a), the UK Act of 1978 Section 13(4), the Canadian Act Section 11(1), only accord immunity in respect of state property being used for public purposes. South Africa, Singapore and Pakistan Acts, undoubtedly also follow a similar approach alluded to above by according immunity only in respect of state activities where the use of state property falls within the confines of *acta jure imperii*. A country such as former USSR, i.e. Russia, before 1990 granted absolute immunity in the spheres of enforcement measures. And it is quite clear China, Brazil, Chile and Syria also follow the absolute sovereign immunity rule. Before the 1992 civil war or when active antagonism took place in Socialist Federal Republic of Yugoslavia, there was evidence to

[12] See The International Law Commissions Reports, 1978–1988.

support the fact that Socialist Federal Republic of Yugoslavia also supported the grant of absolute immunity from enforcement measures. But ever since the war, Federal Republic of Yugoslavia's position has become obscure.

10. The question relating to the grant of immunity to subdivisions of states is not clearcut and over the years has proved to be quite elusive. In other words, there is no uniform state practice respecting immunity *ratione personae* of political subdivisions, municipalities, regions or constituent states of a federal government. Under the UK Act of 1978, Article 14, § 2,

> "A separate entity is immune from the jurisdiction of the courts of the United States if, and only if (a) the proceedings relate to anything done by it in the exercise of sovereign authority and (b) the circumstances are such that a state (or, in the case of proceedings to which Section 10 above applies, a state which is not a party to the Brussels Convention) would have been so immune."

> "(3) If a separate entity (not being a state's central bank or other monetary authority submits to the jurisdiction in respect of proceedings in the case of which it is entitled to immunity by virtue of Section (2) above subsection (1) to 4 of Section 13 above shall apply to it in respect of those proceedings as if references to a state were references to that entity."

Although the above 1978 UK Act Section (14) appears to offer some help, there is still some difficulty in distinguishing between what is a state entity and what is not. The problem is even exacerbated because subsidiary organs of states perform different activities, which in reality differ from country to country, thus it is quite difficult to formulate a general formula geared towards the resolution of problems relating to state entities as regards the granting of immunity. The European Convention Art. 27 denies immunity to any entity with an independent personality from the state, which in the main can sue and be sued. The question to grapple with, however, is whether the dual test specified under Art. 27 of the European Convention is adequate. Perhaps it could open the way for some pertinent questions to be asked. However, after this point, the whole subject matter seemed to be thrown unto the uncharted seas without any clearcut destination. In other words, the purported exception seems to be drawn at sea.

11. Recent state practice seems to support an approach whereby a distinction is carefully made between the relationship between the state and the subsidiary organs (state agent) in order to grant immunity. Thus where the legal entity in issue is independent of the state and thus could sue and be sued, then such an entity may not claim immunity. But in reality, how can evidence regarding the status of these subsidiary organs be adequately procured? Is the evidence given by the foreign minister of a given state enough? And how can the veracity of the said evidence be verified? In view of the authority of Rolimpex, it is suggested that legal entities within a state be logically treated in the same manner as the state or government, or the

concept of agency law in respect of general principles of law duly accepted by nations of the world could be applied to contain the problem. The current test appears to be predicated on effective control of the government over the subsidiary organ.

12. As a matter of point of law, the ILC draft articles are not binding at the moment but in every respect follows the principle whereby sovereign acts *jure imperii* are *mutatis mutandis* immune, while sovereign activities *jure gestionis* are denied immunity. Article 2(2) of the Draft Articles is particularly important because it gives prominence to the purpose test as follows:

> "In determining whether a contract or transaction is a 'commercial transaction' under paragraph 1(C), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if, in the practice of the state which is a party to it, that purpose is relevant to determining the non–commercial character of the contract or transaction."

Article 7(2) is also important because it resolves one of the controversial issues regarding the exercise of jurisdiction *qua lex voluntatis*. It reads as follows: "Agreement by a state for the application of the law of another state shall not be interpreted as consent to the exercise of jurisdiction by the courts of that other state."

It is clear that the current law of sovereign immunity is changing but it is hard to tell exactly where the change is taking us. Thus although some countries are modulating their positions on the said subject matter, however, state practice seemed not uniform.[13] For example, the meaning of commercial transaction and sovereign authority undoubtedly opens a Pandora's box of difficulties and uncertainties, hence there is the need for more clarification and elucidation of these terms. The distinction between *jure imperii* and *jure gestionis*, although predicated on questionable assumptions, is gaining grounds and it is now quite clear states could follow restrictive immunity without incurring liability under state responsibility in general international law. In other words, states would not incur any legal claims whatsoever by resorting to the application of restrictive immunity.

True, restrictive immunity or relative immunity is gradually becoming well grounded in the practice of states in Western industrial countries. And the question that must be truly grappled with is whether the said rule has crystallised into customary international law. As already stated elsewhere, customary international law is formed when *usus* is aided by *opinio juris sive necessitatis*, so in essence the restrictive immunity doctrine lacks *usus* and therefore has not as yet attained the status of *opinio generalis juris generalis*. This is so because a new international law is formed or created provided there is no weighty state practice in existence that conflicts with it.[14] Perhaps one could argue that restrictive immunity without doubt is an emerging rule which in the future may be accepted by some states, but as of now, the best that can be said about restrictive immunity or relative immunity is that it has perhaps crystallised into a regional custom because in reality it

[13] Ibid., 43rd sess., Suppl No. 10 (A/43/10 pp. 258–9, paras 398–503, etc.

[14] Villinger, op. cit., pp. 1–65; M. Akehurst, op. cit., p. 53.

appears to lack uniformity and consistency of general practice.[15] Absolute immunity therefore survived with some exceptions, less grounded in the practice of states and this has so far created difficulties in litigation.

11.4 A Look at Current State Practice

One pertinent provision of Article 38 of the Statute of the International Court of Justice, which the court must follow or apply, reads thus: "International custom, as evidence of a general practice accepted as law."[16]

Professor Brierly in explaining what is practice postulated that "What is sought for is a general recognition among states of a certain practice as obligatory"[17]; and Judge Read, in the Fisheries case, argued that "Customary international law is the generalization of the practice of states."[18]

The explanation offered by these scholars undoubtedly proves that there is a relationship between custom and practice. Thus practice must *ex hypothesi* be constant and uniformly grounded in order to aid the formation of custom and this has been clearly explained and supported in the Asylum Case.[19] Thus arguably where states vigorously give their support to an international rule, no difficulties would be encountered in proving the general acceptance of the said rule. But in certain cases one is bound to encounter difficulties and that is if there is no clearcut evidence respecting a particular rule, in which case it would be expedient to infer consent from a state's conduct, its failure to react or protest and its acquiescence in a given rule. It is important to stress that both custom and practice do in the main compliment each other and this is well expressed in Article 38(1)(b) of the Statute of the International Court of Justice.

Today, no one can say with much candour or exactitude as to whether there is *usus* respecting the doctrine of restrictive immunity. Although the Tate letter touched on the changing scope of state immunity, however, the evidence therein submitted seemed quite limited as to prompt a momentous change from absolute immunity to restrictive immunity.[20] In recent times municipal courts have handed down conflicting decisions in respect of exercising jurisdiction over sovereign states in America, U.K., Germany, France, Italy, Canada, Australia, Austria, Holland and South Africa. The courts in these countries, it would appear, follow the doctrine of restrictive immunity at one time and absolute immunity at other times, while scholars to some extent have been cautious and perhaps hesitant to emphatically state the current trend of state practice in respect of restrictive immunity. A

[15] I. Brownlie, op. cit., p. 330; Schreuer, State Immunity – Some Recent Developments (1993).

[16] See Article 38(1)b of the Statute of International Court.

[17] Brierly, op. cit., p. 61.

[18] See ICJ Reports (1951), 191.

[19] See ICJ Reports (1950).

[20] For a careful analysis, see The Tate Letter of 1952 which is quoted in this study in Chapter Four.

careful review of the law, however, shows that the practice of states is quite scanty and conflicting. And comments or replies of governments to the International Law Commission's questionnaires clearly indicate that the divergence between the restrictive school and the absolute school is far from over.[21] Dr. Schreuer in his book, for example, concluded that "from a general perspective it can be said that the doctrine of restrictive immunity has been strengthened to a point where practically all countries from which any substantive material is available have embraced it."[22] Dr. Schreuer appears to have exaggerated the current trend of events, for his conclusion does not fully reflect the proceedings and reports of the International Law Commission,[23] the current state practice and perhaps the behaviour of states regarding the subject.

Judge Jennings and Sir Watts also argued that "Most states have now abandoned or are in the process of abandoning the rule of absolute immunity."[24] Again such a statement seems overly optimistic and arguably not in line with state practice and that of Prof. Brownlie's position, when he argued that there is a persistent divergence between the adherence of the doctrine of restrictive immunity and that of absolute immunity.[25] Unless Professor Jennings and his co-editor were referring to the practice of states in the industrialised world, which forms less than one-third of the total number of countries in the world. Quite apart from this, although the practice of states in respect of restrictive immunity seemed to find favour with some Western states, in real terms, however, one is hesitant to conclude that the said doctrine has become well grounded in the practice of the majority of states as to prompt any accurate postulation of its general acceptance on the international plane or in the international community. For example, the group of 77, as a matter of fact, in recent years have mounted opposition against the attempt by some states to increase the purported exceptions to the rule of state immunity. Having stated the position of the group of 77; it is essential also to point out that courts in Kenya, Nigeria, and Zimbabwe in recent times have followed the restrictive immunity, although these countries do not have legistation on the restrictive approach. Simlarly, courts in Ireland and New Zealand have followed the restrictive immunity without enacting law (legislation) on the said subject. But one must be eclectic in reading too much into these court decisions, since the Lex Fori is bound to follow local data as was explained by the German Court in the Empire of Iran case. Which means the distinction between *acts jure imperii* and *jure gestionis* would simply be based on the opinion of the state having jurisdiction over the suit. Lord Wilberforce, in I congreso, followed about the same argument questioning the legitimacy of the concept of restrictive immunity as to whether it is well grounded in the practice of states. The current state of the law is not clear-cut and evidence shows that restrictive immunity lacks the necessary condition i.e.

[21] See generally the International Law Commission Report on State Immunity 1978–1988; 1988–1990.

[22] Schreuer, op. cit., p. 168.

[23] Schreuer, op. cit., p. 168.

[24] Oppenheim, International Law (EDs) Judge Jennings and Watts (1992) p. 357.

[25] See I. Brownlie, op. cit., p. 330.

repetitio facti or 'diuturnitas' – Uniformity of conduct, and the conviction that the said emerging rule is juridically mandatory on states. In other words there is no consensus of individual '*opiniones juris*' of states truly affected by the sovereign immunity controversy at the moment. And it is worth pointing out that Law is not univocal but rather polysemous. Hence one must be eclectic in exploring the issues respecting restrictive immunity.

11.4.1 Some Evidence of European State Practice

Table 13. Ratification of the European Convention (1972)

Countries in Europe	Restrictive Immunity
Austria	"
Belgium	"
Cyprus	"
Germany	"
Luxembourg	"
The Netherlands	"
Switzerland	"
United Kingdom	"

Portugal has signed the treaty but has not as yet ratified the Convention. The additional protocol had been ratified by Austria, Belgium, Cyprus, Luxembourg, The Netherlands and Switzerland. Germany signed the protocol, but has not as yet ratified it. Portugal also falls into this group.

The Dutch, Italians, the French and the Swiss have developed a rich store of jurisprudence on restrictive immunity.

Only few states on the Continent have so far ratified the Convention.

SOURCE: See Oppenheim's International Law, 9th Ed., Vol. 1, page 343, particularly the footnotes.

Table 14. Countries with National Legislation on Restrictive Immunity

Countries	Legislation and Dates
U.S.A.	Passed in 1976
U.K.	Passed in 1978
Singapore	Passed in 1979
Pakistan	Passed in 1981
South Africa	Passed in 1981
Canada	Passed in 1982
Australia	Passed in 1985
Malaysia	Passed in 1984

These countries have incorporated into national legislation the restrictive doctrine, thus introducing some important exceptions to the absolute immunity rule.

One important principle in international law is that the essence of customary law is *opinio generalis juris generalis* of sovereign states.

The above position is supported by Article 38(1)b of the Statute of the International Court of Justice.

The various national legislation in place could be designated as representing the *opinio individualis juris generalis* of each of the states listed above, but in reality do not represent general international law or customary international law.

The various legislative provisions enacted in the USA, UK, Singapore, Pakistan, South Africa, Canada and Australia simply show how international law is understood in these countries and therefore such provisions cannot be imposed on the international community at large, because international law is horizontal in structure.

SOURCE: See the various legislative provisions in Int Leg Materials 8 ILM 21 (1982), ILM 25 (1986), ILM 23 (1984). But see also Malawi Immunities and Privleges Act 1984 (N016 of 1984), and that of St. Kitts (1974).

Table 15.

Sovereign Countries Following Restrictive Immunity	
Barbados	Argentina
Chile	Liberia*
Finland	Romania
Iceland	Peru
Mexico	Denmark
Norway	Estonia
Madagascar	Austria
Qatar	Belgium
Surinam	Canada
Togo	France
Yugoslavia (former)	Holland
Egypt	Spain
South Africa	

*Seemed to follow the American approach before the Civil War. But its position is obscure as of now.

Some of the above listed countries are either imitating the leading industrialised countries or may have been influenced by the *opinio individualis juris generalis* of Belgium, Italy, UK and the USA as regards the doctrine of restrictive immunity. *Opinio juris generalis* may be created *eo instanti* as regards the reduction of nuclear weapons between super powers but not in respect of restrictive immunity, e.g., in matters respecting the survival of the universe and certain delicate and sensitive issues. In other words, *droit spontane* is formed only with the aid of *opinio juris*, without the traditional requirement of state practice. Some scholars, however, have taken issue with the above stated process.

The present writer is indebted to Judge Ago and Professor Bin Cheng for their learned writings on instant customary law or *droit spontane*.

Table 16.

Sovereign Countries Following Absolute Immunity		
Brazil	Thailand	Ghana
Bulgaria*	Trinidad and Tobago	Sierra Leone
China	Russia	Gambia*
Czechoslovakia (former)	Venezuela	Cameroon*
Ecuador	Burma*	Iran
Hungary	Philippines*	Iraq
Japan	Tunisia*	Mozambique
Poland	Libya	Portugal
Nigeria	Sudan	Tanzania
Syria	Zambia	Indonesia
Spain*	Ukraine	

*The position of the above countries seemed obscure but would rather prefer absolute immunity.[26] Russia seemed to be moving towards a market economy but its position on sovereign immunity appears more inclined to accepting the modalities of state immunity, i.e., the old order.

*Ukraine quite recently has argued forcefully that it be granted immunity before English courts, and it appears some of the former Soviet republics would rather prefer that the old order be maintained.

*Bulgaria recently opposed the purpose test although in the past it did support state immunity.

[26] See Int. Law Commission's Report 1978–1988.

Table 17. State Practice in Africa Is Limited

Countries Favouring Restrictive Immunity in Africa	
North Africa	Egypt
Southern part of Africa	South Africa*
An African Island	Madagascar
Southern Part of Africa	Lesotho
South Eastern Africa	Malawi*

*Has national legislation on sovereign immunity. And it is one of the major countries in Africa so far to jump on the legislative bandwagon.

*The rest of African countries would rather prefer that absolute immunity be maintained. A good example is herewith provided below, e.g., the International Law Commission's proceedings relating to the draft articles is a good evidence to attest to the fact that Third World countries and the great majority of African countries have through interest articulation challenged the legal basis of the restrictive immunity. (1980–1988) ILC Report.

*This is even more so because African countries still believe in EXTERNAL and INTERNAL NATIONALISM.

*Very few African states have had the chance to consider the issues relating to restrictive immunity locally.

*Hence state practice may be determined from claims made before foreign courts and declarations made before the OAU and international bodies.

*I was able to compile this data by exchanging letters with 350 students I met at the Hague Academy of International Law in the summer of 1997.

Table 18. French–Speaking Countries in Africa

Countries	State Immunity	Restrictive Immunity	Position Obscure
Algeria	x		
Benin	x		
Burkina Faso	x		
Cameroon			x
Senegal			x
Madagascar		x	
Mali	x		
Mauritania	x		
Morocco	x		
Niger	x		
Central African Republic	x		
Djibouti	x		
Togo		x	
Gabon	x		
Guinea	x		
Ivory Coast			x
Chad	x		
Camoros	x		
Congo	x		
Tunisia	x		

*These countries have a promobilised authoritarian or democratic political systems and their declarations before the OAU indicate a well grounded support in the direction of absolute sovereign immunity for there is no evidence of practice in these countries respecting restrictive immunity.

Table 19. English–Speaking Countries of Africa

Countries	State Immunity	Restrictive Immunity	Position Obscure
Ghana	x		
Nigeria	x		
Sierra Leone	x		
Botswana	x		
Egypt		x	
Malawi		x	
Kenya	x		
Gambia	x		
Lesotho		x	
Sudan	x		
Swaziland	x		
South Africa		x Has a legislation in place.	But followed absolute immunity until 1981.
Uganda	x		
Tanzania	x		
Zambia	x		
Zimbabwe	x		
Mauricius	x		
Seychelles	x		

*These countries have a premobilised authoritarian or democratic political systems and therefore steadfastly believe in internal and external nationalism.

*This means that the above listed countries would not submit to the jurisdiction of foreign courts without a fight, i.e., arguing as of right that they be accorded immunity.

*Zimbabwe – Its Supreme Court fully supported the nature test in 1983.

Table 20. Other Countries in Africa

Country	State Immunity	Restrictive Immunity	Position Obscure
Spanish Sahara	x		
Spanish Guinea	x		
Angola	x		
Cape Verde	x		
Guinea Bissaau	x		
Mozambique	x		
Republic of Congo	x		
Rwanda	x		
Burundi	x		
Somalia	Followed state immunity before the Civil War. There is, however, no government in Somalia at the moment.		
Libya	x		

*There is no evidence of the practice of restrictive immunity in the countries listed above. But the fact that these countries have promobilised authoritarian or democratic systems shows a clear preference for absolute immunity.

Table 21. Latin American Countries

Country	State Immunity	Restrictive Immunity	Position Obscure
Ecuador	x		
Brazil	x		
Mexico		x	
Guyana			x
Guatemala	x		
El Salvador	x		
Costa Rica	x		
Panama	x		
Nicaragua	x		
Honduras	x		
Venezuela	x		
Colombia	x		
Peru		x	
Surinam		x	
Chile			x
Argentina		x	
Uruguay	x		
Paraguay	x		

*Latin American countries would like to have state immunity preserved except those few countries with low subsystem autonomy like Mexico, Argentina, etc., ready to imitate leading industrialised countries such as the USA and the UK, in respect of the momentous legislative changes that were made in the said leading industrialised countries.

Latin American countries have from the outset expressed *opinio non juris* against the application of restrictive immunity. And those sued in foreign courts have also resisted the jurisdiction of national authorities, arguing that they be accorded immunity, which according to them is the accepted norm.

Table 22. Caribbean Countries or West Indies

Country	State Immunity	Restrictive Immunity	Position Obscure
Cuba	x		
Jamaica			x But in the past followed sovereign immunity
Bahamas			x "
Haiti			x "
Dominican Republic			x "
St. Kitts Nevis		x	
Martinique			x "
St. Lucia			x "
St. Vincent			x "
Grenada	x		
Trinidad and Tobago	x		
Barbados		x	
Dominica			x "
Guadeloupe			x "
Antigua and Barbuda			x "
Virgin Islands		x	
Puerto Rico		x	
Bermuda		x	

The above list of developing nations has not considered the state immunity controversy locally but evidence forthcoming shows clearly that all these countries either have promobilised authoritarian or promobilised democratic political systems.

Virgin Islands and Puerto Rico follow the restrictive immunity because U.S.A. follows the same principle.

Bermuda also follows restrictive immunity because the U.K. has a legislation on restrictive immunity.

Table 23. The Position of Other States

Country	State Immunity	Restrictive Immunity	Position Obscure
India	x Join the group of 77 to oppose restrictive immunity		
South Korea			x
North Korea	x		
Turkey		x	
Saudi Arabia	x		
Sweden		x	
Lebanon		Its courts have followed restrictive immunity	
Bangladesh	x		
Kuwait	x		
Israel			x
Jordan	x		
United Arab Emirates	x		
Afghanistan	x		
Vietnam	x		
Malaysia		Its courts have followed the nature test	x
Ireland	Its courts have followed sovereign immunity		
Byelorussia	x		
New Zealand		x	

11.5 Asian–African Legal Consultative Committee Report

The Asian–African Legal Consultative Committee in 1960 considered the central issue relating to the immunity of states in respect of commercial transactions. The Committee was made up of the representatives of such countries as Burma, Ceylon, India, Indonesia, Iraq, Japan, Pakistan, Sudan, Syria and the United Arab Republic. The final report of the Committee on Immunity of States in respect of commercial transactions and other matters relating to transactions of a private character, as revised in the third session, held between January and February 1960 in Colombo, with Indonesia as the only dissenter in support of absolute immunity, fell short of recommending that states should subscribe to a multilateral treaty, which they considered as premature at that time.

The Committee was enlarged in 1958 to include African states, since it was exclusively an Asian Committee in 1956, and so far these countries have been able to play an important role in promoting the development of international law.[27]

One aspect of the Asian–African Legal Consultative Committee report which is of immediate importance to this study can be stated as follows:

"(8) It was recognised by all delegations that a decree obtained against a foreign state could not be executed against its public property. The property of a state trading organisation which has a separate juristic entity may, however, be available for execution.

(9) The Committee having taken the view of all the delegations into consideration decided to recommend as follows:

(10) The state trading organisations which have a separate juristic entity under the municipal laws of the country where they are incorporated should not be entitled to immunity of the state in respect of any of its activities in a foreign state. Such organisations and their representatives could be sued in the municipal courts of a foreign state in respect of their transactions or activities in these states.

(11) A state which enters into transactions of a commercial or private character ought not to raise the plea of sovereign immunity if sued in the courts of a foreign state in respect of such transactions. If the plea of immunity is raised it should not be admissible to deprive the jurisdiction of the domestic courts."[28]

But the question to ask respecting the above recommendations is what yardstick must be used in the determination of the activities of the sovereign state and how are the legal relationship between the state and juristic organs be determined? These are complicated issues because states differ in their needs and interest and secondly, it is submitted that the legal position of these juristic organs is derived from local constitutional and administrative laws which may differ from country to country, and therefore it would not be helpful to simply generalise on such delicate issues as regards their status and authority.

In one of the questionnaires sent to the delegates of the Committee, the following questions were posited:

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[27] See T.O. Elias, New Horizons of International Law (1979) pp. 21–30.

[28] See Asian–African Legal Consultative Committee Report, Third Session, Colombo (1960) pp. 72–73.

Q(3) "Do you agree with the view expressed by some that a state by entering into trade assumes the role of a private individual, and in respect of such transactions its waiver of immunity should be presumed?"

In reply:

"Japan and the U.A.R. answered the question in the affirmative. Iraq did not think that the state assumed the role of a private individual by entering into trade or other private activities; the state remained a public authority regardless of what activity it entered into. Ceylon and India agreed with Iraq. Burma did not think that any presumption would arise."

Q(4) "Has your government either in its practice or in any declaration of policy made its position known on this question, i.e., whether it regards the doctrine of sovereign immunity as absolute or subject to limitations?"

In reply:

"Iraq, Burma, Indonesia and Japan said their governments had not declared their policy on this matter. The U.A.R. said that though there was no official declaration, the trend of practice was to limit state immunity."

Under governmental activities of a quasi–public character:

"Does your government engage in the purchase of materials or equipment in foreign countries which are needed for public services, or public utilities or for the maintenance of food supplies within the country?"

"All delegations answered the question in the affirmative."[29]

The report in its entirety appeared to have been greatly influenced by European practice and the juristic writings of English and American publicists on state immunity. The report in some respects did follow the modalities of the doctrine of restrictive immunity, but failed to provide a road map as to how to distinguish between commercial and non–commercial activities of states. The report also did not tell us what role the *lex fori* must play in the characterisation of the activities of states. It simply suggested that a state which enters into a commercial transaction with a private trader ought not to plead for immunity. The said limitation was presumed and wholly derived from European and American practice. The delegates, however, recommended against the use of enforcement measures. An objective comparison of the answers given by delegates to the said questionnaires appeared less reflective of the final recommendation of the AALCC in many respects. The report thus mirrors the import of the Tate letter, which according to the delegates, served as an inspiration to them.

Although the Asian–African Legal Consultative Committee report on state immunity of 1960 had been cited in numerous legal periodicals over the years, as evidence of practice of the developing world in respect of sovereign immunity, there are indeed, however, some difficulties associated with the report being designated as the current evidence of practice of Asian and African countries, in view of the fact that in 1960 only very few countries in Africa were independent, and for that matter, did not participate or share the original views expressed in the report. Furthermore, the views expressed in the report cannot be imposed on those countries which became independent after the report was adopted. So in essence the said report or recommendations could only be referred to as an expression of

[29] Ibid. at p. 73.

some countries totally limited in value as evidence of practice of all the countries in Asia and Africa. In fact, the report is over thirty–eight years old and the position adopted by Burma, Ceylon, India, Indonesia, Iraq, Japan, Pakistan, the Sudan, Syria and the U.A.R. have arguably metamorphosed over the years. It is therefore not that easy as of now to correctly state the position of these countries on state immunity by using the AALCC report as a yardstick. The U.A.R., as it may be recalled, for example, broke up in the early 1960s and Egypt went its way by fully embracing the restrictive principle, while Pakistan thereafter resorted to the same principle by introducing the doctrine of restrictive immunity into its statute book. The position of the AALCC at the moment is far from clear on the issues relating to the absolute sovereign immunity controversy. However, it would appear a great number of these countries would like to have state immunity preserved.

11.6 Further Reflections on the State of the Law

11.6.1 Some Salient Issues

The doctrine of state immunity has a long history, but in spite of its long history, there is still uncertainty with respect to its current place in international law. Some countries in the Western world have for reasons of justice and equity in transnational business transactions threw their support behind the restrictive immunity while other countries, particularly the developing world of Asia, Africa and Latin American countries, and also Eastern European countries for reasons of self–interest peculiar to central economic planning and trade, have tried to advance their preferences for state immunity in order to avoid being open to suit.

It is therefore important that a considerable caution be taken in assessing the current state of the law. This is so because state practice on the subject is not settled and decisions of municipal courts on the application of restrictive immunity are not particularly thorough and the problem is further exacerbated by equivocal and conflicting judgments less reflective of customary international law.

Decisions of municipal courts in general, although quite important, do play a more or less subordinate role in international law. And this is perfectly logical because international law is horizontal and thus regulated by treaties and customary law principles quite different from municipal jurisprudence. In practice, however, domestic law analogies have influenced international law. In any event, there is less consistency in the decisions of municipal courts because the *lex fori* differ from country to country and thus in the main has created different methods in the characterisation of the activities of modern states.[30] The end result is that a considerable amount of divergent decisions have been developed to such heights as to create a penumbra of doubt in the current law and for that matter, in the rule of restrictive immunity.

[30] Oppenheim, International Law, 9th Ed. (1992) pp. 362–363; I. Brownlie, op. cit., p. 333.

A review of the literature on state immunity shows that some leading authorities who have written on the subject have failed to speak with clear and unequivocal voice.[31] Thus while some scholars have spoken with one voice, their counterparts have on the other hand expressed scepticism and therefore have taken quite a different position.[32] This phenomenon is not at all helpful and therefore has given room or reasons to national authorities to enact laws couched on national data not in the least reflective of customary international law. For obvious reasons, it is submitted that because of the force of the principle of equality of states in international law, customary law cannot be created by some few states by imposing their will on others, but should rather be made through a careful rationalisation of the elements of *usus* and *opinio juris*.

So far the attempt by some municipal courts in the Western world to follow the doctrine of restrictive immunity has met with difficulties and this is particularly due to the fact that modern judges have cavalierly relied on the preponderance, support and writings of some influential scholars in respect of the distinction between *acta jure gestionis* and *acta jure imperii*, without considering the basic and specific underlying principles respecting the said distinction, and whether it is logically grounded and supported by state practice and therefore reflective of customary international law. In I Congreso del Partido, Lord Wilberforce offered a plausible and helpful explanation of the law thus:

"We do not need statute to make this good. On the other hand, the precise limits of the doctrine were, as the voluminous material placed at our disposal well shows, still in course of development and in many respects uncertain. If one state chooses to lay down by enactment certain limits, that is by itself no evidence that those limits are generally accepted by states. And particularly enacted limits may be (or presumed to be) not inconsistent with general international law – the latter being in a state of uncertainty – without affording evidence what that law is."[33]

The thrust and force of this part of the said judgment is generally in line with the principles of public international law. It therefore essentially answers the tricky question and confusion surrounding the current place of restrictive immunity and national legislation in international law. Which simply means that the enactment of the basic underlying principles of restrictive immunity into the various national legislation in place are not conclusive or supported by state practice and therefore do not command the support of general international law.[34]

It must be stated clearly, however, that in the I Congreso del Partido, which admittedly was a complicated case, the Law Lords were candid to say that they had difficulties in tackling the issue related to the Marble Islands, and this is arguably so in view of the fact that the Law Lords were forced to go an extra mile

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[31] Sucharitkul, State Immunities and Trading Activities (1959); Lissitzyn in Friedmann, Henkin and Lissitzyn (eds.), Essays in Honour of Philip C. Jessup (1972); Molot and Jewett, (1982) 20 Canadian Year Book pp. 96–104; Brownlie, op. cit., pp. 322–345.

[32] Fitzmaurice 1933 14 BYIL; O'Connell, op. cit.

[33] 1988 I Legal Reports 64 p. 311.

[34] See the judgment of Lord Wilberforce: (1983) ILR, 64; McElhinney v. Williams and Her Majesty's Secretary of State for Northern Ireland, Ireland Supreme Court, 15 Dec. (1995) per Hamilton CJ. (1995) 104 ILR 691.

by their own cheerful intentions to rely on an emerging rule, i.e., restrictive immunity which is cumbersome of definition and application.

In Trendtex, an earlier case, which was litigated before the Court of Appeals, Lord Denning and his colleagues were also taken to task for trying to determine whether based upon the nature test of a transnational transaction, an agency of the Federal Republic of Nigeria, i.e, the Central Bank, could be accorded immunity in respect of its activities in importing cement into the said country. The court rationalised doctrine, case law *qua* the changing scope of sovereign immunity and the nature of the commercial transaction in question to deny immunity to Nigeria, but failed to give clear and convincing reasons why the Central Bank be characterised or designated as an independent juristic organ. The judgment found favour with some, however, others still remain dissatisfied with the primary issue regarding the status of the Central Bank and whether the interim *Mareva* injunction directed against the removal of funds from the forum state, i.e., England, was consistent with general international law. The answer is simply no, for such a decision was contrary to international law, however, much depends, of course, upon the data before the *lex fori* and secondly because state practice is still evolving and not yet well settled in respect of this area of the law. While Shaw LJ thought the enforcement measure was in order and therefore derivative of the suit, Stephenson LJ, on the other hand, voiced out the difficulties he had with the issue concerning *saisie conservatoire*, but never dissented on the *Mareva* injunction, thus leaving on record only his well reasoned reservations in respect of the argument posited by Lord Denning that there had been a change in international law and that it be received into English law.

The difficulties regarding political subdivisions and state agencies still remain for the mere fact that the functions of these state instrumentalities appear undoubtedly obscure coupled with the fact that these state agencies operate under different economic, social and legal systems. It is also important to note that these state agencies do perform concurrent functions covering both political and commercial policies directly controlled from the top by policy makers and government technocrats. So in most cases, the functions of these political subdivisions are intertwined and thus could give mixed and conflicting signals as to the real scope of commercial or political activities of state agencies. The current law is based on unexamined assumptions and a priori generalisations and therefore does not provide any consistent approach to resolving these intractable problems. Perhaps the problem could be contained if the status of these political subdivisions or state agencies is deemphasised and reference is made respecting national law and comparative law – to determine their legal status.

The judgment in the recent case of Kuwait Airways Corp. v. Iraqi Airways,[35] for example, leaves much to be desired because although the use of force by Iraq in itself was a violation of the peremptory norms of international law, nonetheless it was *acta jure imperii* and the *acta jure gestionis* argument advanced by the court in support of the judgment although may find favour with some, lacks logical foundation and thus may lead us into uncharted seas of legal contradictions. Is

[35] (1995) 1 WLR 1147 House of Lords.

aggression by a sovereign state *acta jure gestionis*? Certainly no. The wrongful interference by the first defendant with the aircraft was an incidental commercial element which must be discounted. Lord Slynn must therefore be commended for there is an element of reasonableness in his reasoning. In the French case of Cameroon's Development Bank v. Souete des Establissement Robber,[36] the transaction which fell to be considered involved a guarantee duly given by a state owned financial institution, in respect of bills of exchange drawn by the Republic of Cameroon, for the main purpose of securing or insuring credit for the construction of a public hospital in Yaounde. The bank was sued for violating the agreement. The bank in turn argued that being a governmental entity, it could not be impleaded. The court by following the nature test ruled that it had jurisdiction and thus overlooked the fact that the guarantee was made on behalf of the said government for a public works contract. This is another example where the nature test produced an undesirable result. The court should have considered the whole context in which the claim against the bank was made vis–à–vis the legal position of the Republic of Cameroon in international law.

11.7 Embassy Bank Accounts and Foreign Reserves

In respect of issues relating to execution of judgments against state property, i.e., *execution forcée*, it would appear the seizure of the assets of the Central Bank in Hispanio Americano Mercantil v. Central Bank of Nigeria,[37] particularly the *mareva* injunction sanctioned by English courts in restraining the removal of funds from the jurisdiction until further notice was contrary to general international law. It is important to note that immunity from jurisdiction or suits and execution against state property are two different facets of the legal process, and the fact that jurisdiction has been procured by a national judicial authority does not mean that a decision *execution forcée* can be taken without the consent of the defendant's state. The main question to consider in this light is whether enforcement measures could be directed against the property of a state, including its assets specifically designated for the official functions of a diplomatic mission.

The majority opinion says no, but some countries on record have been quite adamant in acceding to a practice which lacks *usus*, where immunity is denied to sovereign states in respect of their assets. E.g., Nigeria, Guinea and Tanzania have been subjected to such actions in the U.S.

The underlying question relating, however, to *execution forcée* was thoroughly considered in the Philippine Embassy case.[38] There the plaintiff obtained an attachment and assignment order from the District Court of Bonn (Amtsgericht) against the bank account held in the name of Philippine Embassy at the Deutsche Bank of Bonn for arrears of rent and repair costs emanating from a purported ten-

[36] (1988) 77 IL Reports p. 37.
[37] Hispano (1979) 2 Lloyds Report 277.
[38] ILR 65, 146., 1982 St. Leg Sev B/20 p 297.

ancy contract. The account in question presumably was partly used for the every day running of the Philippine Embassy. The Government of Philippines in turn filed an objection to the said order arguing that the attached account was not subject to the jurisdiction of German courts and that the account was specifically designated for the running of the Philippine Embassy. The District Court of Bonn stayed the action in the light of the force of Article 100(2), of the Basic Law and thus referred the matter to the Federal Constitutional Court. After a thorough analysis of the issues in the case, the court ruled that

"There existed a general rule of international law according to which forced execution of judgment by the state of the forum under a writ of execution against a foreign state which had been issued in respect of non–sovereign acts *acta iure gestionis* of that state, on property of that state which was present or situated in the territory of the state of the forum was inadmissible without the consent of the foreign state if, at the time of the initiation of the measure of execution, such property served sovereign purposes of the foreign state. Claims against a general current bank account of the embassy of a foreign state which existed in the state of the forum and the purposes of which was to cover the embassy's costs and expenses were not subject to forced execution by the state of the forum."[39]

The court further argued that

"The principle of international law *ne impediatur legatio* precludes such measures where they might impair the exercise of diplomatic duties."[40]

The court in clear terms laid down some important principles of international law in respect of enforcement measures. However, there still remains certain specific difficulties that can be detected in the judgment, and that is which assets of the state can clearly be designated as immune because of its diplomatic purpose and whether general international law allows a municipal court to investigate or inquire into the specific proportion of embassy accounts used for commercial purposes without interfering with the sovereignty or the regal dignity of states. Certainly, it is difficult to find a workable method by which to delimit diplomatic assets from other assets used for non–diplomatic purposes. Furthermore, it would be an exercise of futility to group bank accounts into watertight compartments – one for immune purposes and the other for non–immune purposes. Incidentally, general international law does not cover these sensitive areas of the problem and therefore municipal courts are left to fill in the gaps. And so far the attempts made by national authorities to deal with these elusive legal problems have failed to attract the support of sovereign states.

The judgment in Alcom and the Philippine Embassy case *ex hypothesi* displaced the authority in the non–resident Petition v. Central Bank of Nigeria case, where Nigeria's plea for immunity was rejected, even though the main objection raised was centred on the sensitive issue of avoiding execution against its foreign reserves. It would have been helpful if the said issue was singled out for an in–depth analysis. In short, the district court cavalierly rejected Nigeria's plea that it

[39] Ibid., p. 150.

[40] Ibid., p. 186. A similar approach seemed to have been followed in Foxworth v. Permanent Mission of the Rep. of Uganda to the U.N. (ILR 99 p. 138), U.S. District Court Southern District of N.Y. (1992); and in Third Ave. Associates and Another (1993) ILR 99, p. 195.

be accorded immunity and thus sidestepped the important issue whether foreign reserves are meant for immune activities. In Alcom, which relates to the attachment of a bank account belonging to Colombian diplomatic mission, the House of Lords ruled that a bank account of a diplomatic mission which is used for a sovereign purpose cannot be attached even though Donoldson MR in a prior court of appeal judgment restored the garnishee orders.[41] The judgment of English courts and German courts shows clearly that the problems of embassy bank accounts and foreign reserves are far from over. Perhaps arbitration could be designated as a way of resolving these elusive problems, where issues respecting embassy accounts can be resolved without creating any political tensions and resentments.

In the absence of legislative executive and judiciary pronouncements on the law, state practice in respect of state immunity can be seen in the context of reactions to claims which have been preferred against foreign states in domestic courts. The resistance to these private claims and the quest in pleading that immunity be accorded presupposes a legal claim or the balancing of conflicting interests and needs. These claims, clothed in legal arguments clearly reflective of customary law, are state practice and thus representative of the position of the defendant state. Thus, to the defendant state, its position respecting state immunity is how international law is supposed to be.

It would take a lawsuit to draw the attention of sovereign states to react to private claims. Thus no state simply submits to the jurisdiction of another state without first pleading that it be accorded immunity.[42] Thus, although some states are willing to accept the rationale behind the restrictive immunity, however, this does not necessarily mean that they would submit to the jurisdiction of other states without a fight since government lawyers or international lawyers are always ready to explore the loopholes usually associated with national legislation, and for that matter, restrictive immunity. Dr. Laurence Collins some time ago wrote an article entitled "The Effectiveness of the Restrictive Theory of Sovereign Immunity," in which he advanced arguments in support of the said theory, with respect, his position thus on the subject in view of the current state of the law was premature because the distinction between *acta jure imperium* and *acta jure gestionis* is fundamentally flawed.[43] And Dr. Badr's thesis which concludes that state immunity is a fiction and that it would soon wither away is *non–sequitur* for sovereign immunity would continue to appeal to states because of the horizontal nature of international law.[44] Thus, although restrictive immunity has gained some grounds, it still lacks *usus* and therefore would take some time to become well grounded in the practice of states. It would therefore be careless to conclude as of now that restrictive immunity has attained the status of customary international law.[45] It is

[41] (1983) 3 WLR 906, 911.

[42] Sinclair (1980 11) 167 Hague Recueil; Schreuer, State Immunity, Some Recent Developments (1988). The litigation before American Courts, English courts, German courts and Canadian courts could be cited as good examples.

[43] See I. Brownlie, op. cit., p. 333.

[44] See Sornarajah (1981) 31 ICLQ, 661.

[45] See I. Brownlie, op. cit.; see also the judgment per Wilberforce in I Congreso del Partido (1983) AC 244 at 269.

submitted that state immunity is not dead accurate and therefore the debate between the supporters of restrictive immunity and sovereign immunity will certainly continue into the future. In fairness, the various national legislation or state legislation in place cannot simply be accepted as evidence of the principles of general international law. In real terms, the said individual national legislation on restrictive immunity represents the *opinio individualis juris generalis* of each of these countries and therefore cannot be forced on other countries as a way of creating equity in the market place. In sum, the dismal swamp is still full of muddy water, for the USSR, now Russia, and other Eastern European countries as well as a majority of developing countries from Asia, Africa and Latin American countries have expressed an *opinio non juris* in respect of restrictive immunity and therefore would like to have the rule of absolute immunity preserved rather than abrogated. Certainly, the position of these countries cannot be relegated to the background.

11.8 Employment Contracts and Restrictive Immunity

The attempt by municipal courts to apply restrictive immunity to employment contracts in respect of the person of the state is arguably incautious and therefore must be discarded for a more venerable approach. Strictly speaking, the law of diplomatic privileges and immunities precedes the principles of international law as regards state immunity.[46] It is instructive to note that the law of immunities of sovereigns and ambassadors has in the main exercised to a large extent some influence on the development of the law of state immunity.[47] This might have influenced modern judges to devise a single legal approach to resolving problems relating to these two important areas of international law. State immunity and diplomatic immunity are two distinct legal disciplines. Diplomatic immunity is as old as international law[48] and may in many respects be construed as *lex specialis*. Thus, while the law of state immunity operates on the notion of immunity *ratione materia*, the law of diplomatic privileges on the other hand is predicated on immunity *ratione personae*. These privileges exist so as to pave way for state representatives in the receiving state to perform their diplomatic work most efficiently without any interference whatsoever. The relevant principles relating to this area of the law can be found in the Vienna Convention on Diplomatic Relations 1961, Articles 29, 30, 31, 32, 33, 34, 35, 36 and 37, respectively. The privileges and immunities therefore granted to diplomatic missions are (1) the person of a diplomat and his or her private residence shall be inviolable; (2) the diplomat shall be immune from local jurisdiction; (3) a diplomat shall be protected against giving evidence as a witness; (4) there shall be inviolability of archives and correspon-

[46] Sompong Sucharitkul, op. cit., p. 23; Craig Baker, The Abuse of Diplomatic Privileges and Immunities – A Necessary Evil (1997), pp. 14–31.

[47] Sucharitkul, op. cit., pp. 23–24.

[48] Craig Baker, The Abuse of Diplomatic Privileges and Immunities – A Necessary Evil (1997), p. 14; see, Geraldo E. do Nasamento e Silva, infra.

dence of the sending state; and (5) there shall be exemption from taxes and custom duties. Thus in spite of the force and thrust of the Vienna Convention on Diplomatic Relations as regards privileges and immunities duly accorded to the representatives of states, there appear to be an avalanche of suits preferred against foreign sovereign states before the courts of the host country or the receiving state.[49] For example, out of the 1200 cases brought against the United States in 80 countries in 1993, it would appear that about 80–82 percent seemed to be related to staff–employment disputes.[50] One important question worth considering at this juncture, however, is whether the exercising of jurisdiction over employment disputes or suits against a foreign state can adequately be supported. And if so, what logical legal arguments can be advanced to counteract the principle of *ne impediatur legatio* or the effect of the Vienna Convention of 1961, article 31, which had been ratified by a large number of countries?

