UNITED
NATIONS

A

General Assembly

Distr.
GENERAL

A/CN.4/422
11 April 1989

ORIGINAL: ENGLISH

INTERNATIONAL LAW COMMISSION
Forty-first session
Geneva, 2 May-21 July 1989

SECOND REPORT ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

by

Mr. Motoo OGISO, Special Rapporteur

CONTENTS

* For additional comments, including the text of paragraph 1 bis, see document A/CN.4/422/Add.1.

** For comments on this article, see ibid.

INTRODUCTION

1. The present report is the second report of the Special Rapporteur dealing with the entire set of draft articles on the topic "Jurisdictional immunities of States and their property", which was adopted on first reading in 1986 after long considerations by the International Law Commission. The first preliminary report (A/CN.4/415 and Corr.1 and 2) was submitted to the Commission at its fortieth session, in 1988. In the first report the comments of Governments, which had been submitted by 24 March 1988 in response to the request of the Commission, were analysed, and certain amendments to the draft articles were recommended in the light of those comments. The present report is additional to the first report, and the two reports should be read together for the purpose of conducting the second reading of the draft articles.

I. GENERAL COMMENTS

2. On closer examination of the comments of Governments, there is a clear split of views on the present status of the rule of State immunity in international law. In light of the two main different points of view (ibid., p. 6), the Special Rapporteur makes a few comments in this second report on the rule of State immunity and proposes an appropriate approach towards a possible codification of the draft Convention. As a matter of fact, the former Special Rapporteur examined in detail in his second report (1980) State practice concerning the rule of State immunity and concluded as follows: in the general practice of States as evidence of customary rule, there was no doubt that the principle of State immunity has been firmly established as a norm of customary international law. 1/ Yet, at that early stage, this conclusion was confirmed as a justification for commencing work by the International Law Commission on this topic, and since then, the Commission has been making efforts to clarify the measure or extent of application of the principle of State immunity to various activities of foreign States.

3. Though the draft articles, which were provisionally adopted in 1986 on first reading, must be tested by reference to accepted principles of international law and emerging State practice, the Commission has already identified the basic concept in this draft Convention, which can be described in a formulation that a State enjoys immunity from the jurisdiction of the court of another State with certain limitations/exceptions (ibid., p. 47, para. (8) and p. 65, para. (2)). In his preliminary report, the Special Rapporteur tried not to reopen discussion on the theoretical basis of the rule of State immunity. That was why the preliminary report did not touch upon in detail judicial practice and domestic legislation as well as international agreements. However, after the introduction of the preliminary report towards the end of the last session, some members of the Commission expressed their preference for hearing about the recent development of

---

1/ Yearbook of International Law Commission, 1980, vol. II (Part One), p. 221, para. 90.

the general practice of State immunity in more detail. Although the former Special Rapporteur had already done that in some of his reports in his excellent manner, this is an entirely legitimate request, in particular on the part of those members who joined the Commission in relatively recent years. The Special Rapporteur is pleased to respond to such a request by including a summary of the recent development of general State practice below in this report, without touching upon in detail the theoretical basis of the rule of State immunity. However, it would be pertinent to stress that what is needed at this stage of second reading would be to endeavour to make a new multilateral agreement which enables to reconcile conflicting sovereign interests arising out of the application or non-application of State immunity, rather than mere confirmation of the more fundamental principle of sovereignty in this specific area.

4. One point of view, which appeared in the comments of Governments, is that a State is absolutely immune from the jurisdiction of a foreign court in practically all circumstances, unless it has expressly consented to submit to such jurisdiction. According to this position, the absolute immunity is a norm of general international law and, consequently, States which do not abide by it violate international law. Several States such as the Soviet Union, China, Bulgaria, the German Democratic Republic and Venezuela have apparently supported this absolute doctrine (ibid., p. 6, para. (4)). Indeed, this idea rests in part on the fact that for some time in the past it was the rule predominantly applied by the courts of several States. 2/ In fact, however, the doctrine of absolute immunity has gradually given way to a doctrine of restrictive immunity, and therefore, it now appears that there is no existing rule of customary international law which automatically requires a State to grant jurisdictional immunity to other States in general terms. Next, this report will examine briefly this process in which domestic courts have adopted a restrictive view of immunity.

5. The doctrine of absolute immunity appeared entrenched in the judicial practice of the nineteenth century. The following selective State practice can be suggested. In French, the Cour de Cassation, in the Gouvernement espagnol v. Casauz case (1849), affirmed the doctrine of absolute immunity in respect of private law acts, by applying the general principle that a Government might not be subjected to the jurisdiction of a foreign State with respect to commitments which it might have entered into. 3/ In the beginning of this century, the German courts also began to embrace the doctrine of absolute immunity. For example, in the Hellfeld case (1910), the Prussian Court for Conflicts of Jurisdiction took the view that the distinction between the State as exercising its sovereignty and as appearing in its private law personality had not been generally recognized in

---

2/ But for the view that the principle of jurisdictional immunity of States is universally recognized in international law, see, e.g., E/CN.4/415, p. 9 (Bulgaria) and p. 11 (China).

