was held to constitute an act of a governmental nature and thus subject to state immunity.[191] In *Jones* v. *Saudi Arabia*, the House of Lords, overturning the Court of Appeal decision to the contrary on this point, held that there was 'a wealth of authority to show that . . . the foreign state is entitled to claim immunity for its servants as it could if sued itself. The foreign state's right to immunity cannot be circumvented by suing its servants or agents.'[192]

One particular issue that has caused controversy in the past relates to the status of component units of federal states.[193] There have been cases asserting immunity[194] and denying immunity[195] in such circumstances. In *Mellenger* v. *New Brunswick Development Corporation*,[196] Lord Denning emphasised that since under the Canadian Constitution

> Each provincial government, within its own sphere, retained its independence and autonomy directly under the Crown . . . It follows that the Province of New Brunswick is a sovereign state in its own right and entitled if it so wishes to claim sovereign immunity.

However, article 28 of the European Convention on State Immunity, 1972 provides that constituent states of a federal state do not enjoy immunity, although this general principle is subject to the proviso that federal state parties may declare by notification that their constituent states may invoke the benefits and carry out the obligations of the Convention.[197]

The State Immunity Act follows this pattern in that component units of a federation are not entitled to immunity. However, section 14(5) provides that the Act may be made applicable to the 'constituent territories of a

[191] [1998] 1 FLR 1027, 1034–5; 114 ILR, p. 485. See also J. C. Barker, 'State Immunity, Diplomatic Immunity and Act of State: A Triple Protection Against Legal Action?', 47 ICLQ, 1998, p. 950.

[192] [2006] UKHL 26, para. 10 (per Lord Bingham); 129 ILR, p. 717. This applied to acts done to such persons as servants or agents, officials or functionaries of the state, *ibid.*

[193] See e.g. I. Bernier, *International Legal Aspects of Federalism*, London, 1973, pp. 121 ff. and Sucharitkul, *State Immunities*, p. 106.

[194] See e.g. *Feldman* c. *État de Bahia, Pasicrisie Belge*, 208, II, 55; *État de Céara* c. *Dorr et autres* 4 AD, p. 39; *État de Céara* c. *D'Archer de Montgascon*, 6 AD, p. 162 and *Dumont* c. *État d'Amazonas* 15 AD, p. 140. See also *État de Hesse* c. *Jean Neger* 74 *Revue Générale de Droit International Public*, 1970, p. 1108.

[195] See e.g. *Sullivan* v. *State of Sao Paulo* 122 F.2d 355 (1941); 10 AD, p. 178.

[196] [1971] 2 All ER 593, 595; 52 ILR, pp. 322, 324. See also *Swiss-Israel Trade Bank* v. *Salta* 55 ILR, p. 411.

[197] See e.g. I. Sinclair, 'The European Convention on State Immunity', 22 ICLQ, 1973, pp. 254, 279–80.

federal state by specific Order in Council'.[198] Where no such order is made, any such 'constituent territory' would be entitled to immunity only if it conformed with section 14(2), being a separate entity acting in the exercise of sovereign authority and in circumstances in which the state would be immune.[199] While the matter is thus determined in so far as the Act operates in the particular circumstances, s. 16(4) states that Part I of the Act does not apply to criminal proceedings. In the case of *Alamieyeseigha* v. *CPS*, the Court did not accept that the state of Bayelsa, a constituent unit of the Nigerian Federation, and its Governor were entitled to state immunity with regard to criminal proceedings, a claim made on the basis of *Mellenger*.[200] Key to the decision was the fact that Bayelsa state had no legal powers to conduct foreign relations on its own behalf, external affairs being exclusively reserved to the federal government under the Nigerian Constitution. As further and decisive evidence, the Court referred to the certificate from the UK Foreign Office to the effect that Bayelsa was a constituent territory of the Federal Republic of Nigeria.[201]

Article 2(1)b of the UN Convention on Jurisdictional Immunities, it should be noted, includes within its definition of state, 'constituent units of a federal state'.[202] The issue of the status of the European Community in this context was raised in the course of the ITC litigation as the EEC was a party to the sixth International Tin Agreement, 1982 under which the ITC was constituted. The Court of Appeal in *Maclaine Watson* v. *Department of Trade and Industry*[203] held that the EEC's claim to sovereign immunity was untenable. It had been conceded that the EEC was not a state and thus could not rely on the State Immunity Act 1978, but it was argued that the Community was entitled to immunity analogous to sovereign immunity under the rules of common law. This approach was held by Kerr

[198] An Order in Council has been made with respect to the constituent territories of Austria, SI 1979 no. 457, and Germany, SI 1993 no. 2809. The Act may also be extended to dependent territories: see e.g. the State Immunity (Overseas Territories) Order 1979, SI 1979 no. 458 and the State Immunity (Jersey) Order 1985, SI 1985 no. 1642.

[199] See e.g. *BCCI* v. *Price Waterhouse* [1997] 4 All ER 108; 111 ILR, p. 604.

[200] [2005] EWHC 2704. [201] *Ibid.*, paras. 38 ff.

[202] See also the Report of the International Law Commission, 1991, p. 13. Note that article I of the Revised Draft Articles for a Convention on State Immunity adopted by the International Law Association in 1994 defines the term 'foreign state' to include the government of the state, any other state organs and agencies and instrumentalities of the state not possessing legal personality distinct from the state. No specific reference to units of federal states is made.

[203] [1988] 3 WLR 1033; 80 ILR, p. 49.

LJ to be 'entirely misconceived'.[204] Although the EEC had personality in international law and was able to exercise powers and functions analogous to those of sovereign states, this did not lead on to immunity as such. This was because sovereign immunity was 'a derogation from the normal exercise of jurisdiction by the courts and should be accorded only in clear cases',[205] while the concept itself was based upon the equality of states. The EEC Treaty, 1957 and the Merger Treaty, 1965 themselves made no claim for general immunity and nothing else existed upon which such a claim could be based.[206]

The personality issue – immunity for government figures[207]

The question of immunity *ratione personae* arises particularly and most strongly in the case of heads of state. Such immunity issues may come into play either with regard to international tribunals or within domestic orders. Taking the first, it is clear that serving heads of state, and other governmental officials, may be rendered susceptible to the jurisdiction of international tribunals, depending, of course, upon the terms of the constitutions of such tribunals. The provisions of, for example, the Versailles Treaty, 1919 (article 227); the Charter of the International Military Tribunal at Nuremberg, 1945 (article 7); the Statutes of the Yugoslav and Rwanda International Criminal Tribunals (articles 7 and 6 respectively); the Rome Statute of the International Criminal Court, 1998 (article 27) and the Statute for the Special Court for Sierra Leone, 2002 (article 6(2)) all expressly state that individual criminal responsibility will exist irrespective of any official status, including that of head of state. This was reaffirmed by the Special Court for Sierra Leone in its decision concerning the claim for immunity made by Charles Taylor.[208]

[204] [1988] 3 WLR 1107; 80 ILR, p. 122.

[205] *Victory Transport* v. *Comisaria General de Abastecimientos y Transportes* 336 F.2d 354 (1964), cited with approval by Ackner LJ in *Empresa Exportadora de Azucar* v. *Industria Azucarera Nacional* [1983] 2 LL. R 171, 193 and Lord Edmund-Davies in *I° Congreso del Partido* [1983] 1 AC 244, 276.

[206] [1988] 3 WLR 1033, 1108–12; 80 ILR, pp. 49, 123. Nourse and Ralph Gibson LLJ agreed with Kerr LJ completely on this issue, *ibid.*, pp. 1131 and 1158; 80 ILR, pp. 150, 180.

[207] See e.g. Y. Simbeye, *Immunity and International Criminal Law*, Aldershot, 2004, and A. Borghi, *L'Immunité des Dirigeants Politiques en Droit International*, Geneva, 2003.

[208] Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, 31 May 2004, 128 ILR, p. 239.

The situation of immunity before domestic courts is more complex.[209] First, the question of the determination of the status of head of state before domestic courts is primarily a matter for the domestic order of the individual concerned. In *Republic of the Philippines* v. *Marcos* (*No. 1*),[210] for example, the US Court of Appeals for the Second Circuit held that the Marcoses, the deposed leader of the Philippines and his wife, were not entitled to claim sovereign immunity. In a further decision, the Court of Appeals for the Fourth Circuit held in *In re Grand Jury Proceedings, Doe No. 770* [211] that head of state immunity was primarily an attribute of state sovereignty, not an individual right, and that accordingly full effect should be given to the revocation by the Philippines government of the immunity of the Marcoses.[212] Also relevant would be the attitude adopted by the executive in the state in which the case is being brought. In *US* v. *Noriega*,[213] the District Court noted that head of state immunity was grounded in customary international law, but in order to assert such immunity, a government official must be recognised as head of state and this had not happened with regard to General Noriega.[214] This was confirmed by the Court of Appeals for the Eleventh Circuit, who noted that the judiciary deferred to the executive in matters concerning jurisdiction over foreign sovereigns and their instrumentalities, and, in the Noriega situation, the executive had demonstrated the view that he should not be granted head of state status. This was coupled with the fact that he had never served as constitutional ruler of Panama and that state had not sought immunity for him; further the charges related to his private enrichment.[215] In *First American Corporation* v. *Al-Nahyan*, the District Court noted that the Foreign Sovereign Immunities Act did not affect the right of the US government to file a Suggestion of Immunity asserting

[209] See e.g. the observations submitted by the UK government to the European Court of Human Rights concerning *Association SOS Attentats* v. *France*, regarding the immunity of President Gaddafi of Libya in criminal and civil proceedings in France, UKMIL, 77 BYIL, 2006, pp. 735 ff.

[210] 806 F.2d 344 (1986); 81 ILR, p. 581. See also e.g. *Re Honecker* 80 ILR, p. 365.

[211] 817 F.2d 1108 (1987); 81 ILR, p. 599.

[212] See also *Doe* v. *United States of America* 860 F.2d 40 (1988); 121 ILR, p. 567.

[213] 746 F.Supp. 1506, 1519 (1990); 99 ILR, pp. 143, 161.

[214] See also Watts, 'Legal Position', pp. 52 ff. See also H. Fox, 'The Resolution of the Institute of International Law on the Immunities of Heads of State and Government', 51 ICLQ, 2002, p. 119.

[215] 117 F.3d 1206 (1997); 121 ILR, p. 591. See also *Flatow* v. *Islamic Republic of Iran* 999 F.Supp. 1 (1998); 121 ILR, p. 618.

immunity with regard to a head of state and this would be binding on the courts.[216]

Secondly, international law has traditionally made a distinction between the official and private acts of a head of state.[217] In the case of civil proceedings, this means that a head of state may be susceptible to the jurisdiction where the question concerns purely private acts as distinct from acts undertaken in exercise or ostensible exercise of public authority.[218]

Thirdly, serving heads of state benefit from absolute immunity from the exercise of the jurisdiction of a foreign domestic court.[219] This was reaffirmed in *Ex parte Pinochet (No. 3)*. Lord Browne-Wilkinson, for example, noted that, 'This immunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attaching to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions whether or not they relate to matters done for the benefit of the state.'[220] Lord Hope referred to the '*jus cogens* character of the immunity enjoyed by serving heads of state *ratione personae*'.[221] This approach affirming the immunity of a serving head of state is endorsed by the decision of the French Cour de Cassation in the *Ghaddafi* case.[222] In *Tachiona* v. *USA*, the Court of Appeals for the Second Circuit, although deciding the issue as to the immunity of President Mugabe of Zimbabwe on the basis of diplomatic immunity, expressly doubted that the Foreign Sovereign Immunities Act was meant to change the common

[216] 948 F.Supp. 1107 (1996); 121 ILR, p. 577.

[217] See e.g. Draft Articles with Commentary on Jurisdictional Immunities, ILC Report, 1991, A/46/10, pp. 12, 15, 18 and 22.

[218] See e.g. *Republic of the Philippines* v. *Marcos (No. 1)*, 806 F.2d 344 (1986); 81 ILR, p. 581; *Jimenez* v. *Aristeguieta* 33 ILR, p. 353; *Lafontant* v. *Aristide* 103 ILR, pp. 581, 585 and *Mobutu and Republic of Zaire* v. *Société Logrine* 113 ILR, p. 481. See also Watts, 'Legal Position', pp. 54 ff.

[219] See e.g. Watts, 'Legal Position', p. 54. See also *Djibouti* v. *France*, ICJ Reports, 2008, paras. 170 ff.

[220] [2000] 1 AC 147, 201–2; 119 ILR, p. 135.

[221] [2000] 1 AC 244. See also Lord Goff at 210; Lord Saville at 265 and Lord Millett at 269. See also the decision of 12 February 2003 of the Belgian Court of Cassation in *HSA et al.* v. *SA et al.*, No. P. 02.1139. F/1, affirming the immunity of Prime Minister Sharon of Israel.

[222] Arrêt no. 1414, 14 March 2001, Cass. Crim. 1. See e.g. S. Zappalà, 'Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The *Ghaddafi* Case Before the French Cour de Cassation', 12 EJIL, 2001, p. 595. See also *Tatchell* v. *Mugabe*, unreported decision of the Bow Street Magistrates' Court, 14 January 2004, affirming the absolute immunity of President Mugabe, the Head of State of Zimbabwe.

law of head of state immunity,[223] a proposition affirmed in earlier case-law.[224]

Fourthly, the immunity of a former head of state differs in that it may be seen as moving from a status immunity (*ratione personae*) to a functional immunity (*ratione materiae*), so that immunity will only exist for official acts done while in office. The definition of official acts is somewhat unclear, but it is suggested that this would exclude acts done in clear violation of international law. It may be concluded at the least from the judgment in *Ex parte Pinochet (No. 3)* that the existence of the offence in question as a crime under international law by convention will, when coupled in some way by a universal or extraterritorial mechanism of enforcement, operate to exclude a plea of immunity *ratione materiae* at least in so far as states parties to the relevant treaty are concerned.[225] This may be a cautious reading and the law in this area is likely to evolve further.

The question as to whether immunities *ratione personae* apply to other governmental persons has been controversial.[226] The International Law Commission, for example, in its commentary on the Draft Articles on Jurisdictional Immunities (which led to the UN Convention on Jurisdictional Immunities) distinguished between the special position as regards immunities *ratione personae* of personal sovereigns (which would include heads of state) and diplomatic agents and that of other representatives of the government who would have only immunities *ratione materiae*.[227]

[223] 386 F.3d 205 (2004).

[224] See *Wei Ye* v. *Jiang Zemin* 383 F.3d 620 (2004), noting also that the State Department's suggestion as to immunity was conclusive.

[225] [2000] 1 AC 147 at e.g. 204–5 (Lord Browne-Wilkinson); 246 (Lord Hope); 262 (Lord Hutton); 266–7 (Lord Saville); 277 (Lord Millett); 290 (Lord Phillips); 119 ILR, p. 135. Note that by virtue of s. 20 of the State Immunity Act cross-referring to the Diplomatic Privileges Act 1964 incorporating the Vienna Convention on Diplomatic Relations, 1961, the immunities of a head of state were assimilated to those of the head of a diplomatic mission. Article 39(2) of the Vienna Convention provides that once a diplomat's functions have come to an end, immunity will only exist as regards acts performed 'in the exercise of his functions'.

[226] Note that as far as UK law is concerned, the provisions of s. 20(1) of the State Immunity Act do not apply so that the analogy with diplomatic agents is not relevant: see previous footnote.

[227] See the Report of the International Law Commission, 1991, pp. 24–7. See also Watts, 'Legal Position', pp. 53 and 102, who adopts a similar position. Lord Millett in *Ex parte Pinochet (No. 3)* took the view that immunity *ratione personae* was 'only narrowly available. It is confined to serving heads of state and heads of diplomatic missions, their families and servants. It is not available to serving heads of government who are not also heads of state . . . ', [2000] 1 AC 147 at 268; 119 ILR, p. 135.

