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State Immunity: The United Nations Convention and its effect

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Summary

- **If a person is tortured by officials of a foreign state, can that state be sued in the courts of the victim's own country?**
- **Should a state ever be immune from proceedings in a foreign court when it has chosen to employ people in that foreign state, entered into commercial transactions there or agreed to arbitration?**
- **What are the rules of international law on state immunity and should they be changed?**
- **Is the new United Nations Convention a useful statement of the law? Or will it freeze the law and stop useful developments? Should states be encouraged to ratify the Convention and bring it into force?**

This paper deals with questions such as these. It explains in non-technical language what the basic rules of state immunity are and what the new United Nations Convention will do.

In summary, the rules of state immunity concern the protection which a state is given from being sued in the courts of other states; the rules relate to legal proceedings in the courts of another state, not in a state's own courts. The rules developed at a time when it was thought to be an infringement of a state's sovereignty to bring proceedings against it or its officials in a foreign country. But there are now substantial exceptions to the rule of immunity; in particular, a state can be sued when the dispute arises from a commercial transaction entered into by a state or some other non-sovereign activity of a state. The new UN Convention, which is not yet in force, formulates the rules and the exceptions to them. It does not cover criminal proceedings, and it does not allow civil actions for human rights abuses against state agents where the abuse has occurred in another country. These are two of the points discussed in this paper.

The rules on state immunity are technical. But they can affect businesses and individuals, and should be more widely known and discussed, in particular at this time, when governments are having to take the decision whether or not to sign and ratify the new Convention.

Introduction

1. States engage in many activities which can end in disputes in other countries: they may enter into contracts with individuals and companies based in other countries; they may own and operate enterprises such as state airlines which offer services to other countries' citizens; they may employ other countries' citizens in their embassies; their officials may commit wrongful acts against citizens of other countries. Questions of state immunity can arise when disputes about any such matters are taken to the courts of those other countries. Some examples taken from the facts of past court cases are described below and elsewhere in this paper.

American holidaymakers travelling from Florida to the Dominican Republic were denied entry by Dominican immigration officials and forced to return to the United States. They sought damages for breach of contract from the airline, Dominica, a wholly owned state agency of the Dominican Republic. The claim concerned (a) the failure to warn of the possibility of being turned back and (b) the forced return itself. The US courts were prepared to allow the claim to proceed on the first point but said that the Dominican Republic had immunity for their refusal to allow entry.¹

The Liberian owner of an oil tanker allegedly bombed by Argentine aircraft during the Falklands conflict tried to bring a claim for compensation against Argentina in the US courts. The court decided that Argentina had immunity from the proceedings.²

Agents of the Chilean government murdered a former Chilean ambassador in Washington. The victim's family and personal representatives brought a claim for damages before the US courts. The courts decided that Chile did not have immunity and the case proceeded.³

An American official who was providing educational services to United States forces and their families in the United Kingdom was sued for defamation by a teacher under his supervision. The English court concluded that state immunity applied to bar the claim.⁴

Victims of alleged torture abroad by officials of Kuwait and Saudi Arabia have sued those states in separate cases before the English courts. In both cases, the courts did not allow the claims to proceed against the states concerned, because of the rule of state immunity. In the case involving Saudi Arabia, however, the Court of Appeal has recently refused to accept that the state officials have immunity.⁵

2. The rules of state immunity lay down the extent to which a state is protected from being sued in the courts of other states. A successful plea of immunity will prevent a state being made a party to proceedings in the courts of a foreign state and will protect its property from being seized to satisfy a judgment. Immunity can extend to legal proceedings against the state itself, its organs and enterprises and its agents. It is international law that determines the general rules of whether or not a state should be accorded immunity by the courts of another state, but it is national law that interprets and applies those rules. In the United Kingdom, for example, the State Immunity Act 1978 sets out the circumstances under which immunity will be granted to other states in this country (see Box A).

3. The question of immunity only arises where courts would otherwise have jurisdiction in a case. In practice, the place where the acts took place, the nationality or place of residence of the parties to the dispute and its subject-matter may all be relevant factors in determining whether a particular national court is the proper place to hear a case. The rules on jurisdiction govern these matters and decide the question of whether or not a national court has power to hear the case. If the answer is yes, the case may proceed unless immunity applies. Immunity is a procedural bar based on the status of the defendant as a sovereign state. It does not mean exemption from the law. If it wishes, the defendant state may waive its right to immunity and the case will then proceed.

4. What justification can there be for a state and its agents to enjoy immunity in the courts of another state? It is sometimes said that the principle comes from the sovereign equality of states and it is a consequence of this equality that one state cannot exercise jurisdiction over another. It is also said that it originates in the independence or dignity of states (and the latter was particularly important when kings and queens embodied the state). But it is not always obvious that equality, independence or dignity would be damaged by a state having to defend legal proceedings in the courts of another state. When proceedings against officials of a state are concerned, there is an additional concern that the conduct of international relations should not be hindered by proceedings being brought in a foreign state. Whatever the reason, international law does impose a general requirement that foreign states should not be sued. But there are important exceptions to this rule, exceptions that have been growing over the years.

5. At one time, states had absolute immunity. Proceedings against foreign states were inadmissible without their consent. But as states became involved in commercial activities, some national courts began to apply a more restrictive law of immunity by reference to the type of activity carried out by the state. Under the restrictive law of immunity, courts recognize immunity for acts carried out by a state in the exercise of its sovereign authority but will deny immunity for acts of a commercial or private nature. Some broad exceptions to immunity have become generally

established, but the details vary considerably from one country to another. The changing functions of the state create further complications: what one regime may characterize as public or sovereign may be seen by another as essentially private.

Following the unlawful occupation of Kuwait by Iraqi forces in 1990, Iraq and the Iraqi Airways Corporation seized ten Kuwaiti civilian aircraft which were later incorporated into the Iraqi Airways Corporation by Iraqi legislation. The English courts upheld the immunity of the defendants for the initial seizure and detention but allowed the legal proceedings to continue for the later expropriation for commercial use.⁶

BOX A: THE STATE IMMUNITY ACT 1978

The Act was passed following the ratification by the UK of the European Convention on State Immunity. The Convention came into force on 11 June 1976 but only eight states are parties. The 1978 Act is modelled on its provisions and reflects the UK view of the international law on state immunity. The Act states the general rule that a state is immune before the courts of another state and then proceeds to list a number of exceptions to that general rule. The basis for most of these exceptions is a recognition that a state's acts may not only be of a sovereign or public nature but may also be of a commercial or private law nature and that it is not appropriate – or required by international law – to give immunity for the second kind of activity. The Act does not draw a straightforward distinction between public or sovereign acts of the state on the one hand, and private acts on the other. Instead it opts for a list approach identifying specific exceptions to immunity. One exception is for proceedings relating to commercial transactions, and to state obligations under a contract which are to be performed in the UK.

