

Recent Trends in the Principle of State Immunity

Marlar Maw

要 旨

本稿は国家免除（主権免除）原則に関する最近の発展を素描するものである。伝統的な国家免除原則では、国家やその財産は外国の裁判管轄権に服さず、したがって国家自体や国家機関は外国の裁判所で被告となることはないと考えられてきた。これを絶対免除主義という。その後、国家の行為を主権的行為と私法行為に分け、前者は免除対応とされるが、後者は免除対応とされないという制限免除主義が台頭した。従来絶対免除主義では、外国国家と取引関係に入る私人に不公正をもたらすことになりかねないという批判を受けたためである。

現在多くの国家は、国家によって権利侵害された個人に救済を提供することで貿易を拡大するため、制限免除主義を採用している。しかし、免除の付与に関し諸国は多様な対応を示してきた。そこで国連国際法委員会が採択した案文にもとづき、2004年12月2日に国連主権免除条約が採択された。この多数国間条約によって世界的に受け入れられる国家免除の範囲が明確になった。

Keywords: Absolute doctrine, Restrictive doctrine, UN Convention of the Jurisdictional immunity of States and Governments and their Properties

Table of contents

I. Introduction

II. The Doctrine of State Immunity

(a) The Absolute Doctrine

(b) The Restrictive Doctrine

III. Different types of immunities from the jurisdiction of national courts

(a) State Sovereign immunity

(b) Head- of -State immunity

Recent Trends in the Principle of State Immunity (Marlar)

(c) Diplomatic immunity

(d) Intergovernmental organizations and their officials' immunity

IV. Waiver of Immunity

V. Recent trends in the principle of State Immunity

(a) UK Law (State Immunity Act, 1978)

(b) US Law (The Foreign Sovereign Immunities Act 1976)

(c) UN Convention of the Jurisdictional immunity of States and Governments and their Properties

VI. State Immunity and Myanmar's Perspective

VII. Conclusion

I. Introduction

The topic of sovereign immunity is one of the vast subjects of international law. It also stands as a customary rule of international law which is commonly based and justified on various general principles of international law.¹ The principles of international law regarding jurisdictional immunities of states have derived mainly from the judicial practice of individual nations.² Immunity means any exemption from a duty, liability, or service of process; especially such an exemption granted to a public official.³ In general term, State immunity means the immunity from civil suit afforded to entities of sovereign status, including the sovereign or head of state when acting in a public capacity.⁴ According to the principle of state immunity, foreign states are entitled to claim immunity from the jurisdiction of municipal courts. Therefore, the law of State immunity relates to the grant in conformity with international law of immunities to states to enable them to carry out their public functions effectively and to the representatives of states to secure the orderly conduct of international relations.⁵

The concept of state immunity initially formulated in the eighteenth century and nineteenth century, and had been logically enjoyed as uncomplicated role of the sovereign and of government as the concept of absolute immunity, where by the sovereign was completely immune from foreign jurisdiction in all cases regardless of circumstances.⁶ During this period, any country would hardly permit its courts to entertain actions brought by a private citizen or enterprise. The maxim *par in parem non habet imperium* expresses the idea that it is legally impossible for one sovereign power to exercise authority (by means of its legal system) over another sovereign power.⁷ Therefore, there was virtual unanimity in international law and practice those sovereigns (both states and heads of state) were absolutely immune from the jurisdiction of

foreign courts until the early to mid-twentieth century.

However, as international commerce gradually developed, as states became increasingly involved in the international commercial activities with much more complications by application of absolute doctrine. Accordingly, courts became cautious about the granting of immunity to distinguish all activities, whether governmental or commercial and draw a conclusion that these public activities are immune and those private activities are not. Later on, courts began to develop a doctrine of restrictive immunity as a consequence of greater involvement by states in commercial activities. As the doctrine of restrictive immunity has increasingly gained position in international law, as states recognized their immunity when engaged in official or sovereign activities as act of public and governmental nature (*acta jure imperii*) but denied of immunity when claims arise from their commercial transactions as private act of state (*acta jure gestionis*).

This distinction between *acta de jure imperii*, acts in exercise of the public or sovereign powers of a State, and *acta de jure gestionis*, acts performed as a private person or trader, is crucial to the present law of State immunity.⁸ The application of a restrictive doctrine of immunity by states in their national courts is now widely accepted. Even many states had already adopted it as legislation or case law in line with the restrictive approach, some states have not yet domestic statutes till now relating with this issue. As a result, courts of several states could take different views for determining the distinction between act of governmental nature and act of commercial nature because of a lack of unanimity. States have taken a great diversity in practice and approach of granting immunity.

. The development of state immunity has been gradually become since 1970s by promulgating various national and regional laws such as English law, US law and etc. At that time, requirement of law of state immunity as international level has been demanding among states. Accordingly, encouragements and efforts by states, the International Law Commission (ILC) had acknowledged the importance and significance of the sphere of immunities in respect of their activities. In 1977, the United Nations invited the International Law Commission (ILC) to consider the question of immunities of states and their property. The ILC began its consideration of the topic in 1978, and produced a set of draft articles on immunities, which was presented to the General Assembly in 1986.⁹ The ILC frequently concentrated on codification of customary international law.

