The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and Their Property

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I. Introduction

Jurisdictional immunity concerns the question of the extent to which States, or their organs or State enterprises, can be sued in the civil courts of other States, and how far there can be execution on property of a foreign State.[1] Originally in international law the prevailing theory was that of absolute immunity, according to which actions against foreign States were in general inadmissible without their consent, but restrictive immunity has since gained sway.[2] Under this theory immunity is to be granted only in the case of particular types of property, notably those of a sovereign nature (*acta iure imperii*). The problem is clearly that of drawing a precise demarcation line between immune and non-immune State activity.

The international development of State immunity has since the 1970s been determined by a variety of national[3] and international[4] codes, which delimit immunity by laying down exceptions in particular groups of cases. These codes are binding particularly on the Western industrial States, and it is before their courts that almost all known actions against foreign States have been brought. Since 1977 most of these cases have been heard in the USA. Here a private plaintiff

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1 From the vast literature on State immunity, only recent fundamental works are cited: see Crawford, 'International Law and Foreign Sovereigns: Distinguishing Immune Transactions', 54 *BYIL* (1983) 74; H. Damian, *Staatenimmunität und Gerichtszwang* (1985); C. Schreuer, *State Immunity: Some Recent Developments* (1988); Sornarajah, 'Problems in Applying the Restrictive Theory of Sovereign Immunity', 31 *ICLQ* 661 (1982); H. Steinberger, *State Immunity*, Encyclopedia of Public International Law Vol. 10 (1987) 433; Trooboff, 'Foreign State Immunity – Emerging Consensus of Principles', 200 *RdC* (1986) 235.

2 This development was largely determined by the collapse of the socialist States, which had previously largely kept to the absolute theory. Today the absolute theory is represented only by the People's Republic of China and a few other third world countries; cf. Jin, Jingshen, 'Immunities of States and Their Property: the Practice of the People's Republic of China', 1 *Hague Yearbook of International Law* (1988) 163. For a survey see B. Heß, *Staatenimmunität bei Distanzdelikten* (1992) 196 et seq.

3 USA, Foreign Sovereign Immunities Act; 28 USC paras. 1330, 1602-1611, 15 ILM (1976) 1398; United Kingdom, State Immunity Act, 17 ILM (1978) 1123, (with largely identically worded Acts in Pakistan (1981), South Africa (1981) and Singapore (1979)); Canada, State Immunity Act 1982, 21 ILM (1982) 798, and Australia, Foreign States Immunities Act 1985, 25 ILM (1986) 715.

4 Notably the European Convention on State Immunity of 16 May 1972, ETS 3, 28 et seq., at present ratified by 8 States.

finds a system of procedural law that generates comparatively low costs, and is able to profit from the Foreign Sovereign Immunities Act which lays down far-reaching exceptions to immunity.[5] Academic bodies have also made proposals for codifying State immunity: notably the International Law Association[6] and the *Institut de Droit International*.[7]

In view of the continuing uncertainty as to the sphere of application of immunity, and a perceptible reticence on the part of many third world countries about the development of international norms which are imposed by mainly first world countries, the UN General Assembly decided in 1977 to include the topic in the work programme of the International Law Commission (ILC). Professor Sompong Sucharitkul of Thailand was appointed Rapporteur, and between 1979 and 1986 he produced eight extensive reports.[8] Professor Sucharitkul comprehensively worked through existing case-law and codifications, but went further by decisively developing the law. The draft articles he proposed were not confined to simply reproducing the law in force. They formed the basis for a draft convention adopted by the ILC in 1986 after their first reading.[9] By 1988 23 States had taken their positions on this draft.[10] Between 1988 and 1991 the ILC produced a final draft on second reading. The Rapporteur was Professor Motoo Ogiso of Japan, who prepared the final version in three further reports.[11] At the 43rd session of the ILC in Spring 1991 the final draft was adopted; it was submitted to the UN General Assembly in Autumn 1991.[12]

The draft contains 22 Articles which are divided into five sections: Part I (Introduction, Articles 1-4) regulates the personal,[13] material[14] and temporal[15] sphere of application of the draft, the most important definitions being contained in Article 2. Part II (Articles 5-9) prescribes in Article 5 immunity as the rule for trial proceedings. Article 6 specifies the forum

5 See Trooboff, *supra* note 1; J. Dellapenna, *Suing Foreign Governments and their Corporations* (1988). After 15 years of court practice, essential legal questions of this Act have now been clarified.

6 Montreal Draft, 22 ILM (1983) 287. This is at present being reworked (Rapporteur Prof. Ress (Saarbrücken), see *Cairo Report on State Immunity*, 1992). The ILA discussed the proposals in Spring 1992.

7 See volume 64 *Annuaire de l'Institut de droit international* (1992) 388, special rapporteur Prof. Brownlie.

8 The reports contain the most thorough and creative treatment of State immunity to date. They can be found in the ILC Yearbooks for 1979-1986; references in ILC Report (43rd session), A/46/10, Suppl. 10, 8, para. 17.

9 Greig, 'Forum State Jurisdiction and Sovereign Immunity Under the International Law Commission's Draft Articles', 38 *ICLQ* (1989) 243 et seq.; Greig, 'Specific Exceptions to Immunity Under the International Law Commission's Draft Articles', 38 *ICLQ* (1989) 560 et seq.; Morris, 'The International Law Commission's Draft on the Jurisdictional Immunities of States and Their Property', 17 *Denver Journal of International Law and Policy* (1989) 395 et seq.; Tomuschat, 'Jurisdictional Immunities of States and Their Property. The Draft Convention of the International Law Commission', *Essays in Honour of I. Seidl-Hohenveldern* (1988) 603 et seq.

10 The written comments and observations were reproduced in Doc. A/CN.4/410 and Add. 1-5.

11 Preliminary Report, A/CN.4/415; Second Report, A.CN.4/422 and Corr.1; Third Report, A/CN.4/431 and Corr.1 (not yet published).

