

LEGAL STATUS OF GOVERNMENT  
MERCHANT SHIPS  
IN INTERNATIONAL LAW

*by*

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## CHAPTER I

# GOVERNMENT SHIPS AND THEIR STATUS IN INTERNATIONAL LAW

It is a generally recognized principle of international law that foreign ships which enter the waters of a coastal state are subject in many ways to the jurisdiction and control of the local authorities.<sup>1</sup> Even on the high seas, a limited jurisdiction may be exercised on board them by states other than the flag state.<sup>2</sup> These general statements are, however, subject to certain qualifications. Foreign warships and other government ships assimilated to the position of warships enjoy several jurisdictional immunities while lying within or passing through the waters of a coastal state.<sup>3</sup> On the high seas, such ships have complete immunity from the jurisdiction of any state other than the flag state.<sup>4</sup> It is this immunity from jurisdiction that gives a government ship a status in international law quite peculiar to herself and different from that enjoyed by a private ship. Whether this immunity from jurisdiction is characteristic of all government ships without distinction, or whether it is limited to certain categories of government ships, is still not clear. The purpose of this work is to conduct an enquiry into this very question, and to ascertain the legal status of a particular category of government ships, namely, merchant ships.

### I. JURISDICTION OVER FOREIGN GOVERNMENT SHIPS

To determine the legal status of government ships, as distinguished from private ships, it is necessary to ascertain the limits of their immunities. It is therefore necessary to examine the nature and the extent of the jurisdictional powers of a state over foreign government ships for the purpose of determining those immunities.

<sup>1</sup> See Chapter II.

<sup>2</sup> *ibid.*

<sup>3</sup> See below, pp. 4 *et seq.*

<sup>4</sup> Articles 8 and 9 of the Geneva Convention of 1958 on the High Seas.

### A. *Military ships*

This work, as the title indicates, is concerned only with the legal status of government merchant ships. To determine this status, it is essential to enquire into the question as to whether or not such ships are entitled to all or some of the jurisdictional immunities of warships; for it is, as pointed out above, this very privilege of immunity that gives government ships a status different from that of private ships. It is therefore important to undertake a quick survey of the privileges enjoyed by warships in foreign jurisdictions as well as on the high seas in order to understand the problem of immunity of ships.

The Geneva Convention of 1958 on the High Seas says:

the term "warship" means a ship belonging to the naval forces of a state and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew who are under regular naval discipline.<sup>1</sup>

Accordingly any ship that satisfies the above conditions is deemed to be a warship.<sup>2</sup>

A warship is deemed to be a part of the armed forces of a state only so long as she retains the character of a warship. A warship abandoned by her crew, or whose crew has mutinied and taken control of the ship, is not deemed to be a part of the armed forces of her state.<sup>3</sup> Vessels employed by a state for carrying the head of the state and his suite exclusively are also granted the same immunities as those of a warship.<sup>4</sup>

It would seem that warships have no legal right of entry to a foreign port, except perhaps in cases of distress.<sup>5</sup> However, the ports of a friendly state are considered to be open to the warships of all states with which it is at peace.<sup>6</sup> But they are expected to observe strictly the conditions under which they are admitted. The authorities of the flag state are generally required to notify in advance the coastal state of the proposed visit of a warship. In some states, foreign warships are required to secure prior authorization of the local authorities before entering their ports. States usually regulate the number of warships

<sup>1</sup> Art. 8 (2).

<sup>2</sup> "Warships" and "military ships" are used throughout this book as synonymous terms.

<sup>3</sup> Oppenheim, *International Law*, 8th ed. (1955), Vol. I, p. 852; see Art. 16 of the Geneva Convention on the High Seas (1958).

<sup>4</sup> Oppenheim, *op.cit.*, p. 852.

<sup>5</sup> H. A. Smith, *The Law and Custom of the Sea*, 3rd ed. (1959), pp. 37-38.

<sup>6</sup> Colombos, *International Law of the Sea*, 4th ed. (1959), p. 224, and the authorities cited therein.

belonging to the same nation that may remain in their ports at the same time and the duration of their stay. The restrictions regarding the number of warships and the period of their stay do not generally apply to warships carrying heads of state, or the ambassadors or envoys accredited to the coastal state, or to warships in distress.<sup>1</sup>

A foreign warship in a friendly port enjoys complete immunity from any kind of legal process or police action. This immunity, however, does not grant her complete exemption from local law.<sup>2</sup>

The rule that all ships in a port are subject to the law of the land applies equally to warships, but with the important qualification that the law cannot be enforced by any action taken on board or against the ship.<sup>3</sup>

No official of the coastal state is entitled to go on board a foreign warship without the permission of the commander. The commander and other authorities of the flag state have exclusive jurisdiction over crimes committed on board by persons in the service of the ship. It would, however, seem that this immunity may be waived in specific cases.<sup>4</sup> If persons who do not belong to the ship commit crimes on board, they are generally handed over to the local authorities by the commander; but he cannot be forced to do so. It would seem that if a crime is committed on board the ship by a national of the coastal state against a fellow national, the commander is bound to hand him over to the local authorities.<sup>5</sup>

A foreign warship is not a sanctuary for persons charged with non-political crimes. If a person who does not belong to such a ship seeks protection on board after having committed a crime ashore, the commander has no right to receive him. If, however, he has secured admission to the ship and the commander refuses to surrender him, he cannot be removed forcibly; his surrender can be obtained only by diplomatic means.

In so far as political offenders are concerned, it is not clear whether international law recognizes the right of the commander of a warship to offer them asylum on board the ship. There is, however, considerable

<sup>1</sup> See *Laws and Regulations on the Regime of the Territorial Sea*, U.N. pub., 1957, pp. 361-420, for the regulations in various states concerning the access of foreign warships to their ports.

<sup>2</sup> Brierly rejects the theory of extritoriality; see *The Law of Nations*, 5th ed. (1955), pp. 187, 191. This view was accepted by the Judicial Committee of the Privy Council in *Chung Chi Cheung v. The King* [1939] A.C. 160.

<sup>3</sup> H. A. Smith, *The Law and Custom of the Sea*, 3rd. ed. (1959), p. 37.