As noted above, however, international practice with respect to immunities is insufficiently uniform to reach the level of unanimous practice. Thus, the ILC's draft articles are more of a "progressive development" of international law than a codification of existing practice. Many of these progressive

developments were very controversial during the ILC debates and may not be accepted by portions of the international community.¹⁰ At that time, the ILC had been received much attention from the states on the “Draft Article of Jurisdictional Immunities of States and Their Property.” Finally, the ILC has successfully adopted Convention of the Jurisdictional immunity of States and Governments and Their Properties on December 2, 2004 which can be seen the creation of worldwide accepted multilateral Convention to clarify the extent of state immunity. This would be the recent trends of State immunity.

The purpose of this article is focusing on the principle of state immunity and the recent trends of state immunity mainly focusing on the UN Convention on state immunity. It will reach to analyze whether the recent Convention is applicable statements of the law or not and whether states should be encouraged to ratify the convention. Moreover, I would like to underline the current applications of state immunity in Myanmar. In Myanmar, there exists no any specific domestic legislation on state immunity, but three cases relating to this issue show Myanmar courts' desire for having a precise own legislation to apply in the field of state immunity.

II. The Doctrine of State Immunity

As above mentioned, the rules of state immunity have derived mainly from the judicial practice of individual nations since the nineteenth century.¹¹ However, the genesis of the doctrine of state immunity is not readily discernible and its historical evolution does not follow a clearly defined course. The classical writers on international law during its formative stage did not deal with the notion that a foreign state enjoys immunity from the jurisdiction of the courts of another state.¹² At that time, only personal immunities such as head of foreign state and diplomat immunities were discussed. The distinction between that acts of activities had already been drawn and can be seen clearly before the courts.

Nowadays, the rule of state immunity has become concrete foundation of international level as emerged as the Convention of the Jurisdictional Immunity of States and Governments and Their Property. From the doctrinal approach, there are two different doctrines regarding state immunity: the absolute doctrine and the restrictive doctrine. Although the doctrine of absolute immunity had been accepted in the initial stage, the restrictive doctrine had become widely accepted through doctrinal opinions and international conventions because of complexity to distinguish public act and private act in the former doctrine.

(a) The Absolute Doctrine

Absolute immunity means a complete exemption from civil liability, usually afforded to officials while performing particularly important functions, such as a representative enacting legislation and a judge presiding over a lawsuit.¹³ The first major judicial decision on state immunity came from the Supreme Court of the United States in the famous case *The schooner Exchange v. M' Faddon*,¹⁴ where the Court held that "the perfect equality and absolute independence of sovereigns" prohibits one state to exercise the "exclusive territorial jurisdiction, which has been stated to be the attribute of every nation."¹⁵ This case was one of the mile stone as the first judicial expression of the doctrine of absolute immunity.¹⁶ According to this doctrine, at that time state had enjoyed immunity without restrictions as perfect privilege.

The absolute theory of immunity was widely accepted in other countries as well. Germany adhered to this doctrine until 1945. England courts followed the doctrine until about 1975 and with them the courts of other commonwealth countries.¹⁷ Regarding with state-owned and state-operated ships, the *Parlement Belge case*,¹⁸ *the Porto Alexandre case*,¹⁹ *The Cristina case*²⁰ and *the Pasaro case*²¹ were the leading cases which established the absolute rule of state immunity in UK and US courts. Later, the UK court moved to consider the position of state-owned vessels in *the Philippine Admiral case*²² in which the Privy Council did not follow the previous decisions and held that in cases where a state-owned merchant ship involved in ordinary trade was the object of a writ, it would not be entitled to sovereign immunity and the litigation would proceed.²³ After that, the UK courts have generally trended to apply state immunity with restrictions.

And then, the late quarter of the nineteenth century, foreign trade had been declined gradually around the world because of governments' participation in trading activities which led to become unfair by using immunity. However, during the time, even the absolute doctrine was widely accepted, its exact content was unclear to use because various degrees of immunity have always existed.²⁴ The application of absolute immunity caused unfair or unjust circumstances on private enterprise trading with government entities. In most countries, there were examined that whether state immunity should or should not continue to apply when states greatly involved in economic spheres. Today, the absolute immunity doctrine is not applied throughout the entire world.

(b) The Restrictive Doctrine

The absolute immunity doctrine had been accepted as formality rule of state immunity for many

years ago. As I have mentioned above, due to states participating in world trading activities, many states have moved in their practice to a doctrine of restrictive immunity in which a foreign state is allowed immunity for *acts jure imperii* only. The bulk of this practice consists of municipal court decisions. 4th Report in Jurisdictional Immunities of States and their Property, (1982) study shows that the courts of great majority of states in which the matter has been considered in recent years (mostly Western states) now favour the doctrine of restrictive immunity.²⁵ The British courts had abandoned the doctrine of absolute immunity in the case of *The Philippine Admiral* (*actions in rem*) and *Trendtex Trading Corp V. Central Bank of Nigeria*²⁶(*actions in personam*), just before the 1978 Act was enacted.²⁷ In *Trendtex Trading Corp V. Central Bank of Nigeria case*, the court of Appeal accepted the validity of the restrictive approach as being consonant with justice, comity, and international practice.²⁸ Later, the majority of states now have tended to accept the restrictive immunity doctrine and this has been reflected in domestic legislation.²⁹

In 1952, the Department of State announced its intention to follow the restrictive principle of immunity, and the restrictive doctrine of immunity is now codified in the United States as a result of the Foreign Sovereign Immunities Act of 1976.³⁰ After the US foreign Sovereign Immunities Act 1976 enacted in line with the restrictive principle of immunity, UK State Immunity Act 1978 also provides for a general rule of a state immunity from the jurisdiction of the courts with a range of exceptions. As a result, most of the municipal legal systems have now changed to a doctrine of restrictive immunity.