12 Draft Articles on Jurisdictional Immunities of States and Their Property, 30 ILM (1991) 1554; the ILC's exhaustive comments can be found in Report of the International Commission on the work of its forty-third session, A/46/10, Suppl. 10, 8 et seq.; Cf. Kessedjian, Schreuer, 'Le projet d'articles de la Commission du droit international des Nations-Unies sur les immunités des Etats', 96 *RGDIP* (1992) 299.

13 See *infra* text note 83 et seq.

14 Diplomatic and consular immunities remain unaffected (Article 3(1)). The same applies under Article 3(2) to the personal privileges of Heads of State. As far as their action in the line of duty is concerned, they are equated with the other State organs, by virtue of Article 2(1)(b)(v).

15 Article 4 excludes retroactive application of the Convention.

State's obligation to observe immunity. Articles 7-10 contain the generally recognized circumstances where immunity is waived.[16] Part III (Articles 10-17) contains exceptions to immunity for trial proceedings associated with the property under the dispute. Part IV (Articles 18-19) concerns immunity from enforcement. Part V under the heading Miscellaneous Provisions regulates in particular procedural questions, while Article 20 concerns notification, and Article 21 the handing down of judgments *in absentia*. Article 22(1) bans the imposition of procedural constraints on foreign States.[17]

II. Immunity to Adjudicate

A. State Immunity and International Competence

It is the special feature of State immunity that it is at the point of intersection of international law and national procedural law. The ground of validity is customary international law[18] while the assertion of the claim is by civil trial, which is to be conducted under the rules of the *lex fori*. The positioning of immunity within domestic law means that courts have not always based their decisions on State immunity, but also on similar institutions of national law, such as the doctrines of *forum non-conveniens*, act of State and non-justiciability.[19] Other courts have required a substantive territorial connection with the subject of the dispute as a special precondition for action.[20]

For the ILC, the question accordingly arose of how far these related legal institutions were to be brought into the attempt at codification. In the Third Report, Professor Sucharitkul had exhaustively discussed the distinction between immunity and similar legal concepts, but he opposed incorporation since national laws in this connection differed too much.[21] The ILC followed this suggestion, especially since its statute obliges it to codify international and not domestic law. By contrast, the *Institut de Droit International* included these legal concepts in its latest work.[22]

The advantage of this approach is that all issues which may arise during judicial proceedings against foreign States are settled in one comprehensive codification. Only this approach leads to an international uniform practice by creating a uniform minimum standard. From this point of view the restrictive codification approach of the ILC is to be regretted.

But the ILC too, indirectly addressed jurisdictional issues: all exceptions to immunity in Articles 10 et seq. presuppose that the tribunal did accept its jurisdiction by applying municipal

16 Specifically, waiver of immunity by treaty (Article 7), by accepting the proceedings (Article 8) and by relevant counter-suit (Article 9).

17 See *infra* text note 77 et seq.

18 Case-law in the Federal Republic of Germany in particular has so far treated State immunity as a legal principle of customary international law (through para. 20 GVG, Article 25 GG), and developed it further: see BVerfGE 16, 32 (1963); BVerfGE 46, 242 (1977); BVerfGE 64, 1 (1983).

19 Cf. *IAM v. OPEC*, 649 F.2d 1354 (9th Cir.1981); *Environmental Tectonics v. W.S. Kirkpatrick*, Inc., 110 S.Ct.701 (1990); *Buttes Oil & Gas v. Hammer* [1982] A.C. 888 (H.L.).

20 *Liamco* case, Swiss Federal Court, BGE 106 Ia, 142 (148). Likewise the Austrian courts, which, on the background of a narrow view of international competence, did not allow orders in the Chernobyl actions: see OGH, 10 *JBl.* (1988) 323.

21 Cf. Third Report, YBILC (1981 II) (Part One) 128-140.

22 Admittedly, special rapporteur Brownlie was not able fully to push through this approach; see Definitive Report, 62 *Annuaire de l'Institut de droit international* (1987) 45: the resolution adopted in 1991 (11 *Praxis des internationalen Privat- und Verfahrensrechts* (1991) 430 refers by its wording only to State Immunity, though in content it is in line with the rapporteur's farther-reaching approach. See B. Heß, *supra* note 2, 269 et seq.

law. For that reason Articles 10 to 17 contain the same formulation which reads: 'a State cannot invoke immunity from jurisdiction before a court of another state *which is otherwise competent*'. The ILC's commentary to Article 6 also states explicitly that the verification of State immunity presupposes that the competence of the trial court has been established.[23] Secondly, almost all exceptions to immunity[24] in articles 10 to 17 presuppose a territorial connection with the forum State, thereby restricting international competence.[25] Accordingly, the sequence of verification proposed by the ILC is logically compelling.

This statement is of interest in particular to German practice. Here State immunity is tested against the concept 'German jurisdiction' (*Deutsche Gerichtsbarkeit*) before it is reviewed in the light of international competence, with the consequence that territorial connection does not in general count as a component part of the immunity.[26] Against the background of the ILC draft – but also in view of the similar regulations in the European Convention[27] – this sequence of verification is no longer tenable and should be abandoned.[28]

B. The Commercial Transaction Exception

The central exception to immunity is contained in Article 10(1). This makes an action admissible where according to *lex fori* the trial court is internationally competent and the subject of the dispute can be regarded as a 'commercial transaction'.[29] No special connection between the subject of the dispute and the forum is required.[30] Instead a State engaging in private legal transactions ought to be treated like its private competitors. With this provision, the ILC has adopted the restrictive approach;[31] it was heatedly debated in the ILC and in the 6th Committee.[32] Its incorporation in the draft as a universally accepted convention can be regarded as a definitive breakthrough for the restrictive theory.[33]

23 Cf. ILC Comment A/46/10 Suppl. 10, 39 et seq.

24 With exceptions only in Article 10 (commercial transactions) and Article 17 (effect of an arbitral agreement).

25 This becomes particularly clear in Article 12: the provision requires a tort committed within the forum State; the tortfeasor must have been present in the State when the damage was caused. Accordingly, the exception relates to the place of the deed, just like competence in the case of actions for delicts (cf. e.g. Article 5(3) of the Brussels's Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters) though formulated more narrowly than this since transboundary torts are excluded.

