IN DEFENCE OF STATE IMMUNITY: WHY THE UN CONVENTION ON STATE IMMUNITY IS IMPORTANT

The Convention on State Immunity adopted by the UN General Assembly in 2004 represents in treaty form a finished product of some 22 years of work.[1] It indicates a consensus of State support for the restrictive doctrine of State immunity in its application to civil proceedings relating to commercial matters in national courts. It is a considerable achievement from the viewpoint of the specialist lawyers and diplomats who have steered the project to UN endorsement.

But is it anything more? Is the convention a last frail attempt of besieged sovereign States to put a finger in the dam—that wall of sovereign authority (*acta jure imperii*) which since recognition of the restrictive doctrine of State immunity has been battered by the rights of private traders, prosecution of officials, and a flood of victims drowning in the abuse of human rights by States?

It is proposed to assess the merits of the convention under three headings: (i) the interests of States; (ii) criticism of particular provisions in determining how they are likely to affect the convention's application; and (iii) the convention's contribution to the structure of general international law.

I. THE CONVENTION FROM THE VIEWPOINT OF STATES

From the point of view of some developed States, the convention may be judged as little more than a holding position, an endeavour 'to keep immunity within bounds', and to bring it up to date; that is to dismantle immunity to the extent recognized by their own national legislation and courts. But for other States the attractions of the convention are greater. Current State practice relating to immunity is complicated, diverse and, somewhat surprisingly, case law-dependent in many civil law countries in Europe and Latin America. Especially for States such as China and many of the States making up the former USSR, which until recently adhered to an absolute doctrine of State immunity, and whose public authorities are undergoing to varying degrees privatization of their economic activities, the State Immunity Convention provides a source of certainty and detailed international rules for their national courts.

In assessing the prospects for ratification, it should not be forgotten that the enactment of US and UK legislation on State immunity in 1976 and 1978 was welcomed by both government and business interests. Central governments found it useful to transfer from the executive to national courts the responsibility of affording protection for the interests of friendly States and of obtaining reciprocity of treatment for the activities of their own governments abroad. The US FSIA 1976 enabled commercial banks to grant, and show on their balance sheets as enforceable debts, loans made to foreign governments, and similarly, in the UK, the City, mindful of US competition, welcomed the UK SIA 1978s provision removing immunity from loans 'or any other transaction

[1] UNGA Res 59/38 (2005), adopted without a vote. Elaboration of the Convention took 12 years in the International Law Commission, leading to the 1991 Draft Articles, and a further ten years of discussions in the UNGA 6th Committee and its working parties.

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for the provision of finance' (a phrase which is also used in the Convention, Article 2(1)(c)(ii)). As with the UK legislation, commercial interests under the UN convention will thus gain a major advance over existing customary international law by permitting legal proceedings in respect of contracts and loans, regardless of their public purpose.

By providing a general rule of immunity for the State 'in respect of itself and its property from the jurisdiction of the courts of another State' (Article 5) the convention may be read as confirming the classical position in which States continue as the principal actors in 'the law of nations'. But the words 'subject to the provisions of the present Convention', the eight exceptions to immunity set out in Articles 10–17, and the authorization in certain circumstances to enforce judgments against State property 'in use or intended use for other than government or non-commercial purposes', immediately swing the balance against this privileged position of the State and subject it to the rule of law in regard to private persons and corporations, at least in respect of contracts and commercial dealings. A particular plus here is the codification for proceedings brought against States in national courts of the rules of procedure dealing with service of process, time limits, default judgment and security for costs; although there is no compulsory production of evidence and fines and penalties are barred, the national court is not prevented from drawing adverse conclusions against a State which fails to produce the requested evidence.

The lack of any restriction on reservations is to be regretted. In the absence of any monitoring body to ensure compliance, States need to be sparing in their reservations, if they value the harmonization of State practice on immunity which the convention offers. The provision for compulsory settlement of disputes by arbitration or reference to the International Court of Justice (Article 27) may go some way to ensure uniformity.

II. AN ASSESSMENT OF THE MAJOR CRITICISMS

Three main criticisms may be directed at the convention with regard to its contribution to the development of general international law: the deferment to the forum State of the definition of commercial transaction, and hence of the scope of the main area for which the convention removes immunity; its relationship to other rules of international law including other conventions; and its treatment of jurisdiction.