3/ See S. Sucharitkul, "Immunities of foreign States before national authorities", Recueil des cours (hereinafter cited as Recueil), vol. 149 (1976-I), pp. 140 and 141.

international law. 4/ Again, in the Polish Loans case (1921) the same court supported the rule of absolute immunity by holding that, according to international law, a foreign State, both its public capacity, and in transactions of a private law nature, was not subject to the jurisdiction of the courts of another country, except in cases of voluntary submission and in matters involving immovable property. 5/ Furthermore, in the United Kingdom of Great Britain and Northern Ireland, the lower courts generally followed the absolute doctrine since 1880 at least with respect to arrest or attachment of foreign State-owned vessels, 6/ though in The Cristina (1938) some Lords in the highest court reserved their view as to whether the doctrine was applicable in international law. 7/ In addition to this selective case law, it has been often said that the courts of many countries, including the United States of America, Australia, India, South Africa and so on, adhered to the absolute immunity doctrine in the past. 8/

6. On the other hand, even in that early stage, especially in the 1920s and the 1930s, the courts of Belgium 9/ and Italy 10/ developed and applied the so-called restrictive theory which denied immunity to foreign State in proceedings arising out of acts done in a non-sovereign capacity (acts jure gestionis). As early as 1878, the Belgian court denied immunity in proceedings arising out a contract for the sale of guano, observing as follows: the principle of sovereignty is not adversely affected when a foreign Government "posits actions and makes contracts which, always and everywhere, have been considered as commercial contracts, subject to the jurisdiction of commercial courts". 11/ In 1933, after an extensive survey of the State practice, one scholar concluded that the doctrine of restrictive immunity based upon the distinction between acts jure imperii and acts jure gestionis was "peculiar to Belgium and Italy [, and that] must be enlarged to include Switzerland, Egypt, Romania, France, Austria and Greece". Since then, the distinction between acts jure imperii and acts jure gestionis has been

---

4/ I. Sinclair, "The Law of sovereign immunity. Recent development", Recueil, vol. 167 (1980-II), p. 130.

5/ Annual Digest of Public International Law Cases (hereinafter cited as Annual Digest), vol. 1 (1919-1922), p. 118.

6/ I. Sinclair, op. cit., pp. 121-127.

7/ S. Sucharitkul, op. cit., p. 162.

8/ I. Brownlie, Principles of Public International Law, 3rd ed., 1979, pp. 328 and 329, footnote 5.

9/ S. Sucharitkul, op. cit., pp. 132-135.

10/ Ibid., pp. 126-132.

11/ I. Sinclair, op. cit., p. 132.

developed and applied in a number of important civil law countries in Western Europe. 12/

7. As the practice of State trading has spread rapidly, particularly since 1945, the number of States rejecting the absolute theory has continued to grow up to this day. In the United States, the Supreme Court in Berizzi Bros Co. v. S. Pesaro case (1926) upheld the immunity of a vessel owned and operated by the Italian Government and engaged in the carriage of passengers and cargo to the United States. 13/ But, in the subsequent cases, the Court took the position that the granting of State immunity was a matter of national policy as determined by the executive branch of the Government, and thereafter, in 1952, the Department of State announced that it espoused the restrictive theory in the so-called "Tate Letter". 14/ The present position in the United States is governed by the provisions of the Foreign Sovereign Immunities Act of 1976 which reflects the restrictive immunity doctrine. 15/ Following the enactment of the United States Act, the United Kingdom courts admitted the applicability of the restrictive theory in The Philippine Admiral v. Wallerm Shipping Ltd. (1976). In this case the Judicial Committee of the Privy Council, breaking the tradition, held that a foreign State could not claim immunity from jurisdiction in an action in rem against a vessel if the vessel was used in commercial service by the Government of the State. 16/ In this connection, reference to the opinion of two members of the English Court of Appeal, Lord Denning and Shaw L. J., in Trendtex Trading Cooperation Ltd. v. Central Bank of Nigeria (1977) is not without significance. They held there that the Bank was not entitled to immunity in an action in personam, since the letter of credit on which the plaintiff had sued the Bank was a commercial document. As Lord Denning remarked obiter dicta in this case, their position indicates the adoption of the principle that a foreign State has no immunity when it enters into a commercial transaction with a trader in the United Kingdom. 17/ Subsequent to this case, the

---

12/ E. W. Allen, The Position of Foreign States before National Courts, Chiefly in Continental Europe, 1933, p. 301, cited in I. Sinclair, op. cit., p. 134.