So far municipal courts have given conflicting decisions often obscured by failed theories and exceptions to state immunity. There is therefore a general confusion and incidentally the various national legislation in place seem to offer only very little help. Will it be apposite to rely on the rules of private international law and arbitration, or should these private suits be settled on restrictive immunity before the courts of the receiving state? Or is it still rewarding for municipal courts to continue relying on the doctrine of absolute immunity? These are important questions that must be carefully addressed. Perhaps our starting point must be the *lex laboris generalis et arbitri* or one could also consider the *leges laboris speciales*, as regards private litigating parties with respect to certain underlying fundamental rights and duties of states in international law. For what is in actual fact being considered herein is not jurisdictional immunity of diplomatic agents, but rather indirectly the immunity of the person of the state. Because in actual fact, the immunity *ratione personae* of the diplomatic agent is derived from the "representative link" which the diplomat has with the sending state. The argument commonly advanced by municipal courts is that any decision taken by a diplomatic mission respecting employment contracts which is not governmental but commercial and results in dispute must be denied immunity and liability imputed to the state. The said approach, however, is not an easy undertaking since the application of relative immunity lacks *usus* and seems to create a web of confusion in respect of the fact that both diplomatic law and state immunity are two distinctive subjects arguably regulated by different legal principles but somehow exhibit an element of

[49] See Lady Fox Employment Contracts as an exception to state immunity. Is all public service immune? (1995) BYIL, Vol. LXVI. The United States, for example, has been sued in a lot of countries. See also David Epstein's lecture, A Paper Delivered at the Lawyers in Europe Conference on State Immunity, 30 June–2 July (1994); cases: Heusala v. Turkish State 1993 § 92/44 3:120; MK v. Republic of Turkey 94 Int Law Reports (1994) p. 350; Abbott v. Republic of South Africa ILA Report 5(a) 135, Boletin de Jurisprudencia Constitutional (1992), p. 155, et seq.; Reid v. Republic of Nauru, (1995) 101 ILR 193. Arab Rep. of Egypt v. Gamal–Eldin (Employment Appeal Tribunal, [6 June (1995)], 1997 104 ILR, pp. 673–683.

[50] Lady Fox, op. cit., p. 98; David Epstein, op. cit.

confluere as regards the position of the state.[51] Arguably, even if a national authority be allowed to exercise jurisdiction over a particular claim, state practice and decisions by municipal courts show that it would be difficult to have the judgment enforced.[52] The decisions in Zaire v. Duclaux,[53] Alcom, and the Philippine Embassy case are clear authoritative judgments that cannot be swept under the carpet.

Thus in Sengupta v. Republic of India,[54] already considered, Professor Higgins, argued on behalf of her client that "the question of immunity has to be decided by reference solely to the terms of the contract without regard to the breach of it by the state."[55] The Employment Appeal Tribunal rejected her submission by ruling that "The decision of the House of Lords in I Congreso de Partido shows that the question does not fall to be decided solely by reference to the nature of the underlying contract and without reference to the nature of the breach."[56] The court therefore declined to take jurisdiction of the case because of the underlying reasoning that all matters respecting the running of an embassy were immune. Sengupta, therefore, established a precedent at English common law that employment contracts entered into by states in respect of all workers employed within the confines of diplomatic premises, be it senior staff or junior staff, are immune. Some commentators are also agreed that even if the 1978 Act had been applied, the Republic of India would still have been immune.[57] A similar reasoning can be detected in the judgment of the Irish Supreme Court in Canada v. Burke,[58] where a wrongful dismissal claim brought against Canada was held immune. The thrust of the decision of the Irish Supreme Court in all probabilities seemed to have been predicated on the security aspect of the position of the Ambassador's driver. The principle of sovereign immunity was therefore applied by the said court because of the underlying security reason, for in this case the nature test appeared not at all appropriate.

Again in Van Der Hulst v. United States,[59] the plaintiff was employed as a secretary at the United States embassy in Holland – the Hague. While at work one day the plaintiff was duly informed that because of security reasons her appointment would be subject to periodic satisfactory security check. In August 1984 Van Der Hulst was sacked for not living up to the security requirements of the em-

[51] Geraldo E. do Nasamento e Silva in International Law Achievements and Prospects, op. cit., pp. 441–442; Foxworth (1992) ILR 99, p. 138; Republic of 'A' Embassy Case, ILR 77, 489.

[52] See generally the writings of the various scholars on the execution of state property, 1979 NYIL 10; see also (1999) General Assembly, Fifty–First Session, A/CN.4/L.576 p. 51.

[53] (1994) 94 ILR, pp 368–9.

[54] (1983) ICR 221, Employment Appeal Tribunal.

[55] Ibid.

[56] Ibid.

[57] See Lady Fox, op. cit., (1995) BYIL for a clear exposition on the issues regarding employment contracts and state immunity.

[58] Canada v. Employment Appeals Tribunal and Burke (1994) 95 ILR 467. Here, the Irish Court followed the English decision in Sengupta.

[59] (1994) 94 ILR 373, (The Netherlands Supreme Court).

bassy. The plaintiff then sued for breach of the employment contract in issue. After a careful consideration of the evidence therein presented, the district court ruled that "Even if there was already a private law employment contract and the result of the security check was used as a ground for termination thereof, the claim by the United States to immunity was well founded."[60] On appeal the judgment of the district court was upheld based on a straight–forward reasoning that a sovereign state in the course of carrying out its diplomatic activities has the right to claim immunity for dismissing an employee for security reasons.

In MK v. The Republic of Turkey,[61] the plaintiff, a Dutch national, was dismissed in 1984 from her position as secretary of the Turkish Embassy in the Netherlands. The plaintiff, having carefully considered the issues regarding her dismissal, appealed to the sub–district court of the Hague to declare the termination of her appointment void. To the surprise of many, the plaintiff's claim was granted in the following formulated words:

"(1) It could not be argued that the plaintiff was employed on Turkish territory and that therefore the court had no jurisdiction to hear the case. Although the embassy served as Turkish territory for diplomatic purposes, the land on which the embassy was situated was part of Dutch territory over which the Netherlands had full jurisdiction.

(2) The absolute theory of immunity could no longer be regarded as a rule of international law and states were only entitled to immunity for acts that had been performed *jure imperii*; accordingly, the court had jurisdiction over a foreign state for acts that were performed on the same footing as private individual under private law."[62]

It would appear counsel for Turkey seemed to have overlooked the authority in Radwan v. Radwan,[63] in defending the republic of Turkey, for according to general international law the premises of an embassy and perhaps the consulate are not part of the territory of the sending state. This exactly represents the position advanced sometime ago by Dr. Akehurst,[64] and Professor Fawcett in his writings.[65] The second argument advanced by the sub–district court of the Hague that "the absolute theory of immunity could no longer be regarded as a rule of international law" appears to be in error or might have been based on conjecture. For such a position simply appears to run counter to current state practice because many states still resist the underlying principles of restrictive immunity. It is instructive to note, however, that in view of the force of the International Law Commission's Report and the position of developing states, sovereign immunity is not dead accurate. Although the issues in MK and Heusala v. Turkey appear quite similar, the Supreme Court of Finland held that sovereign immunity applied in respect of a claim for unfair dismissal.[66] Arguably, counsel for Turkey lost the case in MK v. The Republic of Turkey by his reliance on a failed theory, coupled with a less convincing international law argument which did not find favour with the juris-

[60] Ibid.

[61] (1994) IL Report, p. 350, Vol. 94.

[62] Ibid., p. 351.

[63] (1972) 3 All ER 967 (Family Division). This explains the law to some extent.

[64] Akehurst, International Law (1991), p. 117.

[65] See the judgment of Cumning–Bruce J in Radwan v. Radwan (1972) 3 All ER 967.

[66] §92/44.3, 1993: 120.

prudence of the court as regards the extraterritoriality of the embassy of the sending state on the territory of the receiving state.[67] The petitioner having won the said case attempted to enforce the judgment by seeking to attach the embassy bank account of the Republic of Turkey. This prompted the Dutch Secretary of Justice, acting pursuant to Article 13(4) of the Bailiff's Regulations, to intervene, thus instructing the bailiffs to desist from executing the judgment against the Republic of Turkey. The petitioner, having been embittered by such an action, appealed against the decision of the State Secretary for justice. On November 1986, the Netherlands Council of State rejected the appeal as follows:

"(1) In the absence of any treaty between Turkey and the Netherlands regarding immunity from execution of judgment, the case had to be decided in accordance with the provisions of customary international law.

(2) When interpreting and analysing customary international law the court should take account of the opinion of the Executive as it represented the state in its relationship with other states and help mould customary international law by its practice and the dissemination of its views.

(3) Customary international law did not permit the attachment of assets belonging to another state if those assets were intended to be used for a public purpose. The Turkish Embassy in a *note verbale* to the court, had stated that all funds in the bank account in question had been set aside for the purpose of defraying the running costs of the embassy. Taking into account the great importance that had traditionally been attached to the efficient performance of embassy functions as evidenced by the Vienna Conventions on diplomatic and consular relations, Turkey's submission was sufficient for the court to award it immunity from execution."[68]

The said judgment is absolutely in line with the functional necessity theory and thus also seemed to support the concept of the special duty of protection required of the receiving state. Perhaps the clearest expression of diplomatic law can be found in the writings of Vattel thus:

"The respect which is due to sovereigns should reflect upon their representatives and particularly upon an ambassador, as representing the person of his master in the highest degree. . . It is particularly the duty of sovereign to whom a minister is sent to afford security to the person of the minister. To receive a minister in his representative capacity is equivalent to promising to give him the most particular protection and to see that he enjoys all possible safety."[69]

If Vattel's position be relevant to our needs today as regards diplomatic law, then one could argue that all things being equal, the inviolability of the person of the diplomat simply reinforces the often criticised rule of state immunity by virtue of Articles 22 to 38, respectively. Vattel's position is *ex hypothesi* therefore relevant in these modern times in respect of the representative character theory in diplomatic law.

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[67] (1994) 94 ILR 351.

[68] MK v. State Secretary for Justice, The Netherlands, Council of State, 24 November (1986).

[69] Cited from J. Craig Barker, The Abuse of Diplomatic Privileges and Immunities – A Necessary Evil? (1997), p. 76.

Quite a different view, however, was taken in Reid v. the Republic of Nauru,[70] there the plaintiff was employed by the Republic of Nauru as a pilot. The airline in question was wholly owned by the Republic of Nauru. The plaintiff thus brought suit against the said country for a breach of his contract of employment. The defendant in turn pleaded that it be accorded immunity. The court, having taken pains to review the evidence therein presented, ruled in favour of Mr. Reid. The Australian court simply ruled that immunity from the jurisdiction of the courts of another state was not absolute anymore. The court simply followed the distinction between *acta jure imperii* and *acta jure gestionis* and thus found for the plaintiff. The court also argued forcefully that "The restrictive theory of immunity did not compromise the sovereignty of the state concerned and protected the interests of justice with respect to an individual entering into a transaction with a state."[71]

A careful review of these cases shows crystal clear that while civil law countries follow the public/private law distinction in determining whether to grant immunity or not in respect of employment contracts, courts in common law countries have simply resigned to the well–known approach in distinguishing between commercial and non–commercial activities of states when faced with claims against sovereign states before domestic or local courts.[72] This in fact has given rise to diversity in state practice and uncertain grasp of the subject in issue. Lady Fox in offering her thoughts on the above subject concluded that

"The first conclusion to be drawn from the above survey of the operation of the employment exception to immunity is that a restrictive theory in simple form does not work. Under that theory, if the work is identical to that performed in the private sector, the test of the nature of the work should render the claim subject to the local court's jurisdiction. But as the House Report on the US FSIA, the US and other common law jurisdictions in model show, public service continues immune by taking into account the public status of the employer and the purpose of the work, the achievements of the classic functions of government, thus largely preserving a rule of absolute immunity for civil servants abroad. Whilst this goal may be the desired result, the distortion of the commerciality test to achieve it undermines its use elsewhere in restrictive immunity."[73]

The current state of the law in respect of employment contracts and state immunity is far from clear. And the attempt to introduce the manifestly flawed concept of restrictive immunity into the parlance of diplomatic law would undoubtedly exacerbate the problem to such heights as to create harassment which would lead to disrepute. It is submitted that the exposition of Lady Fox on employment contracts as regards the position of the sovereign state is logically grounded and therefore one may be hard put to take issue with the underlying reasoning behind her thesis.[74] At any rate it would be quite difficult to characterise the work of a civil servant in an embassy setting to be commercial by relying on the nature test.

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[70] Australia, Supreme Court of Victoria, (1995) 101 ILR, p 193 [17 Feb. (1992)].

[71] Ibid.

[72] See Lady Fox in 1995 BYIL on this point. However, there are other important cases that attest to this approach: Heusala v. Turkish State, 1993 § 92/44.3: 120; MK v. Republic of Turkey 1994 94 International Law Reports, p. 350; Sengupta v. Republic of India (1983) ICR 221 Employment Appeal Tribunal.

[73] Lady Fox, op. cit.

[74] Ibid.

Thus the employment of a qualified local national to work in the embassy of the sending state is not any different from nationals employed from the sending state, for in the main the work done in most embassies is always politically based and specifically geared towards the fulfilment of the sovereign function of the sending state. Furthermore, in order to aid the effective performance of the work of the diplomatic agent, the special duty of protection has in the strictest sense been confirmed and strengthened under Articles 22(2) and 29, respectively. Embassies do not produce goods for sale on the market and therefore the reason for employment contracts or the employment of the nationals of a given receiving state is arguably to fill vacancies that could help promote the effective political representation of the sending state. Hence it would be logically untenable to suggest that employment contracts be characterised into commercial and non–commercial categories as a prelude to determining what is immune and what is not immune. Perhaps the public and private law distinction may be somewhat helpful but again it would seem such an approach is also fraught with difficulties and uncertainties and therefore most likely to confuse the modern judge because a state does not become a juridical person or natural person simply by employing a resident of the forum state. In the light of these bottlenecks, it is suggested that municipal courts must endeavour to abandon the quest of introducing the restrictive approach into diplomatic law in respect of employment contracts, for state practice is unsettled, coupled with a clear diversity in the jurisprudence of states.[75] Thus the continued application of the doctrine of restrictive immunity to resolve these problems simply undermines the force of the inviolability of the person of the diplomatic agent which on the whole is representative in nature. This, however, does not mean that a senior staff of an embassy could dismiss an employee at will without any justification. At least the employment practices of the staff of the sending state must be based on good faith and good conscience in order to dispel local employee apprehensions in respect of job security.

The perception held in certain circles that workers within the embassy of the sending state be classified according to grades leads us nowhere, since every member of the work force in the embassy, one way or the other, aids in the representation of the sending state. Hence positions such as a secretary, driver, messenger and other support services arguably seem to be more political in many respects than many would believe.[76] The heart of the whole issue, however is whether a diplomatic mission has acted as a private person because it offered a job to a local national. It is not that easy to come up with a straightforward answer, but scholars are agreed that the state nevertheless acts *imperium* and its diplomatic agents always act as civil servants and that it would be difficult to delimit the scope of the activities of state agents, i.e., civil servants resident in a receiving state on a hybrid basis – one commercial and the other non–commercial. It is also important to state more clearly that the issue of procedural immunity is different from questions relating to enforcement measures against state property. The former always precedes

[75] Ibid.

[76] Sengupta v. Republic of India (1983) ICR 221 Employment Appeal; Van Der Hulst v. U.S., 94 ILR 374, The Netherlands Supreme Court; Canada v. Burke (1992) ILM, 325.

the latter. But one important point worth putting forth is that although it is possible a domestic court could take jurisdiction over certain claims duly preferred against foreign states, the next stage of enforcing the judgment becomes a difficult task since such measures undermine the position of the state in international law. Thus although jurisdiction may be procured, the enforcement of the judgment (*execution forceé*) and pre–judgment attachment (*saisie conservatoire*) are not supported by state practice[77] and therefore may militate against peaceful relations of states. It is therefore the opinion of the present writer that arbitration be studied in depth as a prelude to resolving problems in this area of the law, or judges could simply resort to the application of the *lex laboris generalis et arbitri*, which means certain private international law principles must be explored to aid the process.

Any state that is *ipso iure* sovereign and thus has *suprema potestas* within its spheres of influence would not on its own accord submit to the jurisdiction of the courts of another state and in the end being made to face the consequence of losing its property to a private entity.[78] Thus until such time that the two constitutive elements of state immunity, that is, the *corpus* and the *animus* are totally overshadowed by the spectre of the emerging doctrine of restrictive immunity, sovereign states would continue to plead that they be accorded immunity in view of the fact that international law is horizontal in nature and secondly because state practice is far from settled. The problem therefore cannot be resolved *eo instanti* by simply resigning to a distinction between commercial and non–commercial or to the public and private law distinctions as regards state activities.

It is therefore the opinion of the present writer to postulate that the persistent divergence between countries that adhere to state immunity and that of countries gravitating toward the doctrine of restrictive immunity will certainly continue unabated until someone comes along perhaps with a better philosophical approach likely to appeal to all and sundry, thus bridging this self–imposed deep gulf. Certainly, the "dismal swamp" is left undrained for the exceptions advocated at state level do not have the support of state practice universally grounded as to allow derogation from customary international law. After all the provisions set forth in the various national legislation do not accurately represent the principles of international law[79] but only show as to how international law is understood in each of these countries. The current state of the law is still not clear, hence state immunity in every respect remains a rule rather than an exception, notwithstanding the plea by the legislature in some countries that exceptions to state immunity be increased. Perhaps Alexander Hamilton was right when he postulated that "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of man-

[77] See the contribution made by different scholars on the subject in (1979) NYIL 10, where most of the scholars have argued that the question of execution is unsettled in the practice of states, e.g., Bouchez, et al., 10 Neths Yrbk (1979).

[78] See M. Sornarajah (1982) ICLQ, Vol. 31, 661 relating to the problem of applying the doctrine of restrictive immunity. See also the decisions of English and American courts.

[79] John McElhinney v. Anthony Ivar John Williams and Her Majesty's Secretary of State for Northern Ireland (defendants), The Supreme Court 175/94, Del (1995).

kind."[80] It would undoubtedly be hard for any "candid mind" to take issue with Hamilton's position in respect of present–day international law because the said law is horizontal while municipal law is hierarchical coupled with its compulsory force only over the ruled.

The treaty text currently registered with the UN unfortunately had produced mixed results and therefore highly unlikely to find favour with many countries. The rift between the West and the Third World certainly therefore would continue unabated and the argument by some leading scholars that as result of the demise of the USSR the currency of the restrictive immunity would supersede that of absolute immunity is simply premature and *non sequitur*.

It is instructive to note that state practice in respect of contracts of employment is scanty and quite fragmented. The attempt by the Sixth Committee to consider the subject proved unfruitful. And incidentally, subsequent informal consultations held in 1994 met with difficulties because of the divergent views expressed on draft article 11, sub–paragraphs (a) and (c) of paragraph 2. As regards sub–paragraph (c), members of the informal group suggested that the said provision could not possibly be reconciled with the principle of non–discrimination, as derived from the concept of nationality.[81]

Article 11 of ILC draft articles offers a delicate balance between the labour laws of the receiving state and the competing interests of the sending state, i.e., the employer state. The individual legislation passed in the seven common law countries failed to resolve the problem but rather exacerbated it by the increasing emphasis placed on the nature test. Although the U.S. follows restrictive immunity, recent Sixth Committee meeting on the subject shows that it is not in favour of article 11 of the draft article. Ms. Jacobson of the United States offered the position of her country thus:

"The current wording of draft article 11 (contracts of employment) failed to address the major labour–employment issue facing diplomatic missions. Her delegation had raised before its concerns over the conflict between local labour laws and the ability of diplomatic facilities to perform their mission. Lawsuits against foreign states for actions relating to downsizing, reorganization and closing of diplomatic and consular facilities, and the withdrawal of diplomatic missions from participating in bankrupt mandatory social security systems for their locally hired personnel had soured over the past years."[82]

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[80] See The Federalist Papers, No. 81, p. 487 (Hamilton): This does not mean that the present writer is advocating that state immunity be maintained. Nothing on this earth would remain the same, for everything is bound to undergo some changes. But such a change must be done with care and should not be predicated on failed theories or incomplete theories likely to increase the muddy water in the "dismal swamp." Certainly, if progress is to be made, restrictive immunity is not the answer for it has *sit vernia verbo* created a Pandora's box of difficulties and uncertainties in transnational litigation. I certainly, therefore, share the position of M. Sornarajah on problems relating to the application of the restrictive immunity (1983) 31 ICLQ 661.

[81] See generally, International Law Commission, Fifty–First Session, Geneva, 3 May 23 July, 1999.

[82] Fifty–Second Session A/C 6/52 SR 26 2 Feb. 1998, Sixth Committee Meeting.

The concern of the U.S.A. is justified, but its current position is ambivalent since over the years the (nature test), restrictive immunity has been made the basis of its practice.

Immunity so far has been granted to states in respect of employment of nationals of the forum at diplomatic or consular posts, where there is a clear evidence that the employment in issue involves the performance of a governmental activity.[83] Courts in some other countries, on the other hand, have exercised jurisdiction if the employment contract in dispute mirrors that of the private sector.[84] However, it is submitted that general recognition is given to contracts of employment, if there is a showing that the employee's position is inextricably related or involved with governmental activities. Courts in general have had difficulties in exploring the above stated issues.

The suggestion, however, by the working group which was established by General Assembly resolution 53/98, of 8 December 1998, that a distinction be made between the right and duties of employees and issues relating to general policy of employment is in order, but this idea must be explored by incorporating the 1961 Vienna Convention on diplomatic relations and the 1963 Vienna Convention on Consular Relations into the draft articles as a way of building consensus among states.

11.9 The Future of the Law of Sovereign Immunity

How does one prove that the currency of a rule has come to an end or completely abandoned and that a new rule has come to birth in international law? This is not an easy question, but such legal parameters as evidence of *usus* and *opinio juris* could be helpful in exploring the said question. These parameters, however, have not been particularly helpful as regards the current status of restrictive immunity in modern international law, and this is so because local or forum law is a creature of sovereignty coupled with the fact that the jurisprudential foundations of restrictive immunity are fatally flawed. In other words, there is no clearcut boundary between immune and non–immune transactions which according to the proponents of restrictive immunity must solely be based on the nature test. Furthermore, the argument usually made in support of restrictive immunity, that it would promote justice in the market place, lacks logic and therefore not compelling enough as to prompt a radical change from sovereign immunity to restrictive immunity. Arguably, for such a change to command the support of states, the underlying principles of restrictive immunity must be predicated on a well reasoned and grounded set of rules without any varied connotations. Any rule of law which has varied meaning

[83] United States of America v. The Public Service of Canada and others, ILR, 94, p. 264; (1992) 65 ILR p. 338.

[84] Reid v. Republic of Nauru ILR 101 p. 193: Supreme Court of Australia (Victoria. (1994); Governor of Pitcairn and Associated Island v. Sutton, ILR 40, p. 508: New Zealand Court of Appeal.

must be rejected, otherwise it would defeat the purpose of justice and thus may introduce relativity into international law.

Many have argued that the state be subjected to the jurisdiction of judicial authorities of the forum state, and be made to pay for any infractions caused by its actions and that the state is not above the law. But which law are we specifically referring to? If it is international law, then one is burdened by the fact that all states are equal before the law and sovereign immunity is still supported by many states because of the inescapable idea that sovereignty is inalienable and desirable in the community of independent states. However, in case of municipal law (i.e., the procedural and remedial law), a different result may be realised because the *lex fori* may interpret the law according to the dictates of local law, thus disturbing the positive normative rules of general international law, which in all fairness are based on general agreement rather than subjection or harassment.

True, why should the individual bear the consequences of state activities which might have worked hardship on the individual? Or can a state be sued for violating the terms of an agreement to build a nuclear facility? What about a wrongful dismissal of an employee in the forum state? Can an aggression which has produced an economic crime be characterised according to the nature test? And can a state be brought to justice for its tortious act, *jure imperii*? These are difficult questions to grapple with since international law does not have any build–in mechanism in tackling the above stated questions. However, in John McElhinney v. Anthony Ivor John Williams and Her Majesty's Secretary of State for Northern Ireland, the Supreme Court of Ireland ruled that statutes belong to the domestic domain and therefore did not evidence the principle of general international law and that the statutory provisions and the European Convention that were cited by the appellant to support his claim deviated from general international law and therefore not representative of it. The court is totally right simply because international law truly represents what has been accepted, understood and generally acknowledged among sovereign states as law but not what the *lex fori* in a given country deems fit. Thus the fact that a sovereign state has entered into a contractual relationship with a trader is not sufficient for those states who have statutes in place to exercise jurisdiction or for any other states to exercise jurisdiction over the contract in issue without procuring the consent of the defendant state, and this applies as well to the locus test or the *lex loci delicti*, respecting tortious infractions of states, because such municipal analogies as the nature test and locus test have no place in public international law in the light of the fact that these theories were premised upon unexamined assumptions respecting the status and functions of states.

Aggression in international law is regarded as *delicta juris gentium* and therefore must be accepted as *acta jure imperii*, even if it resulted in economic crimes. In Kuwait Airways Corporation which involves the use of force and seizure of property, the court of appeal granted immunity.[85] However, on appeal to the house

[85] Kuwait Airways Corporation v. Iraqi Airways Company and Another (1993), The Times 27 October 122.

of Lords, the Law Lords disagreed by denying immunity to Iraqi Airways.[86] It is true that Iraq violated article 2(4), but is aggression *acta jure gestionis*? Or is the economic crime of conversion in a state of war commercial? Certainly no, for Iraqi Airways (a subsidiary organ of Iraq) would not dare to flout the authority of a dictatorial government of Saddam Hussein by refusing to follow national policy directives and this should have given the Law Lords the bright light to approach the issues of the case eclectically, for the invasion of Kuwait and the seizure of Kuwait Airways aircraft cannot be characterised as falling within the confines of Section 3(3)c of the 1978 Act. The Law Lords should have rather relied on *jus cogens* as their reason for the judgment.

The nature test and the locus test are derived from human values without much regard to state values and therefore must only be applied to the needs of municipal law rather than to international law, i.e., the activities of states. The judgments in Senguta v. Republic of India, Alcom v. Republic of Colombia, Canada v. Bucke, and Mcelhinney *ex hypothesi* would not offend common sense. However, decisions such as Trentext, Texas and Milling Corp. v. Federal Republic of Nigeria, Cameroon's Development Bank v. Societé des Establissement Robber, I Congreso del Partido, Nonresident Petitioner v. Central Bank of Nigeria, and Kuwait Airways Corporation, leave much to be desired, if carefully balanced against the needed requirement of *usus*, thus exposing the fallacy in the nature test, for it is not easy sometimes to separate the nature test from the purpose test.

It is submitted that as a result of the rules of the interstate system, sovereign states are radically opposed to the nature test and thus unwilling to submit to the jurisdiction of other states for there is no persuasive principle or rule well grounded in state practice which stipulates that state activities be distinguished according to local data as a prelude to exercising jurisdiction over subjects of international law. The nature test, therefore, is open to question because it is based on unfounded mythology of justice without any coherence.

The law of sovereign immunity, however, has lost its great appeal in the West and therefore may never be the same again. Its weakness in terms of equity and stability in the market place has well been explored, debunked and exposed without seriously considering the inherent weakness in the nature test. The suggestion, however, that it be replaced has met with difficulties in the light of the position of Latin American countries, the new commonwealth African states and other states from Asia, e.g., India, China, etc.

Sovereign immunity, given the current position of states, would continue to be the guiding light but one must also concede that although restrictive immunity was a mistake, it would persist as a rule of thumb in individual state legislation. But it is appropriate to suggest that it should not be used as shackles to bind sovereign states because of the very fact that it is wholly premised upon the transitory conditions or functions of states. There is an air of sophistry associated with restrictive immunity and it is in reality nebulous at best.

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[86] Kuwait Airways Corporation v. Iraqi Airways Company and Another, per Lord Goff (1995) IWLR 1147.

It is equally important to state that at its Forty–Third Session in 1991 the ILC submitted the draft articles to the General Assembly with a recommendation that an international conference of plenipotentiaries be convened to examine the draft articles so as to have a convention concluded. The Assembly in its resolution 49/61 of 9th December 1994 duly accepted the recommendation of the ILC. Somewhere last year the Assembly recommended that the Sixth Committee should look into the possibility of setting up a working group at the Fifty–Fourth Session to consider outstanding substantive issues in respect of the draft articles. The Sixth Committee commenced its work on 9th November 1998 and all speakers at the meeting were agreed that a working group be formed as envisaged in General Assembly resolution 52/151. At its 2569th meeting an agreement was reached where a working group was established, i.e., on 7 May 1999, and the said group so far has made some insightful suggestions as to how to deal with the unresolved issues arising out of the draft articles.

States are still divided over issues relating to the concept of state for purpose of immunity, criteria for determining the commercial character of a contract, concept of a state enterprise in relation to commercial transactions, contracts of employment and measures of constraint against state property. So far we do not have any accepted set of rules on jurisdictional immunities of states, but one is hopeful that the suggestions of the working group would find favour with many states. Certainly great difficulties still exist in a quest to find a common understanding and solution to the problems relating to sovereign immunity. It is instructive to state however that the recent decision of the international court of justice in the Arrest Warrant Case,[87] has set the record straight in respect of the fact that the law of privileges and immunities is still well grounded and indispensable in promoting stability and mutual relations between states. The Arrest Warrant Case is without doubt the first ICJ decision on the International Law of privileges and immunities and it *prima facie* supports the Schooner Exchange. Thus, in the light of the said decision state practice in the form of what states say and do, national legislation, arguments of defendant states, and municipal court decisions remains the most compelling sources of the law of state immunity. And this *exhypothesi* cannot be disputed in view of the copious literature on the subject.

[87] Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium) Preliminary objections and merits, judgment ICJ Reports 2002 p 3.

12 Conclusion

12.1 A Proposal for Resolving the Controversy

The following conclusions are derived from the preceding analysis as regards the rights of the sovereign state and that of the private trader.

(1) The doctrine of state immunity, as can be gathered from case law, state practice and the writings of learned scholars, must be designated *de lege lata* as customary international law, a product of early European meta–juridical philosophy which found application in the classic judgment of Chief Justice Marshall in 1812, involving private suits against Napoleon of France, for having forcibly acquired title to the Schooner Exchange, albeit a private property belonging to two American citizens. That the decision in the Schooner Exchange did find favour with many judges and therefore became well established or grounded in the practice of states in the 19th century up to the early part of the 20th century cannot be disputed. In other words, there was enough evidence of *usus* and *opinio juris sive necessitatis* for its acceptance among sovereign states. This, however, is gradually changing in the West.

The Influence Of European Meta–Juridical Philosophy On American Courts And International Law Can Be Supported By The Following Statistics

Table 24. Influence of European Writers on American Courts

The Writings of Publicists	Citations in Pleadings	Court Citations	Court Quotations
Grotius	16	11	2
Pufendorf	9	4	8
Bynkershoek	25	16	2
Vattel	92	38	22

(a) Professor Edwin D. Dickinson, a leading American legal scholar, prepared the above statistics. Vattel's work, for example, became a source book and an essential authority in American jurisprudence respecting the theory of international law.

(b) The statistics are clear evidence of how American courts relied on the writings of Grotius, Pufendorf, Bynkershoek and Vattel to decide cases between 1789–1820. Bynkershoek and Vattel, for example, were specifically cited in the Schooner Exchange in 1812.

(c) Thus Grotius, Pufendorf, Bynkershoek and Vattel, although did not study state immunity specifically, however the philosophical writings of these scholars did influence the development of the doctrine of state immunity. A careful review of history, however, would show that Gentili, Grotius, Bynkershoek and Vattel expended their energies in studying personal immunities of foreign sovereigns and problems of diplomatic immunities.

(2) Whenever there is doubt as to the exact scope of an applicable rule of international law, that is, when there is no treaty, then the said rule must be interpreted according to the essential elements of customary international law. This approach, however, becomes quite difficult because of the state voluntarist approach, i.e., the consent of states to international law is determined from the conduct or behaviour of the subjects of the lawmakers themselves, which in the main requires proper proof. The subjects of international law, technically, are also lawmakers, law enforcement agents and judges of the law at the same time in their own right. Thus given the horizontal nature of international law, there is every indication that developing countries would continue to insist that sovereign immunity be maintained because of their collective self–interest and sheer lack of capital and technological advancement. This argument is supported by the work of the Sixth Committee and the proceedings of the International Law Commission's draft articles on jurisdictional immunities of foreign states and their property (ILC Report 1980–1988).

(3) Large markets in industrialised centres regarding trading activities would not decline if countries subscribe to the tenets of absolute immunity, for so far no one has been able to prove by clear evidence of any serious harm caused to date to private traders as a result of according absolute immunity to their foreign business partners, i.e., foreign sovereign states. Thus the application or the introduction of the doctrine of restrictive immunity into transnational litigation would not help but confound the situation because the mechanism of adjudicative competence and the enforcement jurisdiction of domestic courts are rendered less effective by the horizontal nature of international law.

(4) Countries would continue to pray in their defence that they be granted immunity in view of the fact that the doctrine of restrictive immunity lacks *usus* and *opinio juris*. Secondly, as a result of the influence of the legal profession and the loopholes in national legislation, lawyers would continue defending foreign states before domestic courts.

(5) True, it would be in order or apposite if the concept of absolute immunity is modified to move in abreast with time, thus promoting good faith, good conscience and substantial justice in transnational business transaction. This proposition, however, is not advocating a wholesale enactment of national legislation couched in radical terms wholly lacking of *usus* and *opinio juris*. In this respect it is important to guard against facile legislation or locally enacted legislation somewhat couched in support of private traders over the rights of states, for the legal foundation of state immunity to some extent still has merit. That is why to

date it has remained the starting point in international litigation respecting suits against foreign states before domestic courts. For lawyers, the issue can vigorously be argued both ways, e.g., Trendtex, I Congreso del Partido, Rolimpex, Alcom, Philippines Embassy Case and Sengupta.[1]

(6) It is equally important to note that legislation or codification has its own inherent problems:

(a) That it is less flexible.

(b) That it is less adaptable to changes in international law.

(c) That it is impossible to cover every aspect of the sovereign immunity controversy through legislation, e.g., the State Immunity Act 1978 failed to cover issues that fell before the court to consider in Sengupta v. Republic of India (1983) ICR 221. American scholars, for example, in recent times have called for the amendment of the 1976 FSIA.

(d) The meaning of the terms commercial transaction and sovereign authority in respect of direct or indirect impleading are not well explained in the various national legislation. There is therefore the need for amendments to be made to the various enacted laws respecting state immunity.

(e) The elucidation on subsidiary organs of the state or "separate entity", e.g., § 14 of the 1978 UK Act is far from adequate. The explanation, for example, given in Trendtex Trading Corp. v. Central Bank of Nigeria, without doubt was inconclusive and thus leaving certain questions unanswered, i.e., mixed activities of states.

(7) Treaty provision would be most helpful and will certainly bring about stability in transnational business transaction. Thus bilateral treaties must be preferred to multilateral treaties. It is further suggested that states should enter into bilateral treaties in order to provide for waiver of immunity in cases of commercial contracts. But it appears some countries would not be able to waive immunity because of constitutional constraints, e.g., Colombia. Thus while constitutional provisions of some countries may allow waiver to jurisdiction, others do not allow waiver to jurisdiction or enforcement measures in respect to state property. This simply confounds the problem; that is why perhaps bilateral treaties would be most appropriate.

(8) A Proposal for the Development of the Law. The problems of state immunity can only be resolved through a practical approach. One such approach for resolving these problems is to allow the law to grow through a gradual process, thus encouraging municipal court judges to put their legal reasoning to work rather than restrict them to local legislation, which are in most cases not reflective of customary international law and sometimes enacted with simplistic aspirations. Secondly, such an approach would build into international law flexibility, certainty and an abundant source of comparative literature for the judge to draw on, thus removing a penumbra of doubt as to the legitimate legal basis of national legislation in respect to general international law. Thirdly, to promote the development of sovereign immunity law, a national judicial authority faced with the issue of granting immunity or denying immunity must choose a road of eclecticism by

[1] (1978) 1 All ER 89.

making reference first to the history of the subject, municipal laws and general international law for guidance. These must further be carefully supplemented by comparative literature and state practice the world over. In this connection, such parameters as *usus, opinio juris* or *opinio juris sive necessitatis* must be taken into consideration, but where the issues appear not to be clearcut, a municipal court must rely on a "proviso" or what scholars have called the "residual clause," i.e., the principles of justice, equity and good conscience to resolve the problem.

(9) The kernel of the whole subject matter is that as of now there is no agreed principle on the question of relative immunity. One important practice that must be adhered to strictly, however, is that each state must respect the fundamental right of each other. The application of the concept of restrictive immunity has given birth to the distinction between public and private acts of the state, which has admittedly confused the subject to such heights as to make it most elusive. There is, therefore, no uniform rule nor a uniform practice to follow. Given these difficulties, it is suggested that when courts are faced with sovereign immunity issues, regard must be had, or attention be paid to the following factors:

(a) The state and its economic organisation, e.g., China and the Third World.

(b) The constitution of the state.

(c) The political system of the state, which must encompass structural differentiation and cultural secularisation, e.g., while some countries such as Britain, France, Germany and the USA, have a high subsystem autonomy, others such as Russia, China, North Korea, have a subsystem control. Furthermore, most Third World countries such as Libya, Zimbabwe, Sudan, Cuba, etc., have promobilised authoritarian systems.

(d) The difference in the activity of states and state economic vehicles.

(e) The value placed on state organs and entities, as regards legal authority, ownership, possession and representation.

These suggestions are being put forth in order to promote conditions in which sovereign immunity litigation would be centred on the specific issues respecting the behaviour and needs of states coupled with the determination and the balancing of the justified expectations of the private trader as against the right of the state, rather than simply resign to the determination of whether a governmental activity is commercial or not. This approach certainly would eclipse the entrenched attributes of the state, e.g., the independence, equality and dignity of states. It is therefore submitted that balancing the rights of the litigating parties in respect of the issue in a given case would produce a better result than arguably resign to a distinction between the public and private acts of the state, a method all too often made the cornerstone of national legislation.

(10) In order to promote a balance of justice, it is submitted *de lege ferenda* that the doctrine of restrictive immunity be forsaken or abandoned entirely because it has created confusion and indeed has made transnational litigation more uncertain and difficult than ever before. Thus the promise given by the protagonists of restrictive immunity that it would crystallise into the promotion of equity and justice has been conducted on theoretical grounds due to the fact that the dis-

tinction between *acta jure imperii* and *acta jure gestionis quaere jure privoto* is simply impracticable for the whole concept is quite difficult of application.

(11) The formation of an international contract between a state and a foreign private entity requires a lot of hard work and good legal drafting, taking into consideration complex legal principles. Be this as it may, it is suggested that in order to avoid "litigating future" disputes before municipal courts, a special clause be inserted into the contract calling for any dispute to be first resolved amicably based on the principle of *novation ad interim* or through a process of conciliation. This approach would afford the two opposing parties the opportunity to get their differences resolved instead of throwing their efforts into the uncharted seas by canvassing their differences before a national judicial authority which in turn would rekindle the problem of restrictive immunity, all too often wholly predicated on the distinction between acts *jure imperii* and acts *jure gestionis*.

(12) A careful review of all the national legislation in place would show that mixed activities of states and the concept of act of state were ignored or were not given any consideration. It is suggested that these mixed activities of states be designated as a discrete category for diplomatic resolution as was suggested by Goff J, in I Congreso del Partido. Or a "discretionary function exemption" be duly accorded to government executives so that they would be in a better position to take swift decisions free from suit or possible litigation, so as to prevent a disaster or arrest a difficult political or economic problem.[2] Or a judge could resort to the application of the maxim, *salus populi suprema lex*, i.e., the principle of self–preservation to deal with problems respecting mixed activities of states, because the said principle permits the welfare and security of a sovereign state to override the rights of its citizens and the nationals of foreign states under exceptional circumstances. This principle is undoubtedly recognised by many nations of the world and therefore would not offend common sense. Thus if Country A enters into a contract with a private entity B, can it be immune by a subsequent political decision which *prima facie* might have been genuinely prompted by an unexpected event even though it breaches the initial transaction? As already stated above, such problems be resolved through the maxim *salus populi suprema lex* or a "discretionary function exemption" be followed by the judge to promote justice.

(13) It is submitted that local jurisprudence or municipal jurisprudence should not be readily translated from the internal plane into public international law if such laws are not supported *ex abundanti cautela* by general international law, for the relations of states cannot be considered on an equal footing as regards the position of natural persons within a polity. Thus international law problems must not be judged strictly according to municipal law criteria but rather by international law standards.

(14) The new states of Asia and Africa, according to international law, are automatically bound by the rules of customary international law existing at the

[2] The Trendtex case which dealt with the Nigerian Cement case; and the De Sanchez, involving the use of discretionary powers, are good examples where the "discretionary function exemption" concept can be allowed without attracting an avalanche of suits from individuals.

time of their independence. But these countries on the other hand can prevent any emerging customary law from becoming binding on them provided the said countries oppose the rule *ab initio* and thereafter continue to maintain consistent opposition to the said rule, i.e., the persistent objector rule. In this respect Asian and African states and other Third World states which have recently gained independence have the right to resist the currency of the doctrine of restrictive immunity *ex debito*.

(15) Customary international law in some unique cases may be created *eo instanti* (i.e., immediately or instantly or *droit spontane*). However, state immunity or restrictive immunity cannot be created *eo instanti* without state practice. Thus in concrete terms, claims or arguments made by states before municipal courts based on a well founded rule of international law or interest are state practice because such claims or arguments show how international law is perceived and understood in a given state. Municipal court decisions also fall neatly into this category. The November 1987 complaint made by the Asian–African Legal Consultative Committee against the United States 1976 Sovereign Immunity Act respecting "excessive jurisdiction," for example, can also be designated as state practice. (See Doc No AALCC/IM/87/1 [Nov. 1987] for details.)

(16) The International Law Commission has incorporated into the draft articles the purpose test, which has been rejected in most national legislation. Thus if these draft articles are accepted as a treaty text, it would give foreign states an effective tool in challenging the jurisdiction of domestic courts on many grounds, although there appears to be a seemingly stringent requirement imposed upon when the purpose test is to be taken into consideration. The recent Tsunami disaster in South East Asia reinforces the utility and the need to retain the purpose test.

(17) Another panacea to resolving the sovereign immunity controversy is to resort to arbitration, where litigating parties would be brought together based on the principle of entente *cordiale*. This method was sometime ago suggested in Part II of the resolution of the 45th Conference of the International Law Association at Lucerne in 1952. However, the suggestion was quickly criticised and simply buried. Thus an equitable method likely to command the acceptance of all and sundry must follow sound principles whereby the *lex fori* and the *lex arbitri* can be clearly distinguished to avoid complications. Which means that the attempt to arbitrate would not open the door for the foundation of jurisdiction over the dispute by a local court without first giving the litigating parties the opportunity to settle their differences per the terms of the contract. It is suggested herein that the domestic court must aid the umpire rather than frustrate him. And the umpire is advised to follow the principle of equity, where the three elements of equity can be put to use, e.g., equity *intra legem*, i.e., adopting the laws to the facts of a given case, *equity praeter legem*, i.e., filling gaps in the law and *equity infra legem*, i.e., applying only just laws and rejecting unjust laws,[3] or the whole subject of arbitration

[3] Michael Akehurst (1976) 25 ICLQ 801. It is suggested that arbitration is a viable alternative which must be taken seriously. For it would appear most countries would prefer settling their disputes or differences amicably rather than throw their disputes within the realm of the domestic jurisdiction of a forum state.

could be delocalised, thus applying the concept of the *lex marcatorial*, i.e., where the ordinary process of local arbitration proves very difficult and unattainable in a given case.

(18) If the treaty text on sovereign immunity currently registered with the UN fails to attract the required ratifications, and failing all the suggestions put forth herein, then it would be most apposite if a plea is made for the establishment of a special court for the settlement of sovereign immunity issues. For in reality legal disputes between a natural person and a state cannot be brought before the International Court. Thus only states may litigate before the World Court (Article 34). Special courts have been established in civil law countries with success and the suggestion such as is here put forth would go a long way to promote stability in international business transactions between states and natural persons. In this regard the controversy of subjecting a state to the jurisdiction of another state would be resolved or put to rest. This special court must have a compulsory jurisdiction and must follow the practice of the world court, but its functions should be narrowly structured to cater for legal issues arising from sovereign immunity controversy. Thus if a special international court or tribunal is established for the reasons advanced above, such problems of political embarrassment, an affront to the dignity of states, the violation of the principle of state equality and the problems of jurisdiction would disappear overnight, or would perhaps be minimised in the eyes of sovereign states.