26 Cf. H. Schack, *Internationales Zivilprozessrecht* (1991) para. 130 et seq. This distinction is to be explained by the conceptual distinction, specific to German procedural law, between null and disputable judgments: the absence of immunity should lead to nullity, and absence of competency to disputability. Clearly, international law does not require this distinction. Cf. B. Heß, *supra* note 2, at 387-391.

27 *Supra* note 4. All the exceptions to immunity in the European Convention on State Immunity (Articles 2-14) require a substantial territorial connection.

28 Cf. Heß, *supra* note 2, at 379 et seq.

29 Article 10(2) excludes agreements between States, and disputes in which the parties have arrived at another arrangement.

30 The need for this feature of the situation follows from the basic jurisdictional conflict underlying immunity, between the States involved. For its inclusion see Sucharitkul, Fourth Report, YBILC (1982 II) 229, para. 121. See also Greig, *supra* note 9, at 266.

31 Though mitigated by the twofold qualification of Article 2(2); see *infra* note 38.

32 See the sharply-worded memorandum from Soviet ILC member Ushakov, YBILC (1983 II) 56, and the dissenting opinion from the Chinese ILC member Ni, YBILC (1983 I) 84, who both advocated the absolute theory.

33 And this is a considerable merit for the ILC's work of codification.

However, the real problem consists in classifying the subject of a dispute as a 'commercial' or 'non-commercial' transaction. The objective of codification is to develop a conceptual system with a comprehensive terminology.[34] Admittedly, neither case-law nor doctrine have to date been able to agree on a satisfactory definition for 'commercial' transaction. Nor has the ILC solved this problem, and it followed the pragmatic approach that has been adopted in other codes on jurisdictional immunity.[35] Article 2(1)(c) contains, instead of a conclusive definition, a list of *typical* commercial transactions (commercial contracts, transactions for the sale of goods or services, transactions of financial nature or any other contract or transaction of commercial, industrial trading or professional nature).[36] This covers all economic commercial legal transactions. It is the task of the trial court to test whether the action in dispute falls under one of the examples, or is comparable with them.

In classifying transactions under Article 2(2), it is not only the nature of the action that should be considered; the purpose pursued by the defendant State is also to be taken into account if this is of significance under domestic law.[37] This consideration of the purpose was advocated particularly by the developing countries; it was, however, opposed by the Western States.[38] The argument against taking purpose into account is that government action ultimately always serves sovereign purposes, the outcome being the reintroduction of absolute immunity.[39] Therefore, particularly with politically problematic actions like investment disputes, immunity continues to apply.[40]

However, the reservations against taking purpose into account seem less cogent if Article 2(2) is seen as a conflict-of-laws rule: focusing on the 'nature' of the action in reality means nothing other than excluding the law of the defendant State and applying *lex fori* to the classification.[41] Considering the 'purpose', however, does necessitate taking account of the defendant State's law in the classification.[42] Understood this way, Article 2(2) entails reference to the law of both States concerned: the classification of the subject of the dispute has to be made having regard to the groups of cases listed in Article 2(1)(c), according to the *lex fori* and to the

34 This sort of conclusive definition would mean that the distinction should be drawn exclusively according to international law.

35 Cf. Section 3(3) United Kingdom State Immunity Act (1978) *supra* note 3; Section 11(3) Australian Foreign States Immunities Act of 1985, *supra* note 3.

36 The remaining exclusion pertains to labour contracts, which are exhaustively regulated in Article 11.

37 Accordingly, a two-stage verification is made. Firstly, the nature of the action in dispute is to be inquired into. Then it should be ascertained whether, despite the private-law nature of the agreement (e.g. supply of medicine) treatment as a sovereign is requisite because of the agreement's set purpose (e.g. because the medicine were to cope with an urgent emergency situation in the defendant State); see ILC Comment, A/46/10 Suppl. 10, Article 2(25).

38 Cf. the written Comments on the Draft Convention of Australia, Austria, Great Britain, France, United States of America, Italy, Netherlands and Federal Republic of Germany, UN Doc. A/47/326 (*infra* note 115). See also Kessedjian, Schreuer, *supra* note 12, at 308 et seq.

39 Rejected by C. Tomuschat, *supra* note 9, at 612 et seq.; Morris, *supra* note 9, at 439; A. Verdross, B. Simma, *Universelles Völkerrecht* (1984) para. 1173.

40 This has effects particularly on the exception to immunity for arbitration proceedings, Article 17; see *infra* note 67 et seq.

41 This is particularly clear in BVerfGE 16, 32 (1963).

42 Taking the law of the State concerned into account is proper also having regard to the *lex causae* of the claim at issue: in German private international law (cf. Article 28 EGBGB), the position mostly taken is that as a rule the law of the contracting States applies to treaties with foreign States; cf. Oberlandesgericht Koblenz, *Rechtsprechung zum Internationalen Privatrecht* (1974) No. 1a; Martiny Comment, in *Münchner Kommentar zum Bürgerlichen Gesetzbuch Vol. VIII*, Art. 28 EGBGB para. 85. It would, however, be contradictory to decide the qualification of *lex causae* completely differently from the qualification in the context of immunity.

