ABHANDLUNGEN

Immunity of States before Belgian Courts and Tribunals

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Introduction

The verdicts of the German Federal Constitutional Court (Bundesverfassungsgericht) of October 30, 1962[1]) and April 30, 1963[2]) have produced increased interest in the German doctrine regarding the significant problem of the immunity of foreign States[3]). With these verdicts – and specially that of April 30, 1963, – Germany seems definitely to have adopted

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[1]) Entscheidungen des Bundesverfassungsgerichts (BVerfGE), vol. 15, pp. 25–43. See also ZaöRV vol. 24 (1964), pp. 279–292.

[2]) ZaöRV vol. 24 (1964), pp. 292–316.

[3]) F. Münch, Immunität fremder Staaten in der deutschen Rechtsprechung bis zu den Beschlüssen des Bundesverfassungsgerichts vom 30. Oktober 1962 und 30. April 1963, ZaöRV vol. 24 (1964), pp. 265–278. – A special commission of the German Society for International Law made a study of the problem, to be published as vol. 8 of the Berichte der Deutschen Gesellschaft für Völkerrecht.

the theory of restricted immunity, according to which foreign States are only exempt from the jurisdiction of the Courts in so far as the dispute concerns acts committed *iure imperii*. Thus Germany comes into line with the other countries of Western Europe, where the restrictive theory originated and has constantly been applied for a long time. For nearly a century now, Belgian Courts and Tribunals have repeatedly rejected the immunity from jurisdiction of foreign States for acts committed *iure gestionis*[4]).

Great Britain as well as the United States have always taken a broader view; in the famous Tate Letter of 1952[5]) however, the Department of State abandoned its traditional attitude and came out in favour of the theory of restricted immunity. This attitude was recently confirmed in the case of *Victory Transport Inc.* v. *Comisaria General de Abastecimientos y Transportes*[6]), though the application of the new theory remains incertain in view of the part played by the Department of State as *amicus curiae*[7]).

In the verdicts mentioned above, the German Federal Constitutional Court not only pronounced in favour of the restrictive theory; it also drew from it certain very interesting consequences relating to the basic problem of the whole modern theory of immunity, that is to say, the distinction between acts accomplished *iure imperii* and acts accomplished *iure gestionis*. In fact the Court is of the opinion that it is possible to draw up a limiting list of acts accomplished *iure imperii*, referring to internal law *(lex fori)* for the solution of doubtful cases[8]).

The question of immunity of States is a classic instance for the shaping

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[4]) This also was – and still is – the position taken by the italian Courts. See: Anzilotti, Le esenzione degli Stati stranieri dalla giurisdizione, in Rivista di diritto internazionale (1910), p. 447; Allen, The position of Foreign States before National Courts (1933), pp. 221–264. Among the more recent literature, see especially: Cassoni, Su di un recente caso di pretesa esenzione dello Stato straniero dalla giurisdizione, in Rivista di diritto internazionale (1960), p. 532; Miele, L'immunità giurisdizionale degli Stati stranieri (1947); Panebianco, L'immunità giurisdizionale degli Stati stranieri, in Annuario di diritto internazionale, vol. 1 (1965), pp. 295–340; Quadri, L'immunità di Giurisdizione degli Stati stranieri, in Annuario di diritto internazionale, vol. 1 (1965), pp. 589–596.

[5]) 26 Department of State Bulletin (1952), p. 984.

[6]) 336 F. 2d 354, Decision of the US Ct. App., 2d Cir. of September 9, 1964. Reprinted in The American Journal of International Law (AJIL) vol. 59 (1965), pp. 388–390.

[7]) Alexy, Der Einfluß der Exekutive und innerstaatlicher Rechtsgrundsätze auf die amerikanische Rechtsprechung zur Immunität fremder Staaten, ZaöRV vol. 22 (1962), p. 661. – In fact the State Department has silently abandoned "'the revised and restricted policy' set forth in the Tate Letter and has substituted a case by case foreign Sovereign Immunity policy", *Chemical Natural Resources, Inc.* v. *Republic of Venezuela*, 1966, AJIL vol. 60 (1966), p. 843.

[8]) ZaöRV, vol. 24 (1964), pp. 315–316.

of a norm of International Law by the jurisprudential practice of States. In fact the immunity problem cannot appear before an International Court, for as an organ of the international community the latter does not pronounce judgment as among equals as internal courts do when taking cognisance of an action entered against a foreign State. For an international Court a complaint by a State is just conceivable, pretexting a violation of international law in the refusal of the judicial organs of another State to admit immunity. However that may be, the continuous concordant and general practice of States determines the tenor of international law regulations relating to immunity. In the following pages we shall examine Belgian judicial practice under the following headings: the basis of immunity, the immunity of federated States, the theory of restricted immunity and immunity from execution[9]).

I. The Basis of jurisdictional Immunity

In Belgian jurisprudence certain verdicts do exist that recognise the immunity from jurisdiction of a foreign State, but it must be stated here and now that on the matter of basis, the opinion of Belgian Courts is far from being unanimous. Some appeal to the conception of the independence of States, others to that of State sovereignty or the equality of States. Nor are these principles the only ones to have been invoked. Before entering into details, let us recapitulate shortly the teaching of international law on this point.

1. The tenets of international law

According to these, the exemption from internal jurisdiction from which foreign States benefit, is founded sometimes on the principle of equality of States *(par in parem non habet jurisdictionem)*, sometimes on that of their sovereignty or independence. A comparative study of jurisprudence would provide innumerable cases in which each of these principles is regarded as the basis for the immunity of a foreign State. But serious objections can be raised.

As for the principle of equality, the point can be made that it is

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[9]) Although an excellent survey of the Belgian judicial practice was given in 1933 by E. W. Allen in her book: The Position of Foreign States before National Courts chiefly in Continental Europe, pp. 187–219 (those pages having been published separately in 1929 under the title: The Position of Foreign States before Belgian Courts, 40 pp.), we nevertheless undertook the reexamination of this practice in a more systematic way, taking also into account the few but important cases from the last thirtyfive years, and while underlining some particular aspects to which literature payed less attention.

wholly respected if each State is entitled to judge any other State[10]). In addition, States remain equal even in their trading activities. The principle of independence is in fact only a consequence of that of equality, and it means that States are directly subject only to international law *(Völkerrechtsunmittelbarkeit)* where all immunity is excluded, and that they are not subject to the jurisdiction of other States. As Max Huber stated in the *Palmas Arbitration*, 1928, "independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State". Thus the theory of independence as a basis for immunity is only a *petitio principii* that explains nothing. To justify the immunity from jurisdiction of foreign States by reference to the notion of independence is meaningless. Likewise that of sovereignty, closely connected with equality and independence, is an unsatisfactory argument. It is not clear why the State should cease to be sovereign on purchasing a cargo of wheat for its famished population. Why should the granting of a concession to a foreign business concern, or the undertaking to build a dam, diminish the sovereignty of a State? Surely the contrary holds good here, that it is in activities of this kind precisely that a modern State sees an expression of its independence. So long as types of sovereign acts are not clearly defined, appeals to the principle of sovereignty will remain unsatisfactory.

There is also the question of whether an enquiry into the basis of immunity from jurisdiction can have any meaning before we know whether, and to what an extent, such immunity exists. To raise the question at all presupposes that in principle States do enjoy this immunity, which is not at all sure. Like all questions concerning international law, the problem of immunity may be considered from the standpoint of two very different axioms.

If we consider that all States in principle possess full sovereignty and full jurisdiction in their territory over the people to be found there as over the events that take place there, immunity or exemption from this jurisdiction should be regarded as an exception, with all the consequences this implies, specially as to the restrictive interpretation of this immunity. It is this first position on principle that seems to prevail today. Indeed the expressions "immunity", and "exemption from jurisdiction", seem to confirm the principle of the full jurisdiction of States. Present practice reveals a very clear tendency to set a definite limit to the acts for which immunity is or should be accorded. That is the bearing of the verdict in the *Victory Transport* case: "Sovereign immunity is a derogation from the normal exer-

[10]) Dahm, Völkerrecht, vol. 1, p. 225 note 1.

cise of jurisdiction by the courts and should be accorded only in clear cases". In the *Portuguese State* v. *Sauvage* case, which will be discussed below, the Brussels Court of Appeal regarded immunity from execution as a "restriction of national sovereignty".

On the other hand, starting from the principle of delimitation, by international law, of the different spheres of jurisdiction of the States, we come to the conclusion that, in principle, States already enjoy immunity, and that exceptions should only be admitted with much caution; in case of doubt, national Courts should pronounce in favour of immunity.