13/ S. Sucharitkul, op. cit., p. 155; G. M. Badr, State Immunity: An Analytical and Prognostic View, 1984, p. 36.

14/ I. Sinclair, op. cit., pp. 161-163.

15/ For the full text of the Foreign Sovereign Immunities Act of 1976, see Materials on Jurisdictional Immunities of States and Their Property (hereinafter cited as U.N. Materials), United Nations Legislative Series (ST/LEG/SER.B/20), 1982, pp. 55-63.

16/ G. M. Badr, op. cit., pp. 48 and 79; I. Sinclair, op. cit., pp. 154 and 155.

17/ R. Higgins, "Recent developments in the law of sovereign immunity in the United Kingdom , vol. 71 AJIL (1977), pp. 424, 425 and 429. See also G. M. Badr, op. cit., p. 49; and I. Sinclair, op. cit., p. 155.

United Kingdom enacted the State Immunity Act of 1978 which represented the restrictive immunity theory. 18/

8. In the Federal Republic of Germany, its former position in favour of the absolute immunity doctrine was decisively rejected in the Danish State Railways in Germany case (1953) by the District Court of Kiel: "... a State must be subject to the jurisdiction of foreign courts in respect of activities of a private and civil nature" such as the operation of bus services by a foreign State in Germany. 19/ This restrictive doctrine was also recognized in the decision of the Constitutional Court of the Federal Republic in 1963. 20/ After a comprehensive survey of the judicial practice in other States, relevant treaties and the various codification efforts, 21/ the Court supported the restrictive immunity theory as follows: "As a means for determining the distinction between acts jure imperii and jure gestionis one should rather defer to the nature of the State transaction or the resulting legal relationships, and not to the motive or purpose of the State activity. It thus depends on whether the foreign State has acted in exercise of its sovereign authority, that is in public law, or like a private person, that is in private law". 22/ SUch an approach on the issue of State immunity was followed by the courts of other countries, for example, by Austrian court of Dralle v. Republic of Czechoslovakia (1950) 23/ and Holubek v. United States (1961), 24/ by Belgian court of S. A. Eau, Gaz, Electricité et Applications v. Office d'Aide Mutuelle (1956) 25/ and by Netherlands courts of Krol v. Bank of Indonesia (1958), 26/ N. V. Cabolen v.

18/ For the full text of the State Immunity Act of 1978, see U.N. Materials (supra, note 15), pp. 41-51.

19/ International Law Reports (hereinafter cited as ILR), vol. 20, p. 179.

20/ Claim against the Empire of Iran case (1963), ILR, vol. 45, pp. 57-82.

21/ Ibid., pp. 63-73.

22/ Ibid., p. 80.

23/ Annual Digest of Public International Law Cases, vol. 17, pp. 155-166, esp., p. 163.

24/ Collision with Foreign Government-Owned Motor Car (Austria) case, ILR (supra, note 19), vol. 40, pp. 73-78, esp., pp. 77 and 78.

25/ ILR, vol. 23, pp. 205-208.

26/ ILR. vol. 26, pp. 180 and 181.

National Iranian Oil Company (1965) 27/ and Parsons v. Republic of Malta (1977). 28/

9. Furthermore, several domestic statutes which were similar to the United States and the United Kingdom legislation were recently enacted by other countries, including Canada (1982), Pakistan (1981), Singapore (1979), South Africa (1981) and Australia (1985). 29/ These codification attempts clearly refused the general principle of absolute immunity of a foreign State and adhered to the restrictive principle of State immunity. Attention has also been drawn to certain relevant treaty practice, particularly in the field of commercial activities by a foreign State and its agencies. The 1926 Brussels Convention (the International Convention for the Unification of Certain Rules Relating to Immunity of State-Owned Vessels) and its Additional Protocol (1934) preserved jurisdictional State immunity only to public vessels of a non-commercial nature. 30/ This principle was confirmed by the Convention on the Territorial Sea and the Contiguous Zone (1958), which treated public ships operated for commercial purposes in the same manner as private merchant ships, abandoning the distinction between public and private ships based only upon their ownership. 31/

10. In the light of the preceding brief sketch of State practice from the nineteenth century to the present period, it can no longer be maintained that the absolute theory of State practice is a universally binding norm of customary international law. 32/ Indeed, it might be argued that the absolute immunity doctrine is still the norm on which States that have not consented to its modification could rely. But, as the former Special Rapporteur suggested in his sixth report (1984), unless the absolute doctrine provides "concrete evidence of a judicial decision allowing immunity in cases where it would have been denied in countries practising restricted immunity", the restrictive trends could not be denied simply by enunciation of an opposing doctrine or by mere declaration of an

---

27/ ILR, vol. 47, pp. 138-149.