However, in its judgment in the *Congo* v. *Belgium* case, the International Court of Justice stated that, 'in international law it is firmly established that . . . certain holders of high-ranking office in a state, such as the head of state, head of government and minister for foreign affairs, enjoy immunities from jurisdiction in other states, both civil and criminal'.[228] The Court took the view that serving Foreign Ministers would benefit from immunity *ratione personae* on the basis that such immunities were in order to ensure the effective performance of their functions on behalf of their states.[229] The extent of such immunities would be dependent upon the functions exercised, but they were such that 'throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability',[230] irrespective of whether the acts in question have been performed in an official or a private capacity.[231] This absolute immunity from the jurisdiction of foreign courts would also apply with regard to war crimes or crimes against humanity.[232] Immunities derived from customary international law would remain opposable to national courts even where such courts exercised jurisdiction under various international conventions requiring states parties to extend their criminal jurisdiction to cover the offences in question.[233] The Court concluded by noting that after a person ceased to hold the office of Foreign Minister, the

[228] ICJ Reports, 2002, pp. 3, 20; 128 ILR, p. 76. See also A. Cassese, 'When May Senior State Officials Be Tried for International Crimes?', 13 EJIL, 2002, p. 853. See also *Djibouti* v. *France*, ICJ Reports, 2008, paras. 181 ff.

[229] ICJ Reports, 2002, pp. 3, 21–2. [230] *Ibid.*, p. 22. [231] *Ibid.* [232] *Ibid.*, p. 24.

[233] *Ibid.*, pp. 24–5. See, as to such conventions, above, chapter 12, p. 673. See also the application brought by the Government of the Republic of the Congo against France on 9 December 2002. France consented to the Court's jurisdiction on 11 April 2003. In its Application, the Republic of the Congo seeks the annulment of the investigation and prosecution measures taken by the French judicial authorities further to a complaint for crimes against humanity and torture filed by various associations against *inter alia* the President of the Republic of the Congo, Mr Denis Sassou Nguesso, and the Congolese Minister of the Interior, Mr Pierre Oba, together with other individuals including General Norbert Dabira, Inspector-General of the Congolese Armies. The Application further states that, in connection with these proceedings, an investigating judge of the Meaux *tribunal de grande instance* issued a warrant for the President of the Republic of the Congo to be examined as a witness. The Republic of the Congo declares this to be a violation of international law. See also the order of the ICJ of 17 June 2003 refusing an indication of provisional measures in this case. Rwanda introduced an application against France on 18 April 2007 concerning international arrest warrants issued by the latter's judicial authorities against three Rwandan officials on 20 November 2006 and a request sent to the United Nations Secretary-General that President Paul Kagame of Rwanda should stand trial at the International Criminal Tribunal for Rwanda (ICTR). France has to date not given its consent to this application and there is no other jurisdictional basis.

courts of other countries may prosecute with regard to acts committed before or after the period of office and also 'in respect of acts committed during that period of office in a private capacity'.[234] This appears to leave open the question of prosecution for acts performed in violation of international law (such as, for example, torture), unless these are deemed to fall within the category of private acts.

It is also uncertain as to how far the term used by the Court, 'holders of high-ranking office in a state', might extend and practice is unclear.[235]

Waiver of immunity

It is possible for a state to waive its immunity from the jurisdiction of the court. Express waiver of immunity from jurisdiction, however, which must be granted by an authorised representative of the state,[236] does not of itself mean waiver of immunity from execution.[237] In the case of implied waiver, some care is required. Section 2 of the State Immunity Act provides for loss of immunity upon submission to the jurisdiction, either by a prior written agreement[238] or after the particular dispute has arisen. A state is deemed to have submitted to the jurisdiction where the state has instituted proceedings or has intervened or taken any step in the

[234] ICJ Reports, 2002, pp. 25–6. But see the Dissenting Opinion of Judge Al-Khasawneh.

[235] See above, note 228. See also *Application for Arrest Warrant Against General Shaul Mofaz*, decision of the Bow Street Magistrates' Court, 12 February 2004, where it was held that a serving Defence Minister of another state would benefit from immunities before the English court, 128 ILR, p. 709.

[236] See e.g. *R* v. *Madan* [1961] QB 1, 7. Although this was a case on diplomatic immunity which preceded the 1964 Diplomatic Privileges Act incorporating the Vienna Convention on Diplomatic Relations, 1961, the Court of Appeal in *Aziz* v. *Republic of Yemen* [2005] EWCA Civ 745, para. 48, held the statement to be of general application, including with regard to a consideration of waiver of state immunity under the 1978 Act.

[237] See e.g. article 20 of the UN Convention on Jurisdictional Immunities. Note, however, that the issue will turn upon the interpretation of the terms of the waiver: see *A Company* v. *Republic of X* [1990] 2 LL. R 520; 87 ILR, p. 412. However, it is suggested that the principle that waiver of immunity from jurisdiction does not of itself constitute a waiver of immunity from the grant of relief by the courts is of the nature of a presumption, thus placing the burden of proof to the contrary upon the private party and having implications with regard to the standard of proof required. See also *Sabah Shipyard* v. *Pakistan* [2002] EWCA Civ. 1643 at paras. 18 ff.

[238] Overruling *Kahan* v. *Pakistan Federation* [1951] 2 KB 1003; 18 ILR, p. 210. Submission to the jurisdiction by means of a provision in a contract must be in clear, express language. The choice of UK law as the governing law of the contract did not amount to such a submission: see *Mills* v. *USA* 120 ILR, p. 612.

proceedings.[239] Article 8 of the UN Convention on Jurisdictional Immunities is essentially to the same effect.[240]

If a state submits to proceedings, it is deemed to have submitted to any counter-claim arising out of the same legal relationship or facts as the claim.[241] A provision in an agreement that it is to be governed by the law of the UK is not to be taken as a submission. By section 9 of the State Immunity Act, a state which has agreed in writing to submit a dispute to arbitration is not immune from proceedings in the courts which relate to the arbitration.[242] In *Svenska Petroleum* v. *Lithuania*, the Court of Appeal held that a failure to challenge an award made without jurisdiction did not of itself amount to an agreement in writing on Lithuania's part to submit the dispute to arbitration.[243] However, the Court noted that there was no basis for construing section 9 of the State Immunity Act (particularly when viewed in the context of the provisions of section 13 dealing with execution) as excluding proceedings relating to the enforcement of a foreign arbitral award. It was emphasised that arbitration was a consensual procedure and the principle underlying section 9 was that, if a state had

[239] But not where the intervention or step taken is only for the purpose of claiming immunity, or where the step taken by the state is in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained and immunity is claimed as soon as reasonably practicable, s. 2(5). See also article 1 of the European Convention on State Immunity, 1972.

[240] This provides that: '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'.

[241] See also article 1 of the European Convention on State Immunity, 1972 and article 9 of the UN Convention on Jurisdictional Immunities.

[242] See also article 12 of the European Convention on State Immunity, 1972 and article 17 of the UN Convention on Jurisdictional Immunities.

[243] [2006] EWCA Civ 1529, para. 113. See also *Donegal* v. *Zambia* [2007] EWHC 197 (Comm), holding that written submissions to the jurisdiction with regard to a compromise agreement amounted to a waiver of immunity.

agreed to submit to arbitration, it had thus rendered itself amenable to such process as might be necessary to render the arbitration effective.[244]

The issue of waiver is also a key factor in many US cases. Section 1605(a)(1) of the Foreign Sovereign Immunities Act 1976 provides that a foreign state is not immune where it has waived its immunity either expressly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect, except in accordance with the terms of the waiver.[245] The Court of Appeals has held, however, that the implied waiver provision did not extend to conduct constituting a violation of *jus cogens*.[246]

Pre-judgment attachment[247]

Section 1610(d) of the US Foreign Sovereign Immunities Act 1976 prohibits the attachment of the property of a foreign state before judgment unless that state has explicitly waived its immunity from attachment prior to judgment and the purpose of the attachment is to secure satisfaction of a judgment that has been or may be entered against the foreign state. A variety of cases in the US has arisen over whether general waivers contained in treaty provisions may be interpreted as permitting pre-judgment attachment, in order to prevent the defendant from removing his assets from the jurisdiction. The courts generally require clear evidence of the intention to waive pre-judgment attachment, although that actual phrase need not necessarily be used.[248]

[244] [2006] EWCA Civ 1529, paras. 117 and 123. See also *The Akademik Fyodorov* 131 ILR, p. 460.

[245] See e.g. *Siderman* v. *Republic of Argentina* 965 F.2d 699 (1992); 103 ILR, p. 454. It should also be noted that a substantial number of bilateral treaties expressly waive immunity from jurisdiction. This is particularly the case where the states maintaining the absolute immunity approach are concerned: see e.g. UN, *Materials*, part III. See also *USA* v. *Friedland* (1998) 40 OR (3d) 747; 120 ILR, p. 418.

[246] *Smith* v. *Libya* 101 F.3d 239 (1996); 113 ILR, p. 534. See also *Hirsch* v. *State of Israel* 962 F.Supp. 377 (1997); 113 ILR, p. 543.

[247] See e.g. J. Crawford, 'Execution of Judgments and Foreign Sovereign Immunity', 75 AJIL, 1981, pp. 820, 867 ff., and Schreuer, *State Immunity*, p. 162.

[248] See e.g. *Behring International Inc.* v. *Imperial Iranian Air Force* 475 F.Supp. 383 (1979); 63 ILR, p. 261; *Reading & Bates Corp.* v. *National Iranian Oil Company* 478 F.Supp. 724 (1979); 63 ILR, p. 305; *New England Merchants National Bank* v. *Iran Power Generation and Transmission Company* 19 ILM, 1980, p. 1298; 63 ILR, p. 408; *Security Pacific National Bank* v. *Government of Iran* 513 F.Supp. 864 (1981); *Libra Bank Ltd* v. *Banco Nacional de Costa Rica* 676 F.2d 47 (1982); 72 ILR, p. 119; *S & S Machinery Co.* v. *Masinexportimport* 706 F.2d 411 (1981); 107 ILR, p. 239, and *O'Connell Machinery* v. *MV Americana* 734 F.2d 115 (1984); 81 ILR, p. 539. See also article 23 of the European Convention on State

Under the UK State Immunity Act 1978, no relief may be given against a state by way of injunction or order for specific performance, recovery of land or recovery of any property without the written consent of that state.[249] The question has therefore arisen as to whether a *Mareva* injunction,[250] ordering that assets remain within the jurisdiction pending the outcome of the case, may be obtained, particularly since this type of injunction is interlocutory and obtained without notice (*ex parte*). It is suggested that an application for a *Mareva* injunction may indeed be made without notice since immunity may not apply in the circumstances of the case. In applying for such an injunction, a plaintiff is under a duty to make full and frank disclosure and the standard of proof is that of a 'good and arguable case', explaining, for example, why it is contended that immunity would not be applicable. It is then for the defendant to seek to discharge the injunction by arguing that these criteria have not been met. The issue as to how the court should deal with such a situation was discussed in *A Company* v. *Republic of X*.[251] Saville J noted that the issue of immunity had to be finally settled at the outset so that when a state sought to discharge a *Mareva* injunction on the grounds of immunity, the court could not allow the injunction to continue on the basis that the plaintiff has a good arguable case that immunity does not exist, for if immunity did exist 'then the court simply has no power to continue the injunction'. Accordingly, a delay between the granting of the injunction *ex parte* and the final determination by the court of the issue was probably unavoidable.[252] The situation is generally the same in other countries.[253]

Immunity prohibiting such action. Article 18 of the UN Convention on Jurisdictional Immunities provides that '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'.

249 S. 13(2).

250 See *Mareva Compania Naviera* v. *International Bulkcarriers* [1975] 2 LL. R 509. See also S. Gee, *Mareva Injunctions & Anton Piller Relief*, 2nd edn, London, 1990, especially at p. 22.

251 [1990] 2 LL. R 520; 87 ILR, p. 412.

252 [1990] 2 LL. R 525; 87 ILR, p. 417, citing *Maclaine Watson* v. *Department of Trade and Industry* [1988] 3 WLR 1033 at 1103–4 and 1157–8.

253 But see the case of *Condor and Filvem* v. *Minister of Justice* 101 ILR, p. 394 before the Italian Constitutional Court in 1992.

Immunity from execution[254]

Immunity from execution is to be distinguished from immunity from jurisdiction, particularly since it involves the question of the actual seizure of assets appertaining to a foreign state. As such it poses a considerable challenge to relations between states and accordingly states have proved unwilling to restrict immunity from enforcement judgment in contradistinction to the situation concerning jurisdictional immunity. Consent to the exercise of jurisdiction does not imply consent to the execution or enforcement of any judgment obtained.[255]

Article 23 of the European Convention on State Immunity, 1972 prohibits any measures of execution or preventive measures against the property of a contracting state in the absence of written consent in any particular case. However, the European Convention provides for a system of mutual enforcement of final judgments rendered in accordance with its provisions[256] and an Additional Protocol provides for proceedings to be taken before the European Tribunal of State Immunity, consisting basically of members of the European Court of Human Rights. Article 19 of the UN Convention on Jurisdictional Immunities provides that 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, the state has expressly consented to the taking of such measures as indicated by international agreement; an arbitration agreement or in a written contract; or by a declaration before the court or by a written communication after a dispute between the parties has arisen; or where the state has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or where 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

[254] See e.g. Schreuer, *State Immunity*, chapter 6; Sinclair, 'Sovereign Immunity', chapter 4; Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 453; Crawford, 'Execution of Judgments'; A. Reinisch, 'European Court Practice Concerning State Immunity from Enforcement Measures', 17 EJIL, 2006, p. 803; H. Fox, 'Enforcement Jurisdiction, Foreign State Property and Diplomatic Immunity', 34 ICLQ, 1985, p. 115, and various articles in 10 Netherlands YIL, 1979.

[255] See e.g. article 20 of the UN Convention on Jurisdictional Immunities.

[256] Article 20 of the European Convention on State Immunity.

that has a connection with the entity against which the proceeding was directed.

Section 13(2)b of the UK State Immunity Act provides, for instance, that 'the property of a state shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action *in rem*, for its arrest, detention or sale'. Such immunity may be waived by written consent but not by merely submitting to the jurisdiction of the courts,[257] while there is no immunity from execution in respect of property which is for the time being in use or intended for use for commercial purposes.[258] It is particularly to be noted that this latter stipulation is not to apply to a state's central bank or other monetary authority.[259] Thus, a *Trendtex* type of situation could not arise again in the same form. It was emphasised in *AIC Ltd* v. *Federal Government of Nigeria* that this absolute immunity accorded to the property of a foreign state's central bank applied irrespective of the source of the funds in the account or the purpose for which the account was maintained,[260] while in *AIG Capital Partners Inc.* v. *Republic of Kazakhstan*, it was noted that the term 'property' in the Act had to be given a broad meaning and included all real and personal property, including any right or interest, whether legal, equitable or contractual. The property in question appertained to the central bank if held in its name, irrespective of the capacity in which the bank held it or the purpose for which it was held.[261]

It is also interesting that the corresponding provision in the US Foreign Sovereign Immunities Act of 1976 is more restrictive with regard to immunity from execution.[262] The principle that existence of immunity from

[257] S. 13(3). See also s. 14 of the South African Foreign Sovereign Immunity Act 1981; s. 14 of the Pakistan State Immunity Ordinance 1981; s. 15 of the Singapore State Immunity Act 1979 and s. 31 of the Australian Foreign States Immunities Act 1985.

[258] S. 13(4).