law of the defendant State. This sort of twofold classification is quite proper, according to *lex fori*,[43] and is inappropriate because it means unilateral extension of national legal thought to the defendant State, whereas the exclusive application of subjective purposes of the defendant State would ultimately mean that admissibility of the action was at its disposal. Only the twofold classification does justice to the conflict of sovereignty between the States concerned that underlies immunity.[44] Seen this way, the test first requires consideration of whether the subject of the dispute falls under one of the groups of cases listed in Article 2(1)(c). In borderline cases there should be additional consideration of whether according to the substantive law of the States concerned, the subject of a dispute could be considered a commercial transaction. Certainly, Article 2(2) should be so worded as to make it clear that the classification is to be decided by the trial court alone in accordance with the substantive laws involved. The subjective views of the defendant State's government should not be decisive.[45]

C. Personal Injuries and Damage to Property

Tortious liability is comprehensively regulated in Article 12 of the ILC draft: anyone suffering injury in the venue State (death, injury to the person or damage to or loss of tangible property) may sue for monetary compensation.[46] Other immunity codifications have focused on whether the wrongful action was committed in the forum State,[47] rather than emphasizing the distinction between sovereign and private law action.[48] This approach has been adopted in the ILC's draft Convention. Thus it is irrelevant whether the liability is based on negligent conduct or on strict liability. The primary object of the provision is to give victims of traffic accidents caused by officials of the defendant State a possibility of bringing a lawsuit at home.[49]

However, the exception to immunity deliberately goes beyond this primary goal. Since even deliberate sovereign activity is covered, actions may be brought even for activities of the secret service of the foreign State.[50] This marks a considerable improvement in the legal position of

43 According to the case-law of German courts to date this is done according to the substantive law of the *lex fori*, that is, according to the distinction between German public law and private law. Cf. Damiam, *supra* note 1, at 97 et seq.; Steinberger, *supra* note 1, at 438.

44 See B. Heß, *supra* note 2, at 308 et seq.

45 The reference to the 'practice' of the defendant State should be replaced by an explicit reference to its legal system. The Federal Republic of Germany said as much in the 6th Committee of the ILC on 29 October 1991.

46 By contrast actions for restitution in kind or for restraining orders are explicitly excluded: here immunity is to be granted.

47 Implying an attempt at parallelism with the principle of *lex loci delicti commissi* in private international law and procedural law.

48 By contrast with the case-law in continental European countries, which apply the distinction between *iure gestionis* and *iure imperii* to tort actions too; cf. Schreuer, *supra* note 1, at 47 et seq.

49 Additionally, liability insurance is to be prevented from appealing to State immunity; cf. ILC Comment, A/46/10 Suppl. 10, 103, Art. 12(4).

50 See *Letelier v. Chile*, Dispute concerning responsibility for the Deaths of Letelier and Moffit, 31 ILM (1992) 1 et seq. which concerned the murder of a Chilean opposition politician on the street in Washington D.C., and *Liu v. Republic of China*, 892 F.2d. 1419 (9th Cir.1989), which concerned the murder of an exiled politician by the Taiwanese secret service in California. The *Letelier* case was definitively settled in arbitration proceedings under international law between the US and Chile, and the victim's heirs secured compensation to the amount of US $2,611,892, 6 *International Arbitration Reports* (1992) D.1. Cf. Hess, 'Staatenimmunität und völkerrechtlicher Rechtsschutz bei politischem Mord – Die Beilegung der Letelier-Affaire vor einer US-chilenischen Schiedskommission im Januar 1992', 13 *Praxis des internationalen Privat- und Verfahrenrechts (IPRax)* (1993) 110.

the victims of political terrorism, who are no longer dependent solely on the guarantee of diplomatic protection by their home country,[51] and can now bring actions themselves.

To be sure, this point reveals a weakness of the draft convention: the ILC has omitted to take a position on the relationship between individual compensation for damages and State responsibility under international law.[52] The better view is that the individual making claims should take second place if the States concerned reach an agreement in international law.[53] Article 12 regulates the problem only indirectly by giving priority to agreement in international law between the relevant States.[54]

The starting point for the exception to immunity is the territorial connection between the subject of the dispute and the forum State. Accordingly, only municipal torts are covered, that is, torts where the place of action and occurrence lie in the forum State.[55] In the case of border-crossing torts, such as the explosion of a nuclear power station near a frontier, or a shot fired across it, immunity continues to apply. The same applies to torts that were committed on the territory of the defendant State (torts abroad), even where these amount to a severe infringement of human rights. The case-law has also refused to admit actions concerning conduct by the defendant State on its own territory.[56]

The limitation of the exception to immunity for municipal torts goes beyond the case-law of European courts, as they have not granted immunity in cases of remote torts *iure gestionis*.[57] It is questionable whether such actions are admissible under Article 10(1) of the ILC draft where there is a commercial transaction. This view is supported by the fact that on second reading the ILC replaced the original restriction in Article 10 on commercial contracts with the broader term 'commercial transactions'. This is intended to also cover actions not directly based on contractual relationships, such as expenses associated with treaty negotiation, or unjust enrichment.[58]

Whether tort actions based on purely factual conduct are also covered remains doubtful: the ILC did not use the comprehensive term 'activity'.[59] The term used, 'transaction with a foreign

51 The mere possibility of this sort of civil action has recently induced States to subject themselves to arbitration proceedings: cf. the settlement of the *Rainbow Warrior* case (1985) between Greenpeace and France in confidential arbitration proceedings in Geneva, see B. Heß, *supra* note 2, at 347.

52 Cf. Fox, 'State Responsibility and Tort Proceedings against a Foreign State in Municipal Courts', 20 *NYIL* 3 (1989).

53 For details see B. Heß, *supra* note 2, at 360 et seq. In terms of procedural technique, the application of diplomatic protection merges the private claim for compensation for damages into the claim for indemnification in international law. See also Concurring separate opinion Vincuna, in *Chilean Ruling*, *supra* note 51, at para. 7.

54 Cf. the wording of Article 12: 'Unless otherwise agreed between the States concerned...'. The wording is unclear insofar as it does not become evident whether the application of protection in itself leads to the granting of immunity.