However that may be, the taking up of theoretical positions is always dangerous because too far removed from the realities of inter-State life. Let it be sufficient to observe that modern international law contains a principle – a very general one – of exemption from jurisdiction to the advantage of States, where it is a matter of acts accomplished by them *iure imperii*. Whatever the theoretical basis professed (equality, sovereignty or independence), the true motive is, either the desire to maintain friendly relations among States, or the principle of equal treatment or reciprocity in applying the old saws "Do not do to others what you do not wish done to yourself" *(quod tibi non vis fieri, alteri nec feceris)*, "Do as you would be done by" *(quod vis ut alii tibi faciant, ut ipsis facies)*. American practice seems to be inspired by the desire to maintain good inter-State relations. Here we may well quote the verdict in the *Chemical Natural Resources Inc.* v. *Republic of Venezuela* case: "The State Department will recognise and suggest, or fail to recognise or grant or suggest Sovereign Immunity in each case presented to it, depending a) upon the foreign and diplomatic relations which our Country has at that particular time with the other Country, and b) the best interests of our Country at that particular time" [11]).

Belgian jurisprudence is largely dominated by the idea of reciprocity. Anyhow, we are far away from a practice followed with the conviction of being legally obliged to do so. In the following pages we shall examine Belgian jurisprudence in relation to the following points: *ratione personae* competency, the principles of equality, independence and sovereignty, immunity from execution, international courtesy and reciprocity.

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[11]) AJIL vol. 60 (1966), p. 843.

2. Belgian Jurisprudence

a) The 1876 law on competency, and the principles of sovereignty, independence and equality

For Belgian Courts and Tribunals the question of the immunity from jurisdiction of foreign States is above all a problem of *ratione personae* competency. Article 14 of the Civil Code, modified by Article 52 of the 25 March 1876 law on competency, permits Belgians, in certain cases, to sue foreigners at Belgian Courts as to the pursuit of civil rights. It was long admitted, in France as in Belgium, that the word "foreigner" only applied to foreign individuals, and then only if they did not represent their nation. In the first case relating to the immunity from jurisdiction of foreign States, the Brussels Court of Appeal decided on December 30, 1840, that article 14 of the Code civil, "in the natural meaning of its terms, only concerns foreign private persons" (*Société Générale pour favoriser l'Industrie nationale* v. *Le Syndicat d'Amortissement, le Gouvernement des Pays-Bas, et le Gouvernement belge*, Pasicrisie belge [further quoted as Pas.] 1841, II, 33, 53).

But the benefit of exterritoriality should logically extend to the foreign States themselves; as an ambassador only has the benefit of immunities by reason of the representative character with which he is invested, the verdict already mentioned grants *a fortiori* to the accrediting State the benefit of immunity from jurisdiction. The reasoning of the Antwerp Civil Court (Tribunal civil) was similar in a judgment of November 11, 1876, relating to the case of the *Ottoman Government* v. *La Société de Sclessin et Deppe et Roef* (Pas. 1877, III, 28). In a very important paragraph, this tribunal judged that the identification of foreign governments with private individuals "would be ... contrary to the primary principle of international public law which proclaims all nations equally sovereign, independent, and hence without jurisdiction over one another, since jurisdiction presupposes a subordination and not perfect equality". So here we have the three justifications that will henceforth predominate in Belgian jurisprudence in the matter of immunity.

We are, however, bound to add at once that when the sovereignty and independence of States are not in question, Belgian Courts will refuse immunity, at least in matters of jurisdiction, grounding their *ratione personae* jurisdiction on the identification of the State with a private individual. An application of this is to be found two years later, when in a verdict of July 17, 1878, the Ostend Commercial Court (Tribunal de Commerce) set aside the plea of incompetency raised by the Peru Government, founded on the argument of sovereignty. The Court decided that "the principle (of

sovereignty) may be valid when a government, remaining within the limits of its governmental function, takes measures in the interest of its self-preservation or for acts dictated by general interest". The principle, however, becomes valueless "when the government sells guano and, whether on its own account or by intermediaries, posits actions and makes contracts which, always and everywhere, have been considered as commercial contracts, subject to the jurisdiction of commercial Courts" (the case of *Rau, van den Abeele et Cie* v. *Duruty*, decision confirmed by the Court of Appeal, Ghent, March 14, 1879, Pas. 1879, II, 175). In the case of *De Croonenbergh* v. *L'Etat indépendant du Congo*, the Brussels Court referred explicitly to article 52 of the 1876 law on competency, which it declared was applicable to foreign States "when it was a matter of pronouncing judgment on acts consented by them as civil persons" (decision of January 4, 1896, Pas. 1896, III, 252).

In the famous judgment of June 11, 1903, relating to a dispute between the *S.A. des Chemins de Fer liégeois-limbourgeois* c. *L'Etat néerlandais* (Ministry of Waterstaat), where the theory of restricted immunity from jurisdiction was admitted by the Cour de Cassation, the latter often alluded to the principle of the sovereignty and independence of States. The rule of the independence of nations, which proceeds from the principle of their sovereignty, is "without application when that sovereignty is not involved" (Pas. 1903, I, 294).

A year earlier, a Justice of the Peace in Brussels had to take cognisance of a litigation between a private person, M. *Braive*, on the one side, and the *Ottoman Government* on the other, relating to the renting of premises for the installation of an embassy. The judge rejected restrictive theory and took his stand on international law which "proclaims the independence of sovereign nations towards one another"; "one of the consequences of this sovereignty and independence is to place obstacles in the way of any nation being constrained to accept the jurisdiction of another nation". In any case, the judgment continues, "were it necessary to admit a distinction between the acts of the foreign State, according to whether it acted as a public person or as a private person, the renting of premises for the establishment of an embassy certainly has the character of an act of public power" (April 28, 1902, Pas. 1902, III, 240). The Brussels Civil Court (Tribunal Civil) returned to this argument in a judgment of April 20, 1903, relating to the case of *Tilkens* v. *L'Etat indépendant du Congo*. The judge opined that article 52 of the law of March 25, 1876, "only concerns foreign private persons and not States and public establishments", and repeated word for word the judgment of the Justice of the Peace in 1902 on the

Braive case. At the end of his motivation, the same line of argument recurs: immunity from jurisdiction must be granted "specially when the act (the acceptance and preservation by the Congolese State of a security) was accomplished by it in the exercise of its sovereign power" (Pas. 1903, III, 180).

As time goes on, Belgian jurisprudence is marked only by constant repetition of the great classic principles already enunciated. We may quote one or two more verdicts, that of the Civil Court of Antwerp of February 2, 1920, in the case of *De Roover* v. *The Belgian State* (Pas. 1920, III, 93) and that of the Commercial Court of this same city, dated February 9, 1920, in the case of *West Russian Steamship Co Ltd.* v. *Sucksdorff* (Pas. 1922, III, 3) which contains a more detailed passage on the subject of grounds for immunity. The Court began by observing that the Belgian government had officially recognised the Finnish Republic, then it decided that a foreign State does not come under the jurisdiction of foreign common law courts, because the idea of jurisdiction "is incompatible with the notion of the sovereignty of States and of their reciprocal independence". Since no State is qualified to judge another, "*a fortiori* is it inadmissible that a Court, as partial emanation of the internal sovereignty of the State, could arrogate to itself the right of jurisdiction over a foreign State from which it holds no mandate". The verdict then continues, following word for word the text of the 1876 judgment in the case of the *Ottoman Government* v. *de Sclessin*, quoted at the beginning of this section.

The case of the *West Russian Steamship Co.* does not, however, appear to have any direct bearing on the question of immunity. In 1918 the Finnish government had appropriated a Russian steamship captured in its internal waters and used it for the transport of merchandise. In 1920 this vessel reached Antwerp flying the Finnish flag and had a seizure for security laid on it by the *West Russian Steamship Co.* who claimed it as its own, arguing that confiscation could have no extra-territorial effect. This principle is correct, said the Court, and "would apply for example to a case when the Finnish government might want to capture some ship in a Belgian port". But it could not apply to the present case since the Finnish State had captured the ship "within its own States" and had effective possession of it, whatever its title to it. Thus it was rather a matter of recognition of an Act of State than of immunity from jurisdiction.

The Belgian Courts and Tribunals did not, however, ground their judgments solely on the principles enunciated, in order to affirm immunity from jurisdiction. Very often, indeed, judgments invoke other arguments such as impossibility of execution, or courtesy, or reciprocity.

b) The impossibility of execution as a basis of the immunity from jurisdiction

To the classic argument of sovereignty, independence and equality of States, certain Belgian judicial decisions sometimes add an argument of a more technical nature. This argument is founded on the connection that must logically exist between the power to render judgment and that of executing it. From this it follows that if, as admitted, the means of execution are blocked, juridical competency ceases: it could do no more than issue a sterile declaration of rights. The Brussels Court of Appeal took this line in its judgment of February 7, 1902, relating to the case of *The Netherlands State* v. *The S.A. du Chemin de Fer liégeois-limbourgeois* (Pas. 1902, II, 162). This reasoning was taken up again textually a few weeks later by the Brussels Justice of the Peace in the *Braive* case already quoted, where the immunity of the Ottoman Government was recognised since "the right to judge, emanating from the public power, implies the obligation of the justiciable to submit to the injunctions of the power rendering justice" (judgment of April 28, 1902, Pas. 1902, III, 240). The judgment under consideration likewise inspired the Brussels Court in the *Tilkens* case (judgment of April 20, 1903, Pas. 1903, III, 180).