[259] S. 14(4), which provides that, 'Property of a state's central bank or other monetary authority shall not be regarded for the purposes of subsection (4) of section 13 above as in use or intended for use for commercial purposes; and where any such bank or authority is a separate entity subsections (1) to (3) of that section shall apply to it as if references to a state were references to the bank or authority.' See also Fox, *State Immunity*, p. 393, and W. Blair, 'The Legal Status of Central Bank Investments under English Law' [1998] CLJ, pp. 374, 380–1.

[260] [2003] EWHC 1357, paras. 46 ff.; 129 ILR, p. 571.

[261] [2005] EWHC 2239 (Comm), paras. 33 ff.; 129 ILR, p. 589.

[262] S. 1610. Thus, for example, there would be no immunity with regard to property taken in violation of international law. See also *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba* 462 US 611 (1983); 80 ILR, p. 566; *Letelier* v. *Republic of Chile* 748 F.2d 790 (1984) and *Foxworth* v. *Permanent Mission of the Republic of Uganda to the United*

jurisdiction does not automatically entail immunity from execution has been reaffirmed in the case-law on a number of occasions.[263]

In 1977, the West German Federal Constitutional Court in the *Philippine Embassy* case[264] declared that:

> forced execution of judgment by the state of the forum under a writ of execution against a foreign state which has been issued in respect of non-sovereign acts . . . of that state, or property of that state which is present or situated in the territory of the state of the forum, is inadmissible without the consent of the foreign state if . . . such property serves sovereign purposes of the foreign state.

In particular it was noted that:

> claims against a general current bank account of the embassy of a foreign state which exists in the state of the forum and the purpose of which is to cover the embassy's costs and expenses are not subject to forced execution by the state of the forum.[265]

This was referred to approvingly by Lord Diplock in *Alcom Ltd* v. *Republic of Colombia*,[266] a case which similarly involved the attachment of a bank account of a diplomatic mission. The House of Lords unanimously accepted that the general rule in international law was not overturned in the State Immunity Act. In *Alcom*, described as involving a question of law of 'outstanding international importance',[267] it was held that such a bank account would not fall within the section 13(4) exception relating to commercial purposes, unless it could be shown by the person seeking to attach the balance that 'the bank account was earmarked by the foreign state solely . . . for being drawn on to settle liabilities incurred in

Nations 796 F.Supp. 761 (1992); 99 ILR, p. 138. See also G. R. Delaume, 'The Foreign Sovereign Immunities Act and Public Debt Litigation: Some Fifteen Years Later', 88 AJIL, 1994, pp. 257, 266. Note that in 1988, the legislation was amended to include a provision that, with regard to measures of execution following confirmation of an arbitral award, all the commercial property of the award debtor was open to execution: new s. 1610(a)(6), *ibid*.

263 See e.g. *Abbott* v. *South Africa* 113 ILR, p. 411 (Spanish Constitutional Court); *Centre for Industrial Development* v. *Naidu* 115 ILR, p. 424 and *Flatow* v. *Islamic Republic of Iran* 999 F.Supp. 1 (1998); 121 ILR, p. 618. See also *The Akademik Fyodorov*, 131 ILR, pp. 460, 485–6.

264 See UN, *Materials*, p. 297; 65 ILR, pp. 146, 150.

265 UN, *Materials*, pp. 300–1; 65 ILR, p. 164.

266 [1984] 2 All ER 6; 74 ILR, p. 180, overturning the Court of Appeal Decision, [1984] 1 All ER 1; 74 ILR, p. 170.

267 [1984] 2 All ER 14; 74 ILR, p. 189.

commercial transactions'.[268] The onus of proof lies upon the applicant. It is also to be noted that under section 13(5) of the Act, a certificate by a head of mission to the effect that property was not in use for commercial purposes was sufficient evidence of that fact, unless the contrary was proven.[269] The question of determining property used for commercial purposes is a significant and complex one that will invariably depend upon an analysis of various factors, as seen in the light of the law of the forum state,[270] for example the present and future use of the funds and their origin.[271]

In *Banamar* v. *Embassy of the Democratic and Popular Republic of Algeria*,[272] the Italian Supreme Court reaffirmed the rule that customary international law forbids measures of execution against the property of foreign states located in the territory of the state seeking to exercise jurisdiction and used for sovereign purposes, and held that it lacked jurisdiction to enforce a judgment against a foreign state by ordering execution against bank accounts standing in the name of that state's embassy. This approach appears to have been modified in *Condor and Filvem* v. *Minister of Justice*[273] before the Italian Constitutional Court in 1992. The Court held that it could no longer be affirmed that there existed an international customary rule forbidding absolutely coercive measures against the property of foreign states. In order for immunity against execution not to apply, it is necessary not only to demonstrate that the activity or transaction concerned was *jure gestionis*, but also to show that the property to which the request for execution refers is not destined to accomplish public functions (*jure imperii*) of the foreign state.[274]

However, the Spanish Constitutional Court in *Abbott* v. *South Africa* held that bank accounts held by foreign states used for the purposes of ordinary diplomatic or consular activity were immune from attachment or execution even where the funds were also used for commercial

[268] [1984] 2 All ER 13; 74 ILR, p. 187. But cf. *Birch Shipping Corporation* v. *Embassy of the United Republic of Tanzania* 507 F.Supp. 311 (1980); 63 ILR, p. 524. But see the decision of the Swiss Federal Tribunal in 1990 in *Z* v. *Geneva Supervisory Authority for the Enforcement of Debts and Bankruptcy*, 102 ILR, p. 205, holding that funds allocated for the diplomatic service of a foreign state were immune from attachment.

[269] Such certificate had been issued by the Colombian Ambassador. See below, p. 750, with regard to diplomatic immunities.

[270] See the West German Federal Constitutional Court decision in the *National Iranian Oil Co.* case, 22 ILM, 1983, p. 1279.

[271] See e.g. *Eurodif Corporation* v. *Islamic Republic of Iran* 23 ILM, 1984, p. 1062.

[272] 84 AJIL, 1990, p. 573; 87 ILR, p. 56. See also *Libya* v. *Rossbeton SRL*, 87 ILR, p. 63.

[273] 101 ILR, p. 394.

[274] *Ibid.*, pp. 401–2.

purposes,[275] while the Austrian Supreme Court held in *Leasing West GmbH* v. *Algeria* that a general bank account of a foreign embassy allocated partly but not exclusively for diplomatic purposes was immune from enforcement proceedings without the consent of the state concerned. Attachment could only take place if the account could be shown to be used exclusively for private purposes.[276]

The burden and standard of proof

Since section 1 of the State Immunity Act stipulates that a state is immune from the jurisdiction of the courts of the UK except as provided in the following sections, it is clear that the burden of proof lies upon the plaintiff to establish that an exception to immunity applies.[277] However, the court is under a duty to ensure that effect is given to the immunity conferred by the State Immunity Act 1978 and of its own motion if necessary.[278]

As far as the standard of proof is concerned, the Court of Appeal in *Maclaine Watson* v. *Department of Trade and Industry*[279] held that whenever a claim of immunity is made, the court must deal with it as a preliminary issue and on the normal test of balance of probabilities.[280] It would be insufficient to apply the 'good arguable case' test usual in Order 11[281] cases with regard to leave to serve.[282] To have decided otherwise would have meant that the state might have lost its claim for immunity upon the more impressionistic 'good arguable case' basis, which in practice is decided upon affidavit evidence only, and would have been precluded from pursuing its claim at a later stage since that could well be construed

[275] 113 ILR, pp. 411, 423–4. [276] 116 ILR, p. 526.

[277] See also Staughton J in *Rayner* v. *Department of Trade and Industry* [1987] BCLC 667; *Donegal* v. *Zambia* [2007] EWHC 197 (Comm), para. 428, and Fox, *State Immunity*, p. 177.

[278] Mummery J stated that, 'The overriding duty of the court, of its own motion, is to satisfy itself that effect has been given to the immunity conferred by the State Immunity Act 1978. That duty binds all tribunals and courts, not just the court or tribunal which heard the original proceedings. If the tribunal in the original proceedings has not given effect to the immunity conferred by the Act, then it must be the duty of the appeal tribunal to give effect to it by correcting the error': see *United Arab Emirates* v. *Abdelghafar* [1995] ICR 65, 73–4; 104 ILR, pp. 647, 654–5. See also *Military Affairs Office of the Embassy of Kuwait* v. *Caramba-Coker*, Appeal No. EAT/1054/02/RN, Employment Appeal Tribunal (2003).

[279] [1988] 3 WLR 1033, 1103 and 1157; 80 ILR, pp. 49, 118, 179.

[280] This would be done procedurally under Order 12, Rule 8 of the Rules of the Supreme Court, 1991. See also *A Company* v. *Republic of X* 87 ILR, pp. 412, 417.

[281] Rules of the Supreme Court, 1991.

[282] See e.g. *Vitkovice Horni* v. *Korner* [1951] AC 869.

as submission to the jurisdiction under section 2(3) of the State Immunity Act.

The question of service of process upon a foreign state arose in *Westminster City Council* v. *Government of the Islamic Republic of Iran*,[283] where Peter Gibson J held that without prior service upon the Iranian government, the court was unable to deal with the substantive issue before it which concerned the attempt by the Westminster City Council to recover from the Iranian government charges incurred by it in rendering the Iranian embassy safe after it had been stormed in the famous 1980 siege. In the absence of diplomatic relations between the UK and Iran at that time and in the absence of Iranian consent, there appeared to be no way to satisfy the requirement in section 12 of the State Immunity Act that 'any writ or other document required to be served for instituting proceedings against a state shall be served by being transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the state'. The question also arose in *Kuwait Airways Corporation* v. *Iraqi Airways*.[284] Since at the relevant time there was no British diplomatic presence in Baghdad, the necessary documents were lodged pursuant to Order 11, Rule 7 at the Central Office, whence they were sent to the Foreign and Commonwealth Office and thence to the Iraqi Embassy in London with a request for transmission to Baghdad. The House of Lords held that since the writ was not forwarded to the Iraqi Ministry of Foreign Affairs in Baghdad, the writ was not served as required under section 12(1) of the 1978 Act.[285]

Conclusion

Although sovereign immunity is in various domestic statutes proclaimed as a general principle, subject to wide-ranging exceptions, it is, of course, itself an exception to the general rule of territorial jurisdiction. The enumeration of non-immunity situations is so long, that the true situation of a rapidly diminishing exception to jurisdiction should be appreciated. In many instances, it has only been with practice that it has become apparent how much more extensive the submission to jurisdiction has become under domestic legislation. In *Letelier* v. *Republic of Chile*,[286] for example, section 1605(a)5 providing for foreign state liability for injury,

[283] [1986] 3 All ER 284; 108 ILR, p. 557. [284] [1995] 1 WLR 1147; 103 ILR, p. 340.

[285] [1995] 1 WLR 1156 (per Lord Goff). See also *AN International Bank Plc* v. *Zambia* 118 ILR, p. 602.

[286] 488 F.Supp. 665 (1980); 63 ILR, p. 378.

death and loss of property occurring in the US was used to indict the secret service of Chile with regard to the murder of a former Chilean Foreign Minister in Washington. Similarly in *Verlinden* v. *Central Bank of Nigeria*,[287] the Supreme Court permitted a Dutch company to sue the Central Bank of Nigeria in the US,[288] although the *Tel-Oren*[289] case may mark a modification of this approach. The amendment to the Act providing for jurisdiction in cases of state-sponsored terrorism has also been a significant development.[290]

The principle of diplomatic immunity may often be relevant in a sovereign immunity case. This is considered in the next section.

Diplomatic law[291]

Rules regulating the various aspects of diplomatic relations constitute one of the earliest expressions of international law. Whenever in history there

[287] 22 ILM, 1983, p. 647; 79 ILR, p. 548.

[288] Nevertheless, it would appear that the Foreign Sovereign Immunities Act of 1976 does require some minimum jurisdictional links: see generally *International Shoe Co.* v. *Washington* 326 US 310 (1945) and *Perez* v. *The Bahamas* 482 F.Supp. 1208 (1980); 63 ILR, p. 350, cf. State Immunity Act of 1978.

[289] 726 F.2d 774 (1984); 77 ILR, p. 193. See further above, p. 683.

[290] See above, p. 715.

[291] See e.g. E. Denza, *Diplomatic Law*, 3rd edn, Oxford, 2008; P. Cahier, *Le Droit Diplomatique Contemporain*, Geneva, 1962; M. Hardy, *Modern Diplomatic Law*, Manchester, 1968; Do Naslimento e Silva, *Diplomacy in International Law*, Leiden, 1973; L. S. Frey and M. L. Frey, *The History of Diplomatic Immunity*, Ohio, 1999; *Satow's Guide to Diplomatic Practice* (ed. P. Gore-Booth), 5th edn, London, 1979; B. Sen, *A Diplomat's Handbook of International Law and Practice*, 3rd edn, The Hague, 1988; J. Brown, 'Diplomatic Immunity: State Practice under the Vienna Convention on Diplomatic Relations', 37 ICLQ, 1988, p. 53; Société Français de Droit International, *Aspects Récents du Droit des Relations Diplomatiques*, Paris, 1989; G. V. McClanahan, *Diplomatic Immunity*, London, 1989; B. S. Murty, *The International Law of Diplomacy*, Dordrecht, 1989; L. Dembinski, *The Modern Law of Diplomacy*, Dordrecht, 1990; J. Salmon, *Manuel de Droit Diplomatique*, Brussels, 1994, and Salmon, 'Immunités et Actes de la Fonction', AFDI, 1992, p. 313; J. C. Barker, *The Abuse of Diplomatic Privileges and Immunities*, Aldershot, 1996, and Barker, *The Protection of Diplomatic Personnel*, Aldershot, 2006; C. E. Wilson, *Diplomatic Privileges and Immunities*, Tucson, 1967; M. Whiteman, *Digest of International Law*, Washington, 1970, vol. VII; *Third US Restatement of Foreign Relations Law*, St Paul, 1987, pp. 455 ff.; House of Commons Foreign Affairs Committee, *The Abuse of Diplomatic Immunities and Privileges*, 1984 and the UK Government Response to the *Report*, Cmnd 9497, and *Memorandum on Diplomatic Privileges and Immunities in the United Kingdom*, UKMIL, 63 BYIL, 1992, p. 688. See also R. Higgins, 'The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience', 79 AJIL, 1985, p. 641, and Higgins, *Problems and Process*, Oxford, 1994, p. 86; A. James, 'Diplomatic Relations and Contacts', 62 BYIL, 1991, p. 347; Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 739, and *Oppenheim's International Law*, chapters 10 and 11.

has been a group of independent states co-existing, special customs have developed on how the ambassadors and other special representatives of other states were to be treated.[292]

Diplomacy as a method of communication between various parties, including negotiations between recognised agents, is an ancient institution and international legal provisions governing its manifestations are the result of centuries of state practice. The special privileges and immunities related to diplomatic personnel of various kinds grew up partly as a consequence of sovereign immunity and the independence and equality of states, and partly as an essential requirement of an international system. States must negotiate and consult with each other and with international organisations and in order to do so need diplomatic staffs. Since these persons represent their states in various ways, they thus benefit from the legal principle of state sovereignty. This is also an issue of practical convenience.