55 See B. Heß, *supra* note 2, at 6 et seq. Article 12 accordingly requires the tortfeasor's presence at the commission of the tort in the venue State.

56 Cf. esp. the recent case-law of US courts on the Alien Torts Claims Act, *Argentine Republic v. Amerada Hess Shipping Corp.* 109 S.Ct.683 (1989). For a survey see Ress, *supra* note 6, para. 47 et seq.; Fox, *supra* note 53, at 24 et seq.

57 Cf. *Tschernobyl* case, Austrian Supreme Court, 110 *Juristische Blätter* (1988) 323, *Mochovce* case, Austrian Supreme Court, 110 *Juristische Blätter* (1988) 459. See also *Tschernobyl* case, Amtsgericht Bonn, 41 *NJW* (1988) 1393.

58 ILC Comment, A/46/10 Suppl. 10, Art. 2, para. 20.

59 By contrast with, say, the Sovereign Immunity Acts in Britain and Australia, which also include 'activities' under 'transaction', cf. Section 3 (3) United Kingdom State Immunity Act and Section 11 (3) United States Foreign Sovereign Immunities Act, *supra* note 3.

natural person', implies the presence of a legal transactional relationship.[60] This means that actions arising out of remote torts are in general excluded. However, the present limitation in Article 10 should be abandoned: action arising out of remote torts should be admissible where according to the law of both States concerned the subject of a dispute is to be described as 'commercial'.[61] Admittedly, in this case also the primacy of a settlement in international law must remain guaranteed.[62]

D. Further Exceptions to Immunity

Article 11 of the ILC draft lays down an exception to immunity for labour disputes. The provision applies particularly to employment in embassies, consulates and cultural institutions in the forum State, and guarantees application of the venue State's labour law in relation to employment taking place on its territory. The Italian courts have developed notable ample practice in this field; the Italian cases have declined to grant immunity where the embassy employees are not nationals of the defendant State and no high-level duties are involved.[63]

The other exceptions to immunity in Article 13 (ownership, possession and use of property)[64] and Article 17 (effect of an arbitration agreement) are in line with the provisions of other codifications on jurisdictional immunity. They are essentially uncontroversial.[65]

One problematic point is the exception to immunity under Article 17. This provision limits the support function of national courts in arbitration proceedings to commercial transactions. In view of the narrow definition of commercial transaction in Article 2(1)(c) and (2), it is unclear how far this provision also covers investment disputes. However disputes of this nature are often the object of arbitration proceedings involving States. They come under the New York United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 20 June 1958.[66] Since by signing the arbitration clause a State also subjects itself to international jurisdiction insofar as this is necessary to carry out the arbitration proceedings, the limitation to commercial transactions can be deleted.[67] Instead, it should be

60 Also in favour of this is the systematic connection between Articles 10 and 12, covering legal transactions and tortious conduct respectively. On these problems cf. C. Tomuschat, *supra* note 9, at 608.

61 For details see B. Heß, *supra* note 2, at 401 et seq.

62 On one further point the provisions of Article 12 need to be supplemented: the ILC did not address the question whether in the event of succession of States actions may be brought against the territorial predecessor at the *locus delicti*. In view of the many present border changes, this issue is of considerable practical relevance: it covers, for instance, actions against a former occupying army (for, say, contaminated soil or ultra-vires conduct by army or secret service such as bodily injuries in internment camps). Admitting such actions before the courts of the territorial successor may lead to considerable political tension; here conclusive primacy for compensation provisions in international law ought to be explicitly included.

63 See L. Sbolci, *Controversi di lavoro con stati stranieri e diritto internazionale* (1987).

64 This provision was reworded by the ILC during the second reading to bring it in line with the wording in the UN Law of the Sea Convention.

65 The ILC deleted the former Article 16 concerning immunity in tax cases, on the ground that the provision exclusively concerned inter-State relations.

66 330 UNTS 38 (1959). See P. Schlosser, *Recht der Internationalen Schiedsgerichtbarkeit* (1989) para. 57 et seq. Article 1(3) of the Convention avoids limiting the sphere of application to commercial disputes; this limitation can however be made through separate declaration on ratification.

67 This deletion was also made in the regulations in Section 9 United Kingdom State Immunity Act *supra* note 3 and Article 12 of the European Convention on State Immunity, *supra* note 4. See also Israel's position in the 6th Committee on 29 October 1991, and Morris, *supra* note 9, at 439.

made clear that arbitration proceedings in international law do not come under the draft Convention.[68]

III. Immunity in Execution Procedures

The practice of States draws a clear distinction between jurisdictional immunity and immunity against enforcement. Certainly, enforcement is the necessary continuation of any court proceedings, since it is only by judicial process that the victorious plaintiff can hope for fulfilment of the claim; but the forced sale of State assets leads to particularly intensive interference with the sovereign interests of the defendant State, since it may hamper its functional capacity.[69]

Court practice has accordingly admitted exceptions to enforcement immunity only reluctantly; the focus is mostly on whether the objects of enforcement serve sovereign or commercial purposes.[70] The more recent codes on jurisdictional immunity generally contain similar provisions. The ILC has largely kept to these models.

A. Enforcement of Monetary Claims

Articles 18 and 19 regulate the enforcement of monetary claims. Enforcement is admissible where either the State waives its immunity (Article 18(1)(a)[71]), or when enforcement is made on assets the State has set aside to meet the claim in the action (Article 18(1)(b) or when enforcement occurs against assets that serve economic purposes and are connected with the subject of the action (Article 18(1)(c)). Article 19 clarifies Article 18(1)(c) to the effect that particular groups of assets are generically excluded from enforcement.