Under the doctrine of restrictive state immunity, a state has immunity from the jurisdiction of a local court only in respect of certain classes of acts. A distinction is to be drawn between acts of sovereign nature and acts of commercial nature. Essentially, the distinction designed to ensure that the state is treated as a normal litigant when it behave like one, and as a sovereign when it exercises sovereign power.³¹ Today, the restrictive doctrine is gained worldwide acceptance. It gives some extent of clarification of distinction between state acts and commercial acts, most of the countries have already adopted the law in line with this doctrine.

III. Different types of immunities from the jurisdiction of national courts

There are different types of immunities areas under international law. The different immunities derive from some reasons. Firstly, persons accorded immunity can embody the state. Secondly, the diplomat, consul, or other official traveling abroad, like the embassy abroad, may embody the fictional characterization as an "enclave of the sending state." Thirdly, state officials may receive a grant of immunity in order to enable

them to properly carry out their functions unimpeded.³²

Thus, the state, its officers and agencies are conferred state immunity as vested rights, to perform state duties effectively under customary international law. Today, they have been enjoyed rights of immunity with limitations as international law has been transforming in accordance with changing various fashion of international community.

(a) State Sovereign immunity

State enjoys immunity from the jurisdiction of its own courts and the courts of other state. This is called Sovereign immunity. Therefore, it is not only a government's immunity from being sued in its own courts without its consent but also a state's immunity from being sued in foreign court by the state's own citizens. It can be said that the immunities of personal sovereign. Accordingly, rule of sovereign immunity govern the extent to which a state may claim to be free from the jurisdiction of a foreign nation's courts.³³

Personal sovereign have frequently been identified with the states of which they are the heads. The majority of writers have treated the immunities of foreign sovereigns together with those of foreign states. For instance, in the Harvard Draft Convention, sovereign as well as other heads of states are included in the definition of the term state.³⁴ The concept state covers both the government and the people of a certain territorial entity.³⁵ It is interesting to note that the western doctrine of the immunity of the sovereign and such rules stemming from it as "the King can do no wrong" and "the King cannot be sued in his own courts" have never been universally accepted principles.³⁶ Thus, state sovereign immunity, as a rule, has not been accepted absolutely for a long time.

(b) Head-of-State immunity

Heads of state enjoy benefits from total immunity from criminal legal process in foreign states for all acts that are normally subject to the jurisdiction of these states.³⁷ However, a strong head-of-state immunity doctrine would prevent states from bringing some violators of the most serious international crimes to justice, a consequence that seemed at odds with the international community's ever-increasing focus on protecting fundamental human rights.³⁸ *The Pinochet* decision³⁹ became a leading movement of the doctrine of the head of state immunity. In 1973, a right wing military coup led by the General Pinochet overthrew the left wing Chilean Government of President Allende. Pinochet subsequently became Head of State of Chile until 1990, when he resigned. In 1998, While he was visiting the United Kingdom for medical treatment,

Spain requested Pinochet' extradition to face charges, inter alia, of torture and conspiracy to torture in the Spanish Courts. The Divisional Court quashed a provisional warrant for the Pinochet' arrest issued in response to the extradition request, on the ground that the Pinochet had immunity from prosecution as a former head of state. In these proceedings, the House of Lords heard an appeal against this decision.⁴⁰

In this case, The House of Lords pointed out that "the notion of continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention.....senator Pinochet organized and authorized torture after 8 December 1988, he was not acting in any capacity which gives rise to immunity *rationae materiae* because such actions were contrary to international law..."⁴¹In fact, there can be realized that Pinochet' case decision was a first step of the establishment of the new concept of head of state immunity. Later on, *The arrest warrant of 11 April 2000*(or *Yerodia*)⁴²Case (following the case of *Pinochet* and *Al-Adsani* case) has already had a practical impact of the modern law of human rights on the doctrine of head of state immunity. Thus, the international community moved toward a restrictive form of sovereign immunity, the modern trend in the law increasingly indicated to identify situations in which heads of state would not be entitled to immunity in foreign courts.⁴³

(c) Diplomatic immunity

Diplomatic immunity means the general exemption of diplomatic ministers from the operation of local law, the exception being that a minister who is plotting against the security of the host nation may be arrested and sent out of the country.⁴⁴ Diplomatic immunity is a principle of international law by which certain foreign government officials are not subject to the jurisdiction of local courts and other authorities.⁴⁵

Regarding with diplomatic immunity, Vienna Convention on Diplomatic Relations 1961⁴⁶ was adopted at the United Nations Conference on Diplomatic Intercourse and Immunities in Vienna in 1961. The Convention divides persons entitled to immunity into three categories, members of the diplomatic staff, of the administrative and technical staff, and the service staff, and confers degrees of immunity in a descending scale of protection.⁴⁷ According to Article 31(1) of this Convention, diplomatic agents enjoy complete immunity from the legal system of the receiving state, although there is no immunity from the jurisdiction of the sending state.⁴⁸ But, under Article 41(1), if diplomatic agents act and behave unlawfully and disturb the internal affair of the state, he will be sent back at once. When a diplomat is exclusively immune from the local criminal jurisdiction, the question arises for the remedy of a victim of a crime. Therefore, it is possible to solution that the aggrieved person can ask his remedy to a forum (the sending state) where diplomat cannot

request any special status in accordance with Article 31(4). Article 31(1) also specifies that diplomatic are immune from the civil and administrative jurisdiction of the state in which they are serving with exceptions. Although diplomatic agents enjoy immunity when they perform state duties, this immunity can be waived as provided by Article 32.