Diplomatic relations have traditionally been conducted through the medium of ambassadors[293] and their staffs, but with the growth of trade and commercial intercourse the office of consul was established and expanded. The development of speedy communications stimulated the creation of special missions designed to be sent to particular areas for specific purposes, often with the head of state or government in charge. To some extent, however, the establishment of telephone, telegraph, telex and fax services has lessened the importance of the traditional diplomatic personnel by strengthening the centralising process. Nevertheless, diplomats and consuls do retain some useful functions in the collection of information and pursuit of friendly relations, as well as providing a permanent presence in foreign states, with all that that implies for commercial and economic activities.[294]

The field of diplomatic immunities is one of the most accepted and uncontroversial of international law topics, as it is in the interest of all states ultimately to preserve an even tenor of diplomatic relations, although not all states act in accordance with this. As the International Court noted in the *US Diplomatic and Consular Staff in Tehran* case:[295]

[292] See e.g. G. Mattingley, *Renaissance Diplomacy*, London, 1955, and D. Elgavish, 'Did Diplomatic Immunity Exist in the Ancient Near East?', 2 *Journal of the History of International Law*, 2000, p. 73. See also Watts, 'Legal Position'.

[293] See, as to the powers of ambassadors, *First Fidelity Bank NA* v. *Government of Antigua and Barbuda Permanent Mission* 877 F.2d 189 (1989); 99 ILR, p. 125.

[294] See generally *Satow's Guide*, chapter 1.

[295] ICJ Reports, 1980, p. 3; 61 ILR, p. 504.

> the rules of diplomatic law, in short, constitute a self-contained regime, which on the one hand, lays down the receiving state's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving state to counter any such abuse.[296]

The Vienna Convention on Diplomatic Relations, 1961

This treaty, which came into force in 1964,[297] emphasises the functional necessity of diplomatic privileges and immunities for the efficient conduct of international relations[298] as well as pointing to the character of the diplomatic mission as representing its state.[299] It both codified existing laws and established others.[300] Questions not expressly regulated by the Convention continue to be governed by the rules of customary international law.[301] The International Court has recently emphasised that the Convention continues to apply notwithstanding the existence of a state of armed conflict between the states concerned.[302]

There is no right as such under international law to diplomatic relations, and they exist by virtue of mutual consent.[303] If one state does not

[296] ICJ Reports, 1980, p. 40; 61 ILR, p. 566. See also, affirming that the rules of diplomatic law constitute a self-contained regime, the decision of the German Federal Constitutional Court of 10 June 1997, *Former Syrian Ambassador to the German Democratic Republic* 115 ILR, p. 597.

[297] The importance of the Convention was stressed in the *Iranian Hostages* case, ICJ Reports, 1980, pp. 330–430; 61 ILR, p. 556. Many of its provisions are incorporated into English law by the Diplomatic Privileges Act 1964.

[298] See also *767 Third Avenue Associates* v. *Permanent Mission of the Republic of Zaire to the United Nations* 988 F.2d 295 (1993); 99 ILR, p. 194.

[299] See *Yearbook of the ILC*, 1958, vol. II, pp. 94–5. The extraterritorial theory of diplomatic law, according to which missions constituted an extension of the territory of the sending state, was of some historic interest but not of practical use, *ibid.* See also *Radwan* v. *Radwan* [1973] Fam. 24; 55 ILR, p. 579 and *McKeel* v. *Islamic Republic of Iran* 722 F.2d 582 (1983); 81 ILR, p. 543. Note that in *US* v. *Kostadinov* 734 F.2d 906, 908 (1984); 99 ILR, pp. 103, 107, the term 'mission' in the Convention was defined not as the premises occupied by diplomats, but as a group of people sent by one state to another.

[300] See e.g. the *Iranian Hostages* case, ICJ Reports, 1980, pp. 3, 24; 61 ILR, p. 550.

[301] Preamble to the Convention.

[302] *Democratic Republic of the Congo* v. *Uganda*, ICJ Reports, 2005, pp. 168, 274. See also the *Iranian Hostages* case, ICJ Reports, 1980, pp. 3, 40; and the decisions of the Eritrea–Ethiopia Claims Commission on 19 December 2005, in the Partial Award, Diplomatic Claim, Ethiopia's Claim 8, para. 24 and the Partial Award, Diplomatic Claim, Eritrea's Claim 20, para. 20.

[303] Article 2.

wish to enter into diplomatic relations, it is not legally compelled so to do. Accordingly, the Convention specifies in article 4 that the sending state must ensure that the consent (or *agrément*) of the receiving state has been given for the proposed head of its mission, and reasons for any refusal of consent do not have to be given. Similarly, by article 9 the receiving state may at any time declare any member of the diplomatic mission *persona non grata* without having to explain its decision, and thus obtain the removal of that person.[304] However, the principle of consent as the basis of diplomatic relations may be affected by other rules of international law. For example, the Security Council in resolution 748 (1992), which imposed sanctions upon Libya, decided that 'all states shall: (a) significantly reduce the number and level of the staff at Libyan diplomatic missions and consular posts and restrict or control the movement within their territory of all such staff who remain . . . '.

The main functions of a diplomatic mission are specified in article 3 and revolve around the representation and protection of the interests and nationals of the sending state, as well as the promotion of information and friendly relations. Article 41(1) also emphasises the duty of all persons enjoying privileges and immunities to respect the laws and regulations of the receiving state and the duty not to interfere in the internal affairs of that state.

Article 13 provides that the head of the mission is deemed to have taken up his functions in the receiving state upon presentation of credentials. Heads of mission are divided into three classes by article 14, viz. ambassadors or nuncios accredited to heads of state and other heads of mission of equivalent rank; envoys, ministers and internuncios accredited to heads of state; and chargés d'affaires accredited to ministers of foreign affairs.[305] It is customary for a named individual to be in charge of a diplomatic mission. When, in 1979, Libya designated its embassies as 'People's Bureaux' to be run by revolutionary committees, the UK insisted upon and obtained the nomination of a named person as the head of the mission.[306]

[304] See e.g. the Ethiopian demand that Eritrea reduce its diplomatic staff at the commencement of the armed conflict between the states: see Eritrea–Ethiopia Claims Commission, decision of 19 December 2005, Partial Award, Eritrea's Claim 20, paras. 40 ff.

[305] The rules as to heads of missions are a modern restatement of the rules established in 1815 by the European powers: see Denza, *Diplomatic Law*, p. 110.

[306] Comment by Sir Antony Acland, Minutes of Evidence Taken Before the Foreign Affairs Committee, *Report*, p. 20. See also DUSPIL, 1979, pp. 571–3.

The inviolability of the premises of the mission

In order to facilitate the operations of normal diplomatic activities, article 22 of the Convention specifically declares that the premises of the mission are inviolable and that agents of the receiving state are not to enter them without the consent of the mission. This appears to be an absolute rule[307] and in the Sun Yat Sen incident in 1896, the Court refused to issue a writ of habeas corpus with regard to a Chinese refugee held against his will in the Chinese legation in London.[308] Precisely what the legal position would be in the event of entry without express consent because, for example, of fire-fighting requirements or of danger to persons within that area, is rather uncertain under customary law, but under the Convention any justification pleaded by virtue of implied consent would be regarded as at best highly controversial.[309] The receiving state is under a special duty to protect the mission premises from intrusion or damage or 'impairment of its dignity'.[310] The US Supreme Court, for example, while making specific reference to article 22 of the Vienna Convention, emphasised in *Boos* v. *Barry* that, 'The need to protect diplomats is grounded in our Nation's important interest in international relations . . . Diplomatic personnel are essential to conduct the international affairs so crucial to the well-being of this Nation.'[311] It was also noted that protecting foreign diplomats in the US ensures that similar protection would be afforded to US diplomats abroad.[312] The Supreme Court upheld a District of Columbia statute which made it unlawful to congregate within 500 feet of diplomatic premises and refuse to disperse after having been so ordered by the police, and stated that, 'the "prohibited quantum of disturbance" is whether normal

[307] See e.g. *767 Third Avenue Associates* v. *Permanent Mission of the Republic of Zaire to the United Nations* 988 F.2d 295 (1993); 99 ILR, p. 194.

[308] A. D. McNair, *International Law Opinions*, Oxford, 1956, vol. I, p. 85. The issue was resolved by diplomatic means.

[309] The original draft of the article would have permitted such emergency entry, but this was rejected: see Denza, *Diplomatic Law*, pp. 144 ff. In 1973 an armed search of the Iraqi Embassy in Pakistan took place and considerable quantities of arms were found. As a result the Iraqi ambassador and an attaché were declared *personae non grata, ibid.*, p. 149. As to further examples, see *ibid.*, pp. 149–50. A search by US troops of the residence of the Nicaraguan ambassador in Panama in 1989 was condemned in a draft Security Council resolution by a large majority, but was vetoed by the US, *ibid.* Nevertheless, Denza concludes that, 'In the last resort, however, it cannot be excluded that entry without the consent of the sending State may be justified in international law by the need to protect human life', *ibid.*, p. 150.

[310] See e.g. the statement of US President Johnson after a series of demonstrations against the US Embassy in Moscow in 1964–5, 4 ILM, 1965, p. 698.

[311] 99 L.Ed.2d 333, 345–6 (1988); 121 ILR, p. 551. [312] *Ibid.*

embassy activities have been or are about to be disrupted'.[313] By the same token, the premises of a mission must not be used in a way which is incompatible with the functions of the mission.[314]

In 1979, the US Embassy in Tehran, Iran was taken over by several hundred demonstrators. Archives and documents were seized and fifty diplomatic and consular staff were held hostage. In 1980, the International Court declared that, under the 1961 Convention (and the 1963 Convention on Consular Relations):

> Iran was placed under the most categorical obligations, as a receiving state, to take appropriate steps to ensure the protection of the United States Embassy and Consulates, their staffs, their archives, their means of communication and the free movement of the members of their staffs.[315]

These were also obligations under general international law.[316] The Court in particular stressed the seriousness of Iran's behaviour and the conflict between its conduct and its obligations under 'the whole corpus of the international rules of which diplomatic and consular law is comprised, rules the fundamental character of which the Court must here again strongly affirm'.[317] In *Congo* v. *Uganda*, the International Court held that attacks on the Ugandan Embassy in Kinshasa, the capital of Congo, and attacks on persons on the premises by Congolese armed forces constituted a violation of article 22.[318] In addition, the Court emphasised that the Vienna

[313] 99 L.Ed.2d 351. See also *Minister for Foreign Affairs and Trade* v. *Magno* 112 ALR 529 (1992–3); 101 ILR, p. 202.

[314] Article 41(3) of the Vienna Convention. Note that in *Canada* v. *Edelson*, 131 ILR, p. 279, the Israeli Supreme Court held that a dispute over a lease granted to Canada, as represented by the Canadian Ambassador, raised issues of state immunity rather than diplomatic immunity. It was further held that there was no state immunity with regard to the lease of buildings for a residence for the Ambassador as leasing was a private law act.

[315] The *Iranian Hostages* case, ICJ Reports, 1980, pp. 3, 30–1; 61 ILR, p. 556. This the Iranians failed to do, ICJ Reports, 1980, pp. 31–2. The Court emphasised that such obligations concerning the inviolability of the members of a diplomatic mission and of the premises, property and archives of the mission continued even in cases of armed conflict or breach of diplomatic relations, *ibid.*, p. 40. See also DUSPIL, 1979, pp. 577 ff.; K. Gryzbowski, 'The Regime of Diplomacy and the Tehran Hostages', 30 ICLQ, 1981, p. 42, and L. Gross, 'The Case Concerning United States Diplomatic and Consular Staff in Tehran: Phase of Provisional Measures', 74 AJIL, 1980, p. 395.

[316] See e.g. *Belgium* v. *Nicod and Another* 82 ILR, p. 124.

[317] The *Iranian Hostages* case, ICJ Reports, 1980, p. 42; 61 ILR, p. 568. The Court particularly instanced articles 22, 25, 26 and 27 and analogous provisions in the 1963 Consular Relations Convention, *ibid.*

[318] ICJ Reports, 2005, paras. 337–8 and 340.

Convention not only prohibits any infringements of the inviolability of the mission by the receiving state itself but also puts the receiving state under an obligation to prevent others, such as armed militia groups, from doing so.[319]

On 8 May 1999, during the Kosovo campaign, the Chinese Embassy in Belgrade was bombed by the US. The US declared that it had been a mistake and apologised. In December 1999, the US and China signed an Agreement providing for compensation to be paid by the former to the latter of $28m. At the same time, China agreed to pay $2.87m to the US to settle claims arising out of rioting and attacks on the US Embassy in Beijing, the residence of the US consulate in Chengdu and the consulate in Guangzhu.[320]

On 17 April 1984, a peaceful demonstration took place outside the Libyan Embassy in London. Shots from the Embassy were fired that resulted in the death of a policewoman. After a siege, the Libyans inside left and the building was searched in the presence of a Saudi Arabian diplomat. Weapons and other relevant forensic evidence were found.[321] The issue raised here, in the light of article 45(a) which provides that after a break in diplomatic relations, 'the receiving state must . . . respect and protect the premises of the mission', is whether that search was permissible. The UK view is that article 45(a) does not mean that the premises continue to be inviolable[322] and this would clearly appear to be correct. There is a distinction between inviolability under article 22 and respect and protection under article 45(a).

The suggestion has also been raised that the right of self-defence may also be applicable in this context. It was used to justify the search of personnel leaving the Libyan Embassy[323] and the possibility was noted

[319] *Ibid.*, para. 342, citing the *Iranian Hostages* case, ICJ Reports, 1980, pp. 30–2. See also the condemnation by the Eritrea–Ethiopia Claims Commission of the entry, ransacking and seizure by Ethiopian security agents of the Eritrean Embassy residence, as well as vehicles and other property, without Eritrea's consent, Partial Award, Diplomatic Claim, Eritrea's Claim 20, para. 46.

[320] See DUSPIL, 2000, pp. 421–8. In addition, the US had earlier made a number of *ex gratia* payments to the individuals injured and to the families of those killed in the Embassy bombing, *ibid.*, p. 428. See also Denza, *Diplomatic Law*, p. 166.

[321] See Foreign Affairs Committee, *Report*, p. xxvi.

[322] Memorandum by the Foreign and Commonwealth Office, Foreign Affairs Committee, *Report*, p. 5.

[323] *Ibid.*, p. 9. Such a search was declared essential for the protection of the police, *ibid.* Note the reference to self-defence is both to domestic and international law, *ibid.*

that in certain limited circumstances it may be used to justify entry into an embassy.[324]

A rather different issue arises where mission premises have been abandoned. The UK enacted the Diplomatic and Consular Premises Act in 1987, under which states wishing to use land as diplomatic or consular premises are required to obtain the consent of the Secretary of State. Once such consent has been obtained (although this is not necessary in the case of land which had this status prior to the coming into force of the Act), it could be subsequently withdrawn. The Secretary of State has the power to require that the title to such land be vested in him where that land has been lying empty, or without diplomatic occupants, and could cause damage to pedestrians or neighbouring buildings because of neglect, providing that he is satisfied that to do so is permissible under international law (section 2). By section 3 of the Act, the Secretary of State is able to sell the premises, deduct certain expenses and transfer the residue to the person divested of his interest.

This situation occurred with respect to the Cambodian Embassy in London, whose personnel closed the building after the Pol Pot takeover of Cambodia in 1975, handing the keys over to the Foreign Office.[325] In 1979, the UK withdrew its recognition of the Cambodian government after the Vietnamese invasion and since that date had had no dealings with any authority as the government of that country. Squatters moved in shortly thereafter. These premises were made subject to section 2 of the Diplomatic and Consular Premises Act in 1988[326] and the Secretary of State vested the land in himself. This was challenged by the squatters and in *R* v. *Secretary of State for Foreign and Commonwealth Affairs, ex parte Samuel*,[327] Henry J held that the Secretary of State had acted correctly and in accordance with the duty imposed under article 45 of the Vienna Convention. The Court of Appeal dismissed an appeal,[328] holding that the

[324] See the comments of the Legal Adviser to the FCO, Minutes of Evidence, Foreign Affairs Committee, *Report*, p. 28. Of course, entry can be made into the building with the consent of the receiving state, as for example when Iran requested the UK to eject militants who had taken over their London embassy in 1980.