28/ "Netherlands Judicial Decisions", Netherlands Yearbook of International Law, vol. 9 (1978), pp. 272 and 273.

29/ Full texts of these enactments are reproduced respectively in U.N. Materials (supra, note 15), pp. 7-11, 20-27, 28-34 and 34-40. As to the Australian Foreign States Immunities Act 1985, see Foreign State Immunity, The Law Reform Commission (Report No. 24), 1984, pp. 109-125.

30/ See U.N. Materials, pp. 173-176; I. Brownlie, op. cit., p. 329.

31/ Ibid., p. 156; see also, pp. 310 and 311.

32/ See, e.g., I. Sinclair, op. cit., p. 214.

absolute principle". 33/ A crucial fact is that "the judicial practice of the States that had upheld absolute immunity has now radically changed" 34/ and, therefore, there is no general consensus in favour of absolute immunity.

11. Next, we shall refer to the rule of State immunity from the opposite side. The question is whether general international law now leaves a State free to deny immunity to other States as it sees fit. If the rule of State immunity is governed by international law, we can suppose that international law contains a norm limiting the freedom of States to deny immunity to other States. However, the problem of the scope of limitations on this freedom has not been resolved to permit any precise formulation which would meet general consensus. Indeed, avocates of the restrictive doctrine of State immunity have proposed that acts of a foreign State can be divided into two categories: acts jure imperii and acts jure gestionis, and that the foreign State is entitled to immunity only with respect the first category. Unfortunately, in practice, this distinction has posed difficulties in its application to various types of State's activities. 35/ This seems to be one of the reasons why adherents of the absolute immunity doctrine are hesitant to accept the restrictive trend. 36/

12. With respect to that distinction, we shall turn our attention to the question of the so-called purpose-or-nature test. Acts jure imperii in the restrictive theory are acts done by a State for a "public purpose", only for which immunity is or should be accorded. But this test has been rejected in judicial practice and criticized by international lawyers because all acts performed by a State could be

---

33/ Yearbook ... 1984, vol. II (Part One), p. 16, para. 46.

G. M. Badr also refers to this "implicit general acquiescence in the restricted rule of immunity" as follows:

> "A fact worthy of being pointed out is that there is no record of any protests or other diplomatic representations made over the years to any of the States applying the restrictive rule by those other States who have failed in their pleas before the courts of the former. Had there been a perception that under international law States were entitled to immunity from the jurisdiction of other States, those increasing 'violations' of such a rule of general international law would not have failed to elicit appropriate reactions from the 'injured' States." G. M. Badr, op. cit, pp. 33 and 34.

34/ Yearbook ... 1984, vol. II (Part One), p. 16, para. 47.

35/ See, e.g., I. Sinclair, op. cit., pp. 210, 212 and 214.

36/ C. Schreuer, State Immunity: Some Recent Developments, 1988, p. 41:

> "In fact, one of the main arguments of the proponents of absolute immunity has always been that it is impossible to draw the line between the two types of State activity".

assumed to have some public purpose. 37/ Therefore, some courts have considered the nature of the act of a foreign State determinative. 38/ According to this nature test, the foreign State is not entitled to immunity if the act is of such nature that a private person could perform it. Yet the nature test has also similar difficulty. A foreign State being sued for a breach of contract with a private person should not be granted immunity; but, if one supposes that private persons in general do not maintain armed forces, it follows that the foreign State is entitled to immunity in the proceeding of contract to pay for supplies delivered to such forces. 39/

13. As to the difficulty in applying the purpose-or-nature test, one scholar, examining recent judicial practice in a number of countries, 40/ remarked in 1988: while the more recent cases of "contracts for the purchase, transportation or financing of goods for public works" in a defendent foreign State were almost regarded as commercial and non-immune cases, "borderline situation" still remain in the cases of "State-run services in areas like transportation, telecommunication or education". 41/ In the latter cases, he indicates, the judicial practice varies from country to country or even from court to court in the same country. However, he continued to say as follows: "A borderline area will always remain. [But] this grey zone can be narrowed if we employ the right criteria and if courts are prepared to look beyond national confines to try and find common international standards". 42/ We also note that the same approach was suggested by Professor I. Brownlie in 1979 as follows: "the least objectionable technique" is to clarify the exception from immunity of "a particular type of activity or subject-matter, for example government ships operated for commercial purposes", leaving aside an attempt of establishing general criteria for distinguishing between acts jure imperii and acts jure gestionis. 43/

14. In sum, there is no single, generally accepted meaning of either of acts jure imperii and acts jure gestionis, though a number of scholars support the principle of restrictive immunity. At the same time, however, now that we cannot neglect "a clear and unmistakable trend towards recognition of the principle that

---

37/ See, e.g., I. Brownlie, op. cit., p. 331.

38/ See, e.g., S. Sucharitkul, op cit., p. 187.