<sup>4</sup> *Chung Chi Cheung v. The King* [1939] A.C. 160.

<sup>5</sup> See Colombos, *op. cit.*, p. 235.

authority in support of the view that their reception is "justified by custom so long as they are kept harmless." <sup>1</sup>

In civil matters, no form of public or private process will lie against a foreign warship in respect of any action arising out of a maritime claim or any other claim. She cannot be seized or arrested by any legal proceedings.

It would seem that persons on board a foreign warship lying within the waters of a coastal state are subject to the jurisdiction of the local tribunals in respect of obligations assumed in their personal capacity vis-à-vis persons who do not belong to the ship. However, members of the crew of a warship cannot be detained or imprisoned by way of execution of judgments.<sup>2</sup>

A foreign warship is expected to observe the local laws and regulations regarding order in the port, the places for casting anchor, sanitation and quarantine, customs, etc., etc.<sup>3</sup> If she fails to do so, she may be required, and if necessary compelled, to leave the port.<sup>4</sup>

The position of the commander and the crew of a foreign warship when they are ashore is not clear. Some writers maintain that they are in every case under the local jurisdiction whilst ashore; whereas, the majority of writers are of the opinion that there is a distinction between a stay on land in the service of the ship and a stay for other purposes.<sup>5</sup> The writers who draw this distinction maintain that the commander and members of the crew of a warship remain under the exclusive jurisdiction of their home state so long as they are on land on official duty. If however they are ashore for purposes of pleasure and

<sup>1</sup> Colombos, *op.cit.*, p. 239; on the question of asylum, see Oppenheim, *op.cit.*, Vol. I, p. 854, n.2; H. A. Smith, *op.cit.*, p. 39.

<sup>2</sup> See Art. 23 of the Resolution of the Institute of International Law, 1898, The Hague, *Annuaire*, 17 (1898); also Art. 25 of the Resolution of the Institute of International Law, Stockholm, 1928, *Annuaire*, 34 (1928).

See also Van Praag, *Jurisdiction et Droit International Public* (1915), p. 507.

<sup>3</sup> Articles 8-24 of the Resolution of the Institute of International Law, 1898, deal with warships in foreign ports; *Annuaire*, 17 (1898), pp. 275-280. See also Articles 15-26 of the Resolutions of the Institute of International Law, 1928, Stockholm, *Annuaire*, 34 (1928), pp. 741 *et seq.*

<sup>4</sup> See for example the Netherlands law which provides that even force may be used to expel a foreign warship which contravenes the local regulations [Decree of 2 June 1931 (as amended by Decree of 13 Sept. 1946), Article 14; *Staatsblad*, 1931, No. 237 and *Staatsblad*, 1946, No. G. 253; *Laws and Regulations on the Regime of the Territorial Sea*, U.N. pub., p. 390]. See also Royal Decree of 30 Oct. 1909, Art. 12 [*Staatsblad van het Koninkrijk der Nederlanden*, 1909, No. 351; U.N. pub., *op.cit.*, p. 385]. See also Colombos, *op.cit.*, p. 227.

<sup>5</sup> See Oppenheim, *op.cit.*, Vol. I, pp. 855-6; Moore, Vol. 2, § 256; Hall, *A Treatise on International Law*, 8th ed. (1924), § 55; Phillimore, *Commentaries upon International Law*, 3rd ed., Vol. 1, § 346.

recreation, they fall under the jurisdiction of the coastal state like other foreigners.<sup>1</sup>

Opinions differ as to whether or not foreign warships have a right of innocent passage through the territorial sea of a coastal state. Hall is of the opinion that this right is not enjoyed by warships;<sup>2</sup> whereas Westlake does not agree with Hall on this point.<sup>3</sup> In time of peace states normally allow warships to exercise this right. The Hague Codification Conference of 1930 has recognized the right of a foreign warship to pass through the territorial sea of a coastal state without previous authorization or notification. The coastal state, however, has the right to regulate the conditions of such passage.<sup>4</sup> The Geneva Convention of 1958 on the Territorial Sea and the Contiguous Zone has recognized the right of all ships to exercise this right.<sup>5</sup> The International Court of Justice has held in the *Corfu Channel Case*<sup>6</sup> that in time of peace warships enjoy the right of innocent passage through straits which are used for international navigation between two parts of the high seas.

A foreign warship in the course of passage through the territorial sea of the coastal state is liable to be expelled by the local authorities if she fails to comply with the local regulations concerning the passage and disregards any request made to her for such compliance.<sup>7</sup> However she remains immune from all kinds of legal proceedings while in the course of such passage.

<sup>1</sup> See the decision of the Court of Cassation of the Mixed Courts in Egypt in 1942 in *Ministère public v. Triandafilou, A-D.*, 1919-42, Case 86.

See also *Gounaris v. Ministère public, A-D.*, 1943-45, Case 41; *Japan v. Smith and Stinner* (1952), High Court of Osaka, *I.L.R.*, 1952, Case 47.

The position of the crew ashore was admirably summed up by the Institute of International Law in its Resolution adopted at Stockholm in 1928. Art. 20 says "If the members of the crew ashore commit breaches of the law of the country they may be arrested by the local authorities and brought before the local courts. The captain of the ship should be notified of the arrest, but he has no right to demand their surrender.

If the offenders regain their ship without having been arrested, the local authorities have no right to board the ship for the purpose of arresting them, but can only request that they should be handed over to the tribunals which are competent according to the law of the flag and that they (the local authorities) should be informed of the result of such proceedings.

If the members of the crew ashore on official duty (*service commandé*) whether individually or collectively, commit offences or crimes ashore, the local authority may proceed to arrest them but should hand them over to the captain if he should demand their surrender.

The local authority . . . has the right to request that the delinquents should be prosecuted before the competent authorities and that they should be informed of the result of the proceedings." Quoted from *A-D.*, 1919-42, Case 86, at pp. 167-168.

<sup>2</sup> *op.cit.*, p. 198.

<sup>3</sup> *International Law*, 2nd ed. (1910), Part 1, p. 196.

<sup>4</sup> Draft Convention, Article 12; publication of the League of Nations C., 1930, V. 9.

<sup>5</sup> Art. 14.

<sup>6</sup> *I. C. J. Reports*, 1949, p. 4.