6. There are other areas of state activity which have given rise to a challenge to the traditional rules of state immunity. One example is where foreign state agents have been accused of causing harm to individuals in the country in which proceedings take place, for example, by the negligent driving of a car. Here courts in many countries have been prepared to recognize an exception to the rules on state immunity. But where the acts complained of take place abroad, for example when foreign state officials are responsible for torture or other abuses, state immunity blocks proceedings in the courts of another country. Courts in some states have been prepared to accept *criminal* proceedings against those officials even though the acts complained of were committed abroad. But where the victims have tried to recover compensation by way of *civil* proceedings against the foreign state or its officials, a plea of state immunity has generally barred the way. One exception to this is in the United States; that country allows claims to be brought in US courts against foreign state officials for

torture and other human rights violations (see paragraph 34 below).

The family of a 17-year-old Paraguayan national tortured to death in Paraguay brought a civil claim against the responsible Paraguayan police officer who had fled to the United States. The US courts held that immunity did not apply. At a later hearing, compensation including punitive damages of over \$10 million were awarded to the victim's father and sister.⁷

The new UN Convention

7. The rules on state immunity are rules of customary international law; that is, they originate in the practice and custom of states. But the practice of states in giving immunity to states has not been consistent. The international community tried for many years to agree a treaty on the subject. Disagreements between countries which had adopted a restrictive approach to immunity and those which pursued a more absolutist approach (chiefly the socialist state-trading countries, for example the old Soviet Union and China) made the negotiation of a treaty extremely difficult. Countries which had already adopted their own domestic legislation were anxious that their law should not be seen as incompatible with international law and were reluctant to change their law. Eventually agreement was reached and the Convention was adopted by the United Nations General Assembly in December 2004. A brief history of its negotiation is given in Box B. The text of the Convention is attached as an appendix to this paper, together with copies of related documents.

8. Attempts to resolve the differences among states led to compromises. In some cases, these compromises and the resulting ambiguities in wording were not tackled or fully resolved in the main provisions of the Convention but in annexed understandings and in the statement of the Chairman of the Ad Hoc Committee. In other cases, wording has been included in the Preamble rather than in the Convention's main provisions. Some of the major provisions of the Convention are discussed below.

9. The Convention draws a line between those situations in which a state may properly claim immunity and those in which immunity has, over the years, been restricted and denied. It lays down a general rule – that a state has immunity, for itself and its property, from the jurisdiction of other states' courts – but then provides exceptions to that general rule. The Convention is concerned with civil proceedings against a state in the courts of another state. It is not intended to cover criminal proceedings (see paragraph 30 below).

BOX B: HISTORY OF THE CONVENTION

The rules on state immunity are rules of customary international law; that is, they originate in the practice and custom of states. The first comprehensive multilateral treaty to be concluded on the matter was the European Convention on State Immunity, which was adopted in 1972 and came into force on 11 June 1976. It was agreed among Council of Europe countries and is generally thought to reflect the broad principles of customary international law, if not all the details. However, only eight states (Austria, Belgium, Cyprus, Germany, Luxembourg, the Netherlands, Switzerland and the United Kingdom) are parties.

Around the world there continued to be differences in the practice of states, and it was this diversity and consequent uncertainty in the law that prompted the decision of the United Nations General Assembly in 1977 to include the topic of state immunity in the work programme of the International Law Commission (ILC). Discussion within the ILC and among state representatives in the UN Sixth (Legal) Committee over subsequent years revealed deep divisions among states. The Convention on the Jurisdictional Immunities of States and Their Property is the culmination of nearly 27 years work within the ILC, the UN General Assembly Sixth Committee and the Ad Hoc Committee which was established by the General Assembly in its resolution 55/150 of 12 December 2000.

In 2003, the Ad Hoc Committee was reconvened under General Assembly resolution 58/74 with a mandate 'to formulate a preamble and final clauses, with a view to completing a convention'. The Committee then succeeded in reaching agreement on a finalized version of the 1991 Draft Articles on Jurisdictional Immunities of States and their Property and it is this text, accompanied by a set of annexed understandings, that was finally adopted by the UN General Assembly. The Convention provides that it shall enter into force after it has been signed and ratified by 30 states. To date the Convention has been signed by Austria, Morocco, Portugal and Belgium.

Exceptions to immunity

10. These are some of the exceptions to the general rule of immunity which are set out in the Convention; if any of these exceptions apply in a case, a state will not be able to claim immunity in a foreign court.

Commercial transactions

A large quantity of cement was supplied by a private contractor in the UK to the Nigerian Defence Ministry. Following a change of regime, the Nigerian government decided it no longer required the cement and refused to pay for it. The supplier brought proceedings against Nigeria in the UK courts. Nigeria's claim of state immunity was eventually dismissed and the action allowed to proceed.⁸

11. A state cannot claim immunity from the jurisdiction of another state in legal proceedings which arise from a commercial transaction. This rule does not apply to commercial transactions *between* states or where the parties to the transaction have explicitly agreed otherwise. At the heart of this major exception to state immunity is the question of what is a 'commercial transaction'. The term as defined in the Convention includes any commercial contract or transaction for the sale of goods or supply of services, any contract for a loan or other transaction of a financial nature and 'any other contract or transaction of a commercial, industrial, trading, or professional nature, but not including a contract of employment'. The term 'transaction' is much wider than 'contract' and is capable of covering a broader range of activities. But it is the *commercial* character of a transaction that is likely to be at issue and it was this that caused most difficulty in reaching agreement among states on the text of the Convention.

12. The main question is whether the criteria defining a commercial transaction should relate to the nature of the transaction or its purpose. If a state orders boots for its armed forces, the nature of the transaction is commercial, but its purpose (to kit out its army) is a sovereign state activity. The Convention's solution is that contracts for the supply of goods or services are defined as commercial transactions (for which there is no immunity); but then the Convention states that in deciding whether something is a commercial transaction reference should be made primarily to the *nature* of the transaction, but its *purpose* should also be taken into account if the parties have so agreed or if, in the practice of the state where legal proceedings are brought, purpose is relevant in determining the non-commercial character of the transaction.

13. The Convention test for determining the commercial or non-commercial character of a particular transaction is a compromise between competing views. Its meaning is not very clear, and it could encourage differences in approach from one country to another. The reference to 'practice' could be interpreted as much wider than 'law' and could allow administrative practice or preference to decide the immune or non-immune nature of the transaction.

Contracts of employment

An Irish national formerly employed as an administrative assistant at the American Embassy in London sought re-employment with the Embassy by applying for two vacant posts. Both applications were unsuccessful and she brought a claim against the United States before a UK employment tribunal alleging sex discrimination. The US government's claim of immunity was allowed.⁹

An Austrian national working at the United States Embassy in Vienna in its information service was dismissed on unspecified security

grounds and began proceedings before the Austrian courts claiming severance pay but not reinstatement. The Austrian Supreme Court held that the United States did not have immunity.¹⁰

BOX C: APPROACH OF UK COURTS

Under the State Immunity Act 1978 a state is not immune in proceedings relating to a commercial transaction, which is defined as a contract for the supply of goods or services, a financial loan and any other transaction into which a state enters otherwise than in the exercise of sovereign authority.