These three decisions, unique of their kind, thus implicitly reject the widely accepted point of view that a distinction needs to be made between immunity from jurisdiction and immunity from execution. We may note that in these cases it was solely a question of immunity from jurisdiction, which was admitted because there was total immunity from execution. Later on, in the section on immunity from execution, we shall see that a more recent and very famous decision likewise refused to dissociate the two immunities, this time denying immunity from execution because immunity from jurisdiction had been refused. However it may be, the curious argument that swayed the decisions of the years 1902–3 is unique of its kind and was not used again, for the judgment of February 7, 1902, which was responsible for this aberration was quashed by the famous decision of June 11, 1903, of the Cour de Cassation.

c) International courtesy

In recognising the immunity from jurisdiction of the Netherlands State, the Brussels Court of Appeal likewise took its stand on "international usage which has the value of tacit treaties, and rejects the competency of the Courts to deal with acts committed against foreign States". This universal agreement, it continues, "rests on a basic need, that of not introducing into relations between the powers elements likely to destroy their harmony". In the *Urrutia & Amallobieta* v. *Martiarema & Cs.* case the

Brussels Court of Appeal declared that "the limitation of national sovereignty (that is, the impossibility of judging a foreign State) had its basis in the principle of the courtesy that should exist between nations and that of their reciprocal duty not to disturb their conditions of existence" [12]).

More recently, the Léopoldville Court of Appeals, in the *Decker* v. *U.S.A.* case, referred to the notion of courtesy among nations as the foundation of immunity. Although in the case in question the immunity from jurisdiction of the United States was ruled out, the judgment started with the following consideration: "that it is a matter of international tradition, based on a notion of courtesy in regard to foreign sovereignty that is indispensable to good understanding among countries and unanimously admitted, that foreign States ... enjoy immunity from jurisdiction" (judgment of May 29, 1956, Pas. 1957, II, 56).

d) Equality and reciprocity

We saw under a) that the principle of equality is often invoked in Belgian judicial decisions. But in basing the immunity from jurisdiction of foreign States on it, the Belgian Courts and Tribunals did not generally have in mind a principle of international law. They proceeded rather by reference to Belgian internal law which has for a long time admitted the immunity from jurisdiction of the Belgian State when acting *iure imperii.* Now a foreign State recognised by Belgium and on an equal footing with Belgium, cannot be subject to the jurisdiction of our Courts and Tribunals for any the acts on account of which the Belgian State is exempt.

On the subject of the immunity of the Belgian State, we may quote the judgment of the Brussels Court of November 18, 1897, rendered in the *Durdec* v. *Belgian State* case, where we read that "acts emanating from the State, considered in its political function, are not within the competency of the Courts" (Pas. 1898, III, 43). Now precisely in the *Boshart* case of February 5, 1898, the Brussels Court declared "that the civil courts that would be competent to deal with an act of this nature emanating from the Belgian government, are equally competent when the State in question is a foreign one of which the independence has been recognised" (Pas. 1898, III, 306). And in the *Ottoman Government* v. *Gaspary and Sloisberg* case, (judgment of November 24, 1910) the civil Court of Antwerp judged that "the acts by means of which the public powers of a State are asserted do not come under the control of the judicial authority either of the country itself or of a foreign country" (Pas. 1911,

[12]) Journal des Tribunaux [JdT], March 6, 1938, N° 3525.

III, 105). The same attitude is found in the *De Croonenbergh* case (Pas. 1896, III, 253).

Although the position of the Belgian State before its own Courts and Tribunals has heavily influenced the attitude adopted by these towards foreign States – and most particularly in the elaboration of the so-called restrictive theory of immunity from jurisdiction – it seems now to be of no importance. In fact, since then, the Belgian State has become accountable to its own Courts, even for acts by which its capacity as a public power is asserted; whereas for foreign States, jurisprudence continues to distinguish between acts accomplished *iure imperii* and those accomplished *iure gestionis*. Thus this interesting interpretation of the principle of equality no longer has any bearing on the matter. This clearly demonstrates how dangerous it is to borrow elements of a solution from public law and private internal law, when the solution has to be sought in the application of principles of international law.

Sometimes Belgian Courts have accorded foreign States the same treatment in the matter of immunity as that accorded by foreign Courts to the Belgian State. In the *De Roover* case, the Antwerp civil Court, after motivating the immunity of the French State by the usual classic arguments (sovereignty, independence and autonomy), added that "during the war the French Courts worked on this principle in that they abstained carefully from any criticism concerning the use of Belgian public powers in France" (Pas. 1920, III, 94). We shall meet the theory of reciprocity again in dealing with immunity from execution.

II. Immunity from jurisdiction of a federated State

Belgian jurisprudence only provides us with a single case where proceedings have been instituted against a federated State. This was the *Feldman* v. *The State of Bahia* case that came before the Brussels Court of Appeal in 1907. It is a very important one, regarding both the position of federated States before Belgian Courts and Tribunals, and the immunity from jurisdiction on account of loans. The case originated in a decision of the Governor of the State of Bahia to launch a foreign loan. To do so he authorised a man named de Carvalho to negociate the conditions of the loan. The Government of the State in question undertook moreover to grant to M. de Carvalho or someone proposed by him, the necessary powers to sign the contract. Finally a verbal agreement was reached in Brussels on October 15, 1903, between M. Worms, director of the «Omnium industriel et commercial» in Paris, acting on behalf of the Government of the

State of Bahia, on the one hand, and M. Feldman on the other. Alleging the violation of the agreement, M. Feldman had a writ issued against several banks by the Commercial Court of Brussels, and in so far as possible, against the State of Bahia. As reparation the appellant demanded payment of the sum of 250.000 Frs by way of damages and interest. The State of Bahia pleaded the incompetency of the Court owing to the sovereignty of the foreign State. The Commercial Court had omitted to make a ruling on the defendant's plea, so the verdict was annulled.

To settle the question of the immunity from jurisdiction of a federated State, the Court of Appeal referred to public foreign law, on this occasion, to Brazilian Law. First it was established that the Belgian executive power recognised the United States of Brazil as a sovereign State, and that this recognition implied that of the foreign State "as it is constituted". The United States of Brazil consist of a certain number of States that claim sovereignty; but absolute and complete sovereignty, from the standpoint of international law, appertains only to the federal State. Each of the member States of the Federation, however, disposes of powers of its own; thus the 1891 constitution of the State of Bahia acknowledges the right of the general assembly of this State to legislate on all matters of interest to the State, with the exception of those specially reserved for the federal power or municipal power. From this the Brussels Court drew the following conclusion: "if an isolated State is ... summoned before a Belgian tribunal, it is indispensable, in order to verify whether it acted as sovereign in accomplishing the act that provoked the dispute, to discover whether such an act depends on its exclusive sovereignty".

If the act in question comes within the exclusive sphere of the federated State, as defined both by the federal constitution and its own, "then it has been posited by a sovereign State, and consequently the scrutiny and criticism of its expediency do not come within the scope of the Belgian Courts". Now from the constitution it appears "that the act of authorising and that of contracting a loan ... constitute acts of the sovereign power of the State of Bahia". Thus if the Governor of the State of Bahia contracted a loan authorised by the legislative power, it was an act of the sovereign power of the State in question, and the Belgian Courts are incompetent to deal with it. But all "the accessory facts, not indispensable to the authorised emission, although connected with it, are not acts of sovereign power but simple agreements which the Belgian Courts are competent to deal with ...".

As it happened, the Governor of the State of Bahia had only authorised M. de Carvalho to find a lender and discuss the conditions of the loan.

This authorisation, which carried no delegation of powers with it, and was simply a proxy, "does not constitute an act of sovereignty". The Belgian Courts would have been without jurisdiction "to judge of the legality and expediency of the authorisation given (by the parliament) to the Governor ... to contract the loan ... by the very fact that it was effected by the head of the executive power". But they were competent "to estimate the relations that existed between him (the Governor) and third parties for the purpose of finding lenders and discussing their conditions". Finally the Court decided that there was no question of a commercial deal, and that the commercial Courts were therefore incompetent to settle the dispute; this competency belongs to the common law Courts (Pas. 1908, II, 55–58).

This judgment therefore admits that a federated State can benefit from the immunity from jurisdiction, so long as the dispute concerns an act, qualified as sovereign, posited by the State in a sphere coming under its exclusive competence as laid down by constitutional law. We consider however that this is going too far. The possibility of international law referring back to constitutional law cannot be excluded; this is what happens for instance when we need to know to what extent a federated State has the capacity to conclude a treaty. The State must be considered as sovereign in the matters on account of which it has been granted such capacity. But if certain matters are reserved to the exclusive sphere of federated States, without their having been invested with the capacity of concluding international agreements, their sovereignty remains purely internal. For foreign States, only the federal State is a State in the international law sense. Now according to the 1891 constitution, federated States, while possessing the power to maintain local armies and grant concessions to foreigners, as well as to borrow, had not the capacity to conclude treaties with a foreign State.