39/ See, e.g., I. Sinclair, op. cit., p. 213; and I. Brownlie, op. cit., p. 331.

40/ C. Schreuer, op. cit., pp. 17-31.

41/ Ibid., pp. 18 and 26.

42/ Ibid., p. 41.

43/ I. Brownlie, op. cit., p. 331.

the jurisdictional immunity of States is not unlimited", 44/ the Special Rapporteur understands that both acts jure imperii and acts jure gestionis need to be elaborated and defined in objective legal terms.

15. From the above point of view, we shall consider the formulation of draft article 6. One possible formulation of a general rule of State immunity is as follows: "In general, a foreign State shall be immune from the jurisdiction of a forum State for acts performed by it in the exercise of its sovereign authority, i.e., jure imperii, and it shall not be immune in the circumstances provided in the present articles." 45/ This formulation does not entitle the foreign State to automatic residual immunity, because the foreign State must demonstrate that the conduct subject to litigation was performed in its jure imperii capacity, even if the conduct does not fall within one of the express exceptions. But, such a formulation, which imposes on the foreign State the burden of proving its entitlement to immunity, has never been proposed and is not adopted in the present draft article 6. 46/ The more usual approach in drafting is that, if none of the express exceptions applies, a foreign State is entitled to immunity from jurisdiction; the first alternative formulation of this approach begins with a general rule of immunity and then lists the exceptions in which the foreign State

---

44/ I. Sinclair, op. cit., p. 196.

45/ As an example, which adopted such a formula, article 2 of the International Law Association Montreal Draft Convention on State Immunity should be noted. It provides as follows:

> "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 provides several exception to immunity from adjudication). For the text, see G. M. Badr, op. cit., pp. 231 and 232.

46/ The draft article 6 which was agreed to adopt on first reading in 1986 provides as follows:

> "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 draft articles [and the relevant rules of general international law]". (A/CN.4/415, p. 46)

cannot claim immunity, 47/, and the second alternative lists the exceptions and then provides a residual general rule of immunity. 48/

16. Draft article 6 adopts the first alternative formulation mentioned above, but there are two conflicting views as to the possible addition of the bracketed phrase, "[and the relevant rules of general international law]" (A/CN.4/415, pp. 46 and 47). The deletion of the phrase might restrict the jurisdiction of some States whose courts are already applying the rule of restrictive immunity. 49/ It is actually conceivable that some cases covered by the domestic rule fall outside the list of non-immunity cases provided for in the draft Convention. In view of the recent developments supporting the restrictive immunity doctrine, the retention of the phrase would not be illogical, as it would allow for the future development of the law on this subject.

17. On the other hand, the retention may result in increasing the number of exceptions to immunity. By subjecting the provision to unilateral interpretation by a court of the forum State, 50/ which would consequently lead to undue restrictions on acts jure imperii. 51/ Should the deletion of the phrase be admitted for this and other reasons, the Special Rapporteur proposes the following additional article be included in the draft Convention for the purpose of keeping a balance between the two different views above.

> "Notwithstanding the provision of article 6, any State party may, when signing this Convention or depositing its ratification, acceptance or accession, or at any later date, make a declaration of any exception to State immunity, in addition to the cases falling under articles 11 to 19, according to which the court of that State shall be able to entertain proceedings against another State party, unless the latter State raises objection within thirty days after the declaration was made. The court of the State which has made the

---

47/ See, e.g., the United States Foreign Sovereign Immunities Act of 1976, sections 1604 and 1605; the United Kingdom State Immunity Act 1978, sections 1 (1) and 2-11; the International Law Association Montreal Draft Convention on State Immunity (1982), articles 2 and 3. For the text of these articles, see supra, notes 29 and 45.

48/ See, e.g., European Convention on State Immunity and Additional Protocol 1972, articles 1-15. For the text of this Convention, see U.N. Materials (supra, note 15), pp. 156-172.

49/ See, e.g., document A/CN.4/415, p. 50 (Federal Republic of Germany), p. 47 (Australia), p. 49 (Denmark, Finland, Iceland, Norway and Sweden), and p. 51 (Switzerland).

50/ Ibid., p. 19 (Union of Soviet Socialist Republics) and p. 50 (German Democratic Republic).

51/ Ibid., p. 48 (Bulgaria).

declaration cannot entertain proceedings under the exception to State immunity contained in the declaration against the State which has objected to the declaration. Either of the State which has made the declaration or the State which has raised objection may withdraw its declaration or objection at any time."