The Act does not refer to the purpose of a transaction as a relevant criterion for determining its sovereign or private nature. In practice, where there is doubt, the English courts have adopted a broad contextual approach in deciding cases under the Act and under the common law. See *I Congreso del Partido* (1983) 1 AC 244, (1981) 2 All ER 1062 Lord Wilberforce at 1074 HL: 'The conclusion which emerges is that in considering, under the restrictive theory, whether state immunity should be granted or not the court must consider the whole context in which the claim against the state is made, with a view to deciding whether the relevant act(s) on which the claim is based should, in that context, be considered as fairly within an area of activity, trading or commercial or otherwise of a private law character, in which the state has chosen to engage or whether the relevant act(s) should be considered as having been done outside that area and within the sphere of governmental or sovereign activity'. Further examples of this approach can be seen in *Kuwait Airways Corporation v Iraqi Airways Company* (1995) 3 All ER 694 and *Holland v Lampen-Wolfe* (2000) 3 All ER 833.

The Working Group of the International Law Commission, after an exhaustive review of practice in different states, commented in 1999 that 'the distinction between the so called nature and purpose tests might be less significant in practice than the long debate about it might imply'.

14. Employment contracts are treated as a separate exception to immunity under the Convention and are not included within the term 'commercial transaction'. Unless otherwise agreed between the states concerned, a state is not entitled to immunity in proceedings which relate to a contract of employment between the state and an individual for work performed in the state where the proceedings are started. At first sight this might seem like quite a large exception to state immunity but there are many exceptions to the exception. First, the exception does not apply to employees who are nationals of the employing state unless they are permanently resident in the state where proceedings take place. Secondly, the Convention excludes from this exception proceedings relating to the recruitment, renewal of employment or

reinstatement of an individual. Thirdly, the exception does not apply where the employee is a diplomatic agent, a consular officer or any other person enjoying diplomatic immunity. Fourthly, the exception does not apply where legal proceedings would interfere with the security interests of the employer state. Finally, it does not apply where the employee has been 'recruited to perform particular functions in the exercise of governmental authority'. In all these cases, therefore, the state will have immunity if a disgruntled employee or job applicant wants to bring legal proceedings. For further details of these exceptions, see Box D.

BOX D: EXCEPTIONS TO EMPLOYMENT EXCEPTION

The exclusion of proceedings relating to recruitment, renewal of employment or reinstatement is significant. In practice, it is likely to limit the exception to cases involving dismissal, termination of employment, and claims for unpaid wages.

The exclusion of diplomats, consular officers and those enjoying diplomatic immunity from the exception to immunity is well established under international law. But it does provide a contrast with the State Immunity Act. This sets out a wider exclusion and refers simply to 'members of the staff at a diplomatic mission', which would include not only diplomatic officers but also lower-grade administrative, technical and domestic staff, not all of whom are entitled to diplomatic immunities.

It is unclear how national courts will interpret the reference to security interests. Will they be content to accept the assertion of the employer state that legal proceedings will interfere with its security interests? The annex to the Convention sets out an understanding that the term 'security interests' is intended to address 'matters of national security and the security of diplomatic missions and consular posts'.

The exception relating to people performing functions in the exercise of governmental authority could cover a very broad range of employees in the public sector. In some countries the public sector is very large and may include post office workers, railway workers, teachers and many others.

Third country nationals

The Convention differs from the UK Act in that it does not permit the foreign state to retain immunity simply because the employee is a third country national and not habitually resident in the state where legal proceedings take place. The provision in the UK Act seems discriminatory and inconsistent with the United Kingdom's international obligations under the European Convention on Human Rights, in particular the obligation to afford individuals a right of access to a court.

Personal injuries and damage to property

Mr Al Adsani made a claim in the UK courts against the Government of Kuwait on the ground that he had been detained and tortured by Kuwaiti government officials in Kuwait. The State Immunity Act 1978 provides that a state retains immunity unless the injuries were inflicted in that country. The victim had said that the psychological injuries he had received under torture had been exacerbated by threats he had received over the telephone while in London from the Kuwaiti ambassador anonymously, but he was unable to prove that the threats had been made by the ambassador. The Court of Appeal therefore held that the state of Kuwait was entitled to immunity and the case could not proceed.¹¹

15. Under the Convention, a state will not be immune if legal proceedings are brought against it seeking compensation for death or personal injury caused by an act of the state in the country where proceedings are begun. The same rule applies to damage to or loss of property. In one sense this is a much wider exception than the one for commercial transactions; it covers actions which a state has committed in the exercise of its sovereign authority as well as private activities. This of course means that victims of traffic accidents caused by officials of a foreign state can bring a lawsuit at home. But it also allows proceedings to be brought for deliberate activities of a foreign state, for example its police or secret service.

16. In another sense the exception is much narrower than the commercial exception. It does not apply to acts committed outside the state where proceedings are brought. In addition, the author of the act or omission must be present in that state at the time of the act or omission. This means that if police or prison officers torture foreign prisoners in the jails of one country, the victims will not be able to come home and claim compensation from the state which employed those officers, since that state will be able to claim immunity in the courts of the victims' country. If a state agent places a bomb on an aircraft in one country which causes the aircraft to blow up over another, the victims' families will be unable to sue the state which employed the agent in the country where harm was caused. Nor will victims of pollution caused across a frontier by state agencies from another country be able to claim in their own courts against the state agencies concerned.

17. The legal proceedings in question must relate to financial compensation. This means that a state will still have immunity from proceedings asking for an order of the court to stop the carrying out of a wrongful act or to ask for the return of property. It is not clear whether an injured party could seek punitive damages in addition to compensation. And it is not clear whether proceedings could be brought for compensation for mental pain and suffering of the

kind often suffered by victims of torture and other human rights abuses.

Arbitration agreements

18. Questions of immunity often arise in connection with arbitration agreements entered into by states. Under the Convention, unless the arbitration agreement provides otherwise, immunity cannot be claimed by a state which has agreed with a foreign entity to submit to arbitration a dispute relating to a commercial transaction. The proceeding in question must be before a court which would otherwise have jurisdiction and the proceeding must relate to the validity, interpretation or application of the arbitration agreement, the arbitration procedure, or the confirmation or setting aside of the award. The term 'commercial transaction' is defined (in one of the understandings annexed to the Convention) as including investment matters.

19. If a state agrees to arbitrate a dispute but then disagrees with the result of the arbitration procedure (the award), is it immune in legal proceedings in a domestic court to enforce the award? The Convention does not entirely preclude a claim of immunity at the stage of judicial enforcement of the award. A later provision of the Convention¹² says that no measures to enforce may be taken unless a state has consented, and that one way in which a state may give such consent is by an arbitration agreement. To come within this exception it is likely that enforcement measures would need to be very precisely described in the agreement.

20. Should a state be immune if the arbitration concerns a dispute about a non-commercial matter? The exception to immunity refers only to the arbitration of disputes about commercial transactions. But if a state has gone through the arbitration procedure, the Convention's provision on enforcement of judgments says that measures of enforcement may be taken against the property of a state where the state has consented to the taking of those measures by an arbitration agreement. Again the measures would need to be precisely described.