The definition of 'commercial transaction', for which immunity is removed in Article 10, is to be found in Article 2 paragraphs 2 and 3. Undoubtedly the final limb of this definition, Article 2 (2), represents a compromise of the widely divergent views held by the negotiating States. By permitting the purpose of the transaction to be taken into account 'if in the practice of the State of the forum, the purpose is relevant to determining the non-commercial character of the contract or transaction' it might be contended that no harmonization of State practice can be achieved, and that the demarcation line between public and private activity will continue to vary according to the forum. But this overlooks the preceding sub-paragraph which defines commercial transactions as including the sale of goods, supply of services, a loan, guarantee, indemnity or other transaction of a financial nature, and transactions of a commercial, industrial, trading or professional nature. These are wide categories, which have generally enabled UK courts applying the State Immunity Act to decide whether a transaction is non-immune without having to seek assistance from State practice in the manner envisaged by Article 2(2).

Article 4 provides for non-retroactivity. Any question relating to immunity in a

proceeding instituted prior to the convention coming into force will thus continue to be governed by customary international law. The same or even wider effect may result for ratifying States which are also parties to the 1969 Vienna Convention on Treaties. Article 4's 'without prejudice' clause would seem to import VC Article 28 on non-retroactivity which provides that the provisions of a treaty do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the treaty's entry into force.[2] As regards international conventions in force prior to the UN Convention, such as the 1926 Brussels Convention relating to the Immunity of State-Owned Vessels, the European Convention on Human Rights, 1952, and agreements relating to visiting armed forces, Article 26 provides that nothing in the convention shall 'affect the rights and obligations of States Parties under existing international agreements which relate to matters dealt with in the present Convention between the parties to those conventions'. Future international agreements would appear to be subordinated to the convention's principles but any agreement for a more extensive restriction of immunity would seem capable of being construed as waiver, since Article 7 states express consent to the exercise of jurisdiction may be '(a) by international agreement'.[3]

An undoubted defect of the convention is its muddled treatment of matters excluded from its scope. Article 3, supplemented by statements of the General Assembly Resolution adopting the convention, and of the Chairman of the Sixth Committee ad hoc working group, Professor Hafner, provides partial clarification. Article 3 states that the provisions of the Draft are without prejudice to immunities of diplomatic and consular posts etc, heads of State *ratione personae*, and, added in 2002, immunities enjoyed by States in respect of aircraft and space objects. In paragraph 2 of its resolution adopting the draft convention, the UN General Assembly accepts 'the general understanding of the ad hoc Committee that the convention does not cover criminal proceedings'. Professor Hafner's statement expressly refers to 'military activities' and states that 'the general understanding has always prevailed that they are not covered by the convention'; he referred to the commentary of the ILC on draft Article 12, the exception for personal injuries and damage to property, which declared that it did not 'apply to situations involving armed conflict'. As various commentators have pointed out, acts of visiting armed forces present in the territory in peacetime and with the consent of the forum State do not readily fall within the phrases 'military activities' and 'armed conflict'. Moreover, 'property of a military character or in use or intended use for the performance of military functions' is one of the categories of State property expressly declared by Article 21 to be immune from enforcement.

[2] The UK's transitional provisions were somewhat less sweeping. In addition to barring the statute's application to proceedings instituted before its entry into force, the UK Act did not apply to any submission to the jurisdiction or consent to enforcement prior to that date or to the application of any exception to immunity for a transaction or contract of employment entered into prior to the Act's entry into force; thus common law rules continued to govern these matters.

[3] States would seem free to grant larger immunities than those laid down in the UN Convention provided they are in conformity with international law and that the national law of the former State law permits such a denial of jurisdiction, see Vancouver Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law, Art 9, ADI 69 (2000–1) 743, 749; an over-wide immunity afforded to commercial transactions might lead to a challenge as a disproportionate restriction on the procedural right of access to court. See *Fogarty v UK* (2002) 34 EHRR 12.123 ILR 54; *McElhinney v Ireland and UK* (2000) 29 EHRR CD 214, 123 ILR 73.

Accordingly, where any issue as to the scope of the convention arises, in addition to the text of the convention, including its preamble, reference will need to be made to the Understandings which by Article 25 of the convention are expressly annexed to the convention, and statements such as those referred to above relating to exclusions. Such statements would come 'within the context' for interpretation of a treaty within the meaning of Article 31(2)(b) of the 1969 Vienna Convention on Treaties. Professor Hafner's important affirmation of the exclusion of military activities would thus be construed as 'an instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty'.