<sup>7</sup> Geneva Convention of 1958 on the Territorial Sea and the Contiguous Zone, Article 23.

On the high seas, warships enjoy complete immunity from the jurisdiction of any state other than the flag state.<sup>1</sup> If, however, the crew of a warship has mutinied whilst on the high seas and has taken control of the ship for the purpose of committing piracy, the ship ceases to enjoy the privileges of a warship and is assimilated to the position of a pirate ship. Such a ship is liable to be seized on the high seas by warships or other specially authorized ships or aircraft of any state.<sup>2</sup>

It is not clear whether warships will enjoy the privileges that are usually accorded to them if they adopt the character of merchant ships by carrying commercial cargo or otherwise engaging in trading operations. There is, however, some authority for the view that they shall cease to enjoy their special privileges if they engage in commercial activities.<sup>3</sup>

### *B. Non-military ships*

#### *(a) Government ships engaged in non-commercial activities.*

Two important international Conventions<sup>4</sup> have affirmed the principle that ships owned or operated by a state and used exclusively for governmental and non-commercial purposes shall enjoy immunity from the jurisdiction of states other than the flag state. Under this rule, ships in the service of the police, customs, port authorities or other government departments for strictly governmental and non-commercial purposes are considered to be immune from the jurisdiction of foreign states.

#### *(b) Government merchant ships.*

In view of the increasing practice of several states of owning or operating a large number of merchant ships, the question of the

<sup>1</sup> Geneva Convention of 1958 on the High Seas, Article 8.

<sup>2</sup> *ibid.*, Articles 16–21.

<sup>3</sup> The Brazilian Regulations annexed to Decree No. 24063 of 29 March 1934 provide that a foreign warship in a Brazilian port shall forfeit its privileges if it engages in trading operations while in that port without being authorized to do so by the Brazilian Government. Such a ship shall be subject to “all the obligations to which merchant ships are normally subject under the relevant regulations” [*Diário oficial*, 5 Ap. 1934, p. 6461; see *Laws and Regulations on the Regime of the Territorial Sea*, U.N. pub. (1957), pp. 363–66].

See the shipping order (1908) of Surinam which provides that foreign warships carrying cargoes for the purpose of trade have to obtain an “outward clearance” certificate before their departure from port. [See Ch. III below, p. 116]. See Moore, Vol. 2, p. 577, where he says “Foreign armed vessels, adopting the character of merchant ships by carrying merchandise, render themselves subject to the revenue laws.”

<sup>4</sup> The Brussels Convention of 1926, Art. 3; and the Geneva Conventions of 1958 (the first Convention, Art. 22; and the second Convention, Art. 9.); see Ch. IV.



jurisdictional immunities of these ships has become one of great practical importance. At a time when governments did not operate ships for commercial purposes, as they now do, it was generally recognized that the principle of immunity of warships as laid down in 1812 by Chief Justice Marshall of the United States Supreme Court in *The Exchange*<sup>1</sup> was applicable to all government ships without distinction. The United States and the English courts have been – at any rate until recently – steadfast in their strict adherence to this doctrine of absolute immunity of government ships. This doctrine has the support of writers like Westlake,<sup>2</sup> Fitzmaurice,<sup>3</sup> Zourek<sup>4</sup> and probably Hall.<sup>5</sup>

However, the case law and state practice of various nations as well as the writings of several recent publicists seem to confirm the view<sup>6</sup> that “it has gradually been realised that if a government elected to navigate and trade as a shipowner, it ought to submit to the same legal actions and claims as any other shipowner.”<sup>7</sup>

Nevertheless, there is so much divergence in the practice of states that the question of immunity of government ships still remains a matter of heated controversy, as was evidenced at the Geneva Conference on the Law of the Sea in 1958.<sup>8</sup>

## II. PRINCIPLES RELATING TO THE DOCTRINE OF IMMUNITY OF SHIPS

It was not until the beginning of the 19th century that the doctrine of jurisdictional immunities of government ships came to be recognized as a principle of international law. Even the immunity of foreign warships was not universally accepted until that time.

<sup>1</sup> *The Schooner Exchange v. M'Faddon and others* (1812), 7 Cranch 116; see Ch. III below. See Lloyd's Register of shipping (latest edition), Vol. III, for the number of ships owned or operated by various states and other particulars concerning such ships.

<sup>2</sup> *International Law*, 2nd ed. (1910), Part 1, p. 265.

<sup>3</sup> G. G. Fitzmaurice, *State Immunity from Proceedings in Foreign Courts*, B.Y., 14 (1933), pp. 101 *et seq.* The learned writer in the above article discusses the general problem of immunity of foreign states and does not deal specifically with the particular problem of immunity of government ships.

<sup>4</sup> Jaroslav Zourek, *Clunet*, 1959, No. 3, pp. 639, 665.

<sup>5</sup> *A Treatise on International Law*, 8th ed. (1924), p. 307. Although Hall stands for absolute immunity of government ships on the high seas from the jurisdiction of any state other than the flag state, he is not so emphatic as regards their status while in foreign waters (*ibid.*, pp. 247–8). See below, pp. 23, 27.

<sup>6</sup> See below, pp. 24 *et seq.*

<sup>7</sup> Colombos, *op.cit.*, p. 232.

<sup>8</sup> See the proceedings of the Conference A/CONF 13/39 and 40; see also Ch. IV below.

In 1794 Attorney General Bradford of the United States advised the Government of Washington that international law did not invest the Commander of a foreign warship with any exemption from the jurisdiction of the coastal state.<sup>1</sup> In 1799 Attorney General Lee of the United States declared in the case of a British warship lying in the harbour of New York that it was lawful to serve civil or criminal process upon a person on board the ship.<sup>2</sup> Lord Stowell of England expressed similar views in connection with the case of John Brown.<sup>3</sup> The above views had their parallel in Europe in the opinions expressed by eminent jurists like Lampredi<sup>4</sup> and Bynkershoek.<sup>5</sup> In 1904 the courts in the Netherlands attempted to levy execution upon a Belgian government ship employed for training purposes.<sup>6</sup> In 1909 a court at Haarlem authorized the seizure of a Swedish submarine in a case arising out of a claim for assistance rendered to her.<sup>7</sup>

It was Chief Justice Marshall of the Supreme Court of the United States of America who laid down for the first time in *The Exchange* case the principle of immunity of foreign warships from the jurisdiction of the tribunals of a coastal state.<sup>8</sup> This principle came to be accepted in England<sup>9</sup> and in many countries of Europe<sup>10</sup> in the course of the 19th century.