21. This exception to immunity may be a little narrower than the provisions of some national legislation. ICSID arbitrations (under the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States) are a special case. Because of their exclusive and self-contained nature, agreement to ICSID arbitration should probably not be interpreted as a waiver by a state of immunity from proceedings in a national court.

Other exceptions to immunity

22. A state does not enjoy immunity in legal proceedings connected with immovable property (land or buildings) in the state where legal proceedings are

brought, or relating to other kinds of property where the rights arose from succession or gift. Additional exceptions relate to legal proceedings concerning a state's intellectual or industrial property rights or any alleged infringement by that state of rights protected in the other state; participation by a state in companies or other bodies incorporated or constituted under the law of the state where proceedings are brought; and the operation of commercial ships. All are well recognized exceptions to state immunity although, in all cases, immunity will be retained if the states concerned agree.

Enforcement of judgments

23. It is one thing to bring proceedings against a foreign state and get a judgment against that state but quite another to get that judgment enforced. The Convention makes a very clear distinction between a state's immunity from legal proceedings and its immunity from measures enforcing any judgment obtained as a result. On the former, it sets out the significant exceptions which are discussed in this paper. On the latter, immunity remains almost absolute. The difference in approach is based on the recognition that the seizure and sale of a state's assets in order to satisfy a judgment against it constitutes a particularly dramatic interference with its interests and could damage its ability to function properly.

24. *Before* judgment, no enforcement measures can be taken against the property of a state in the courts of another state unless the state has explicitly agreed. If a claimant fears that the state will try to avoid the consequences of any adverse judgment by moving its assets out of the country, there is not much he can do about it. *After* judgment, no enforcement measures can be taken unless the state has explicitly agreed or the property which is the subject of the enforcement is 'specifically in use or intended for use by the state for other than government non-commercial purposes'. In addition, the property must be in the territory of the state where legal proceedings have been instituted and must have a 'connection with the entity against which the proceeding was directed'. An understanding in the annex to the Convention indicates that the 'connection' in this context is to be understood as broader than ownership or possession. The Convention lists some specific categories of property which are not to be considered as in use for 'other than government non-commercial purposes'; these include embassy bank accounts, property of a military character or property used in the performance of military functions and property of a central bank or other state monetary authority. However, the list is clearly not intended to be complete.

25. The wording of the Convention suggests that it covers only financial claims against a state. On this basis, the Convention will not disturb the general rule that a state should not be made subject to court orders such as injunctions which would compel it to perform a particular act or refrain from a particular action. There

is no explicit provision to this effect, although it is clear that, during the course of any legal proceedings, a state cannot be forced to comply with any order requiring it to do something or refrain from doing something. It cannot, for example, be forced to produce a particular document. Nor can it be fined or otherwise penalized in respect of any such refusal. However, a court is entitled to reach its own conclusions as to why a state should refuse to cooperate in such circumstances.

Interpretation and scope of the Convention

26. The text of the Convention and its accompanying documents reflect the difficult compromises that had to be made in order to reach agreement. These compromises have created some ambiguity as to what the Convention covers.

Definition of state

27. States operate through a wide range of subordinate agencies, organs and individuals. The definition of a 'state' in the Convention is, therefore, crucial in any understanding of who may raise a plea of immunity and how the exceptions to immunity will apply. The Convention opts for a broad definition of 'state' which includes not only the state itself and its organs but also units and subdivisions, agencies and other entities which are entitled to perform and are actually performing acts in the exercise of sovereign authority. Companies wholly owned by a state or in which the state is a majority shareholder could have immunity if they were acting in 'the exercise of sovereign authority'. The definition also includes representatives of the state acting in that capacity.

State enterprises

28. State enterprises are entities set up by a state which have a separate legal personality from that state. If they become involved in proceedings relating to a commercial transaction, the immunity enjoyed by the state will not be affected. This provision was added at the request of the former socialist states. Fears that it had been inserted to shield a state from its responsibilities and could frustrate a claim where a state enterprise had deliberately disposed of its assets to avoid satisfying a judgment have been allayed to some extent by an understanding in the annex that the provision 'does not prejudice the question of *piercing the corporate veil*'. In other words, it would not necessarily prevent a claimant from looking behind the enterprise and suing the state itself.

What proceedings are covered

29. The rules on state immunity apply if legal proceedings are brought against a state (as defined

above). But under the Convention they also apply even if a state is not sued directly, but if the legal proceedings would affect the property, rights, interests or activities of a state. This is very wide and vague. Should questions of immunity really be raised if the value of a state's embassy, a government's political interests or its tourist activities are somehow touched on in legal proceedings between other people?

Criminal proceedings

30. The Convention was not negotiated to cover immunity from criminal prosecutions. The General Assembly resolution which adopts the Convention refers to the understanding reached in the Ad Hoc Committee that the Convention does not deal with criminal proceedings. So prosecutions against a state's officials for torture, for example, will not be affected by the Convention. But the division between criminal and civil proceedings within domestic legal systems is not always clear cut. In states with a civil law tradition, for example many countries within continental Europe, it is possible for victims to lodge claims for compensation in a criminal prosecution as *parties civiles*. Would such a claim be regarded as civil or criminal proceedings for the purposes of the Convention? It will be for national courts to take their own view, if and when the Convention comes into effect.

Activities of troops in armed conflict

31. It is not clear whether the Convention takes away immunity from states for legal proceedings seeking compensation for the actions of their troops in battle. Would the families of Serbian civilian casualties in the Belgrade bombing have been able to take proceedings in Serbia against UK and US forces? The statement of the Chairman of the Ad Hoc Committee refers to a general understanding that the Convention will not cover military activities; it refers to the commentary of the International Law Commission which indicated that it would not apply to situations involving armed conflict. But this may not be enough to make the position clear. There is nothing in the Convention itself to show that actions of troops are not covered.

Some questions to be resolved

- **Are the Convention's provisions on commercial transactions compatible with the current approach of national courts in countries where the restrictive doctrine of immunity has long held sway?**
- **In particular, given the increasing tendency of governments to 'contract out' functions which have been traditionally regarded as carried out in the exercise of sovereign authority, will it permit courts to develop their current pragmatic approach or could it hinder such development ?**

32. Yes, by and large. The Convention provisions on commercial transactions are, on the face of it, broad enough to permit the UK courts and other national courts with a similar approach to continue along current lines. But in the definition of commercial transaction, the reference to 'purpose', linked with the 'practice' of the state where legal proceedings occur, might give some states more room for manoeuvre than is desirable, given the importance of building up a consistent practice in this area. This compromise wording might detract, therefore, from one of the aims of the Convention, which is to achieve uniformity within the international community on this important topic.

- **Is the Convention compatible with current developments in the law relating to torture and other human rights abuses? Would it allow torture victims to claim compensation from foreign state officials in the UK courts? Is it compatible with US legislation on this subject?**
- **Will the Convention stop possible developments in international law which might allow proceedings to be brought against foreign states for torture or other human rights abuses?**

33. Recent developments in international law have focused on creating greater *individual* accountability for violations of human rights and other serious breaches of international law. In international *criminal* courts such as the International Criminal Court and the tribunals for the former Yugoslavia and for Rwanda, there is no immunity for heads of state or state officials. In domestic courts, international law requires that serving heads of state and ministers continue to enjoy personal immunity. But in the *Pinochet* case, the highest court in England took the view that, if a former head of state had carried out acts of torture (as defined in the 1984 UN Torture Convention) he would not be immune from prosecution.