(19) Finally, I venture to propose a COMPARATIVE DOMINANT THEORY, i.e., if a court wishes to balance the nature test as against the purpose test. This approach may encompass first the characterisation of the issues of a given case. After this the problem must be broken down into pieces having regard to the status of the state and the rights of the natural person or legal entity. This then must be followed by a logical test where the rights of the state and the individual are balanced. Which means that the primary and secondary purpose tests would carefully be compared or balanced against the primary and secondary nature tests to determine which one predominates or is more well grounded respecting the activities of the state *qua* the contract or transaction and breach in issue. In this respect the purpose test and the nature test would judiciously be compared to determine whether to grant immunity or not. Thus where the purpose test predominates immunity must be granted, but if, on the other hand, the nature of the activity appears dominant, then immunity must be denied or the matter be referred to arbitra-

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The enactment of legislation by some leading Western nations as regards the limiting of immunity would continue to create controversy in view of the fact that restrictive immunity is not well grounded in the practice of a great majority of countries of the world. The argument by some scholars that the rule of state immunity would completely be abandoned in the shortest possible time is *non sequitur* and perhaps premature; see the International Law Commission's Report from 1978–1988 and the inclusion of the purpose test in the draft articles of the ILC Report (1991). There is certainly an expression of *opinio non juris* by a great majority of countries of the developing world in the direction of the restrictive immunity. And these expressions show how international law is understood in these countries. The "Brownlie Approach", although descriptive but not prescriptive is electic and forward–looking and thus may be helpful in many respects.

tion. Municipal courts are therefore urged to incorporate the purpose test into their working formula in order to promote justice and tranquillity in transnational business transactions. This approach may not resolve all the intractable problems associated with state immunity, but would at least help the judge to ask the right questions and to explore the issues in a meaningful manner rather than simply resign only to the distinction between commercial and non–commercial activities of states.

True, perfection is not a human virtue, hence it is the fervent expectation of the present writer that these modest proposals would find favour with judges, lawyers and legal scholars. But before I put down my pen I shall humbly beg to crave the indulgence of those interested in reading this study to take note of what Sir Frederick Pollock said some time ago, thus:

"Those who make no mistakes, it has been said will never make anything; and the judge who is afraid of committing himself may be called sound and safe in his own generation, but will not have no mark on the law."

By Sir Frederick Pollock
Judicial Caution and Valour
(1929) 45 LQR 293.

Justice Marshall and Lord Denning therefore must be highly commended for their courage and contributions to the development of the law of sovereign immunity and all other judges and scholars, such as I. Brownlie and Judge Lauterpatch who have also contributed to the understanding of this elusive subject. Thus without their sagacious reasoning we shall all be left in the middle of the ocean without any navigating force, but now, we do have a navigating force and may therefore someday reach the shore. Is there any unity between the state and the law? And can the state be justified by law? These are difficult questions. However, once we begin to understand the underlying principles behind positive law, and that it is different from justice and therefore gives root to the compulsive order of the state then one would be justified to argue that it is quite cumbersome to justify the state by law. The era of natural law has given way to positive law which says that law be construed as an order of human compulsion. Can it be said that sovereign states be subjected to this compulsion in view of the fact that it is locally based and therefore vertical in every respect? The answer is in the negative, hence the long controversy respecting state immunity and the expression of *opinio non juris* in respect of restrictive immunity by Third World countries.

Appendix

Treaty of Westphalia

Munster, October 24, 1648

Peace Treaty between the Holy Roman Emperor and the King of France and their respective Allies.

In the name of the most holy and individual Trinity: Be it known to all, and every one whom it may concern, or to whom in any manner it may belong, That for many Years past, Discords and Civil Divisions being stir'd up in the Roman Empire, which increas'd to such a degree, that not only all Germany, but also the neighbouring Kingdoms, and France particularly, have been involv'd in the Disorders of a long and cruel War: And in the first place, between the most Serene and most Puissant Prince and Lord, Ferdinand the Second, of famous Memory, elected Roman Emperor, always August, King of Germany, Hungary, Bohemia, Dalmatia, Croatia, Slavonia, Arch–Duke of Austria, Duke of Burgundy, Brabant, Styria, Carinthia, Carniola, Marquiss of Moravia, Duke of Luxemburgh, the Higher and Lower Silesia, of Wirtemburg and Teck, Prince of Suabia, Count of Hapsburg, Tirol, Kyburg and Goritia, Marquiss of the Sacred Roman Empire, Lord of Burgovia, of the Higher and Lower Lusace, of the Marquisate of Slavonia, of Port Naon and Salines, with his Allies and Adherents on one side; and the most Serene, and the most Puissant Prince, Lewis the Thirteenth, most Christian King of France and Navarre, with his Allies and Adherents on the other side. And after their Decease, between the most Serene and Puissant Prince and Lord, Ferdinand the Third, elected Roman Emperor, always August, King of Germany, Hungary, Bohemia, Dalmatia, Croatia, Slavonia, Arch–Duke of Austria, Duke of Burgundy, Brabant, Styria, Carinthia, Carniola, Marquiss of Moravia, Duke of Luxemburg, of the Higher and Lower Silesia, of Wirtemburg and Teck, Prince of Suabia, Count of Hapsburg, Tirol, Kyburg and Goritia, Marquiss of the Sacred Roman Empire, Burgovia, the Higher and Lower Lusace, Lord of the Marquisate of Slavonia, of Port Naon and Salines, with his Allies and Adherents on the one side; and the most Serene and most Puissant Prince and Lord, Lewis the Fourteenth, most Christian King of France and Navarre, with his Allies and Adherents on the other side: from whence ensu'd great Effusion of Christian Blood, and the Desolation of several Provinces. It has at last happen'd, by the effect of Divine Goodness, seconded by the Endeavours of the most Serene Republick of Venice, who in this sad time, when all Christendom is imbroil'd, has not ceas'd to contribute its Counsels for the publick Welfare and Tranquillity; so that on the side, and the other, they have form'd Thoughts of an universal Peace. And for this purpose, by a mutual Agreement and Covenant of both Partys, in the year of our Lord 1641. the 25th of December, N.S. or the 15th O.S. it was resolv'd at Hamburgh, to hold an Assembly of Plenipotentiary Ambassadors, who should render themselves at Munster and Osnabrug in Westphalia the 11th of July, N.S. or the 1st of the said month O.S. in the year 1643. The Plenipotentiary Ambassadors on the one side, and the other, duly establish'd, appearing at the prefixt time, and on

the behalf of his Imperial Majesty, the most illustrious and most excellent Lord, Maximilian Count of Trautmansdorf and Weinsberg, Baron of Gleichenberg, Neustadt, Negan, Burgau, and Torzenbach, Lord of Teinitz, Knight of the Golden Fleece, Privy Counsellor and Chamberlain to his Imperial Sacred Majesty, and Steward of his Houshold; the Lord John Lewis, Count of Nassau, Catzenellebogen, Vianden, and Dietz, Lord of Bilstein, Privy Counsellor to the Emperor, and Knight of the Golden Fleece; Monsieur Isaac Volmamarus, Doctor of Law, Counsellor, and President in the Chamber of the most Serene Lord Arch–Duke Ferdinand Charles. And on the behalf of the most Christian King, the most eminent Prince and Lord, Henry of Orleans, Duke of Longueville, and Estouteville, Prince and Sovereign Count of Neuschaftel, Count of Dunois and Tancerville, Hereditary Constable of Normandy, Governor and Lieutenant–General of the same Province, Captain of the Cent Hommes d'Arms, and Knight of the King's Orders, &c. as also the most illustrious and most excellent Lords, Claude de Mesmes, Count d'Avaux, Commander of the said King's Orders, one of the Superintendents of the Finances, and Minister of the Kingdom of France &c. and Abel Servien, Count la Roche of Aubiers, also one of the Ministers of the Kingdom of France. And by the Mediation and Interposition of the most illustrious and most excellent Ambassador and Senator of Venice, Aloysius Contarini Knight, who for the space of five Years, or thereabouts, with great Diligence, and a Spirit intirely impartial, has been inclin'd to be a Mediator in these Affairs. After having implor'd the Divine Assistance, and receiv'd a reciprocal Communication of Letters, Commissions, and full Powers, the Copys of which are inserted at the end of this Treaty, in the presence and with the consent of the Electors of the Sacred Roman Empire, the other Princes and States, to the Glory of God, and the Benefit of the Christian World, the following Articles have been agreed on and consented to, and the same run thus.

I.

That there shall be a Christian and Universal Peace, and a perpetual, true, and sincere Amity, between his Sacred Imperial Majesty, and his most Christian Majesty; as also, between all and each of the Allies, and Adherents of his said Imperial Majesty, the House of Austria, and its Heirs, and Successors; but chiefly between the Electors, Princes, and States of the Empire on the one side; and all and each of the Allies of his said Christian Majesty, and all their Heirs and Successors, chiefly between the most Serene Queen and Kingdom of Swedeland, the Electors respectively, the Princes and States of the Empire, on the other part. That this Peace and Amity be observ'd and cultivated with such a Sincerity and Zeal, that each Party shall endeavour to procure the Benefit, Honour and Advantage of the other; that thus on all sides they may see this Peace and Friendship in the Roman Empire, and the Kingdom of France flourish, by entertaining a good and faithful Neighbourhood.

II.

That there shall be on the one side and the other a perpetual Oblivion, Amnesty, or Pardon of all that has been committed since the beginning of these Troubles, in what place, or what manner soever the Hostilitys have been practis'd, in such a manner, that no body, under any pretext whatsoever, shall practice any Acts of Hostility, entertain any Enmity, or cause any Trouble to each other; neither as to Persons, Effects and Securitys, neither of themselves or by others, neither privately nor openly, neither directly nor indirectly, neither under the colour of Right, nor by the way of Deed, either within or without the extent of the Empire, notwithstanding all Covenants made before to the contrary: That they shall not act, or permit to be acted, any wrong or injury to any whatsoever; but that all that has pass'd on the one side, and the other, as well before as during the War, in Words, Writings, and Outra-

geous Actions, in Violences, Hostilitys, Damages and Expences, without any respect to Persons or Things, shall be entirely abolish'd in such a manner that all that might be demanded of, or pretended to, by each other on that behalf, shall be bury'd in eternal Oblivion.

III.

And that a reciprocal Amity between the Emperor, and the Most Christian King, the Electors, Princes and States of the Empire, may be maintain'd so much the more firm and sincere (to say nothing at present of the Article of Security, which will be mention'd hereafter) the one shall never assist the present or future Enemys of the other under any Title or Pretence whatsoever, either with Arms, Money, Soldiers, or any sort of Ammunition; nor no one, who is a Member of this Pacification, shall suffer any Enemys Troops to retire thro' or sojourn in his Country.

IV.

That the Circle of Burgundy shall be and continue a Member of the Empire, after the Disputes between France and Spain (comprehended in this Treaty) shall be terminated. That nevertheless, neither the Emperor, nor any of the States of the Empire, shall meddle with the Wars which are now on foot between them. That if for the future any Dispute arises between these two Kingdoms, the abovesaid reciprocal Obligation of not aiding each others Enemys, shall always continue firm between the Empire and the Kingdom of France, but yet so as that it shall be free for the States to succour; without the bounds of the Empire, such or such Kingdoms, but still according to the Constitutions of the Empire.

V.

That the Controversy touching Lorain shall be refer'd to Arbitrators nominated by both sides, or it shall be terminated by a Treaty between France and Spain, or by some other friendly means; and it shall be free as well for the Emperor, as Electors, Princes and States of the Empire, to aid and advance this Agreement by an amicable Interposition, and other Offices of Pacification, without using the force of Arms.

VI.

According to this foundation of reciprocal Amity, and a general Amnesty, all and every one of the Electors of the sacred Roman Empire, the Princes and States (therein comprehending the Nobility, which depend immediately on the Empire) their Vassals, Subjects, Citizens, Inhabitants (to whom on the account of the Bohemian or German Troubles or Alliances, contracted here and there, might have been done by the one Party or the other, any Prejudice or Damage in any manner, or under what pretence soever, as well in their Lordships, their fiefs, Underfiefs, Allodations, as in theirDignitys, Immunitys, Rights and Privileges) shall be fully re-establish'd on the one side and the other, in the Ecclesiastick or Laick State, which they enjoy'd, or could lawfully enjoy, notwithstanding any Alterations, which have been made in the mean time to the contrary.

VII.

If the Possessors of Estates, which are to be restor'd, think they have lawful Exceptions, yet it shall not hinder the Restitution; which done, their Reasons and Exceptions may be examin'd before competent Judges, who are to determine the same.

VIII.

And tho by the precedent general Rule it may be easily judg'd who those are, and how far the Restitution extends; nevertheless, it has been thought fit to make a particular mention of the following Cases of Importance, but yet so that those which are not in express Terms nam'd, are not to be taken as if they were excluded or forgot.

IX.

Since the Arrest the Emperor has formerly caus'd to be made in the Provincial Assembly, against the moveable Effects of the Prince Elector of Treves, which were transported into the Dutchy of Luxemburg, tho releas'd and abolish'd, yet at the instance of some has been renew'd; to which has been added a Sequestration, which the said Assembly has made of the Jurisdiction of Burch, belonging to the Archbishoprick, and of the Moiety of the Lordship of St. John, belonging to John Reinbard of Soeteren, which is contrary to the Concordat's drawn up at Ausburg in the year 1548 by the publick interposition of the Empire, between the Elector of Treves, and the Dutchy of Burgundy: It has been agreed, that the abovesaid Arrest and Sequestration shall be taken away with all speed from the Assembly of Luxemburg, that the said Jurisdiction, Lordship, and Electoral and Patrimonial Effects, with the sequestred Revenues, shall be releas'd and restor'd to the Elector; and if by accident some things should be Imbezel'd, they shall be fully restor'd to him; the Petitioners being refer'd, for the obtaining a determination of their Rights, to the Judge of the Prince Elector, who is competent in the Empire.

X.

As for what concerns the Castles of Ehrenbreitstein and Homestein, the Emperor shall withdraw, or cause the Garisons to be withdrawn in the time and manner limited hereafter in the Article of Execution, and shall restore those Castles to the Elector of Treves, and to his Metropolitan Chapter, to be in the Protection of the Empire, and the Electorate; for which end the Captain, and the new Garison which shall be put therein by the Elector, shall also take the Oaths of Fidelity to him and his Chapter.

XI.

The Congress of Munster and Osnabrug having brought the Palatinate Cause to that pass, that the Dispute which has lasted for so long time, has been at length terminated; the Terms are these.

XII.

In the first place, as to what concerns the House of Bavaria, the Electoral Dignity which the Electors Palatine have hitherto had, with all their Regales, Offices, Precedencys, Arms and Rights, whatever they be, belonging to this Dignity, without excepting any, as also all the Upper Palatinate and the County of Cham, shall remain, as for the time past, so also for the

future, with all their Appurtenances, Regales and Rights, in the possession of the Lord Maximilian, Count Palatine of the Rhine, Duke of Bavaria, and of his children, and all the Willielmine Line, whilst there shall be any Male Children in being.

XIII.

Reciprocally the Elector of Bavaria renounces entirely for himself and his Heirs and Successors the Debt of Thirteen Millions, as also all his Pretensions in Upper Austria; and shall deliver to his Imperial Majesty immediately after the Publication of the Peace, all Acts and Arrests obtain'd for that end, in order to be made void and null.

XIV.

As for what regards the House of Palatine, the Emperor and the Empire, for the benefit of the publick Tranquillity, consent, that by virtue of this present Agreement, there be establish'd an eighth Electorate; which the Lord Charles Lewis, Count Palatine of the Rhine, shall enjoy for the future, and his Heirs, and the Descendants of the Rudolphine Line, pursuant to the Order of Succession, set forth in the Golden Bull; and that by this Investiture, neither the Lord Charles Lewis, nor his Successors shall have any Right to that which has been given with the Electoral Dignity to the Elector of Bavaria, and all the Branch of William.

XV.

Secondly, that all the Lower Palatinate, with all and every the Ecclesiastical and Secular Lands, Rights and Appurtenances, which the Electors and Princes Palatine enjoy'd before the Troubles of Bohemia, shall be fully restor'd to him; as also all the Documents, Registers and Papers belonging thereto; annulling all that hath been done to the contrary. And the Emperor engages, that neither the Catholick King, nor any other who possess any thing thereof, shall any ways oppose this Restitution.

XVI.

Forasmuch–as that certain Jurisdictions of the Bergstraet, belonging antiently to the Elector of Mayence, were in the year 1463 mortgag'd to the House Palatine for a certain Sum of Money: upon condition of perpetual Redemption, it has been agreed that the same Jurisdictions shall be Restor'd to the present Elector of Mayence, and his Successors in the Archbishoprick of Mayence, provided the Mortgage be paid in ready Mony, within the time limited by the Peace to be concluded; and that he satisfies the other Conditions, which he is bound to by the Tenor of the Mortgage–Deeds.

XVII.

It shall also be free for the Elector of Treves, as well in the Quality of Bishop of Spires as Bishop of Worms, to sue before competent Judges for the Rights he pretends to certain Ecclesiastical Lands, situated in the Territorys of the Lower Palatinate, if so be those Princes make not a friendly Agreement among themselves.

VIII.

That if it should happen that the Male Branch of William should be intirely extinct, and the Palatine Branch still subsist, not only the Upper Palatinate, but also the Electoral Dignity of the Dukes of Bavaria, shall revert to the said surviving Palatine, who in the mean time enjoys the Investiture: but then the eighth Electorate shall be intirely suppress'd. Yet in such case, nevertheless, of the return of the Upper Palatinate to the surviving Palatines, the Heirs of any Allodian Lands of the Bavarian Electors shall remain in Possession of the Rights and Benefices, which may lawfully appertain to them.

XIX.

That the Family–Contracts made between the Electoral House of Heidelberg and that of Nieuburg, touching the Succession to the Electorate, confirm'd by former Emperors; as also all the Rights of the Rudolphine Branch, forasmuch as they are not contrary to this Disposition, shall be conserv'd and maintain'd entire.

XX.

Moreover, if any Fiefs in Juliers shall be found open by lawful Process, the Question shall be decided in favour of the House Palatine.

XXI.

Further, to ease the Lord Charles Lewis, in some measure, of the trouble of providing his Brothers with Appenages, his Imperial Majesty will give order that forty thousand Rixdollars shall be paid to the said Brothers, in the four ensuing Years; the first commencing with the Year 1649. The Payment to be made of ten thousand Rixdollars yearly, with five per Cent Interest.

XXII.

Further, that all the Palatinate House, with all and each of them, who are, or have in any manner adher'd to it; and above all, the Ministers who have serv'd in this Assembly, or have formerly serv'd this House; as also all those who are banish'd out of the Palatinate, shall enjoy the general Amnesty here above promis'd, with the same Rights as those who are comprehended therein, or of whom a more particular and ampler mention has been made in the Article of Grievance.

XXIII.

Reciprocally the Lord Charles Lewis and his Brothers shall render Obedience, and be faithful to his Imperial Majesty, like the other Electors and Princes of the Empire; and shall renounce their Pretensions to the Upper Palatinate, as well for themselves as their Heirs, whilst any Male, and lawful Heir of the Branch of William shall continue alive.

XXIV.

And upon the mention which has been made, to give a Dowry and a Pension to the Mother Dowager of the said Prince, and to his Sisters; his Sacred Imperial Majesty (according to the Affection he has for the Palatinate House) has promis'd to the said Dowager, for her

Maintenance and Subsistence, to pay once for all twenty thousand Rixdollars; and to each of the Sisters of the said Lord Charles Lewis, when they shall marry, ten thousand Rixdollars, the said Prince Charles Lewis being bound to disburse the Overplus.

XXV.

That the said Lord Charles Lewis shall give no trouble to the Counts of Leiningen and of Daxburg, nor to their Successors in the Lower Palatinate; but he shall let them peaceably enjoy the Rights obtain'd many Ages ago, and confirm'd by the Emperors.

XXVI.

That he shall inviolably leave the Free Nobility of the Empire, which are in Franconia, Swabia, and all along the Rhine, and the Districts thereof, in the state they are at present.

XXVII.

That the Fiefs confer'd by the Emperor on the Baron Gerrard of Waldenburg, call'd Schenck–heeren, on Nicholas George Reygersberg, Chancellor of Mayence, and on Henry Brombser, Baron of Rudeheim; Item, on the Elector of Bavaria, on Baron John Adolph Wolff, call'd Meternicht, shall remain firm and stable: That nevertheless these Vassals shall be bound to take an Oath of Fidelity to the Lord Charles Lewis, and to his Successors, as their direct Lords, and to demand of him the renewing of their Fiefs.

XXVIII.

That those of the Confession of Augsburg, and particularly the Inhabitants of Oppenheim, shall be put in possession again of their Churches, and Ecclesiastical Estates, as they were in the Year 1624. as also that all others of the said Confession of Augsburg, who shall demand it, shall have the free Exercise of their Religion, as well in publick Churches at the appointed Hours, as in private in their own Houses, or in others chosen for this purpose by their Ministers, or by those of their Neighbours, preaching the Word of God.

XXIX.

That the Paragraphs, Prince Lewis Philip, &c. Prince Frederick, &c. and Prince Leopold Lewis, &c. be understood as here inserted, after the same manner they are contain'd in the Instrument, or Treaty of the Empire with Swedeland.

XXX.

That the Dispute depending between the Bishops of Bamberg and Wirtzberg on the one, and the Marquiss of Brandenburg, Culmbach, and Onalzbach, on the other side, touching the Castle, Town, Jurisdiction, and Monastery of Kitzingen in Franconia, on the Main, shall be amicably compos'd; or, in a judicial manner, within two years time, upon pain of the Person's losing his Pretensions, that shall delay it: and that, in the mean time, the
Fort of Wirtzberg shall be surrender'd to the said Lords Marquisses, in the same state it was taken, according as it has been agreed and stipulated.

XXXI.

That the Agreement made, touching the Entertainment of the Lord Christian William, Marquiss of Brandenburg, shall be kept as if recited in this place, as it is put down in the fourteenth Article of the Treaty between the Empire and Swedeland.

XXXII.

The Most Christian King shall restore to the Duke of Wirtemberg, after the manner hereafter related, where we shall mention the withdrawing of Garisons, the Towns and Forts of Hohenwiel, Schorendorff, Turbingen, and all other places, without reserve, where he keeps Garisons in the Dutchy of Wirtemberg. As for the rest, the Paragraph, THE HOUSE OF WIRTEMBERG, &c. shall be understood as inserted in this Place, after the same manner it's contain'd in the Treaty of the Empire, and of Swedeland.

XXXIII.

That the Princes of Wirtemberg, of the Branches of Montbeillard, shall be re-establish'd in all their Domains in Alsace, and wheresoever they be situated, but particularly in the three Fiefs of Burgundy, Clerval, and Passavant: and both Partys shall re-establish them in the State, Rights and Prerogatives they enjoy'd before the Beginning of these Wars.

XXXIV.

That Frederick, Marquiss of Baden, and of Hachberg, and his Sons and Heirs, with all those who have serv'd them in any manner whatsoever, and who serve them still, of what degree they may be, shall enjoy the Amnesty above-mention'd, in the second and third Article, with all its Clauses and Benefices; and by virtue thereof, they shall be fully re-establish'd in the State Ecclesiastical or Secular, in the same manner as the Lord George Frederick Marquiss of Beden and of Hachberg, possess'd, before the beginning of the Troubles of Bohemia, whatever concern'd the lower Marquisate of Baden, call'd vulgarly Baden Durlach, as also what concern'd the Marquisate of Hachberg, and the Lordships of Rottelen, Badenweiller, and Sausenberg, notwithstanding, and annulling all the Changes made to the contrary. After which shall be restor'd to Marquiss Frederick, the Jurisdictions of Stein and Renchingen, without being charg'd with Debts, which the Marquiss William has contracted during that time, by Reason of the Revenues, Interests and Charges, put down in the Transaction pass'd at Etlingen in the Year 1629. and transfer'd to the said William Marquiss of Baden, with all the Rights, Documents, Writings, and other things appertaining; so that all the Plea concerning the Charges and Revenues, as well receiv'd as to receive, with their Damages and Interests, to reckon from the time of the first Possession, shall be intirely taken away and abolish'd.

XXXV.

That the Annual Pension of the Lower Marquisate, payable to the Upper Marquisate, according to former Custom, shall by virtue of the present Treaty be intirely taken away and annihilated; and that for the future nothing shall be pretended or demanded on that account, either for the time past or to come.

XXXVI.

That for the future, the Precedency and Session, in the States and Circle of Swabia, or other General or Particular Assemblys of the Empire, and any others whatsoever, shall be alternative in the two Branches of Baden; viz. in that of the Upper, and that of the Lower Marquisate of Baden: but nevertheless this Precedency shall remain in the Marquiss Frederick during his Life. It has been agreed, touching the Barony of Hohengerolt Zegk that if Madam, the Princess of Baden, verifies the Rights of her Pretension upon the said Barony by authentick Documents, Restitution shall be made her, according to the Rights and Contents of the said Documents, as soon as Sentence shall be pronounc'd. That the Cognizance of this Cause shall be terminated within two Years after the Publication of the Peace: And lastly, no Actions, Transaction, or Exceptions, either general or particular, nor Clauses comprehended in this Treaty of Peace, and whereby they would derogate from the Vigour of this Article, shall be at any time alledg'd by any of the Partys against this special Agreement. The Paragraphs, the Duke of Croy, &c. As for the Controversy of Naussau–Siegen, &c. To the Counts of Naussau, Sarrepont, &c. The House of Hanau, &c. John Albert Count of Solms, &c. as also, Shall be re–establish'd the House of Solms, Hohensolms, &c. The Counts of Isemburg, &c. The Rhinegraves, &c. The Widow of Count Ernest of Sainen, &c. The Castle and the County of Flackenstein, &c. Let also the House of Waldeck be re–establish'd, &c. Joachim Ernest Count of Ottingen, &c. Item, The House of Hohenlo, &c. Frederick Lewis, &c. The Widow and Heirs of the Count of Brandenstein, &c. The Baron Paul Kevenhuller, &c. shall be understood to be inserted in this place word by word, as they are put down in the Instruor Treaty between the Empire and Swedeland.

XXXVII.

That the Contracts, Exchanges, Transactions, Obligations, Treatys, made by Constraint or Threats, and extorted illegally from States or Subjects (as in particular, those of Spiers complain, and those of Weisenburg on the Rhine, those of Landau, Reitlingen, Hailbron, and others) shall be so annull'd and abolish'd, that no more Enquiry shall be made after them.

XXXVIII.

That if Debtors have by force got some Bonds from their Creditors, the same shall be restor'd, but not with prejudice to their Rights.

XXXIX.

That the Debts either by Purchase, Sale, Revenues, or by what other name they may be call'd, if they have been violently extorted by one of the Partys in War, and if the Debtors alledge and offer to prove there has been a real Payment, they shall be no more prosecuted, before these Exceptions be first adjusted. That the Debtors shall be oblig'd to produce their Exceptions within the term of two years after the Publication of the Peace, upon pain of being afterwards condemn'd to perpetual Silence.

XL.

That Processes which have been hitherto enter'd on this Account, together with the Transactions and Promises made for the Restitution of Debts, shall be look'd upon as void; and

yet the Sums of Money, which during the War have been exacted bona fide, and with a good intent, by way of Contributions, to prevent greater Evils by the Contributors, are not comprehended herein.

XLI.

That Sentences pronounc'd during the War about Matters purely Secular, if the Defect in the Proceedings be not fully manifest, or cannot be immediately demonstrated, shall not be esteem'd wholly void; but that the Effect shall be suspended until the Acts of Justice (if one of the Partys demand the space of six months after the Publication of the Peace, for the reviewing of his Process) be review'd and weigh'd in a proper Court, and according to the ordinary or extraordinary Forms us'd in the Empire: to the end that the former Judgments may be confirm'd, amended, or quite eras'd, in case of Nullity.

XLII.

In the like manner, if any Royal, or particular Fiefs, have not been renew'd since the Year 1618. nor Homage paid to whom it belongs; the same shall bring no prejudice, and the Investiture shall be renew'd the day the Peace shall be concluded.

XLIII.

Finally, That all and each of the Officers, as well Military Men as Counsellors and Gownmen, and Ecclesiasticks of what degree they may be, who have serv'd the one or other Party among the Allies, or among their Adherents, let it be in the Gown, or with the Sword, from the highest to the lowest, without any distinction or exception, with their Wives, Children, Heirs, Successors, Servants, as well concerning their Lives as Estates, shall be restor'd by all Partys in the State of Life, Honour, Renown, Liberty of Conscience, Rights and Privileges, which they enjoy'd before the abovesaid Disorders; that no prejudice shall be done to their Effects and Persons, that no Action or accusation shall be enter'd against them; and that further, no Punishment be inflicted on them, or they to bear any damage under what pretence soever: And all this shall have its full effect in respect to those who are not Subjects or Vassals of his Imperial Majesty, or of the House of Austria.

XLIV.

But for those who are Subjects and Hereditary Vassals of the Emperor, and of the House of Austria, they shall really have the benefit of the Amnesty, as for their Persons, Life, Reputation, Honours: and they may return with Safety to their former Country; but they shall be oblig'd to conform, and submit themselves to the Laws of the Realms, or particular Provinces they shall belong to.

XLV.

As to their Estates that have been lost by Confiscation or otherways, before they took the part of the Crown of France, or of Swedeland, notwithstanding the Plenipotentiarys of Swedeland have made long instances, they may be also restor'd. Nevertheless his Imperial Majesty being to receive Law from none, and the Imperialists sticking close thereto, it has not been thought convenient by the States of the Empire, that for such a Subject the War should be continu'd: And that thus those who have lost their Effects as aforesaid, cannot recover them to the prejudice of their last Masters and Possessors. But the Estates, which

have been taken away by reason of Arms taken for France or Swedeland, against the Emperor and the House of Austria, they shall be restor'd in the State they are found, and that without any Compensation for Profit or Damage.

XLVI.

As for the rest, Law and Justice shall be administer'd in Bohemia, and in all the other Hereditary Provinces of the Emperor, without any respect; as to the Catholicks, so also to the Subjects, Creditors, Heirs, or private Persons, who shall be of the Confession of Augsburg, if they have any Pretensions, and enter or prosecute any Actions to obtain Justice.

XLVII.

But from this general Restitution shall be exempted things which cannot be restor'd, as Things movable and moving, Fruits gather'd, Things alienated by the Authority of the Chiefs of the Party, Things destroy'd, ruin'd, and converted to other uses for the publick Security, as publick and particular Buildings, whether sacred or profane, publick or private Gages, which have been, by surprize of the Enemys, pillag'd, confiscated, lawfully sold, or voluntarily bestow'd.

XLVIII.

And as to the Affair of the Succession of Juliers, those concern'd, if a course be not taken about it, may one day cause great Troubles in the Empire about it; it has been agreed, That the Peace being concluded it shall be terminated without any Delay, either by ordinary means before his Imperial Majesty, or by a friendly Composition, or some other lawful ways.

XLIX.

And since for the greater Tranquillity of the Empire, in its general Assemblys of Peace, a certain Agreement has been made between the Emperor, Princes and States .of the Empire, which has been inserted in the Instrument and Treaty of Peace, concluded with the Plenipotentiarys of the Queen and Crown of Swedeland, touching the Differences about Ecclesiastical Lands, and the Liberty of the Exercise of Religion; it has been found expedient to confirm,and ratify it by this present Treaty, in the same manner as the abovesaid Agreement has been made with the said Crown of Swedeland; also with those call'd the Reformed, in the same manner, as if the words of the abovesaid Instrument were reported here verbatim.

L.

Touching the Affair of Hesse Cassel, it has been agreed as follows: In the first place, The House of Hesse Cassel, and all its Princes, chiefly Madam Emelie Elizabeth Landgravine of Hesse, and her Son Monsieur William and his Heirs, his Ministers, Officers, Vassals, Subjects, Soldiers, and others who follow his Service in any manner soever, without any Exception, notwithstanding Contracts to the contrary, Processes, Proscriptions, Declarations, Sentences, Executions and Transactions; as also notwithstanding any Actions and Pretensions for Damages and Injuries as well from Neutrals, as from those who were in Arms, annull'd by the General Amnesty here before establish'd, and to take place from the beginning of the War in Bohemia, with a full Restitution (except the Vassals, and Hereditary Subjects of his Imperial Majesty, and the House of Austria, as is laid down in the Para-

graph, Tandemomnes, &c.) shall partake of all the Advantages redounding from this Peace, with the same Rights other States enjoy, as is set forth in the Article which commences, Unanimi, &c.

LI.

In the second place, the House of Hesse Cassel, and its Successors, shall retain, and for this purpose shall demand at any time, and when it shall be expir'd, the Investiture of his Imperial Majesty, and shall take the Oath of Fidelity for the Abby of Hitsfield, with all its Dependencys, as well Secular as Ecclesiastical, situated within or without his Territorys (as the Deanery of Gellingen) saving nevertheless the Rights possess'd by the House of Saxony, time out of mind.

LII.

In the third place, the Right of a direct Signiory over the Jurisdictions and Bayliwick of Schaumburg, Buckenburg, Saxenhagen, and Stattenhagen, given heretofore and adjudged to the Bishoprick of Mindau, shall for the future belong unto Monsieur William, the present Landgrave of Hesse, and his Successors in full Possession, and for ever, so as that the said Bishop, and no other shall be capable of molesting him; saving nevertheless the Agreement made between Christian Lewis, Duke of Brunswick and Lunenburg, and the Landgravine of Hesse, and Philip Count of Lippe, as also the Agreement made between the said Landgravine, and the said Count.

LIII.

It has been further agreed, That for the Restitution of Places possess'd during this War, and for the Indemnity of Madam, the Landgravine of Hesse, who is the Guardian, the Sum of Six Hundred Thousand Rixdollars shall be given to her and her Son, or his Successors Princes of Hesse, to be had from the Archbishopricks of Mayence and Cologne, from the Bishopricks of Paderborn and Munster, and the Abby of Fulden; which Sum shall be paid at Cassel in the term of eight Months, to reckon from the Day of the Ratification of the Peace, at the peril and charge of the Solvent: and no Exception shall be used to evade this promis'd Payment, on any Pretence; much less shall any Seizure be made of the Sum agreed on.

LIV.

And to the end that Madam, the Landgravine, may be so much the more assur'd of the Payment, she shall retain on the Conditions following, Nuys, Cuesfeldt, and Newhaus, and shall keep Garisons in those Places which shall depend on her alone; but with this Limitation, That besides the Officers and other necessary Persons in the Garisons, those of the three above-nam'd Places shall not exceed the number of Twelve Hundred Foot, and a Hundred Horse; leaving to Madam, the Landgravine, the Disposition of the number of Horse and Foot she shall be pleas'd to put in each of these Places, and whom she will constitute Governor.

LV.

The Garisons shall be maintain'd according to the Order, which has been hitherto usually practis'd, for the Maintenance of the Hessian Soldiers and Officers; and the things neces-

sary for the keeping of the Forts shall be furnish'd by the Arch–bishopricks and Bishopricks, in which the said Fortresses are situated, without any Diminution of the Sum above–mention'd. It shall be allow'd the Garisons, to exact the Money of those who shall retard Payment too long, or who shall be refractory, but not any more than what is due. The Rights of Superiority and Jurisdiction, as well Ecclesiastical as Secular, and the Revenues of the said Castles and Towns, shall remain in the Arch–bishop of Cologne.

LVI.

As soon as after the Ratification of Peace, Three Hundred Thousand Rixdollars shall be paid to Madam, the Landgravine, she shall give up Nuys, and shall only retain Cuesfeldt and Newhaus; but yet so as that the Garison of Nuys shall not be thrown into the other two Places, nor nothing demanded on that account; and the Garisons of Cuesfeldt shall not exceed the Number of Six Hundred Foot and Fifty Horse. That if within the term of nine Months, the whole Sum be not paid to Madam the Landgravine, not only Cuesfeldt and Newhaus shall remain in her Hands till the full Payment, but also for the remainder, she shall be paid Interest at Five per Cent. and the Treasurers and Collectors of the Bayliwicks appertaining to the abovesaid Arch–bishopricks, Bishopricks and Abby, bordering on the Principality of Hesse, shall oblige themselves by Oath to Madam the Landgravine, that out of the annual Revenues, they shall yearly pay the Interest of the remaining Sum notwithstanding the Prohibitions of their Masters. If the Treasurers and Collectors delay the Payment, or alienate the Revenues, Madam the Landgravine shall have liberty to constrain them to pay, by all sorts of means, always saving the Right of the Lord Proprietor of the Territory.

LVII.

But as soon as Madam the Landgravine has receiv'd the full Sum, with all the Interest, she shall surrender the said Places which she retain'd for her Security; the Payments shall cease, and the Treasurers and Collectors, of which mention has been made, shall be freed, from their Oath: As for the Bayliwicks, the Revenues of which shall be assign'd for the Payment of the Sum, that shall be adjusted before the Ratification of the Peace; and that Convention shall be of no less Force than this present Treaty of Peace.

LVIII.

Besides the Places of Surety, which shall be left, as aforesaid, to Madam the Landgravine, which she shall restore after the Payment, she shall restore, after the Ratification of the Peace, all the Provinces and Bishopricks, as also all their Citys, Bayliwicks, Boroughs, Fortresses, Forts; and in one word, all immoveable Goods, and all Rights seiz'd by her during this War. So, nevertheless, that as well in the three Places she shall retain as Cautionary, as the others to be restor'd, the said Lady Landgravine not only shall cause to be convey'd away all the Provisions and Ammunitions of War she has put therein (for as to those she has not sent thither, and what was found there at the taking of them, and are there still, they shall continue;) but also the Fortifications and Ramparts, rais'd during the Possession of the Places, shall be destroy'd and demolish'd as much as possible, without exposing the Towns, Borroughs, Castles and Fortresses, to Invasions and Robberys.

LIX.

And tho Madam the Landgravine has only demanded Restitution and Reparation of the Arch–bishopricks of Mayence, Cologne, Paderborn, Munster, and the Abby of Fulden; and has not insisted that any besides should contribute any thing for this Purpose: nevertheless the Assembly have thought fit, according to the Equity and Circumstances of Affairs, that without prejudice to the Contents of the preceding Paragraph, which begins, Conventum praterea est, &c. IT HAS BEEN FURTHER AGREED, the other States also on this and the other side the Rhine, and who since the first of March of this present Year, have paid Contributions to the Hessians, shall bear their Proportion pro Rata of their preceding Contributions, to make up the said Sum with the Arch–bishopricks, Bishopricks and Abby above–named, and forward the Payments of the Garisons of the Cautionary Towns. If any has suffer'd Damage by the delay of others, who are to pay their share, the Officers or Soldiers of his Imperial Majesty, of the most Christian King, and of the Landgravine of Hesse, shall not hinder the forcing of those who have been tardy; and the Hessian Soldiers shall not pretend to except any from this Constraint, to the prejudice of this Declaration, but those who have duly paid their Proportion, shall thereby be freed from all Charges.

LX.

As to the Differences arisen between the Houses of Hesse Cassel, and of Darmstadt, touching the Succession of Marburg; since they have been adjusted at Cassel, the 14th of April, the preceding Year, by the mutual Consent of the Interested Partys, it has been thought good, that that Transaction, with all its Clauses, as concluded and sign'd at Cassel by both Partys, should be intimated to this Assembly; and that by virtue of this present Treaty, it shall be of the same force, as if inserted word by word: and the same shall never be infring'd by the Partys, nor any other whatsoever, under any pretence, either by Contract, Oath, or otherways, but ought to be most exactly kept by all, tho perhaps some of the Partys concern'd may refuse to confirm it.

LXI.

As also the Transaction between the Deceas'd monsieur William, Landgrave of Hesse, and Messieurs Christian and Wolrad, Counts of Waldeck, made the 11th of April, 1635. and ratify'd to Monsieur George, Landgrave of Hesse, the 14th of April 1648. shall no less obtain a full and perpetual force by virtue of this Pacification, and shall no less bind all the Princes of Hesse, and all the Counts of Waldeck.

LXII.

That the Birth–right introduc'd in the House of Hesse Cassel, and in that of Darmstadt, and confirm'd by His Imperial Majesty, shall continue and be kept firm and inviolable.

LXIII.

And as His Imperial Majesty, upon Complaints made in the name of the City of Basle, and of all Switzerland, in the presence of their Plenipotentiarys deputed to the present Assembly, touching some Procedures and Executions proceeding from the Imperial Chamber against the said City, and the other united Cantons of the Swiss Country, and their Citizens and Subjects having demanded the Advice of the States of the Empire and their Council; these have, by a Decree of the 14th of May of the last Year, declared the said City of Basle,

and the other Swiss–Cantons, to be as it were in possession of their full Liberty and Exemption of the Empire; so that they are no ways subject to the Judicatures, or Judgments of the Empire, and it was thought convenient to insert the same in this Treaty of Peace, and confirm it, and thereby to make void and annul all such Procedures and Arrests given on this Account in what form soever.

LXIV.

And to prevent for the future any Differences arising in the Politick State, all and every one of the Electors, Princes and States of the Roman Empire, are so establish'd and confirm'd in their antient Rights, Prerogatives, Libertys, Privileges, free exercise of Territorial Right, as well Ecclesiastick, as Politick Lordships, Regales, by virtue of this present Transaction: that they never can or ought to be molested therein by any whomsoever upon any manner of pretence.

LXV.

They shall enjoy without contradiction, the Right of Suffrage in all Deliberations touching the Affairs of the Empire; but above all, when the Business in hand shall be the making or interpreting of Laws, the declaring of Wars, imposing of Taxes, levying or quartering of Soldiers, erecting new Fortifications in the Territorys of the States, or reinforcing the old Garisons; as also when a Peace of Alliance is to be concluded, and treated about, or the like, none of these, or the like things shall be acted for the future, without the Suffrage and Consent of the Free Assembly of all the States of the Empire: Above all, it shall be free perpetually to each of the States of the Empire, to make Alliances with Strangers for their Preservation and Safety; provided, nevertheless, such Alliances be not against the Emperor, and the Empire, nor against the Publick Peace, and this Treaty, and without prejudice to the Oath by which every one is bound to the Emperor and the Empire.

LXVI.

That the Diets of the Empire shall be held within six Months after the Ratification of the Peace; and after that time as often as the Publick Utility, or Necessity requires. That in the first Diet the Defects of precedent Assemblys be chiefly remedy'd; and that then also be treated and settled by common Consent of the States, the Form and Election of the Kings of the Romans, by a Form, and certain Imperial Resolution; the Manner and Order which is to be observ'd for declaring one or more States, to be within the Territorys of the Empire, besides the Manner otherways describ'd in the Constitutions of the Empire; that they consider also of re–establishing the Circles, the renewing the Matricular–Book, the re–establishing suppress'd States, the moderating and lessening the Collects of the Empire, Reformation of Justice and Policy, the taxing of Fees in the Chamber of Justice, the Due and requisite instructing of ordinary Deputys for the Advantage of the Publick, the true Office of Directors in the Colleges of the Empire, and such other Business as could not be here expedited.

LXVII.

That as well as general as particular Diets, the free Towns, and other States of the Empire, shall have decisive Votes; they shall, without molestation, keep their Regales, Customs, annual Revenues, Libertys, Privileges to confiscate, to raise Taxes, and other Rights, lawfully obtain'd from the Emperor and Empire, or enjoy'd long before these Commotions, with a full Jurisdiction within the inclosure of their Walls, and their Territorys: making void at the

same time, annulling and for the future prohibiting all Things, which by Reprisals, Arrests, stopping of Passages, and other prejudicial Acts, either during the War, under what pretext soever they have been done and attempted hitherto by private Authority, or may hereafter without any preceding formality of Right be enterpris'd. As for the rest, all laudable Customs of the sacred Roman Empire, the fundamental Constitutions and Laws, shall for the future be strictly observ'd, all the Confusions which time of War have, or could introduce, being remov'd and laid aside.

LXVIII.