The decision in *The Exchange* was concerned only with warships. Nevertheless the principle established in this case was applied in a series of decisions by the United States and English courts so as to grant jurisdictional immunities to all categories of government ships, irrespective of their functions.<sup>11</sup> This attitude of the United States and English courts may be contrasted with that of the Italian courts and the Mixed Courts of Egypt which have consistently refused to grant jurisdictional immunities to government merchant ships.<sup>12</sup>

<sup>1</sup> T. J. Lawrence, *The Principles of International Law*, 7th ed., p. 226.

<sup>2</sup> *ibid.*

<sup>3</sup> *ibid.*

<sup>4</sup> Hall, *op.cit.*, p. 237.

<sup>5</sup> See the judgment of Marshall, C. J., in *The Exchange* (1812), 7 Cranch at 145.

<sup>6</sup> See *B. Y.* 28 (1951), p. 263.

<sup>7</sup> *B. Y.*, *ibid.*

<sup>8</sup> *The Schooner Exchange v. M'Faddon and others* (1812), 7 Cranch 116; see Ch. III for a discussion of this case.

<sup>9</sup> *The Constitution* (1879) 4 P.D. 39.

<sup>10</sup> Sucharitkul, p. 52; Hall, *op.cit.*, pp. 244-5.

<sup>11</sup> For example, *Berizzi Bros v. SS Pesaro* (1926), 271 U.S. 562;

*The Pampa* (1917), 245 F. 137 [The *Pampa* was carrying general merchandise, although she belonged to the Argentine Navy];

*The Roseric* (1918), 254 F. 154;

*The Parlement Belge* (1880) 5 P.D. 197;

*The Porto Alexandre* [1920] P. 30. See Ch. III for a discussion of some of the above cases.

<sup>12</sup> See below under Recent Developments.

The principle of absolute immunity of government ships as laid down by the United States and English courts has now come to be disowned by a very large number of modern jurists in both these countries.<sup>1</sup> At the Geneva Conference on the Law of the Sea in 1958 it was, paradoxical and ironical as it might seem, the task of the representatives of the Soviet Union supported by those of a few other nations (mostly of Eastern Europe) to uphold the principle of absolute immunity as developed and perfected by the United States and English courts.<sup>2</sup>

It may be of interest, in this connection, to undertake a brief survey of the practice of the United States and English courts and see how they have developed the principle of absolute immunity of government ships. Recent developments in the practice of courts and governments in various states are briefly examined in another part of this chapter.<sup>3</sup>

#### A. *Judicial practice in the U.S.A. and England*

All public ships of foreign states enjoy immunity from the jurisdiction of the United States courts.<sup>4</sup> All ships in the possession and service of a state are deemed to be public ships. This is so even if such a ship is engaged in ordinary commercial undertakings. As the Supreme Court of the United States observed: <sup>5</sup>

... when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that warships are.

The courts in the United States do not exercise jurisdiction over a foreign government ship whose immunity has been recognized by the Department of State.<sup>6</sup> If the Department of State has refused to recognize the immunity of a ship, and if it has no guiding policy in the matter, the courts do not accord immunity to a ship unless she is in the possession and service of a foreign state.<sup>7</sup>

<sup>1</sup> For example see: W. L. McNair, *Grotius Society*, 34 (1948), p. 43; Brierly, *The Law of Nations*, 5th ed. (1955), p. 193; Garner, *B.Y.*, 1925, p. 128; F. K. Nielsen, *A.J.*, 13 (1919), p. 20; W. R. Bisschop, *B.Y.*, 1922-23, p. 159; Norman Hill, *C.M.I. Bulletin*, No. 57, Oct. 1922, p. 257; Maurice Hill, *ibid.*, p. 230; Lauterpacht, *B.Y.*, 28 (1951), pp. 220 *et seq.*

<sup>2</sup> See the Proceedings of the Conference, A/CONF 13/39 and 40.

<sup>3</sup> See pp. 28 *et seq.*

<sup>4</sup> *The Schooner Exchange v. M'Faddon* (1812), 7 Cranch 116; *Berizzi Bros v. SS Pesaro*, 271 U.S. 562. See Ch. III for a discussion of the above cases.

<sup>5</sup> *The Pesaro*, *ibid.*, 574.

<sup>6</sup> *Republic of Mexico v. Hoffman* (1945), 324 U.S. 30; see Ch. III below.

<sup>7</sup> *ibid.*

Consequently, a state-owned ship is not exempt from suit *in rem* unless she is proved to have been in the possession and service of a foreign state.<sup>1</sup> No maritime lien attaches to a ship which is in the ownership, possession and service of a foreign state. A lien cannot attach even in suspense so as to be enforceable after the ship has passed into private hands.<sup>2</sup> If, however, a foreign state acquired the ownership of a ship against which a maritime claim had already arisen before it became state property, the state is deemed to have acquired the ownership subject to the claim.<sup>3</sup> A privately owned ship in the possession and service of a foreign state probably enjoys as much immunity from suit as does a state-owned ship in the possession and service of a foreign state.<sup>4</sup> A privately owned ship chartered or requisitioned by a foreign state but left in the possession and charge of its private owner does not enjoy immunity from the process of the United States courts.<sup>5</sup>

The possession should be actual and effective. The ship should be either in the physical control of the foreign government, or it should be shown that there is some recognition on the part of the ship's officers that they are controlling the ship and the crew on behalf of that government, or there should be clear evidence that the ship is in fact engaged in the public service of such a government.<sup>6</sup>

Possession must be peaceably acquired.<sup>7</sup> There should not be any use of force or breach of the peace or violation of the laws of the local state in acquiring possession. A foreign government may claim immunity for a ship which it has requisitioned and reduced to possession in American waters, provided there was no use of force or breach of the peace.<sup>8</sup> If a foreign state appears before a court in the United States to enforce a maritime lien in its favour, the state subjects itself to the jurisdiction of the court and is bound by its orders.<sup>9</sup>

In so far as the United States courts are concerned, it may be concluded that a ship is immune from suit not because she is owned by

<sup>1</sup> *ibid.*, *The Navemar*, 303 U.S. 68; *Ervin v. Quintanilla* (1938), 99 F (2d) 935; 1938 *A.M.C.* 1459; *The Beaton Park*, *A-D.*, 1946 No. 35.