The final criticism is directed at the failure of the convention to base its rules on some general principle of the jurisdiction exercisable by the forum State. This is a criticism voiced strongly by human rights non-governmental organizations who envisage the jurisdiction of national courts both to prosecute and award reparation as an effective means of enforcing international human rights law against other States or their officials. The convention would seem to accept the view expounded by the International Court of Justice in the *Arrest Warrant* case that 'the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction'[4] Judges Higgins, Kooijmans, and Buergenthal in their joint separate opinion disagreed with this formulation declaring that immunity is not 'a free-standing topic of international law . . . "Immunity" and "jurisdiction" are inextricably linked'.[5]

The Court's view would seem better to fit the absolute than the restrictive doctrine of State immunity: under the former doctrine a forum State may have competence but immunity bars its application to another State by reason of the latter's sovereign status; but on the basis of a restrictive doctrine as set out in the convention, the forum State's jurisdiction depends on the nature of the jurisdictional link and the nature of the activity of the defendant State, as well as the sovereign status of the defendant State. Thus, the exercise of jurisdiction of the forum State is 'inextricably linked' with the determination of the scope of immunity.

The convention addresses the question of jurisdiction only in piecemeal fashion, varying it according to the particular activity declared non-immune, and for the all important commercial transaction exception leaves the assertion of jurisdiction to a State's own conflict of laws. It also seems to assume that in respect of the special situations of employment contracts and claims for personal injuries, more rigorous jurisdictional links than those which apply to litigation between private individuals are required.

The failure of the convention to provide a general principle on which to base forum State jurisdiction cannot be blamed on the ILC and its Rapporteurs. Although there is an emerging consensus as to the exercise of universal criminal jurisdiction over individuals,[6] there is unfortunately no general agreement with regard to the exercise of civil

[4] *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo/Belgium)* Judgment Preliminary Objections and Merits; 14 Feb 2002 ICJ Reports 2002, para 39.

[5] (n 4) Joint separate opinion para 3.

[6] The recent 2005 Krakow Resolution of the Institut de droit international on universal criminal jurisdiction is recommended for consideration; rather than accepting the exercise of such jurisdiction over all violations of human rights, this Resolution requires the presence of the accused within the forum territory and limits the exercise of such universal criminal jurisdiction to international crimes recognized by international law or grave violations of international humanitarian law.

jurisdiction concerning its permissible scope or the jurisdictional links upon which a territorial State may base its exercise of jurisdiction in civil proceedings. The failure of the last round of discussions under the auspices of the Hague Committee for Private International Law between European States and the USA for an agreement on jurisdiction relating to judgments in civil and commercial matters evidences the width of disagreement. The ILC Special Rapporteur Ogiso recognized these difficulties when he explained the omission of a general jurisdictional requirement in the convention as unavoidable given the diversity of links to be found in different legal systems.[7] Failure then to come up with a general principle of forum State jurisdiction cannot be attributed to the draughtsmen of the convention; the differences go deeper and a piecemeal papering over the divisions and the resort to immunity as offered by the provisions of the convention, rather than a confession of anarchy with regard to jurisdiction, may be the only available solution at the present time.

To sum up this section, the convention represents only a partial codification of State immunity, focused solely on immunity from civil jurisdiction and one, which by the need for diplomatic compromise, can be faulted for its lack of clarity. But as one step, one jigsaw piece in the subjection of the State to the rule of law it should be welcomed.

III. THE CONVENTION'S CONTRIBUTION TO THE STRUCTURE OF GENERAL INTERNATIONAL LAW

There is currently a school of thought which maintains the discretionary nature of sovereign immunity, a position which finds support in the United States largely by reason of the federal courts, even after the enactment of the FSIA, continuing to defer to the executive's directions on matters of foreign relations. It is a view not entirely discredited in the seminal decision of Marshall CJ in *The Schooner Exchange*: although he states that the full and absolute territorial jurisdiction of the forum State' would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects', he also speaks of a State's 'relaxation in practice' of its absolute territorial jurisdiction and contemplates its unilateral withdrawal, though not 'suddenly and without notice'.[8] In an article in the *American Journal of International Law* Caplan has forcefully restated the case that immunity is nothing more than a privilege granted by the forum State to foreign States; he defines immunity as 'the forum State's waiver of adjudicatory jurisdiction over a foreign State with the aim of promoting beneficial interstate relations'.[9]

Any idea that such a reductionist view of immunity prevails solely in academic circles has been dispelled by the US Supreme Court's recent decision in *Republic of Austria v Altmann,* a decision ruling that the FSIA has retroactive effect with regard to acts of expropriation committed in 1948 prior to the Tate letter when US courts applied a rule of absolute immunity. The Court boldly declared that:

> the principal purpose of foreign sovereign immunity has never been to permit foreign States and their instrumentalities to shape their conduct in reliance on the promise of future immunity from suit in US courts. Rather, such immunity reflects current political realities and relationships, and aims to give foreign States and their instrumentalities some *present*:

[7] Preliminary Report by Mr Ogiso A/CN.4/415 ILC YB 1988 II pt 1, 109 paras 118–19 of the recommendations by the Special Rapporteur to Art 11. Commentary to 1991 draft articles, Art 10, paras 3–5.