As for the finding out of equitable and expedient means, whereby the Prosecution of Actions against Debtors, ruin'd by the Calamitys of the War, or charg'd with too great Interests, and whereby these Matters may be terminated with moderation, to obviate greater inconveniences which might arise, and to provide for the publick Tranquillity; His Imperial Majesty shall take care to hearken as well to the Advices of his Privy Council, as of the Imperial Chamber, and the States which are to be assembled, to the end that certain firm and invariable Constitutions may be made about this Matter And in the mean time the alledg'd Reasons and Circumstances of the Partys shall be well weigh'd in Cases brought before the Sovereign Courts of the Empire, or Subordinate ones of States and no body shall be oppress'd by immoderate Executions; and ail this without prejudice to the Constitution of Holstein.

LXIX.

And since it much concerns the Publick, that upon the Conclusion of the Peace, Commerce be re-establish'd, for that end it has been agreed, that the Tolls, Customs, as also the Abuses of the Bull of Brabant, and the Reprisals and Arrests, which proceeded from thence, together with foreign Certifications, Exactions, Detensions; Item, The immoderate Expences and Charges of Posts, and other Obstacles to Commerce and Navigation introduc'd to its Prejudice, contrary to the Publick Benefit here and there, in the Empire on occasion of the War, and of late by a private Authority against its Rights and Privileges, without the Emperor's and Princes of the Empire's consent, shall be fully remov'd; and the antient Security, Jurisdiction and Custom, such as have been long before these Wars in use, shall be re-establish'd and inviolably maintain'd in the Provinces, Ports and Rivers.

LXX.

The Rights and Privileges of Territorys, water'd by Rivers or otherways, as Customs granted by the Emperor, with the Consent of the Electors, and among others, to the Count of Oldenburg on the Viserg, and introduc'd by a long Usage, shall remain in their Vigour and Execution. There shall be a full Liberty of Commerce, a secure Passage by Sea and Land: and after this manner all and every one of the Vassals, Subjects, Inhabitants and Servants of the Allys, on the one side and the other, shall have full power to go and come, to trade and return back, by Virtue of this present Article, after the same manner as was allowed before the Troubles of Germany; the Magistrates, on the one side and on the other, shall be oblig'd to protect and defend them against all sorts of Oppressions, equally with their own Subjects, without prejudice to the other Articles of this Convention, and the particular laws and Rights of each place. And that the said Peace and Amity between the Emperor and the Most Christian King, may be the more corroborated, and the publick Safety provided for, it has been agreed with the Consent, Advice and Will of the Electors, Princes and States of the Empire, for the Benefit of Peace:

LXXI.

First, That the chief Dominion, Right of Sovereignty, and all other Rights upon the Bishopricks of Metz, Toul, and Verdun, and on the Citys of that Name and their Diocesses, particularly on Mayenvick, in the same manner they formerly belong'd to the Emperor, shall for the future appertain to the Crown of France, and shall be irrevocably incorporated therewith for ever, saving the Right of the Metropolitan, which belongs to the Archbishop of Treves.

LXXII.

That Monsieur Francis, Duke of Lorain, shall be restor'd to the possession of the Bishoprick of Verdun, as being the lawful Bishop thereof; and shall be left in the peaceable Administration of this Bishoprick and its Abbys (saving the Right of the King and of particular Persons) and shall enjoy his Patrimonial Estates, and his other Rights, wherever they may be situated (and as far as they do not contradict the present Resignation) his Privileges, Revenues and Incomes; having previously taken the Oath of Fidelity to the King, and provided he undertakes nothing against the Good of the State and the Service of his Majesty.

LXXIII.

In the second place, the Emperor and Empire resign and transfer to the most Christian King, and his Successors, the Right of direct Lordship and Sovereignty, and all that has belong'd, or might hitherto belong to him, or the sacred Roman Empire, upon Pignerol.

LXXIV.

In the third place the Emperor, as well in his own behalf, as the behalf of the whole most Serene House of Austria, as also of the Empire, resigns all Rights, Propertys, Domains, Possessions and Jurisdictions, which have hitherto belong'd either to him, or the Empire, and the Family of Austria, over the City of Brisac, the Landgraveship of Upper and Lower Alsatia, Suntgau, and the Provincial Lordship of ten Imperial Citys situated in Alsatia, viz. Haguenau, Calmer, Sclestadt, Weisemburg, Landau, Oberenheim, Rosheim, Munster in the Valley of St. Gregory, Keyerberg, Turingham, and of all the villages, or other Rights which depend on the said Mayoralty; all and every of them are made over to the most Christian King, and the Kingdom of France; in the same manner as the City of Brisac, with the Villages of Hochstet, Niederrimsing, Hartem and Acharren appertaining to the Commonalty of Brisac, with all the antient Territory and Dependence; without any prejudice, nevertheless, to the Priviliges and Libertys granted the said Town formerly by the House of Austria.

LXXV.

Item, The said Landgraveship of the one, and the other Alsatia, and Suntgau, as also the Provincial Mayoralty on the ten Citys nominated, and their Dependencys.

LXXVI.

Item, All the Vassals, Subjects, People, Towns, Boroughs, Castles, Houses, Fortresses, Woods, Coppices, Gold or Silver Mines, Minerals, Rivers, Brooks, Pastures; and in a word, all the Rights, Regales and Appurtenances, without any reserve, shall belong to the most Christian King, and shall be for ever incorporated with the Kingdom France, with all man-

ner of Jurisdiction and Sovereignty, without any contradiction from the Emperor, the Empire, House of Austria, or any other: so that no Emperor, or any Prince of the House of Austria, shall, or ever ought to usurp, nor so much as pretend any Right and Power over the said Countrys, as well on this, as the other side the Rhine.

LXXVII.

The most Christian King shall, nevertheless, be oblig'd to preserve in all and every one of these Countrys the Catholick Religion, as maintain'd under the Princes of Austria, and to abolish all Innovations crept in during the War.

LXXVIII.

Fourthly, By the Consent of the Emperor and the whole Empire, the most Christian King and his Successors shall have perpetual Right to keep a Garison in the Castle of Philipsburg, but limited to such a number of Soldiers, as may not be capable to give any Umbrage, or just Suspicion to the Neighbourhood; which Garison shall be maintain'd at the Expences of the Crown of France. The Passage also shall be open for the King into the Empire by Water, when, and as often as he shall send Soldiers, Convoys, and bring necessary things thither.

LXXIX.

Nevertheless the King shall pretend to nothing more than the Protection and safe Passage of his Garison into the Castle of Philipsburg: but the Property of the Place, all Jurisdiction, Possession, all its Profits, Revenues, Purchases, Rights, Regales, Servitude, People, Subjects, Vassals, and every thing that of old in the Bishoprick of Spire, and the Churches incorporated therein, had appertain'd to the Chapter of Spire, or might have appertain'd thereto; shall appertain, and be intirely and inviolably preserv'd to the same Chapter, saving the Right of Protection which the King takes upon him.

LXXX.

The Emperor, Empire, and Monsieur the Arch Duke of Insprug, Ferdinand Charles, respectively discharge the Communitys, Magistrates, Officers and Subjects of each of the said Lordships and Places, from the Bonds and Oaths which they were hitherto bound by, and ty'd to the House of Austria; and discharge and assign them over to the Subjection, Obedience and Fidelity they are to give to the King and Kingdom of France; and consequently confirm the Crown of France in a full and just Power over all the said Places, renouncing from the present, and for ever, the Rights and Pretensions they had thereunto: Which Cession the Emperor, the said Arch–Duke and his Brother (by reason the said Renunciation concerns them particularly) shall confirm by particular Letters for themselves and their Descendants; and shall so order it also, that the Catholick King of Spain shall make the same Renunciation in due and authentick form, which shall be done in the name of the whole Empire, the same Day this present Treaty shall be sign'd.

LXXXI.

For the greater Validity of the said Cessions and Alienations, the Emperor and Empire, by virtue of this present Treaty, abolish all and every one of the Decrees, Constitutions, Stat-

utes and Customs of their Predecessors, Emperors of the sacred Roman Empire, tho they have been confirm'd by Oath, or shall be confirm'd for the future; particularly this Article of the Imperial Capitulation, by which all or any Alienationof the Appurtenances and Rights of the Empire is prohibited: and by the same means they exclude for ever all Exceptions hereunto, on what Right and Titles soever they may be grounded.

LXXXII.

Further it has been agreed, That besides the Ratification promis'd hereafter in the next Diet by the Emperor and the States of the Empire, they shall ratify anew the Alienations of the said Lordships and Rights: insomuch, that if it shou'd be agreed in the Imperial Capitulation, or if there shou'd be a Proposal made for the future, in the Diet, to recover the Lands and Rights of the Empire, the abovenam'd things shall not be comprehended therein, as having been legally transfer'd to another's Dominion, with the common Consent of the States, for the benefit of the publick Tranquillity; for which reason it has been found expedient the said Seigniorys shou'd be ras'd out of the Matricular-Book of the Empire.

LXXXIII.

Immediately after the Restitution of Benfield, the Fortifications of that Place shall be ras'd, and of the Fort Rhinau, which is hard by, as also of Tabern in Alsatia, of the Castle of Hohember and of Newburg on the Rhine: and there shall be in none of those Places any Soldiers or Garison.

LXXXIV.

The Magistrates and the Inhabitants of the said City of Tabern shall keep an exact Neutrality, and the King's Troops shall freely pass thro' there as often as desir'd. No Forts shall be erected on the Banks of this side the Rhine, from Basle to Philipsburg; nor shall any Endeavours be made to divert the Course of the River, neither on the one side or the other.

LXXXV.

As for what concerns the Debts wherewith the Chamber of Ensisheim is charg'd, the Arch-Duke Ferdinand Charles shall undertake with that part of the Province, which the most Christian King shall restore him, to pay one third without distinction, whether they be Bonds, or Mortgages; provided they are in authentick form, and that they have a particular Mortgage, either on the Provinces to be restor'd, or on them which are to be transfer'd; or if there be none, provided they be found on the Books of Accounts, agreeing with those of Receipts of the Chamber of Ensisheim, until the Expiration of the year 1632, and have been inserted amonst the Debts of the publick Chamber, and the said Chamber having been oblig'd to pay the Interests: the Arch-Duke making this Payment, shall keep the King exempt from the same.

LXXXVI.

And as for those Debts which the Colleges of the States have been charg'd with by the Princes of the House of Austria, pursuant to particular Agreements made in their Provincial Assemblys, or such as the said States have contracted in the name of the Publick, and to which they are liable; a just distribution of the same shall be made between those who are to transfer their Allegiance to the King of France, and them that continue under the Obedi-

ence of the House of Austria, that so either Party may know what proportion of the said Debt he is to pay.

LXXXVII.

The most Christian King shall restore to the House of Austria, and particularly to the Arch–Duke Ferdinand Charles, eldest Son to Arch–Duke Leopold, four Forest–Towns, viz. Rheinselden, Seckingen, Laussenberg and Waltshutum, with all their Territorys and Bayliwicks, Houses, Villages, Mills, Woods, Forests, Vassals, Subjects, and all Appurtenances on this, or the other side the Rhine.

LXXXVIII.

Item, The County of Hawenstein, the Black Forest, the Upper and Lower Brisgaw, and the Towns situate therein, appertaining of Antient Right to the House of Austria, viz. Neuburg, Friburg, Edingen, Renzingen, Waldkirch, Willingen, Bruenlingen, with all their Territorys; as also, the Monasterys, Abbys, Prelacys, Deaconrys, Knight–Fees, Commanderships, with all their Bayliwicks, Baronys, Castles, Fortresses, Countys, Barons, Nobles, Vassals, Men, Subjects, Rivers, Brooks, Forests, Woods, and all the Regales, Rights, Jurisdictions, Fiefs and Patronages, and all other things belonging to the Sovereign Right of Territory, and to the Patrimony of the House of Austria, in all that Country.

LXXXIX.

All Ortnaw, with the Imperial Citys of Ossenburg, Gengenbach, Cellaham and Harmospach, forasmuch as the said Lordships depend – on that of Ortnaw, so that no King of France can or ought ever to ; pretend to or usurp any Right or Power over the said Countrys situated on this and the other side the Rhine: nevertheless, in such a manner, that by this present Restitution, the Princes of Austria shall acquire no new Right; that for the future, the Commerce and Transportation shall be free to the Inhabitants on both sides of the Rhine, and the adjacent Provinces. Above all, the Navigation of the Rhine be free, and none of the partys shall be permitted to hinder Boats going up or coming down, detain, stop, or molest them under any pretence whatsoever, except the Inspection and Search which is usually done to Merchandizes: And it shall not be permitted to impose upon the Rhine new and unwonted Tolls, Customs, Taxes, Imposts, and other like Exactions; but the one and the other Party shall contented with the Tributes, Dutys and Tolls that were paid before these Wars, under the Government of the Princes of Austria.

XC.

That all the Vassals, Subjects, Citizens and Inhabitants, as well on this as the other side the Rhine, who were subject to the House of Austria, or who depended immediately on the Empire, or who acknowledg'd for Superiors the other Orders of the Empire, notwithstanding all Confiscations, Transferrings, Donations made by any Captains or Generals of the Swedish Troops, or Confederates, since the taking of the Province, and ratify'd by the most Christian King, or decreed by his own particular Motion; immediately after the Publication of Peace, shall be restor'd to the possession of their Goods, immovable and stable, also to their Farms, Castles, Villages, Lands, and Possessions, without any exception upon the account of Expences and Compensation of Charges, which the modern Possessors may alledge, and without Restitution of Movables or Fruits gather'd in.

XCI.

As to Confiscations of Things, which consist in Weight, Number and Measure, Exactions, Concussions and Extortions made during the War; the reclaiming of them is fully annull'd and taken away on the one side and the other, in order to avoid Processes and litigious Strifes.

XCII.

That the most Christian King shall be bound to leave not only the Bishops of Strasburg and Basle, with the City of Strasburg, but also the other States or Orders, Abbots of Murbach and Luederen, who are in the one and the other Alsatia, immediately depending upon the Roman Empire; the Abess of Andlavien, the Monastery of St. Bennet in the Valley of St. George, the Palatines of Luzelstain, the Counts and Barons of Hanaw, Fleckenstein, Oberstein, and all the nobility of Lower Alsatia; Item, the said ten Imperial Citys, which depend on the Mayory of Haganoc, in the Liberty and Possession they have enjoy'd hitherto, to arise as immediately dependent upon the Roman Empire; so that he cannot pretend any Royal Superiority over them, but shall rest contented with the Rights which appertain'd to the House of Austria, and which by this present Treaty of Pacification, are yielded to the Crown of France. In such a manner, nevertheless, that by the present Declaration, nothing is intended that shall derogate from the Sovereign Dominion already hereabove agreed to.

XCIII.

Likewise the most Christian King, in compensation of the things made over to him, shall pay the said Archduke Ferdinand Charles three millions of French Livres, in the next following Years 1649 1650, 1651, on St. John Baptist's Day, paying yearly one third of the said Sum at Basle in good Money to the Deputys of the said Archduke.

XCIV.

Besides the said Sum, the most Christian King shall be oblig'd to take upon him two Thirds of the Debts of the Chamber of Ensisheim without distinction, whether by Bill or Mortgage, provided they be in due and authentic Form, and have a special Mortgage either on the Provinces to be transfer'd, or on them to be restor'd; or if there be none, provided they be found on the Books of Accounts agreeing with those of the Receits of the Chamber of Ensisheim, until the end of the Year 1632, the said Sums having been inserted among the Debts of the Community, and the Chamber having been oblig'd to pay the Interests: And the King making this Payment, the Archduke shall be exempted for such a proportion. And that the same may be equitably executed, Commissarys shall be deputed on the one side and the other, immediately after the signing of this present Treaty, who before the Payment of the first Sum, shall agree between them what Debts every one has to pay.

XCV.

The most Christian King shall restore to the said Archduke bona fide, and without delay, all Papers, Documents of what nature so-ever, belonging to the Lands which are to be surrender'd to him, even as many as shall be found in the Chancery of the Government and Chamber of Ensisheim, or of Brisac, or in the Records of Officers, Towns, and Castles possess'd by his Arms.

XCVI.

If those Documents be publick, and concern in common and jointly the Lands yielded to the King, the Archduke shall receive authentick Copys of them, at what time and as often as he shall demand them.

XCVII.

Item, For fear the Differences arisen between the Dukes of Savoy and M antua touching Montserrat, and terminated by the Emperor Ferdinand and Lewis XIII. Fathers to their Majestys, shou'd revive some time or other to the damage or Christianity; it has been agreed, That the Treaty of Cheras of the 6th of April 1631. with the Execution thereof which ensu'd in the Montserrat, shall continue firm for ever, with all its Articles: Pignerol, and its Appurtenances, being nevertheless excepted, concerning which there has been a decision between his most Christian Majesty and the Duke of Savoy, and which the King of France and his Kingdom have purchas'd by particular Treatys, that shall remain firm and stable, as to what concerns the transferring or resigning of that Place and its Appurtenances. But if the said particular Treatys contain any thing which may trouble the Peace of the Empire, and excite new Commotions in Italy, after the present War, which is now on foot in that Province, shall be at an end, they shall be look'd upon as void and of no effect; the said Cession continuing nevertheless unviolable, as also the other Conditions agreed to, as well in favour of the Duke of Savoy as the most Christian King: For which reason their Imperial and most Christian Majestys promise reciprocally, that in all other things relating to the said Treaty of Cheras, and its Execution, and particularly to Albe, Trin, their Territorys, and the other places, they never shall contravene them either directly or indirectly, by the way of Right or in Fact; and that they neither shall succour nor countenance the Offender, but rather by their common Authority shall endeavour that none violate them under any pretence whatsoever; considering that the most Christian King has declar'd, That he was highly oblig'd to advance the Execution of the said Treaty, and even to maintain it by Arms; that above all things the said Lord, the Duke of Savoy, notwithstanding the Clauses abovemention'd, shall be always maintain'd in the peaceable possession of Trin and Albe, and other places, which have been allow'd and assign'd him by the said Treaty, and by the Investiture which ensu'd thereon of the Dutchy of Montserrat.

XCVIII.

And to the end that all Differences be extirpated and rooted out between these same Dukes, his most Christian Majesty shall pay to the said Lord, the Duke of Mantua, four hundred ninety four thousand Crowns, which the late King of blessed Memory, Lewis XIII. had promis'd to pay to him on thu Duke of Savoy's Discount; who by this means shall together with his Heirs and Successors be discharg'd from this Obligation, and secur'd from all Demands which might be made upon him of the said Sum, by the Duke of Mantua, or his Successors; so that for the future neither the Duke of Savoy, nor his Heirs and Successors, shall receive any Vexation or Trouble from the Duke of Mantua, his Heirs and Successors, upon this subject, or under this pretence.

XCIX.

Who hereafter, with the Authority and Consent of their Imperial and most Christian Majestys, by virtue of this solemn Treaty of Peace, shall have no Action for this account against the Duke of Savoy, or his Heirs and Successors.

C.

His Imperial Majesty, at the modest Request of the Duke of Savoy, shall together with the Investiture of the antient Fiefs and States, which the late Ferdinand II. of blessed memory granted to the Duke of Savoy, Victor Amadeus, also grant him the Investiture of the Places, Lordships, States, and all other Rights of Montserrat, with their Appurtenances, which have been surrender'd to him by virtue of the abovesaid Treaty of Cheras, and the Execution thereof which ensu'd; as also, of the Fiefs of New Monsort, of Sine, Monchery, and Castelles, with their Appurtenances, according to the Treaty of Acquisition made by the said Duke Victor Amadeus, the 13th of October 1634. and conformable to the Concessions or Permissions, and Approbation of his Imperial Majesty; with a Confirmation also of all the Privileges which have been hitherto granted to the Dukes of Savoy, when and as often as the Duke of Savoy shall request and demand it.

CI.

Item, It has been agreed, That the Duke of Savoy, his Heirs and Successors, shall no ways be troubled or call'd to an account by his Imperial Majesty, upon account of the Right of Sovereignty they have over the Fiefs of Rocheveran, Olme, and Casoles, and their Appurtenances, which do not in the least depend on the Roman Empire, and that all Donations and Investitures of the said Fiefs being revok'd and annul'd, the Duke shall be maintain'd in his Possession as rightful Lord; and if need be, reinstated: for the same reason his Vassal the Count de Verrue shall be re–instated in the same Fiefs of Olme and Casoles, and in the Possession of the fourth part of Rocheveran, and in all his Revenues.

CII.

Item, It is Agreed, That his Imperial Majesty shall restore to the Counts Clement and John Sons of Count Charles Cacheran, and to his Grandsons by his Son Octavian, the whole Fief of la Roche d'Arazy, with its Appurtenances and Dependencys, without any Obstacle whatever.

CIII.

The Emperor shall likewise declare, That within the Investiture of the Dutchy of Mantua are comprehended the Castles of Reygioli and Luzzare, with their Territorys and Dependencys, the Possession whereof the Duke of Guastalla shall be oblig'd to render to the Duke of Mantua, reserving to himself nevertheless, the Right of Six Thousand Crowns annual Pension, which he pretends to, for which he may sue the Duke before his Imperial Majesty.

CIV.

As soon as the Treaty of Peace shall be sign'd and seal'd by the Plenipotentiarys and Ambassadors, all Hostilitys shall cease, and all Partys shall study immediately to put in execution what has been agreed to; and that the same may be the better and quicker accomplish'd, the Peace shall be solemnly publish'd the day after the signing thereof in the usual form at the Cross of the Citys of Munster and of Osnabrug. That when it shall be known that the signing has been made in these two Places, divers Couriers shall presently be sent to the Generals of the Armys, to acquaint them that the Peace is concluded, and take care that the Generals chuse a Day, on which shall be made on all sides a Cessation of Arms and Hostilitys for the publishing of the Peace in the Army; and that command be given to all

and each of the chief Officers Military and Civil, and to the Governors of Fortresses, to abstain for the future from all Acts of Hostility: and if it happen that any thing be attempted, or actually innovated after the said Publication, the same shall be forthwith repair'd and restor'd to its former State.

CV.

The Plenipotentiarys on all sides shall agree among themselves, between the Conclusion and the Ratification of the Peace, upon the Ways, Time, and Securitys which are to be taken for the Restitution of Places, and for the Disbanding of Troops; of that both Partys may be assur'd, that all things agreed to shall be sincerely accomplish'd.

CVI.

The Emperor above all things shall publish an Edict thro'out the Empire, and strictly enjoin all, who by these Articles of Pacification are oblig'd to restore or do any thing else, to obey it promptly and without tergi-versation, between the signing and the ratifying of this present Treaty; commanding as well the Directors as Governors of the Militia of the Circles, to hasten and finish the Restitution to be made to every one, in conformity to those Conventions, when the same are demanded. This Clause is to be inserted also in the Edicts, That whereas the Directors of the Circles, or the Governors of the Militia of the Circles, in matters that concern themselves, are esteem'd less capable of executing this Affair in this or the like case and likewise if the Directors and Governors of the Militia of the Circles refuse this Commission, the Directors of the neighbouring Circle, or the Governors of the Militia of the Circles shall exercise the Function, and officiate in the execution of these Restitutions in the other Circles, at the instance of the Partys concern'd.

CVII.

If any of those who are to have something restor'd to them, suppose that the Emperor's Commissarys are necessary to be present at the Execution of some Restitution (which is left to their Choice) they shall have them. In which case, that the effect of the things agreed on may be the less hinder'd, it shall be permitted as well to those who restore, as to those to whom Restitution is to be made, to nominate two or three Commissarys immediately after the signing of the Peace, of whom his Imperial Majesty shall chuse two, one of each Religion, and one of each Party, whom he shall injoin to accomplish without delay all that which ought to be done by virtue of this present Treaty. If the Restorers have neglected to nominate Commissioners, his Imperial Majesty shall chuse one or two as he shall think fit (observing, nevertheless, in all cases the difference of Religion, that an equal number be put on each side) from among those whom the Party, to which somewhat is to be restor'd, shall have nominated, to whom he shall commit the Commission of executing it, notwithstanding all Exceptions made to the contrary; and for those who pretend to Restitutions, they are to intimate to the Restorers the Tenour of these Articles immediately after the Conclusion of the Peace.

CVIII.

Finally, That all and every one either States, Commonaltys, or private Men, either Ecclesiastical or Secular, who by virtue of this Transaction and its general Articles, or by the express and special Disposition of any of them, are oblig'd to restore, transfer, give, do, or execute any thing, shall be bound forthwith after the Publication of the Emperor's Edicts,

and after Notification given, to restore, transfer, give, do, or execute the same, without any Delay or Exception, or evading Clause either general or particular, contain'd in the precedent Amnesty, and without any Exception and Fraud as to what they are oblig'd unto.

CIX.

That none, either Officer or Soldier in Garisons, or any other whatsoever, shall oppose the Exccution of the Directors and Governors of the Militia of the Circles or Commissarys, but they shall rather promote the Execution; and the said Executors shall be permitted to use Force against such as shall endeavour to obstruct the Execution in what manner soever.

CX.

Moreover, all Prisoners on the one side and the other, without any distinction of the Gown or the Sword, shall be releas'd after the manner it has been covenanted, or shall be agreed between the Generals of the Armys, with his Imperial Majesty's Approbation.

CXI.

The Restitution being made pursuant to the Articles of Amnesty and Grievances, the Prisoners being releas'd, all the Soldiery of the Garisons, as well the Emperor's and his Allys, as the most Christian King's, and of the Landgrave of Hesse, and their Allys and Adherents, or by whom they may have been put in, shall be drawn out at the same time, without any Damage, Exception, or Delay, of the Citys of the Empire, and all other Places which are to be restor'd.

CXII.

That the very Places, Citys, Towns, Boroughs, Villages, Castles, Fortresses and Forts which have been possess'd and retain'd, as well in the Kingdom of Bohemia, and other Countrys of the Empire and Hereditary Dominions of the House of Austria, as in the other Circles of the Empire, by one or the other Army, or have been surrender'd by Composition; shall be restor'd without delay to their former and lawful Possessors and Lords, whether they be mediately or immediately States of the Empire, Ecclesiastical or Secular, comprehending therein also the free Nobility of the Empire: and they shall be left at their own free disposal, either according to Right and Custom, or according to the Force this present Treaty ought to have, notwithstanding all Donations, Infeoffments, Concessions (except they have been made by the free–will of some State) Bonds for redeeming of Prisoners, or to prevent Burnings and Pillages, or such other like Titles acquir'd to the prejudice of the former and lawful Masters and Possessors. Let also all Contracts and Bargains, and all Exceptions contrary to the said Restitution cease, all which are to be esteem'd void; saving nevertheless such things as have been otherwise agreed on in the precedent Articles touching the Satisfaction to made to his most Christian Majesty, as also some Concessions and equivalent Compensations granted to the Electors and Princes of the Empire. That neither the Mention of the Catholick King, nor Quality of the Duke of Lorain given to Duke Charles in the Treaty between the Emperor and Swedeland, and much less the Title of Landgrave of Alsace, given to the Emperor, shall be any prejudice to the most Christian King. That also which has been agreed touching the Satisfaction to be made to the Swedish Troops, shall have no effect in respect to his Majesty.

CXIII.

And that this Restitution of possess'd Places, as well by his Imperial Majesty as the most Christian King, and the Allys and Adherents of the one and the other Party, shall be reciprocally and bona fide executed.

CXIV.

That the Records, Writings and Documents, and other Moveables, be also restor'd; as likewise the Cannon found at the taking of the Places, and which are still in being. But they shall be allow'd to carry off with them, and cause to be carry'd off, such as have been brought thither from other parts after the taking of the Places, or have been taken in Battels, with all the Carriages of War, and what belongs thereunto.

CXV.

That the Inhabitants of each Place shall be oblig'd, when the Soldiers and Garisons draw out, to furnish them without Money the necessary Waggons, Horses, Boats and Provisions, to carry off all things to the appointed Places in the Empire; which Waggons, Horses and Boats, the Governors of the Garisons and the Captains of the withdrawing Soldiers shall restore without any Fraud or Deceit. The Inhabitants of the States shall free and relieve each other of this trouble of carrying the things from one Territory to the other, until they arrive at the appointed Place in the Empire; and the Governors or other Officers shall not be allow'd to bring with him or them the lent Waggons, Horses and Boats, nor any other thing they are accommodated with, out of the limits they belong unto, much less out of those of the Empire.

CXVI.

That the Places which have been restor'd, as, well Maritime as Frontiers, or in the heart of the Country shall from henceforth and for ever be exempted from all Garisons, introduc'd during the Wars, and left (without prejudice in other things to every one's Right) at the full liberty and disposal of their Masters.

CXVII.

That it shall not for the future, or at present, prove to the damage and prejudice of any Town, that has been taken and kept by the one or other Party; but that all and every one of them, with their Citizens and Inhabitants, shall enjoy as well the general Benefit of the Amnesty, as the rest of this Pacification. And for the Remainder of their Rights and Privileges, Ecclesiastical and Secular, which they enjoy'd before these Troubles, they shall be maintain'd therein; save, nevertheless the Rights of Sovereignty, and what depends thereon, for the Lords to whom they belong.

CXVIII.

Finally, that the Troops and Armys of all those who are making War in the Empire, shall be disbanded and discharg'd; only each Party shall send to and keep up as many Men in his own Dominion, as he shall judge necessary for his Security.

CXIX.

The Ambassadors and Plenipotentiarys of the Emperor, of the King, and the States of the Empire, promise respectively and the one to the other, to cause the Emperor, the most Christian King, the Electors of the Sacred Roman Empire, the Princes and States, to agree and ratify the Peace which has been concluded in this manner, and by general Consent; and so infallibly to order it, that the solemn Acts of Ratification be presented at Munster, and mutually and in good form exchang'd in the term of eight weeks, to reckon from the day of signing.

CXX.

For the greater Firmness of all and every one of these Articles, this present Transaction shall serve for a perpetual Law and establish'd Sanction of the Empire, to be inserted like other fundamental Laws and Constitutions of the Empire in the Acts of the next Diet of the Empire, and the Imperial Capitulation; binding no less the absent than the present, the Ecclesiasticks than Seculars, whether they be States of the Empire or not: insomuch as that it shall be a prescrib'd Rule, perpetually to be follow'd, as well by the Imperial Counsellors and Officers, as those of other Lords, and all Judges and Officers of Courts of Justice.

CXXI.

That it never shall be alledg'd, allow'd, or admitted, that any Canonical or Civil Law, any general or particular Decrees of Councils, any Privileges, any Indulgences, any Edicts, any Commissions, Inhibitions, Mandates, Decrees, Rescripts, Suspensions of Law, Judgments pronounc'd at any time, Adjudications, Capitulations of the Emperor, and other Rules and Exceptions of Religious Orders, past or future Protestations, Contradictions, Appeals, Investitures, Transactions, Oaths, Renunciations, Contracts, and much less the Edict of 1629. or the Transaction of Prague, with its Appendixes, or the Concordates with the Popes, or the Interims of the Year 1548. or any other politick Statutes, or Ecclesiastical Decrees, Dispensations, Absolutions, or any other Exceptions, under what pretence or colour they can be invented; shall take place against this Convention, or any of its Clauses and Articles neither shall any inhibitory or other Processes or Commissions be ever allow'd to the Plaintiff or Defendant.

CXXII.

That he who by his Assistance or Counsel shall contravene this Transaction or Publick Peace, or shall oppose its Execution and the abovesaid Restitution, or who shall have endeavour'd, after the Restitution has been lawfully made, and without exceeding the manner agreed on before, without a lawful Cognizance of the Cause, and without the ordinary Course of Justice, to molest those that have been restor'd, whether Ecclesiasticks or Laymen; he shall incur the Punishment of being an Infringer of the publick Peace, and Sentence given against him according to the Constitutions of the Empire, so that the Restitution and Reparation may have its full effect.

CXXIII.

That nevertheless the concluded Peace shall remain in force, and all Partys in this Transaction shall be oblig'd to defend and protect all and every Article of this Peace against any one, without distinction of Religion; and if it happens any point shall be violated, the Of-

fended shall before all things exhort the Offender not to come to any Hostility, submitting the Cause to a friendly Composition, or the ordinary Proceedings of Justice.

CXXIV.

Nevertheless, if for the space of three years the Difference cannot be terminated by any of those means, all and every one of those concern'd in this Transaction shall be oblig'd to join the injur'd Party, and assist him with Counsel and Force to repel the Injury, being first advertis'd by the injur'd that gentle Means and Justice prevail'd nothing; but without prejudice, nevertheless, to every one's Jurisdiction, and the Administration of Justice conformable to the Laws of each Prince and State: and it shall not be permitted to any State of the Empire to pursue his Right by Force and Arms; but if any difference has happen'd or happens for the future, every one shall try the means of ordinary Justice, and the Contravener shall be regarded as an Infringer of the Peace. That which has been determin'd by Sentence of the Judge, shall be put in execution, without distinction of Condition, as the Laws of the Empire enjoin touching the Execution of Arrests and Sentences.

CCXXV.

And that the publick Peace may be so much the better preserv'd intire, the Circles shall be renew'd; and as soon as any Beginnings of Troubles are perceiv'd, that which has been concluded in the Constitutions, of the Empire, touching the Execution and Preservation of the Public Peace, shall be observ'd.

CXXVI.

And as often as any would march Troops thro' the other Territorys, this Passage shall be done at the charge of him whom the Troops belong to, and that without burdening or doing any harm or damage to those whole Countrys they march thro'. In a word, all that the Imperial Constitutions determine and ordain touching the Preservation of the publick Peace, shall be strictly observ'd.

CXXVII.

In this present Treaty of Peace are comprehended such, who before the Exchange of the Ratification or in six months after, shall be nominated by general Consent, by the one or the other Party; mean time by a common Agreement, the Republick of Venice is therein compriz'd as Mediatrix of this Treaty. It shall also be of no prejudice to the Dukes of Savoy and Modena, or to what they shall act, or are now acting in Italy by Arms for the most Christian King.

CXXVIII.

In Testimony of all and each of these things, and for their greater Validity, the Ambassadors of their Imperial and most Christian Majestys, and the Deputys, in the name of all the Electors, Princes, and States of the Empire, sent particularly for this end (by virtue of what has been concluded the 13th of October, in the Year hereafter mention'd, and has been deliver'd to the Ambassador of France the very day of signing under the Seal of the Chancellor of Mentz) viz. For the Elector of Mayence, Monsieur Nicolas George de Reigersberg, Knight and Chancellor; for the Elector of Bavaria, Monsieur John Adolph Krebs, Privy

Counsellor; for the Elector of Brandenburg, Monsieur John Count of Sain and Witgenstein, Lord of Homburg and Vallendar, Privy Counsellor.

In the Name of the House of Austria, M. George Verie, Count of Wolkenstein, Counsellor of the Emperor's Court; M. Corneille Gobelius, Counsellor of the Bishop of Bamberg; M. Sebastian William Meel, Privy Counsellor to the Bishop of Wirtzburg; M. John Earnest, Counsellor of the Duke of Bavaria's Court; M. Wolff Conrad of Thumbshirn, and Augustus Carpzovius, both Counsellors of the Court of Saxe–Altenburg and Coburg; M. John Fromhold, Privy Counsellor of the House of Brandenburg–Culmbac, and Onolzbac; M. Henry Laugenbeck, J.C. to the House of Brunswick–Lunenburg; James Limpodius, J.C. Counsellor of State to the Branch of Calemburg, and Vice–Chancellor of Lunenburg. In the Name of the Counts of the Bench of Wetteraw, M. Matthews Wesembecius, J. D. and Counsellor.

In the Name of the one and the other Bench, M. Marc Ottoh of Strasburg, M. John James Wolff of Ratisbon, M. David Gloxinius of Lubeck, and M. Lewis Christopher Kres of Kressenstein, all Syndick Senators, Counsellors and Advocates of the Republick of Noremberg; who with their proper Hands and Seals have sign'd and seal'd this present Treaty of Peace, and which said Deputys of the several Orders have engag'd to procure the Ratifications of their Superiors in the prefix'd time, and in the manner it has been covenanted, leaving the liberty to the other Plenipotentiarys of States to sign it, if they think it convenient, and send for the Ratifications of their Superiors: And that on condition that by the Subscription of the abovesaid Ambassadors and Deputys, all and every one of the other States who shall abstain from signing and ratifying the present Treaty, shall be no less oblig'd to maintain and observe what is contain d in this presen t Treaty of Pacification, than if they had subscrib'd and ratify'd it; and no Protestation or Contradiction of the Council of Direction in the Roman Empire shall be valid, or receiv'd in respect to the Subscription and said Deputys have made.

Done, pass'd and concluded at Munster in Westphalia, the 24th Day of October, 1648.

Translation: British Foreign Office

The Schooner Exchange Decision

by Chief Justice Marshall

"This case involves the very delicate and important inquiry, whether an American citizen can assert in an American court, a title to an armed national vessel, found within the waters of the United States.

The question has been considered with an earnest solicitude, that the decision may conform to those principles of national and municipal law by which it ought to be regulated.

In exploring an unbeaten path, with few, if any, aids from precedents or written law, the court has found it necessary to rely much on general principles, and on a train of reasoning, founded on cases in some degree analogous to this.

The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power.

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood not less obligatory.

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

This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage.

A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra–territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other,

have given rise to a class of cases in which every sovereign is understood to wave the exercise of a part of what complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

1st. One of these is admitted to be the exemption of the person of the sovereign from arrest or detention within a foreign territory.

If he enters that territory with the knowledge and license of its sovereign, that license, although containing no stipulation exempting his person from arrest, is universally understood to imply such stipulation.

Why has the whole civilized world concurred in this construction? The answer cannot be mistaken. A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation, and it is to avoid this subjection that the license has been obtained. The character to whom it is given, and the object for which it is granted, equally require that it should be construed to impart full security to the person who has obtained it. This security, however, need not be expressed; it is implied from the circumstances of the case.

Should one sovereign enter the territory of another, without the consent of that other, expressed or implied, it would present a question which does not appear to be perfectly settled, a decision of which. is not necessary to any conclusion to which the Court may come in the cause under consideration. If he did not thereby expose himself to the territorial jurisdiction of the sovereign, whose dominions he had entered, it would seem to be because all sovereigns impliedly engage not to avail themselves of a power over their equal, which a romantic confidence in their magnanimity has placed in their hands.

2d. A second case, standing on the same principles with the first, is the immunity which all civilized nations allow to foreign ministers.

Whatever may be the principle on which this immunity is established, whether we consider him as in the place of the sovereign he represents, or by a political fiction suppose him to be extra–territorial, and, therefore, in point of law, not within the jurisdiction of the sovereign at whose Court he resides; still the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of ex–territoriality could not be erected and supported against the will of the sovereign of their territory. He is supposed to assent to it.

This consent is not expressed. It is true that in some countries, and in this among others, a special law is enacted for the case. But the law obviously proceeds on the idea of prescribing the punishment of an act previously unlawful, not of granting to a foreign minister a privilege which he would not otherwise possess.

The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him, implies a consent that he shall possess those privileges which his principal intended he should retain–.privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.

In what cases a minister, by infracting the laws of the country in which he resides, may subject himself to other punishment than will be inflicted by his own sovereign, is an inquiry foreign to the present purpose. If his crimes be such as to render him amenable to the local jurisdiction, it must be because they forfeit the privileges annexed to his character; and the minister, by violating the conditions under which he was received as the representa-

tive of a foreign sovereign, has surrendered the immunities granted on those conditions; or, according to the true meaning of the original assent, has ceased to be entitled to them.

3d. A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is where he allows the troops of a foreign prince to pass through his dominions.

In such case, without any express declaration waving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage therefore implies a waver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.

But if, without such express permit, an army should be led through the territories of a foreign prince, might the jurisdiction of the territory be rightfully exercised over the individuals composing this army?

Without doubt, a military force can never gain immunities of any other description than those which war gives, by entering a foreign territory against the will of its sovereign. Bu": if his consent, instead of being expressed by a particular license, be expressed by a general declaration that foreign troops may pass through a specified tract of country, a distinction between such general permit and a particular license is not perceived. It would seem reasonable that every immunity which would be conferred by a special license, would be in like manner conferred by such general permit.

We have seen that a license to pass through a territory implies immunities not expressed, and it is material to enquire why the license itself may not be presumed?

It is obvious that the passage of an army through a foreign territory will probably be at all times inconvenient and injurious, and would often be imminently dangerous to the sovereign through whose dominion it passed. Such a practice would break down some of the most decisive distinctions between peace and war, and would reduce a nation to the necessity of resisting by war an act not absolutely hostile in its character, or of exposing itself to the stratagems and frauds of a power whose integrity might be doubted, and who might enter the country under deceitful pretexts. It is for reasons like these that the general license to foreigners to enter the dominions of a friendly power is never understood to extend to a military force; and an army marching into the dominions of another sovereign may justly be considered as committing an act of hostility; and, if not opposed by force, acquires no privilege by its irregular and improper conduct. It may however well be questioned whether any other than the sovereign power of the state be capable of deciding that such military commander is without a license.

But the rule which is applicable to armies, does not appear to be equally applicable to ships of war entering the ports of a friendly power. The injury inseparable from the march of an army through an inhabited country, and the dangers often, indeed generally, attending it, do not ensue from admitting a ship of war, without special license, into a friendly port. A different rule therefore with respect to this species of military force has been generally adopted. If, for reasons of state, the ports of a nation generally, or any particular ports be closed against vessels of war generally, or the vessels of any particular nation, notice is usually given of such determination. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports and to remain in them while allowed to remain, under the protection of the government of the place.

In almost every instance, the treaties between civilized nations contain a stipulation to this effect in favor of vessels driven in by stress of weather or other urgent necessity. In such cases the sovereign is bound by compact to authorize foreign vessels to enter his ports. The treaty binds him to allow vessels in distress to find refuge and asylum in his ports, and this is a license which he is not at liberty to retract. It would be difficult to assign a reason for withholding from a license thus granted, any immunity from local jurisdiction which would be implied in a special license.

If there be no treaty applicable to the case, and the sovereign, from motives deemed adequate by himself, permits his ports to remain open to the public ships of foreign friendly powers, the conclusion seems irresistible, that they enter by his assent. And if they enter by his assent necessarily implied, no just reason is perceived by the Court for distinguishing their case from that of vessels which enter by express assent.

In all the cases of exemption which have been reviewed, much has been implied, but the obligation of what was implied has been found equal to the obligation of that which was expressed. Are there reasons for denying the application of this principle to ships of war?

In this part of the subject a difficulty is to be encountered, the seriousness of which is acknowledged, but which the Court will not attempt to evade.

Those treaties which provide for the admission and safe departure of public vessels entering a port from stress of weather, or other urgent cause, provide in like manner for the private vessels of the nation; and where public vessels enter a port under the general license which is implied merely from the absence of a prohibition, they are, it may be urged, in the same condition with merchant entering the same port for the purposes of trade who thereby claim any exemption from the jurisdiction of country. It may be contended, certainly with much plausibility if not correctness, that the same rule, and same principle are applicable to public and private ships; and since it is admitted that private sips entering without special license become subject to the local jurisdiction, it is demanded on what authority an exception is made in favor of ships of war.

It is by no means conceded that a private vessel really availing herself of an asylum provided by treaty, and not attempting to trade, would become amenable to the local jurisdiction, unless she committed some act forfeiting the protection she claims under compact. On the contrary, motives may be assigned for stipulating, and according immunities to vessels in cases of distress, which would not be demanded for, or allowed to those which enter voluntarily and for ordinary purposes. On this part of the subject, however, the Court does not mean to indicate any opinion. The case itself may possibly occur, and ought not to be prejudged.

Without deciding how far such stipulations in favor of distressed vessels, as are usual in treaties, may exempt private ships from the jurisdiction of the place, it may safety be asserted, that the whole reasoning upon which such exception has been implied in other cases, applies with full force to the exemption of ships of war in this.

'It is impossible to conceive,' says Vattel, 'that a Prince who sends an ambassador or any other minister can have any intention of subjecting him to the authority of a foreign power; and this consideration furnishes an additional argument, which completely establishes the independency of a public minister. If it cannot be reasonably presumed that his sovereign means to subject him to the authority of the prince to whom he is sent, the latter, in receiving the minister, consents to admit him on the footing of independency; and thus there exists between the two princes a tacit convention, which gives a new force to the natural obligation.'