34. In *civil* proceedings, national courts have, by and large, continued to grant immunity to foreign states for abuses committed abroad. The United States is an exception and allows proceedings against states identified by the US government as 'terrorist states' relating to personal injury or death from such acts as torture or hostage taking.¹³ Since that Act, several judgments have been issued against Cuba and Iran. The fact that the proceedings depend upon designation of the state as terrorist by the US government makes this a very narrow and highly politicized exception to the general rule on immunity.

On 24 February 1996, the Cuban air force shot down two unarmed US civilian aircraft over international waters, killing all four occupants, three of whom were US nationals. The families of the three US victims sued the state of Cuba and obtained a judgment against it for

approximately \$187.6 million in compensatory and punitive damages.¹⁴

On 9 April 1995, a suicide bomber drove a van loaded with explosive into a bus driving through the Gaza Strip, killing seven Israeli soldiers and an American student, Ms Flatow. A terrorist group, which was funded by the government of Iran, claimed responsibility for the attack. The family of Ms Flatow obtained a judgment against Iran for \$247 million in compensatory and punitive damages.¹⁵

35. The position with regard to civil proceedings against state officials rather than the state itself is a little more developed. Again, the United States has taken a lead and allows claims to be brought in US courts for torture and other human rights violations committed abroad by foreign state officials.¹⁶ The United States representative made a statement in the United Nations when the Convention was adopted: the Convention 'leaves open questions with respect to the further evolution of public international law in those specific circumstances where the conduct complained of contravenes other widely accepted international conventions ... for example the UN Conventions Against Torture or Hostage-Taking'.

36. There is one case in English law which goes some way to developing the law in civil proceedings in a similar direction. In a recent Court of Appeal case relating to alleged torture of British prisoners in Saudi Arabia, the court held that immunity cannot be used to shield state officials from civil claims in respect of systematic torture. In the court's view civil proceedings against a state official, in such circumstances, are not brought against the state and do not, therefore, raise issues of state immunity. There is an appeal against that decision of the court. But if the decision stands, it could be in conflict with the provision of the Convention mentioned in paragraph 29 above: the effect of this provision is that even if a state is not sued directly, the rules on immunity will apply if the legal proceeding would affect the rights, interests or activities of a state. An action brought against a foreign state official, although not directly suing the state, might well affect its interests or activities.

- **If a victim of human rights abuses is barred from bringing a claim by state immunity, is such a bar consistent with the international human rights obligations undertaken by the UK and other states, e.g. the victim's right to have access to a court?**

37. In the *Al Adsani*¹⁷ case, the European Court of Human Rights in Strasbourg held that the application of state immunity restricted a person's right of access to the courts. By a narrow majority, however, the Court held that, in the circumstances, the application of immunity was not a disproportionate, and therefore impermissible, restriction because the grant of immunity pursued the legitimate aim of complying

with international law to promote comity and good relations between states. The Court did not make clear in what circumstances the application of immunity might impose an impermissible restriction on the right of access to a court. At present the law is that the rules on state immunity, if properly applied, are not in conflict with human rights obligations. But the view of the Strasbourg Court may change in the future.

- **Should the law on immunity continue to protect states or their agents against civil proceedings for serious human rights abuses?**

38. It is not obvious why states should have immunity in cases relating to serious human rights abuses. The argument is made that fundamental human rights such as the right to life and the prohibition against torture should take precedence over rules of state immunity. The argument goes that these rights have a higher ranking and importance (in lawyers' speak they constitute norms of *ius cogens*) than a rule of state immunity, and that the recent focus on ending impunity for serious human rights abuses should ensure that the law develops to allow states to be sued.

39. The argument on the other side is that impunity should be ended but that there are other ways of doing this and that it should not be at the expense of the proper conduct of relations between states; that one country's perception of abuse may not be another's; that civil actions for a state agent's atrocities should be brought in the courts of that state, not in a foreign court; that prosecution of crime lies in the hands of the state whereas civil proceedings are pursued by individuals for their own ends; that civil actions brought by disgruntled individuals in one country against another state can have grave political and economic repercussions for both states; and that civil proceedings can raise difficult issues of enforcement and extra-territorial jurisdiction. The arguments on either side reflect different perceptions of the balance to be struck between protection of state interests and protection of an individual's human rights.

40. There is also the practical argument that a court located many miles away from where the acts which gave rise to the proceedings took place is not well placed to judge the matter and can be at a considerable disadvantage in assessing evidence and hearing witnesses. However, this argument is already taken care of to some extent by legal rules which determine in what circumstances a court has power to hear a particular case (see paragraph 3 above, which deals with the question of jurisdiction).

Conclusion

• Should the United Kingdom government become a party to the Convention by signing and ratifying it?

41. The Convention has been many years in the making. Now that it has been adopted, governments around the world have to decide whether to bring it into force by signing and ratifying it.

42. It is a great achievement that countries have agreed on a treaty which does not allow states to have absolute immunity in the courts of other countries. The Convention's basic approach is a very good one, and it ought to be followed. Countries without their own domestic laws will be able to use its rules as a model for new legislation. But for countries with their own laws, is there any advantage in ratifying the Convention?

43. The UK already has its own legislation, the State Immunity Act, and the courts have acquired wide

experience in interpreting and applying its provisions. Some of the wording of the new Convention discussed in this paper gives rise to doubts as to whether UK ratification of the Convention would improve the legal position of people or companies wanting to start proceedings in the UK against states.

44. So far as proceedings in other countries are concerned, the important thing is for litigants to be confident that courts will follow the same basic approach across the world. But the Convention is unlikely to lead to exact uniformity.

45. Bringing the Convention into force might freeze the law and stop the development of state practice outside the Convention. One alternative is to leave it to lie on the table as a generally accepted picture of the current position under international law. This would allow further developments of the law in line with the needs of businesses, individuals and governments. One way or another, it is important that there is wide discussion of the new Convention and its likely effects, so that a decision on signature and ratification can be taken in full knowledge of all the different interests concerned.

The UK Foreign and Commonwealth Office has been undertaking consultations about whether the UK should sign and eventually ratify the Convention (www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1017170970560). The consultations also address the question of whether ratification would require any amendment to the 1978 State Immunity Act and to what extent the Convention is compatible generally with UK law and practice.