It may be observed that the immunity which the diplomat possesses is not his personal prerogative but the immunity of his government, and consequently it is for sending state to decide whether the immunity of the diplomat should or should not be waived on a particular occasion.⁴⁹

(d) Intergovernmental organizations and their officials' immunity

The source of immunities of international organizations is treaty or agreement, not international custom.⁵⁰ International institutions such as United Nations and the ILO have been granted immunity from the territorial jurisdiction under international agreements, namely:

1. The Convention on the Privileges and Immunities of the United Nations, 1946; and
2. The Convention on the Privileges and Immunities of the specialized Agencies, 1947⁵¹

The Convention on the Privileges and Immunities of the United Nations of 1946, which sets out the immunities of the United Nations and its personnel and emphasizes the inviolability of its premises, archives and documents.⁵² The rationale for their grant is the protection of their functioning and independence, uniformity of dispute settlement, equality of treatment by states, and to ensure respect for their status and internal law.⁵³ Unlike state, organizations have no territory or population and can only perform their functions on territory over which a state exercises jurisdiction and through persons who are linked to a state by a bond of nationality.⁵⁴ Therefore, the privileges and immunities exist to enable the international organization to achieve its ends without hindrance by local authorities.⁵⁵

IV. Waiver of Immunity

Waiver of immunity means the act of giving up the right against self-discrimination and proceeding to testify.⁵⁶ Waiver may occur, *inter alia*, in a treaty, in a diplomatic communication, or by actual submission to the proceeding in the local courts.⁵⁷ Waiver may be express or implied. In those cases, Waiver of immunity does not mean that waiver of immunity from execution. Waiver of immunity from jurisdiction in respect of civil or administrative proceeding is not to be taken to imply waiver from immunity in respect of the execution of the judgment, for which a separate waiver is necessary.⁵⁸

The issue of waiver is also a key factor in many US cases. Section 1605(a)(1) of the Foreign Sovereign Immunities Act (FSIA) 1976 provides that a foreign state is not immune where it has waived its immunity either expressly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may support to effect, except in accordance with the terms of the waiver.⁵⁹ The FSIA covers three types of waiver of immunity, waiver from adjudication, waiver from execution after judgment, waiver from attachment prior to the entry of judgment. It characterizes them as exceptions to state immunity.⁶⁰

Regarding with English law, the 1978 Act, Section 2 provides that concept as exception from immunity, by submitting the consent of waiver to the jurisdiction of the courts. Section 2 recognizes four ways in which a state may give or be deemed to give its consent to the proceeding:

(i) by submission after the dispute

(ii) by prior written agreement

(iii) by institution of proceedings

(iv) by intervening or taking any step in the proceeding other than to claim immunity or assert an interest in property in certain cases.⁶¹

A state can waive immunity by its consent and submit it in accordance with the rule prescribed by legislation. But in commercial matter, a state or government waives immunity when they have made a contract with business partner as relinquishment of state immunity by submitting their consent.

V. Recent trends in the Principle of State Immunity

The United States, the United Kingdom, Australia, Canada, Malaysia, Pakistan, South Africa, and Singapore have already all enacted legislation on state immunity adopting a restrictive approach.⁶² Above mentioned legislations of nations, UK law serves as a model law of state immunity among the commonwealth countries. Accordingly, the commonwealth countries borrowed some provisions from the UK law. The current states practice of state immunity is derived from the UK law and similar of the US law. These laws serve a proper clear indication that how their legislations should be promulgated on state immunity. Therefore, UK Law and US Law can be seen as current state practice regarding with state immunity. The states have further looked at some specific cases in which these laws have been applied to show the need of harmonized law among nations. After completion of great debates of state immunity organized by ILC, the UN Convention of the Jurisdictional immunity of States and Governments and their Properties has already adopted as a recent development in the principle of state immunity, therefore, the question of whether the

recent Convention is applicable statements of the law or not and whether states should be encouraged to ratify the convention have been analyzed in this chapter.

(a) UK Law (State Immunity Act, 1978)

Since the end of the Second World War the United Kingdom had become increasingly isolated in its adherence under the common law to the doctrine of absolute immunity.⁶³ However, "*The Philippine Admiral V. Wallem Shipping (Hong Kong)*" brings the UK courts into consistent with restrictive immunity. In this case, the Privy Council's decision came in *an action in rem* against an ordinary trading vessel, the Philippine Admiral, owned by the Philippine Republic. The government of the Philippines invoked immunity, but the Privy Council, moving away from considerable precedents, ruled in favour of the restrictive doctrine.⁶⁴ Later, in *Trendtex Trading case*, the Court of Appeal adopted the doctrine of restrictive immunity. In *I Congreso del Partido*⁶⁵ case, the House of Lords confirmed that the doctrine of restrictive immunity was part of the common law and was applicable to all actions involving recognized sovereign states before UK national courts. Finally, the United Kingdom promulgated the State Immunity Act (1978); it is obvious that the English law is also in line with the doctrine of restrictive immunity.