[325] See C. Warbrick, 'Current Developments', 38 ICLQ, 1989, p. 965.

[326] See s. 2 of the Diplomatic and Consular Premises (Cambodia) Order, SI 1988 no. 30.

[327] *The Times*, 10 September 1988.

[328] *The Times*, 17 August 1989; 83 ILR, p. 232. Note that in *Secretary of State for Foreign and Commonwealth Affairs* v. *Tomlin, The Times*, 4 December 1990; [1990] 1 All ER 920, the Court of Appeal held that in this situation, the extended limitation period of thirty years under s. 15(1) of and Schedule 1 to the Limitation Act 1980 was applicable and the squatters could not rely on twelve years' adverse possession.

relevant section merely required that the Secretary of State be satisfied that international law permitted such action.[329]

In *Westminster City Council* v. *Government of the Islamic Republic of Iran*,[330] the issue concerned the payment of expenses arising out of repairs to the damaged and abandoned Iranian Embassy in London in 1980. The council sought to register a land charge, but the question of the immunity of the premises under article 22 of the Vienna Convention was raised. Although the Court felt that procedurally it was unable to proceed,[331] reference was made to the substantive issue and it was noted that the premises had ceased to be diplomatic premises in the circumstances and thus the premises were not 'used' for the purpose of the mission as required by article 22, since that phrase connoted the present tense. The inviolability of diplomatic premises, however, must not be confused with extraterritoriality. Such premises do not constitute part of the territory of the sending state.[332]

Whether a right of diplomatic asylum exists within general international law is doubtful and in principle refugees are to be returned to the authorities of the receiving state in the absence of treaty or customary rules to the contrary. The International Court in the *Asylum* case between Colombia and Peru[333] emphasised that a decision to grant asylum involves a derogation from the sovereignty of the receiving state 'and constitutes an intervention in matters which are exclusively within the competence of that state. Such a derogation from territorial sovereignty cannot be recognised unless its legal basis is established in each particular case.' Where treaties exist regarding the grant of asylum, the question will arise as to the respective competences of the sending and receiving state or the state granting asylum and the territorial state. While the diplomats of the sending state may provisionally determine whether a refugee meets any condition laid down for the grant of asylum under an applicable treaty this would not bind the receiving state, for 'the principles of international law do not recognise any rule of unilateral and definitive qualification by

[329] Note that in the US, embassies temporarily abandoned due to broken relations may be sequestered and turned to other uses pending resumption of relations. This has been the case with regard to Iranian, Cambodian and Vietnamese properties that have been in the custody of the Office of Foreign Missions: see McClanahan, *Diplomatic Immunity*, pp. 53 and 110. See also the US Foreign Missions Act 1982.

[330] [1986] 3 All ER 284; 108 ILR, p. 557. [331] See above, p. 748.

[332] See e.g. *Persinger* v. *Islamic Republic of Iran* 729 F.2d 835 (1984). See also *Swiss Federal Prosecutor* v. *Kruszyk* 102 ILR, p. 176.

[333] ICJ Reports, 1950, pp. 266, 274–5.

the state granting asylum'.[334] It may be that in law a right of asylum will arise for 'urgent and compelling reasons of humanity',[335] but the nature and scope of this is unclear.

The diplomatic bag

Article 27 provides that the receiving state shall permit and protect free communication on behalf of the mission for all official purposes. Such official communication is inviolable and may include the use of diplomatic couriers and messages in code and in cipher, although the consent of the receiving state is required for a wireless transmitter.[336]

Article 27(3) and (4) deals with the diplomatic bag,[337] and provides that it shall not be opened or detained[338] and that the packages constituting the diplomatic bag 'must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use'.[339] The need for a balance in this area is manifest. On the one hand, missions require a confidential means of communication, while on the other the need to guard against abuse is clear. Article 27, however, lays the emphasis upon the former.[340] This is provided that article 27(4) is complied with. In the Dikko incident on 5 July 1984, a former Nigerian minister was kidnapped in London and placed in a crate to be flown to Nigeria. The crate was opened at Stansted Airport, although accompanied by a person claiming diplomatic status. The crate[341] did not contain an official seal and was thus clearly not a diplomatic bag.[342] When, in March

[334] *Ibid.*, p. 274. [335] *Oppenheim's International Law*, p. 1084.

[336] There was a division of opinion at the Vienna Conference between the developed and developing states over this issue. The former felt that the right to instal and use a wireless did not require consent: see Denza, *Diplomatic Law*, pp. 214 ff.

[337] Defined in article 3(2) of the Draft Articles on the Diplomatic Courier and the Diplomatic Bag adopted by the International Law Commission in 1989 as 'the packages containing official correspondence, and documents or articles intended exclusively for official use, whether accompanied by diplomatic courier or not, which are used for the official communication referred to in article 1 and which bear visible external marks of their character' as a diplomatic bag: see *Yearbook of the ILC*, 1989, vol. II, part 2, p. 15.

[338] Article 27(3). [339] Article 27(4).

[340] This marked a shift from earlier practice: see *Yearbook of the ILC*, 1989, vol. II, part 2, p. 15.

[341] An accompanying crate contained persons allegedly part of the kidnapping operation.

[342] See Foreign Affairs Committee, *Report*, pp. xxxiii–xxxiv. Note also the incident in 1964 when an Israeli was found bound and drugged in a crate marked 'diplomatic mail' at Rome Airport. As a result, the Italians declared one Egyptian official at the Embassy *persona non grata* and expelled two others, *Keesing's Contemporary Archives*, p. 20580. In 1980, a crate bound for the Moroccan Embassy in London split open at Harwich to reveal $500,000 worth of drugs, *The Times*, 13 June 1980. In July 1984, a lorry belonging to the

2000, diplomatic baggage destined for the British High Commission in Harare was detained and opened by the Zimbabwe authorities, the UK government protested vigorously and announced the withdrawal of its High Commissioner for consultations.[343]

In view of suspicions of abuse, the question has arisen as to whether electronic screening, not involving opening or detention, of the diplomatic bag is legitimate. The UK appears to take the view that electronic screening of this kind would be permissible, although it claims not to have carried out such activities, but other states do not accept this.[344] It is to be noted that after the Libyan Embassy siege in April 1984, the diplomatic bags leaving the building were not searched.[345] However, Libya had entered a reservation to the Vienna Convention, reserving its right to open a diplomatic bag in the presence of an official representative of the diplomatic mission concerned. In the absence of permission by the authorities of the sending state, the diplomatic bag was to be returned to its place of origin. Kuwait and Saudi Arabia made similar reservations which were not objected to.[346] This is to be contrasted with a Bahraini reservation to article 27(3) which would have permitted the opening of diplomatic bags in certain circumstances.[347] The Libyan reservation could have been relied upon by the UK in these conditions.

It is also interesting to note that after the Dikko incident, the UK Foreign Minister stated that the crates concerned were opened because of the suspicion of human contents. Whether the crates constituted diplomatic bags or not was a relevant consideration with regard to a right to search, but:

> the advice given and the advice which would have been given had the crate constituted a diplomatic bag took fully into account the overriding duty to preserve and protect human life.[348]

USSR was opened for inspection by West German authorities on the grounds that a lorry itself could not be a bag. The crates inside the lorry were accepted as diplomatic bags and not opened, Foreign Affairs Committee, *Report*, p. xiii, note 48.

343 See UKMIL, 71 BYIL, 2000, pp. 586–7.

344 See the Legal Adviser, FCO, Foreign Affairs Committee, *Report*, p. 23. See also 985 HC Deb., col. 1219, 2 June 1980, and Cmnd 9497. See further *Yearbook of the ILC*, 1988, vol. II, part 1, p. 157, and Denza, *Diplomatic Law*, pp. 238 ff.

345 Foreign Affairs Committee, *Report*, p. xxx.

346 See Denza, *Diplomatic Law*, pp. 229 ff. The UK did not object and regarded the reservations in fact as reflective of customary law prior to the Convention, Memorandum of the FCO, Foreign Affairs Committee, *Report*, p. 4.

347 This was objected to, Foreign Affairs Committee, *Report*, p. 4, and see Denza, *Diplomatic Law*, pp. 230–1.

348 See Foreign Affairs Committee, *Report*, p. 50.

This appears to point to an implied exception to article 27(3) in the interests of humanity. It is to be welcomed, provided, of course, it is applied solely and strictly in these terms.

The issue of the diplomatic bag has been considered by the International Law Commission, in the context of article 27 and analogous provisions in the 1963 Consular Relations Convention, the 1969 Convention on Special Missions and the 1975 Convention on the Representation of States in their Relations with International Organisations. Article 28 of the Draft Articles on the Diplomatic Courier and the Diplomatic Bag, as finally adopted by the International Law Commission in 1989, provides that the diplomatic bag shall be inviolable wherever it may be. It is not to be opened or detained and 'shall be exempt from examination directly or through electronic or other technical device'. However, in the case of the consular bag, it is noted that if the competent authorities of the receiving or transit state have serious reason to believe that the bag contains something other than official correspondence and documents or articles intended exclusively for official use, they may request that the bag be opened in their presence by an authorised representative of the sending state. If this request is refused by the authorities of the sending state, the bag is to be returned to its place of origin.[349] It was thought that this preserved existing law. Certainly, in so far as the consular bag is concerned, the provisions of article 35(3) of the Vienna Convention on Consular Relations are reproduced, but the stipulation of exemption from electronic or other technical examination does not appear in the Vienna Convention on Diplomatic Relations and the view of the Commission that this is mere clarification[350] is controversial.[351]

As far as the diplomatic courier is concerned, that is, a person accompanying a diplomatic bag, the Draft Articles provide for a regime of privileges, immunities and inviolability that is akin to that governing diplomats. He is to enjoy personal inviolability and is not liable to any form of arrest or detention (draft article 10), his temporary accommodation is inviolable (draft article 17), and he will benefit from immunity from the criminal and civil jurisdiction of the receiving or transit state in

[349] Draft article 28(2). See *Yearbook of the ILC*, 1989, vol. II, part 2, pp. 42–3. See also S. McCaffrey, 'The Forty-First Session of the International Law Commission', 83 AJIL, 1989, p. 937.

[350] *Yearbook of the ILC*, 1989, vol. II, part 2, p. 43.

[351] See e.g. *Yearbook of the ILC*, 1980, vol. II, pp. 231 ff.; *ibid.*, 1981, vol. II, pp. 151 ff. and *ibid.*, 1985, vol. II, part 2, pp. 30 ff. See also A/38/10 (1983) and the Memorandum by Sir Ian Sinclair, member of the ILC, dealing with the 1984 session on this issue, Foreign Affairs Committee, *Report*, pp. 79 ff.

respect of all acts performed in the exercise of his functions (draft article 18). In general, his privileges and immunities last from the moment he enters the territory of the receiving or transit state until he leaves such state (draft article 21).[352]

Diplomatic immunities – property

Under article 22 of the Vienna Convention, the premises of the mission are inviolable[353] and, together with their furnishings and other property thereon and the means of transport, are immune from search, requisition, attachment or execution. By article 23, a general exception from taxation in respect of the mission premises is posited. The Court in the *Philippine Embassy* case explained that, in the light of customary and treaty law, 'property used by the sending state for the performance of its diplomatic functions in any event enjoys immunity even if it does not fall within the material or spatial scope' of article 22.[354] It should also be noted that the House of Lords in *Alcom Ltd* v. *Republic of Colombia*[355] held that under the State Immunity Act 1978 a current account at a commercial bank in the name of a diplomatic mission would be immune unless the plaintiff could show that it had been earmarked by the foreign state solely for the settlement of liabilities incurred in commercial transactions. An account used to meet the day-to-day running expenses of a diplomatic mission would therefore be immune. This approach was also based upon the obligation contained in article 25 of the Vienna Convention on Diplomatic Relations, which provided that the receiving state 'shall accord full facilities for the performance of the functions of the mission'. The House of Lords noted that the negative formulation of this principle meant that neither the executive nor the legal branch of government in the receiving state must act in such manner as to obstruct the mission in carrying out its functions.[356]

Section 16(1)b of the State Immunity Act provides, however, that the exemption from immunity in article 6 relating to proceedings involving immovable property in the UK did not extend to proceedings concerning 'a state's title to or its possession of property used for the purposes of a

[352] See e.g. McClanahan, *Diplomatic Immunity*, p. 64, and *Yearbook of the ILC*, 1985, vol. II, part 2, pp. 36 ff.

[353] By article 30(1) of the Convention, the private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.

[354] See UN, *Materials*, pp. 297, 317; 65 ILR, pp. 146, 187.

[355] [1984] 2 All ER 6; 74 ILR, p. 180.

[356] [1984] 2 All ER 9; 74 ILR, p. 182. See also Denza, *Diplomatic Law*, pp. 156–9 and 202.

diplomatic mission'. It was held in *Intpro Properties (UK) Ltd* v. *Sauvel*[357] by the Court of Appeal that the private residence of a diplomatic agent, even where used for embassy social functions from time to time, did not constitute use for the purposes of a diplomatic mission and that in any event the proceedings did not concern the French government's title to or possession of the premises, but were merely for damages for breach of a covenant in a lease. Accordingly, there was no immunity under section 16.

It is to be noted that by article 24 of the Vienna Convention, the archives and documents of the mission are inviolable at any time and wherever they may be.[358] Although 'archives and documents' are not defined in the Convention, article 1(1)k of the Vienna Convention on Consular Relations provides that the term 'consular archives' includes 'all the papers, documents, correspondence, books, films, tapes and registers of the consular post together with the ciphers and codes, the card-indexes and any article of furniture intended for their protection or safekeeping'. The term as used in the Diplomatic Relations Convention cannot be less than this.[359]

The question of the scope of article 24 was discussed by the House of Lords in *Shearson Lehman* v. *Maclaine Watson* (*No. 2*),[360] which concerned the intervention by the International Tin Council in a case on the grounds that certain documents it was proposed to adduce in evidence were inadmissible. This argument was made in the context of article 7 of the International Tin Council (Immunities and Privileges) Order 1972 which stipulates that the ITC should have the 'like inviolability of official archives as . . . is accorded in respect of the official archives of a diplomatic mission'. Lord Bridge interpreted the phrase 'archives and documents of the mission' in article 24 as referring to the archives and documents 'belonging to or held by the mission'.[361] Such protection was not confined to executive or judicial action by the host state, but would cover, for example, the situation where documents were put into circulation by virtue of theft or other improper means.[362]

[357] [1983] 2 All ER 495; 64 ILR, p. 384.

[358] This goes beyond previous customary law: see e.g. *Rose* v. *R* [1947] 3 DLR 618. See also *Renchard* v. *Humphreys & Harding Inc.* 381 F.Supp. 382 (1974); the *Iranian Hostages* case, ICJ Reports, 1980, pp. 3, 36, and Denza, *Diplomatic Law*, pp. 189 ff.

[359] See e.g. Denza, *Diplomatic Law*, p. 195.

[360] [1988] 1 WLR 16; 77 ILR, p. 145.

[361] [1988] 1 WLR 24; 77 ILR, p. 150.

[362] [1988] 1 WLR 27; 77 ILR, p. 154. See also *Fayed* v. *Al-Tajir* [1987] 2 All ER 396; 86 ILR, p. 131.