[8] *The Schooner Exchange v McFaddon* 11 US 116 (1812); (1812) 7 Cranch 116.

[9] AJIL 97 (2003) 741, 755.

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> protection from the inconvenience of suit as a gesture of comity *Dole Food C v Patrickson* 538 US 468,479 (2003). Throughout history, courts have resolved questions of foreign sovereign immunity by deferring to the 'decisions of the political branches . . . on whether to take jurisdiction', a privilege granted by the forum State to foreign States'. *Verlinden,* 461 US, 486.[10]

The practice of civil law courts and common law jurisdictions other than the United States has been totally opposed to such a reduction of immunity as 'a gesture of comity'. From the decision of the French Court of Cassation in 1849, that 'it follows from this principle [of the independence of States] that Governments cannot, in respect of the commitments into which they enter, be subject to the jurisdiction of a foreign State',[11] to the decision of the Italian Court of Cassation in *Ferrini v Federal Republic of Germany*, which, despite its controversial conclusion, acknowledged 'the existence of a customary norm of international law which imposes on States the obligation to restrain themselves from exercising their jurisdictional competence with regard to foreign States',[12] civil law courts have unanimously treated the observance of State immunity as an obligation imposed by international law.

For common law jurisdictions other than the United States, the international law source of State immunity applied by their courts was well expressed by Lord Wilberforce in *I Congreso del* Partido:

> It is necessary to start from first principle. The basis on which one State is considered to be immune from the territorial jurisdiction of the courts of another State is 'par in parem . . . ' which effectively means that the sovereign or governmental acts of one State are not matters on which the courts of other States will adjudicate.[13]

There is then a significant body of State practice in civil and common law countries, evidencing in the words of the European Court of Human Rights in *Al-Adsani* the 'generally recognised rules of public international law on State immunity'[14] in reliance upon which 'States have shaped their conduct'. Nonetheless several commentators, particularly those wishing to remove the bar which immunity presents to reparation for violation of human rights committed outside the forum State, now favour the US position, arguing that the complexity of case law and its divergence on the public/private law distinction demonstrates that any international consensus exists only at 'a high level of abstraction'.

This reduction of immunity to a privilege is particularly evident in the 1996 amendment of the FSIA by the Anti-Terrorism and Death Penalty Act which removes immunity in respect of claims for money damages against a foreign government for personal injury or death caused by an act of torture, extrajudicial killing, hostage taking or the provision of material support or resources to terrorists, but—and here is the discretionary element—only in respect of claims made by US nationals against a foreign government designated as a State sponsor of terrorism pursuant to statutory powers given to the federal government. Criticizing this Act, Sealing argues:

> if the US Courts declare that, as a matter of international law a US court has jurisdiction over a sovereign State because the US executive branch has declared it a State sponsor of

[10] *Republic of Austria v Altmann* US Supreme Ct (4 June 2004).
[11] *Spanish Govt v Lambege and Pujot* (22 Jan 1849) Sirey 1830, I, 81, 93; Dalloz 1848, I,5.
[12] Judgment No 5044 of 11 Mar 2004, registered 11 Mar 2005 (2004) 87 Rivista diritto internazionale 539.
[13] *I Congreso del Partido* [1983]1 AC 244, [1981] 2 All ER 1064 , 1070, 64 ILR 307.
[14] *Al-Adsani v UK ECHR* (2002) 34 EHRR 111, para 56, 123 ILR 24.