Equally impossible is it to conceive, whatever may be the construction as to private ships, that a prince who stipulates a passage for his troops, or an asylum for his ships of war in distress, should mean to subject his army or his navy to the jurisdiction of a foreign sovereign. And if this cannot be presumed, the sovereign of the port must be considered as

having conceded the privilege to the extent in which it must have been understood to be asked.

To the Court, it appears, that where, without treaty, the ports of a nation are open to the private and public ships of a friendly power, whose subjects have also liberty without special license, to enter the country for business or amusement, a clear distinction is to be drawn between the rights accorded to private individuals or private trading vessels, and those accorded to public armed ships which constitute a part of the military force of the nation.

The preceding reasoning has maintained the propositions that all exemptions from territorial jurisdiction must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that when implied, its extent must be regulated by the nature of the case, and the views under which the parties requiring and conceding it must be supposed to act.

When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter can never be construed to grant such exemption.

But in all respects different is the situation of a public armed ship. She constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity. The implied license therefore under which such vessel enters a friendly port may reasonably be construed, and it seems to the Court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rites of hospitality.

Upon the principles, by the unanimous consent of nations, a foreign is amenable to the laws of the place; but certainly in practice, nations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception.

Bynkershoek, a jurist of great reputation, has indeed maintained that the property of a foreign sovereign is not distinguishable by any legal exemption from the property of an ordinary individual, and has quoted several cases in which courts have exercised jurisdiction over causes in which a foreign sovereign was made a party defendant.

Without indicating any opinion on this question, it may safety be affirmed that there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting the property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force, which upholds his crown, and the nation he is entrusted to govern.

The only applicable case cited by Bynkershoek is that of the Spanish ships of war seized in Flushing for a debt due from the king of Spain. In that case, the states general interposed; and there is reason to believe, from the manner in which the transaction is stated, that, ei-

ther by the interference of government, or the decision of the court, the vessels were released.

This case of the Spanish vessels is, it is believed, the only case furnished by the history of the world, of an attempt made by an individual to assert a claim against a foreign prince, by seizing the armed vessels of the nation. That this proceeding was at once arrested by the government, in a nation which appears to have asserted the power of proceeding in the name manner against the private property of the prince, would seem to furnish no feeble argument in support of the universality of the opinion in favor of the exemption claimed for ships of war. The distinction made in our own laws between public and private ships would appear to proceed from the same opinion.

It seems then to the Court to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.

Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise. Those general statutory provisions therefore which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country in which it is found, ought not, in the opinion of this Court, to be so construed as to give them jurisdiction in a case, in which the sovereign power has impliedly consented to wave its jurisdiction.

The arguments in favor of this opinion which have been drawn from the general inability of the judicial power to enforce its decisions in cases of this description, from the consideration that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, that they are for diplomatic, rather than legal discussion, are of great weight, and merit serious attention. But the argument has already been drawn to a length, which forbids a particular examination of these points.

The principles which have been stated will now be applied to the case at bar.

In the present state of the evidence and proceedings, the Exchange must be considered as a vessel, which was the property of the Libellants, whose claim is repelled by the fact that she is now a national armed vessel, commissioned by, and in the service of the emperor of France. The evidence of this fact is not controverted. But it is contended, that it constitutes no bar to an enquiry into the validity of the title, by which the emperor holds this vessel. Every person, it is alleged, who is entitled to property brought within the jurisdiction of our Courts, has a right to assert his title in those Courts, unless there be some law taking his case out of the general rule. It is therefore said to be the right, and if it be the right, it is the duty of the Court, to enquire whether this title has been extinguished by an act, the validity of which is recognized by national or municipal law.

If the preceding reasoning be correct, the Exchange, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.

If this opinion be correct, there seems to be a necessity for admitting that the fact might be disclosed to the Court by the suggestion of the Attorney for the United States.

I am directed to deliver it, as the opinion of the Court, that the sentence of the Circuit Court, reversing the sentence of the District Court, in the case of the Exchange be reversed, and that of the District Court, dismissing the libel, be affirmed.

Judge Weiss' Concept of Restrictive Immunity (1922)

"How then shall it be determined whether an act done by a foreign state, and for which it is sought to hold the state to account before the courts of another country, is of a "private" or a "political" character, and consequently whether the courts have or have not jurisdiction to pass upon it? To what criterium must one adhere? Is it the object and purpose of the act, or is it its intrinsic nature? It is certain that if we take into consideration for the determination of the character of a contract and the submission, in consequence, to the determination of foreign courts, only the purpose of a contract, we shall be faced by distinctions often subtle and dangerous. For instance, the French courts will be without jurisdiction to entertain suit in the case of loans contracted abroad by a foreign government, to meet the expenses of its army or navy, or to balance its budget. On the other hand, they would assume jurisdiction in the case of suits on a loan contracted by the same government touching matters concerning its private estates. The financial undertaking thus realized by a foreign state in the interest of one of its public services would be withdrawn from the jurisdiction of the French courts, while another, in all respects similar but made in the object of extending the public domain, would not be withdrawn. It would seem a surer test to admit that the nature alone of the act should be taken into consideration. Thus the distinctions just mentioned disappear; the judge need not consider intention; his duty becomes a simple on, since it involves merely a question of fact: An act performed by a government is presented for his judicial appreciation; to determine whether he may pass upon it, he has but one question to ask: Is the act by its nature such that in no case could it be performed by other than by a state, or in its name; in such a case it is an act of public authority (*puissance publique*); it is a political act which may not, without infringing upon the sovereignty of such a state, be submitted to the judgment of a foreign authority. There is a clear lack of jurisdiction. On the contrary, if the act is by its nature such as any private person could engage in, as, for instance, a contract or a loan, the act, whatever its purpose, is a private act, and the foreign court has jurisdiction. And thus we must conclude that jurisdiction may not be declined even if the contract is touched with an administrative character, as, for instance, if it concerns the purchase of a warship or an order of munitions, and arms for its arsenals. It is of no importance that a private citizen does not ordinarily make such contracts, or on such a scale or to the same purpose. If it is the question of a contract or an acquisition, that is enough. It is the nature and not the purpose that is to no importance that a private citizen does not ordinarily make such contracts, or on such a scale or to the same purpose. If it is the question of a contract or an acquisition, that is enough. It is the nature and not the purpose that is to be considered."

The Tate Letter

My Dear Mr. Attorney General:
May 19, 1952

The Department of State has for some time had under consideration the question whether the practice of the Government in granting immunity from suit to foreign governments made parties defendant in the courts of the United States without their consent should not be changed. The Department has now reached the conclusion that such immunity should no longer be granted in certain types of cases. In view of the obvious interest of your Department in this matter I should like to point out briefly some of the facts which influenced the Department's decision.

A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*). There is agreement by proponents of both theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property (diplomatic and perhaps consular property excepted) or with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary.

The classical or virtually absolute theory of sovereign immunity has generally been followed by the courts of the United States, the British Commonwealth, Czechoslovakia, Estonia, and probably Poland.

The decisions of the courts of Brazil, Chile, China, Hungary, Japan, Luxembourg, Norway, and Portugal may be deemed to support the classical theory of immunity if one or at most two old decisions anterior to the development of the restrictive theory may be considered sufficient on which to base a conclusion.

The position of the Netherlands, Sweden, and Argentina is less clear since although immunity has been granted in recent cases coming before the courts of those countries, the facts were such that immunity would have been granted under either the absolute or restrictive theory. However, constant references by the courts of these three countries to the distinction between public and private acts of the state, even though the distinction was not involved in the result of the case, may indicate an intention to leave the way open for a possible application of the restrictive theory of immunity if and when the occasion presents itself.

A trend to the restrictive theory is already evident in the Netherlands where the lower courts have started to apply that theory following a Supreme Court decision to the effect that immunity would have been applicable in the case under consideration under either theory.

The German courts, after a period of hesitation at the end of the nineteenth century have held to the classical theory, but it should be noted that the refusal of the Supreme Court in 1921 to yield to pressure by the lower courts for the newer theory was based on the view that that theory had not yet developed sufficiently to justify a change. In view of the growth of the restrictive theory since that time the German courts might take a different view today.

The newer or restrictive theory of sovereign immunity has always been supported by

the courts of Belgium and Italy. It was adopted in turn by the courts of Egypt and of Switzerland. In addition, the courts of France, Austria, and Greece, which were traditionally supporters of the classical theory, reversed their position in the 20's to embrace the restrictive theory. Rumania, Peru, and possibly Denmark also appear to follow this theory.

Furthermore, it should be observed that in most of the countries still following the classical theory there is a school of influential writers favoring the restrictive theory and the views of writers, at least in civil law countries, are a major factor in the development of the law. Moreover, the leanings of the lower courts in civil law countries are more significant in shaping the law than they are in common law countries where the rule of precedent prevails and the trend in these lower courts is to the restrictive theory.

Of related interest to this question is the fact that ten of the thirteen countries which have been classified above as supporters of the classical theory have ratified the Brussels Convention of 1926 under which immunity for government owned merchant vessels is waived. In addition the United States, which is not a party to the Convention, some years ago announced and has since followed, a policy of not claiming immunity for its public owned or operated merchant vessels. Keeping in mind the importance played by cases involving public vessels in the field of sovereign immunity, it is thus noteworthy that these ten countries (Brazil, Chile, Estonia, Germany, Hungary, Netherlands, Norway, Poland, Portugal, Sweden) and the Untied States have already relinquished by treaty or in practice an important part of the immunity which they claim under the classical theory.

It is thus evident that with the possible exception of the United Kingdom little support has been found except on the part of the Soviet Union and its satellites for continued full acceptance of the absolute theory of sovereign immunity. There are evidences that British authorities are aware of its deficiencies and ready for a change. The reasons which obviously motivate state trading countries in adhering to the theory with perhaps increasing rigidity are most persuasive that the United States should change its policy. Furthermore, the granting of sovereign immunity to foreign governments in the courts of the United States is most inconsistent with the action of the Government of the United States in subjecting itself to suit in these same courts in both contract and tort and with its long established policy of not claiming immunity in foreign jurisdictions for its merchant vessels. Finally, the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons 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.

It is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so. There have been indications that at least some Justices of the Supreme Court feel that in this matter courts should follow the branch of the Government charged with responsibility for the conduct of foreign relations.

In order that your Department, which is charged with representing the interests of the Government before the courts, may be adequately informed it will be the Department's practice to advise you of all requests by foreign governments for the grant of immunity from suit and of the Department's action thereon.

Sincerely yours,

For the Secretary of State:
Jack B. Tate
Acting Legal Adviser"

European Convention on State Immunity

(ETS No. 74), entered into force June 11, 1976.
Protocol to the Convention (ETS 074A)

Preamble

The member States of the Council of Europe, signatory hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members;

Taking into account the fact that there is in international law a tendency to restrict the cases in which a State may claim immunity before foreign courts;

Desiring to establish in their mutual relations common rules relating to the scope of the immunity of one State from the jurisdiction of the courts of another State, and designed to ensure compliance with judgments given against another State;

Considering that the adoption of such rules will tend to advance the work of harmonisation undertaken by the member States of the Council of Europe in the legal field,

Have agreed as follows:

Chapter I – Immunity from jurisdiction

Article 1

1. A Contracting State which institutes or intervenes in proceedings before a court of another Contracting State submits, for the purpose of those proceedings, to the jurisdiction of the courts of that State.
2. Such a Contracting State cannot claim immunity from the jurisdiction of the courts of the other Contracting State in respect of any counterclaim:
   a. arising out of the legal relationship or the facts on which the principal claim is based;
   b. if, according to the provisions of this Convention, it would not have been entitled to invoke immunity in respect of that counterclaim had separate proceedings been brought against it in those courts.
3. A Contracting State which makes a counterclaim in proceedings before a court of another Contracting State submits to the jurisdiction of the courts of that State with respect not only to the counterclaim but also to the principal claim.

Article 2

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if it has undertaken to submit to the jurisdiction of that court either:

a. by international agreement;
b. by an express term contained in a contract in writing; or
c. by an express consent given after a dispute between the parties has arisen.

Article 3

1. A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if, before claiming immunity, it takes any step in the proceedings relating to the merits. However, if the State satisfies the Court that it could

not have acquired knowledge of facts on which a claim to immunity can be based until after it has taken such a step, it can claim immunity based on these facts if it does so at the earliest possible moment.

2. A Contracting State is not deemed to have waived immunity if it appears before a court of another Contracting State in order to assert immunity.

Article 4

1. Subject to the provisions of Article 5, a Contracting State cannot claim immunity from the jurisdiction of the courts of another Contracting State if the proceedings relate to an obligation of the State, which, by virtue of a contract, falls to be discharged in the territory of the State of the forum.
2. Paragraph 1 shall not apply:
   a. in the case of a contract concluded between States;
   b. if the parties to the contract have otherwise agreed in writing;
   c. if the State is party to a contract concluded on its territory and the obligation of the State is governed by its administrative law.

Article 5

1. A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to a contract of employment between the State and an individual where the work has to be performed on the territory of the State of the forum.
2. Paragraph 1 shall not apply where:
   a. the individual is a national of the employing State at the time when the proceedings are brought;
   b. at the time when the contract was entered into the individual was neither a national of the State of the forum nor habitually resident in that State; or
   c. the parties to the contract have otherwise agreed in writing, unless, in accordance with the law of the State of the forum, the courts of that State have exclusive jurisdiction by reason of the subject–matter.
2. Where the work is done for an office, agency or other establishment referred to in Article 7, paragraphs 2.a and b of the present article apply only if, at the time the contract was entered into, the individual had his habitual residence in the Contracting State which employs him.

Article 6

1. A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if it participates with one or more private persons in a company, association or other legal entity having its seat, registered office or principal place of business on the territory of the State of the forum, and the proceedings concern the relationship, in matters arising out of that participation, between the State on the one hand and the entity or any other participant on the other hand.
2. Paragraph 1 shall not apply if it is otherwise agreed in writing.

Article 7

1. A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if it has on the territory of the State of the forum an office, agency or other establishment through which it engages, in the same manner as a private person, in an industrial, commercial or financial activity, and the proceedings relate to that activity of the office, agency or establishment.
2. Paragraph 1 shall not apply if all the parties to the dispute are States, or if the parties have otherwise agreed in writing.

Article 8

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate:

a. to a patent, industrial design, trade–mark, service mark or other similar right which, in the State of the forum, has been applied for, registered or deposited or is otherwise protected, and in respect of which the State is the applicant or owner;
b. to an alleged infringement by it, in the territory of the State of the forum, of such a right belonging to a third person and protected in that State;
c. to an alleged infringement by it, in the territory of the State of the forum, of copyright belonging to a third person and protected in that State;
d. to the right to use a trade name in the State of the forum.

Article 9

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to:

a. its rights or interests in, or its use or possession of, immovable property; or
b. its obligations arising out of its rights or interests in, or use or possession of, immovable property and the property is situated in the territory of the State of the forum.

Article 10

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to a right in movable or immovable property arising by way of succession, gift or *bona vacantia.*

Article 11

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred.

Article 12

1. Where a Contracting State has agreed in writing to submit to arbitration a dispute which has arisen or may arise out of a civil or commercial matter, that State may not claim immunity from the jurisdiction of a court of another Contracting State on the territory or according to the law of which the arbitration has taken or will take place in respect of any proceedings relating to:
   a. the validity or interpretation of the arbitration agreement;
   b. the arbitration procedure;

c. the setting aside of the award,
unless the arbitration agreement otherwises provides.

2. Paragraph 1 shall not apply to an arbitration agreement between States.

Article 13

Paragraph 1 of Article 1 shall not apply where a Contracting State asserts, in proceedings pending before a court of another Contracting State to which it is not a party, that it has a right or interest in property which is the subject–matter of the proceedings, and the circumstances are such that it would have been entitled to immunity if the proceedings had been brought against it.

Article 14

Nothing in this Convention shall be interpreted as preventing a court of a Contracting State from administering or supervising or arranging for the administration of property, such as trust property or the estate of a bankrupt, solely on account of the fact that another Contracting State has a right or interest in the property.

Article 15

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

Chapter II – Procedural rules

Article 16

1. In proceedings against a Contracting State in a court of another Contracting State, the following rules shall apply.
2. The competent authorities of the State of the forum shall transmit
   - the original or a copy of the document by which the proceedings are instituted;
   - a copy of any judgment given by default against a State which was defendant in the proceedings,

   through the diplomatic channel to the Ministry of Foreign Affairs of the defendant State, for onward transmission, where appropriate, to the competent authority. These documents shall be accompanied, if necessary, by a translation into the official language, or one of the official languages, of the defendant State.
3. Service of the documents referred to in paragraph 2 is deemed to have been effected by their receipt by the Ministry of Foreign Affairs.
4. The time–limits within which the State must enter an appearance or appeal against any judgment given by default shall begin to run two months after the date on which the document by which the proceedings were instituted or the copy of the judgment is received by the Ministry of Foreign Affairs.
5. If it rests with the court to prescribe the time–limits for entering an appearance or for appealing against a judgment given by default, the court shall allow the State not less than two months after the date on which the document by which the proceedings are instituted or the copy of the judgment is received by the Ministry of Foreign Affairs.
6. A Contracting State which appears in the proceedings is deemed to have waived any objection to the method of service.
7. If the Contracting State has not appeared, judgment by default may be given against it only if it is established that the document by which the proceedings were instituted has been transmitted in conformity with paragraph 2, and that the time–limits for entering an appearance provided for in paragraphs 4 and 5 have been observed.

Article 17

No security, bond or deposit, however described, which could not have been required in the State of the forum of a national of that State or a person domiciled or resident there, shall be required of a Contracting State to guarantee the payment of judicial costs or expenses. A State which is a claimant in the courts of another Contracting State shall pay any judicial costs or expenses for which it may become liable.

Article 18

A Contracting State party to proceedings before a court of another Contracting State may not be subjected to any measure of coercion, or any penalty, by reason of its failure or refusal to disclose any documents or other evidence. However the court may draw any conclusion it thinks fit from such failure or refusal.

Article 19

1. A court before which proceedings to which a Contracting State is a party are instituted shall, at the request of one of the parties or, if its national law so permits, of its own motion, decline to proceed with the case or shall stay the proceedings if other proceedings between the same parties, based on the same facts and having the same purpose:
   a. are pending before a court of that Contracting State, and were the first to be instituted; or
   b. are pending before a court of any other Contracting State, were the first to be instituted and may result in a judgment to which the State party to the proceedings must give effect by virtue of Article 20 or Article 25.
2. Any Contracting State whose law gives the courts a discretion to decline to proceed with a case or to stay the the proceedings in cases where proceedings between the same parties, based on the same facts and having the same purpose, are pending before a court of another Contracting State, may, by notification addressed to the Secretary General of the Council of Europe, declare that its courts shall not be bound by the provisions of paragraph 1.

Chapter III – Effect of Judgment

Article 20

1. A Contracting State shall give effect to a judgment given against it by a court of another Contracting State:
   a. if, in accordance with the provisions of Articles 1 to 13, the State could not claim immunity from jurisdiction; and
   b. if the judgment cannot or can no longer be set aside if obtained by default, or if it is not or is no longer subject to appeal or any other form of ordinary review or to annulment.
2. Nevertheless, a Contracting State is not obliged to give effect to such a judgment in any case:
   a. where it would be manifestly contrary to public policy in that State to do so, or where, in the circumstances, either party had no adequate opportunity fairly to present his case;
   b. where proceedings between the same parties, based on the same facts and having the same purpose:
      i. are pending before a court of that State and were the first to be instituted;

ii. are pending before a court of another Contracting State, were the first to be instituted and may result in a judgment to which the State party to the proceedings must give effect under the terms of this Convention;

c. where the result of the judgment is inconsistent with the result of another judgment given between the same parties:
   i. by a court of the Contracting State, if the proceedings before that court were the first to be instituted or if the other judgment has been given before the judgment satisfied the conditions specified in paragraph 1.b; or
   ii. by a court of another Contracting State where the other judgment is the first to satisfy the requirements laid down in the present Convention;

d. where the provisions of Article 16 have not been observed and the State has not entered an appearance or has not appealed against a judgment by default.

3. In addition, in the cases provided for in Article 10, a Contracting State is not obliged to give effect to the judgment:
   a. if the courts of the State of the forum would not have been entitled to assume jurisdiction had they applied, *mutatis mutandis*, the rules of jurisdiction (other than those mentioned in the annex to the present Convention) which operate in the State against which judgment is given; or
   b. if the court, by applying a law other than that which would have been applied in accordance with the rules of private international law of that State, has reached a result different from that which would have been reached by applying the law determined by those rules.

   However, a Contracting State may not rely upon the grounds of refusal specified in sub–paragraphs a and b above if it is bound by an agreement with the State of the forum on the recognition and enforcement of judgments and the judgment fulfils the requirement of that agreement as regards jurisdiction and, where appropriate, the law applied.

Article 21

1. Where a judgment has been given against a Contracting State and that State does not give effect thereto, the party which seeks to invoke the judgment shall be entitled to have determined by the competent court of that State the question whether effect should be given to the judgment in accordance with Article 20. Proceedings may also be brought before this court by the State against which judgment has been given, if its law so permits.
2. Save in so far as may be necessary for the application of Article 20, the competent court of the State in question may not review the merits of the judgment.
3. Where proceedings are instituted before a court of a State in accordance with paragraph 1:
   a. the parties shall be given an opportunity to be heard in the proceedings;
   b. documents produced by the party seeking to invoke the judgment shall not be subject to legalisation or any other like formality;
   c. no security, bond or deposit, however described, shall be required of the party invoking the judgment by reason of his nationality, domicile or residence;
   d. the party invoking the judgment shall be entitled to legal aid under conditions no less favourable than those applicable to nationals of the State who are domiciled and resident therein.
4. Each Contracting State shall, when depositing its instrument of ratification, acceptance or accession, designate the court or courts referred to in paragraph 1, and inform the Secretary General of the Council of Europe thereof.

Article 22

1. A Contracting State shall give effect to a settlement to which it is a party and which has been made before a court of another Contracting State in the course of the proceedings; the provisions of Article 20 do not apply to such a settlement.
2. If the State does not give effect to the settlement, the procedure provided for in Article 21 may be used.

Article 23

No measures of execution or preventive measures against the property of a Contracting State may be taken in the territory of another Contracting State except where and to the extent that the State has expressly consented thereto in writing in any particular case.

Chapter IV – Optional provisions

Article 24

1. Notwithstanding the provisions of Article 15, any State may, when signing this Convention or depositing its instrument of ratification, acceptance or accession, or at any later date, by notification addressed to the Secretary General of the Council of Europe, declare that, in cases not falling within Articles 1 to 13, its courts shall be entitled to entertain proceedings against another Contracting State to the extent that its courts are entitled to entertain proceedings against States not party to the present Convention. Such a declaration shall be without prejudice to the immunity from jurisdiction which foreign States enjoy in respect of acts performed in the exercise of sovereign authority *(acta jure imperii)*.
2. The courts of a State which has made the declaration provided for in paragraph 1 shall not however be entitled to entertain such proceedings against another Contracting State if their jurisdiction could have been based solely on one or more of the grounds mentioned in the annex to the present Convention, unless that other Contracting State has taken a step in the proceedings relating to the merits without first challenging the jurisdiction of the court.
3. The provisions of Chapter II apply to proceedings instituted against a Contracting State in accordance with the present article.
4. The declaration made under paragraph 1 may be withdrawn by notification addressed to the Secretary General of the Council of Europe. The withdrawal shall take effect three months after the date of its receipt, but this shall not affect proceedings instituted before the date on which the withdrawal becomes effective.

Article 25

1. Any Contracting State which has made a declaration under Article 24 shall, in cases not falling within Articles 1 to 13, give effect to a judgment given by a court of another Contracting State which has made a like declaration:
   a. if the conditions prescribed in paragraph 1.b of Article 20 have been fulfilled; and
   b. if the court is considered to have jurisdiction in accordance with the following paragraphs.
2. However, the Contracting State is not obliged to give effect to such a judgment:
   a. if there is a ground for refusal as provided for in paragraph 2 of Article 20; or
   b. if the provisions of paragraph 2 of Article 24 have not been observed.

3. Subject to the provisions of paragraph 4, a court of a Contracting State shall be considered to have jurisdiction for the purpose of paragraph 1.b:
   a. if its jurisdiction is recognised in accordance with the provisions of an agreement to which the State of the forum and the other Contracting State are Parties;
   b. where there is no agreement between the two States concerning the recognition and enforcement of judgments in civil matters, if the courts of the State of the forum would have been entitled to assume jurisdiction had they applied, *mutatis mutandis*, the rules of jurisdiction (other than those mentioned in the annex to the present Convention) which operate in the State against which the judgment was given. This provision does not apply to questions arising out of contracts.
4. The Contracting States having made the declaration provided for in Article 24 may, by means of a supplementary agreement to this Convention, determine the circumstances in which their courts shall be considered to have jurisdiction for the purposes of paragraph 1.b of this article.
5. If the Contracting State does not give effect to the judgment, the procedure provided for in Article 21 may be used.

Article 26

Notwithstanding the provisions of Article 23, a judgment rendered against a Contracting State in proceedings relating to an industrial or commercial activity, in which the State is engaged in the same manner as a private person, may be enforced in the State of the forum against property of the State against which judgment has been given, used exclusively in connection with such an activity, if:

a. both the State of the forum and the State against which the judgment has been given have made declarations under Article 24;
b. the proceedings which resulted in the judgment fell within Articles 1 to 13 or were instituted in accordance with paragraphs 1 and 2 of Article 24; and
c. the judgment satisfies the requirements laid down in paragraph 1.b of Article 20.

Chapter V – General provisions

Article 27

1. For the purposes of the present Convention, the expression "Contracting State" shall not include any legal entity of a Contracting State which is distinct therefrom and is capable of suing or being sued, even if that entity has been entrusted with public functions.
2. Proceedings may be instituted against any entity referred to in paragraph 1 before the courts of another Contracting State in the same manner as against a private person; however, the courts may not entertain proceedings in respect of acts performed by the entity in the exercise of sovereign authority *(acta jure imperii)*.
3. Proceedings may in any event be instituted against any such entity before those courts if, in corresponding circumstances, the courts would have had jurisdiction if the proceedings had been instituted against a Contracting State.

Article 28

1. Without prejudice to the provisions of Article 27, the constituent States of a Federal State do not enjoy immunity.
2. However, a Federal State Party to the present Convention, may, by notification addressed to the Secretary General of the Council of Europe, declare that its constituent States may invoke the provisions of the Convention applicable to Contracting States, and have the same obligations.
3. Where a Federal State has made a declaration in accordance with paragraph 2, service of documents on a constituent State of a Federation shall be made on the Ministry of Foreign Affairs of the Federal State, in conformity with Article 16.
4. The Federal State alone is competent to make the declarations, notifications and communications provided for in the present Convention, and the Federal State alone may be party to proceedings pursuant to Article 34.

Article 29

The present Convention shall not apply to proceedings concerning:

a. social security;
b. damage or injury in nuclear matters;
c. customs duties, taxes or penalties.

Article 30

The present Convention shall not apply to proceedings in respect of claims relating to the operation of seagoing vessels owned or operated by a Contracting State or to the carriage of cargoes and of passengers by such vessels or to the carriage of cargoes owned by a Contracting State and carried on board merchant vessels.

Article 31

Nothing in this Convention shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State.

Article 32

Nothing in the present Convention shall affect privileges and immunities relating to the exercise of the functions of diplomatic missions and consular posts and of persons connected with them.

Article 33

Nothing in the present Convention shall affect existing or future international agreements in special fields which relate to matters dealt with in the present Convention.

Article 34

1. Any dispute which might arise between two or more Contracting States concerning the interpretation or application of the present Convention shall be submitted to the International Court of Justice on the application of one of the parties to the dispute or by special agreement unless the parties agree on a different method of peaceful settlement of the dispute.

2. However, proceedings may not be instituted before the International Court of Justice which relate to:
   a. a dispute concerning a question arising in proceedings instituted against a Contracting State before a court of another Contracting State, before the court has given a judgment which fulfils the condition provided for in paragraph 1.b of Article 20;
   b. a dispute concerning a question arising in proceedings instituted before a court of a Contracting State in accordance with paragraph 1 of Article 21, before the court has rendered a final decision in such proceedings.

Article 35

1. The present Convention shall apply only to proceedings introduced after its entry into force.
2. When a State has become Party to this Convention after it has entered into force, the Convention shall apply only to proceedings introduced after it has entered into force with respect to that State.
3. Nothing in this Convention shall apply to proceedings arising out of, or judgments based on, acts, omissions or facts prior to the date on which the present Convention is opened for signature.

Chapter VI – Final provisions

Article 36

1. The present Convention shall be open to signature by the member States of the Council of Europe. It shall be subject to ratification or acceptance. Instruments of ratification or acceptance shall be deposited with the Secretary General of the Council of Europe.
2. The Convention shall enter into force three months after the date of the deposit of the third instrument of ratification or acceptance.
3. In respect of a signatory State ratifying or accepting subsequently, the Convention shall enter into force three months after the date of the deposit of its instrument of ratification or acceptance.

Article 37

1. After the entry into force of the present Convention, the Committee of Ministers of the Council of Europe may, by a decision taken by a unanimous vote of the members casting a vote, invite any non–member State to accede thereto.
2. Such accession shall be effected by depositing with the Secretary General of the Council of Europe an instrument of accession which shall take effect three months after the date of its deposit.
3. However, if a State having already acceded to the Convention notifies the Secretary General of the Council of Europe of its objection to the accession of another non–member State, before the entry into force of this accession, the Convention shall not apply to the relations between these two States.

Article 38

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or accession, specify the territory or territories to which the present Convention shall apply.
2. Any State may, when depositing its instrument of ratification, acceptance or accession or at any later date, by declaration addressed to the Secretary General of the Council of Europe, extend this Convention to any other territory or territories specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings.
3. Any declaration made in pursuance of the preceding paragraph may, in respect of any territory mentioned in such declaration, be withdrawn according to the procedure laid down in Article 40 of this Convention.

Article 39

No reservation is permitted to the present Convention.

Article 40

1. Any Contracting State may, in so far as it is concerned, denounce this Convention by means of notification addressed to the Secretary General of the Council of Europe.
2. Such denunciation shall take effect six months after the date of receipt by the Secretary General of such notification. This Convention shall, however, continue to apply to proceedings introduced before the date on which the denunciation takes effect, and to judgments given in such proceedings.

Article 41

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe and any State which has acceded to this Convention of:

a. any signature;
b. any deposit of an instrument of ratification, acceptance or accession;
c. any date of entry into force of this Convention in accordance with Articles 36 and 37 thereof;
d. any notification received in pursuance of the provisions of paragraph 2 of Article 19;
e. any communication received in pursuance of the provisions of paragraph 4 of Article 21;
f. any notification received in pursuance of the provisions of paragraph 1 of Article 24;
g. the withdrawal of any notification made in pursuance of the provisions of paragraph 4 of Article 24;
h. any notification received in pursuance of the provisions of paragraph 2 of Article 28;
i. any notification received in pursuance of the provisions of paragraph 3 or Article 37;
j. any declaration received in pursuance of the provisions of Article 38;
k. any notification received in pursuance of the provisions of Article 40 and the date on which denunciation takes effect.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at Basle, this 16th day of May 1972, in English and French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each of the signatory and acceding States.

Annex

The grounds of jurisdiction referred to in paragraph 3, sub–paragraph a, of Article 20, paragraph 2 of Article 24 and paragraph 3, sub–paragraph b, of Article 25 are the following:

a. the presence in the territory of the State of the forum of property belonging to the defendant, or the seizure by the plaintiff of property situated there, unless:
   - the action is brought to assert proprietary or possessory rights in that property, or arises from another issue relating to such property; or
   - the property constitutes the security for a debt which is the subject–matter of the action;

b. the nationality of the plaintiff;

c. the domicile, habitual residence or ordinary residence of the plaintiff within the territory of the State of the forum unless the assumption of jurisdiction on such a ground is permitted by way of an exception made on account of the particular subject–matter of a class of contracts;

d. the fact that the defendant carried on business within the territory of the State of the forum, unless the action arises from that business;

e. a unilateral specification of the forum by the plaintiff, particularly in an invoice.

A legal person shall be considered to have its domicile or habitual residence where it has its seat, registered office or principal place of business.

US: Foreign Sovereign Immunities Act of 1976

[NOT AN OFFICIAL TEXT]

[October 21, 1976]

90 STAT. 2891

Public Law 94–583
94th Congress

An Act

To define the jurisdiction of United States courts in suits against foreign states, the circumstances in which foreign states are immune from suit and in which execution may not be levied on their property, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Foreign Sovereign Immunities Act of 1976".

Sec. 2. (a) That chapter 85 of title 28 United States Code, is amended by inserting immediately before section 1331 the following new section:

"§ 1330. Actions against foreign states

"(a) The district courts shall have original Jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personas with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement.

"(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have Jurisdiction under subsection (a) where service has been made under section 1608 of this title.

"(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605–1607 of this title.

(b) By inserting in the chapter analysis of that chapter before – "1331. Federal question amount in controversy costs."

the following new item:

"1330. Action against foreign states"

Sec. 3. That section 1332 of title 28, United States Code, is amended by striking subsections (a) (2) and (3) and substituting in their place the following:

"(2) citizens of a State and citizens or subjects of a foreign state

"(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties– and

"(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States

" Sec. 4. (a) That title 28, United States Code, is amended by inserting after chapter 95 the following new chapter:

"Chapter 97. JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

"Sec.

"1602. Findings and declaration of purpose.
"1603. Definitions.
"1604. Immunity of a foreign state from Jurisdiction.
"1605. General exceptions to the jurisdictional immunity of a foreign state.
"1606. Extent of liability.
"1607. Counterclaims.
"1608 Service; time to answer default.
"1609. Immunity from attachment and execution of property of a foreign state.
"1610. Exceptions to the immunity from attachment or execution.
"1611. Certain types of property immune from execution.

§ 1602. Findings and declaration of purpose

"The Congress finds that the determination by United States courts Of the claims of foreign states to immunity from the Jurisdiction of such courts would serve the interests Of Justice and would protect the rights Of both foreign states and litigants in United States courts. Under international law, states are not immune from the Jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction Of Judgments rendered against them in connection with their commercial activities. Claims Of foreign states to immunity should henceforth be decided by courts Of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions

"For purposes of this chapter

"(a) A 'foreign state', except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

"(b) An 'agency or instrumentality of a foreign state' means any entity

"(1) which is a separate legal person, corporate or otherwise, and

"(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

"(3) which is neither a citizen of a State Of the United States as defined in section 1332 (c) and (d) of this title, nor created under the laws of any third country.

"(c) The 'United States' includes all territory and waters, continental or insular, subject to the Jurisdiction of the United States.

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

"(e) A 'commercial activity carried on in the United States by a foreign state' means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from Jurisdiction

"Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the Jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

"(a) A foreign state shall not be immune from the Jurisdiction of courts of the United States or of the States in any case

"(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

"(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

"(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state– or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States

"(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue or

"(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to

"(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

"(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceits or interference with contract rights. "(b) A foreign state shall not be immune from the Jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: Provided, That

"(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted– but such notice shall not be deemed to have been delivered, nor may it thereafter be delivered if the vessel or cargo is arrested pursuant to process obtained on behalf Of the party bringing the suit – unless the party was unaware that the vessel or cargo of a foreign state was involved, in which event the service of process of arrest shall be deemed to constitute valid delivery of such notice; and

"(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in subsection (b)(l) of this section or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

Whenever notice is delivered under subsection (b)(l) of this section, the maritime lien shall thereafter be deemed to be in an personam claim against the foreign state which at that time owns the vessel or cargo involved: Provided, That a court may not award Judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose, such value to be determined as of the time notice is served under subsection (b)(l) of this section.

§ 1606. Extent of liability

"As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

§ 1607. Counterclaims

"In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim

"(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign states or

"(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state, or

"(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

§ 1608. Service time to answer default

"(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

"(1) by delivery of a cops of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

"(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of Judicial documents; or

"(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

"(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services – and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a 'notice of suit' shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

"(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

"(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality– or

"(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of Judicial documents; or

"(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state –

"(A) as directed by an authority of the foreign state or political subdivision in response to a letter regatory or request or

"(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

"(C) as directed by order of the court consistent with the law of the place where service is to be made.

"(c) Service shall be deemed to have been made

"(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note– and

"(2) in any other ease under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

"(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an

answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

"(e) No Judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default Judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

§ 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chanter.

§ 1610. Exceptions to the immunity from attachment or execution

"(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a Judgment entered by a court of the United States or of a State after the effective date of this Act, if –

"(l) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

"(2) the property is or was used for the commercial activity upon which the claim is based, or

"(3) the execution relates to a Judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

"(4) the execution relates to a Judgment establishing rights in property

"(A) which is acquired by succession or gift,

or "(B) which is immovable and situated in the United States: Provided, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

"(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the Judgment.

"(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a Judgment entered by a court of the United States or of a State after the effective date of this Act, if –

"(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

"(2) the Judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3), or (5), or 1605(b) of this chapter, regardless of whether the property is or was used for the activity upon which the claim is based.

"(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry Of Judgment and the giving of any notice required under section 1608(e) of this chapter.

"(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of Judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if–

"(1) the foreign state has explicitly waived its immunity, from attachment prior to Judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waivers and

"(2) the purpose of the attachment is to secure satisfaction of a Judgment that has been or may ultimately be entered against the foreign state, and not to obtain Jurisdiction.

"§ 1611. Certain types of property immune from execution

"(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other Judicial process impeding the disbursement of funds to, or on the order of a foreign state as the result of an action brought in the courts of the United States or of the States.

"(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if –

"(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

"(2) the property is, or is intended to be, used in connection with a military activity and

"(A) is of a military character, or

"(B) is under the control of a military authority or defense agency. " (b) That the analysis of "PART IV – JURISDICTION AND VENUE" of title 28, United States Code, is amended by inserting after –

"95. Customs Court"

the following new item:

"97. Jurisdictional Immunities of Foreign States".

SEC. 5. That section 1391 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(f) A civil action against a foreign state as defined in section 1603(a) of this title may be brought–

"(1) in any Judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

"(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this titles

"(3) in any Judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title, or

"(4) in the United States District Court for the District of Columbia if the action is brought against a foreign statc or political subdivision thereof."

SEC.6. That section 1441 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without Jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

"SEC.7. If any provision of this Act or the application thereof to any foreign state is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SEC.8. This Act shall take effect ninety days after the date of its enactment.

Approved October 21, 1976.

UK: State Immunity Act of 1978

An Act to make new provision with respect to proceedings in the United Kingdom by or against other States. to provide for the effect of judgments given against the United Kingdom in the courts of States parties to the European Convention on State Immunity; to make new provision with respect to the immunities and privileges of heads of State; and for connected purposes.

[2Oth July 1978]

PART I. PROCEEDINGS IN UNITED KINGDOM BY OR AGAINST OTHER STATES

Immunity from Jurisdiction

1. – (1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.

(2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.

Exceptions from immunity

2. – (1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom.

(2) A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is to be governed by the law of the United Kingdom is not to be regarded as a submission.

(3) A State is deemed to have submitted –

(a) if it has instituted the proceedings; or

(b) subject to subsections (4) and (5) below, if it has intervened or taken any step in the proceedings.

(4) Subsection (3)(b) above does not apply to intervention or any step taken for the purpose only of –

(a) claiming immunity; or

(b) asserting an interest in property in circumstances such that the State would have been entitled to immunity if the proceedings had been brought against it.

(5) Subsection (3)(b) above does not apply to any step taken by the State in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained and immunity is claimed as soon as reasonably practicable.

(6) A submission in respect of any proceedings extends to any appeal but not to any counterclaim unless it arises out of, the same legal relationship or facts as the claim.

(7) The head of a State's diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to submit on behalf of the State in respect of any proceedings; and any person who has entered into a contract on behalf of and with the authority of a State shall be deemed to have authority to submit on its behalf in respect of proceedings arising out of the contract.

3. – (1) A State is not immune as respects proceedings relating to –

(a) a commercial transaction entered into by the State or

(b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom.

(2) This section does not apply if the parties to the dispute are States or have otherwise agreed in writing; and subsection (1)(b) above does not apply if the contract (not being a commercial transaction) was made in the territory of the State concerned and the obligation in question is governed by its administrative law.

(3) In this section "commercial transaction" means –

(a) any contract for the supply of goods or services;

(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and

(c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority;

but neither paragraph of subsection (1) above applies to a contract of employment between a State and an individual.

4. – (1) A State is not immune as respects proceedings relating to a contract of employment between the State and an individual where the contract was made in the United Kingdom or the work is to be wholly or partly performed there.

(2) Subject to subsections (3) and (4) below, this section does not apply if –

(a) at the time when the proceedings are brought the individual is a national of the State concerned; or

(b) at the time when the contract was made the individual was neither a national of the United Kingdom nor habitually resident there; or

(c) the parties to the contract have otherwise agreed in writing.

(3) Where the work is for an office, agency or establishment maintained by the State in the United Kingdom for commercial purposes, subsection (2)(a) and (b) above do not exclude the application of this section unless the individual was, at the time when the contract was made, habitually resident in that State.

(4) Subsection (2)(c) above does not exclude the application of this section where the law of the United Kingdom requires the proceedings to be brought before a court of the United Kingdom.

(5) In subsection (2)(b) above "national of the United Kingdom" means a citizen of the United Kingdom and Colonies, a person who is a British subject by virtue of section 2, 13 or 16 of the British Nationality Act 1948 or by virtue of the British Nationality Act 1965, a British protected person within the meaning of the said Act of 1948 or a citizen of Southern Rhodesia.

(6) In this section "proceedings relating to a contract of employment" includes proceedings between the parties to such a contract in respect of any statutory rights or duties to which subject as employer or employee.

5. A State is not immune as respects proceedings in respect of –

(a) death or personal injury; or

(b) damage to or loss of tangible property,

caused by an act or omission in the United Kingdom.

6. – (1) A State is not immune as respects proceedings relating to –

(a) any interest of the State in, or its possession or use of, immovable property in the United Kingdom; or

(b) any obligation of the State arising out of its interest in, or its possession or use of, any such property.

(2) A State is not immune as respects proceedings relating to any interest of the State in movable or immovable property, being an interest arising by way of succession, gift or bona vacantia.

(3) The fact that a State has or claims an interest in any property shall not preclude any court from exercising in respect of it any jurisdiction 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.

(4) A court may entertain proceedings against a person other than a State notwithstanding that the proceedings relate to property –

(a) which is in the possession or control of a State; or

(b) in which a State claims an interest,

if the State would not have been immune had the proceedings been brought against it or, in a case within paragraph (b) above, if the claim is neither admitted nor supported by prima fade evidence.

7. A State is not immune as respects proceedings relating to –

(a) any patent, trade–mark, design or plant breeders' rights belonging to the State and registered or protected in the United Kingdom or for which the State has applied in the United Kingdom;

(b) an alleged infringement by the State in the United Kingdom of any patent, trade–mark, design, plant breeders' rights or copyright; or

(c) the right to use a trade or business name in the United Kingdom.

8. – (1) A State is not immune as respects proceedings relating to its membership of a body corporate, an unincorporated body or a partnership which –

(a) has members other than States; and

(b) is incorporated or constituted under the law of the United Kingdom or is controlled from or has its principal place of business in the United Kingdom,

being proceedings arising between the State and the body or its other members or, as the case may be, between the State and the other partners.

(2) This section does not apply if provision to the contrary has been made by an agreement in writing between the parties to the dispute or by the constitution or other instrument establishing or regulating the body or partnership in question.

9. – (l) Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration.

(2) This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States.

10. – (l) This section applies to –

(a) Admiralty proceedings: and

(b) proceedings on any claim which could be made the subject of Admiralty proceedings.

(2) A State is not immune as respects –

(a) an action in rem against a ship belonging to that State; or

(b) an action in personam for enforcing a claim in connection with such a ship,

if, at the time when the cause of action arose, the ship was in use or intended for use for commercial purposes.

(3) Where an action in rem is brought against a ship belonging to a State for enforcing a claim in connection with another ship belonging to that State, subsection (2)(a) above does not apply as respects the first–mentioned ship unless, at the time when the cause of action relating to the other ship arose, both ships were in use or intended for use for commercial purposes.