Endnotes

- 1 Arango v Guzman Travel Advisors Corp. 621 F 2d 1371 (5th Cir. 1980), 63 ILR 467.
- 2 Argentine Republic v Amerada Hess Shipping Corp. 109 S Ct 683 (1989), 488 US 428 (1989), 81 ILR 658.
- 3 Letelier v Republic of Chile 488 F Supp. 665 (DDC 1980) 63 ILR 378.
- 4 Holland v Lampen-Wolfe (1998) 1 WLR 188 CA, (2000) 1 WLR 1573 HL, (2000) 3 All ER 833.
- 5 Al Adsani v Government of Kuwait and Others 21 January 1994 CA, 100 ILR 465; 103 ILR 420; CA 12 March 1996, 107 ILR 536. Jones v Kingdom of Saudi Arabia and Anor (2004) EWCA Civil 1394.
- 6 Kuwait Airways Corp. v Iraqi Airways Co. (1995) 3 All ER 694 HL, 103 ILR 340. Kuwait Airways Corp. v Iraqi Airways Co. (No 2) (2002) UKHL 19, 16 May 2002.
- 7 Filartiga v Pena Irala 639 F (2nd 876 92 CD Cir. 1980) 77 ILR 169.
- 8 Trendtex Trading Corp. v Central Bank of Nigeria (1977) 1 QB 529, (1977) 1 All ER 881.
- 9 Fogarty v United Kingdom ECHR Application 37112/97 (2001) 34 EHRR 302.
- 10 Seidenschmidt v United States of America (Case No 9 Ob A 116/92) Austria Supreme Court.
- 11 Al Adsani v Government of Kuwait and Others, 21 January 1994 CA, 100 ILR 465; 103 ILR 420; CA 12 March 1996, 107 ILR 536.
- 12 Article 19.
- 13 The Antiterrorism and Effective Death Penalty Act of 1996 amended the Foreign Sovereign Immunities Act to allow legal proceedings for monetary damages against foreign states that cause personal injury or death 'by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources ... for such an act', if the victim was a US national at the time of the act and the foreign state is designated by the US Secretary of State as a sponsor of terrorism.
- 14 Alejandro v Republic of Cuba 996 F Supp 1239 (SD Fla. 1997).
- 15 Flatow v Islamic Republic of Iran, 999 F Supp 1 (DDC 1998).
- 16 The Alien Tort Claims Act (ACTA) and the Torture Victims Protection Act (TVPA) make provision for claims to be brought in US courts in respect of torture and other human rights violations committed abroad by foreign state officials. The TVPA was passed primarily to permit US nationals to sue in US courts in the same way as aliens under the ACTA. However, the TVPA is more limited as it deals only with torture and extrajudicial killing and the defendant official must be acting under the authority or law of a foreign state.
- 17 Al Adsani v United Kingdom ECHR Application 35753/97 (2002 29 EHRR CD 99).

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APPENDIX

Resolution of the United Nations General Assembly adopting the Convention, which attaches the text of the Convention

General Assembly 16 December 2004

Resolution adopted by the General Assembly 59/38. United Nations Convention on Jurisdictional Immunities of States and Their Property

The General Assembly,

Bearing in mind Article 13, paragraph 1 (a), of the Charter of the United Nations,

Recalling its resolution 32/151 of 19 December 1977, in which it recommended that the International Law Commission take up the study of the law of jurisdictional immunities of States and their property with a view to its progressive development and codification, and its subsequent resolutions 46/55 of 9 December 1991, 49/61 of 9 December 1994, 52/151 of 15 December 1997, 54/101 of 9 December 1999, 55/150 of 12 December 2000, 56/78 of 12 December 2001, 57/16 of 19 November 2002 and 58/74 of 9 December 2003,

Recalling also that the International Law Commission submitted a final set of draft articles, with commentaries, on the law of jurisdictional immunities of States and their property in chapter II of its report on the work of its forty-third session,¹

Recalling further the reports of the open-ended Working Group of the Sixth Committee,¹ as well as the report of the Working Group on Jurisdictional Immunities of States and Their Property of the International Law Commission,³ submitted in accordance with General Assembly resolution 53/98 of 8 December 1998,

Recalling that in its resolution 55/150 it decided to establish the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property, open also to participation by States members of the specialized agencies, to further the work done, consolidate areas of agreement and resolve outstanding issues with a view to elaborating a generally acceptable instrument based on the draft articles on jurisdictional immunities of States and their property adopted by the International Law Commission and also on the discussions of the open-ended Working Group of the Sixth Committee,

Having considered the report of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property,⁴

Stressing the importance of uniformity and clarity in the law of jurisdictional immunities of States and their property, and emphasizing the role of a convention in this regard,

Noting the broad support for the conclusion of a convention on jurisdictional immunities of States and their property,

Taking into account the statement of the Chairman of the Ad Hoc Committee introducing the report of the Ad Hoc Committee,⁵

1. *Expresses its deep appreciation* to the International Law Commission and the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property for their valuable work on the law of jurisdictional immunities of States and their property;
2. *Agrees* with the general understanding reached in the Ad Hoc Committee that the United Nations Convention on Jurisdictional Immunities of States and Their Property does not cover criminal proceedings;
3. *Adopts* the United Nations Convention on Jurisdictional Immunities of States and Their Property, which is contained in the annex to the present resolution, and requests the Secretary-General as depositary to open it for signature;
4. *Invites* States to become parties to the Convention.

65th plenary meeting

2 December 2004

Annex: United Nations Convention on Jurisdictional Immunities of States and Their Property

The States Parties to the present Convention,

Considering that the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law,

Having in mind the principles of international law embodied in the Charter of the United Nations,

Believing that an international convention on the jurisdictional immunities of States and their property would enhance the rule of law and legal certainty, particularly in dealings of States with natural or juridical persons, and would contribute to the codification and development of international law and the harmonization of practice in this area,

¹ *Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10 (A/46/10).*

² A/C.6/54/L.12 and A/C.6/55/L.12.

³ *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10 and corrigenda (A/54/10 and Corr.1 and 2), annex.*

⁴ *Ibid., Fifty-ninth Session, Supplement No. 22 (A/59/22).*

⁵ *Ibid., Fifty-ninth Session, Sixth Committee, 13th meeting (A/C.6/59/SR.13), and corrigendum.*

Taking into account developments in State practice with regard to the jurisdictional immunities of States and their property,
Affirming that the rules of customary international law continue to govern matters not regulated by the provisions of the present Convention,
Have agreed as follows:

Part I: Introduction

Article 1: Scope of the present Convention

The present Convention applies to the immunity of a State and its property from the jurisdiction of the courts of another State.

Article 2: Use of terms

1. For the purposes of the present Convention:

(a) 'court' means any organ of a State, however named, entitled to exercise judicial functions;

(b) 'State' means:

(i) the State and its various organs of government;

(ii) constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity;

(iii) agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State;

(iv) representatives of the State acting in that capacity;

(c) 'commercial transaction' means:

(i) any commercial contract or transaction for the sale of goods or supply of services;

(ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction;

(iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

2. In determining whether a contract or transaction is a 'commercial transaction' under paragraph 1 (c), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.

3. The provisions of paragraphs 1 and 2 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or in the internal law of any State.

Article 3: Privileges and immunities not affected by the present Convention

1. The present Convention is without prejudice to the privileges and immunities enjoyed by a State under international law in relation to the exercise of the functions of:

(a) its diplomatic missions, consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences; and

(b) persons connected with them.

2. The present Convention is without prejudice to privileges and immunities accorded under international law to heads of State *ratione personae*.

3. The present Convention is without prejudice to the immunities enjoyed by a State under international law with respect to aircraft or space objects owned or operated by a State.