Diplomatic immunities – personal

The person of a diplomatic agent[363] is inviolable under article 29 of the Vienna Convention and he may not be detained or arrested.[364] This principle is the most fundamental rule of diplomatic law and is the oldest established rule of diplomatic law.[365] In resolution 53/97 of January 1999, for example, the UN General Assembly strongly condemned acts of violence against diplomatic and consular missions and representatives,[366] while the Security Council issued a presidential statement, condemning the murder of nine Iranian diplomats in Afghanistan.[367] States recognise that the protection of diplomats is a mutual interest founded on functional requirements and reciprocity.[368] The receiving state is under an obligation to 'take all appropriate steps' to prevent any attack on the person, freedom or dignity of diplomatic agents.[369]

After a period of kidnappings of diplomats, the UN Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents was adopted in 1973. This provides that states parties must make attacks upon such persons a crime in internal law with appropriate penalties and take such measures as may be necessary to establish jurisdiction over these crimes. States parties are obliged

[363] Defined in article 1(e) as the head of the mission or a member of the diplomatic staff of the mission. See above, p. 735, with regard to head of state immunities. See also e.g. *US* v. *Noriega* 746 F.Supp. 1506, 1523–5; 99 ILR, pp. 145, 165–7.

[364] Note that by article 26 the receiving state is to ensure to all members of the mission freedom of movement and travel in its territory, subject to laws and regulations concerning prohibited zones or zones regulated for reasons of national security.

[365] See Denza, *Diplomatic Law*, pp. 256 ff.

[366] See also resolution 42/154 and Secretary-General's Reports A/INF/52/6 and Add.1 and A/53/276 and Corr.1.

[367] SC/6573 (15 September 1998). See also the statement of the UN Secretary-General, SG/SM/6704 (14 September 1998).

[368] See e.g. the US Supreme Court in *Boos* v. *Barry* 99 L Ed 2d 333, 346 (1988); 121 ILR, pp. 499, 556.

[369] Note that in *Harb* v. *King Fahd* [2005] EWCA Civ 632, para. 40, the Court of Appeal held that article 29 was not breached by the court hearing an issue relating to sovereign immunity in open court where the sovereign in question wished a challenge to an application for maintenance to be held in private. In *Mariam Aziz* v. *Aziz and Sultan of Brunei* [2007] EWCA Civ 712, paras. 88 ff., it was held by the Court of Appeal that while under international law a state is obliged to take steps to prevent physical attacks on, or physical interference with, a foreign head of state in the jurisdiction, it was doubted whether the rule extended to preventing conduct by individuals which was simply offensive or insulting to a foreign head of state abroad.

to extradite or prosecute offenders.[370] The most blatant example of the breach of the obligation to protect diplomats was the holding of the US diplomats as hostages in Iran in 1979–80, where the International Court held that the inaction of the Iranian government faced with the detention of US diplomatic and consular staff over an extended period constituted a 'clear and serious violation' of article 29.[371] In *Congo* v. *Uganda*, the International Court held that the maltreatment by Congo forces of persons within the Ugandan Embassy constituted a violation of article 29 in so far as such persons were diplomats, while the maltreatment of Ugandan diplomats at the airport similarly breached the obligations laid down in article 29.[372]

However, in exceptional cases, a diplomat may be arrested or detained on the basis of self-defence or in the interests of protecting human life.[373]

Article 30(1) provides for the inviolability of the private residence[374] of a diplomatic agent, while article 30(2) provides that his papers, correspondence and property[375] are inviolable. Section 4 of the Diplomatic Privileges Act 1964 stipulates that where a question arises as to whether a person is or is not entitled to any privilege or immunity under the Act, which incorporates many of the provisions of the Vienna Convention, a certificate issued by or under the authority of the Secretary of State stating any fact relating to that question shall be conclusive evidence of that fact.

[370] See articles 2, 3, 6 and 7. Such crimes are by article 8 deemed to be extraditable offences in any extradition treaty between states parties. See *Duff* v. *R* [1979] 28 ALR 663; 73 ILR, p. 678.

[371] ICJ Reports, 1980, pp. 3, 32, 35–7; 61 ILR, p. 530.

[372] ICJ Reports, 2005, paras. 338–40. See also the decision of the Eritrea–Ethiopia Claims Commission on 19 December 2005 in Partial Award, Diplomatic Claim, Ethiopia's Claim 8, that Eritrea was liable for violating article 29 by arresting and briefly detaining the Ethiopian Chargé d'Affaires in September 1998 and October 1999 without regard to his diplomatic immunity.

[373] ICJ Reports, 1980, p. 40. See also Denza, *Diplomatic Law*, p. 267.

[374] As distinct from the premises of the mission. Such residence might be private leased or leased by the sending state for use as such residential premises and may indeed be temporary only. Temporary absence would not lead to a loss of immunity, but permanent absence would: see e.g. *Agbor* v. *Metropolitan Police Commissioner* [1969] 2 All ER 707 and Denza, *Diplomatic Law*, pp. 270 ff. S. 9 of the Criminal Law Act 1977 makes it a criminal offence knowingly to trespass on any premises which are the private residence of a diplomatic agent.

[375] Except that this is limited by article 31(3): see below, p. 767. Possession alone of property would be sufficient, it appears, to attract inviolability: see Denza, *Diplomatic Law*, p. 277.

As far as criminal jurisdiction is concerned, diplomatic agents enjoy complete immunity from the legal system of the receiving state,[376] although there is no immunity from the jurisdiction of the sending state.[377] This provision noted in article 31(1) reflects the accepted position under customary law. The only remedy the host state has in the face of offences alleged to have been committed by a diplomat is to declare him *persona non grata* under article 9.[378] Specific problems have arisen with regard to motoring offences.[379]

Article 31(1) also specifies that diplomats[380] are immune from the civil and administrative jurisdiction of the state in which they are serving, except in three cases:[381] first, where the action relates to private immovable property situated within the host state (unless held for mission purposes);[382] secondly, in litigation relating to succession matters in which

[376] See e.g. *Dickinson* v. *Del Solar* [1930] 1 KB 376; 5 AD, p. 299; the *Iranian Hostages* case, ICJ Reports, 1980, pp. 3, 37; 61 ILR, p. 530 and *Skeen* v. *Federative Republic of Brazil* 566 F.Supp. 1414 (1983); 121 ILR, p. 481. See also Denza, *Diplomatic Law*, pp. 280 ff.

[377] Article 31(4).

[378] See e.g. the incident in Washington DC in 1999, when an attaché of the Russian Embassy was declared *persona non grata* for suspected 'bugging' of the State Department, 94 AJIL, 2000, p. 534.

[379] However, the US has tackled the problem of unpaid parking fines by adopting s. 574 of the Foreign Operations, Export Financing and Related Programs Appropriations Act 1994, under which 110 per cent of unpaid parking fines and penalties must be withheld from that state's foreign aid. In addition, the State Department announced in December 1993 that registration renewal of vehicles with unpaid or unadjudicated parking tickets more than one year old would be withheld, thus rendering the use of such vehicles illegal in the US: see 'Contemporary Practice of the United States Relating to International Law', 88 AJIL, 1994, p. 312. It is also required under the US Diplomatic Relations Act 1978 that diplomatic missions, their members and families hold liability insurance and civil suits against insurers are permitted. Note that the UK has stated that persistent failure by diplomats to respect parking regulations and to pay fixed penalty parking notices 'will call into question their continued acceptability as members of diplomatic missions in London', UKMIL, 63 BYIL, 1992, p. 700. See also Denza, *Diplomatic Law*, pp. 288–9 and UKMIL, 77 BYIL, 2006, pp. 741 ff.

[380] Note that a diplomat who is a national or permanent resident of the receiving state will only enjoy immunity from jurisdiction and inviolability in respect of official acts performed in the exercise of his functions, article 38.

[381] Article 31(1)a, b and c. Note that there is no immunity from the jurisdiction of the sending state, article 31(4).

[382] See *Intpro Properties (UK) Ltd* v. *Sauvel* [1983] 2 All ER 495; 64 ILR, p. 384. In the *Deputy Registrar* case, 94 ILR, pp. 308, 311, it was held that article 31(1)a was declaratory of customary international law. In *Hildebrand* v. *Champagne* 82 ILR, p. 121, it was held that this provision did not cover the situation where a claim was made for payment for charges under a lease. See also *Largueche* v. *Tancredi Feni* 101 ILR, p. 377 and *De Andrade* v. *De Andrade* 118 ILR, pp. 299, 306–7. Article 13 of the UN Convention on Jurisdictional

the diplomat is involved as a private person (for example as an executor or heir); and, finally, with respect to unofficial professional or commercial activity engaged in by the agent.[383] In a document issued by the Foreign Office in 1987, entitled *Memorandum on Diplomatic Privileges and Immunities in the United Kingdom*,[384] it was noted that a serious view was taken of any reliance on diplomatic immunity from civil jurisdiction to evade a legal obligation and that such conduct could call into question the continued acceptability in the UK of a particular diplomat.[385] By article 31(2), a diplomat cannot be obliged to give evidence as a witness, while by article 31(3), no measures of execution may be taken against such a person except in the cases referred to in article 31(1)a, b and c and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence. Diplomatic agents are generally exempt from the social security provisions in force in the receiving state,[386] from all dues and taxes, personal or real, regional or municipal except for indirect taxes,[387] from personal and public services[388] and from customs duties and inspection.[389] The personal baggage of a diplomat is exempt from inspection unless there are serious grounds for presuming that it contains articles not covered by the specified exemptions in article 36(1). Inspections can only take place in the presence of the diplomat or his authorised representative.[390]

Article 37 provides that the members of the family of a diplomatic agent forming part of his household[391] shall enjoy the privileges and immunities specified in articles 29 to 36 if not nationals of the receiving state.[392] In UK practice, members of the family include spouses and minor children

Immunities provides for an exception to state immunity for proceedings which relate to the determination of 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 situation in the forum state.

383 See *Portugal* v. *Goncalves* 82 ILR, p. 115. This exception does not include ordinary contracts incidental to life in the receiving state, such as a contract for domestic services: see *Tabion* v. *Mufti* 73 F.3d 535 and Denza, *Diplomatic Law*, pp. 301 ff. See also *De Andrade* v. *De Andrade* 118 ILR, pp. 299, 306–7, noting that the purchase by a diplomat of the home unit as an investment was not a commercial activity within the meaning of the provision.

384 See UKMIL, 58 BYIL, 1987, p. 549.

385 Annex F, reproducing a memorandum dated February 1985, *ibid.*, p. 558. See Annex F of the 1992 Memorandum, UKMIL, 63 BYIL, 1992, p. 698.

386 Article 33. 387 Article 34 and see subsections b to g for certain other exceptions.

388 Article 35. 389 Article 36(1). 390 Article 36(2).

391 See Brown, 'Diplomatic Immunity', pp. 63–6 and Denza, *Diplomatic Law*, pp. 391 ff.

392 The rationale behind this is to ensure the diplomat's independence and ability to function free from harassment: see Denza, *Diplomatic Law*, pp. 393–4.

(i.e. under the age of eighteen); children over eighteen not in permanent paid employment (such as students); persons fulfilling the social duties of hostess to the diplomatic agent; and the parent of a diplomat living with him and not engaged in paid permanent employment.[393]

Members of the administrative and technical staff (and their households), if not nationals or permanent residents of the receiving state, may similarly benefit from articles 29–35,[394] except that the article 31(1) immunities do not extend beyond acts performed in the course of their duties, while members of the service staff, who are not nationals or permanent residents of the receiving state, benefit from immunity regarding acts performed in the course of official duties.[395]

Immunities and privileges start from the moment the person enters the territory of the receiving state on proceeding to take up his post or, if already in the territory, from the moment of official notification under article 39.[396] In *R* v. *Governor of Pentonville Prison, ex parte Teja*,[397] Lord Parker noted that it was fundamental to the claiming of diplomatic immunity that the diplomatic agent 'should have been in some form accepted or received by this country'.[398] This view was carefully interpreted by the Court of Appeal in *R* v. *Secretary of State for the Home Department, ex parte Bagga*[399] in the light of the facts of the former case so that, as Parker LJ held, if a person already in the country is employed as a secretary, for example, at an embassy, nothing more than notification is required before that person would be entitled to immunities. While it had been held in

[393] *Ibid.*, pp. 394–5. Since the Civil Partnership Act 2004, household would include same sex partners. See, for the slightly different US practice, *ibid.*, pp. 395–6. The term 'spouse' may be interpreted to include more than one wife in a polygamous marriage forming part of the household of the diplomat and may include a partner not being married to the diplomat, *ibid.*, pp. 394–6.

[394] The privileges specified in article 36(1) in relation to exemption from customs duties and taxes apply only to articles imported at the time of first installation.

[395] Customary law prior to the Vienna Convention was most unclear on immunities of such junior diplomatic personnel and it was recognised that these provisions in article 37 constituted a development in such rules: see e.g. Denza, *Diplomatic Law*, pp. 401 ff. and *Yearbook of the ILC*, 1958, vol. II, pp. 101–2. See also S v. *India* 82 ILR, p. 13.

[396] See also article 10, which provides that the Ministry of Foreign Affairs of the receiving state shall be notified of the appointment of members of the mission, their arrival and their final departure or the termination of their functions with the mission. There are similar requirements with regard to family members and private servants. See also *Lutgarda Jimenez* v. *Commissioners of Inland Revenue* [2004] UK SPC 00419 (23 June 2004), and Denza, *Diplomatic Law*, pp. 88 ff.

[397] [1971] 2 QB 274; 52 ILR, p. 368.

[398] [1971] 2 QB 282; 52 ILR, p. 373.

[399] [1991] 1 QB 485; 88 ILR, p. 404.

R v. *Lambeth Justices, ex parte Yusufu*[400] that article 39, in the words of Watkins LJ, provided 'at most some temporary immunity between entry and notification to a person who is without a diplomat', the court in *Bagga* disagreed strongly.[401] Immunity clearly did not depend upon notification and acceptance,[402] but under article 39 commenced upon entry. Article 40 provides for immunity where the person is in the territory in transit between his home state and a third state to which he has been posted.[403] Where, however, a diplomat is in a state which is neither the receiving state nor a state of transit between his state and the receiving state, there will be no immunity.[404] Immunities and privileges normally cease when the person leaves the country or on expiry of a reasonable period in which to do so.[405] However, by article 39(2) there would be continuing immunity with regard to those acts that were performed in the exercise of his functions as a member of the mission. It follows from this formulation that immunity would not continue for a person leaving the receiving state for any act which was performed outside the exercise of his functions as a member of a diplomatic mission even though he was immune from prosecution at the time. This was the view taken by the US Department of State with regard to an incident where the ambassador of Papua New Guinea was responsible for a serious automobile accident involving damage to five cars and injuries to two persons.[406] The ambassador was withdrawn from the US and assurances sought by Papua New Guinea that any criminal investigation of the incident or indictment of the former ambassador under US domestic law would be quashed were rejected. The US refused to accept the view that international law precluded the prosecution of the former diplomat for non-official acts committed during his period of accreditation.[407] In *Propend Finance* v. *Sing*, the Court took a broad view

400 [1985] Crim. LR 510; 88 ILR, p. 323.

401 [1991] 1 QB 485, 498; 88 ILR, pp. 404, 412.

402 [1991] 1 QB 499; 88 ILR, p. 413, 'save possibly in the case of a head of mission or other person of diplomatic rank', *ibid.* See also *Lutgarda Jimenez* v. *Commissioners of Inland Revenue* [2004] UK SPC 00419 (23 June 2004), and Denza, *Diplomatic Law*, p. 431.

403 See Brown, 'Diplomatic Immunity', p. 59, and *Bergman* v. *de Sieyès* 170 F.2d 360 (1948). See also *R* v. *Governor of Pentonville Prison, ex parte Teja* [1971] 2 QB 274; 52 ILR, p. 368. Note that such immunity only applies to members of his family if they were accompanying him or travelling separately to join him or return to their country, *Vafadar* 82 ILR, p. 97.