A problematic provision is Article 18(1)(c), insofar as it requires a nexus between the ground of action and the object of enforcement. This criterion is in line with Section 1610(a) (2) United States Foreign Sovereign Immunities Act; however other codes on jurisdictional immunity have not adopted the nexus requirement. The protection of the foreign State's sovereign interests does not require this sort of restriction, since the requirement for designation for economic purposes already guarantees the existence of State assets for public purposes. Moreover, it is contrary to general principles of execution to confine the creditor, as far as enforcement is concerned, to access to assets connected with the ground of action: a debtor under enforcement is liable to the extent of all his assets.[72]

68 These include both arbitration proceedings between the States concerned and those under the International Center for the Settlement of Investment Disputes (575 UNTS 159 [1965], which contains a self-contained regime; cf. ILC Comment, A/46/10 Suppl. 10, Art. 17, para. 8.

69 A prominent example for this sort of hampering comes from the so-called Nigerian cement cases (1975-6): creditors of the Nigerian Government brought about such comprehensive freezes of Nigerian foreign assets in various European countries and the US that the whole external currency reserves were blocked; see Nwogugu, 'Immunity of State Property – the Central Bank of Nigeria in Foreign Courts', 10 *NYIL* (1979) 179 et seq.

70 Cf. Damian, *supra* note 1, at 116 et seq.; Schreuer, *supra* note 1, at 125 et seq.

71 Article 18(2) makes it clear that waiver of jurisdicational immunity does not mean waiver of enforcement immunity.

72 Considered this way, there are also overlaps between Article 18(1)(b) and (c), since the assets made available will as a rule be connected with the claim in the action – if only because of the explicitly intended satisfaction of the claim in the action. For an opposing view see Morris, *supra* note 9, at 445.

Article 18(1)(c) leads to gaps in legal protection. While the victim of an illicit act committed on a sovereign basis is able by Article 12 of the ILC draft to bring suit at the *locus delicti*, the plaintiff will have no possibility of having the judgment enforced there.[73] Assets that serve economic purposes that are additionally connected with the victim's claim will not be found in the *locus delicti*.[74] There have accordingly been repeated calls in the US for deletion of the nexus requirement;[75] an amendment to the United States Foreign Sovereign Immunities Act made in 1988 focused solely on economic earmarking as regards enforcement of arbitration rulings.[76] A similar provision should be inserted in the final convention.

By contrast, the listing of assets which are subject to general protection in Article 19 is acceptable. This is particularly the case for the ban on enforcement against embassy accounts with mixed (sovereign and non-sovereign) purposes,[77] and for the prohibition on enforcement against archives or art objects of the defendant State that happen to be at exhibitions.

B. Enforcement of Non-monetary Relief

Judicial commands and prohibitions are generally enforced by imposing contempt fines against the debtor. When imposed on foreign States, these raise particular problems. Firstly, indirect enforcement also allows the implementation of commands and prohibitions abroad, for instance on the territory of the defendant State.[78] Secondly, the imposition of contempt fines on a State frequently leads to intensification of the political conflict accompanying the judicial proceedings.

In Article 26 of the draft adopted in 1986, the ILC had in general ruled out the enforcement of disciplinary fines. The final version of 1991 contains, in Article 22(1), only the prohibition of provisions which would authorize the continuation of proceedings enforced through such fines.[79] A corresponding prohibition applies in general to enforcement, because the comprehensively formulated immunity of Article 18(1) provides for no exceptions to such measures. This provision is in line with solutions in other codifications.[80]

73 Instead the plaintiff will have to depend on an – unlikely – subsequent waiver of immunity by the State convicted (Article 18(1)(a)).

74 On the corresponding position in the US cf. *Leteller v. Republic of Chile*, 748 F.2d 790 (2nd.Cir.1984). The ILC has not addressed this decision, see Morris, *supra* note 9, at 445.

75 Cf. Trooboff, *supra* note 1, at 377 et seq. An amending bill failed in 1988 because of State Department resistance.

76 Section 1610 (a) (6) United States Foreign Sovereign Immunities Act, see 28 ILM (1989) 398.

77 The contrary decision *Alcom Ltd v. Republic of Columbia* [1984] 1 All ER 1, 5 (C.A.) led to considerable diplomatic tension, and was quashed by the House of Lords [1984] 2 All ER 6, see Schreuer, *supra* note 1, at 189 et seq.

78 *Mochovce* case, Austrian Supreme Court, 110 *Juristische Blätter* (1988) 459. See Heß, 'Probleme der Staatenimmunität bei grenzüberschreitenden Unterlassungsklagen', 111 *Juristische Blätter* (1989) 285; Temelin case, Austrian Supreme Court, 13 April 1989, 6 Nd 503/89 – unpublished: this concerned a prohibition on the setting up of nuclear power stations on the territory of the Czecho-Slovac Socialistic Republic.

79 Other procedural sanctions such as preclusion or disadvantageous evaluation of evidence remain admissible.

80 See B. Heß, *supra* note 2, at 398-401.

C. Prejudgment Attachment

The ILC draft convention does not explicitly regulate interim legal protection.[81] Accordingly, the provisions of jurisdictional and enforcement immunity are to be applied in combination with arrest procedures. This follows from the structure of interim legal protection: arrest is a summary trial procedure, and accordingly there should be confirmation that an exception to jurisdictional immunity is present (Article 6-17). Enforcement of arrest is by contrast not separately governed by the provisions regarding enforcement; accordingly, the rules of enforcement immunity apply (Articles 18, 19). The ILC has rightly clarified that no special provisions are required; State immunity does not exclude provisional measures.[82] The draft convention goes beyond the provisions of the British and US Acts in the case of interim legal protection.[83]

IV. Personal Scope

A. Definition of the 'State', Article 2(b)

The extent of the personal scope of State immunity has always been controversial. While it is recognized that States themselves through their governments and other supreme representative organs may appeal for immunity, it is disputed whether this also applies to subordinate agencies.[84] In Article 2(b) the ILC decided in favour of a broad definition of the State: accordingly, all State organs are to be granted immunity where sovereign tasks are conferred on them,[85] and no exception to immunity operates in the specific case. The same provision applies to territorial authorities[86] and to individual officials.[87] This extension of immunity is logical: according to the restrictive immunity underlying the draft convention, all that comes into the granting of immunity is the object of dispute. The action must be attributable to the foreign State and no exception to immunity can operate. How a State regulates the allocation of its sovereign powers is by contrast its own internal matter.[88]