<sup>2</sup> *The Nevada*, *A-D.*, 1925-26, Case 134.

<sup>3</sup> *The Secundus*, *A-D.*, 1925-26, Case 136; 15 FR (2nd) 711, 713.

<sup>4</sup> *The Navemar*, *ibid.*, at 74; *Ervin v. Quintanilla*, *ibid.*

<sup>5</sup> *The Attualità* (1916), 238 F. 909; *The Beaverton* 273 F. 539; D.C. N.Y., 1919; see Garner, *B.Y.*, 1925, p. 128.

<sup>6</sup> *The Navemar*, 303 U.S. 68.

<sup>7</sup> *ibid.*, 18 F. supp. 153, 158 (E.D.N.Y. 1937); 1937 *A.M.C.* 26.

<sup>8</sup> *Ervin v. Quintanilla* 99 F (2d) 935 (C.C.A., 5th, 1938); see Preuss, *A.J.*, 1942, p. 55; A. D. McNair, *Grotius Society*, 31 (1945), pp. 30, 46.

<sup>9</sup> *ibid.*

a foreign state, but because she is in the possession and service of such a state. As Chief Justice Waite said:

property does not necessarily become a part of the sovereignty because it is owned by the sovereign. To make it so it must be devoted to the public use and must be employed in carrying on the operations of the Government.<sup>1</sup>

The courts of law in England do not implead a foreign sovereign,<sup>2</sup> unless he voluntarily submits to the jurisdiction of the English courts by specifically waiving his immunity.<sup>3</sup>

The English courts hold the view that a foreign sovereign is impleaded, "whether the proceedings involve process against his person or seek to recover from him specific property or damages."<sup>4</sup> Property which is his or which is in his possession or control cannot be seized or detained, whether or not he is a party to the proceedings.<sup>5</sup>

An English court will not exercise jurisdiction over a ship which is claimed to be the property of a foreign state, whether or not the ship is operated for non-commercial and government purposes.<sup>6</sup> A declaration by a foreign state that the ship is its property is conclusive and cannot be enquired into by an English court.<sup>7</sup> The ship is immune from proceedings *in rem* or from arrest or seizure. The foreign state which owns the ship is also immune from all proceedings *in personam* in respect of a claim against the ship.<sup>8</sup> No maritime lien will attach to such a ship so long as she is the property of a foreign state. A lien cannot attach, even in suspense, to such a ship so as to be enforceable against her after she has ceased to be the property of the state.<sup>9</sup>

As regards ships which are not the property of a foreign state, but are chartered or requisitioned by it or otherwise in its possession or control, the English courts will not order the arrest of such ships so long as they are subject to such control by the state, irrespective of the nature of their activities.<sup>10</sup> No action will lie against the foreign state in

<sup>1</sup> *The Fidelity*, Fed. Case No. 4758. See 324 U.S. 37.

<sup>2</sup> *Mighell v. Sultan of Johore* [1894] 1 Q.B. 149. The same is the position in the United States. *The Schooner Exchange v. M'Faddon* (1812) 7 Cranch 116; see Hyde, Vol. I, p. 817.

<sup>3</sup> *Duff Development Co. v. The Government of Kelantan*, [1924] A.C. 797. See G. G. Fitzmaurice, *B.Y.*, 1933, pp. 101, 105.

<sup>4</sup> *Per* Lord Atkin, [1938] A.C. 485, 490; see Ch. III below.

<sup>5</sup> *ibid.*

<sup>6</sup> *The Parlement Belge* (1880) 5 P.D. 197; *The Porto Alexandre* [1920] P. 30. See Ch. III.

<sup>7</sup> *The Parlement Belge*, *ibid.*

<sup>8</sup> *The Parlement Belge*, *ibid.*; *The Porto Alexandre*, *ibid.*

<sup>9</sup> *The Tervaete* [1922] P. 2 59

<sup>10</sup> *The Messicano* (1916) 32 T.L.R. 519; *The Erissos* (1917) *Lloyd's List Newspaper Reports*, Oct. 23; *The Koursk* (1918) *ibid.*, June 19; *The Eolo* (1918) 2 *Irish Reports*, 78; *The Crimdom* (1918) 35 T.L.R. 81; see Oppenheim, 8th ed. (1955) Vol. I. p. 857, note 1.

respect of any claim connected with the ship; nor will a maritime lien attach to such a ship for damages caused by her or salvage services rendered to her during the time she was in the possession or control of the foreign state.<sup>1</sup> It would, however, appear that the owner is liable to be sued *in personam* after the ship has been re-delivered to him in respect of salvage services rendered to her during the governmental possession or control, provided the owner has benefited from those services.<sup>2</sup> It would seem that the English courts draw a distinction between a writ of summons instituting an action *in rem* and a warrant of arrest.<sup>3</sup> It appears that there is no objection to a writ *in rem* being brought against a privately owned ship in the possession or control of the foreign state provided the proceedings are not in respect of the governmental possession or control of the ship, and provided such proceedings are only intended to induce the foreign owner to appear and submit to the jurisdiction of the English court in regard to a lien.<sup>4</sup> The plaintiff cannot, however, enforce his lien by effective arrest, as the courts in England do not allow the arrest or detention of such a ship so long as she is in the possession or control of the foreign state. His remedy is therefore only a personal action against the foreigner owner.<sup>5</sup>

The English courts recognize the right of a foreign government to requisition ships flying its flag. If a foreign government enjoys *de facto* possession of a requisitioned ship, the courts in England will not by their process oust it from such possession, even if the ship was reduced to possession within British waters. It is, however, doubtful if the courts will by their process help a foreign government obtain possession of a requisitioned ship within British waters. In *The Cristina*

<sup>1</sup> *The Sylvan Arrow* [1923] P. 220.