Article 4: Non-retroactivity of the present Convention

Without prejudice to the application of any rules set forth in the present Convention to which jurisdictional immunities of States and their property are subject under international law independently of the present Convention, the present Convention shall not apply to any question of jurisdictional immunities of States or their property arising in a proceeding instituted against a State before a court of another State prior to the entry into force of the present Convention for the States concerned.

Part II: General principles

Article 5: State immunity

A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention.

Article 6: Modalities for giving effect to State immunity

1. A State shall give effect to State immunity under article 5 by refraining from exercising jurisdiction in a proceeding before its courts against another State and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected.
2. A proceeding before a court of a State shall be considered to have been instituted against another State if that other State:
 - (a) is named as a party to that proceeding; or
 - (b) is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State.

Article 7: Express consent to exercise of jurisdiction

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case:
 - (a) by international agreement;
 - (b) in a written contract; or
 - (c) by a declaration before the court or by a written communication in a specific proceeding.
2. Agreement by a State for the application of the law of another State shall not be interpreted as consent to the exercise of jurisdiction by the courts of that other State.

Article 8: Effect of participation in a proceeding before a court

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has:
 - (a) itself instituted the proceeding; or
 - (b) intervened in the proceeding or taken any other step relating to the merits. However, if the State satisfies the court that it could not have acquired knowledge of facts on which a claim to immunity can be based until after it took such a step, it can claim immunity based on those facts, provided it does so at the earliest possible moment.
2. A State shall not be considered to have consented to the exercise of jurisdiction by a court of another State if it intervenes in a proceeding or takes any other step for the sole purpose of:
 - (a) invoking immunity; or
 - (b) asserting a right or interest in property at issue in the proceeding.
3. The appearance of a representative of a State before a court of another State as a witness shall not be interpreted as consent by the former State to the exercise of jurisdiction by the court.
4. Failure on the part of a State to enter an appearance in a proceeding before a court of another State shall not be interpreted as consent by the former State to the exercise of jurisdiction by the court.

Article 9: Counterclaims

1. A State instituting a proceeding before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of any counterclaim arising out of the same legal relationship or facts as the principal claim.
2. A State intervening to present a claim in a proceeding before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of any counterclaim arising out of the same legal relationship or facts as the claim presented by the State.
3. A State making a counterclaim in a proceeding instituted against it before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of the principal claim.

Part III: Proceedings in which State immunity cannot be invoked**Article 10: Commercial transactions**

1. If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction.
2. Paragraph 1 does not apply:
 - (a) in the case of a commercial transaction between States; or
 - (b) if the parties to the commercial transaction have expressly agreed otherwise.
3. Where a State enterprise or other entity established by a State which has an independent legal personality and is capable of:
 - (a) suing or being sued; and
 - (b) acquiring, owning or possessing and disposing of property, including property which that State has authorized it to operate or manage,

is involved in a proceeding which relates to a commercial transaction in which that entity is engaged, the immunity from jurisdiction enjoyed by that State shall not be affected.

Article 11: Contracts of employment

1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State.

2. Paragraph 1 does not apply if:

- (a) the employee has been recruited to perform particular functions in the exercise of governmental authority;
- (b) the employee is:
 - (i) a diplomatic agent, as defined in the Vienna Convention on Diplomatic Relations of 1961;
 - (ii) a consular officer, as defined in the Vienna Convention on Consular Relations of 1963;
 - (iii) a member of the diplomatic staff of a permanent mission to an international organization or of a special mission, or is recruited to represent a State at an international conference; or
 - (iv) any other person enjoying diplomatic immunity;
- (c) the subject-matter of the proceeding is the recruitment, renewal of employment or reinstatement of an individual;
- (d) the subject-matter of the proceeding is the dismissal or termination of employment of an individual and, as determined by the head of State, the head of Government or the Minister for Foreign Affairs of the employer State, such a proceeding would interfere with the security interests of that State;
- (e) the employee is a national of the employer State at the time when the proceeding is instituted, unless this person has the permanent residence in the State of the forum; or
- (f) the employer State and the employee have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding.

Article 12: Personal injuries and damage to property

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.

Article 13: Ownership, possession and use of property

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the determination of:

- (a) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum;
- (b) any right or interest of the State in movable or immovable property arising by way of succession, gift or *bona vacantia*; or
- (c) any right or interest of the State in the administration of property, such as trust property, the estate of a bankrupt or the property of a company in the event of its winding up.

Article 14: Intellectual and industrial property

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

- (a) the determination of any right of the State in a patent, industrial design, trade name or business name, trademark, copyright or any other form of intellectual or industrial property which enjoys a measure of legal protection, even if provisional, in the State of the forum; or
- (b) an alleged infringement by the State, in the territory of the State of the forum, of a right of the nature mentioned in subparagraph (a) which belongs to a third person and is protected in the State of the forum.

Article 15: Participation in companies or other collective bodies

1. A State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to its participation in a company or other collective body, whether incorporated or unincorporated, being a proceeding concerning the relationship between the State and the body or the other participants therein, provided that the body:

- (a) has participants other than States or international organizations; and
- (b) is incorporated or constituted under the law of the State of the forum or has its seat or principal place of business in that State.

2. A State can, however, invoke immunity from jurisdiction in such a proceeding if the States concerned have so agreed or if the parties to the dispute have so provided by an agreement in writing or if the instrument establishing or regulating the body in question contains provisions to that effect.

Article 16: Ships owned or operated by a State

1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the operation of that ship if, at the time the cause of action arose, the ship was used for other than government non-commercial purposes.
2. Paragraph 1 does not apply to warships, or naval auxiliaries, nor does it apply to other vessels owned or operated by a State and used, for the time being, only on government non-commercial service.
3. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the carriage of cargo on board a ship owned or operated by that State if, at the time the cause of action arose, the ship was used for other than government non-commercial purposes.
4. Paragraph 3 does not apply to any cargo carried on board the ships referred to in paragraph 2, nor does it apply to any cargo owned by a State and used or intended for use exclusively for government non-commercial purposes.
5. States may plead all measures of defence, prescription and limitation of liability which are available to private ships and cargoes and their owners.
6. If in a proceeding there arises a question relating to the government and non-commercial character of a ship owned or operated by a State or cargo owned by a State, a certificate signed by a diplomatic representative or other competent authority of that State and communicated to the court shall serve as evidence of the character of that ship or cargo.

Article 17: Effect of an arbitration agreement

If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction, that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

- (a) the validity, interpretation or application of the arbitration agreement;
- (b) the arbitration procedure; or
- (c) the confirmation or the setting aside of the award, unless the arbitration agreement otherwise provides.

Part IV: State immunity from measures of constraint in connection with proceedings before a court

Article 18: State immunity from pre-judgment measures of constraint

No pre-judgment measures of constraint, such as attachment or arrest, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

- (a) the State has expressly consented to the taking of such measures as indicated:
 - (i) by international agreement;
 - (ii) by an arbitration agreement or in a written contract; or
 - (iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or
- (b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding.

