CHAPTER I

PRIVILEGES AND IMMUNITIES IN INTERNATIONAL LAW

I. FOREIGN STATES

(i) Recent trends towards the abandonment of the theory of absolute immunity of States

In general, every State has the exclusive right to exercise jurisdiction within its own territory. This jurisdiction is not absolute because it is subject to certain limitations imposed by international law. One instance where a State agrees to waive a part of its territorial sovereignty relates to foreign States who are accorded certain privileges and immunities. The rule of State immunity from suit in foreign courts is based upon and firmly grounded on the principles of independence, equality, and the dignity of States, which are deemed to be three characteristics of statehood. In fact, the well known maxim par in parem non habet imperium has been derived from these principles. Two different points of view exist on the subject of State immunity from suit in foreign courts. According to the classical or absolute doctrine of sovereign immunity, immunity is granted ratione personae, irrespective of the nature of the act involved. On the other hand, the restrictive or newer theory of sovereign immunity draws a distinction between acts performed by a State in its sovereign capacity i.e. acts jure imperii and private acts i.e. acts jure gestionis, immunity being restricted only to acts jure imperii.

Originally, the absolute doctrine of sovereign immunity was applied by all States, but this doctrine is no more an adequate expression of its modern application. With the breakdown of the concept of laissez-faire,

1 See the opinion of Chief Justice Marshall of the United States Supreme Court in the celebrated case of Schooner Exchange v. McFadden, 7 Cranch 116 (1812), and Brett L. J. in the classic English case of The Parliament Beige, [1880] 5 P.D. 197.
States have undertaken economic activities on unprecedented scales. These are the activities which were previously performed only by private individuals. In view of the fact that States have transcended the bounds of traditionally sovereign functions, it is increasingly questioned whether the immunity which was previously conferred *ratione personae* i.e. on the basis of the entity affected, should be equally applied *ratione materiae* i.e. on the basis of the nature of the acts. Admittedly, the principle of absolute immunity of States places the individual in a position of disadvantage before national courts in suits concerning matters not related to the sovereignty of States. Behind the protective shield of immunity, injustices may be inflicted on individuals. Besides, the principle of dignity no more furnishes the rational basis for the grant of absolute immunity.2 There are still more cogent reasons for the repudiation of the theory of absolute immunity. An anomalous situation would result if States continue to grant absolute immunity to foreign States when they claim narrow immunity for themselves in the courts of their own country.3

(ii) *Proposals of unofficial bodies, the League of Nations, and the United Nations*

A change in attitude towards the grant of absolute immunity to States can be seen from the position taken by various unofficial bodies. We shall first of all refer to The Harvard Research in International Law. The Harvard Research draws a distinction between acts *jure imperii* and *jure gestionis* and maintains that a State should be granted immunity from local jurisdiction only when it acts *jure imperii*. Taking account of the changed circumstances as a result of the Industrial Revolution, the Research states in Article II that a State may be made a respondent in a court of another State when it occupies itself with industrial, commercial, financial or other business enterprises in which private persons may there engage.4

The question of sovereign immunity of States was taken up by the International Law Association at its Copenhagen Conference in 1950.

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3 Following the Italo-Belgian precedents, a trend towards a definite policy to submit to suit can be evidenced in Great Britain and the United States. The Crown Proceedings Act of 1947 places the Crown in the same position as the subjects. According to Court of Claims Act (1946), Suits in Admirality Act (1946), the Public Vessels Act (1946) and the Federal Tort Claims Act (1946), the United States Government has also agreed to be sued by its courts in certain cases. See the sources cited in note 29 on page 13 infra.