The State Immunity Act (SIA) 1978 was enacted to codify the restrictive rule of state immunity and to enable the UK to ratify the European Convention on State Immunity (ECSI) 1972 and the earlier 1926 Brussels Convention and 1934 Protocol relating to the Immunity of State-Owned ships.⁶⁶ But, it is considerably more restrictive than the European Convention on which it is largely based.⁶⁷ The Act consists of three parts, of which Part I (proceedings in United Kingdom by or against other states) contains the provisions regarding immunity. Part II is concerned with recognition of judgments against the United Kingdom in states which have ratified the European Convention and Part III contains miscellaneous and supplementary provisions.⁶⁸ The Act treats separately immunity from adjudication and immunity from execution, drawing a clear distinction between the adjudicative jurisdiction and the enforcement jurisdiction of the courts of law in the United Kingdom.⁶⁹ The Act does not affect immunities under the Diplomatic Privileges Act 1964 or the Consular Relations Act 1968, Section 16(1).⁷⁰ There might be seen that this law was emphasized by the distinctive features of commercial transactions by state agencies.

Even though the definition of commercial transaction in SIA section 3(3) covers all contracts and financial transactions of the kinds listed in this section, there is no distinction between nature and purpose of transaction or contract like the recent Convention, in which make a vague for the courts to consider the

difficult question whether they result from the "exercise of sovereign authority". This law is very broad and provides various areas of exceptions as general principles. In practice, where is doubt, the English courts have applied a broad contextual approach in deciding cases under the Act and under the common law.

(b) US Law (The Foreign Sovereign Immunities Act 1976)

As to the practice of United States, the "Tate Letter" is an important landmark. This statement of the Department of state known as the Tate Letter was issued on May 19, 1952. The United States had followed the restrictive doctrine since 1952 under the lead of the State Department.⁷¹ The Act accordingly had four purposes, which were set out in the accompanying House Report of the Legislative History of the Act: to codify the restrictive principle of immunity whereby the immunity of a foreign state is restricted to suits involving its public acts (*jure imperii*) and is not extended to suits based on its commercial or private acts (*jure gestionis*), to ensure the application of this restrictive principle in the courts and not by the State Department, to provide a statutory procedure to make service upon and establish personal jurisdiction over a foreign state, and to remedy in part the private litigant's inability to obtain execution of a judgment obtained against a foreign state.⁷²

There can be seen that all purposes of this Act are in favour of public litigants, the foreign state derived benefit from the Act's putting an end to the practice of pre-judgment attachment of its assets as a mean to secure jurisdiction and from its establishment as a sole and exclusive standard for resolving questions of sovereign immunity in US courts.⁷³ This Act is extremely cautious in regards to exceptions from immunity from attachment or execution. Section 1605 provides general exceptions to the jurisdictional immunity of a foreign state with various activities. Regarding with commercial activities, this Act gave on the basis of restrictive doctrine as exception to the immunity. Though the US law led the way in introducing a restrictive rule by national legislation, the Act has been amended two times in 1996 and 1998, because it couldn't cover to solve the activities which increased as various occasions that brought to the US courts.

US law adopted a very broad definition of a state for the purposes of immunity including instrumentalities and agencies of the foreign states.⁷⁴ The enactment of the Act and its application by the US courts has undoubtedly, as intended, reduced the extent to which the executive and policy issues determine the immunity of foreign states before US courts. However, US law is only primarily practice of domestic law and can as such not reflect developments in international law.⁷⁵ It could not be settled all controversies because of its complexity functions. As a national legislation, it needs to accord with the court of another

foreign state when they involved in sophisticated commercial activities. Therefore, the international adoption of immunity has required as a fundamental standard of international law, to achieve consensus among nations.

It is showed that the UK Act leads to serve as frame work legislation among the commonwealth countries for applying in the field of immunity. In addition, the current adoption of UN Convention also adapted some areas of its provisions. And then, the review of UK law is more comprehensive than US law. The review of English law is intended to give an up-to-date account of the present law relating to state immunity as applied in the English courts. The review of US law is intended to give an understanding of the treatment of state immunity under the US legislation and in the US federal courts, to enable a comparison with English law to be made, and to describe legislation which permits proceedings against individual public officials of a foreign state which immunity bars where proceeding for the same acts are brought against the state.⁷⁶ Nevertheless, most of the countries lack domestic legislations which concern about the important issue of state immunity. Even among those with such laws, there remains a wide diversity of practice and approach on that topic.

(c) United Nations Convention of the Jurisdictional immunity of States and Governments and their Properties

The UN General Assembly successfully adopted the UN Convention on Jurisdictional Immunities of States and Their Property on December 2, 2004. The 33-article United Nations Convention with annexed applies to the immunity of a State and its property from the jurisdiction of the court of itself and courts of another State. The recent Convention is a pioneer modern multilateral instrument to provide a comprehensive approach to complicated issue of state immunity. The Convention also appears as development of the law of state immunity has reached an emergent global consensus.