(4) A State is not immune as respect –

(a) an action in rem against a cargo belonging to that State if both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes; or

(b) an action in personam for enforcing a claim in connection with such a cargo if the ship carrying it was then in use or intended for use as aforesaid.

(5) In the foregoing provisions references to a ship or cargo belonging to a State include references to a ship or cargo in its possession or control or in which it claims an interest; and, subject to subsection (4) above, subsection (2) above applies to property other than a ship as it applies to a ship.

(6) Sections 3 to 5 above do not apply to proceedings of the kind described in subsection (1) above if the State in question is a party to the Brussels Convention and the claim relates to the operation of a ship owned or operated by that State, the carriage of cargo or passengers on any such ship or the carriage of cargo owned by that State on any other ship.

11. A State is not immune as respects proceedings relating to its liability for –

(a) value added tax, any duty of customs or excise or any agricultural levy; or

(b) rates in respect of premises occupied by it for commercial purposes.

Procedure

12. – (l) Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the State and service shall be deemed to have been effected when the writ or document is received at the Ministry.

(2) Any time for entering an appearance (whether prescribed. by rules of court or otherwise) shall begin to run two months after the date on which the writ or document is received as aforesaid.

(3) A State which appears in proceedings cannot thereafter object that subsection (1) above has not been complied with in the case of those proceedings.

(4) No judgment in default of appearance shall be given against a State except on proof that subsection (1) above has been complied with and that the time for entering an appearance as extended by subsection (2) above has expired.

(5) A copy of any judgment given against a State in default of appearance shall be transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of that State and any time for applying to have the judgment set aside (whether prescribed by rules of court or otherwise) shall begin to run two months after the date on which the copy of the judgment is received at the Ministry.

(6) Subsection (1) above does not prevent the service of a writ or other document in any manner to which the State has agreed and subsections (2) and (4) above do not apply where service is effected in any such manner.

(7) This section shall not be construed as applying to proceedings against a State by way of counter–claim or to an action in rem; and subsection (1) above shall not be construed as affecting any rules of court whereby leave is required for the service of process outside the jurisdiction.

13. – (1) No penalty by way of committal or fine shall be imposed in respect of any failure or refusal by or on behalf of a State to disclose or produce any document or other information for the purposes of proceedings to which it is a party.

(2) Subject to subsections (3) and (4) below –

(a) relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property; and

(b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.

(3) Subsection (2) above does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection.

(4) Subsection (2)(b) above does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes; but, in a case not falling within section 10 above, this subsection applies to property of a State party to the European Convention on State Immunity only if –

(a) the process is for enforcing a judgment which is final within the meaning of section 18(1)(b) below and the State has made a declaration under Article 24 of the Convention; or

(b) the process is for enforcing an arbitration award.

(5) The head of a State's diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to give on behalf of the State any such consent as is mentioned in subsection (3) above and, for the purposes of subsection (4) above, his certificate to the effect that any property is not in use or intended for use by or on behalf of the State for commercial purposes shall be accepted as sufficient evidence of that fact unless the contrary is proved.

(6) In the application of this section to Scotland –

(a) the reference to "injunction" shall be construed as a reference to "interdict";

(b) for paragraph (b) of subsection (2) above there shall be substituted the following paragraph –

"(b) the property of a State shall not be subject to any diligence for enforcing a judgment or order of a court or a decree arbitral or, in an action in rem, to arrestment or sale."; and

(c) any reference to "process" shall be construed as a reference to "diligence", any reference to "the issue of any process" as a reference to "the doing of diligence" and the reference in subsection (4)(b) above to "an arbitration award" as a reference to "a decree arbitral".

Supplementary Provisions

14. – (1) The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom, and references to a State include references to –

(a) the sovereign or other head of that State in his public capacity;

(b) the government of that State; and

(c) any department of that government,

but not to any entity (hereafter referred to as a "separate entity") which is distinct from the executive organs of the government of the State and capable of suing or being sued.

(2) A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if –

(a) the proceedings relate to anything done by it in the exercise of sovereign authority; and

(b) the circumstances are such that a State (or, in the case of proceedings to which section 10 above applies, a State which is not a party to the Brussels Convention) would have been so immune.

(3) If a separate entity (not being a State's central bank or other monetary authority) submits to the jurisdiction in respect of proceedings in the case of which it is entitled to immunity by virtue of subsection (2) above, subsections (1) to (4) of section 13 above shall apply to it in respect of those proceedings as if references to a State were references to that entity.

(4) Property of a State's central bank or other monetary authority shall not be regarded for the purposes of subsection (4) of section 13 above as in use or intended for use for commercial purposes; and where any such bank or authority is a separate entity subsections (1) to (3) of that section shall apply to it as if references to a State were references to the bank or authority.

(5) Section 12 above applies to proceedings against the constituent territories of a federal State; and Her Majesty may by Order in Council provide for the other provisions of this Part of this Act to apply to any such constituent territory specified in the Order as they apply to a State.

(6) Where the provisions of this Part of this Act do not apply to a constituent territory by virtue of any such Order subsections (2) and (3) above shall apply to it as if it were a separate entity.

15. – (1) If it appears to Her Majesty that the immunities and privileges conferred by this Part of this Act in relation to any State –

(a) exceed those accorded by the law of that State in relation to the United Kingdom; or

(b) are less than those required by any treaty. convention or other international agreement to which that State and the United Kingdom are parties.

Her Majesty may by Order in Council provide for restricting or, as the case may be, extending those immunities and privileges to such extent as appears to Her Majesty to be appropriate.

(2) Any statutory instrument containing an Order under this section shall be subject to annulment in pursuance of a resolution of either House of Parliament.

16. – (l) This Part of this Act does not affect any immunity or privilege conferred by the Diplomatic Privileges Act 1964 or the Consular Relations Act 1968; and –

(a) section 4 above does not apply to proceedings concerning the employment of the members of a mission within the meaning of the Convention scheduled to the said Act of 1964 or of the members of a consular post within the meaning of the Convention scheduled to the said Act of 1968;

(b) section 6(1) above does not apply to proceedings concerning a State's title to or its possession of property used for the purposes of a diplomatic mission.

(2) This Part of this Act does not apply to proceedings relating to anything done by or in relation to the armed forces of a State while present in the United Kingdom and. in particular, has effect subject to the Visiting Forces Act 1952.

(3) This Part of this Act does not apply to proceedings to which section 17(6) of the Nuclear Installations Act 1965 applies.

(4) This Part of this Act does not apply to criminal proceedings.

(5) This Part of this Act does not apply to any proceedings relating to taxation other than those mentioned in section 11 above.

17. – (1) In this Part of this Act –

"the Brussels Convention" means the International Convention for the Unification of Certain Rules Concerning the Immunity of State–owned Ships signed in Brussels on 10th April 1926;

"commercial purposes" means purposes of such transactions or activities as are mentioned in section 3(3) above;

"ship" includes hovercraft.

(2) In sections 2(2) and 13(3) above references to an agreement include references to a treaty, convention or other international agreement.

(3) For the purposes of sections 3 to 8 above the territory of the United Kingdom shall be deemed to include any dependent territory in respect of which the United Kingdom is a party to the European Convention on State Immunity.

(4) In sections 3(l), 4(1), 5 and 16(2) above references to the United Kingdom include references to its territorial waters and any area designated under section 1(7) of the Continental Shelf Act 1964.

(5) In relation to Scotland in this Part of this Act "action in rem" means such an action only in relation to Admiralty proceedings.

PART II. JUDGMENTS AGAINST UNITED KINGDOM IN CONVENTION STATES

18. – (1) This section applies to any judgment given against the United Kingdom by a court in another State party to the European Convention on State immunity, being a judgment –

(a) given in proceedings in which the United Kingdom was not entitled to immunity by virtue of provisions corresponding to those of sections 2 to ii above; and

(b) which is final, that is. to say, which is not or is no longer subject to appeal or, if given in default of appearance, liable to be set aside.

(2) Subject to section 19 below, a judgment to which this section applies shall be recognised in any court in the United Kingdom as conclusive between the parties thereto in all proceedings founded on the same cause of action and may be relied on by way of defence or counter–claim in such proceedings.

(3) Subsection (2) above (but not section 19 below) shall have effect also in relation to any settlement entered into by the United Kingdom before a court in another State party to the Convention which under the law of that State is treated as equivalent to a judgment.

(4) In this section references to a court in a State party to the Convention include references to a court in any territory in respect of which it is a party.

19. – (1) A court need not give effect to section 18 above in the case of a judgment–

(a) if to do so would be manifestly contrary to public policy or if any party to the proceedings in which the judgment was given had no adequate opportunity to present his case; or

(b) if the judgment was given without provisions corresponding to those of section 12 above having been complied with and the United Kingdom has not entered an appearance or applied to have the judgment set aside.

(2) A court need not give effect to section 18 above in the case of a judgment –

(a) if proceedings between the same parties' based on the same facts and having the same purpose –

(i) are pending before a court in the United Kingdom and were the first to be instituted; or

(ii) are pending before a court in another State party to the Convention, were the first to be instituted and may result in a judgment to which that section will apply; or

(b) if the result of the judgment is inconsistent with the result of another judgment given in proceedings between the same parties and –

(i) the other judgment is by a court in the United Kingdom and either those proceedings were the first to be instituted or the judgment of that court was given before the first–mentioned judgment became final within the meaning of subsection (1)(b) of section 18 above; or

(ii) the other judgment is by a court in another State party to the Convention and that section has already become applicable to it.

(3) Where the judgment was given against the United Kingdom in proceedings in respect of which the United Kingdom was not entitled to immunity by virtue of a provision corresponding to section 6(2) above, a court need not give effect to section 18 above in respect of the judgment if the court that gave the judgment –

(a) would not have had jurisdiction in the matter if it had applied rules of jurisdiction corresponding to those applicable to such matters in the United Kingdom; or

(b) applied a law other than that indicated by the United Kingdom rules of private international law and would have reached a different conclusion if it had applied the law so indicated.

(4) In subsection (2) above references to a court in the United Kingdom include references to a court in any dependent territory in respect of which the United Kingdom is a party to the Convention, and references to a court in another State party to the Convention include references to a court in any territory in respect of which it is a party.

PART III. MISCELLANEOUS AND SUPPLEMENTARY

20.–(l) Subject to the provisions of this section and to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to –

(a) a sovereign or other head of State;

(b) members of his family forming part of his household; and

(c) his private servants,

as it applies to the head of a diplomatic mission, to members of his family forming part of his household and to his private servants.

(2) The immunities and privileges conferred by virtue of subsection (1)(a) and (b) above shall not be subject to the restrictions by reference to nationality or residence mentioned in Article 37(1) or 38 in Schedule 1 to the said Act of 1964.

(3) Subject to any direction to the contrary by the Secretary of State, a person on whom immunities and privileges are conferred by virtue of subsection (1) above shall be entitled to the exemption conferred by section 8(3) of the Immigration Act 1971.

(4) Except as respects value added tax and duties of customs or excise, this section does not affect any question whether a person is exempt from, or immune as respects proceedings relating to, taxation.

(5) This section applies to the sovereign or other head of any State on which immunities and privileges are conferred by Part I of this Act and is without prejudice to the application of that Part to any such sovereign or head of State in his public capacity.

21. A certificate by or on behalf of the Secretary of State shall be conclusive evidence on any question –

(a) whether any country is a State for the purposes of Part I of this Act, whether any territory is a constituent territory of a federal State for those purposes or as to the person or persons to be regarded for those purposes as the head or government of a State;

(b) whether a State is a party to the Brussels Convention mentioned in Part I of this Act;

(c) whether a State is a party to the European Convention on State Immunity, whether it has made a declaration under Article 24 of that Convention or as to the territories in respect of which the United Kingdom or any other State is a party;

(d) whether, and if so when, a document has been served or received as mentioned in Section 12(1) or (5) above.

22. – (1) In this Act "court" includes any tribunal or body exercising judicial functions; and references to the courts or law of the United Kingdom include references to the courts or law of any part of the United Kingdom.

(2) In this Act references to entry of appearance and judgments in default of appearance include references to any corresponding procedures.

(3) In this Act "the European Convention on State Immunity" means the Convention of that name signed in Basle on 16th May 1972.

(4) In this Act "dependent territory" means –

(a) any of the Channel Islands;

(b) the Isle of Man;

(c) any colony other than one for whose external relations a country other than the United Kingdom is responsible; or

(d) any country or territory outside Her Majesty's dominions in which Her Majesty has jurisdiction in right of the government of the United Kingdom.

(5) Any power conferred by this Act to make an Order in Council includes power to vary or revoke a previous Order.

23. – (1) This Act maybe cited as the State Immunity Act 1978.

(2) . . . . . .

(3) Subject to subsection (4) below, Parts I and II of this Act do not apply to proceedings in respect of matters that occurred before the date of the coming into force of this Act and, in particular –

(a) sections 2(2) and 13(3) do not apply to any prior agreement, and

(b) sections 3, 4 and 9 do not apply to any transaction, contract or arbitration agreement, entered into before that date.

(4) Section 12 above applies to any proceedings instituted after the coming into force of this Act.

(5) This Act shall come into force on such date as may be specified by an order made by the Lord Chancellor by statutory instrument.

(6) This Act extends to Northern Ireland.

(7) Her Majesty may by Order in Council extend any of the provisions of this Act, with or without modification, to any dependent territory.

The following provision has been omitted from the text for the reason stated: –

S. 23(2) ... ... repeals Administration of Justice (Miscellaneous Provisions) Act 1938 (c. 63) s.13 and Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 (c. 42), s. 7.

Last Update: 08/17/98

The Singapore State Immunity Act 1979

An Act to make provisions with respect to proceedings in Singapore by or against other States, and for purposes connected therewith.

[26 October 1979]

PART I
PRELIMINARY

1. (1) This Act may be cited as the State Immunity Act, 1979.

(2) Subject to subsection (3), Part II does not apply to proceedings in respect of matters that occurred before the commencement of this Act and, in particular:

(a) subsection (2) of section 4 and subsection (3) of section 15 do not apply to any prior agreement; and

(b) sections 5, 6 and 11 do not apply to any transaction, contract or arbitration agreement, entered into before that date.

(3) Section 14 applies to any proceedings instituted after the commencement of this Act.

2. (1) In this Act:

"commercial purposes" means purposes of such transactions or activities as are mentioned in subsection (3) of section 5;

"court" includes any tribunal or body exercising judicial functions;

"ship" includes hovercraft.

(2) (1) In this Act:

(a) references to an agreement in subsection (2) of section 4 and subsection (3) of section 15 include references to a treaty, convention or other international agreement;

(b) references to entry of appearance and judgments in default of appearance include references to any corresponding procedures.

PART II
PROCEEDINGS IN SINGAPORE BY OR AGAINST OTHER STATES

Immunity from jurisdiction

3. (1) A State is immune from the jurisdiction of the courts of Singapore except as provided in the following provisions of this Part.

(2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.

Exceptions from immunity

4. (1) A State–Is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of Singapore.

(2) A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is to be governed by the law of Singapore is not to be regarded as a submission.

(3) A State is deemed to have submitted:

(a) if it has instituted the proceedings; or

(b) subject to subsections (4) and (5), if it has intervened or taken any step in the proceedings.

(4) Paragraph *(b)* of subsection (3) does not apply to intervention or any step taken for the purpose only of:

(a) claiming immunity; or

(b) asserting an interest in property in circumstances such that the State would have been entitled to immunity if the proceedings had been brought against it.

(5) Paragraph *(b)* of subsection (3) does not apply to any step taken by the State in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained and immunity is claimed as soon as reasonably practicable.

(6) A submission in respect of any proceedings extends to any appeal but not to any counter–claim unless it arises out of the same legal relationship or facts as the claim.

(7) The head of a State's diplomatic mission in Singapore, or the person for the time being performing his functions, shall be deemed to have authority to submit on behalf of the State in respect of any proceedings; and any person who has entered into a contract on behalf of and with the authority of a State shall be deemed to have authority to submit on its behalf in respect of proceedings arising out of the contract.

5. (1) A State is not immune as respects proceedings relation to:

(a) a commercial transaction entered into by the State; or

(b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in Singapore,

but this subsection does not apply to a contract of employment between a State and an individual.

(2) This section does not apply if the parties to the dispute are States or have otherwise agreed in writing; and paragraph *(b)* of subsection (1) does not apply if the contract (not being a commercial transaction) was made in the territory of the State concerned and the obligation in question is governed by its administrative law.

(3) In this section "commercial transaction" means:

(a) any contract for the supply of goods or services;

(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and

(c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority.

6. (1) A State is not immune as respects proceedings relating to a contract of employment between the State and an individual where the contract was made in Singapore or the work is to be wholly or partly performed in Singapore.

(2) Subject to subsections (3) and (4), this section does not apply if:

(a) at the time when the proceedings are brought the individual is a. national of the State concerned;

(b) at the time when the contract was made the individual was neither a citizen of Singapore nor habitually resident in Singapore; or

(c) the parties to the contract have otherwise agreed in writing.

(3) Where the work is for an office, agency or establishment maintained by the State in Singapore for commercial purposes, paragraphs *(a)* and *(b)* of subsection (2) do not exclude the application of this section unless the individual was, at the time when the contract was made, habitually resident in that State.

(4) Paragraph *(c)* of subsection (2) does not exclude the application of this section where the law of Singapore requires the proceedings to be brought before a court in Singapore.

(5) in this section "proceedings relating to a contract of employment" includes proceedings between the parties to such a contract in respect of any statutory rights or duties to which they are entitled or subject as employer or employee.

7. A State is not immune as respects proceedings in respect of:

(a) death or personal injury; or

(b) damage to or loss of tangible property, caused by an act or omission in Singapore.

8. (1) A State is not immune as respects proceedings relating to:

(a) any interest of the State in, or its possession or use of, immovable property in Singapore; or

(b) any obligation of the State arising out of its interest in, or its possession or use of, any such property.

(2) A State is not immune as respects proceedings relating to any interest of the State in movable or immovable property, being an interest arising by way of succession, gift or *bona vacantia.*

(3) The fact that a State has or claims an interest in any property shall not preclude any court from exercising in respect of it any jurisdiction 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.

(4) A court may entertain proceedings against a person other than a State notwithstanding that the proceedings relate to property:

(a) which is in the possession or control of a State; or

(b) in which a State claims an interest,

if the State would not have been immune had the proceedings been brought against it or, in a case within paragraph *(b),* if the claim is neither admitted nor supported by *prima facie* evidence.

9. A State is not immune as respects proceedings relating to:

(a) any patent, trade–mark or design belonging to the State and registered or protected in Singapore or for which the State has applied in Singapore;

(b) an alleged infringement by the State in Singapore of any patent, trade–mark, design or copyright; or

(c) the right to use a trade or business name in Singapore.

10. (1) A State is not immune as respects proceedings relating to its membership of a body corporate, an unincorporated body or a partnership which:

(a) has members other than States; and

(b) is incorporated or constituted under the law of Singapore or is controlled from or has its principal place of business in Singapore,

being proceedings arising between the State and the body or its other members or, as the case may be, between the State and the other partners.

(2) This Section does not apply, if provision to the contrary has been made by an agreement in writing between the parties to the dispute or by the constitution or other instrument establishing or regulating the body or partnership in question.

11. (1) Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts in Singapore which relate to the arbitration.

(2) This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States.

12. (1) This section applies to:

(a) Admiralty proceedings; and

(b) proceedings on any claim which could be made the subject of Admiralty proceedings.

(2) A State is not immune as respects:

(a) an action *in rem* against a ship belonging to that State; or

(b) an action *in personam* for enforcing a claim in connection with such a ship,

if, at the time when the cause of action arose, the ship was in use or intended for use for commercial purposes.

(3) Where an action *in rem* is brought against a ship belonging to a State for enforcing a claim in connection with another ship belonging to that State, paragraph *(a)* of subsection (2) does not apply as respects the first–mentioned ship unless, at the time when the cause of action relating to the other ship arose, both ships were in use or intended for use for commercial purposes.

(4) A State is not immune as respects:

(a) an action *in rem* against a cargo belonging to that State if both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes; or

(b) an action *in personam* for enforcing a claim in connection with such a cargo if the ship carrying it was then in use or intended for use as aforesaid.

(5) In the foregoing provisions references to a ship or cargo belonging to a State include references to a ship or cargo in its possession or control or in which it claims an interest; and, subject to subsection (4), subsection (2) applies to property other than a ship as it applies to a ship.

13. A State is not immune as respects proceedings relating to its liability for:

(a) any customs duty or excise duty; or

(b) any tax in respect of premises occupied by it for commercial purposes.

Procedure

14. (1) Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Ministry of Foreign Affairs, Singapore, to the Ministry of Foreign Affairs of the State and service shall be deemed to have been effected when the writ or document is received at the Ministry.

(2) Any time for entering an appearance (whether prescribed by rules of court or otherwise) shall begin to run two months after the date on which the writ or document is received as aforesaid.

(3) A State which appears in proceedings cannot thereafter object that subsection (1) has not been complied with in the case of those proceedings.

(4) No judgment in default of appearance shall be given against a State except on proof that subsection (1) has been complied with and that the time for entering an appearance as extended by subsection (2) has expired.

(5) A copy of any judgment given against a State in default of appearance shall be transmitted through the Ministry of Foreign Affairs, Singapore, to the Ministry of Foreign Affairs of that State and any time for applying to have the judgment set aside (whether prescribed by rules of court or otherwise) shall begin to run two months after the date on which the copy of the judgment is received at the Ministry.

(6) Subsection (1) does not prevent the service of a writ or other document in any manner to which the State has agreed and subsections (2) and (4) do not apply where service is effected in any such manner.

(7) This section shall not be construed as applying to proceedings against a State by way of counter–claim or to an action *in rem;* and subsection (1) shall not be construed as affecting any rules of court whereby leave is required for the service of process outside the jurisdiction.

15. (1) No penalty by way of committal or fine shall be imposed in respect of any failure or refusal by or on behalf of a State to disclose or produce any document or other information for the purposes of proceedings to which it is a party.

(2) Subject to subsections (3) and (4):

(a) relief shall not be given against a State by way of injunction or order for specific performance or for the– recovery of land or other property; and

(b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action *in rem,* for its arrest, detention or sale.

(3) Subsection (2) does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection.

(4) Paragraph *(b)* of subsection (2) does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes.

(5) The head of a State's diplomatic mission in Singapore, or the person for the time being performing his functions, shall be deemed to have authority to give on behalf of the State any such consent as is mentioned in subsection (3) and, for the purposes of subsection (4), his certificate to the effect that any property is not in use or intended for use by or on behalf of the State for commercial purposes shall be accepted as sufficient evidence of that fact unless the contrary is proved.

PART III

SUPPLEMENTARY PROVISIONS

16. (1) The immunities and privileges conferred by Part II apply to any foreign or commonwealth State other than Singapore; and references to a State include references to:

(a) the sovereign or other head of that State in his public capacity;

(b) the government of that State; and

(c) any department of that government.

but not to any entity (hereinafter referred to as a separate entity) which is distinct from the executive organs of the governments of the State and capable of suing or being sued.

(2) A separate entity is immune from the jurisdiction of the courts in Singapore if, and only if:

(a) the proceedings relate to anything done by it in the exercise of sovereign authority; and

(b) the circumstances are such that a State would have been so immune.

(3) if a separate entity (not being a State's central bank of other monetary authority) submits to the jurisdiction in respect of proceedings in the case of which it is entitled to immunity by virtue of subsection (2), subsections (1) to (4) of section 15 shall apply to it in respect of those proceedings as if references to a State were references to that entity.

(4) Property of a State's central bank or other monetary authority shall not be regarded for the purposes of subsection (4) of section 15 as in use or intended for use for commercial purposes; and where any such bank or authority is a separate entity subsections (1) to (3) of

that section shall apply to it as if references to a State were references to the bank or authority.

(5) Section 14 applies to proceedings against the constituent territories of a federal State; and the President may by order provide for the other provisions of this Part to apply to any such constituent territory specified in the order as they apply to a State.

(6) Where the provisions of Part II do not apply to a constituent territory by virtue of any such order subsections (2) and (3) shall apply to it as if it were a separate entity.

17. If it appears to the President that the immunities and privileges conferred by Part 11 in relation to any State:

(a) exceed those accorded by the law of that State in relation to Singapore; or

(b) are less than those required by any treaty, convention or other international agreement to which that State and Singapore are parties,

the President may, by order, provide for restricting or, as the case may be, extending those immunities and privileges to such extent as appears to the President to be appropriate.

18. A certificate by or on behalf of the Minister for Foreign Affairs shall be conclusive evidence on any question:

(a) whether any country is a State for the purposes of Part II, whether any territory is a constituent territory of a federal State for those purposes or as to the person or persons to be regarded for those purposes as the head or government of a State;

(b) whether, and if so when, a document has been served or received as mentioned in subsection (1) or (5) of section 14.

19. (1) Part II does not affect any immunity or privilege applicable in Singapore to diplomatic and consular agents, and subsection (1) of section 8 does not apply to proceedings concerning a State's title to or its possession of property used for the purposes of a diplomatic mission.

(2) Part II does not apply to:

(a) proceedings relating to anything done by or in relation to the armed forces of a State while present in Singapore and, in particular, has effect subject to the Visiting Forces Act;

(b) criminal proceedings; and

(c) proceedings relating to taxation other than those mentioned in section 13.

The Pakistani State Immunity Ordinance 1981

ORDINANCE NO. VI of 1981

AN ORDINANCE

to amend and consolidate the law relating to the immunity of States from the jurisdiction of courts

Whereas it is expedient to amend and consolidate the law relating to the immunity of States from the jurisdiction of courts;

And whereas the President is satisfied that circumstances exist which render it necessary to take immediate action;

Now, therefore, in pursuance of the Proclamation of the fifth day of July, 1977, read with the Laws (Continuance in Force) Order, 1977 (C.M.L.A. Order No.1 of 1977), and in exercise of all powers enabling him in that behalf, the President is pleased to make and promulgate the following Ordinance:

1. *Short title; extend and commencement.* (1) This Ordinance may be called the State Immunity Ordinance, 1981.

(2) It extends to the whole of Pakistan.

(3) It shall come into force at once.

2. *Interpretation.* In this Ordinance, "court" includes any tribunal or body exercising judicial functions.

Immunity from jurisdiction

3. *General immunity from jurisdiction.* (1) A State is immune from the jurisdiction of the courts of Pakistan except as hereinafter provided.

(2) A court shall give effect to the immunity conferred by subsection (1) even if the State does not appear in the proceedings in question.

Exceptions from immunity

4. *Submission to jurisdiction.* (1) A State is not immune as respects proceedings in respect of which it has submitted to jurisdiction.

(2) A State may submit to jurisdiction after the dispute giving rise to the proceedings has arisen or by a prior agreement; but a provision in any agreement that it is to be governed by the law of Pakistan shall not be deemed to be a submission.

Explanation In this subsection and in subsection (3) of section 14, "agreement" includes a treaty, convention or other international agreement.

(3) A State shall be deemed to have submitted:

(a) if it has instituted the proceedings; or

(b) subject to subsection (4) it has intervened or taken any step, in the proceedings.

(4) Clause *(b)* of subsection (3) does not apply:

(a) to intervention or any step taken for the purpose only of:

(i) claiming immunity; or

(ii) asserting an interest in property in circumstances such that the State would have been entitled to immunity if the proceedings had been brought against it; or

(b) to any step taken by the State in ignorance of the facts entitling it to immunity if those facts could .not reasonably have been ascertained and immunity is claimed as soon as reasonably practicable.

(5) A submission in respect of any proceedings extends to any appeal but not to any counter claim unless it arises out of the same legal relationship or facts as the claim.

(6) The head of a State's diplomatic mission in Pakistan, or the person for the time being performing his functions, shall be deemed to have authority to submit on behalf of the State in respect of any proceedings; and any person who has entered into a contract on behalf of and with the authority of a State shall be deemed to have authority to submit on its behalf in respect of proceedings arising out of the contract.

5. *Commercial transactions and contracts to be performed in Pakistan.* (I) A State is not immune as respects proceedings relating to:

(a) a commercial transaction entered into by the State; or

(b) an obligation of the State which by virtue of a contract, which mayor may not be a commercial transaction, falls to be performed wholly or partly in Pakistan.

(2) Subsection (1) does not apply to a contract of employment between a State and an individual or if the parties to the dispute are States or have otherwise agreed in writing; and clause *(b)* of that subsection does not apply if the contract, not being a commercial transaction, was made in the territory of the State concerned and the obligation in question is governed by its administrative law.

(3) In this section "commercial transaction" means: *(a)* any contract for the supply of goods or services;

(b) any loan or other transaction' for" the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and

(c) any other transaction or activity; whether of a commercial, industrial, financial, professional or other similar character: into which a State enters or in which it engages otherwise than in the exercise of its sovereign authority.

6. *Contracts of employment.* (1) A State is not immune as respects proceedings relating to a contract of employment between a State and an individual where the contract was made, or the work is to be wholly or partly performed, in Pakistan.

Explanation. In this subsection, "proceedings relating to a contract of employment" includes proceedings between the parties to such a contract in respect of any statutory rights or duties to which they are entitled or subject as employer or employee.

(2) Subject to subsections (3) and (4), subsection (1) does not apply if:

(a) at the time when the proceedings. are brought the individual is a national of the State concerned; or

(b) at the time when the contract was made the individual was neither a citizen of Pakistan nor habitually resident in Pakistan; or

(c) the parties to the contract have otherwise agreed in writing.

(3) Where the work is for an office, agency or establishment maintained by the State in Pakistan for commercial purposes, clauses *(a)* and *(b)* of subsection (2) do not exclude the application of subsection (1) unless the individual was, at the time when the contract was made, habitually resident in that State.

(4) Clause *(c)* of subsection (2) does not exclude the application of subsection (1) where the law of Pakistan requires the proceedings to be brought before a court in Pakistan.

7. *Ownership, possession and use of property.* (1) A State is not immune as respects proceedings relating to:

(a) any interest of the State in, or its possession or use of, immovable property in Pakistan; or

(b) any obligation of the State arising out of its interest in, or its possession or use of, any such property.

(2) A State is not immune as respects proceedings, relating to any interest of the State in movable or immovable property, being an interest arising by way of succession, gift or *bona vacantia.*

(3) The fact that a State has or claims an interest in any property shall not preclude any court from exercising in respect of such property any jurisdiction 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.

(4) A court may entertain proceedings against a person other than a State notwithstanding that the proceedings relate to property:

(a) which is in the possession of a State; or

(b) in which a State claims an interest,

if the State would not have been immune had the proceedings been brought against it or, in a case referred to–in clause *(b),* if the claim is neither admitted nor supported by *prima facie* evidence.

8. *Patents, trade marks. etc.* A State is not immune as respects proceedings relating to:

(a) any patent, trade mark, design or plant breeders' rights belonging to the State which are registered or protected in Pakistan or for which the State has applied in Pakistan;

(b) an alleged infringement by the State in Pakistan of any patent, trade mark, design, plant breeders' rights or copyright; or

(c) the right to use a trade or business name in Pakistan.

9. *Membership of bodies corporate, etc.* (1) A State is not immune as respects proceedings relating to its membership of a body corporate, an unincorporated body or a partnership which:

(a) has members other than States; and

(b) is incorporated or constituted under the law of Pakistan or is controlled from, or has its principal place of business in, Pakistan, being proceedings arising between the State and the body or its other members or, as the case may be, between the State and the other partners.

(2) Subsection (1) does not apply if provision to the contrary has been made by an agreement in writing between the parties to the dispute or by the constitution or other instrument establishing or regulating the body or partnership in question.

10. *Arbitrations.* (1) Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of Pakistan which relate to the arbitration.

Subsection (1) has effect subject to the provisions of the arbitration agreement and does not apply to an arbitration agreement between States.

1. *Ships used for commercial purposes.* (1) The succeeding provisions of this section apply to:

(a) Admiralty proceedings; and

(b) proceedings on any claim which could be made the subject of Admiralty proceedings

(2) A State is not immune as respects:

(a) an action in rem against a ship belonging to it; or

(b) an action in personam for enforcing a claim in connection with such a ship; if, at the time when the cause of action arose, the ship was in use or intended for use for commercial purposes.

(3) Where an action in rem is brought against a ship belonging to a State for enforcing a claim in connection with another ship belonging to that State clause *(a)* of subsection (2)

does not apply as respects the first–mentioned ship unless, at the time when the cause of action relating to the other ship arose, both ships were in use or intended for use for commercial purposes.

(4) A State is not immune as respects:

(a) an action in rem against a cargo belonging to that State if both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes; or

(b) an action in personam for enforcing a claim in connection with such a cargo if the ship carrying it was then in use or intended for use as aforesaid.

(5) In the foregoing provisions references to a ship or cargo belonging to a State include references to a ship or cargo in its possession or control or in which it claims an interest; and, subject to subsection (4), subsection (2) applies to property other than a ship as it applies to a ship.

(6) Section 5 and 6 do not apply to proceedings of the nature mentioned in subsection (1) if the State in question is a party to the Brussels Convention and the claim relates to the operation of a ship owned or operated by that State, the carriage of cargo or passengers on any such ship or the carriage of cargo owned by that State on any other ship.

Explanation. In this section, "Brussels Convention" means the International Convention for the Unification of Certain Rules Concerning the Immunity of State–owned Ships signed in Brussels on the tenth day of April, 1926, and "ship" includes hovercraft.

12. *Value added tax, cultoml–dutiel, etc.* A State is not immune as respects proceedings relating to its liability for:

(a) value added tax, any duty of customs or excise or any agricultural levy; or

(b) rates in respect of premises occupied by it for commercial purposes.

Procedure

13. *Services of process and judgment in default of appearance.* (1) Any notice or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Ministry of Foreign Affairs of Pakistan to the Ministry of Foreign Affairs of the State and service shall be deemed to have been effected when the notice or document is received at the latter Ministry.

(2) Any proceedings in court shall not commence earlier than two months after the date on which the notice or document is received as aforesaid.

(3) A State which appears in proceedings cannot thereafter object that subsection (1) has not been complied with as respects those proceedings.

(4) No judgment in default of appearance shall be given against a State except on proof that subsection (1) has been complied with and that the time for the commencement of proceedings specified in subsection (2) has elapsed.

(5) A copy of any judgment given against a State in default of appearance shall be transmitted through the Ministry of Foreign Affairs of Pakistan to the Ministry of Foreign Affairs of the State and the time for applying to have the judgment set aside shall begin to run two months after the date on which the copy of the judgment is received at the latter Ministry.

(6) Subsection (1) does not prevent the service of a notice or other document in any manner to which the State has agreed and subsections (2) and (4) do not apply where service is effected in any manner.

(7) The preceding provisions of this section shall not be construed as applying to proceedings against a State by way of a counter–claim or to an action in rem,

14. *Other procedural privileges.* (1) No penalty by way of committal to prison or fine shall be imposed in respect of any failure or refusal by or on behalf of a State to disclose or produce any document or information for the purposes of proceedings to which it is a party.

(2) Subject to subsections (3) and (4).

(a) relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property; and

(b) the property of a State, not being property which is for the time being in use or intended for use for commercial purposes, shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.

(3) Subsection (2) does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent, which may be contained in a prior agreement, may be expressed so as to apply to a limited extent or generally:

Provided that a provision merely submitting to the jurisdiction of the courts shall not be deemed to be a consent for the purposes of this subsection.

(4) The head of a State's diplomatic mission in Pakistan, or the person for the time being performing his functions, shall be deemed to have authority to give on behalf of the State any such consent as is mentioned in subsection (3) and, for the purposes of clause *(b)* of subsection (2), his certificate that any property is not in use or intended for use by or on behalf of the State for commercial purposes shall be accepted as sufficient evidence of that fact unless the contrary is proved.

Supplementary provisions

15. *States entitled to immunities and privileges.* (1) The immunities and privileges conferred by this Act apply to any foreign State; and references to State include references to:

(a) the sovereign or other head of that State in his public capacity;

(b) the government of that State; and

(c) any department of that government,

but not to any entity, hereinafter referred to as a "separate entity", which is distinct from the executive organs of the government of the State and capable of suing or being sued.

(2) A separate entity is immune from the jurisdiction of the courts of Pakistan if, and only if:

(a) the proceedings relate to anything done by it in the exercise of sovereign authority; and

(b) the circumstances are such that a State would have been so immune.

(3) If a separate entity, not being a State's central bank or other monetary authority, submits to the jurisdiction in respect of proceedings in the case of which it is entitled to immunity by virtue of subsection (2) of this section, the provisions of subsections (1) to (3) of section 14 shall apply to it in respect of those proceedings as if references to a State were references to that entity.

(4) Property of a State's central bank or other monetary authority shall not, be regarded for the purposes of subsection (3) of section 14 as in use or intended for use for commercial purposes; and where any such bank or authority is a separate entity subsections (1) and (2) of that section shall apply to it as if references to a State were references to the bank or authority.

(5) Section 13 applies to proceedings against the constituent territories of a federal State; and the Federal Government may, by notification in the official Gazette, provide for the other provisions of this Ordinance to apply to any such constituent territory specified in the notification as they apply to a State.

(6) Where the provisions of this Ordinance do not apply to a constituent territory by virtue of a notification under subsection (5), the provisions of subsections (2) and (3) shall apply to it as if it were a separate entity.

16.*Restriction and extension of immunities and privileges.* (1) If it appears to the Federal Government that the immunities and privileges conferred by this Ordinance in relation to any State:

(a) exceed those accorded by the law of that State in relation to Pakistan; or

(b) are less than those required by an treaty, convention or other international agreement to which that State and Pakistan are parties, the Federal Government may, by notification in the official Gazette, provide for restricting or, as the case may be, extending those immunities and privileges to such extent as it may deem fit.

17.*Savings, etc.* (1) This Ordinance does not affect any immunity or privilege conferred by the Diplomatic and Consular Privileges Act, 1972 (IX of 1972); and

(a) section 6 does not apply to proceedings concerning the employment of the members of a mission within the meaning of the Convention set out in the First Schedule to the said Act of 1972 or of the members of a consular post within the meaning of the Convention set out in the Second Schedule to that Act;

(b) subsection (1) of section 7 does not apply to proceedings concerning a State's title to, or its possession of, property used for the purposes of a diplomatic mission.

(2) This Ordinance does not apply to:

(a) proceedings relating to anything done by or in relation to the armed forces of a State while present in Pakistan;

(b) criminal proceedings; or

(c) proceedings relating to taxation other than those mentioned in section 12.

18.*Proof as to certain matters.* A certificate under the hand of a Secretary to the Government of Pakistan shall be conclusive evidence on any question.

(a) whether any country is a State for the purposes of this Ordinance, whether any territory is a constituent territory of a federal State for those purposes or as to the person or persons to be regarded for those purposes as the head or government of a State; or

(b) whether, and if so when, a document has been served or received as mentioned in subsection (1) or subsection (5) of section 13.

19. *Repeal* Sections 86 and 87 of the Code of Civil Procedure, 1908 (Act V of 1908), are hereby repealed.

South African Foreign States Immunities Act 1981

ACT

To determine the extent of the immunity of foreign states from the jurisdiction of the courts of the Republic; and to provide for matters connected herewith.

Be it enacted by the State President and the House of Assembly of the Republic of South Africa, as follows:

1. (1) In this Act, unless the context otherwise indicates:
   (i) "commercial purposes" means purposes of any commercial transaction as defined in section 4 (3);
   (ii) "consular post" means a consulate–general, consulate, consular agency, trade office or labour office;
   (iii) "Republic" includes the territorial waters of the Republic, as deemed in section 2 of the Territorial Waters Act, 1963 (Act No. 87 of 1963);
   (iv) "separate entity" means an entity referred to in subsection (2) (I).

(2) Any reference in this Act to a foreign state shall in relation to any particular foreign state be construed as including a reference to:

(a) the head of state of that foreign state, in his capacity as such head of state;

(b) the government of that foreign state; and

(c) any Department of that government,

but not including a reference to:

(i) any entity which is distinct from the executive organs of the government of that foreign state and capable of suing or being sued; or

(ii) any territory forming a constituent part of a federal foreign state.

2. (1) A foreign state shall be immune from the jurisdiction of the courts of the Republic except as provided in this Act or in any proclamation issued thereunder.

(2) A court shall give effect to the immunity conferred by this section even though the foreign state does not appear in the proceedings in question.

(3) The provisions of this Act shall not be construed as subjecting any foreign state to the criminal jurisdiction of the courts of the Republic.

3. (1) A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings in respect of which the foreign state has expressly waived its immunity or is in terms of subsection (3) deemed to have waived its immunity.

(2) Waiver of immunity may be effected after the dispute which gave rise to the proceedings has arisen or by prior written agreement, but a provision in an agreement that it is to be governed by the law of the Republic shall not be regarded as a waiver.

(3) A foreign state shall be deemed to have waived its immunity:

(a) if it has instituted the proceedings; or

(b) subject to' the provisions of subsection (4), if it has intervened or taken any step in the proceedings.

(4) Subsection (3) *(b)* shall not apply to intervention or any step taken for the purpose only of:

(a) claiming immunity, or

(b) asserting an interest in property in circumstances such that the foreign state would have been entitled to immunity if the proceedings had been brought against it.

(5) A waiver in respect of any proceedings shall apply to any appeal and to any counter–claim arising out of the same legal relationship or facts as the claim.

(6) The head of a foreign state's diplomatic mission in the Republic, or the person for the time being performing his functions, shall be deemed to have authority to waive on behalf of the foreign state its immunity in respect of any proceedings, and any person who has entered into a contract on behalf of and with the authority of a foreign state shall be deemed to have authority to waive on behalf of the foreign state its immunity in respect of proceedings arising out of the contract.

4. (1) A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to:

(a) a commercial transaction entered into by the foreign state; or

(b) an obligation of the foreign state which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the Republic.

(2) Subsection (1) shall not apply if the parties to the dispute are foreign states or have agreed in writing that the dispute shall be justiciable by the courts of a foreign state.

(3) In subsection (1) "commercial transaction" means:

(a) any contract for the supply of services or goods;

(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such loan or other transaction or of any other financial obligation; and

(c) any other transaction or activity of a commercial, industrial, financial, professional or other similar character into which a foreign state enters or in which it engages otherwise than in the exercise of sovereign authority, but does not include a contract of employment between a foreign state and an individual.

5. (1) A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to a contract of employment between the foreign state and an individual if:

(a) the contract was entered into in the Republic or the work is to be performed wholly or partly in the Republic; and

(b) at time when the contract was entered into the individual was a South African citizen or was ordinarily resident in the Republic; and

(c) at the time when the proceedings are brought the individual is not a citizen of the foreign state.

(2) Subsection (1) shall not apply if:

(a) the parties to the contract have agreed in writing that the dispute or any dispute relating to the contract shall be justiciable by the courts of a foreign state; or

(b) the proceedings relate to the employment of the head of a diplomatic mission or any member of the diplomatic, administrative, technical or service staff of the mission or to the employment of the head of a consular post or any member of the consular, labour, trade, administrative, technical or service staff of the post.

6. A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to:

(a) the death or injury of any person; or

(b) damage to or loss of tangible property,

caused by an act or omission in the Republic.

7. (1) A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to:

(a) any interest of the foreign state in, or its possession or use of, immovable property in the Republic;

(b) any obligation of the foreign state arising out of its interest in, or its possession or use of, such property; or

(c) any interest of the foreign state in movable or immovable property, being an interest arising by way of succession, gift or *bona vacantia.*

(2) Subsection (1) shall not apply to proceedings relating to a foreign state's title to, or its use or possession of, property used for a diplomatic mission or a consular post.

8. A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to:

(a) any patent, trade–mark, design or plant breeder's right belonging to the foreign state and registered or protected in the Republic or for which the foreign state has applied in the Republic; or,

(b) an alleged infringement by the foreign state in the Republic of a patent, trade–mark, design, plant breeder's right or copyright; or

(c) the right 10 use a trade or business name in the Republic.