<sup>2</sup> *The Meandros* [1925] P. 61.

<sup>3</sup> *The Messicano* (1916) 32 T.L.R. 519

*The Erissos* (1917) *Lloyd's List Newspaper Reports*, Oct. 23;

*The Crimdon* (1918) 35 T.L.R. 81.

<sup>4</sup> As distinguished from an action for possession: see the remarks of Lord Wright in *The Cristina*, [1938] A.C. 485 at p. 507. The foreign owner is likely to appear rather than let judgment go by default, for in an action *in rem* the rules in England do "not require the arrest of the *res* as a condition precedent to judgment by default, . . . though until it is in the hands of the Court the decree has no practical value." [Roscoe, *Admiralty Practice*, 4th ed. (1920), p. 316; A. D. McNair, *B.Y.*, 1921-22, p. 72; *The Nautik* [1895] P. 121 (cited by Roscoe, *ibid.*)]

<sup>5</sup> *The Crimdon* (1918) 35 T.L.R. 81. See A. D. McNair, *B.Y.*, 1921-22, at p. 74. As regards a privately owned ship in the possession or control of a foreign state, he says: ". . . proceedings *in personam* against the owner of the ship, and (apart from arrest) proceedings *in rem* are unaffected, and a maritime lien or a judgment *in rem* may be enforced as soon as the occupation of the foreign state comes to an end." See also Oppenheim, *International Law*, 8th ed. (1955), Vol. 1, p. 857, n.1.

immunity was granted to the ship for the reason that she was in the actual possession of a foreign government for its public use. The question as to whether the courts in England will recognize such possession acquired within British waters by a breach of the peace seems to be still open.<sup>1</sup>

If a ship which is not in the possession or control of any state, but in which a foreign state claims an interest, is sued *in rem* without impleading the foreign state, the English courts are likely to assume jurisdiction unless the foreign state shows that its claim is "not merely illusory, nor founded on a title manifestly defective."<sup>2</sup> However the foreign state is not "bound as a condition of obtaining immunity to prove its title to the interest claimed."<sup>3</sup>

In this connection, it may be mentioned that the Scottish courts also follow a policy of absolute immunity of government ships.<sup>4</sup> The same principle has been followed by the courts of Canada<sup>5</sup> and South Africa.<sup>6</sup>

To sum up, the position of a state-owned or state-operated ship before the courts of the United States and England is probably as follows.

If it is proved that a ship is in the ownership, possession and service of a foreign state, neither the United States nor the English courts will assume jurisdiction over such a ship. If, however, a state-owned ship is not in the possession and service of a foreign state, she is subject to the jurisdiction of the United States courts in an action *in rem*, whereas the English courts will grant the ship immunity for the reason that she is state-owned. As regards a privately owned ship in the possession and service of a foreign state, neither the United States nor the English courts will entertain an action connected with the governmental operation of the ship, nor will they in any event allow the arrest or detention of the ship. In both countries, the courts do not deny immunity merely because a ship is employed in commerce.

<sup>1</sup> See Mann, *M.L.R.*, Vol. II (1938-9), p. 57. On the right of a state to requisition its ships while they are within foreign waters, see A. D. McNair, *Grotius Society*, Vol. 31 (1945), pp. 30, 46.

<sup>2</sup> *Juan Ysmael and Co v. Government of the Republic of Indonesia* [1955] A.C. 72 at pp. 89-90.

<sup>3</sup> *ibid.*; see G. C. Cheshire, *Private International Law*, 6th ed. (1961), p. 94, for a criticism of this decision.

<sup>4</sup> *S. S. Victoria v. S. S. Quillwark*, Court of Session (1921); (1922) *S.L.T.* 68; *A-D.*, 1919-42, Supp. vol., Case 80.

<sup>5</sup> *Brown v. S. S. Indochine* (1922), *A-D.*, 1919-22, Case 106; *White v. The ship Frank Dale* (1946), *A-D.*, 1946, Case 34.

<sup>6</sup> *De Howorth v. The S. S. India*, *A-D.*, 1919-22, Case 105; *Ex P. Sulman*, *A-D.*, 1941-42, Case 64.

It will, however, be shown below that certain restrictive tendencies can be seen in the recent judicial practice of both countries.<sup>1</sup>

### *B. Jurisdictional immunities of foreign states*

The supporters of the doctrine of absolute immunity of government ships seem to derive their arguments from the wider principle of jurisdictional immunities of foreign states. To subject a foreign government ship to the process of the local courts, they say, is to implead the foreign state itself. It is the immunity of the foreign state that throws a protective umbrella of special privileges over its ships. It is therefore necessary to embark on a brief survey of some of the main arguments adduced by writers for and against the rule of jurisdictional immunities of foreign states.

The advocates of absolute immunity of foreign states contend that the doctrine of immunity is derived from the principles of the independence, the equality, and the dignity of states; that the maxim *par in parem non habet imperium* is rooted in those very principles; and that any exercise of jurisdiction over a foreign state is a violation of the basic principles of international law.<sup>2</sup> Some writers<sup>3</sup> maintain that although the principle of immunity does not derive from any basic rule of international law, it has now become a part of international law as a result of a customary rule and is as such valid and binding.

The advocates of absolute immunity maintain that even if it is possible to assume jurisdiction over foreign states in respect of some of their activities, the assumption of jurisdiction by the local courts has to remain ineffective, for states do not as a rule agree to a seizure of their property by way of execution of judgments rendered against them.<sup>4</sup>

These writers suggest that a plaintiff who has a claim against a foreign state is not justified in proceeding against that state in a court of any other state. He should proceed against the foreign state in its own courts; or he might try to obtain redress from the foreign state through diplomatic methods.<sup>5</sup>

They further argue that any limitation of immunity based on a

<sup>1</sup> See under Recent Developments, pp. 39 *et seq.*

<sup>2</sup> See Jaroslav Zourek, *Clunet*, 1959, (No. 3), pp. 639 *et seq.*

<sup>3</sup> See, for example, Anzilotti; [see Lauterpacht, *B. Y.*, 28 (1951), p. 221, n.3.]

<sup>4</sup> See Fitzmaurice, *B. Y.*, 14 (1933), p. 101 at p. 120.