Independently of this question, the judgment is likewise important in that it admits that the fact of contracting a loan constitutes an act of sovereign power or *iure imperii*. But according to Belgian law, this act does not constitute an act of commerce, but rather an act "concluded according to the procedures of private law" [13]).

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[13]) G. van Hecke, Problèmes juridiques des emprunts étrangers (2nd ed. 1964), p. 291.

III. The theory of restricted immunity

Now that the State takes part in international trade more and more frequently, the question arises as to the protection of private foreign co-contractants. Supposing a State violates its contractual obligations, can the private individuals involved be left without protection? Can the principles of the independence and sovereignty of the State be regarded as a screen behind which States can retire to escape from the consequences of an eventual breach of contract? In very early days Belgian judicial proceedings showed themselves averse to absolute immunity from jurisdiction of foreign States. We know that the distinction between the State acting as public power and the State acting as private person has now become classic in Belgian legal practice. In this section we intend merely to quote the more important judgments of this kind. Then we shall turn our attention to the question of criterion of distinction between acts *iure imperii* and acts *iure gestionis* as applied in Belgian judicial practice. Finally we propose giving a survey of the acts acknowledged as appertaining either to *ius imperii* or to *ius gestionis.*

1. The evolution of jurisprudence

Already in the first case relating to immunity, the 1840 one opposing the *Société Générale* to the *Syndicat d'Amortissement,* the question the judges had to face was whether the Syndicat, one of the great financial undertakings of the Netherlands State, acting for the State and in the name of the State, could be sued before Belgian Courts. We already mentioned that the Court admitted the absolute immunity of the foreign State, in declaring that Article 14 of the Code Civil was inapplicable to ambassadors as well as to the nations they represented. This was however not the opinion of the Attorney General.

In his indictment he admitted that "a foreign government, regarded as sovereign power, could not be summoned to the bar of a Belgian Court for as such it could not even be summoned before the courts of its own country". But, he added, as in the case under consideration, an attachment was effected by the Syndicat which was only summoned before the court because of "obligations contracted towards or by a private establishment in Belgium, in the same manner and on the same grounds as if they had been contracted by a private person, what is in question is solely the power of contentious jurisdiction to judge a purely civil dispute" (Pas. 1841, II, 40).

Nearly forty years went by before this proposition was finally accepted.

It was in 1878 that a Belgian court refused to admit the immunity from jurisdiction of a foreign State in a purely civil dispute: the Ostend commercial Court, to which a dispute was referred regarding the sale, by the Peruvian government, of a certain quantity of guano. The government in question contested the competency of the Court by invoking the principle in international law of the sovereignty of States. To this argument the Court replied "that indeed this principle may be valid when a government, remaining within the limits of its governmental function, takes measures favourable to its preservation or for actions dictated by public interest, but there can be no question of this when the government sells guano and, either on its own account or through intermediaries, posits acts or makes contracts which, always and everywhere, have been regarded as commercial contracts, subject to the jurisdiction of Commercial Courts" *(Rau, van den Abeele et Cie* v. *Duruty,* Pas. 1879, II, 175). This verdict was confirmed the following year by the Ghent Court of Appeal. Since then, with the exception of the *Braive* (Pas. 1902, III, 240) and *Tilkens* (Pas. 1903, III, 180) cases, the Belgian Courts and Tribunals have always distinguished between acts accomplished *iure imperii* and acts accomplished *iure gestionis.*

In 1903, the Cour de Cassation gave its blessing to the theory of restricted immunity in the famous case that saw the *S.A. des Chemins de Fer liégeois-luxembourgeois* in conflict with the *Netherlands State,* which we must now examine more closely. When the Netherlands Government was invited to re-imburse certain expenses incurred by the Belgian *Société des Chemins de Fer* on the occasion of the grading of the railway line linking Eindhoven to the Belgian border – this work and the re-imbursement having been foreseen in a contract concluded with the Netherlands government – the latter presumed on its immunity from jurisdiction. By judgment of May 22, 1901, the Brussels civil Court declared itself competent on the grounds that the dispute came under civil law. This judgment was quashed by the verdict of the Brussels Court of Appeal of February 7, 1902 (Pas. 1902, II, 162. We notice that in this verdict the Société is entitled *Société des Chemins de Fer liégeois-limbourgeois).*

The Cour de Cassation in its turn decided that the principle of independence of States, which is deduced from that of their sovereignty, cannot apply when this sovereignty is not involved. "In view of the needs of the community, [the State] can acquire and possess goods, enter into contracts, or become creditor or debtor; it can even engage in trade, hold monopolies, keep in its own hands the direction of services of general utility . . .". Now "in the management of such matters or services, the State does not involve its public powers but does what private individuals

can do, and therefore only acts as a civil or private person". In such cases the Belgian Courts and Tribunals are competent to deal with a dispute between a Belgian and a foreign State, and this competency derives "not from the consent of the amenable party but from the nature of the act and the capacity in which the State intervened" (Pas. 1903, I, 295–303).

We are now in a position to elucidate several points of the Court's reasoning in reaching its decision. First, it distinguished very clearly between activities in which the State remains within the limits of its public role, and those where it "acts only as a civil or private person". Then, it denied immunity from jurisdiction where private acts *(actes de gestion)* are concerned, in view of the nature of the act. By acting "in view of the needs of the community", and keeping in its own hands "the direction of services of general utility", "the State is not involving its public powers". The Court seemed to admit that the nature of the act is derived from the capacity in which the State acts ("as civil or private person"): if the State acquires and possesses goods, when it is engaged in trading, it "does what private persons can do". Finally, the Court deemed that the foreign State, by entering into a contract with a private person, does not implicitly renounce its immunity. This last argument has not always been held valid by Belgian Courts as we shall see later (*sub* IV).

The Cour de Cassation went on to make out a very interesting case for restricted immunity, declaring that "if the foreign State can bring a lawsuit before our Courts against its debtors, it must also be liable before them to its creditors". This argument is but another application of the principle of reciprocity, and it shows that the doctrine of restrictive immunity of States springs from the need to safeguard the interests of private persons in their transactions with foreign States.

Among other important cases worth mentioning, we will select the judgment of the civil Court of Charleroi of April 8, 1927, relating to a dispute between the *Société Monnoyer et Bernard* and the *French State.* The Société had made several deliveries to the Office de la reconstruction industrielle of Valenciennes, an organ of the Ministry responsible for the liberated regions, whose job it was to ensure the reconstruction of the invaded regions devastated by the war. The Office of reconstruction having omitted to pay the amount due, the Belgian Société issued a writ against the French State for payment of moratory interests and damages in view of the loss of exchange value due to delays in payment.

The French State countered this action with a plea of incompetency; it claimed that the Office's agents had acted as officials of the French State, a public power pursuing a certain useful purpose, and not as man-

dataries of the French State as a private person pursuing a commercial purpose. The Charleroi Court admitted that when the French State created the Office it acted as a public power. But "to perform its function (of reconstruction) after the war, the French State had had to effect purchases of all sorts of raw material, equipment, goods and products for maintenance, in order to get its works and industries back on their feet". All this concerned the administration of a service, and in this type of activity "the State's public powers are not involved; it only does what private persons can do, and thus, it acts as a civil or private person". Any dispute on the subject of such acts "is matter for the civil law", and in giving a ruling on the present dispute, "although the French State is involved, the Court is not in any way impinging on the sovereignty of that country ... because in fact the State is called to account for actions it has committed, not *iure imperiae* [*sic*], but *iure gestionis*" (Pas. 1927, III, 130–131).

We will now quote the most recent Belgian judgment on the matter of immunity from jurisdiction of a foreign State, that of December 4, 1963, given by the Brussels Court of Appeal in the case of *Dhlellemes and Marusel* v. *the Central Bank of the Republic of Turkey*. The appellant based his appeal on the obligation the Central Bank was said to have contracted, *i.e.* to transfer, in Belgian francs, within a certain time limit, the amounts due as the purchase price of merchandise imported into Turkey: but the purchase money had been paid in Turkish pounds. The bank, which was a person distinct from that of the State, might however in certain circumstances act as agent of the State. It presumed on this right to invoke immunity from jurisdiction. The Court deemed that, whatever the capacity of the body concerned (a foreign State, a State organ, a public concern, a public institution in the form of a society acting on behalf of the State), "the act is only covered by immunity from jurisdiction when it constitutes an act of government, or as it is sometimes put ... an act *iure imperii;* that on the other hand it does not come under this immunity when it is done *iure gestionis*". In the case under consideration, the obligation concerned was not an act of public power; "hence, without public power being invoked at all, on the occasion of a private deal, the defendant had merely accepted an obligation in conformity with legal provisions or international agreements" [14]).