9. (1) A foreign State which is a member of an association or other body (whether a juristic person or not), or a partnership, which:

(a) has members that are not foreign states; and

(b) is incorporated or constituted under the law of the Republic or is controlled from the Republic or has its principal place of business in the Republic, shall not be immune from the jurisdiction of thc courts of the Republic in proceedings which:

(i) relate to the foreign state's membership of the association, other body or partnership; and

(ii) arise between the foreign state and the association or other body or its other members or, as the case may be, between the foreign state and the other partners.

(2) Subsection (1) shall not apply if:

(a) in terms of an agreement in writing between the parties to the dispute; or

(b) in terms of the constitution or other instrument establishing or governing the association, other body or partnership in question, the dispute is justiciable by the courts of a foreign state.

10.(1) A foreign state which has agreed in writing to submit a dispute which has arisen, or may rise, to arbitration, shall not be immune from the jurisdiction of the courts of the Republic in any proceedings which relate to the arbitration,

(2) Subsection (1) shall not apply if:

(a) the arbitration agreement provides that the proceedings shall be brought in the courts of a foreign state; or

(b) the parties to the arbitration agrecment are foreign states.

11. (1) A foreign state shall not be immune from the admiralty jurisdiction of any court of the Republic in:

(a) an action *in rem* against a ship belonging to the foreign state; or

(b) an action *in personam* for enforcing a claim in connection with such a ship, if, at the time when the cause of action arose, the ship was in use or intended for use for commercial purposes.

(2) A foreign state shall not be immune from the admiralty jurisdiction of any court of the Republic in:

(a) an action *in rem* against any cargo belonging to the foreign state if both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes; or

(b) an action *in personam* for enforcing a claim in connection with any such cargo if the ship carrying it was, at the time when the cause of action arose, in use or intended for use for commercial purposes.

(3) Any reference in this section to a ship or cargo belonging to a foreign state shall be construed as including a reference to a ship or cargo in the possession or control of a foreign state or in which a foreign state claims an interest, and subject to the provisions of subsection (2), subsection (1) shall apply to property other than a ship as it applies to a ship.

12.A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to the foreign state's liability for:

(a) sales tax or any customs or excise duty; or

(b) rates in respect of premises used by it for commercial purposes.

13.(1) Any process or other document required to be served for instituting proceedings against a foreign state shall be served by being transmitted through the Department of Foreign Affairs and Information of the Republic to the ministry of foreign affairs of the foreign state, and service shall be deemed to have been effected when the process or other document is received at that ministry.

(2) Any time prescribed by rules of court or otherwise for notice of intention to defend or oppose or entering an appearance shall begin to run two months after the date on which the process or document is received as aforesaid.

(3) A foreign state which appears in proceedings cannot thereafter object that subsection (1) has not been complied with in the case of those proceedings.

(4) No judgment in default of appearance shall be given against a foreign state except on proof that subsection (1) has been complied with and that the time for notice of intention to defend or oppose or entering an appearance as extended by subsection (2) has expired.

(5) A copy of any default judgment against a foreign state shall be transmitted through the Department of Foreign Affairs and Information of the Republic to the ministry of foreign affairs of the foreign state, and any time prescribed by rules of court or otherwise for applying to have the judgment set aside shall begin to run two months after the date on which the copy of the judgment is received at that ministry.

(6) Subsection (1) shall not prevent the service of any process or other document in any manner to which the foreign state has agreed, and subsection (2) and (4) shall not apply where service is effected in any such manner.

(7) The preceding provisions of this section shall not be construed as applying to proceedings against a foreign state by way of counter–claim or to an action *in rem,* and subsection (1) shall not be construed as affecting any rules of court whereby leave is required for the service of process outside the jurisdiction of the court.

14. (1) Subject to the provisions of subsections (2) and (3):

(a) relief shall not be given against a foreign state by way of interdict or order for specific performance or for the recovery of any movable or immovable property; and

(b) the property of a foreign state shall not be subject to any process for the enforcement of a judgment or an arbitration award or, in an action *in rem,* for its attachment or sale.

(2) Subsection (1) shall not prevent the giving of any relief or the issue of any process with the written consent of the foreign state concerned, and any such consent, which may be contained in a prior agreement, may be expressed so as to apply to a limited extent or generally, but a mere waiver of a foreign state's immunity from the jurisdiction of the courts of the Republic shall not be regarded as a consent for the purposes of this subsection.

(3) Subsection (1) *(b)* shall not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes.

15. (1) A separate entity shall be immune from the jurisdiction of the courts of the Republic only if:

(a) the proceedings relate to anything done by the separate entity in the exercise of sovereign authority; and

(b) the circumstances are such that a foreign state would have been so immune.

(2) If a separate entity, not being the central bank or other monetary authority of a foreign state, waives the immunity to which it is entitled by virtue of subsection (1) in respect of any proceedings, the provisions of section 14 shall apply to those proceedings as if references in those provisions to a foreign state were references to that separate entity.

(3) Property of the central bank or other monetary authority of a foreign state shall not be regarded for the purposes of subsection (3) of section 14 as in use or intended for use for commercial purposes, and where any such bank or authority is a separate entity the provisions of subsections (1) and (2) of that section shall apply to it as if references in those provisions to a foreign state were references to that bank or authority.

16. If it appears to the State President that the immunities and privileges conferred by this Act in relation to a particular foreign state:

(a) exceed or are less than those accorded by the law of that foreign state in relation to the Republic; or

(b) are less than those required by any treaty, convention or other international agreement to which that foreign state and the Republic are parties, he may by proclamation in the *Gazette* restrict or, as the case may be, extend those immunities and privileges to such extent as appears to him to be appropriate.

17. A certificate by or on behalf of the Minister of Foreign Affairs and Information shall be conclusive evidence on any question:

(a) whether any foreign country is a state for the purposes of this Act;

(b) whether any territory is a constituent part of a federal foreign state for the said purposes;

(c) as to the person or persons to be regarded for the said purposes as the head of state or government of a foreign state;

(d) whether, and if so when, any document has been served or received as contemplated in section 13 (1) or (5).

18. This Act shall be called the Foreign States Immunities Act, 1981, and shall come into operation on a date to be fixed by the State President by proclamation in the *Gazette.*

The ILA Montreal Draft Convention

The ILA Montreal Draft Convention on State Immunity (1982)

The States Party to this Convention.
Desiring to achieve a further harmonization of the law of State Immunity.
Agree upon the following Articles:

ARTICLE 1

Definitions

A. Tribunal
The term "tribunal includes any court and any administrative body acting in an adjudicative capacity.

B. Foreign State
The term "foreign State" includes:
1. The government of the State;
2. Any other State organs;
3. Agencies and instrumentalities of the State not possessing legal personality distinct from the State;
4. The constituent units of a federal State.

An agency or instrumentality of a foreign State which possess legal personality distinct from the State shall be treated as a foreign State only for acts or omissions performed in the exercise of sovereign authority, ie. *jure imperii.*

C. Commercial Activity
The term "commercial activity" refers either to a regular course of commercial conduct or a particular commercial transaction or act. It shall include any activity or transaction into which a foreign State enters or in which it engages otherwise than in the exercise of sovereign authority and in particular:
1. Any arrangement for the supply of goods or services;
2. Any financial transaction involving lending or borrowing or guaranteering financial obligations.

In applying this definition, the commercial character of a particular act shall be determined by reference to the nature of the act rather than by reference to its purpose.

ARTICLE II

Immunity of a Foreign State from adjudication

In general, a foreign State shall be immune from the adjudicatory jurisdiction of a forum State for acts performed by it in the exercise of its sovereign authority, i.e. *jure imperii.* It shall not be immune in the circumstances provided in Article III.

ARTICLE III

Exceptions to Immunity from Adjudication

A foreign State shall not be immune from– the jurisdiction of the forum State to adjudicate in the following instances *inter alia:*

A. Where the foreign State has waived its immunity from the jurisdiction of the forum State either expressly or by implication. A waiver may not be withdrawn except in accordance with its terms.
   1. An express waiver may be made *inter alia:*
      (a) by unilateral declaration; or
      (b) by international agreement; or
      (c) by a provision in a contract; or
      (d) by an explicit agreement.
   2. An implied waiver may be made *inter alia:*
      (a) by participating in proceedings before a tribunal of the forum State.
         (i) Subsection 2(a) above shall not apply if a foreign State intervenes or takes steps in the proceedings for the purpose of:
            (A) claiming immunity; or
            (B) asserting an interest in the proceedings in circumstances such that it would have been entitled to immunity if the proceedings had been brought against it;
         (ii) In any action in which a foreign State participates in a proceeding before a tribunal in the forum State. the foreign State shall not be immune with respect to any counterclaim or setoff (irrespective of the amount thereof):
            (A) for which a foreign State would not be entitled to immunity under other provisions of this Convention had such a claim been brought in a separate action against the foreign State; or
            (B) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign State;
         (iii) In any action not within the scope of subsection 2(A)(ii) above in which a foreign State participates in a proceeding before a tribunal in the forum State. the foreign State shall not be immune with respect to claims arising between the parties from unrelated transactions up – to the amount of its adverse claim.
      (b) by agreeing in writing to submit a dispute which has arisen, or may arise, to arbitration in the forum State or in a number of States which may include the forum State. In such an instance a foreign State shall not be immune with respect to proceedings in a tribunal of the forum State which relate to:
         (i) the constitution or appointment of the arbitral tribunal; or
         (ii) the validity or interpretation of the arbitration agreement or the award, or
         (iii) the arbitration procedure; or
         (iv) the setting aside of the award.

B. Where the cause of action arises out of:
   1. A commercial activity carried on by the foreign State; or
   2. An obligation of the foreign State arising out of a contract (whether or not a commercial transaction but excluding a contract of employment) unless the parties have otherwise agreed in writing.

C. Where the foreign State enters into a contract for employment in the forum State. Or where work under such a contract is to be performed wholly or partly in the forum State and the proceedings relate to the contract. This provision shall not apply if:
   1. At the time proceedings are brought the employee is a national of the foreign State; or
   2. At the time the contract for employment was made the employee was neither a national nor a permanent resident of the forum State; or
   3. The employer and employee have otherwise agreed in writing. This provision shall not confer on tribunals in the forum State competence in respect of employees appointed under the public (administrative) law of the foreign State.

D. Where the cause of action relates to:
   1. The foreign State's rights or interests in, or its possession or use of, immovable property in the forum State; or
   2. Obligations of the foreign State arising out of its rights or interests in, or its possession or use of, immovable property in the forum State; or
   3. Rights or interests of the foreign State in movable or immovable property in the forum State arising by way of succession, gift or *bona vacantia.*

E. Where the cause of action relates to:
   1. Intellectual or industrial property rights (patent, industrial design, trademark, copyright, or other similar rights) belonging to the foreign State in the forum State or for which the foreign State has applied in the forum State; or
   2. A claim for infringement by the foreign State of any patent, industrial design, trademark, copyright or other similar right; or
   3. The right to use a trade or business name in the forum State.

F. Where the cause of action relates to:
   1. Death or personal injury; or
   2. Damage to or loss of property.

   Subsections 1 and 2 shall not apply unless the act or omission which caused the death, injury or damage occurred wholly or partly in the forum State.

G. Where the cause of action relates to rights in property taken in violation of international law and that property or property exchanged for that property is:
   1. In the forum State in connection with a commercial activity carried on in the forum State by the foreign State; or
   2. Owned or operated by an agency or instrumentality of the foreign State and that agency or instrumentality is engaged in a commercial activity in the forum State.

ARTICLE IV

Service of Process

In proceedings against a foreign State under these articles the following rules shall apply:

A. Service shall be made upon a foreign State:
   1. By transmittal of a copy of the summons, notice of suit, and complaint in accordance with any special arrangement in writing for service between the plaintiff and the foreign State; or
   2. By transmittal of a copy of the summons, notice of suit, and complaint in accordance with any applicable international agreement on service of judicial documents; or
   3. By transmittal of a copy of the summons, notice of suit, and complaint through dip-

lomatic channels to the ministry of foreign affairs of the foreign State; or

4. By transmittal of a copy of the summons, notice of suit, and complaint in any other manner agreed between the foreign State and the forum State.

B. Service of documents shall be deemed to have been effected upon their receipt by the ministry of foreign affairs unless some other time of service has been prescribed in an applicable international convention or arrangement.

C. The time limit within which a State must enter an appearance or appeal against any judgment or order shall begin to run sixty days after the. date on which the summons or notice of suit or complaint is deemed to have been– effectively received in accordance with this article.

ARTICLE V

Default Judgments

No default judgment may be entered by a tribunal in a forum State against a foreign State, unless service has been effected in accordance with Article IV and a claim or right to relief is established to the satisfaction of the tribunal.

ARTICLE VI

Extent of Liability

A. As to any claim with respect to which a foreign State is not entitled to immunity under this Convention, the foreign State shall be liable as to amount to the same extent as a private individual under like circumstances; but a foreign State shall not be liable for punitive damages. If, however, in any case wherein death or other loss has occurred, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign State shall be liable for actual or compensatory damages measured by the primary loss incurred by the persons for whose benefit the suit was brought.

B. Judgments enforcing maritime liens against a foreign State may not exceed the value of the vessel or cargo, with value assessed as of the date notice of suit was served.

ARTICLE VII

Immunity from Attachment and Execution

A foreign State's property in the forum State shall be immune from attachment, arrest, and execution, except as provided in Article VIII.

ARTICLE VIII

Exceptions to Immunity from Attachment and Execution

A. A foreign State's property in the forum State, shall not be immune from any measure for the enforcement of a judgment or an arbitration award if;

1. The foreign State has waived its immunity either expressly or by implication from such measures. A waiver may not be withdrawn except in accordance with its terms; or
2. The property is in use for the purposes of commercial activity or was in use for the

commercial activity upon which the claim is based; or

3. Execution is against property which has been taken in violation of international law, or which has been exchanged for property taken in violation of international law and is pursuant to a judgment or an arbitral award establishing rights in such property.

B. In the case of mixed financial accounts that proportion duly identified of the. account used for non-commercial activity shall be entitled to immunity.

C. Attachment or execution shall not be permitted, if:
   1. The property against which execution is sought to be had is used for diplomatic or consular purposes; or
   2. The property is of a military character or is used or intended for use for military purposes; or
   3. The property is that of a State central bank held by it for central banking purposes; or
   4. The property is that of a State monetary authority held by it for monetary purposes; unless the foreign State has made an explicit waiver with respect to such property.

D. In exceptional circumstances, a tribunal of the forum State may order interim measures against the property of a foreign State available under this convention for attachment, arrest, or execution, including prejudgment attachment of assets and injunctive relief, if a party present a *prima facie* case that such assets within the territorial limits of the forum State may be removed, dissipated or otherwise dealt with by the foreign State before the tribunal renders judgment and there is a reasonable probability that such action will frustrate execution of any such judgment.

ARTICLE IX

Miscellaneous Provisions

A. This Convention is without prejudice to;
   1. Other applicable international agreements;
   2. The rules of international law relating to diplomatic and consular privileges and immunities, to the immunities of foreign public ships and to the immunities of international organizations.

B. Nothing in this Convention shall be interpreted as conferring on tribunals in the forum State any additional competence with respect to subject matter.

Foreign States Immunities Act No. 196 of 1985

TABLE OF PROVISIONS

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – LONG TITLE
An Act relating to foreign State immunity
(Assented to 16 December 1985)

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 1
Short title

1. This Act may be cited as the Foreign States Immunities Act 1985.
Commencement
(Minister's second reading speech made in–
House of Representatives on 21 August 1985;
Senate on 8 October 1985)

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 2

2. The provisions of this Act shall come into operation on such day as is, or such respective days as are, fixed by Proclamation.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 3
Interpretation

3. (1) In this Act, unless the contrary intention appears–
"agreement" means an agreement in writing and includes–
(a) a treaty or other international agreement in writing; and
(b) a contract or other agreement in writing;
"Australia", when used in a geographical sense, includes each of the external Territories;
"bill of exchange" includes a promissory note;
"court" includes a tribunal or other body (by whatever name called) that has functions, or exercises powers, that are judicial functions or powers or are of a kind similar to judicial functions or powers;
"diplomatic property" means property that, at the relevant time, is in use predominantly for the purpose of establishing or maintaining a diplomatic or consular mission, or a visiting mission, of a foreign State to Australia;
"foreign State" means a country the territory of which is outside Australia, being a country that is –
(a) an independent sovereign state; or
(b) a separate territory (whether or not it is self–governing) that is not part of an independent sovereign state;
"initiating process" means an instrument (including a statement of claim, application, summons, writ, order or third party notice) by reference to which a person becomes a party to a proceeding;
"law of Australia" means –
(a) a law in force throughout Australia; or
(b) a law of or in force in a part of Australia, and includes the principles and rules of the common law and of equity as so in force;
"military property" means –
(a) a ship of war, a Government yacht, a patrol vessel, a police or customs vessel, a hospital ship, a defence force supply ship or an auxiliary vessel, being a ship or ves-

sel that, at the relevant time, is operated by the foreign State concerned (whether pursuant to requisition or under a charter by demise or otherwise); or

(b) property (not being a ship or vessel) that is –

(i) being used in connection with a military activity; or

(ii) under the control of a military authority or defence agency for military or defence purposes;

"proceeding" means a proceeding in a court but does not include a prosecution for an offence or an appeal or other proceeding in the nature of an appeal in relation to such a prosection;

"property" includes a chose in action;

"separate entity", in relation to a foreign State, means a natural person (other than an Australian citizen), or a body corporate or corporation sole (other than a body corporate or corporation sole that has been established by or under a law of Australia), who or that –

(a) is an agency or instrumentality of the foreign State; and

(b) is not a department or organ of the executive government of the foreign State.

(2) For the purposes of the definition of "separate entity" in sub–section (1), a natural person who is, or a body corporate or a corporation sole that is, an agency of more than one foreign State shall be taken to be a separate entity of each of the foreign States.

(3) Unless the contrary intention appears, a reference in this Act to a foreign State includes a reference to –

(a) a province, state, self–governing territory or other political subdivision (by whatever name known) of a foreign State;

(b) the head of a foreign State, or of a political subdivision of a foreign State, in his or her public capacity; and

(c) the executive government or part of the executive government of a foreign State or of a political subdivision of a foreign State, including a department or organ of the executive government of a foreign State or subdivision, but does not include a reference to a separate entity of a foreign State.

(4) A reference in this Act to a court of Australia includes a reference to a court that has jurisdiction in or for any part of Australia.

(5) A reference in this Act to a commercial purpose includes a reference to a trading, a business, a professional and an industrial purpose.

(6) A reference in this Act to the entering of appearance or to the entry of judgment in default of appearance includes a reference to any like procedure.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 4

External Territories

4. This Act extends to each external Territory.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 5

Act to bind Crown

5. This Act binds the Crown in all its capacities.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 6
Savings of other laws

6. This Act does not affect an immunity or privilege that is conferred by or under the Consular Privileges and Immunities Act 1972, the Defence (Visiting Forces) Act 1963, the Diplomatic Privileges and Immunities Act 1967 or any other Act.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 7
Application

7. (1) Part II (other than section 10) does not apply in relation to a proceeding concerning –

(a) a contract or other agreement or a bill of exchange that was made or given;
(b) a transaction or event that occurred;
(c) an act done or omitted to have been done; or
(d) a right, liability or obligation that came into existence, before the commencement of this Act.

(2) Section 10 does not apply in relation to a submission mentioned in that section that was made before the commencement of this Act.

(3) Part III and section 36 do not apply in relation to a proceeding instituted before the commencement of this Act.

(4) Part IV only applies where, by virtue of a provision of Part II, the foreign State is not immune from the jurisdiction of the courts of Australia in the proceeding concerned.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 8
Application to courts

8. In the application of this Act to a court, this Act has effect only in relation to the exercise or performance by the court of judicial power or function or a power or function that is of a like kind.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 9
General immunity from jurisdiction

9. Except as provided by or under this Act, a foreign State is immune from the jurisdiction of the courts of Australia in a proceeding.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 10
Submission to jurisdiction

10. (1) A foreign State is not immune in a proceeding in which it has submitted to the jurisdiction in accordance with this section.

(2) A foreign State may submit to the jurisdiction at any time, whether by agreement or otherwise, but a foreign State shall not be taken to have so submitted by reason only that it is a party to an agreement the proper law of which is the law of Australia.

(3) A submission under sub–section (2) may be subject to a specified limitation, condition or exclusion (whether in respect of remedies or otherwise).

(4) Without limiting any other power of a court to dismiss, stay or otherwise decline to hear and determine a proceeding, the court may dismiss, stay or otherwise decline to hear and determine a proceeding if it is satisfied that, by reason of the nature of a limitation, condition or exclusion to which a submission is subject (not being a limitation, condition or exclusion in respect of remedies), it is appropriate to do so.

(5) An agreement by a foreign State to waive its immunity under this Part has effect to waive that immunity and the waiver may not be withdrawn except in accordance with the terms of the agreement.

(6) Subject to sub–sections (7), (8) and (9), a foreign State may submit to the jurisdiction in a proceeding by –

(a) instituting the proceeding; or

(b) intervening in, or taking a step as a party to, the proceeding.

(7) A foreign State shall not be taken to have submitted to the jurisdiction in a proceeding by reason only that –

(a) it has made an application for costs; or

(b) it has intervened, or has taken a step, in the proceeding for the purpose or in the course of asserting immunity.

(8) Where the foreign State is not a party to a proceeding, it shall not be taken to have submitted to the jurisdiction by reason only that it has intervened in the proceeding for the purpose or in the course of asserting an interest in property involved in or affected by the proceeding.

(9) Where –

(a) the intervention or step was taken by a person who did not know and could not reasonably have been expected to know of the immunity; and

(b) the immunity is asserted without unreasonable delay, the foreign State shall not be taken to have submitted to the jurisdiction in the proceeding by reason only of that intervention or step.

(10) Where a foreign State has submitted to the jurisdiction in a proceeding, then, subject to the operation of sub–section (3), it is not immune in relation to a claim made in the proceeding by some other party against it (whether by way of set–off, counter–claim or otherwise), being a claim that arises out of and relates to the transactions or events to which the proceeding relates.

(11) In addition to any other person who has authority to submit, on behalf of a foreign State, to the jurisdiction –

(a) the person for the time being performing the functions of the head of the State's diplomatic mission in Australia has that authority; and

(b) a person who has entered into a contract on behalf of and with the authority of the State has authority to submit in that contract, on behalf of the State, to the jurisdiction in respect of a proceeding arising out of the contract.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 11

Commercial transactions

11. (1) A foreign State is not immune in a proceeding in so far as the proceeding concerns a commercial transaction.

(2) Sub–section (1) does not apply –

(a) if all the parties to the proceeding –

(i) are foreign States or are the Commonwealth and one or more foreign States; or

(ii) have otherwise agreed in writing; or

(b) in so far as the proceeding concerns a payment in respect of a grant, a scholarship, a pension or a payment of a like kind.

(3) In this section, "commercial transaction" means a commercial, trading, business, professional or industrial or like transaction into which the foreign State has entered or a like activity in which the State has engaged and, without limiting the generality of the foregoing, includes –

(a) a contract for the supply of goods or services;

(b) an agreement for a loan or some other transaction for or in respect of the provision of finance; and

(c) a guarantee or indemnity in respect of a financial obligation, but does not include a contract of employment or a bill of exchange.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 12

Contracts of employment

12. (1) A foreign State, as employer, is not immune in a proceeding in so far as the proceeding concerns the employment of a person under a contract of employment that was made in Australia or was to be performed wholly or partly in Australia.

(2) A reference in sub–section (1) to a proceeding includes a reference to a proceeding concerning –

(a) a right or obligation conferred or imposed by a law of Australia on a person as employer or employee; or

(b) a payment the entitlement to which arises under a contract of employment.

(3) Where, at the time when the contract of employment was made, the person employed was –

(a) a national of the foreign State but not a permanent resident of Australia; or

(b) an habitual resident of the foreign State, sub–section (1) does not apply.

(4) Sub–section (1) does not apply where –

(a) an inconsistent provision is included in the contract of employment; and

(b) a law of Australia does not avoid the operation of, or prohibit or render unlawful the inclusion of, the provision.

(5) Sub–section (1) does not apply in relation to the employment of –

(a) a member of the diplomatic staff of a mission as defined by the Vienna Convention on Diplomatic Relations, being the Convention the English text of which is set out in the Schedule to the Diplomatic Privileges and Immunities Act 1967; or

(b) a consular officer as defined by the Vienna Convention on Consular Relations, being the Convention the English text of which is set out in the Schedule to the Consular Privileges and Immunities Act 1972.

(6) Sub–section (1) does not apply in relation to the employment of –

(a) a member of the administrative and technical staff of a mission as defined by the Convention referred to in paragraph (5) (a); or

(b) a consular employee as defined by the Convention referred to in paragraph (5) (b), unless the member or employee was, at the time when the contract of employment was made, a permanent resident of Australia.

(7) In this section, "permanent resident of Australia" means –

(a) an Australian citizen; or

(b) a person resident in Australia whose continued presence in Australia is not subject to a limitation as to time imposed by or under a law of Australia.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 13

Personal injury and damage to property

13. A foreign State is not immune in a proceeding in so far as the proceeding concerns –

(a) the death of, or personal injury to, a person; or

(b) loss of or damage to tangible property, caused by an act or omission done or omitted to be done in Australia.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 14

Ownership, possession and use of property, &c.

14. (1) A foreign State is not immune in a proceeding in so far as the proceeding concerns –

(a) an interest of the State in, or the possession or use by the State of, immovable property in Australia; or

(b) an obligation of the State that arises out of its interest in, or its possession or use of, property of that kind.

(2) A foreign State is not immune in a proceeding in so far as the proceeding concerns an interest of the State in property that arose by way of gift made in Australia or by succession.

(3) A foreign State is not immune in a proceeding in so far as the proceeding concerns –

(a) bankruptcy, insolvency or the winding up of a body corporate; or

(b) the administration of a trust, of the estate of a deceased person or of the estate of a person of unsound mind.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 15

Copyright, patents, trade marks, &c.

15. (1) A foreign State is not immune in a proceeding in so far as the proceeding concerns –

(a) the ownership of a copyright or the ownership, or the registration or protection in Australia, of an invention, a design or a trade mark;

(b) an alleged infringement by the foreign State in Australia of copyright, a patent for an invention, a registered trade mark or a registered design; or

(c) the use in Australia of a trade name or a business name.

(2) Sub–section (1) does not apply in relation to the importation into Australia, or the use in Australia, of property otherwise than in the course of or for the purposes of a commercial transaction as defined by sub–section 11 (3).

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 16

Membership of bodies corporate, &c.

16. (1) A foreign State is not immune in a proceeding in so far as the proceeding concerns its membership, or a right or obligation that relates to its membership, of a body corporate, an unincorporated body or a partnership that –

(a) has a member that is not a foreign State or the Commonwealth; and

(b) is incorporated or has been established under the law of Australia or is controlled from, or has its principal place of business in, Australia, being a proceeding arising between the foreign State and the body or other members of the body or between the foreign State and one or more of the other partners.

(2) Where a provision included in –

(a) the constitution or other instrument establishing or regulating the body or partnership; or

(b) an agreement between the parties to the proceeding, is inconsistent with sub–section (1), that sub–section has effect subject to that provision.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 17

Arbitrations

17. (1) Where a foreign State is a party to an agreement to submit a dispute to arbitration, then, subject to any inconsistent provision in the agreement, the foreign State is not immune in a proceeding for the exercise of the supervisory jurisdiction of a court in respect of the arbitration, including a proceeding –

(a) by way of a case stated for the opinion of a court;

(b) to determine a question as to the validity or operation of the agreement or as to the arbitration procedure; or

(c) to set aside the award.

(2) Where –

(a) apart from the operation of sub–paragraph 11 (2) (a) (ii), subsection 12 (4) or sub–section 16 (2), a foreign State would not be immune in a proceeding concerning a transaction or event; and

(b) the foreign State is a party to an agreement to submit to arbitration a dispute about the transaction or event, then, subject to any inconsistent provision in the agreement, the foreign State is not immune in a proceeding concerning the recognition as binding for any purpose, or for the enforcement, of an award made pursuant to the arbitration, wherever the award was made.

(3) Sub–section (1) does not apply where the only parties to the agreement are any 2 or more of the following:

(a) a foreign State;

(b) the Commonwealth;

(c) an organisation the members of which are only foreign States or the Commonwealth and one or more foreign States.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 18

Actions in rem

18. (1) A foreign State is not immune in a proceeding commenced as an action in rem against a ship concerning a claim in connection with the ship if, at the time when the cause of action arose, the ship was in use for commercial purposes.

(2) A foreign State is not immune in a proceeding commenced as an action in rem against a ship concerning a claim against another ship if –

(a) at the time when the proceeding was instituted, the ship that is the subject of the action in rem was in use for commercial purposes; and

(b) at the time when the cause of action arose, the other ship was in use for commercial purposes.

(3) A foreign State is not immune in a proceeding commenced as an action in rem against cargo that was, at the time when the cause of action arose, a commercial cargo.

(4) The preceding provisions of this section do not apply in relation to the arrest, detention or sale of a ship or cargo.

(5) A reference in this section to a ship in use for commercial purposes or to a commercial cargo is a reference to a ship or a cargo that is commercial property as defined by sub–section 32 (3).

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 19

Bills of exchange

19. Where –

(a) a bill of exchange has been drawn, made, issued or indoresed by a foreign State in connection with a transaction or event; and

(b) the foreign State would not be immune in a proceeding in so far as the proceeding concerns the transaction or event, the foreign State is not immune in a proceeding in so far as the proceeding concerns the bill of exchange.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 20

Taxes

20. A foreign State is not immune in a proceeding in so far as the proceeding concerns an obligation imposed on it by or under a provision of a law of Australia with respect to taxation, being a provision that is prescribed, or is included in a class of provisions that is prescribed, for the purposes of this section.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 21

Related proceedings

21. Where, by virtue of the operation of the preceding provisions of this Part, a foreign State is not immune in a proceeding in so far as the proceeding concerns a matter, it is not immune in any other proceeding (including an appeal) that arises out of and relates to the first–mentioned proceeding in so far as that other proceeding concerns that matter.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 22

Application of Part to separate entities

22. The preceding provisions of this Part (other than sub–paragraph 11 (2) (a) (i), sub–section 16 (1) and sub–section 17 (3)) apply in relation to a separate entity of a foreign State as they apply in relation to the foreign State.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 23

Service of initiating process by agreement

23. Service of initiating process on a foreign State or on a separate entity of a foreign State may be effected in accordance with an agreement (wherever made and whether made before or after the commencement of this Act) to which the State or entity is a party.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 24

Service through the diplomatic channel

24. (1) Initiating process that is to be served on a foreign State may be delivered to the Attorney–General for transmission by the Department of Foreign Affairs to the department or organ of the foreign State that is equivalent to that Department.

(2) The initiating process shall be accompanied by –

(a) a request in accordance with Form 1 in the Schedule;

(b) a statutory declaration of the plaintiff or applicant in the proceeding stating that the rules of court or other laws (if any) in respect of service outside the jurisdiction of the court concerned have been complied with; and

(c) if English is not an official language of the foreign State –

(i) a translation of the initiating process into an official language of the foreign State; and

(ii) a certificate in that language, signed by the translator, setting out particulars of his or her qualifications as a translator and stating that the translation is an accurate translation of the initiating process.

(3) Where the process and documents are delivered to the equivalent department or organ of the foreign State in the foreign State, service shall be taken to have been effected when they are so delivered.

(4) Where the process and documents are delivered to some other person on behalf of and with the authority of the foreign State, service shall be taken to have been effected when they are so delivered.

(5) Sub–sections (1) to (4) (inclusive) do not exclude the operation of any rule of court or other law under which the leave of a court is required in relation to service of the initiating process outside the jurisdiction.

(6) Service of initiating process under this section shall be taken to have been effected outside the jurisdiction and in the foreign State concerned, wherever the service is actually effected.

(7) The time for entering an appearance begins to run at the expiration of 2 months after the date on which service of the initiating process was effected.

(8) This section does not apply to service of initiating process in a proceeding commenced as an action in rem.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 25

Other service ineffective

25. Purported service of an initiating process upon a foreign State in Australia otherwise than as allowed or provided by section 23 or 24 is ineffective.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 26

Waiver of objection to service

26. Where a foreign State enters an appearance in a proceeding without making an objection in relation to the service of the initiating process, the provisions of this Act in relation to that service shall be taken to have been complied with.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 27

Judgment in default of appearance

27. (1) A judgment in default of appearance shall not be entered against a foreign State unless –

(a) it is proved that service of the initiating process was effected in accordance with this Act and that the time for appearance has expired; and

(b) the court is satisfied that, in the proceeding, the foreign State is not immune.

(2) A judgment in default of appearance shall not be entered against a separate entity of a foreign State unless the court is satisfied that, in the proceeding, the separate entity is not immune.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 28

Enforcement of default judgments

28. (1) Subject to sub–section (6), a judgment in default of appearance is not capable of being enforced against a foreign State until the expiration of 2 months after the date on which service of –

(a) a copy of the judgment, sealed with the seal of the court or, if there is no seal, certified by an officer of the court to be a true copy of the judgment; and

(b) if English is not an official language of the foreign State –

(i) a translation of the judgment into an official language of the foreign State; and

(ii) a certificate in that language, signed by the translator, setting out particulars of his or her qualifications as a translator and stating that the translation is an accurate translation of the judgment, has been effected in accordance with this section on the department or organ of the foreign State that is equivalent to the Department of Foreign Affairs.

(2) Where a document is to be served as mentioned in sub–section (1), the person in whose favour the judgment was given shall give it, together with a request in accordance with Form 2 in the Schedule, to the Attorney–General for transmission by the Department of Foreign Affairs to the department or organ of the foreign State that is equivalent to that Department.

(3) Where the document is delivered to the equivalent department or organ of the foreign State in the foreign State, service shall be taken to have been effected when it is so delivered.

(4) Where the document is delivered to some other person on behalf of and with the authority of the foreign State, service shall be taken to have been effected when it is so delivered.

(5) The time, if any, for applying to have the judgment set aside shall be at least 2 months after the date on which the document is delivered to or received on behalf of that department or organ of the foreign State.

(6) Where a judgment in default of appearance has been given by a court against a foreign State, the court may, on the application of the person in whose favour the judgment was given, permit, on such terms and conditions as it thinks fit, the judgment to be enforced in accordance with this Act against the foreign State before the expiration of the period mentioned in sub–section (1).

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 29

Power to grant relief

29. (1) Subject to sub–section (2), a court may make any order (including an order for interim or final relief) against a foreign State that it may otherwise lawfully make unless the order would be inconsistent with an immunity under this Act.

(2) A court may not make an order that a foreign State employ a person or re–instate a person in employment.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 30

Immunity from execution

30. Except as provided by this Part, the property of a foreign State is not subject to any process or order (whether interim or final) of the courts of Australia for the satisfaction or enforcement of a judgment, order or arbitration award or, in Admiralty proceedings, for the arrest, detention or sale of the property.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 31

Waiver of immunity from execution

31. (1) A foreign State may at any time by agreement waive the application of section 30 in relation to property, but it shall not be taken to have done so by reason only that it has submitted to the jurisdiction.

(2) The waiver may be subject to specified limitations.

(3) An agreement by a foreign State to waive its immunity under section 30 has effect to waive that immunity and the waiver may not be withdrawn except in accordance with the terms of the agreement.

(4) A waiver does not apply in relation to property that is diplomatic property or military property unless a provision in the agreement expressly designates the property as property to which the waiver applies.

(5) In addition to any other person who has authority to waive the application of section 30 on behalf of a foreign State or a separate entity of the foreign State, the person for the time being performing the functions of the head of the State's diplomatic mission in Australia has that authority.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 32

Execution against commercial property

32. (1) Subject to the operation of any submission that is effective by reason of section 10, section 30 does not apply in relation to commercial property.

(2) Where a foreign State is not immune in a proceeding against or in connection with a ship or cargo, section 30 does not prevent the arrest, detention or sale of the ship or cargo if, at the time of the arrest or detention –

(a) the ship or cargo was commercial property; and

(b) in the case of a cargo that was then being carried by a ship belonging to the same or to some other foreign State – the ship was commercial property.

(3) For the purposes of this section –

(a) commercial property is property, other than diplomatic property or military property, that is in use by the foreign State concerned substantially for commercial purposes; and

(b) property that is apparently vacant or apparently not in use shall be taken to be being used for commercial purposes unless the court is satisfied that it has been set aside otherwise than for commercial purposes.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 33

Execution against immovable property, &c.

33. Where –

(a) property –

(i) has been acquired by succession or gift; or

(ii) is immovable property; and

(b) a right in respect of the property has been established as against a foreign State by a judgment or order in a proceeding as mentioned in section 14, then, for the purpose of enforcing that judgment or order, section 30 does not apply to the property.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 34

Restrictions on certain other relief

34. A penalty by way of fine or committal shall not be imposed in relation to a failure by a foreign State or by a person on behalf of a foreign State to comply with an order made against the foreign State by a court.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 35

Application of Part to separate entities

35. (1) This Part applies in relation to a separate entity of a foreign State that is the central bank or monetary authority of the foreign State as it applies in relation to the foreign State.

(2) Subject to sub–section (1), this Part applies in relation to a separate entity of the foreign State as it applies in relation to the foreign State if, in the proceeding concerned –

(a) the separate entity would, apart from the operation of section 10, have been immune from the jurisdiction; and

(b) it has submitted to the jurisdiction.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 36

Heads of foreign States

36. (1) Subject to the succeeding provisions of this section, the Diplomatic Privileges and Immunities Act 1967 extends, with such modifications as are necessary, in relation to the person who is for the time being –

(a) the head of a foreign State; or

(b) a spouse of the head of a foreign State, as that Act applies in relation to a person at a time when he or she is the head of a diplomatic mission.

(2) This section does not affect the application of any law of Australia with respect to taxation.

(3) This section does not affect the application of any other provision of this Act in relation to a head of a foreign State in his or her public capacity.

(4) Part III extends in relation to the head of a foreign State in his or her private capacity as it applies in relation to the foreign State and, for the purpose of the application of Part III as it so extends, a reference in that Part to a foreign State shall be read as a reference to the head of the foreign State in his or her private capacity.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 37

Effect of agreements on separate entities

37. An agreement made by a foreign State and applicable to a separate entity of that State has effect, for the purposes of this Act, as though the separate entity were a party to the agreement.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 38

Power to set aside process, &c.

38. Where, on the application of a foreign State or a separate entity of a foreign State, a court is satisfied that a judgment, order or process of the court made or issued in a proceeding with respect to the foreign State or entity is inconsistent with an immunity conferred by or under this Act, the court shall set aside the judgment, order or process so far as it is so inconsistent.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 39

Discovery

39. (1) A penalty by way of fine or committal shall not be imposed in relation to a failure or refusal by a foreign State or by a person on behalf of a foreign State to disclose or produce a document or to furnish information for the purposes of a proceeding.

(2) Such a failure or refusal is not of itself sufficient ground to strike out a pleading or part of a pleading.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 40

Certificate as to foreign State, &c.

40. (1) The Minister for Foreign Affairs may certify in writing that, for the purposes of this Act –

(a) a specified country is, or was on a specified day, a foreign State;

(b) a specified territory is or is not, or was or was not on a specified day, part of a foreign State;

(c) a specified person is, or was at a specified time, the head of, or the government or part of the government of, a foreign State or a former foreign State; or

(d) service of a specified document as mentioned in section 24 or 28 was effected on a specified day.

(2) The Minister for Foreign Affairs may, either generally or as otherwise provided by the instrument of delegation, delegate by instrument in writing to a person his or her powers under sub-section (1) in relation to the service of documents.

(3) A power so delegated, when exercised by the delegate, shall, for the purposes of this Act, be deemed to have been exercised by the Minister.

(4) A delegation under sub-section (2) does not prevent the exercise of the power by the Minister.

(5) A certificate under this section is admissible as evidence of the facts and matters stated in it and is conclusive as to those facts and matters.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 41

Certificate as to use

41. For the purposes of this Act, a certificate in writing given by the person for the time being performing the functions of the head of a foreign State's diplomatic mission in Australia to the effect that property specified in the certificate, being property –

(a) in which the foreign State or a separate entity of the foreign State has an interest; or

(b) that is in the possession or under the control of the foreign State or of a separate entity of the foreign State, is or was at a specified time in use for purposes specified in the certificate is admissible as evidence of the facts stated in the certificate.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 42

Restrictions and extensions of immunities and privileges

42. (1) Where the Governor–General is satisfied that an immunity or privilege conferred by this Act in relation to a foreign State is not accorded by the law of the foreign State in relation to Australia, the Governor–General may make regulations modifying the operation of this Act with respect to those immunities and privileges in relation to the foreign State.

(2) Where the Governor–General is satisfied that the immunities and privileges conferred by this Act in relation to a foreign State differ from those required by a treaty, convention or other agreement to which the foreign State and Australia are parties, the Governor–General may make regulations modifying the operation of this Act with respect to those immunities and privileges in relation to the foreign State so that this Act as so modified conforms with the treaty, convention or agreement.

(3) Regulations made under sub–section (1) or (2) that are expressed to extend or restrict an immunity from the jurisdiction may be expressed to extend to a proceeding that was instituted before the commencement of the regulations and has not been finally disposed of.

(4) Regulations made under sub–section (1) or (2) that are expressed to extend or restrict an immunity from execution or other relief may be expressed to extend to a proceeding that was instituted before the commencement of the regulations and in which procedures to give effect to orders for execution or other relief have not been completed.

(5) Regulations in relation to which sub–section (3) or (4) applies may make provision with respect to the keeping of property, or for the keeping of the proceeds of the sale of property, with which a proceeding specified in the regulations is concerned, including provision authorising an officer of a court to manage, control or preserve the property or, if, by reason of the condition of the property, it is necessary to do so, to sell or otherwise dispose of the property.

(6) Regulations under this section have effect notwithstanding that they are inconsistent with an Act (other than this Act) as in force at the time when the regulations came into operation.

(7) Jurisdiction is conferred on the Federal Court of Australia and, to the extent that the Constitution permits, on the courts of the Territories, and the courts of the States are invested with federal jurisdiction, in respect of matters arising under the regulations but a court of a Territory shall not exercise any jurisdiction so conferred in respect of property that is not within that Territory or a Territory in which the court may exercise jurisdiction and a court of a State shall not exercise any jurisdiction so invested in respect of property that is not within that State.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985 – SECT 43

Regulations

43. The Governor–General may make regulations, not inconsistent with this Act, prescribing matters –

(a) required or permitted by this Act to be prescribed; or

(b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

FOREIGN STATES IMMUNITIES ACT 1985 No. 196 of 1985

SCHEDULE Section 24

FORM 1

Request For Service Of Originating Process On A Foreign State

TO: The Attorney–General of the Commonwealth

A proceeding has been commenced in (name of court, tribunal, etc.) against (here insert name of foreign State).

The proceeding concerns (short particulars of the claim against the foreign State).

In accordance with section 24 of the Foreign States Immunities Act 1985, enclosed are:

(a) the initiating process in the proceeding;

(b) a statutory declaration;

(c) *a translation of the initiating process into (name of language), an official language of the foreign State; and

(d) *a certificate signed by the translator, and it is requested that the initiating process, *the translation and the certificate be transmitted by the Department of Foreign Affairs to the department or organ of the foreign State that is equivalent to that Department.

It is further requested that, when service of the initiating process and other documents has been effected on the foreign State in accordance with that Act, the Minister for Foreign Affairs certify accordingly under section 40 of that Act, and forward the certificate to

(name and address of person to whom certificate of service should be forwarded).

DATED this day of 19

(signature of plaintiff or applicant)

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* delete if not applicable.

FORM 2
Section 28

Request For Service Of Default Judgment On A Foreign State

TO: The Attorney–General of the Commonwealth

In a proceeding in (name of court, tribunal, etc.), a judgment in default of appearance has been given against (name of foreign State).

The proceeding concerns (short particulars of the claim against the foreign State).

In accordance with section 28 of the Foreign States Immunities Act 1985, enclosed are:

(a) a copy of the judgment, authenticated as required by that Act;

(b) *a translation of the judgment into (name of language), an official language of the foreign State; and

(c) *a certificate signed by the translator, and it is requested that the judgment, *the translation and the certificate be transmitted by the Department of Foreign Affairs to the department or organ of the foreign State that is equivalent to that Department.