18. It might be too early to predict whether the proposed article will be acceptable to a number of States, but the Special Rapporteur believes that it is consistent with the current general trend in State practice towards the restrictive rule of State immunity in international law; in cases falling outside the scope of draft articles 11-19, the draft Convention does not prejudice the extent of jurisdictional immunity already recognized in States which made the optional declaration under the proposed article. At any rate, this provision might be conducive to the formation of a precise rule of customary international law, which could be based upon regular and uniform judicial practice among States, but which thus far has not yet occurred. In this connection, the Special Rapporteur's view is that, if the proposed article of the optional declaration is adopted together with the deletion of the bracketed phrase of the draft article 6, the provisions of draft article 28 may have to be reconsidered.

Article 3

19. As to paragraph 2 of draft article 3, the Special Rapporteur suggested in his preliminary report that it be revised as appeared in paragraph 3 of new draft article 2 in the light of the fact that several Governments disagreed to the purpose criterion included in the former paragraph because of its subjective or artificial nature. Paragraph 2 of article 3 was intended to be a compromise formula by the drafting committee: encountering strong objections to the adoption of the nature test in determining whether or not a contract is commerial, the Commission had to seek a criterion which would also take into account the motive or the ultimate purpose that a foreign State seeks to achieve by concluding the contract with a private party. As a result, that paragraph was introduced into the draft Convention. However, this double criterion, which referred primarily to the nature of the contract but also to the relevant practice of a foreign State, would lead to uncertainties in its application, since the practice of the State is not necessarily clear; and lean to the doctrine of absolute immunity. As far as the text is interpreted literally, the purpose test is to be used as a supplementary one in cases of doubt. But, according to the commentary to draft article 3, "if after the application of the 'nature' test, the contract or transaction appears to be commercial, then it is open to the State to contest this finding by reference to the purpose of the contract or transaction". The purpose of the contract would be almost always determined on one-sided basis, as the United Kingdom commented on this article. Indeed, the double criterion was designed to provide an appropriate protection for developing countries' endeavours in their national economic development. Though the Special Rapporteur does not deny the necessity in formulating this article, a more balanced criterion could be ensured by the formula which appeared in paragraph 3 of the proposed reformulation of draft article 2: "reference should be made primarily to the nature of the contract, while its purpose should also be taken into account to the extent that public purpose is clearly stipulated in an international agreement between the States concerned or a written contract between the foreign State and the private party."

II. COMMENTS ON PART III, [LIMITATIONS ON] [EXCEPTIONS TO] STATE IMMUNITY

Article 13

20. As the former Special Rapporteur indicated in his fifth report (1983), the relevant provisions in recent codifications provide for the denial of immunity for illegal acts of foreign States which cause death or personal injury or damage or loss of property. Those enactments usually require a territorial jurisdiction as a limiting factor in the application of the torts exception: for example, the United Kingdom act provides that a State is not immune as regards proceedings in respect of certain injury or damage "caused by an act or omission in the United Kingdom". On the other hand, there are two cumulative requirements in draft article 13, which is very similar to article 11 of the 1972 European Convention on State Immunity: "... the author of the act or omission [must be] present in that territory at the time of the act or omission". Though the Special Rapporteur has suggested the deletion of the second territorial requirement in his preliminary report, this tort exception would not be applicable to tort committed abroad or other transfrontier injurious acts because of the first requirement of territorial connection: relevant act or omission must occur "in whole or in part in the territory of the State of forum".

21. As to the question of State responsibility, the illegality of the act or omission in this article is not determined by the rules of international law. According to the commentary to this article, "this exception to the rule of immunity is applicable only to cases or circumstances in which the State concerned would have been liable under the lex loci delicti commissi". In other words, the applicable law is in principle the law of the forum State. Next, the Special Rapporteur understands that the phrase "the act or omission which is alleged to be attributable to the State" is not governed by the general requirement of State responsibility. This point should also be clarified in the light of the comments of some Governments.

22. Furthermore, while this article covers literally the physical injury to the person or the damage to tangible property, it might be arguable that the scope of the article would be too wide to get support of a significant number of States in formulating this draft article. In matter of fact, as far as the intent of the Commission reflected in the commentary is concerned, draft article 13 was designed to cover mainly accidents occurring routinely within the territory of the forum State. Draft article 13 was restored in 1984 to its present form after the former Special Rapporteur replaced that article by a provision which narrowed down its application to traffic accidents for which insurance coverage would be usually sought. In any event, the Commission should reconsider the scope of the article in the light of the fact that liability cases connected with criminal offences were thus far very few in practice.

Article 15

23. Some developing countries have raised objections to draft article 15 because it would have detrimental effect on their economic growth and development. In general, they think that refraining from enacting legislation to protect industrial

or intellectual property is consistent with the national interest, since free reproduction of any new technological advancements in their countries may be for the benefit of the society as a whole. However, draft article 15 does not in any way affect the competence of a State to select and implement its domestic policies within its territory. In fact, the article has placed two specific territorial restrictions on this proposed State immunity exception. First of all, the alleged infringement must have occurred within the territory of the forum State, and second, the case must involve rights which are protected in the forum State. Therefore, under draft article 15 a domestic court could not be empowered to decide infringement occurring outside of the territory of the forum State.