404 See e.g. *Public Prosecutor* v. *JBC* 94 ILR, p. 339.

405 Article 39, and see *Shaw* v. *Shaw* [1979] 3 All ER 1; 78 ILR, p. 483.

406 See 81 AJIL, 1987, p. 937.

407 See the *Tabatabai* case, 80 ILR, p. 388; *US* v. *Guinand* 688 F.Supp. 774 (1988); 99 ILR, p. 117; *Empson* v. *Smith* [1965] 2 All ER 881; 41 ILR, p. 407 and *Shaw* v. *Shaw* [1979] 3

of diplomatic functions, including within this term police liaison functions so that immunity continued under article 39(2).[408]

In the *Former Syrian Ambassador to the GDR* case, the German Federal Constitutional Court held that article 39(2) covered the situation where the ambassador in question was accused of complicity in murder by allowing explosives to be transferred from his embassy to a terrorist group. He was held to have acted in the exercise of his official functions. It was argued that diplomatic immunity from criminal proceedings knew of no exception for particularly serious crimes, the only resort being to declare him *persona non grata*.[409] The Court, in perhaps a controversial statement, noted that article 39(2), while binding on the receiving state, was not binding on third states.[410] Accordingly the continuing immunity of the former ambassador to the German Democratic Republic under article 39(2) was not binding upon the Federal Republic of Germany.

Although a state under section 4 of the State Immunity Act of 1978 is subject to the local jurisdiction with respect to contracts of employment made or wholly or partly to be performed in the UK, section 16(1)a provides that this is not to apply to proceedings concerning the employment of the members of a mission within the meaning of the Vienna Convention[411] and this was reaffirmed in *Sengupta* v. *Republic of India*,[412] a case concerning a clerk employed at the Indian High Commission in London.[413]

All ER 1; 78 ILR, p. 483. See also Y. Dinstein, 'Diplomatic Immunity from Jurisdiction *Ratione Materiae*', 15 ICLQ, 1966, p. 76.

408 111 ILR, pp. 611, 659–61. See also *Re P* (*No. 2*) [1998] 1 FLR 1027; 114 ILR, p. 485.

409 121 ILR, pp. 595, 607–8.

410 *Ibid.*, pp. 610–12. See B. Fassbender, 'S v. Berlin Court of Appeal and District Court of Berlin-Tiergarten', 92 AJIL, 1998, pp. 74, 78.

411 Or to members of a consular post within the meaning of the 1963 Consular Relations Convention enacted by the Consular Relations Act of 1968.

412 64 ILR, p. 352. See further above, p. 725.

413 Diplomatic agents are also granted exemptions from certain taxes and customs duties. However, this does not apply to indirect taxes normally incorporated in the price paid; taxes on private immovable property in the receiving state unless held on behalf of the sending state for purposes of the mission; various estate, succession or inheritance duties; taxes on private income having its source in the receiving state; charges for specific services, and various registration, court and record fees with regard to immovable property other than mission premises: see article 34 of the Vienna Convention. See also *UK Memorandum*, p. 693.

Waiver of immunity

By article 32 of the 1961 Vienna Convention, the sending state may waive the immunity from jurisdiction of diplomatic agents and others possessing immunity under the Convention.[414] Such waiver must be express.[415] Where a person with immunity initiates proceedings, he cannot claim immunity in respect of any counter-claim directly connected with the principal claim.[416] Waiver of immunity from jurisdiction in respect of civil or administrative proceedings is not to be taken to imply waiver from immunity in respect of the execution of the judgment, for which a separate waiver is necessary.

In general, waiver of immunity has been unusual, especially in criminal cases.[417] In a memorandum entitled *Department of State Guidance for Law Enforcement Officers With Regard to Personal Rights and Immunities of Foreign Diplomatic and Consular Personnel*[418] the point is made that waiver of immunity does not 'belong' to the individual concerned, but is for the benefit of the sending state. While waiver of immunity in the face of criminal charges is not common, 'it is routinely sought and occasionally granted'. However, Zambia speedily waived the immunity of an official at its London embassy suspected of drugs offences in 1985.[419]

In *Fayed* v. *Al-Tajir*,[420] the Court of Appeal referred to an apparent waiver of immunity by an ambassador made in pleadings by way of defence. Kerr LJ correctly noted that both under international and English law, immunity was the right of the sending state and that therefore 'only the sovereign can waive the immunity of its diplomatic representatives. They cannot do so themselves.'[421] It was also pointed out that the defendant's defence filed in the proceedings brought against him was not an appropriate vehicle for waiver of immunity by a state.[422] In *A Company* v. *Republic of X*,[423] Saville J noted that whether or not there was a

[414] See Denza, *Diplomatic Law*, pp. 330 ff.
[415] See e.g. *Public Prosecutor* v. *Orhan Olmez* 87 ILR, p. 212.
[416] See e.g. *High Commissioner for India* v. *Ghosh* [1960] 1 QB 134; 28 ILR, p. 150.
[417] See McClanahan, *Diplomatic Immunity*, p. 137, citing in addition an incident where the husband of an official of the US Embassy in London was suspected of gross indecency with a minor, where immunity was not waived, but the person concerned was returned to the US. But see Denza, *Diplomatic Law*, pp. 345 ff., noting the examples of waivers of immunity.
[418] Reproduced in 27 ILM, 1988, pp. 1617, 1633.
[419] McClanahan, *Diplomatic Immunity*, pp. 156–7.
[420] [1987] 2 All ER 396.
[421] *Ibid.*, p. 411.
[422] *Ibid.*, pp. 408 (Mustill LJ) and 411–12 (Kerr LJ).
[423] [1990] 2 LL. R 520, 524; 87 ILR, pp. 412, 416, citing *Kahan* v. *Pakistan Federation* [1951] 2 KB 1003; 18 ILR, p. 210.

power to waive article 22 immunities (and he was unconvinced that there existed such a power), no mere *inter partes* agreement could bind the state to such a waiver, but only an undertaking or consent given to the Court itself at the time when the Court is asked to exercise jurisdiction over or in respect of the subject matter of the immunities. In view of the principle that immunities adhere to the state and not the individual concerned, such waiver must be express and performed clearly by the state as such.

Consular privileges and immunities: the Vienna Convention on Consular Relations, 1963[424]

Consuls represent their state in many administrative ways, for instance, by issuing visas and passports and generally promoting the commercial interests of their state. They have a particular role in assisting nationals in distress with regard to, for example, finding lawyers, visiting prisons and contacting local authorities, but they are unable to intervene in the judicial process or internal affairs of the receiving state or give legal advice or investigate a crime.[425] They are based not only in the capitals of receiving states, but also in the more important provincial cities. However, their political functions are few and they are accordingly not permitted the same degree of immunity from jurisdiction as diplomatic agents.[426] Consuls must possess a commission from the sending state and the authorisation (*exequatur*) of a receiving state.[427] They are entitled to the same exemption from taxes and customs duties as diplomats.

Article 31 emphasises that consular premises are inviolable and may not be entered by the authorities of the receiving state without consent. Like diplomatic premises, they must be protected against intrusion or

[424] See e.g. L. T. Lee, *Consular Law and Practice*, 2nd edn, Durham, 1991, and Lee, *Vienna Convention on Consular Relations*, Durham, 1966; M. A. Ahmad, *L'Institution Consulaire et le Droit International*, Paris, 1973, and *Satow's Guide*, book III. See also Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 757; *Oppenheim's International Law*, pp. 1142 ff., and *Third US Restatement of Foreign Relations Law*, pp. 474 ff. The International Court in the *Iranian Hostages* case stated that this Convention codified the law on consular relations, ICJ Reports, 1980, pp. 3, 24; 61 ILR, pp. 504, 550. See also the Consular Relations Act 1968.

[425] See e.g. the UK Foreign Office leaflet entitled 'British Consular Services Abroad' quoted in UKMIL, 70 BYIL, 1999, p. 530, and see also *Ex parte Ferhut Butt* 116 ILR, pp. 607, 618.

[426] See further above, p. 725, with regard to employment and sovereign immunity disputes, a number of which concerned consular activities.

[427] Articles 10, 11 and 12.

impairment of dignity,[428] and similar immunities exist with regard to archives and documents[429] and exemptions from taxes.[430] Article 35 provides for freedom of communication, emphasising the inviolability of the official correspondence of the consular post and establishing that the consular bag should be neither opened nor detained. However, in contrast to the situation with regard to the diplomatic bag,[431] where the authorities of the receiving state have serious reason to believe that the bag contains other than official correspondence, documents or articles, they may request that the bag be opened and, if this is refused, the bag shall be returned to its place of origin.

Article 36(1) constitutes a critical provision and, as the International Court emphasised in the *LaGrand* (*Germany* v. *USA*) case, it 'establishes an interrelated regime designed to facilitate the implementation of the system of consular protection'.[432] Article 36(1)a provides that consular officers shall be free to communicate with nationals of the sending state and to have access to them, while nationals shall have the same freedom of communication with and access to consular officers. In particular, article 36(1)b provides that if the national so requests, the authorities of the receiving state shall without delay inform the consular post of the sending state of any arrest or detention. The authorities in question shall inform the national of the sending state without delay of his or her rights. Similarly, any communication from the detained national to the consular post must be forwarded without delay. The International Court held that article 36(1) created individual rights for the persons concerned which could be invoked by the state, which, by virtue of the Optional Protocol on Compulsory Settlement of Disputes attached to the Convention, may be brought before the Court.[433] The International Court has subsequently underlined that violations of individual rights under this provision may also violate the rights of the state itself, while such violations could also constitute violations of the individual.[434]

The Court held that the US had breached its obligations under article 36(1)[435] by not informing the LaGrand brothers of their rights under

[428] But note Security Council resolution 1193 (1998) condemning the Taliban authorities in Afghanistan for the capture of the Iranian consulate-general. See also *R (B)* v. *Secretary of State for Foreign and Commonwealth Affairs* [2004] EWCA Civ 1344; 131 ILR, p. 616.

[429] Article 33. [430] Article 32. [431] See above, p. 759.

[432] ICJ Reports, 2001, pp. 466, 492; 134 ILR, pp. 1, 31. See also the *Avena (Mexico* v. *USA)* case, ICJ Reports, 2004, pp. 12, 39; 134 ILR, pp. 120, 142.

[433] ICJ Reports, 2001, p. 494; 134 ILR, p. 33.

[434] The *Avena (Mexico* v. *USA)* case, ICJ Reports, 2004, pp. 12, 36; 134 ILR, pp. 120, 139.

[435] ICJ Reports, 2001, p. 514; 134 ILR, p. 52. In an Advisory Opinion of 1 October 1999, the Inter-American Court of Human Rights concluded that the duty to notify detained

that provision 'without delay'.[436] The International Court reaffirmed its approach in the *Avena* case, brought by Mexico against the US on substantially similar grounds to the *LaGrand* case.[437]

Article 41 provides that consular officers may not be arrested or detained except in the case of a grave crime and following a decision by the competent judicial authority. If, however, criminal proceedings are instituted against a consul, he must appear before the competent authorities. The proceedings are to be conducted in a manner that respects his official position and minimises the inconvenience to the exercise of consular functions. Under article 43 their immunity from jurisdiction is restricted in both criminal and civil matters to acts done in the official exercise of consular functions.[438] In *Koeppel and Koeppel* v. *Federal Republic of Nigeria*,[439] for example, it was held that the provision of refuge by the Nigerian Consul-General to a Nigerian national was an act performed in the exercise of a consular function within the meaning of article 43 and thus attracted consular immunity.

The Convention on Special Missions, 1969[440]

In many cases, states will send out special or ad hoc missions to particular countries to deal with some defined issue in addition to relying upon the permanent staffs of the diplomatic and consular missions. In such circumstances, these missions, whether purely technical or politically

foreign nationals of the right to seek consular assistance under article 36(1) constituted part of the corpus of human rights, Series A 16, OC-16/99, 1999 and 94 AJIL, 2000, p. 555. See above, chapter 7, p. 389. Note that the International Court in the *LaGrand* case felt it unnecessary to deal with this argument, ICJ Reports, 2001, pp. 466, 494–5. As to the right of access to nationals, see also the Yugoslav incident of summer 2000, where the UK protested at the absence of information with regard to the arrest by Yugoslavia of British citizens seconded to the UN Mission in Kosovo: see UKMIL, 71 BYIL, 2000, p. 608.

436 The Court has noted that the obligation on the detaining authorities to provide the necessary information under article 36(1)b arises once it is realised that the detainee is a foreign national or when there are grounds to think that the person is probably a foreign national, the *Avena* case, ICJ Reports, 2004, pp. 12, 43 and 49; 134 ILR, pp. 120, 146 and 153.

437 ICJ Reports, 2004, p. 12. See as to the obligations of the US in the two cases as found by the International Court, below, chapter 19, p. 1103. See also as to the response of the US courts to these cases, above, chapter 4, pp. 135 and 164, note 178.

438 See e.g. *Princess Zizianoff* v. *Kahn and Bigelow* 4 AD, p. 384. See generally, as to consular functions, DUSPIL, 1979, pp. 655 ff. Note that waiver of consular immunities under article 45, in addition to being express, must also be in writing.

439 704 F.Supp. 521 (1989); 99 ILR, p. 121.

440 See e.g. Hardy, *Modern Diplomatic Law*, p. 89, and *Oppenheim's International Law*, pp. 1125 ff. The Convention came into force in June 1985.

important, may rely on certain immunities which are basically derived from the Vienna Conventions by analogy with appropriate modifications. By article 8, the sending state must let the host state know of the size and composition of the mission, while according to article 17 the mission must be sited in a place agreed by the states concerned or in the Foreign Ministry of the receiving state.

By article 31 members of special missions have no immunity with respect to claims arising from an accident caused by a vehicle, used outside the official functions of the person involved, and by article 27 only such freedom of movement and travel as is necessary for the performance of the functions of the special mission is permitted.

The question of special missions was discussed in the *Tabatabai* case before a series of German courts.[441] The Federal Supreme Court noted that the Convention had not yet come into force and that there were conflicting views as to the extent to which it reflected existing customary law. However, it was clear that there was a customary rule of international law which provided that an ad hoc envoy, charged with a special political mission by the sending state, may be granted immunity by individual agreement with the host state for that mission and its associated status and that therefore such envoys could be placed on a par with members of the permanent missions of states.[442] The concept of immunity protected not the diplomat as a person, but rather the mission to be carried out by that person on behalf of the sending state. The question thus turned on whether there had been a sufficiently specific special mission agreed upon by the states concerned, which the Court found in the circumstances.[443] In *US* v. *Sissoko*, the District Court held that the Convention on Special Missions, to which the US was not a party, did not constitute customary international law and was thus not binding upon the Court.[444]

The Vienna Convention on the Representation of States in their Relations with International Organisations of a Universal Character, 1975 [445]

This treaty applies with respect to the representation of states in any international organisation of a universal character, irrespective of whether

[441] See 80 ILR, p. 388. See also Böckslaff and Koch, 'The Tabatabai Case: The Immunity of Special Envoys and the Limits of Judicial Review', 25 German YIL, 1982, p. 539.

[442] 80 ILR, pp. 388, 419. [443] *Ibid.*, p. 420.

[444] 999 F.Supp. 1469 (1997); 121 ILR, p. 600. See also *Re Bo Xilai* 76 BYIL, 2005, p. 601.

[445] See e.g. J. G. Fennessy, 'The 1975 Vienna Convention on the Representation of States in their Relations with International Organisations of a Universal Character', 70 AJIL, 1976, p. 62.

or not there are diplomatic relations between the sending and the host states.

There are many similarities between this Convention and the 1961 Vienna Convention. By article 30, for example, diplomatic staff enjoy complete immunity from criminal jurisdiction, and immunity from civil and administrative jurisdiction in all cases, save for the same exceptions noted in article 31 of the 1961 Convention. Administrative, technical and service staff are in the same position as under the latter treaty (article 36).