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[14]) JdT, January 19, 1964, pp. 44–46.

2. The distinction between *iure imperii* and *iure gestionis* acts

It is one thing to present a theory of restricted immunity on the basis of a distinction between acts of public power and acts of administration, but quite another to put the distinction into practice. The theory remains incapable of solving practical problems so long as it is not in a position to define what acts are public in nature, and hence, in what cases immunity from jurisdiction might be granted. That is the major obstacle to the so-called restrictive theory. An examination of judicial practice reveals that two criteria are observed: that of the nature of the act, and that of the purpose pursued. We need only consider the difficulties encountered by French jurisprudence to realise the insufficiency of the criterion of the purpose pursued[15]). The weakness of this criterion has been adequately exposed by recent German and American judgments.

As far as concerns Belgian jurisprudence, it mainly applies the criterion of the nature of the act. But before we examine this theory more closely, let us remember that a number of judgments have approached the question of State immunity by way of that of Ambassadors. This was done by the Brussels Court of Appeal in its verdict of December 30, 1840, relating to the *Société Générale* v. *le Syndicat d'Amortissement,* in which we see "that the principles of international law applicable to Ambassadors are, on greatly superior grounds, applicable to the nations they represent" (Pas. 1841, II, 53). The Attorney General had, however, rejected this argument, deeming that the immunity of Ambassadors was of a merely functional character. He drew the following conclusion: "since the Ambassador of a foreign power is accountable to the Belgian courts for the personal property and the real estate he possesses in Belgium in any capacity other than that of ambassador, the foreign government he represents is accountable to the same courts for the goods and credits it has here in any capacity other than that of a sovereign power, and for any obligations contracted by it, according to the principles of civil law in Belgium" (Pas. 1841, II, 42). The argument *a fortiori* in favour of the immunity of States was taken up again in the *Braive* case, where we read, "what is right for the mere representative of a government, must *a fortiori* be so for the government itself" (Pas. 1902, III, 241). And in the *West Russian Steamship Cy Ltd* case, the Antwerp commercial Court declared, "it is inconceivable that, if such a degree of respect covers and protects the representatives of foreign governments and all that concerns them, the gov-

[15]) See on this subject the verdicts of the Paris and Rouen Courts in the case between *Société Bauer Marchal et Cie* and the *Turkish Government,* in Revue Générale de Droit International Public, 1965, pp. 1161–1163.

ernments themselves should enjoy less protection and have to see themselves treated like mere private persons" (Pas. 1920, III, 5); this text was itself a quotation from a judgment given by the same Court on November 11, 1876, relating to the case of the *Ottoman Government* v. *la Société de Sclessin e. a.* (Pas. 1877, III, 28).

To return to the criterion of the nature of the act, in its famous verdict of June 11, 1903, the Cour de Cassation deemed that its competency derives from the nature of the act and from the capacity in which the State intervened (Pas. 1903, I, 302); in the recent case of *Dhlellemes et Masurel* v. *Central Bank of the Republic of Turkey,* the Brussels Court of Appeal judged on December 4, 1963, that immunity is determined "by the nature of the act rather than by the capacity of the body performing the act" [16]).

According to established jurisprudence, the nature of the act is determined by the capacity in which a State acts. Our Courts therefore draw a distinction between the State acting "in the exercise of its imperium" and the State which "acted as a private person", and between the State acting "by virtue of its authority" and one "behaving as a civil person"; between the State "regarded in its political function", "behaving as a public power in the exercise of its political sovereignty", and the State "doing what private persons can do"; between acts "posited in the independance of its sovereignty" or "in the plenitude of the exercise of its sovereignty" or "within the limits of its sovereignty", and acts "of civil life" or which are not a part of "the essential attributions of public powers", all expressions having been used by Belgian Courts and Tribunals. It is easy to see that the criterion of the nature of the act only postpones the problem and does not solve it. What appears to be finally decisive for a Belgian judge is the capacity in which the State performs the act under consideration. But this solution risks running into the criterion of the purpose of the State's activity, as the following cases will show.

The first Court to apply the restrictive theory deemed that the State remains within the limits of its governmental functions "when it takes measures in the interest of its preservation or for acts dictated by the general interest" *(Rau, Van den Abeele et Cie* v. *Duruty,* Pas. 1879, II, 176). In the case of *De Bock* v. *Independent Congo State,* the Brussels Court of Appeal had to define the nature of a contracted engagement and examine the act of revocation of an agent by a foreign Government. Such acts, said the Court, are governmental acts "posited by the foreign State in the exercise of its imperium". To support its statement the Court examined

[16]) JdT, January 19, 1964, pp. 44–46.

the nature of the functions for which the agent had been engaged, and observed that he "began by being put at the disposal of the commandant of the police force, since he ... taught target practice ...; he then exercised the functions of superintendent of station, and ended up in the accountancy department". Those are not "services which a person renders to another person or to a State, under an ordinary contract", but "they are indeed the functions or occupations that an agent sent to a colony performs on behalf of the State, his employer, to which he submits, accepting its orders and regulations" (Pas. 1891, II, 420).

In the *Braive* case, the Justice of the Peace in Brussels favoured absolute immunity, and in motivating his judgment he concluded with the following statement: "were a distinction to be drawn between the acts of the foreign State, according to whether it acted as a public person or as a private person, the renting of premises for the establishment of an embassy would indeed take on the character of an act of public power" (Pas. 1902, III, 241). In 1920, the Antwerp civil Court qualified military requisitions as acts of public power consisting in the seizure by the State of "things essentially necessary for the army"; these requisitions depended on the sole will of the State acting in a case of public necessity (Pas. 1920, III, 94). Let us now mention a final case, relating to the engagement by the Canadian government of a woman appointed to its immigration service. This, said the Antwerp civil Court, is public service, since "the execution of the laws relating to immigration is of a purely administrative nature and the personnel employed to this effect fulfills a function that is essentially a public one" (*Epoux Perevostchikoff-Germeau* v. *State of Canada,* October 10, 1934, Pas. 1934, III, 37–38. See also the case of *De Decker* v. *USA,* Léopoldville Court of Appeal, May 29, 1956, Pas. 1957, II, 55–56).

The nature of the acts performed by States is not defined by international law, so it is the judge's function to distinguish them. This technique, though far from exceptional in international law, is nevertheless to be regarded with considerable reserve, specially when, as in the case under consideration, no identity of views exists on what is to be qualified as *ius imperii* or as *ius gestionis.* Regular and uniform judicial practice might have been conducive to the formation of a rule of customary law, but so far this has not occurred. In some States, like Belgium, commercial acts are clearly defined (Code de Commerce, Book I, Title I, articles 2 and 3), and judges have sometimes referred to it to qualify an act performed by a foreign State *(Feldman* v. *State of Bahia,* Pas. 1908, II, 58;*Szczesniak* v. *Backer & cs,* Pas. 1957, II, 40). However it would be erroneous to believe – as did the judge in the *Feldman* case – that all that does not fall

within the compass of this definition automatically becomes an act of government, an act performed *iure imperii;* apart from acts of commerce there exist other acts performed *iure gestionis.* Moreover, there is surely an element of risk in qualifying an act performed by a foreign State in terms of internal law. For in a foreign State the same act may be regarded as a typical expression of the sovereignty and political power of the State, while internal jurisdiction would qualify it as an act of commerce. A regrettable situation might arise if one day the courts of a foreign State were required to deal with an act committed by the State whose internal law defines commercial acts and applied the principle of reciprocity, consequently qualifying the act as performed *iure gestionis.*

And what solution would be adopted by States whose legislation lacks any definition of acts *iure gestionis* – and, as far as Belgium is concerned, what is its attitude to acts other than acts of commerce? It should surely be agreed that the judge is not the proper organ for deciding on the nature of an act; for by arbitrary qualification the judge can turn aside the problem posited by the Act of State doctrine. To these objections we may add another: even within a single State, it is no less difficult to achieve uniform and regular jurisprudence regarding the qualification of a given act. In the matter of State loans, for instance, Belgian jurisprudence is not uniform. In the *Croenenbergh* v. *Strauch* case, the civil Court of Brussels deemed in 1893 that the independent Congo State benefited by immunity from jurisdiction (Pas. 1896, III, 32), and in the *Feldman* case, the Court of Appeal decided in 1907 "that the fact of authorising and the fact of contracting a loan ... constitute acts of the sovereign power of a State" such acts not being mentioned as among the acts of commerce (Pas. 1908, II, 57). But in the case opposing the *Perevostchikoff-Germeau* couple and the *Canadian State,* the Antwerp civil Court in 1934 mentioned loans among the acts posited by a State acting as a civil person (Pas. 1936, III, 38).