Article 18

24. The Special Rapporteur proposes that the expression "non-governmental" be deleted because paragraphs 1 and 4 could be interpreted to mean that a ship owned by a State and used in commercial service enjoys immunity from the jurisdiction of another State. Otherwise, while all commercial ships in service under a State trading system might invoke immunity, a commercial ship operating under the free-market system would be subject to local jurisdiction. Such an uneven legal consequence is quite unacceptable to a significant number of States. It was pointed out that, in countries having the State trading system, a State is the owner of the ship but authorizes an entity separated from the State to use and operate that ship for commercial purposes. In such a case, unless the State could allow the separate operator (see "a State enterprise" under draft article 11 bis) to answer a claim arising out of the operation of the ship, the State should always be answerable for any causes of action relating to the operation of that ship. This proposal would be consistent with the general trend emerging from such international conventions as the 1926 Brussels Convention on the Immunity of State-Owned Ships, the 1958 Convention on the Territorial Sea and the Contiguous Zone and the 1982 United Nations Convention on the Law of the Sea. In the Brussels Convention, it was recognized that State-owned or operated ships and cargoes carried on them were subject to local jurisdiction in the same manner as ordinary private merchant ships, and then the State immunity was claimable only in respect of the former category of ships which were used for public or non-commercial purposes. We might also find such a distinction in the Law of the Sea Conventions: the distinction between government ships operated for commercial purposes and those operated for non-commercial purposes. Following the substantive reasons and the wordings in these international conventions, the expression "non-governmental" should be deleted in paragraphs 1 and 4. With regard to paragraph 6, the Special Rapporteur considers that it should be redrafted because it could be misinterpreted to the effect that States may plead all measures of defence, prescription and limitation of liability only in the proceedings relating to the operation of the relevant ships and cargoes. Finally, the Special Rapporteur doubts whether granting immunity to ships owned or operated by the developing countries is advantageous to them in the long run. If they are not answerable for claims in respect of the operation of ships and the cargoes on board those ships, private parties in the developed as well as other developing countries would hesitate to engage in commercial service with the ships owned or operated by such developing countries.

"[For additional comments on Article 18, including the text of a newly proposed paragraph 1 bis of the article, see A/CN.4/422/Add.1]

Article 19

[For comments on Article 19, see A/CN.4/422/Add.1]"

Article 20

25. The provision of draft article 20 has to be reviewed in connection with draft article 15. The position of the developing countries with regard to draft article 15 is that since their economic policies require the expropriation or nationalization of certain businesses or industries which may involve intangible property, subparagraph (b) of draft article 15 might operate to hinder their economic and industrial development in regard to their competence to expropriate or to take measure of nationalization of the rights mentioned in the article. After the similar concerns were expressed by some members in the Commission, draft article 20 (former proposed draft art. 11, para. 2) was proposed as a general saving clause. The Special Rapporteur considers that draft article 20 should be retained in the draft Convention. In fact, a domestic court might be required to judge the lawfulness of foreign nationalization measures in connection with a proceeding concerning intellectual or industrial property rights. Assuming that (1) company A, incorporated under the laws of State X, has registered a patent in State X and also in State Y, to which company A exported its product; and further (2) State X nationalized company A and then applied to the authorities in State Y for the patent in State Y to be reissued or registered in the name of State X. In this case, if State Y's patent office reissued the patent for State X and company A brought an action for patent infringement, State Y's court would encounter the issue of the validity of State X's nationalization. State X could not invoke State immunity in the court of State Y, as provided for under draft article 15, subparagraph (b), and the court could judge the lawfulness of State X's nationalization under the existing rules of international law. In such a case, irrespective of the provision of draft article 20, domestic court may apply the existing rules of international law concerning nationalization.

III. COMMENTS ON PART IV, STATE IMMUNITY IN RESPECT OF PROPERTY FROM MEASURES OF CONSTRAINT

26. Majority views of government as well as writers are that immunity from measures of constraint is separate from jurisdictional immunity of a State. However, there are some writers who argue that allowing plaintiffs to proceed against foreign States and then withhold from them the fruits of successful litigation through immunity from execution may put them into the doubling frustrating position of being left with an unenforceable judgement with expensive legal costs. 52/ Among Governments, Switzerland points out that immunity from

---

52/ C. Schreuer, op. cit., p. 125.

execution is not different in nature from immunity from jurisdiction and the International Law Commission draft departs from that of the 1972 European Convention on State Immunity appreciably with regard to measures from execution (A/CN.4/415, p. 70). The 1972 European Convention adopts a complicated solution. The basic rule is a general prohibition of enforcement measures subject to the possibility of an express waiver. However, the Convention provides for a direct obligation of Contracting States to (voluntarily) abide by a judgement given against them. In the case of non-compliance the judgement creditor is given the possibility of instituting proceedings before a court of the State against which the judgement has been given. Alternatively, an additional protocol opens the possibility of bringing an action before a special European Tribunal of State Immunity. There is also a possibility for participating States to make an optional declaration which restores the possibility of taking enforcement measures after all. As between the States making the optional declaration, judgements arising from industrial or commercial activities may be enforced against property of the debtor State which is used exclusively for such activity. The system under the European Convention is based on the obligation of State Parties to abide voluntarily by the judgement rendered against them and therefor it would be difficult to apply elsewhere the same system in its entirety.