<sup>5</sup> *ibid.*, p. 121.



distinction between two classes of state acts is unsatisfactory and impractical.<sup>1</sup>

There is on the other hand a formidable array of modern jurists who strongly refute the arguments adduced by the advocates of absolute immunity. They say that the doctrine of absolute immunity does not derive from any basic principle of international law, nor has it become valid or binding as a result of any customary rule.

H. Lauterpacht in a thought-provoking essay on "The Problem of Jurisdictional Immunities of Foreign States"<sup>2</sup> maintains that there is no categorical principle of international law which prohibits the courts of one state from exercising jurisdiction over another state. He says that international practice does not show frequent instances of protests against such exercise of jurisdiction and even against execution of judgments. He points out that the principle of reciprocity adopted by some states in deciding the question of immunity from jurisdiction or execution shows that there is no binding rule of international law in the matter. He maintains that the very fact that the courts of many countries draw a distinction between acts *jure imperii* and acts *jure gestionis* and assume jurisdiction over matters *jure gestionis* shows that the principle of absolute immunity has never been a part of international law.

H. Lauterpacht points out that the doctrine of absolute immunity never formed a part of classical international law. Grotius does not mention it; Bynkershoek is critical of it; Vattel, who admits it with regard to the person of the sovereign, does not refer to the position of his property.

Lauterpacht maintains that it is not so much the principles of *independence* and *equality* that form the basis of immunity, but considerations of a different sort; namely, the dignity of the sovereign state, and the traditional claim of the sovereign state to be above the law, being transposed into the international field. He dismisses the very notion of dignity as an archaic survival and says that it cannot continue as a rational basis of immunity. He asserts, "The dignity of foreign states is no more impaired by their being subjected to the law, impartially applied, of a foreign country than it is by submission to their own law." The learned writer points out that the principle of state immunity – whether of the territorial state or of the foreign state – is a survival of the period when the sovereign was considered to be above

<sup>1</sup> *ibid.*, at p. 123.

<sup>2</sup> *B.Y.*, 28 (1951) pp. 220 *et seq.*

the law. However, he says that recent developments in the fields of legislation and judicial practice in the United States, France, Germany, England and other countries have paved the way for subordinating at least some of the activities of the state to rules of private law.

Lauterpacht suggests that the doctrine of jurisdictional immunity, being inconsistent and incompatible with the rule of law, should be abolished, subject to certain safeguards and exceptions; namely, (a) matters arising out of legislative, executive and administrative acts of a foreign state within its territory, (b) matters excluded from the jurisdiction of the local courts by rules of private international law, (c) matters excluded from local jurisdiction by virtue of the rules of diplomatic immunity or the immunities of military vessels.

J. G. Castel,<sup>1</sup> after an examination of some of the recent decisions of the French courts, comes to the conclusion that the French courts no longer recognize the immunity of a foreign state either from the jurisdiction of the French courts or from the execution of judgments in matters arising out of non-governmental activities. The French courts draw a distinction between the activities of a government in its sovereign capacity – acts *jure imperii* – on the one hand, and its activities of a commercial nature – acts *jure gestionis* – on the other. In respect of the former activities, a foreign state is granted immunity from jurisdiction as well as execution; whereas, in the latter case the foreign state enjoys no immunity. Any property of a foreign state which is used for commercial purposes can be seized in satisfaction of a judgment rendered against it.

Castel says that the French courts have come to accept the principle of limited immunity on account of the fact that the French doctrine does not regard the *independence* of states as a source of their immunity. It holds that it is the *sovereignty* and not the independence of states that gives rise to their immunity. When the state acts like a sovereign, it enjoys immunity; when it acts in a private capacity, it is subject to the rules and obligations of private law.

Jean-Flavien Lalive,<sup>2</sup> who has made a comparative study of judicial decisions of various countries, has come to the conclusion that there is no rule of international customary or treaty law which requires a state to grant jurisdictional immunity to a foreign state. He says most emphatically that several courts and eminent writers have been

<sup>1</sup> *A.J.*, 46 (1952), pp. 520–526; see, however, Walton, *J.C.L.* 3rd ser., Vol. 2 (1920), pp. 252 *et seq.*

<sup>2</sup> *Recueil des Cours*, 84 (1953-III) p. 209. [The present writer has had the advantage of reading an English translation of Dr. Lalive's draft.]

mistaken in regarding jurisdictional immunities of foreign states as a part of international law or custom. The doctrine of immunity, he maintains, is neither based on the principle of sovereignty, independence or equality, nor does it result from any uniform practice of states.

William W. Bishop (Jr.) says in a recent survey of judicial decisions and state practice that the doctrine of absolute immunity does not form a part of customary international law.<sup>1</sup> He says that there is no generally accepted rule of international law which recognizes the immunity of foreign states when they "go beyond traditional governmental activities."<sup>2</sup>

As regards the argument of the advocates of absolute immunity that the assumption of jurisdiction over foreign states is ineffective for the reason that execution of judgments is not possible in the absence of a voluntary submission, writers like Lauterpacht<sup>3</sup> and Lalive<sup>4</sup> point out that it could hardly be asserted in the light of recent developments in the practice of states that the matter of execution is governed by rules different from those relating to the matter of jurisdiction on the merits. The same view is held by Lémonon<sup>5</sup> and the framers of the Harvard Draft.<sup>6</sup>

Regarding the suggestion of the advocates of absolute immunity that a plaintiff who has a claim against a foreign state should proceed against that state in its own courts, it is pointed out by the opponents of this doctrine that recourse to the courts of the foreign state in matters which, but for the claim to immunity, should normally be dealt with in the courts of the plaintiff's state is an artificial solution of the problem and is not in accordance with general legal conceptions.<sup>7</sup> It puts an unnecessary burden on the plaintiff by increasing the costs of the suit and by creating procedural difficulties in matters relating to evidence. In some countries the laws do not even permit judicial proceedings against the state.

As regards the suggestion that the plaintiff may obtain redress from a foreign state through diplomatic methods, the opponents of the doctrine of absolute immunity point out that it has the serious disad-

<sup>1</sup> *A.J.*, 47 (1953), pp. 93-106.