Thus the theory of restricted immunity, although reasonable in principle, is still far from solving the problem. Even if agreement is reached on the criterion of the nature of the act, the divergencies of view remain entire, either because the nature of an act is determined, in the last resort, by its purpose, or because internal law – or rather laws – are too heterogeneous, or even non-existent. It must however be admitted that in general Belgian judges have applied the criterion of the nature of an act in a reasonable manner, and the theoretical objections do not apply to Belgian judicial practice. There is no doubt that the rather small number of cases our judges have had to deal with is not without effect.

Our elaboration of the distinction between acts performed *iure imperii* and acts performed *iure gestionis* has now reached the point where we shall examine very recent developments in both American and German jurisprudence. In the case of *Victory Transport* v. *Comisaria General de Abastecimientos y Transportes*, the U.S. Court of Appeals, 2d Circuit, criticising both the criteria of the purpose and of the nature of an act, put out a list of exclusively sovereign acts for which the foreign State should always have the benefit of immunity from jurisdiction. Such acts are formulated as follows: 1) internal administrative acts, such as expulsion of an alien, 2) legislative acts, such as nationalization, 3) acts concerning the armed forces, 4) acts concerning diplomatic activity, 5) public loans. And the Court added "should diplomacy require contraction of these categories, the State Department can issue a new or clarifying policy pronouncement" [17]).

An identical solution was adopted by the Bundesverfassungsgericht on April 30, 1963. The *lex fori* could not deny immunity except for acts which plainly did not belong to the sphere of State power in the strict sense as defined or accepted by most States. Among typically sovereign acts the Federal Court lists: acts concerning diplomatic and military activities, the exercise of police power and legal procedure *(die Betätigung der auswärtigen und militärischen Gewalt, die Ausübung der Polizeigewalt und die Rechtspflege)*. For all other acts, immunity may be accorded, but there is no international obligation except for those listed.

Belgian courts and tribunals themselves are in the habit of quoting examples of strictly political or public acts. In the *Dhlellemes et Masurel* case, for instance, the Brussels Court of Appeal deemed that "regulating foreign trade, concluding commercial or payment agreements with foreign countries, enacting transfers of currency or forbidding them, constituted acts of public power, since, in those cases, the State ... makes decision of authority in the exercise of its prerogatives, and exercises its governmental powers" [18]).

We may however wonder whether States can come to an agreement on acts that must always be considered as performed *iure imperii*. The Bundesverfassungsgericht asserts that the acts listed must necessarily, on the basis of international law, be regarded as acts performed *iure imperii*. But this presumed general norm still does not rest on any general practice acknowledged as being the law. We need but recall the public loans mentioned in the list quoted in the *Victory Transport* case, which do not appear among

[17]) AJIL vol. 59 (1965), p. 389.
[18]) JdT, January 19, 1964, pp. 44–46.

the acts given by the German Federal Constitutional Court. In both cases, the list contains acts that are formulated much too broadly to be applied in a judicious way by the courts. If, as we are doing, we start from the principle of the general and exclusive competency of the courts, the exceptions to this competency must be formulated clearly and precisely, and, hence, immunities "should be accorded only in clear cases" [19]). The drafting of such an accurate and sufficiently detailed list of exceptions remains to be done, and a comparative study can certainly contribute to it.

3. Statement and classification of acts

In Belgian jurisprudence, acts considered as performed *iure gestionis:* sales contracts (Pas. 1879, II, 175) and transfer contracts (Pas. 1911, III, 105), together with the sale of war booty (Pas. 1922, III, 120 and Pas. 1926, III, 121), contracts for the purchase of munitions (Pas. 1889, III, 62), mandates (Pas. 1896, III, 252), the location of property (Pas. 1902, III, 240), the administration of a railway line (Pas. 1903, I, 294), salaries and rents for crews, the engagement of seamen to man the merchant navy (Pas. 1957, II, 38), contracts for the transference of local currency into foreign currency (JdT, January 19, 1964, p. 44).

Acts considered as performed *iure imperii:* the appointment and recall of an agent (Pas. 1891, II, 420; Pas. 1898, III, 305; Pas. 1957, II, 55), the renting of premisses for the installation of an embassy (Pas. 1902, III, 240), the reception and preservation of a surety to ensure the presence of an individual at all acts of repressive procedure directed against him (Pas. 1903, III, 180), to authorise and contract a loan (Pas. 1908, II, 55, see however: Pas. 1934, III, 37), military requisitioning (Pas. 1920, III, 94; JdT, March 6, 1938, No 3525), the annulment of claims or securities held by enemy subjects (Belgique Judiciaire 1932, 482), the regulation of foreign trade, decreeing measures for safeguarding the currency, concluding agreements for trade and payments, decreeing transfers of currency or forbidding them [20]).

IV. The waiver of immunity from jurisdiction

The waiver by a foreign State of its immunity from jurisdiction is admitted in Belgian jurisprudence. The Court of Appeal of Léopoldville took this into account when pronouncing judgment in 1956 in the case of *De Decker* v. *U.S.A.;* among the exceptions to immunity from jurisdiction of a foreign State, the Court mentioned in particular "an express waiver,

[19]) *Victory Transport,* AJIL vol. 59 (1965), p. 389.
[20]) JdT, January 19, 1964, p. 44.

even a tacit one, provided it is certain and regular on the part of the beneficiaries" (May 29, 1956, Pas. 1957, II, 55–56). In the *West Russian Steamship Co.* case, the Antwerp Court rejected the company's allegation that the fact that the Finnish State itself instituted proceedings before a Belgian Court was equivalent to an implicit waiver of its right to claim immunity from jurisdiction. The Court replied "renunciations are not to be presumed; ... The Finnish State never declared that it wished to renounce the benefit of its sovereignty and submit to the Court's decision the question of knowing whether the right of possession it exercised ... was legitimate" (Pas. 1920, III, 3–6).

But what would make a waiver deliberate or express is never precisely defined in jurisprudence. Anyhow, a contractual stipulation by which the parties concerned (a foreign State and a private firm) would undertake to submit all disputes bearing on the interpretation or application of the contract, to an arbitration council consisting of members chosen by both parties and an umpire appointed by the President of a Belgian Commercial Court, does not amount to a waiver of immunity from jurisdiction before Belgian Courts (judgment of the Antwerp Court of November 11, 1876, in the case of the *Ottoman Government* v. *La Société de Sclessin*, Pas. 1877, III, 29).

Several decisions have admitted that the foreign State, by entering into contract with private persons or performing acts of commerce or acts *iure gestionis*, automatically waived its immunity from jurisdiction. Thus in the case of the *Société pour la Fabrication de Cartouches* v. *Colonel Mutkuroff*, the Brussels Court deemed that "the Bulgarian State, in entering into contract with a Belgian firm for the purchase of cartridges, acted as a private person, voluntarily accepting, in the absence of any stipulation to the contrary, all the civil consequences of the contract; and hence, the rules of competency, substance and form that govern the legal action that has issued from this contract" (December 29, 1888, Pas. 1889, III, 62). This statement is repeated almost word for word in a judgment of the same Court dated January 4, 1896, in the case of *De Croonenbergh* v. *Independent Congo State* (Pas. 1896, III, 252–253). An identical opinion is professed in the *Lemoine* case concerning the sale by the British State of war booty and other material. The Brussels Court judged that "the British State is summoned before the Court on the occasion of a deal it concluded as a private person, with the intention of submitting to the obligations that issue from such a contract for a private person" (Judgment of February 2, 1922, Pas. 1922, III, 120; judgment of October 12, 1925, Pas. 1925, III, 121).

In the case opposing the *Société du Chemin de Fer liégeois-limbourgeois* and the *Netherlands State*, the Brussels Court of Appeal admitted, in its verdict of February 7, 1902, that a State's waiver of its immunity from jurisdiction might be presumed from the conventional attribution of jurisdiction to foreign courts, the bringing of an action before a Belgian Court, and the absence of any dispute as to the jurisdiction. "In these cases", said the Court, "there is always, expressly or implicitly, evidence of the State's intention to accept the jurisdiction of the Belgian Court, but we are not entitled to deduce from this fact that it can be constrained to do so" (Pas. 1902, II, 164). This verdict, as is known, was quashed by the Cour de Cassation. This Court decided that waiver might conceivably occur in the case of a "matter that broaches on inalienable prerogatives", but not over a contract; in this case, "competency derives not from the consent of the justiciable party but from the nature of the act and the capacity in which the State intervened" (Pas. 1903, I, 302).

Once more, this decision touches the bottom of the problem: when the sovereignty of a State is not at stake, there can be no question of immunity; so a waiver of immunity is superfluous. The courts have jurisdiction by virtue of the very nature of the act, because it has nothing to do with the State's exercise of sovereign power. It is only when the State acts *iure imperii* that it can waive its immunity. So the Léopoldville Court of Appeal was right, in its verdict of May 29, 1956, to distinguish between jurisdiction in virtue of "an express waiver, or even a tacit one, provided it is certain and regular", and the fact of "acting like ordinary private persons according to the procedure of private law" (Pas. 1957, II, 56).