The Convention with various attempts has been made at the international level to harmonize the law on state immunity between nations for many years. The International Law Commission of the United Nations put the question of "Jurisdictional Immunities of States and their Property" on its active agenda as part of its program directed towards the progressive development and codification of international law.⁷⁷ The Convention builds on experience under the European Convention on State Immunity 1972 as well as on state practice under various on State Immunity.⁷⁸ The Convention has adopted with the six-part contained in the resolution as an annex. It draws a line between those situations in which a state may properly claim immunity and those in which immunity has been restricted and denied.

Part I of the text is the introduction, dealing with the scope, use of terms, privileges and immunities not affected and non-retroactivity. Part II on general principles treats the issues of immunity, modalities, express consent, participation in a court proceeding and counterclaims. Part III, on proceedings in which State immunity cannot be invoked, covers commercial transactions, contracts of employment, personal injuries and damage to property, ownership, possession and use of property, intellectual and industrial property, participation in companies and collective bodies, ships and arbitration agreements.⁷⁹

Part IV, on immunity from measures of constraint before a court, deals with pre- and post-judgment measures of constraint, effect of consent to jurisdiction and specific categories of property. Part V on miscellaneous provisions covers service of process, default judgment and privileges and immunities during court proceedings. Part VI, final clauses, covers the relationship of the convention to other agreements, dispute settlement and the ratification process. An annex to the convention covers understandings with respect to certain provisions.⁸⁰

The Convention includes some of exceptions to the general rule of immunity that if any of these exceptions apply in a case, a state will not be able to claim immunity in a foreign court.⁸¹ It is designed to provide with express exceptions for varieties regimes such as commercial transactions, contracts, torts, intellectual and industrial property and etc. It is also concerned with civil proceedings against a state in the courts of another state, provided by Article 12. Although it does not cover criminal proceeding, the other international instruments and conventions such as UN Torture Convention 1984 will serve the violation of human rights and other serious breaches of international law. In this provision, it does not comprehensively distinguish injury or loss of property resulting from states' act or omission. So, it may not be easy in given situations to determine where the causal act or omission took place or to distinguish between position of injury and position of tort.⁸²

In this Convention, the most important exception of immunity concerns a commercial transaction which is found in Article 10. Under Article 10(2), it does not apply in the case of commercial transaction between states or if the parties to the commercial transactions have expressly agreed otherwise. The term commercial transaction defines in Article 2(1) (c). Despite the fact that the term commercial transaction is capable of covering a broader range of activities, the main criteria of commercial and non-commercial has been considered on nature and purpose of such transaction or a contract.

The criteria of commercial transaction and non-commercial were major points of debate both during the deliberations of the ILC and in the subsequent negotiation of the Convention, because of the

differing approaches reflected in various domestic legal systems. The formulations ultimately adopted in the Convention represent a compromise.⁸³

This provision on commercial transactions serves effective process that gives to permit other national courts with similar approach which become consistent practice in this area. It can be said that this is the one of the achievements of the Convention, to getting uniformity of legislations within the international community on this ambitious topic. The Convention would contribute to the codification and development of international law and harmonization of practice in this area.⁸⁴

As a result, there can be seen the Convention's text reflects the beginning of worldwide agreement which increasingly demonstrated in doctrine as well as practice, that states and state enterprises can no longer invoke absolute immunity from the proper jurisdiction of foreign courts and agencies, especially for their commercial activities.⁸⁵ Therefore, the new UN Convention is applicable statement of the law providing a concrete foundation on which states can utilize in their domestic law. Most of the countries already have own national legislation such as UK law, US law, in which the courts also have experienced in interpreting and applying its provisions. Nevertheless, the new Convention gives some clarifications of such particular issue, which make more consistent when applying their own legislation with the other foreign nations, when they ratify the Convention. The result might be greater harmonization and compatibility within the international community, providing a good opportunity for reflection on the relations among different areas of international law. Finally, it could contribute to improving international economic relations and improve private plaintiffs' possibilities for legal protection.⁸⁶

VI. State Immunity and Myanmar's Perspective

The legal system of the Union of Myanmar is a unique combination of the customary law of the family, codified English common law and recent Myanmar legislation. Myanmar has not enacted State immunity legislation. But, Myanmar has three leading cases relating to state immunity issues.

In these cases, *U Kyaw Din vs. The British Government*,⁸⁷ and *U Zeya vs. The British Secretary of State for war UN*⁸⁸ were dismissed by High Court that showed applying the doctrine of absolute immunity in that period. In the case of *Kovtunen vs. U Law Yone*⁸⁹ was decided in favor of an approach based on the doctrine of restrictive immunity. Myanmar courts directly apply the customary international law rules of State immunity, in which State property used for commercial purposes is generally not immune from execution. Eventhough Myanmar Courts have been developing the application of state immunity as restrictive approach,

there has still required to distinguishing act of governmental nature and commercial nature. It points out that Myanmar needs to adopt her own legislation regarding to state immunity.