The definition of 'State' needs to be supplemented in one respect: the ILC has not stated whether liberation movements, to which international law attributes a limited legal status, can also appeal to immunity.[89] The question has become a burning one in recent years in the US and

81 On interim legal protection see Damian, *supra* note 1, at 188 et seq.

82 ILC Comment, A/46/10 Suppl. 10, 134(4).

83 See Section 1610(d) United States Foreign Sovereign Immunities Act; Section 13 United Kingdom State Immunity Act.

84 See Sucharitkul, Third Report, YBILC (1982 II) (Part One) 135 et seq.

85 The concept enshrined in Article 2(b): 'entitled to perform acts in the exercise of the sovereign authority of the State' is admittedly liable to misunderstanding. It arouses the impression that immunity presupposes the exercise of powers in international law. In fact, however, any conveyance of sovereign tasks suffices. See C. Tomuschat, *supra* note 9, at 615 et seq.

86 Article 2(b) distinguishes between 'constituent units of a federal State' (ii) and (iii) other 'political subdivisions'. This distinction is superfluous as such, since federal States can also be classified under the definition in (iii).

87 The United States Foreign Sovereign Immunities Act has a lacuna here since officials as such was not included in the definition of Section 1603 United States Foreign Sovereign Immunities Act *supra* note 3. Accordingly, foreign officials have repeatedly been sued in place of the authority employing them; recent case-law also grants immunity to officials, see *Chiudian v. Philippine National Bank*, 912 F.2d 1095 (9th Cir.1990).

88 As Tomuschat rightly says, *supra* note 9, at 616.

89 On the status in international law of liberation movements see A. Verdross, B. Simma, *supra* note 40, at para. 409.

Italy. In the US the PLO has been repeatedly faced with actions for compensation for damages relating to their alleged terrorist activities;[90] in Italy preliminary investigation proceedings were brought against Yasser Arafat.[91] The regulatory purpose of immunity – namely to avoid politically loaded actions against foreign subjects of international law – speaks in favour of extending immunity to liberation movements in such proceedings. This question should accordingly be addressed at the UN Conference on codification of State immunity.[92]

B. State Enterprises

In relation to State enterprises, two approaches have developed.[93] The so-called structural approach focuses solely on the legal autonomy of the State enterprise and does not guarantee immunity to State enterprises in general. If an entity related to a government is a legal person with legal capacity, then the State will be taken to have waived its right to immunity.[94] According to the contrary view (the so-called functional approach) the focus in the case of State enterprises should also be on whether the specific object of dispute deserves immunity or not.[95] The ILC follows the functional approach, in Article 2(b)(iv), without specifying the concept of State enterprises in more detail.[96] All that has to be tested is whether sovereign tasks were conveyed to the State enterprise. If this is the case, the State enterprise can appeal to immunity to the same extent as its parent State.[97] In view of the adoption of restrictive immunity, it is consistent to follow the functional approach.[98] Admittedly, the convention draft should be supplemented to the effect that a company constituted in accordance with the law of the venue State cannot appeal to immunity even if it is controlled by a foreign State.[99]

C. Piercing the Corporative Veil for Liability Purposes

Notably at the request of the (former) Socialist States, the ILC added Article 10(3) to the draft convention on second reading. It provides that the so-called piercing of the corporative veil of State enterprises is excluded even where a commercial transaction is present. But this question is not primarily a matter of State immunity but of private international law: normally, the legal independent personality of the State enterprise is recognized. However, tribunals pierce the

90 *Hanuch Tel Oren v. Liyan Arab republic et al.* 726 F.2d 774 (D.Cir.1984); *Klinghoffer v. S.N.C Achille Lauro* 937 F.2d 44 (2nd Cir.1991).

91 Corte di Cassazione, 69 *RDI* (1986) 884.

92 On the convocation of this conference see text at note 115 below.

93 See Schreuer, *supra* note 1, at 92 et seq.

94 See Oberlandesgericht Frankfurt/Main, 21 October 1980, 2 *Praxis des internationalen Privat- und Verfahrensrechts* (1982) 71.

95 See Oberlandesgericht Frankfurt/Main, 4 May 1982, *Praxis des internationalen Privat- und Verfahrensrechts* (1983) 69.

96 Some codifications contain a reversal of the burden of proof in relation to State enterprises. The State enterprise accordingly has to show that it is entrusted with sovereign powers; cf. e.g. Article 27 European Convention on State Immunity*supra* note 4; Section 14 (2) United Kingdom State Immunity Act *supra* note 3; the provision in Article 2(b)(iv) of the ILC-Draft is in line with Section 22 of the Australian United States Foreign Sovereign Immunities Act *supra* note 3.

97 However as regards enforcement Article 18(1)(c) does not require any nexus between the subject of the action and the assets on which enforcement is made; cf. *supra* note 73.

98 On the relationship between the structural approach and the theory of absolute immunity see B. Heß, *supra* note 2, at 59 et seq.