V. Immunity from execution

Until the case of *Socobelge* v. *The Hellenic State* (1951), Belgian jurisprudence constantly reaffirmed the principle of immunity from execution for foreign States. Distraints and conservatory seizures have always been declared invalid when applied to the property of a foreign State, even when the dispute originated in an act accomplished by the State *iure gestionis*. We need but refer to the judgments and verdicts in the following lawsuits: *Ottoman Government* v. *Société de Sclessin e.a.* (Pas. 1877, III, 28), *Netherlands State* v. *Société des Chemins de Fer liégeois-limbourgeois* (Pas. 1902, II, 162–3), *Braive* (Pas. 1902, III, 240–1), *Tilkens* (Pas. 1903, III, 180), *Société des Chemins de Fer liégeois-luxembourgeois* v. *The Netherlands State* (Pas. 1903, I, 302), *Ottoman Government* v. *Gaspary and Sliosberg* (Pas. 1911, III, 104–5), *Portuguese State* v. *Sauvage* (Pas. 1922,

II, 53–4), *Bastin et cs.* v. *Hellenic Republic and Socobelge* (Belgique Judiciaire 1932, 502), *Brasseur et cs.* v. *Hellenic Republic and Socobelge* (Pas. 1933, II, 208), and *Urrutia* (JdT, March 6, 1938, No 3525).

This consistent jurisprudence does, however, present certain special features that we should note briefly before passing on an analysis of the *Socobelge* case.

We recall that in the years 1902 and 1903 three verdicts admitted total immunity from jurisdiction precisely because the property of a foreign State was not distrainable. Hence "a competency translated by judgments impossible to execute, an order without sanction, injunctions without coercive force" would not be in conformity with the dignity of the judiciary power *(Braive* case, Pas. 1902, III, 240–1; *Tilkens* case, Pas. 1903, III, 180; case of *Netherlands State* v. *Railway Society,* Pas. 1902, II, 162–3). The objection was finally set aside in 1903 by the Cour de Cassation. This Court made the point that Belgian courts are competent to judge the Belgian State itself, although its property is not distrainable; that moreover "the validity of a judgment is independent of the difficulties that its execution might present"; and finally that the argument in question lost sight of "the moral authority attached in our modern societies to a judgment rendered by independent judges" (Pas. 1903, I, 302). Thus, immunity from jurisdiction was definitely dissociated from immunity from execution.

The first important lawsuit relating to the immunity from execution of a foreign State took place in 1921; the *Portuguese State* was in litigation with a Belgian national, *M. Sauvage.* The latter, taking advantage of a claim against a shipping company, *Transportos Marítimos do Estado,* a State agency, obtained from the president of the commercial court two garnishee orders permitting him to distrain upon two ships of this Agency for purposes of conservation. These orders were executed. Before the Brussels Court of Appeal the Portuguese State maintained that these ships, assigned by it to public service, were its property and hence, were not distrainable. The Court declared the orders to be void, affirming that "the Belgian courts are, in an absolute sense, without competency to authorise such distraints".

It is of interest, to analyse the Court's reasoning. First, it noted the impossibility of forced execution against the Belgian State "because its creditors cannot hinder the working of the public services the government is duty-bound to provide". Then, the Court appealed to the principle of equality of States and accordingly granted the same immunity to other States, though these would benefit from the immunity only when they

"admitted immunity from seizure in their own country of their own national property" (Pas. 1921, II, 54).

This last point, endorsing as it does one aspect of the principle of reciprocity, seems to us to seriously weaken the absolute character of immunity from execution. On the hypothesis that measures of execution should be permitted in Belgium against the Belgian State, the foreign State should equally be subject to them, in virtue of the principle of equality, whatever the practice of that foreign State in regard to its own property. If, on the other hand, the Belgian State benefitted from immunity from execution, the foreign State could not do so in spite of the principle of equality, unless it admitted at home the immunity from seizure of its own property. In both hypothesis there is implicit a conflict between the principle of equality and that of reciprocity. In the last resort, the Belgian judge would have to take into consideration both Belgian practice and the practice of the foreign State, which amounts to denying the existence of a rule of international law obliging States to grant mutual immunity from execution to one another. If that is the meaning of this verdict, then it is hard to understand the reason why the Court of Appeal later affirmed that "this restriction of national sovereignty finds its grounds in the courtesy that exists between nations and in their reciprocal duty not to disturb the conditions of their existence".

It seems to us that if the principle of reciprocity is to be applied in a sensible way, it must be interpreted as follows: since the property of the Belgian State benefits in Belgium from immunity from execution, the same should apply to the property of a foreign State, provided that it, too, likewise admits in its own country immunity from seizure of property belonging to the Belgian State. The curious formula, "immunity from seizure in their own country of their own national property", used in this verdict, may perhaps be explained by the fact that the Court deemed that if a State admits in its own country immunity from seizure of its own property, the property of a foreign State would likewise be immune to forced execution. In any case we may conclude from this verdict in the *Portuguese State* v. *Sauvage* case, that the immunity from execution of a foreign State is only conditional.

There is another remark to be made. It is occasioned by a close reading of the verdict to the effect that the principle of equality of States, already limited by the principle of reciprocity, appears to be also limited by the intended purpose of the property, although the verdict is not very categorical on this point. The Court of Appeal repeatedly insists on the fact that the distrainable property is used for public services, and that

forced execution would be out of the question because it would hinder "the working of the public services which the government is duty-bound to provide". Further on, the Court affirms, however, that the State benefits equally from immunity from execution in relation to other property. This follows from the passage where the Court recognises immunity from execution "all the more so when the property has an attribution determined as above", that is, to public services. It means that this property is in any case safe from forced execution, but that the same probably holds for other property. In spite of appearances, a doubt does seem to exist as to the liability to distraint of property not assigned to public services.

In 1933, in one of the lawsuits in connection with the *Société Commerciale de Belgique*, the same Court of Appeal stressed that no more than the Belgian State, could a foreign State be subjected to measures of forced execution. The Court based its argument on "the principles of public international law, which recognises the equality of States". The verdict, however, no longer contains that curious reference to reciprocity asserted in 1921, but finds it sufficient to add that as far as immunity from execution is concerned, "there is no occasion to distinguish between the public and private spheres of the debtor State, or to discover whether, in entering into a contract, it did so as a public power *(iure imperii)* or as civil person *(iure gestionis)" (Brasseur et cs.* v. *Hellenic Republic and Société Socobelge*, verdict of May 24, 1933, Pas. 1933, II, 208). In the *Urrutia* case, judged by the same Court in 1937, we meet again only the one principle of equality of States as basis for immunity from execution[21]).

We observe that in all these cases the measures taken consisted in garnishment or conservatory seizure. The parties concerned were not convinced that this was a real measure of execution: they insisted in fact that the distraint was of a preventive nature and could only become a measure of execution by an adjudication of ratification (validation). The Belgian Courts and Tribunals have always refused to accept this argument, deeming that the garnishment "is in fact an approach to forced execution" *(Sauvage* case, Pas. 1921, II, 54; *Brasseur et cs.*, Pas. 1933, II, 208), since, already at this stage of the procedure, the State is "deprived of the free disposal of its property" (Pas. 1921, II, 54).

By far the most important Belgian judgment in the matter of immunity from execution is without doubt the judgment of April 30, 1951, of the Brussels Court of First Instance, in the case of *Socobelge* v. *the Hellenic State*[22]). The facts are as follows:

[21]) JdT, March 6, 1938, N° 3525.
[22]) Journal du Droit International, vol. 79 (1952), p. 244.

In 1925 the *Société Commerciale de Belgique* concluded a contract with the Greek government by which it undertook to repair and construct certain railway lines in Greece. The agreement also provided for methods of payment and contained an arbitration clause stipulating in effect that the decisions of the arbitrators were final and without appeal. On July 1, 1932, the Greek government, having become insolvent, decided to suspend the re-funding of all its loans. In 1936, a first arbitrators' decision annulled the contract, while a second condemned the government to pay the *Société Commerciale* a sum of approximately seven million gold dollars. The Greek government refused to give effect to this judgment. After trying in vain to settle the dispute by diplomatic means, the Belgian government decided to espouse the case of the Société and presented a plea at the Permanent Court of International Justice. By its judgment of June 15, 1939, the Court declared that the two arbitral awards were final and obligatory[23]).

The Greek government, however, continued to refuse to honour its debts. A first distraint permitted the Socobelge to recuperate the sum of 111.384 $ without any reaction from the Greek government. In 1950, the Société again let important sums be seized, sums which were due to the Greek government or the Bank of Greece. Summoned for ratification of distraint, the government began by presuming on its immunity from jurisdiction but gave this up in the course of the proceedings, while claiming immunity from execution. The Court rejected this plea, thus reversing the previous jurisdiction. We will now examine how the Court reached this surprising conclusion.