The mission premises are inviolable and exempt from taxation by the host state, while its archives, documents and correspondence are equally inviolable.

The Convention has received an unenthusiastic welcome, primarily because of the high level of immunities it provides for on the basis of a controversial analogy with diplomatic agents of missions.[446] The range of immunities contrasts with the general situation under existing conventions such as the Convention on the Privileges and Immunities of the United Nations, 1946.[447]

The immunities of international organisations

As far as customary rules are concerned, the position is far from clear and it is usually dealt with by means of a treaty, providing such immunities to the international institution sited on the territory of the host state as are regarded as functionally necessary for the fulfilment of its objectives.

Probably the most important example is the General Convention on the Privileges and Immunities of the United Nations of 1946, which sets out the immunities of the United Nations and its personnel and emphasises the inviolability of its premises, archives and documents.[448]

[446] It should be noted that among those states abstaining in the vote adopting the Convention were France, the US, Switzerland, Austria, Canada and the UK, all states that host the headquarters of important international organisations: see Fennessy, '1975 Vienna Convention', p. 62.

[447] See in particular article IV. See also, for a similar approach in the Convention on the Privileges and Immunities of the Specialised Agencies, 1947, article V.

[448] See further below, chapter 23, p. 1318. See, as to the privileges and immunities of foreign armed forces, including the NATO Status of Forces Agreement, 1951, which provides for a system of concurrent jurisdiction, S. Lazareff, *Status of Military Forces under Current International Law*, Leiden, 1971; Brownlie, *Principles*, pp. 362 ff., and J. Woodliffe, *The Peacetime Use of Foreign Military Installations under Modern International Law*, Dordrecht, 1992.

Suggestions for further reading

E. Denza, *Diplomatic Law*, 3rd edn, Oxford, 2008

A. Dickinson, R. Lindsay and J. P. Loonam, *State Immunity: Selected Materials and Commentary*, Oxford, 2004

H. Fox, *The Law of State Immunity*, Oxford, 2002

C. H. Schreuer, *State Immunity: Some Recent Developments*, Cambridge, 1988

I. Sinclair, 'The Law of Sovereign Immunity: Recent Developments', 167 HR, 1980, p. 113

A. Watts, 'The Legal Position in International Law of Heads of State, Heads of Governments and Foreign Ministers', 247 HR, 1994 III, p. 13

14

State responsibility

State responsibility is a fundamental principle of international law, arising out of the nature of the international legal system and the doctrines of state sovereignty and equality of states. It provides that whenever one state commits an internationally unlawful act against another state, international responsibility is established between the two. A breach of an international obligation gives rise to a requirement for reparation.[1]

Accordingly, the focus is upon principles concerned with second-order issues, in other words the procedural and other consequences flowing from a breach of a substantive rule of international law.[2] This has led to a number of issues concerning the relationship between the rules of

[1] See generally J. Crawford, *The International Law Commission's Articles on State Responsibility*, Cambridge, 2002; *Obligations Multilatérales, Droit Impératif et Responsabilité Internationale des États* (ed. P. M. Dupuy), Paris, 2003; *Issues of State Responsibility before International Judicial Institutions* (eds. M. Fitzmaurice and D. Sarooshi), Oxford, 2003; M. Forteau, *Droit de la Sécurité Collective et Droit de la Responsabilité Internationale de l'État*, Paris, 2006; N. H. B. Jørgensen, *The Responsibility of States for International Crimes*, Oxford, 2003; *International Responsibility Today: Essays in Memory of Oscar Schachter* (ed. M. Ragazzi), The Hague, 2005; S. Villalpando, *L'Émergence de la Communauté Internationale dans la Responsabilité des États*, Paris, 2005; C. Eagleton, *The Responsibility of States in International Law*, New York, 1928; *International Law of State Responsibility for Injuries to Aliens* (ed. R. B. Lillich), Charlottesville, 1983; R. B. Lillich, 'Duties of States Regarding the Civil Rights of Aliens', 161 HR, 1978, p. 329, and Lillich, *The Human Rights of Aliens in Contemporary International Law*, Charlottesville, 1984; I. Brownlie, *System of the Law of Nations: State Responsibility, Part I*, Oxford, 1983; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, London, 1953; *United Nations Codification of State Responsibility* (eds. M. Spinedi and B. Simma), New York, 1987; Société Français de Droit International, *La Responsabilité dans le Système International*, Paris, 1991; B. Stern, 'La Responsabilité Internationale Aujourd'hui . . . Demain . . . ' in *Mélanges Apollis*, Paris, 1992; Nguyen Quoc Dinh, P. Daillier and A. Pellet, *Droit International Public*, 7th edn, Paris, 2002, p. 729, and *Oppenheim's International Law* (eds. R. Y. Jennings and A. D. Watts), 9th edn, London, 1992, chapter 4. See also the Secretary-General's Compilation of Decisions of International Courts, Tribunals and Other Bodies, A/62/62, 1 February 2007, as supplemented by A/62/62/Add.1, 17 April 2007.

[2] See *Yearbook of the ILC*, 1973, vol. II, pp. 169–70. The issue of state responsibility for injuries caused by lawful activities will be noted in chapter 15.

state responsibility and those relating to other areas of international law. The question as to the relationship between the rules of state responsibility and those relating to the law of treaties arose, for example, in the *Rainbow Warrior* Arbitration between France and New Zealand in 1990.[3] The arbitration followed the incident in 1985 in which French agents destroyed the vessel *Rainbow Warrior* in harbour in New Zealand. The UN Secretary-General was asked to mediate and his ruling in 1986[4] provided *inter alia* for French payment to New Zealand and for the transference of two French agents to a French base in the Pacific, where they were to stay for three years and not to leave without the mutual consent of both states.[5] However, both the agents were repatriated to France before the expiry of the three years for various reasons, without the consent of New Zealand. The 1986 Agreement contained an arbitration clause and this was invoked by New Zealand. The argument put forward by New Zealand centred upon the breach of a treaty obligation by France, whereas that state argued that only the law of state responsibility was relevant and that concepts of *force majeure* and distress exonerated it from liability.

The arbitral tribunal decided that the law relating to treaties was relevant, but that the legal consequences of a breach of a treaty, including the determination of the circumstances that may exclude wrongfulness (and render the breach only apparent) and the appropriate remedies for breach, are subjects that belong to the customary law of state responsibility.[6]

It was noted that international law did not distinguish between contractual and tortious responsibility, so that any violation by a state of any obligation of whatever origin gives rise to state responsibility and consequently to the duty of reparation.[7] In the *Gabčíkovo–Nagymaros Project* case, the International Court reaffirmed the point that

> A determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. On the other hand, an evaluation of the extent to which the suspension or denunciation of a convention, seen as incompatible with the law of treaties, involves the responsibility of the state which proceeded to it, is to be made under the law of state responsibility.[8]

The Arbitration Commission on Yugoslavia also addressed the issue of the relationship between state responsibility and other branches of

[3] 82 ILR, p. 499. [4] See 81 AJIL, 1987, p. 325 and 74 ILR, p. 256.
[5] See also the Agreement between France and New Zealand of 9 July 1986, 74 ILR, p. 274.
[6] 82 ILR, pp. 499, 551. [7] *Ibid.* See further below, p. 801.
[8] ICJ Reports, 1997, pp. 7, 38; 116 ILR, p. 1.

international law in Opinion No. 13, when asked a question as to whether any amounts due in respect of war damage might affect the distribution of assets and debts in the succession process affecting the successor states of the Former Yugoslavia. The Commission, in producing a negative answer, emphasised that the question of war damage was one that fell within the sphere of state responsibility, while the rules relating to state succession fell into a separate area of international law. Accordingly, the two issues had to be separately decided.[9]

Matters regarding the responsibility of states are necessarily serious and it is well established that a party asserting a fact must prove it.[10] The Eritrea–Ethiopia Claims Commission has taken the position that 'clear and convincing evidence' would be required in order to support findings as to state responsibility,[11] while the International Court has held that claims against a state involving 'charges of exceptional gravity' must be proved by evidence that is 'fully conclusive'.[12]

In addition to the wide range of state practice in this area, the International Law Commission worked extensively on this topic. In 1975 it took a decision for the draft articles on state responsibility to be divided into three parts: part I to deal with the origin of international responsibility, part II to deal with the content, forms and degrees of international responsibility and part III to deal with the settlement of disputes and the implementation of international responsibility.[13] Part I was provisionally adopted by the Commission in 1980[14] and the Draft Articles were finally adopted on 9 August 2001.[15] General Assembly resolution 56/83 of

[9] 96 ILR, pp. 726, 728.

[10] See e.g. *Genocide Convention (Bosnia* v. *Serbia)* case, ICJ Reports, 2007, para. 204.

[11] See e.g. Partial Award, Prisoners of War, Eritrea's Claim 17, 1 July 2003, paras. 46 and 49, and Partial Award, Civilian Claims, Ethiopia's Claim 5, 17 December 2004, para. 35.

[12] *Genocide Convention (Bosnia* v. *Serbia)* case, ICJ Reports, 2007, para. 209. See as to evidence and the International Court, below, chapter 19, p. 1088.

[13] *Yearbook of the ILC*, 1975, vol. II, pp. 55–9. See also P. Allott, 'State Responsibility and the Unmaking of International Law', 29 *Harvard International Law Journal*, 1988, p. 1; S. Rosenne, *The ILC's Draft Articles on State Responsibility*, Dordrecht, 1991; 'Symposium: The ILC's State Responsibility Articles', 96 AJIL, 2002, p. 773; 'Symposium: Assessing the Work of the International Law Commission on State Responsibility', 13 EJIL, 2002, p. 1053, and P. M. Dupuy, 'Quarante Ans de Codification de Droit de la Responsabilité Internationale des États: Un Bilan', 107 RGDIP, 2003, p. 305.

[14] *Yearbook of the ILC*, 1980, vol. II, part 2, pp. 30 ff.

[15] ILC Commentary 2001, A/56/10, 2001. This Report contains the Commentary of the ILC to the Articles, which will be discussed in the chapter. The Commentary may also be found in Crawford, *Articles.* Note that the ILC Articles do not address issues of either the responsibility of international organisations or the responsibility of individuals: see articles 57 and 58.

12 December 2001 annexed the text of the articles and commended them to governments, an unusual procedure which must be seen as giving particular weight to the status of the articles.[16]

The nature of state responsibility

The essential characteristics of responsibility hinge upon certain basic factors: first, the existence of an international legal obligation in force as between two particular states; secondly, that there has occurred an act or omission which violates that obligation and which is imputable to the state responsible, and finally, that loss or damage has resulted from the unlawful act or omission.[17]

These requirements have been made clear in a number of leading cases. In the *Spanish Zone of Morocco* claims,[18] Judge Huber emphasised that:

> responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. Responsibility results in the duty to make reparation if the obligation in question is not met.[19]

and in the *Chorzów Factory* case,[20] the Permanent Court of International Justice said that:

> it is a principle of international law, and even a greater conception of law, that any breach of an engagement involves an obligation to make reparation.

Article 1 of the International Law Commission's Articles on State Responsibility reiterates the general rule, widely supported by practice,[21] that every internationally wrongful act of a state entails responsibility.

[16] See also General Assembly resolution 59/35. Assembly resolution 62/61 of 8 January 2008 further commended the Articles on State Responsibility to states and decided to examine the question of a convention on the topic. See also S. Rosenne, 'State Responsibility: *Festina Lente*', 75 BYIL, 2004, p. 363, and J. Crawford and S. Olleson, 'The Continuing Debate on a UN Convention on State Responsibility', 54 ICLQ, 2005, p. 959.

[17] See e.g. H. Mosler, *The International Society as a Legal Community*, Dordrecht, 1980, p. 157, and E. Jiménez de Aréchaga, 'International Responsibility' in *Manual of Public International Law* (ed. M. Sørensen), London, 1968, pp. 531, 534.

[18] 2 RIAA, p. 615 (1923); 2 AD, p. 157.

[19] 2 RIAA, p. 641.

[20] PCIJ, Series A, No. 17, 1928, p. 29; 4 AD, p. 258. See also the *Corfu Channel* case, ICJ Reports, pp. 4, 23; 16 AD, p. 155; the *Spanish Zone of Morocco* case, 2 RIAA, pp. 615, 641 and the *Mayagna (Sumo) Indigenous Community of Awas Tingni* v. *Nicaragua*, Inter-American Court of Human Rights, Judgment of 31 August 2001 (Ser. C) No. 79, para. 163.

[21] See e.g. ILC Commentary 2001, p. 63.

Article 2 provides that there is an internationally wrongful act of a state when conduct consisting of an action or omission is attributable to the state under international law and constitutes a breach of an international obligation of the state.[22] This principle has been affirmed in the case-law.[23] It is international law that determines what constitutes an internationally unlawful act, irrespective of any provisions of municipal law.[24] Article 12 stipulates that there is a breach of an international obligation[25] when an act of that state is not in conformity with what is required of it by that obligation, regardless of its origin or character.[26] A breach that is of a continuing nature extends over the entire period during which the act continues and remains not in conformity with the international obligation in question,[27] while a breach that consists of a composite act will also extend over the entire period during which the act or omission continues and remains not in conformity with the international obligation.[28] A state assisting another state[29] to commit an internationally wrongful act will also be responsible if it so acted with knowledge of the circumstances and where it would be wrongful if committed by that state.[30] State responsibility may co-exist with individual responsibility. The two are not mutually exclusive.[31]

[22] See *Yearbook of the ILC*, 1976, vol. II, pp. 75 ff. and ILC Commentary 2001, p. 68.

[23] See e.g. *Chorzów Factory* case, PCIJ, Series A, No. 9, p. 21 and the *Rainbow Warrior* case, 82 ILR, p. 499.

[24] Article 3. See generally *Yearbook of the ILC*, 1979, vol. II, pp. 90 ff.; *ibid.*, 1980, vol. II, pp. 14 ff. and ILC Commentary 2001, p. 74. See also *Noble Ventures* v. *Romania*, ICSID award of 12 October 2005, para. 53 and above, chapter 4, pp. 133 ff.

[25] By which the state is bound at the time the act occurs, Article 13 and ILC Commentary 2001, p. 133. This principle reflects the general principle of intertemporal law: see e.g. the *Island of Palmas* case, 2 RIAA, pp. 829, 845 and above, chapter 9, p. 508.

[26] See the *Gabčíkovo–Nagymaros (Hungary* v. *Slovakia) Project* case, ICJ Reports, 1997, pp. 7, 38; 116 ILR, p. 1 and ILC Commentary 2001, p. 124.

[27] See article 14. See also e.g. the *Rainbow Warrior* case, 82 ILR, p. 499; the *Gabčíkovo–Nagymaros (Hungary* v. *Slovakia) Project* case, ICJ Reports, 1997, pp. 7, 54; *Genocide Convention (Bosnia* v. *Serbia)* case, ICJ Reports, 2007, para. 431; *Loizidou* v. *Turkey*, Merits, European Court of Human Rights, Judgment of 18 December 1996, paras. 41–7 and 63–4; 108 ILR, p. 443 and *Cyprus* v. *Turkey*, European Court of Human Rights, Judgment of 10 May 2001, paras. 136, 150, 158, 175, 189 and 269; 120 ILR, p. 10.

[28] Article 15.

[29] Or directing or controlling it, see article 17; or coercing it, see article 18.

[30] Article 16. See also the *Genocide Convention (Bosnia* v. *Serbia)* case, ICJ Reports, 2007, para. 420.

[31] See article 58. See also the *Genocide Convention (Bosnia* v. *Serbia)* case, ICJ Reports, 2007, para. 173, and A. Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law', 52 ICLQ, 2003, p. 615.