For commercial matter, Section 8(b) of the State-Owned Economic Enterprise Law (SEE Law)⁹⁰ provided that State-Owned Economic enterprises have the rights to sue and can be sued as corporate body. They have legal personality or legal person in the Myanmar Legal system. They are not the state itself nor can they invoke sovereign immunity as they are mere commercial enterprises.⁹¹ At present, commercial agreements which are made by Myanmar ministries, departments or other branch of government, which will be a partner with Joint Venture Company or foreign government corporations, have included the inclusion of the waiver of sovereign immunity clause. It can be seen that Myanmar practiced in the area of state immunity not only regulating existing law-SEE Law but also making bilateral treaties. However, there has still required concrete legislation to distinguish exactly government act whether state bodies are immune or not. Concerning with state immunity, State can be not only defendant who request to entitle sovereign immunity but also forum state which adjudicates whether granting immunity or not to other foreign state. Due to the lack of specific state immunity law, Myanmar courts could not adjudicate successfully the cases which are relating to state immunity issue and still have complicated.

VII. Conclusion

In recent years, the numerous bilateral and multilateral treaties had dramatically increased in various areas such as commercial sphere, environmental issues, human right and humanitarian issues. It has been becoming more and more difficult to reach agreement among the different legal regimes. The International Law Commission has discussed the topic of jurisdictional immunity for many decades ago. Now the UN Convention has been adopted and opened for signature on January 17, 2005.

The article analyzed overview of the law of state immunity in which describes principle and development of state immunity, as well as an attempt to understand its current practice which have justified in distinction between state sovereign act and private act. It can be seen that some countries which lack of their own legislations, should be able to adapt and adopt provisions of the UN Convention as a model for their new legislations, and for those countries which already have own legislations should be ratified the this Convention. If so, the Convention will serve to improve the legal position of aggrieved persons in the region against states. Later on, it would have received various comments and arguments concerning with this Convention and its provisions, this arguments and comments will contribute to accord controversial particular

issues. Therefore, the effect of this Convention will depend on how it could be implemented in domestic law and applied in specific situations.

As lack of domestic legislation, Myanmar should be adopted the provision in line with the UN Convention. Myanmar is now implementing market oriented economy system, therefore, there is required to enhance the areas of foreign direct investment as well as state-owned economic enterprise. If Myanmar have state immunity law, trade partner from foreign countries do believe to invest with government entities who cannot invoke sovereign immunity. Development of economic as well as development of country will reach ultimate achievement by having state immunity law as incentive of investment. This article, therefore, will contribute to some extent to the development of the law relating to state immunity.

Endnotes

- 1 Brohmer, Jurgen; *State Immunity and the Violation of Human Rights*, The Hague, 1997, P.9.
- 2 Sucharitkul, S; *State Immunities and Treading Activities in International Law*, Steven & Sons Limited, London, 1959, P.3.
- 3 *Black's Law Dictionary*, Bryan A. Garner, P.765, Thomson business, 8th edition, 2004.
- 4 C.J Lewis, *State and Diplomatic Immunity*, Lloyd's of London press Ltd, 1980, P.1.
- 5 Fox, Hazel; *The Law of State Immunity*, Oxford University Press, 2002, P.15.
- 6 M.N. Shaw, *International Law*, Cambridge University Press, 5th Edi, 2004, P.625.
- 7 M.Dixon, *Textbook on International Law*, Oxford University Press, 4th Edi, 2000, P.166.
- 8 Fox, Hazel; *supra*, P.22.
- 9 M.P.A. Kindall, *Immunity of States for Noncommercial Torts: A Comparative Analysis of the International Law Commission's Draft, 1987 California Law Review*, October, available at Web link: <http://www.lexis.com>, accessed on November 6, 2005.
- 10 *Ibid*.
- 11 Badr, Gamal Moursi; *State Immunity: An analytical and Prognostic View*, Martinus Nijhoff Publishers, 1984, P.9.
- 12 *Ibid*.
- 13 *Black's Law Dictionary*, *supra*, P.765.
- 14 7 Cranch 116 (1812).
- 15 Brohmer, Jurgen, *Supra*, P.15.
- 16 Badr, Gamal Moursi, *Supra*, P.10.
- 17 Brohmer, Jurgen, P.16.
- 18 (1880) 5PD 197.
- 19 (1920) P.30, 1AD, P.146.
- 20 (1938) AC485, 9AD, P.250.
- 21 (1926), 271 U.S.562.
- 22 (1977) A.C.373, JC.
- 23 M.N. Shaw, *Supra*, P.629.
- 24 Brohmer, Jurgen, *Supra*, PP.16-17.
- 25 D.J. Harris, *Cases and Materials on International Law*, Sweet & Maxwell limited; 6th edition, 2004, p.306
- 26 (1977) Q.B 529, CA.
- 27 DJ Harris, *Supra*, P.322.
- 28 M.N. Shaw, *Supra*, P.630.
- 29 *Ibid*.
- 30 Brownlie, Ian, *Principle of Public International law*, CLARENDON Press, 4th edition, 1980, P.328.
- 31 M.Dixon, *Supra*, P.169.
- 32 David S. Koller, *Immunities of Foreign Ministers: Paragraph 61 of the Yerodia Judgment as it Pertains to the Security Council and the International Criminal Court*, 20 Am. U. Int'l L. Rev. 7, available at web link; <http://www.lexis.com>, accessed on November 6, 2005.
- 33 Tunks, Michael A, *Diplomats or defendants? Defining the future of head-of-state immunity*, Duke Law