99 Cf. the explicit regulation in Section 1603 (b) United States Foreign Sovereign Immunities Act *supra* note 3.

corporative veil, if the legal separation is not in line with the *de facto* inter-penetration between the State and the State enterprise.[100] The State is liable for commitments made by the State enterprise and the enterprise for those of the State. Correspondingly, there may be piercing of the corporative veil in both trial proceedings[101] and enforcement.[102] The courts have admitted this only in exceptional situations such as in cases of gross abuse or manifest injustice.[103]

However, Article 10(3) is not convincing. It is mistaken as regards its systematic position, since only trial proceedings are addressed (and only those for commercial transactions).[104] Further, it is not entirely clear whether the piercing of the corporative veil is excluded in general,[105] or all that is provided is that the presence of a commercial transaction in relation to the State enterprise and to the State are in each case to be tested separately. The wording of the provision, like the ILC commentary, suggests that the first interpretation is correct.[106] Finally, a reservation at least to the effect that State enterprises are to be endowed with a sufficient basis for liability to prevent disadvantage to private creditors should have been included.[107] However, should involvement of a State enterprise exceptionally lead to unfair curtailment of the rights of the private creditor, it is difficult to see why enforcement against the State responsible should be ruled out, as would be the effect of Article 10(3) of the ILC draft. Deletion of the provision would accordingly be advisable.[108]

V. Summary

The draft convention reflects the present state of development of State immunity more or less accurately.[109] Certainly, individual exceptions are more restricted than the restrictive theory; but it should not be forgotten that the ILC has succeeded in combining the views of ILC members that in part start from sharply differing ideological positions.[110]

It is regrettable that the ILC has chosen a regulatory mechanism that does not make it possible for immunity to be developed further within the framework of the convention. This follows from the fact that immunity has been laid down as the rule (Articles 5 and 18), and only

100 This is secured in legal technical terms by not applying the foreign company statutes, replaced via *ordre public* (Article 6 EGBGB) by the substantive law of the *lex fori*. See I. Seidl-Hohenveldern, *Corporations in and under Int'l Law* (1987) 55 et seq.

101 *Baglab Ltd. v. Johnson Helthy Bankers Ltd.* 665 F.Suppl. 289 (SDNY 1987).

102 *Benvenutti Bonvant v. Banque commerciale congolaise*, 77 *RGDIP* (1988) 347 (Cour de Cassation).

103 *First National City Bank v. Banco Para el Commercio Exterior de Cuba (Bancec)*, 462 US 611 (1983).

104 In the German Chernobyl cases too, the piercing of the corporative veil was alleged, Tschernobyl case, *supra* note 57; these proceedings concerned tortious liability, to which however, Article 12 of the ILC draft is applicable.

105 This could follow from the fact that this question is in general withdrawn from judgment by foreign courts.

106 See ILC Comment, A/46/10 Suppl. 10, Article 10, 73(9).

107 This was the proposal of the German Federal Government; cf. its opinion in the 6th Committee on 29 October 1991. Admittedly, this is not a regulatory object of State immunity, especially since every State is in principle free in international law to call for the presence of an adequate liability basis when foreign State enterprises operate on its territory.

108 B. Heß, *supra* note 2, at 72-78. Kessedjian, Schreuer, *supra* note 12, at 335.

109 The work of the ILC is of great significance for German immunity practice, which focuses on customary international law. In view of recent developments in jurisdictional immunity, the BVerfG should soon be taking a position on this (cf. Article 25, 100 II GG).

110 On this see C. Tomuschat, *supra* note 9, at 604.

limited exceptions have been admitted in subsequent articles. Although the commentary stresses that this is not intended to fix any rule/exception relationship, so that further development of immunity outside the convention remains possible,[111] the regulatory mechanism is nonetheless clear: if no exception operates, then by virtue of Articles 5 and 6 of the ILC draft immunity must be granted. But if the convention is ratified by the majority of States, as must be the object of a codification of international law, then it is to be applied between the contracting parties; no space is left for immunity practice falling outside the convention.

It does not, however, appear as if the development of State immunity has yet reached a point where all possible exceptions are fixed, even though the draft convention requires immunity to be granted to new types of cases that may arise.[112] Accordingly, a clause should be included in the definitive convention which would allow for such a development.[113]

In the Sixth Committee of the United Nation's General Assembly the draft convention was met with mixed response, which gave rise to some strong criticism. It was accordingly decided to give all member States an opportunity to again take a position in writing by 1 July 1992.[114] Only 19 States forwarded comments, and most of them were almost critical of the draft.[115] During the 1992 session of the General Assembly of the UN an open-ended Working Group of the Sixth Committee met only irregularly and discussed the topic without final results.[116] In 1993, the open-ended working group will meet again and decide whether the proposal will be recommended by resolution of the General Assembly for ratification of whether a State conference will take place in 1995, or later to work out a revised convention. Such a conference would be a welcome development: the international situation is currently favourable for the creation of a worldwide accepted convention to clarify the extent of State immunity. It could contribute to improving international economic relations and improve private plaintiffs' possibilities for legal protection. However, prudent further restriction of sovereign immunity should remain possible even if a multilateral convention on jurisdictional immunities has been accepted.

111 See ILC Comment, A/46/10 Suppl. 10, Article 5(3), 37 et seq.

112 The *Institut de Droit International* accordingly, in its resolution adopted in 1991, only included the criteria that in each case argue in favour or against immunity (*Indicia approach*). It is for the judge in each individual case to arrive at proper findings by applying the relevant criteria. See B. Heß, *supra* note 2, at 392 et seq.

113 The draft adopted in 1986 contained, in Article 6 of the old version, which laid down the extent of immunity, a reference to the 'relevant rules of international law', that ought additionally to be taken into account in the individual case. This reference was intended to guarantee further development of immunity. See C. Tomuschat, *supra* note 9, at 609.

114 Resolution of 9 December 1991, A/46/55.

115 Cf. Written Comments of Australia, Austria, Brazil, Cuba, Denmark, Spain, Switzerland, United Kingdom, United States of America, Mexico, Poland, Italy, Venezuela, The Netherlands, France, Peoples' Republic of China, Germany, Turkey, UN Doc. A/47/326.

116 The suggestions of the Chairman Prof. Calero-Rodrigues are reproduced in the report of the working group, UN Doc. A/C.6/47/L.10 (1992). Cf. Morris, Bourloyannis, 'The Work of the Sixth Committee at the Forty-seventh Session of the UN General Assembly', 87 *AJIL* (1993) 307, 316 et seq.