Article 19: State immunity from post-judgment measures of constraint

No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

- (a) the State has expressly consented to the taking of such measures as indicated:
 - (i) by international agreement;
 - (ii) by an arbitration agreement or in a written contract; or
 - (iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or
- (b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or
- (c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.

Article 20: Effect of consent to jurisdiction to measures of constraint

Where consent to the measures of constraint is required under articles 18 and 19, consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint.

Article 21: Specific categories of property

1. The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under article 19, subparagraph (c):

- (a) property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences;
- (b) property of a military character or used or intended for use in the performance of military functions;
- (c) property of the central bank or other monetary authority of the State;
- (d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale;
- (e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale.

2. Paragraph 1 is without prejudice to article 18 and article 19, subparagraphs (a) and (b).

Part V: Miscellaneous provisions**Article 22: Service of process**

1. Service of process by writ or other document instituting a proceeding against a State shall be effected:

- (a) in accordance with any applicable international convention binding on the State of the forum and the State concerned; or
- (b) in accordance with any special arrangement for service between the claimant and the State concerned, if not precluded by the law of the State of the forum; or
- (c) in the absence of such a convention or special arrangement:
 - (i) by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned; or
 - (ii) by any other means accepted by the State concerned, if not precluded by the law of the State of the forum.

2. Service of process referred to in paragraph 1 (c) (i) is deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs.

3. These documents shall be accompanied, if necessary, by a translation into the official language, or one of the official languages, of the State concerned.

4. Any State that enters an appearance on the merits in a proceeding instituted against it may not thereafter assert that service of process did not comply with the provisions of paragraphs 1 and 3.

Article 23: Default judgment

1. A default judgment shall not be rendered against a State unless the court has found that:

- (a) the requirements laid down in article 22, paragraphs 1 and 3, have been complied with;
- (b) a period of not less than four months has expired from the date on which the service of the writ or other document instituting a proceeding has been effected or deemed to have been effected in accordance with article 22, paragraphs 1 and 2; and
- (c) the present Convention does not preclude it from exercising jurisdiction.

2. A copy of any default judgment rendered against a State, accompanied if necessary by a translation into the official language or one of the official languages of the State concerned, shall be transmitted to it through one of the means specified in article 22, paragraph 1, and in accordance with the provisions of that paragraph.

3. The time-limit for applying to have a default judgment set aside shall not be less than four months and shall begin to run from the date on which the copy of the judgment is received or is deemed to have been received by the State concerned.

Article 24: Privileges and immunities during court proceedings

1. Any failure or refusal by a State to comply with an order of a court of another State enjoining it to perform or refrain from performing a specific act or to produce any document or disclose any other information for the purposes of a proceeding shall entail no consequences other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal.

2. A State shall not be required to provide any security, bond or deposit, however described, to guarantee the payment of judicial costs or expenses in any proceeding to which it is a respondent party before a court of another State.

Part VI: Final clauses**Article 25: Annex**

The annex to the present Convention forms an integral part of the Convention.

Article 26: Other international agreements

Nothing in the present Convention shall affect the rights and obligations of States Parties under existing international agreements which relate to matters dealt with in the present Convention as between the parties to those agreements.

Article 27: Settlement of disputes

1. States Parties shall endeavour to settle disputes concerning the interpretation or application of the present Convention through negotiation.
2. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which cannot be settled through negotiation within six months shall, at the request of any of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.
3. Each State Party may, at the time of signature, ratification, acceptance or approval of, or accession to, the present Convention, declare that it does not consider itself bound by paragraph 2. The other States Parties shall not be bound by paragraph 2 with respect to any State Party which has made such a declaration.
4. Any State Party that has made a declaration in accordance with paragraph 3 may at any time withdraw that declaration by notification to the Secretary-General of the United Nations.

Article 28: Signature

The present Convention shall be open for signature by all States until 17 January 2007, at United Nations Headquarters, New York.

Article 29: Ratification, acceptance, approval or accession

1. The present Convention shall be subject to ratification, acceptance or approval.
2. The present Convention shall remain open for accession by any State.
3. The instruments of ratification, acceptance, approval or accession shall be deposited with the Secretary-General of the United Nations.

Article 30: Entry into force

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.
2. For each State ratifying, accepting, approving or acceding to the present Convention after the deposit of the thirtieth instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 31: Denunciation

1. Any State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations.
2. Denunciation shall take effect one year following the date on which notification is received by the Secretary-General of the United Nations. The present Convention shall, however, continue to apply to any question of jurisdictional immunities of States or their property arising in a proceeding instituted against a State before a court of another State prior to the date on which the denunciation takes effect for any of the States concerned.
3. The denunciation shall not in any way affect the duty of any State Party to fulfil any obligation embodied in the present Convention to which it would be subject under international law independently of the present Convention.

Article 32: Depositary and notifications

1. The Secretary-General of the United Nations is designated the depositary of the present Convention.
2. As depositary of the present Convention, the Secretary-General of the United Nations shall inform all States of the following:
 - (a) signatures of the present Convention and the deposit of instruments of ratification, acceptance, approval or accession or notifications of denunciation, in accordance with articles 29 and 31;
 - (b) the date on which the present Convention will enter into force, in accordance with article 30;
 - (c) any acts, notifications or communications relating to the present Convention.

Article 33: Authentic texts

The Arabic, Chinese, English, French, Russian and Spanish texts of the present Convention are equally authentic. IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Convention opened for signature at United Nations Headquarters in New York on 17 January 2005.

Annex to the Convention**Understandings with respect to certain provisions of the Convention**

The present annex is for the purpose of setting out understandings relating to the provisions concerned.

With respect to article 10

The term 'immunity' in article 10 is to be understood in the context of the present Convention as a whole. Article 10, paragraph 3, does not prejudice the question of 'piercing the corporate veil', questions relating to a situation where a State entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim, or other related issues.

With respect to article 11

The reference in article 11, paragraph 2 (d), to the 'security interests' of the employer State is intended primarily to address matters of national security and the security of diplomatic missions and consular posts.

Under article 41 of the 1961 Vienna Convention on Diplomatic Relations and article 55 of the 1963 Vienna Convention on Consular Relations, all persons referred to in those articles have the duty to respect the laws and regulations, including labour laws, of the host country. At the same time, under article 38 of the 1961 Vienna Convention on Diplomatic Relations and article 71 of the 1963 Vienna Convention on Consular Relations, the receiving State has a duty to exercise its jurisdiction in such a manner as not to interfere unduly with the performance of the functions of the mission or the consular post.

With respect to articles 13 and 14

The expression 'determination' is used to refer not only to the ascertainment or verification of the existence of the rights protected, but also to the evaluation or assessment of the substance, including content, scope and extent, of such rights.

With respect to article 17

The expression 'commercial transaction' includes investment matters.

With respect to article 19

The expression 'entity' in subparagraph (c) means the State as an independent legal personality, a constituent unit of a federal State, a subdivision of a State, an agency or instrumentality of a State or other entity, which enjoys independent legal personality.

The words 'property that has a connection with the entity' in subparagraph (c) are to be understood as broader than ownership or possession.

Article 19 does not prejudice the question of 'piercing the corporate veil', questions relating to a situation where a State entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim, or other related issues.

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