It is further requested that, when service of the judgment and other documents has been effected on the foreign State in accordance with that Act, the Minister for Foreign Affairs certify accordingly under section 40 of that Act, and forward the certificate to

(name and address of person to whom certificate of service should be forwarded).

DATED this day of 19

(signature of judgment creditor)

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* delete if not applicable.

State Immunity Act, Chapter S–18

An Act to provide for state immunity in Canadian courts

Source: http://laws.justice.gc.ca/en/S–18/104334.html
Updated to August 31, 2004

SHORT TITLE

Short title

1. This Act may be cited as the *State Immunity Act*.
1980–81–82–83, c. 95, s. 1.

INTERPRETATION

Definitions

2. In this Act,

"agency of a foreign state" «*organisme d'un État étranger*»

"agency of a foreign state" means any legal entity that is an organ of the foreign state but that is separate from the foreign state;

"commercial activity" «*activité commerciale*»

"commercial activity" means any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character;

"foreign state" «*État étranger*»

"foreign state" includes
(*a*) any sovereign or other head of the foreign state or of any political subdivision of the foreign state while acting as such in a public capacity,
(*b*) any government of the foreign state or of any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state, and
(*c*) any political subdivision of the foreign state;

"political subdivision" «*subdivision politique*»

"political subdivision" means a province, state or other like political subdivision of a foreign state that is a federal state.
1980–81–82–83, c. 95, s. 2.

STATE IMMUNITY

State immunity

3. (1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.

Court to give effect to immunity

(2) In any proceedings before a court, the court shall give effect to the immunity conferred on a foreign state by subsection (1) notwithstanding that the state has failed to take any step in the proceedings.
1980–81–82–83, c. 95, s. 3.

Immunity waived

4. (1) A foreign state is not immune from the jurisdiction of a court if the state waives the immunity conferred by subsection 3(1) by submitting to the jurisdiction of the court in accordance with subsection (2) or (4).

State submits to jurisdiction

(2) In any proceedings before a court, a foreign state submits to the jurisdiction of the court where it
(*a*) explicitly submits to the jurisdiction of the court by written agreement or otherwise either before or after the proceedings commence;
(*b*) initiates the proceedings in the court; or
(*c*) intervenes or takes any step in the proceedings before the court.

Exception

(3) Paragraph (2)(*c*) does not apply to
(*a*) any intervention or step taken by a foreign state in proceedings before a court for the purpose of claiming immunity from the jurisdiction of the court; or
(*b*) any step taken by a foreign state in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained before the step was taken and immunity is claimed as soon as reasonably practicable after they are ascertained.

Third party proceedings and counter–claims

(4) A foreign state that initiates proceedings in a court or that intervenes or takes any step in proceedings before a court, other than an intervention or step to which paragraph (2)(*c*) does not apply, submits to the jurisdiction of the court in respect of any third party proceedings that arise, or counter–claim that arises, out of the subject–matter of the proceedings initiated by the state or in which the state has so intervened or taken a step.

Appeal and review

(5) Where, in any proceedings before a court, a foreign state submits to the jurisdiction of the court in accordance with subsection (2) or (4), that submission is deemed to be a submission by the state to the jurisdiction of such one or more courts by which those proceedings may, in whole or in part, subsequently be considered on appeal or in the exercise of supervisory jurisdiction.
1980–81–82–83, c. 95, s. 4.

Commercial activity

5. A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state.
1980–81–82–83, c. 95, s. 5.

Death and property damage

6. A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to
(*a*) any death or personal or bodily injury, or
(*b*) any damage to or loss of property
that occurs in Canada.
R.S., 1985, c. S–18, s. 6; 2001, c. 4, s. 121.

Maritime law

7. (1) A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to
(*a*) an action *in rem* against a ship owned or operated by the state, or
(*b*) an action *in personam* for enforcing a claim in connection with a ship owned or operated by the state,
if, at the time the claim arose or the proceedings were commenced, the ship was being used or was intended for use in a commercial activity.

Cargo

(2) A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to
(*a*) an action *in rem* against any cargo owned by the state if, at the time the claim arose or the proceedings were commenced, the cargo and the ship carrying the cargo were being used or were intended for use in a

commercial activity; or

(*b*) an action *in personam* for enforcing a claim in connection with any cargo owned by the state if, at the time the claim arose or the proceedings were commenced, the ship carrying the cargo was being used or was intended for use in a commercial activity.

Idem

(3) For the purposes of subsections (1) and (2), a ship or cargo owned by a foreign state includes any ship or cargo in the possession or control of the state and any ship or cargo in which the state claims an interest.

1980–81–82–83, c. 95, s. 7.

Property in Canada

8. A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to an interest of the state in property that arises by way of succession, gift or *bona vacantia*.

1980–81–82–83, c. 95, s. 8.

PROCEDURE AND RELIEF

Service on a foreign state

9. (1) Service of an originating document on a foreign state, other than on an agency of the foreign state, may be made

(*a*) in any manner agreed on by the state;

(*b*) in accordance with any international Convention to which the state is a party; or

(*c*) in the manner provided in subsection (2).

Idem

(2) For the purposes of paragraph (1)(*c*), anyone wishing to serve an originating document on a foreign state may deliver a copy of the document, in person or by registered mail, to the Deputy Minister of Foreign Affairs or a person designated by him for the purpose, who shall transmit it to the foreign state.

Service on an agency of a foreign state

(3) Service of an originating document on an agency of a foreign state may be made

(*a*) in any manner agreed on by the agency;

(*b*) in accordance with any international Convention applicable to the agency; or

(*c*) in accordance with any applicable rules of court.

Idem

(4) Where service on an agency of a foreign state cannot be made under subsection (3), a court may, by order, direct how service is to be made.

Date of service

(5) Where service of an originating document is made in the manner provided in subsection (2), service of the document shall be deemed to have been made on the day that the Deputy Minister of Foreign Affairs or a person designated by him pursuant to subsection (2) certifies to the relevant court that the copy of the document has been transmitted to the foreign state.

R.S., 1985, c. S–18, s. 9; 1995, c. 5, s. 27.

Default judgment

10. (1) Where, in any proceedings in a court, service of an originating document has been made on a foreign state in accordance with subsection 9(1), (3) or (4) and the state has failed to take, within the time limited therefor by the rules of the court or otherwise by law, the initial step required of a defendant or respondent in those proceedings in that court, no further step toward judgment may be taken in the proceedings

except after the expiration of at least sixty days following the date of service of the originating document.

(2) Where judgment is signed against a foreign state in any proceedings in which the state has failed to take the initial step referred to in subsection (1), a certified copy of the judgment shall be served on the foreign state

Idem

(*a*) where service of the document that originated the proceedings was made on an agency of the foreign state, in such manner as is ordered by the court; or

(*b*) in any other case, in the manner specified in paragraph 9(1)(*c*) as though the judgment were an originating document.

Idem

(3) Where, by reason of subsection (2), a certified copy of a judgment is required to be served in the manner specified in paragraph 9(1)(*c*), subsections 9(2) and (5) apply with such modifications as the circumstances require.

Application to set aside default judgment

(4) A foreign state may, within sixty days after service on it of a certified copy of a judgment pursuant to subsection (2), apply to have the judgment set aside.
1980–81–82–83, c. 95, s. 9.

No injunction, specific performance, etc., without consent

11. (1) Subject to subsection (3), no relief by way of an injunction, specific performance or the recovery of land or other property may be granted against a foreign state unless the state consents in writing to that relief and, where the state so consents, the relief granted shall not be greater than that consented to by the state.

Submission not consent

(2) Submission by a foreign state to the jurisdiction of a court is not consent for the purposes of subsection (1).

Agency of a foreign state

(3) This section does not apply to an agency of a foreign state.
1980–81–82–83, c. 95, s. 10.

12. (1) Subject to subsections (2) and (3), property of a foreign state that is located in Canada is immune from attachment and execution and, in the case of an action *in rem*, from arrest, detention, seizure and forfeiture except where

Execution

(*a*) the state has, either explicitly or by implication, waived its immunity from attachment, execution, arrest, detention, seizure or forfeiture, unless the foreign state has withdrawn the waiver of immunity in accordance with any term thereof that permits such withdrawal;

(*b*) the property is used or is intended for a commercial activity; or

(*c*) the execution relates to a judgment establishing rights in property that has been acquired by succession or gift or in immovable property located in Canada.

Property of an agency of a foreign state is not immune

(2) Subject to subsection (3), property of an agency of a foreign state is not immune from attachment and execution and, in the case of an action *in rem*, from arrest, detention, seizure and forfeiture, for the purpose of satisfying a judgment of a court in any proceedings in respect of which the agency is not immune from the jurisdiction of the court by reason of any provision of this Act.

Military property

(3) Property of a foreign state

(*a*) that is used or is intended to be used in connection with a military

activity, and
(*b*) that is military in nature or is under the control of a military authority or defence agency
is immune from attachment and execution and, in the case of an action *in rem*, from arrest, detention, seizure and forfeiture.

Property of a foreign central bank immune

(4) Subject to subsection (5), property of a foreign central bank or monetary authority that is held for its own account and is not used or intended for a commercial activity is immune from attachment and execution.

Waiver of immunity

(5) The immunity conferred on property of a foreign central bank or monetary authority by subsection (4) does not apply where the bank, authority or its parent foreign government has explicitly waived the immunity, unless the bank, authority or government has withdrawn the waiver of immunity in accordance with any term thereof that permits such withdrawal.
1980–81–82–83, c. 95, s. 11.

No fine for failure to produce

13. (1) No penalty or fine may be imposed by a court against a foreign state for any failure or refusal by the state to produce any document or other information in the course of proceedings before the court.

Agency of a foreign state

(2) Subsection (1) does not apply to an agency of a foreign state.
1980–81–82–83, c. 95, s. 12.

GENERAL

Certificate is conclusive evidence

14. (1) A certificate issued by the Minister of Foreign Affairs, or on his behalf by a person authorized by him, with respect to any of the following questions, namely,
(*a*) whether a country is a foreign state for the purposes of this Act,
(*b*) whether a particular area or territory of a foreign state is a political subdivision of that state, or
(*c*) whether a person or persons are to be regarded as the head or government of a foreign state or of a political subdivision of the foreign state,
is admissible in evidence as conclusive proof of any matter stated in the certificate with respect to that question, without proof of the signature of the Minister of Foreign Affairs or other person or of that other person's authorization by the Minister of Foreign Affairs.

Idem

(2) A certificate issued by the Deputy Minister of Foreign Affairs, or on his behalf by a person designated by him pursuant to subsection 9(2), with respect to service of an originating or other document on a foreign state in accordance with that subsection is admissible in evidence as conclusive proof of any matter stated in the certificate with respect to that service, without proof of the signature of the Deputy Minister of Foreign Affairs or other person or of that other person's authorization by the Deputy Minister of Foreign Affairs.
R.S., 1985, c. S–18, s. 14; 1995, c. 5, ss. 25, 27.

Governor in Council may restrict immunity by order

15. The Governor in Council may, on the recommendation of the Minister of Foreign Affairs, by order restrict any immunity or privileges under this Act in relation to a foreign state where, in the opinion of the Governor in Council, the immunity or privileges exceed those accorded

by the law of that state.
R.S., 1985, c. S–18, s. 15; 1995, c. 5, s. 25.

Inconsistency

16. If, in any proceeding or other matter to which a provision of this Act and a provision of the *Extradition Act*, the *Visiting Forces Act* or the *Foreign Missions and International Organizations Act* apply, there is a conflict between those provisions, the provision of this Act does not apply in the proceeding or other matter to the extent of the conflict.
R.S., 1985, c. S–18, s. 16; 1991, c. 41, s. 13; 2000, c. 24, s. 70.

Rules of court not affected

17. Except to the extent required to give effect to this Act, nothing in this Act shall be construed or applied so as to negate or affect any rules of a court, including rules of a court relating to service of a document out of the jurisdiction of the court.
1980–81–82–83, c. 95, s. 16.

Application

18. This Act does not apply to criminal proceedings or proceedings in the nature of criminal proceedings.
1980–81–82–83, c. 95, s. 17.

ILC Draft Articles on Jurisdictional Immunities

International Law Commission
Draft Articles on Jurisdictional Immunities of States and Their Property

PART I
INTRODUCTION

Article 1
Scope of the present articles

The present articles apply to the immunity of a State and its property from the jurisdiction of the courts of another State.

Article 2
Use of terms

1. For the purposes of the present articles:
   (a) "court" means any organ of a State, however named, entitled to exercise judicial functions;
   (b) "State" means:
      (i) the State and its various organs of government;
      (ii) constituent units of a federal State;
      (iii) political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State;
      (iv) agencies or instrumentalities of the State and other entities, to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State;
      (v) representatives of the State acting in that capacity;
   (c) "commercial transaction" means:
      (i) any commercial contract or transaction for the sale of goods or supply of services;
      (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction;
      (iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

2. In determining whether a contract or transaction is a "commercial transaction" under paragraph 1 (c), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if, in the practice of the State which is a party to it, that purpose is relevant to determining the non–commercial character of the contract or transaction.

3. The provisions of paragraphs 1 and 2 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or in the internal law of any State.

Article 3
Privileges and immunities not affected by the present articles

1. The present articles are without prejudice to the privileges and immunities enjoyed by a State under international law in relation to the exercise of the functions of:
   (a) its diplomatic missions, consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences; and
   (b) persons connected with them.

2. The present articles are likewise without prejudice to privileges and immunities accorded under international law to Heads of State *ratione personae*.

Article 4
Non–retroactivity of the present articles

Without prejudice to the application of any rules set forth in the present articles to which jurisdictional immunities of States and their property are subject under international law independently of the present articles, the articles shall not apply to any question of jurisdictional immunities of States or their property arising in a proceeding instituted against a State before a court of another State prior to the entry into force of the present articles for the States concerned.

PART II
GENERAL PRINCIPLES

Article 5
State immunity

A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present articles.

Article 6
Modalities for giving effect to State immunity

1. A State shall give effect to State immunity under article 5 by refraining from exercising jurisdiction in a proceeding before its courts against another State and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected.

2. A proceeding before a court of a State shall be considered to have been instituted against another State if that other State:
   (a) is named as a party to that proceeding; or
   (b) is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State.

Article 7
Express consent to exercise of jurisdiction

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case:

(a) by international agreement;
(b) in a written contract; or
(c) by a declaration before the court or by a written communication in a specific proceeding.

2. Agreement by a State for the application of the law of another State shall not be interpreted as consent to the exercise of jurisdiction by the courts of that other State.

Article 8
Effect of participation in a proceeding before a court

1. State cannot invoke immunity From jurisdiction in a proceeding before a court of another State if it has:
(a) itself instituted the proceeding; or
(b) intervened in the proceeding or taken any other step relating to the merits. However, if the State satisfies the court that it could not have acquired knowledge of facts on which a claim to immunity can be based until after it took such a step, it can claim immunity based on those facts, provided it does so at the earliest possible moment.

2. A State shall not be considered to have consented to the exercise of jurisdiction by a court of another State if it intervenes in a proceeding or takes any other step for the sole purpose of:
(a) invoking immunity; or
(b) asserting a right or interest in property at issue in the proceeding.

3. The appearance of a representative of a State before a court of another State as a witness shall not be interpreted as consent by the former State to the exercise of jurisdiction by the court.

4. Failure on the part of a State to enter an appearance in a proceeding before a court of another State shall not be interpreted as consent by the former State to the exercise of jurisdiction by the court.

Article 9
Counter–claims

1. A State instituting a proceeding before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of any counter–claim arising out of the same legal relationship or facts as the principal claim.

2. A State intervening to present a claim in a proceeding before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of any counter–claim arising out of the same legal relationship or facts as the claim presented by the State.

3. A State making a counter–claim in a proceeding instituted against it before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of the principal claim.

PART III
PROCEEDINGS IN WHICH STATE IMMUNITY CANNOT BE INVOKED

Article 10
Commercial transactions

1. If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction.

2. Paragraph 1 does not apply:
   (a) in the case of a commercial transaction between States; or
   (b) if the parties to the commercial transaction have expressly agreed otherwise.

3. The immunity from jurisdiction enjoyed by a State shall not be affected with regard to a proceeding which relates to a commercial transaction engaged in by a State enterprise or other entity established by the State which has an independent legal personality and is capable of:
   (a) suing or being sued; and
   (b) acquiring, owning or possessing and disposing of property, including property which the State has authorized it to operate or manage.

Article 11
Contracts of employment

1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State.

2. Paragraph 1 does not apply if:
   (a) the employee has been recruited to perform functions closely related to the exercise of governmental authority;
   (b) the subject of the proceeding is the recruitment, renewal of employment or reinstatement of an individual;
   (c) the employee was neither a national nor a habitual resident of the State of the forum at the time when the contract of employment was concluded;
   (d) the employee is a national of the employer State at the time when the proceeding is instituted; or
   (e) the employer State and the employee have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject–matter of the proceeding.

Article 12
Personal injuries and damage to property

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.

Article 13
Ownership, possession and use of property

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the determination of:

(a) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum;

(b) any right or interest of the State in movable or immovable property arising by way of succession, gift or *bona vacantia*; or

(c) any right or interest of the State in the administration of property, such as trust property, the estate of a bankrupt or the property of a company in the event of its winding-up.

Article 14
Intellectual and industrial property

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

(a) the determination of any right of the State in a patent, industrial design, trade name or business name, trade mark, copyright or any other form of intellectual or industrial property, which enjoys a measure of legal protection, even if provisional, in the State of the forum; or

(b) an alleged infringement by the State, in the territory of the State of the forum, of a right of the nature mentioned in subparagraph (a) which belongs to a third person and is protected in the State of the forum.

Article 15
Participation in companies or other collective bodies

1. A State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to its participation in a company or other collective body, whether incorporated or unincorporated, being a proceeding concerning the relationship between the State and the body or the other participants therein, provided that the body:

(a) has participants other than States or international organizations; and

(b) is incorporated or constituted under the law of the State of the forum or has its seat or principal place of business in that State.

2. A State can, however, invoke immunity from jurisdiction in such a proceeding if the States concerned have so agreed or if the parties to the dispute have so provided by an agreement in writing or if the instrument establishing or regulating the body in question contains provisions to that effect.

Article 16
Ships owned or operated by a State

1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the operation of that ship, if at the time

the cause of action arose, the ship was used for other than government noncommercial purposes.

2. Paragraph 1 does not apply to warships and naval auxiliaries nor does it apply to other ships owned or operated by a State and used exclusively on government non–commercial service.

3. For the purposes of this article, "proceeding which relates to the operation of that Ship" means, *inter alia*, any proceeding involving the determination of a claim in respect of:
(a) collision or other accidents of navigation;
(b) assistance, salvage and general average;
(c) repairs, supplies or other contracts relating to the ship;
(d) consequences of pollution of the marine environment.

4. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the carnage of cargo on board a ship owned or operated by that State if, at the time the cause of action arose, the ship was used for other than government non–commercial purposes.

5. Paragraph 4 does not apply to any cargo carried on board the ships referred to in paragraph 2 nor does it apply to any cargo owned by a State and used or intended for use exclusively for government non–commercial purposes.

6. States may plead all measures of defence, prescription and limitation of liability which are available to private ships and cargoes and their owners.

7. If in a proceeding there arises a question relating to the government and non–commercial character of a ship owned or operated by a State or cargo owned by a State, a certificate signed by a diplomatic representative or other competent authority of that State and communicated to the court shall serve as evidence of the character of that ship or cargo.

Article 17
Effect of an arbitration agreement

If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction, that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:
(a) the validity or interpretation of the arbitration agreement;
(b) the arbitration procedure; or
(c) the setting aside of the award;
unless the arbitration agreement otherwise provides.

PART IV
STATE IMMUNITY FROM MEASURES OF CONSTRAINT IN CONNECTION WITH PROCEEDINGS BEFORE A COURT

Article 18
State immunity from measures of constraint

1. No measures of constraint, such as attachment, arrest and execution, against property of a Stare may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) the State has expressly consented to the taking of such measures as indicated:
  (i) by international agreement;
  (ii) by an arbitration agreement or in a written contract; or
  (iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen;

(b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or

(c) the property is specifically in use or intended for use by the State for other than government non–commercial purposes and is in the territory of the State of the forum and has a connection with the claim which is the object of the proceeding or with the agency or instrumentality against which the proceeding was directed.

2. Consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint under paragraph 1, for which separate consent shall be necessary.

Article 19
Specific categories of property

1. The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non–commercial purposes under paragraph 1 (c) of article 18:

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

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

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

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

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

2. Paragraph 1 is without prejudice to paragraph 1 (a) and (b) of article 18.

PART V
MISCELLANEOUS PROVISIONS

Article 20
Service of process

1. Service of process by writ or other document instituting a proceeding against a state shall be effected:

(a) in accordance with any applicable international convention binding on the State of the forum and the State concerned; or
(b) in the absence of such a convention:
(i) by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned; or
(ii) by any other means accepted by the State concerned, if not precluded by the law of the State of the forum.

2. Service of process referred to in paragraph 1 (b) (i) is deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs.

3. These documents shall be accompanied, if necessary, by a translation into the official language, or one of the official languages, of the State concerned.

4. Any State that enters an appearance on the merits in a proceeding instituted against it may not thereafter assert that service of process did not comply with the provisions of paragraphs 1 and 3.

Article 21
Default judgement

1. A default judgement shall not be rendered against a State unless the court has found that:
(a) the requirements laid down in paragraphs 1 and 3 of article 20 have been complied with;
(b) a period of not less than four months has expired from the date on which the service of the writ or other document instituting a proceeding has been effected or deemed to have been effected in accordance with paragraphs 1 and 2 of article 20; and
(c) the present articles do not preclude it from exercising jurisdiction.

2. A copy of any default judgement rendered against a State, accompanied if necessary by a translation into the official language or one of the official languages of the State concerned, shall be transmitted to it through one of the means specified in paragraph 1 of article 20 and in accordance with the provisions of that paragraph.

3. The time-limit for applying to have a default judgement set aside shall not be less than four months and shall begin to run from the date on which the copy of the judgement is received or is deemed to have been received by the State concerned.

Article 22
Privileges and immunities during court proceedings

1. Any failure or refusal by a State to comply with an order of a court of another State enjoining it to perform or refrain from performing a specific act or to produce any document or disclose any other information for the purposes of a proceeding shall entail no consequences other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal.

2. A State shall not be required to provide any security, bond or deposit, however described, to guarantee the payment of judicial costs or expenses in any proceeding to which it is a party before a court of another State.

Abstract:

Text adopted by the Commission at its forty–third session, in 1991, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report (A/46/10), which also contains commentaries on the draft articles, was published in the *Yearbook of the International Law Commission*, 1991, vol. II(2).

UN Draft Convention on State Immunity

United Nations
General Assembly

A/59/508*
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Fifty-ninth session
Agenda item 142

Convention on jurisdictional immunities of States and their property
Report of the Sixth Committee
Rapporteur: Ms. Anna Sotaniemi (Finland)

I. Introduction

1. The item entitled "Convention on jurisdictional immunities of States and their property" was included in the provisional agenda of the fifty-ninth session of the General Assembly pursuant to Assembly resolution 58/74 of 9 December 2003.
2. At its 2nd plenary meeting, on 17 September 2004, the General Assembly, on the recommendation of the General Committee, decided to include the item in its agenda and to allocate it to the Sixth Committee.
3. The Committee considered the item at its 13th, 14th, 21st and 25th meetings, on 25 and 26 October and on 5 and 9 November 2004. The views of the representatives who spoke during the Committee's consideration of the item are reflected in the relevant summary records (A/C.6/59/SR.13, 14, 21 and 25).
4. For its consideration of the item, the Committee had before it the report of theAd Hoc Committee on Jurisdictional Immunities of States and Their Property.[1]
5. At the 13th meeting, on 25 October, the Chairman of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property introduced the report of the Ad Hoc Committee and proposed some corrections to the text of the draft United Nations Convention on Jurisdictional Immunities of States and Their Property (see A/C.6/59/SR.13).

II. Consideration of draft resolution A/C.6/59/L.16

6. At the 21st meeting, on 5 November, the representative of Austria, on behalf of the Bureau, introduced draft resolution A/C.6/59/L.16, entitled "United Nations Convention on Jurisdictional Immunities of States and Their Property", to which was annexed the text of the Convention.
7. At the 25th meeting, on 9 November, the Chairman made a statement concerning linguistic changes to be made to the text of the draft resolution (see A/C.6/59/SR.25).
8. At the same meeting, the Committee adopted draft resolution A/C.6/59/L.16 without a vote (see para. 9).

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* Reissued for technical reasons

[1] *Official Records of the General Assembly, Fifthninth Session, Supplement No 22 (A/59/22).*

III. Recommendation of the Sixth Committee

9. The Sixth Committee recommends to the General Assembly the adoption of the following draft resolution:

United Nations Convention on Jurisdictional Immunities of States and Their Property

The General Assembly,

Bearing in mind Article 13, paragraph 1 (a), of the Charter of the United Nations,

Recalling its resolution 32/151 of 19 December 1977, in which it recommended that the International Law Commission take up the study of the law of jurisdictional immunities of States and their property with a view to its progressive development and codification, and its subsequent resolutions 46/55 of 9 December 1991, 49/61 of 9 December 1994, 52/151 of 15 December 1997, 54/101 of 9 December 1999, 55/150 of 12 December 2000, 56/78 of 12 December 2001, 57/16 of 19 November 2002 and 58/74 of 9 December 2003,

Recalling also that the International Law Commission submitted a final set of draft articles, with commentaries, on the law of jurisdictional immunities of States and their property in chapter II of its report on the work of its forty-third session,[1]

Recalling further the reports of the open-ended Working Group of the Sixth Committee,[2] as well as the report of the Working Group on Jurisdictional Immunities of States and Their Property of the International Law Commission,[3] submitted in accordance with General Assembly resolution 53/98 of 8 December 1998,

Recalling that, in its resolution 55/150, it decided to establish the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property, open also to participation by States members of the specialized agencies, to further the work done, consolidate areas of agreement and resolve outstanding issues with a view to elaborating a generally acceptable instrument based on the draft articles on jurisdictional immunities of States and their property adopted by the International Law Commission and also on the discussions of the open-ended Working Group of the Sixth Committee,

Having considered the report of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property,[4]

Stressing the importance of uniformity and clarity in the law of jurisdictional immunities of States and their property, and emphasizing the role of a convention in this regard,

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[1] *Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10* (A/46/10).

[2] A/C.6/54/L.12 and A/C.6/55/L.12.

[3] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* and corrigenda
(A/54/10 and Corr.1 and 2), annex.

[4] Ibid., *Fifty-ninth Session, Supplement No. 22* (A/59/22).

Noting the broad support for the conclusion of a convention on jurisdictional immunities of States and their property,

Taking into account the statement of the Chairman of the Ad Hoc Committee introducing the report of the Ad Hoc Committee,[5]

1. *Expresses its deep appreciation* to the International Law Commission and the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property for their valuable work on the law of jurisdictional immunities of States and their property;

2. *Agrees* with the general understanding reached in the Ad Hoc Committee that the United Nations Convention on Jurisdictional Immunities of States and Their Property does not cover criminal proceedings;

3. *Adopts* the United Nations Convention on Jurisdictional Immunities of States and Their Property, which is contained in the annex to the present resolution, and requests the Secretary–General as depositary to open it for signature;

4. *Invites* States to become parties to the Convention.

Annex

United Nations Convention on Jurisdictional Immunities of States and Their Property

The States Parties to the present Convention,

Considering that the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law,

Having in mind the principles of international law embodied in the Charter of the United Nations,

Believing that an international convention on the jurisdictional immunities of States and their property would enhance the rule of law and legal certainty, particularly in dealings of States with natural or juridical persons, and would contribute to the codification and development of international law and the harmonization of practice in this area,

Taking into account developments in State practice with regard to the jurisdictional immunities of States and their property,

Affirming that the rules of customary international law continue to govern matters not regulated by the provisions of the present Convention,

Have agreed as follows:

[5] Ibid., *Fifty–ninth Session, Sixth Committee*, 13th meeting (A/C.6/59/SR.13), and corrigendum.

Part I
Introduction

Article 1
Scope of the present Convention

The present Convention applies to the immunity of a State and its property from the jurisdiction of the courts of another State.

Article 2
Use of terms

1. For the purposes of the present Convention:

(a) "court" means any organ of a State, however named, entitled to exercise judicial functions;

(b) "State" means:

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

(ii) constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity;

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

(iv) representatives of the State acting in that capacity;

(c) "commercial transaction" means:

(i) any commercial contract or transaction for the sale of goods or supply of services;

(ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction;

(iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

2. In determining whether a contract or transaction is a "commercial transaction" under paragraph 1 (c), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non–commercial character of the contract or transaction.

3. The provisions of paragraphs 1 and 2 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or in the internal law of any State.

Article 3
Privileges and immunities not affected by the present Convention

1. The present Convention is without prejudice to the privileges and immunities enjoyed by a State under international law in relation to the exercise of the functions of:

(a) its diplomatic missions, consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences; and

(b) persons connected with them.

2. The present Convention is without prejudice to privileges and immunities accorded under international law to heads of State *ratione personae*.

3. The present Convention is without prejudice to the immunities enjoyed by a State under international law with respect to aircraft or space objects owned or operated by a State.

Article 4
Non–retroactivity of the present Convention

Without prejudice to the application of any rules set forth in the present Convention to which jurisdictional immunities of States and their property are subject under international law independently of the present Convention, the present Convention shall not apply to any question of jurisdictional immunities of States or their property arising in a proceeding instituted against a State before a court of another State prior to the entry into force of the present Convention for the States concerned.

Part II
General principles

Article 5
State immunity

A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention.

Article 6
Modalities for giving effect to State immunity

1. A State shall give effect to State immunity under article 5 by refraining from exercising jurisdiction in a proceeding before its courts against another State and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected.

2. A proceeding before a court of a State shall be considered to have been instituted against another State if that other State: (a) is named as a party to that proceeding; or

(b) is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State.

Article 7
Express consent to exercise of jurisdiction

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case:

(a) by international agreement;

(b) in a written contract; or

(c) by a declaration before the court or by a written communication in a specific proceeding.

2. Agreement by a State for the application of the law of another State shall not be interpreted as consent to the exercise of jurisdiction by the courts of that other State.

Article 8
Effect of participation in a proceeding before a court

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has:

(a) itself instituted the proceeding; or

(b) intervened in the proceeding or taken any other step relating to the merits. However, if the State satisfies the court that it could not have acquired knowledge of facts on which a claim to immunity can be based until after it took such a step, it can claim immunity based on those facts, provided it does so at the earliest possible moment.

2. A State shall not be considered to have consented to the exercise of jurisdiction by a court of another State if it intervenes in a proceeding or takes any other step for the sole purpose of:

(a) invoking immunity; or

(b) asserting a right or interest in property at issue in the proceeding.

3. The appearance of a representative of a State before a court of another State as a witness shall not be interpreted as consent by the former State to the exercise of jurisdiction by the court.

4. Failure on the part of a State to enter an appearance in a proceeding before a court of another State shall not be interpreted as consent by the former State to the exercise of jurisdiction by the court.

Counterclaims

1. A State instituting a proceeding before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of any counterclaim arising out of the same legal relationship or facts as the principal claim.

2. A State intervening to present a claim in a proceeding before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of any counterclaim arising out of the same legal relationship or facts as the claim presented by the State.

3. A State making a counterclaim in a proceeding instituted against it before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of the principal claim.

Part III
Proceedings in which State immunity cannot be invoked

Article 10
Commercial transactions

1. If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the

commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction.

2. Paragraph 1 does not apply:
(a) in the case of a commercial transaction between States; or
(b) if the parties to the commercial transaction have expressly agreed otherwise.
3. Where a State enterprise or other entity established by a State which has an independent legal personality and is capable of:
(a) suing or being sued; and
(b) acquiring, owning or possessing and disposing of property, including property which that State has authorized it to operate or manage, is involved in a proceeding which relates to a commercial transaction in which that entity is engaged, the immunity from jurisdiction enjoyed by that State shall not be affected.

Article 11
Contracts of employment

1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State.

2. Paragraph 1 does not apply if:

(a) the employee has been recruited to perform particular functions in the exercise of governmental authority;

(b) the employee is:

(i) a diplomatic agent, as defined in the Vienna Convention on Diplomatic Relations of 1961;

(ii) a consular officer, as defined in the Vienna Convention on Consular Relations of 1963;

(iii) a member of the diplomatic staff of a permanent mission to an international organization or of a special mission, or is recruited to represent a State at an international conference; or

(iv) any other person enjoying diplomatic immunity;

(c) the subject–matter of the proceeding is the recruitment, renewal of employment or reinstatement of an individual;

(d) the subject–matter of the proceeding is the dismissal or termination of employment of an individual and, as determined by the head of State, the head of Government or the Minister for Foreign Affairs of the employer State, such a proceeding would interfere with the security interests of that State;

(e) the employee is a national of the employer State at the time when the proceeding is instituted, unless this person has the permanent residence in the State of the forum; or

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

Article 12
Personal injuries and damage to property

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.

Article 13
Ownership, possession and use of property

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the determination of:

(a) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum;

(b) any right or interest of the State in movable or immovable property arising by way of succession, gift or *bona vacantia*; or

(c) any right or interest of the State in the administration of property, such as trust property, the estate of a bankrupt or the property of a company in the event of its winding up.

Article 14
Intellectual and industrial property

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

(a) the determination of any right of the State in a patent, industrial design, trade name or business name, trademark, copyright or any other form of intellectual or industrial property which enjoys a measure of legal protection, even if provisional, in the State of the forum; or

(b) an alleged infringement by the State, in the territory of the State of the forum, of a right of the nature mentioned in subparagraph (a) which belongs to a third person and is protected in the State of the forum.

Article 15
Participation in companies or other collective bodies

1. A State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to its participation in a company or other collective body, whether incorporated or unincorporated, being a proceeding concerning the relationship between the State and the body or the other participants therein, provided that the body:

(a) has participants other than States or international organizations; and

(b) is incorporated or constituted under the law of the State of the forum or has its seat or principal place of business in that State.

2. A State can, however, invoke immunity from jurisdiction in such a proceeding if the States concerned have so agreed or if the parties to the dispute have so provided by an agreement in writing or if the instrument establishing or regulating the body in question contains provisions to that effect.

Article 16
Ships owned or operated by a State

1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the operation of that ship if, at the time the cause of action arose, the ship was used for other than government non–commercial purposes.

2. Paragraph 1 does not apply to warships, or naval auxiliaries, nor does it apply to other vessels owned or operated by a State and used, for the time being, only on government non–commercial service.

3. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the carriage of cargo on board a ship owned or operated by that State if, at the time the cause of action arose, the ship was used for other than government non–commercial purposes.

4. Paragraph 3 does not apply to any cargo carried on board the ships referred to in paragraph 2, nor does it apply to any cargo owned by a State and used or intended for use exclusively for government non–commercial purposes.

5. States may plead all measures of defence, prescription and limitation of liability which are available to private ships and cargoes and their owners.

6. If in a proceeding there arises a question relating to the government and noncommercial character of a ship owned or operated by a State or cargo owned by a State, a certificate signed by a diplomatic representative or other competent authority of that State and communicated to the court shall serve as evidence of the character of that ship or cargo.

Article 17
Effect of an arbitration agreement

If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction, that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

(a) the validity, interpretation or application of the arbitration agreement;
(b) the arbitration procedure; or
(c) the confirmation or the setting aside of the award,

unless the arbitration agreement otherwise provides.

Part IV
State immunity from measures of constraint in connection with proceedings before a court

Article 18
State immunity from pre-judgment measures of constraint

No pre-judgment measures of constraint, such as attachment or arrest, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) the State has expressly consented to the taking of such measures as indicated:
(i) by international agreement;

(ii) by an arbitration agreement or in a written contract; or

(iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or

(b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding.

Article 19
State immunity from post-judgment measures of constraint

No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) the State has expressly consented to the taking of such measures as indicated:

(i) by international agreement;

(ii) by an arbitration agreement or in a written contract; or

(iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or

(b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or

(c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.

Article 20
Effect of consent to jurisdiction to measures of constraint

Where consent to the measures of constraint is required under articles 18 and 19, consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint.

Article 21
Specific categories of property

1. The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under article 19, subparagraph (c):

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

(b) property of a military character or used or intended for use in the performance of military functions;

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

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

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

2. Paragraph 1 is without prejudice to article 18 and article 19, subparagraphs (a) and (b).

Part V
Miscellaneous provisions

Article 22
Service of process

1. Service of process by writ or other document instituting a proceeding against a State shall be effected:

(a) in accordance with any applicable international convention binding on the State of the forum and the State concerned; or

(b) in accordance with any special arrangement for service between the claimant and the State concerned, if not precluded by the law of the State of the forum; or

(c) in the absence of such a convention or special arrangement:

(i) by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned; or
(ii) by any other means accepted by the State concerned, if not precluded by the law of the State of the forum.

2. Service of process referred to in paragraph 1 (c) (i) is deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs.

3. These documents shall be accompanied, if necessary, by a translation into the official language, or one of the official languages, of the State concerned.

4. Any State that enters an appearance on the merits in a proceeding instituted against it may not thereafter assert that service of process did not comply with the provisions of paragraphs 1 and 3.

Article 23
Default judgment

1. A default judgment shall not be rendered against a State unless the court has found that:

(a) the requirements laid down in article 22, paragraphs 1 and 3, have been complied with;

(b) a period of not less than four months has expired from the date on which the service of the writ or other document instituting a proceeding has been effected or deemed to have been effected in accordance with article 22, paragraphs 1 and 2; and

(c) the present Convention does not preclude it from exercising jurisdiction.

2. A copy of any default judgment rendered against a State, accompanied if necessary by a translation into the official language or one of the official languages of the State concerned, shall be transmitted to it through one of the means specified in article 22, paragraph 1, and in accordance with the provisions of that paragraph.

3. The time-limit for applying to have a default judgment set aside shall not be less than four months and shall begin to run from the date on which the copy of the judgment is received or is deemed to have been received by the State concerned.

Article 24
Privileges and immunities during court proceedings

1. Any failure or refusal by a State to comply with an order of a court of another State enjoining it to perform or refrain from performing a specific act or to produce any document or disclose any other information for the purposes of a proceeding shall entail no consequences other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal.

2. A State shall not be required to provide any security, bond or deposit, however described, to guarantee the payment of judicial costs or expenses in any proceeding to which it is a respondent party before a court of another State.

Part VI
Final clauses

Article 25
Annex

The annex to the present Convention forms an integral part of the Convention.

Article 26
Other international agreements

Nothing in the present Convention shall affect the rights and obligations of States Parties under existing international agreements which relate to matters dealt with in the present Convention as between the parties to those agreements.

Article 27
Settlement of disputes

1. States Parties shall endeavour to settle disputes concerning the interpretation or application of the present Convention through negotiation.

2. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which cannot be settled through negotiation within six months shall, at the request of any of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

3. Each State Party may, at the time of signature, ratification, acceptance or approval of, or accession to, the present Convention, declare that it does not consider itself bound by paragraph 2. The other States Parties shall not be bound by paragraph 2 with respect to any State Party which has made such a declaration.

4. Any State Party that has made a declaration in accordance with paragraph 3 may at any time withdraw that declaration by notification to the Secretary–General of the United Nations.

Article 28
Signature

The present Convention shall be open for signature by all States until 17 January 2007, at United Nations Headquarters, New York.

Article 29
Ratification, acceptance, approval or accession

1. The present Convention shall be subject to ratification, acceptance or approval.
2. The present Convention shall remain open for accession by any State.
3. The instruments of ratification, acceptance, approval or accession shall be deposited with the Secretary–General of the United Nations.

Article 30
Entry into force

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession with the Secretary–General of the United Nations.
2. For each State ratifying, accepting, approving or acceding to the present Convention after the deposit of the thirtieth instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 31
Denunciation

1. Any State Party may denounce the present Convention by written notification to the Secretary–General of the United Nations.

2. Denunciation shall take effect one year following the date on which notification is received by the Secretary–General of the United Nations. The present Convention shall, however, continue to apply to any question of jurisdictional immunities of States or their property arising in a proceeding instituted against a State before a court of another State prior to the date on which the denunciation takes effect for any of the States concerned.

3. The denunciation shall not in any way affect the duty of any State Party to fulfil any obligation embodied in the present Convention to which it would be subject under international law independently of the present Convention.

Article 32
Depositary and notifications

1. The Secretary–General of the United Nations is designated the depositary of the present Convention.

2. As depositary of the present Convention, the Secretary–General of the United Nations shall inform all States of the following:

(a) signatures of the present Convention and the deposit of instruments of ratification, acceptance, approval or accession or notifications of denunciation, in accordance with articles 29 and 31;

(b) the date on which the present Convention will enter into force, in accordance with article 30;

(c) any acts, notifications or communications relating to the present Convention.

Article 33
Authentic texts

The Arabic, Chinese, English, French, Russian and Spanish texts of the present Convention are equally authentic.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Convention opened for signature at United Nations Headquarters in New York on 17 January 2005.

Annex to the Convention
Understandings with respect to certain provisions of the Convention

The present annex is for the purpose of setting out understandings relating to the provisions concerned.

With respect to article 10

The term "immunity" in article 10 is to be understood in the context of the present Convention as a whole.

Article 10, paragraph 3, does not prejudge the question of "piercing the corporate veil", questions relating to a situation where a State entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim, or other related issues.

With respect to article 11

The reference in article 11, paragraph 2 (d), to the "security interests" of the employer State is intended primarily to address matters of national security and the security of diplomatic missions and consular posts.

Under article 41 of the 1961 Vienna Convention on Diplomatic Relations and article 55 of the 1963 Vienna Convention on Consular Relations, all persons referred to in those articles have the duty to respect the laws and regulations, including labour laws, of the host country. At the same time, under article 38 of the 1961 Vienna Convention on Diplomatic Relations and article 71 of the 1963 Vienna Convention on Consular Relations, the receiving State has a duty to exercise its jurisdiction in such a manner as not to interfere unduly with the performance of the functions of the mission or the consular post.

With respect to articles 13 and 14

The expression "determination" is used to refer not only to the ascertainment or verification of the existence of the rights protected, but also to the evaluation or assessment of the substance, including content, scope and extent, of such rights.

With respect to article 17

The expression "commercial transaction" includes investment matters.

With respect to article 19

The expression "entity" in subparagraph (c) means the State as an independent legal personality, a constituent unit of a federal State, a subdivision of a State, an agency or instrumentality of a State or other entity, which enjoys independent legal personality.

The words "property that has a connection with the entity" in subparagraph (c) are to be understood as broader than ownership or possession.

Article 19 does not prejudge the question of "piercing the corporate veil", questions relating to a situation where a State entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim, or other related issues.

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Abbreviations

AJIL	American Journal of International Law
BYIL	British Year Book of International Law
California LR	California Law Review
Col LR	Columbia Law Review
Com LR	Commonwealth Law Reports
Cornell LQR	Cornell Law Quarterly Review
Dods	Dodson's Admiralty Reports (1811–22)
"F" (or Fed)	Federal Reporter
F 2d	Federal Reporter (Second Series)
F Supp	Federal Supplement
HLR	Harvard Law Review
ICLQ	International and Comparative Law Quarterly
ILA Report	Report of the International Law Association
ILQ	International Law Quarterly
ILR	International Law Reports (Lauterpacht)
LL New R	Lloyd's List Newspaper Reports
LQR	Law Quarterly Review
Mich LR	Michigan Law Review
Minn LR	Minnesota Law Review
MLR	Modern Law Review
NYULQR	New York University Law Quarterly Review
QB (or QBD)	Queen's Bench Division of the English High Court of Justice
TLR	Times Law Reports
US	United States Reporter (Supreme Court)
USCA	United States Code Annotated
WLR	Weekly Law Reports
YLJ	Yale Law Journal
ILCR	International Law Commission Report
Chic LR	Chicago Law Review
Penn LR	Pennsylvania Law Review
Stan LR	Stanford Law Review

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