The Greek government had first of all insisted that immunity from execution was based on the principle of equality of States: since a forced execution on the property of the Belgian State is impossible in Belgium, then the Greek State should also be immune to it. This argument, which had been admitted by all previous jurisdiction, was rejected by the Court on the basis of the following considerations:

– The immunity of State property is not a legal principle: "Belgian legislation has, in general, made no provision regarding enforced executions exercised either against the Belgian State or against foreign States". The impossibility of enforced execution against the property of the Belgian State is merely a principle taught as a matter of doctrine.

– The Court moreover qualified the Greek government's objection as a theoretical one since "it is a well-known fact that the Belgian State admits

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[23]) Société Commerciale de Belgique, Series A/B N° 78. See Verzijl, The Jurisprudence of the World Court, vol. I (1965), p. 584 ff.

res judicata and automatically enters in the budget ... the amount of damages awarded against them".

Finally, even if the property of the Belgian State was not distrainable, it would be by reason of certain factors arising out of Belgian internal *ordre public, i.e.* participating factors which are part and parcel of the "general interest" of the Belgian community to which "the property of the State is assigned" and which it is important not to "divert from its destination". Consequently, this major interest "does not apply in the case of a foreign State having concluded a *negotium* in Belgium".

A first important conclusion immediately emerges from this reasoning: by accomplishing acts *iure gestionis,* a government would forego the benefit both of immunity from jurisdiction and of immunity from execution. But since the judgment mentions State property as "allocated for the general interest", – a qualification that at least one part of the doctrine reserves to the State's public sphere *(domaine public)* – may we not wonder whether immunity from distraint is not limited to that property? In this hypothesis, the property belonging to the private sphere *(domaine privé)* would not be unassignable.

The first part of the argument likewise calls for some critical remarks. It is true that the unassignability of Belgian State property is not a part of the written law: it is simply a principle applied by jurisprudence and recognised by the doctrine. Only the fourth law of November 28, 1928 – included to introduce in Belgium the 1926 Brussels Convention on the Immunity of State ships – placed ships belonging to the State and those the State employs for freighting under the rule of common law. (See the judgment of the Brussels Court of Appeal of July 14, 1955, in the *Szczesniak* v. *Backer et cs.* case [Pas. 1955, II, 38].) It is also true that the Belgian State accepts *res judicata* and that in general it makes voluntary reparation for any damage caused. But in no case is forced execution on State property possible. In consequence, the application of the principle of equality can never lead to the conclusion that execution on foreign State property is permissible. At the very most, the Court could have concluded that the Greek State was under obligation to repair the damage done, as the Belgian government does, on a voluntary basis.

Evidently the parties to the dispute had produced a great deal of doctrine and jurisprudence to buttress up their respective arguments. But, said the Court, "such opinions do not interpret a written law but rather a custom whose development depends on factors which have given rise to it". The new situation, emerging from more and more active participation of the State in international trade, demands an adaptation of juridical principles.

Jurisprudence has to take into account such facts as these and declare what is just, not with "eyes looking into the past", but "taking into account only of present circumstances and having in mind the future". Inter-State relations are dominated by the recognition and mutual respect of sovereignties. "The sovereignty of a State is not an absolute, vis-à-vis which the other States can only adopt an attitude of unconditional adhesion; such a conception ... would be in strict contradiction with the very concept of an ordered international immunity". It is impossible to overstress the importance the Court attaches to the principle of sovereignty rather than to principles of equality and independence of States; what is vital is to know whether the State behaved as though it were sovereign, and whether a jurisdiction, or even an execution, would affect that sovereignty.

To support its argument of complete immunity from execution, the Greek government also appealed to the notion of international courtesy. Now the Court observed that neither the arbitral procedure, nor the procedure followed before the Court, affected good relations between the two countries. Courtesy moreover assumes reciprocity. To admit the Greek government's attitude would mean no reciprocity, for having accepted the jurisdiction of the Belgian Courts, the Greek government then refused execution on its property in Belgium, an "execution which the Belgian State, when condemned, willingly accepts". Finally, if the Greek government obtained a judgment in the capacity of plaintiff, it certainly would consider itself entitled to execute it in Belgium. If it held itself legally dispensed from executing the judgments that condemn it as defendant, reciprocity is merely illusory. Then the Court put forward the following statement: "that confidence is an essential factor in both national and international transactions and that the normal course of such transactions cannot be greatly influenced by the fact that they are sanctioned by a judgment which ... ensures execution on foreign property in Belgium".

The judgment in the *Socobelge* case is an extremely important one because it recognises, for the first time, a restriction on the immunity from execution of foreign States. In principle, we subscribe to the Court's conclusions; to admit absolute immunity from execution would be illogical when the jurisdiction of the Courts is already recognised for acts performed *iure gestionis*. This restricted immunity from jurisdiction has no meaning if the judgment is not in fact allowed to be enforced. If it is correct that the exercise of jurisdiction is permitted when the State does not act in a sovereign capacity, there seems to be no reason why execution should be forbidden when it does not affect the sovereignty of the foreign State

either, that is, when it bears on property that is not necessary for the exercise of sovereignty. Any other solution would not only be illogical; it would likewise affect the international circulation of capital and international transactions of all kinds.

This does not, however, mean that in all cases where immunity from jurisdiction is not at stake, forced execution should be possible. Jurisdiction and execution are not absolutely bound together. It is, too, on this point that the judgment in the *Socobelge* case calls for some reservation. In matters of jurisdiction, it is wise to keep an eye on the nature of the act, that is, we need enquire whether the State acted in its sovereign capacity: was the act a typical expression of the sovereign power of the State? On the other hand, when it comes to execution, it is the intended purpose of the property that must be examined.

Traditionally a distinction is made between a State's public and private property. Execution should only be possible against private property, that is, property not allocated for use in the general interest of the community, or not necessary for the proper functioning of the public services. Whether the distinction between the State's public and private domain is not just as difficult to establish as that between acts performed *iure gestionis* and *iure imperii*, remains a real problem that we do not have to solve here, but which will have to be taken very seriously when the restrictive theory spreads to the sphere of forced execution. Perhaps would it be possible to reach an agreement along the following lines: international law does not contain a valuable criterion for distinguishing between public and private domain; this distinction has to be made according to the law of the *forum*. This *renvoi* is already accepted for the sake of distinguishing between acts *iure gestionis* and *iure imperii*. It is furthermore accepted in the law of State succession: in the case concerning *Certain German Interests in Polish Upper-Silesia*, the Permanent Court of International Justice decided that, in order to know what belonged to the public domain of a State, one had to look at the law in force at the moment of transfer of sovereignty (Series A, No 7, 41). Now the judgment given in the *Socobelge* case does not seem to have made a clear distinction on that point, and to the degree that it admits execution on all State properties, it certainly goes beyond positive contemporary international law. In our view, execution should be excluded in all cases where it would impinge on the sovereignty of the foreign State, that is to say, when it concerns property indispensable for the proper functioning of public services such as public funds. Finally, one has to be fully alive of the importance of the function the principle of reciprocity always had in solving these problems of State immunity.

We are of the opinion that this principle (combined with the one of non-discrimination) has to be recognised as a legal principle applicable to the doctrine of sovereign immunity in the same way as it governs the law of diplomatic intercourse as codified in Vienna in 1961.

Some conclusions

Nearly a century ago Belgian Courts and Tribunals took a very progressive position in refusing to admit a plea of sovereign immunity from jurisdiction for acts accomplished *iure gestionis*. These acts have been distinguished from those accomplished *iure imperii* on the basis of the criterion of their nature. It seems however that – perhaps for reasons of tradition (the judgments quoted mostly repeat each other) – and at least as far as the theoretical construction is concerned, Belgian jurisprudence is no longer up to date since it failed in providing a workable criterion and satisfying issues for the serious objections to the classical distinction based upon the nature of the acts. It is however doubtful whether the practical results of Belgian case law would substantially differ from those reached in the more modern American and German cases.

One will also note the very strong pragmatical attitude of Belgian jurisprudence: there is only a lip service paid to the principles of international law such as independence, sovereignty and equality of States. But on the other side Belgian case law has the merit of heavily relying upon the principle of reciprocity although it has been interpreted and applied in a somewhat confusing way: in some cases the courts only took into consideration the position of the Belgian State before its own courts, other cases rely upon the attitude of the impleaded State's courts either towards their own State, or towards the Belgian State. This last interpretation, it is submitted, is the only correct one to be retained.

As far as the immunity from execution is concerned, the *Socobelge* case certainly cannot be looked at as presenting the Belgian practice. Traditionally our courts admit the principle of absolute immunity from execution, and the case quoted is the first and until now only exception to this practice. In view, however, of the fact that the legal doctrine already favours a limited possibility of execution against the property of a foreign State, it is probable that the *Socobelge* case constitutes a very important and sound turning point, although it is too far-going in the opposite direction. It seems therefore that legal doctrine will have to concentrate on the problem of the distinction between public and private property of States which is rather a problem of internal administrative law to which the international lawyer cannot remain indifferent.