27. In addition to a waiver, the United Kingdom State Immunity Act of 1978 permits enforcement of a judgement or an arbitral award in respect of a property which for the time being in use or intended for use for commercial purposes. the United States Foreign Sovereign Immunity Act of 1976 establishes a general rule of immunity from execution with a number of exceptions. However, all exceptions refer only to commercial property. One of the differences between the United Kingdom act and the United States act is that under the United States act a waiver is only possible with respect to commercial property, while under the United Kingdom act a waiver can apply to non-commercial property. General tendency among State practice in European countries is to permit enforcement with regard to commercial property but deny it in the case of property designated for public purposes. Article 21 has been drafted along these lines. The only point for consideration is whether the phrase in subparagraph (a) "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed" should be deleted, as suggested by Australia, Canada, the Nordic countries, Qatar, Switzerland, and the United Kingdom. Practice in European countries would be better reflected in this suggestion. If the above suggestion is not agreeable, the addition of the phrase "unless otherwise agreed between the States concerned" to the beginning of the article might alleviate the difficulties on the part of those countries which prefer the deletion of the reference from subparagraph (a) of draft article 21.

28. Bank accounts of a State are involved in many cases concerning constraint measures. One possible view is that the bank accounts are inherently commercial assets which may not be regarded as serving any public purpose. Another view is that a mere future possibility of public use is sufficient to regard the bank account immune. Both views are somewhat extreme. In the case involving attachment of the bank account of National Iranian Oil Company (NIOC), the German Appeals Court found that the mere possibility of future use for sovereign functions was no

basis for immunity. 53/ A similar judgement was rendered by another German court against the Central Bank of Nigeria. 54/ Moneys in bank accounts under the control of a diplomatic or consular mission carries the presumption of a public purpose and, therefore, immunity. According to the United Kingdom act, immunity from execution would apply, if it could be shown that "the bank account was earmarked by State solely for being drawn on to settle liabilities incurred in commercial transactions". Burden of proof would lie on the judgement creditor. The Vienna Convention on Diplomatic Relation does not refer specifically to bank accounts. Indeed, the present wording of draft article 23, paragraph 1 (a), seems to have expressed the understanding on customary law sufficiently clear. Question of mixed accounts may not be an easy problem. But the cautious attitude of several European courts seems to indicate that the general tendency would be to shift the burden of proof to the foreign State. As to the account of the Central Bank, the British court of appeal had denied its immunity twice. 55/ On the other hand, the United States Foreign Sovereign Immunity Act preserves immunity from attachment and execution of property belonging to a foreign central bank or monetary authority held for its own account. Taking into account the comment of the Federal Republic of Germany and the provision of the United States Act, the Special Rapporteur would suggest to reformulate draft article 23, paragraph 1 (c), as follows: "property of the central bank or other monetary authority which is in the territory of another State and serves monetary purposes, unless that property is allocated or earmarekd within the meaning of subparagraph (b) of article 21" and, as a consequence, paragraph 2 may be deleted.

29. Suggestions by the Special Rapporteur for change of draft articles 21 and 23 are as follows:

Article 21

(a) Add the following at the beginning: "Unless otherwise agreed between the States concerned,";

(b) Delete the phrase in paragraph (a) which reads: "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed,"

53/ National Iranian Oil Company Case, Decision of the Federal Constitutional Court of 12 April 1983, vol. 64, p. 1 of the official publication (BVerfGE 64, 1).

54/ Nonresident Petitioner v. Central Bank of Nigeria, Landgericht Frankfurt am Main, Judgement of 2 December 1975, International Legal Materials 16 (1977), p. 501.

55/ Trendtex Trading Corporation v. Central Bank of Nigeria, Decision of the Court of Appeal, 1975 T. No. 3663, International Legal Materials 16 (1977), p. 471. Hispano Americana Mercantil S.A. v. Central Bank of Nigeria [1979], The British Yearbook of International Law, 50 (1979), p. 221.

Article 23

(a) Add the following to the end of paragraph 1 (c): "and serves monetary purposes, unless such property is allocated or earmarked within the meaning of subparagraph (b) of article 21.

(b) Delete paragraph 2.