> terrorism, then only two results can logically flow from that decision. First only the United States can gain jurisdiction over State sponsors of terrorism. Of course that conclusion can only be justified by the threat of pure force: America *will* exercise domestic jurisdiction over foreign sovereigns whenever it chooses because it *can*, as the world's only remaining 'superpower' exercise domestic jurisdiction over foreign States. The only alternative, and the only one both logical and 'fair', is that any nation's domestic jurisdiction can appropriately exercise jurisdiction over a foreign State—including the United States—that it considers a sponsor of terrorism . . . [15]

Some human rights NGOS have welcomed this amendment of the FSIA because it offers a remedy for victims of violations of human rights—though to date there has been little actual recovery of damages. They fail to appreciate that a remedy granted for policy reasons may equally be withdrawn when policy changes. The arbitrary nature by which the AEDPA manipulates immunity to meet the policy demands of the United States is reflected not only in the choice of States so designated but also in the withdrawal of such status. At various times the State Department has designated Cuba, Iran, Iraq, Libya, North Korea, Sudan and Syria as terrorist States and also the Federal Republic of Yugoslavia under President Milosevic's regime. But after the invasion of Iraq the designation of Iraq as a State sponsor of terrorism was lifted and all previously blocked Iraqi assets were vested 'in the Department of the Treasury' to be used 'to assist the Iraqi people and to assist in the reconstruction of the Treasury'.[16] Taken to such extremes, the unilateral discretionary approach to immunity must result in anarchy. A step in that direction is a report that Iran has passed legislation allowing Iranian victims of United States' 'interference' to sue the United States.

The UN State Immunity Convention would arrest this trend and provide strong authority to support immunity as a rule of international law, not a mere privilege granted for reasons of comity by the territorial State. The preamble to the convention refers to the jurisdictional immunities of States and their property as 'generally accepted as a principle of customary international law' and affirms that 'the rules of customary international law continue to govern matters not regulated' by the convention. When ratified, the treaty will give conventional force to the rules and as such many constitutions will accord it primacy over national law. Even unratified, the convention is likely to consolidate the customary status of its rules on immunity.[17]

State immunity is a necessary principle at the present stage of development of international law. It serves as a neutral way of denying jurisdiction to States over the internal administration of another State and diverting claims to settlement in the courts of that State, or by diplomatic or other international means to which that State has consented. The UN Convention relates only to commercial and private law matters. There is no space here to debate the extent to which the convention's rules relating to removal of immunity for non-contractual acts requires an additional protocol to permit, in well-defined circumstances, a further exception to immunity for claims relating to civil reparation for international crimes committed under the auspices of a government. To allow suit against a foreign government by its own nationals in a third State's courts

[15] Sealing '"State sponsors of terrorism" is a question not an answer: the Terrorism amendment to the FSIA makes less sense now than it did before 9/11' (2003) 38 Texas Int L J 103, 105.

[16] Emergency Supplemental Appropriations Act, 16 Apr 2003 and the Presidential determination of 7 May 2003; Murphy 'Terrorist-State litigation in 2000–2003' (2003) AJIL 97 966, 970.

[17] In so far as the rules set forth in the Convention on jurisdictional immunities of States and their property operate under international law independently of the present Convention, Art 4 (non-retroactivity of the Convention) preserves their application.

for acts, even if they be violations of human rights, which take place wholly within their own State is a particularly intrusive kind of jurisdiction and, when the acts take place pursuant to government policy, implicates the inner workings of the government. As Professor Hafner has admitted, there would have been no agreement on the convention's text had the negotiations been widened to include any exception for breach of international law. The rejection by the Institut de droit international of Professor Brownlie's project to redefine immunity as a matter of balancing competences between the forum and the defendant State demonstrates the continuing absence of consensus on how jurisdictions relating to a State's internal administration should be allocated.[18] The ongoing debate on whether *forum non conveniens* and *lis pendens* have any role to play in the exercise of jurisdiction under the Brussels Convention on Jurisdiction and Judgments also evidence the lack of unanimity on the principles governing competence even in commercial matters.[19]

To sum up, immunity for the exercise of sovereign or governmental authority *de jure imperii* exists by reason of the absence of any consensus as to alternative viable procedures. Its retention in the ultimate resort rests on the status and powers which the international system is prepared to accord to the State. As Charnowitz writes

> markets are dependent upon States whose role in the market economy is pervasive. The State is asked to provide security of property, rule of law, sound money, interventions to internalize externalities and various merit goods such as health and education. Much of this can be achieved by strong States on their own, but this process can be supported by wisely designed and focused international agreements.[20]

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[18] Resolution of the Institut de droit at its Basel session, 1991, ADI 1992 64-I, 221.

[19] Harris 'Stays of Proceedings and the Brussels Convention', and Cuniberti '*Forum non Conveniens* and the Brussels Convention' in (2005) 54 International and Comparative Law Quarterly 933 and 973 respectively.

[20] Charnovitz reviewing Martin Wolf *Why Globalization Works* in (2005) 99 AJIL 729.

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