- Journal, available at web link; <http://www.law.duke.edu/shell/cite.pl?52+Duke+L.+J.+651>, accessed on January 25, 2005.
- 34 Sucharitkul, S., *Supra*, P.47.
- 35 Badr, Gamal Moursi, *Supra*, P.73.
- 36 *Ibid*, P.75.
- 37 http://www.eda.admin.ch/sub_dipl/e/home/thema/intlaw/immu.p.html, accessed on November 6, 2005.
- 38 Tunks, Michael A, *Supra*, available at web link; <http://www.law.duke.edu/shell/cite.pl?52+Duke+L.+J.+651>, accessed on January 25, 2005.
- 39 Pinochet Case (2000) 1 A.C.147.
- 40 D.J. Harris, *Supra*, P.333.
- 41 *Ibid*, P.339.
- 42 42. I.C.J Rep. 2002, P.3.
- 43 Gilbert Sison, A King no more: The Impact of the Pinochet Decision on The Doctrine of Head of State Immunity, 78 Wash. U. L. Q.1583, 2000, available at web link; <https://www.lexis.com/research>, accessed on November 6, 2005.
- 44 Black's Law Dictionary, *Supra*, P.765.
- 45 http://en.wikipedia.org/wiki/Diplomatic_immunity, accessed on November 21, 2005.
- 46 In force 1964.177 parties, including the UK. See D.J. Harris, *Supra*, P.354.
- 47 Fox, Hazel, *Supra*, P.450.
- 48 Shaw, M.N, *Supra*, P.682.
- 49 Yangon University Text- Book Publication Series No (61) Law Department, Vol. II, September 1993, P.77.
- 50 Fox, Hazel, *Supra*, P.473.
- 51 Yangon University Text- Book, *Supra*, P.150.
- 52 Shaw, M.N, *Supra*, P.692.
- 53 *Ibid*, P.473.
- 54 Fox, Hazel, *Supra*, p.468.
- 55 M.Dixon, *supra*, P.195.
- 56 Black's Law Dictionary, *supra*, P.1612.
- 57 Brownlie, Ian, *supra*, P.340.
- 58 Shaw, M.N, *supra*, P.687.
- 59 *Ibid*, P.660.
- 60 Fox, Hazel, *supra*, P.191.
- 61 *Ibid*, pp.146-147.
- 62 Fox, Hazel, *supra*, P.124 (Foreign Sovereign Immunities Act 1976 (USA), State Immunity Act 1978 (UK), Foreign States Immunities Act 1985 (Australia), State Immunity Act 1982 (Canada), Immunities and Privileges Act 1984 (Malaysia), State Immunity Ordinance 1981 (Pakistan), State Immunity Act 1979 (Singapore), Foreign States Immunities Act 1981 (South Africa), Immunities and Privileges 1984 (no 16 of 1984) (Malawi), other small common law jurisdictions have enacted similar legislation, e.g. St Kitts 1979).
- 63 C.J Lewis, *supra*, preface.
- 64 Brohmer, Jurgen, *Supra*, PP.84-85.
- 65 (1981)2 All ER 1062, 64 ILR 307.
- 66 Fox, Hazel, *supra*, PP.129-130.
- 67 C.J Lewis, *supra*, P.7.
- 68 Brohmer, Jurgen, *Supra*, P.86.
- 69 Fox, Hazel, *supra*, P.138.
- 70 Brownlie, Ian, *supra*, P.338.
- 71 C.J Lewis, *supra*, preface.
- 72 Fox, Hazel, *supra*, P.188.
- 73 *Ibid*.
- 74 *Ibid*, PP.215-216.
- 75 Brohmer, Jurgen, *Supra*, P.84.
- 76 Fox, Hazel, *supra*, P.124.
- 77 C.J Lewis, *supra*, P.1.
- 78 David P. Stewart, Current Development: The UN Convention on Jurisdictional Immunities of States and Their Property, 99 A.J.I.L. 194, January, 2005, available web link: <http://www.lexis.com/research>, accessed on November 6, 2005.
- 79 <http://www.un.org/news/press/docs/2004/gal3268.doc.htm>, accessed on November 21, 2005.
- 80 *Ibid*.
- 81 Chapter III, Article 10 to 17 of UN Convention.
- 82 David P. Stewart, *supra*, available web link: <http://www.lexis.com/research>, accessed on November 6, 2005.
- 83 *Ibid*.
- 84 UN Convention's third preamble paragraph
- 85 David P. Stewart, *supra*, available web link: <http://www.lexis.com/research>, accessed on November 6, 2005.
- 86 <http://www.ejil.org/journal/Vol4/No2/art8.pdf>, accessed on November 21, 2005.

- 87 UN Materials on Jurisdictional Immunities of States and Their Property, New York, 1982, P. 214, reported originally in Myanmar Law Reports (1948), P.524, Decision by the High Court of Yangon.
- 88 Ibid, P. 215-216, reported originally in Myanmar Law Reports (1949), P.402, Decision by the High Court of Yangon.
- 89 Ibid, P. 217-221, reported originally in Myanmar Law Reports (1960), P.51, Decision by the Supreme Court.
- 90 The State-Owned Economic Enterprise Law, 1989, Law No. 9/89, promulgated on March 31st, 1989.
- 91 Dr. Tun Shin, "The Legal Frame Work of Myanmar", a paper delivered at the Europe/ East Asia Economic Summit in Singapore, September 20-22, 1995.

主指導教員（山崎公士教授）、副指導教員（沢田克己教授・成嶋隆教授）