<sup>2</sup> *ibid.*, at p. 95. See also Art. 11 of the Harvard Draft on Competence of Courts in regard to Foreign States, [Supp. *A.J.*, 26 (1932) Part III]; also the Tate Letter, *Dept. of State Bulletin*, Vol. 26, p. 984, (June 23, 1952); A. K. Kuhn, *A.J.*, 40 (1946), pp. 374-6.

<sup>3</sup> *op.cit.*

<sup>4</sup> *op.cit.*

<sup>5</sup> See Lalive, *op.cit.*

<sup>6</sup> Competence of Courts in regard to Foreign States, Articles 11, 22-25; see Supp. *A.J.*, 26 (1932) Part III.

<sup>7</sup> See Lalive, *op.cit.*

vantage of substituting considerations of expediency for legal methods.<sup>1</sup>

Among the arguments in support of absolute immunity of foreign states from territorial jurisdiction, by far the most important is the view that a limitation of immunity as based on a distinction between acts *jure imperii* and acts *jure gestionis* is unsatisfactory and impractical. They point out "the extreme difficulty of drawing any satisfactory theoretical distinction between one class of state acts and another."<sup>2</sup>

An examination of some of the judicial decisions seems to suggest that there is no generally accepted criterion for drawing a distinction between acts *jure imperii* and acts *jure gestionis*. Italian courts have held that the purchase of shoes by a foreign state for its army was an act *jure gestionis*, and therefore unaffected by the rule of sovereign immunity<sup>3</sup>; whereas, a court in the United States was most emphatic in holding that the same transaction constituted for the foreign state "the highest sovereign function of protecting itself against the enemies."<sup>4</sup> A Belgian court has held that the purchase of goods by a French governmental agency for the reconstruction of a war-devastated area was an act *jure gestionis*<sup>5</sup>; whereas a purchase of goods to be resold to nationals was treated by one French court as an act *jure gestionis*<sup>6</sup> and by another French court as an act *jure imperii*.<sup>7</sup> A Belgian court has considered the activities of a state in promoting immigration as acts *jure imperii*, while an Italian court treated the same activities as constituting acts *jure gestionis*.<sup>8</sup> These and similar decisions show that the tribunals of different states – and at times of the same state – are likely to view the same state act from diametrically opposite points of view.

A ship operated by a state for the transportation of the above-mentioned cargoes or persons is liable to be treated by one court as engaged in commercial activities and by another court as engaged in activities of a non-commercial character.

<sup>1</sup> *ibid*; see Bishop, *op.cit.*, p. 99; F. K. Nielsen, *op.cit.*, p. 17.

<sup>2</sup> G. G. Fitzmaurice, *op.cit.*, at p. 123.

<sup>3</sup> *Governo Rumeno v. Trutta*, *Giurisprudenza Italiana*, 1926, Part 1 (1) p. 774; discussed by H. Lauterpacht, *B.Y.*, 28 (1951), p. 223.

<sup>4</sup> *Kingdom of Roumania v. Guaranty Trust Co. of New York*, (2nd) 250 Fed. 341, 343; see Lauterpacht, *op.cit.*

<sup>5</sup> *Société Monnoyer et Bernard v. Etat français*, 1927 *pasicrisie Belge*, Vol. III, p. 129; *A-D.*, 1927-8, Case 112.

<sup>6</sup> *Etat roumain v. Pascalet et Cie* (1924), *Dalloz hebdomadaire*, 1924, p. 260; *B.Y.*, 28 (1951), pp. 223, 260.

<sup>7</sup> *Lakhovsky v. Gouvernement fédéral Suisse*, *Gazette du Palais*, 1920, Vol. II, p. 382; *B.Y.*, 28 (1951), p. 223.

<sup>8</sup> See H. Lauterpacht, *op.cit.*

The French courts have in fact held that ships carrying wheat and wool for foreign governments were not engaged in activities of a commercial or speculative character<sup>1</sup>; whereas Swedish courts are likely to hold otherwise, in view of the Swedish law of 1938.<sup>2</sup>

It was to solve the above difficulty of drawing a satisfactory distinction between acts *jure imperii* and acts *jure gestionis* that M. Weiss in 1923 suggested that a court should in a given case look at the *nature*, and not the *object*, of a particular act.<sup>3</sup> The test, according to him, is not whether a particular state act is directed towards the attainment of a national object; on the contrary, the test should be whether the juridical nature of the act is such that it can be done by a private individual, irrespective of its object. If the answer is "yes," the act is not *jure imperii*, and the state has no immunity in respect of claims arising out of that act. A state, like any individual, may commit a breach of contract or a tort. Like an individual, the state bears responsibility for such an act and enjoys no immunity. According to this view, a state enjoys immunity only in regard to acts connected with legislation, or the expulsion of an alien or a denial of justice and the like, for an individual cannot perform them in his personal capacity. As Lauterpacht points out,<sup>4</sup> the above test only postpones the difficulty. To what extent, he asks, is it correct to say that a state has no immunity in respect of a contract for the purchase of a warship, merely because it is a contract and that an individual can make a contract. After all, states alone purchase warships.

Applying the above test, to what extent is it correct to say that a state may be sued before a foreign court in respect of claims arising out of a collision caused by one of its warships or salvage services rendered to such a ship, merely because it is a claim arising out of the operation of a ship and a private shipowner can incur similar liabilities in respect of his own ships? For can it not be pertinently asked whether an individual ever operates a warship?

Lauterpacht<sup>5</sup> says that there is in fact a third alternative to absolute immunity, namely, the general abandonment of immunity, subject to certain safeguards and exceptions. He examines a number of judicial decisions and comes to the conclusion that "there is force in

<sup>1</sup> *Etienne c. Gouvernement néerlandais* (1947), *A-D.*, 1947, Case 30. *The Hungerford*, 1922 *Darras* 743; see under France below, p. 31.

<sup>2</sup> See under Sweden, p. 35 below.

<sup>3</sup> Hague Academy of International Law, *Recueil des Cours*, 1923; see H. Lauterpacht, *op. cit.*, p. 225.

<sup>4</sup> *B.Y.*, 28 (1951), p. 225

<sup>5</sup> *op. cit.*, pp. 222-226.

the view that, at least in modern conditions, the distinction between acts *jure gestionis* and acts *jure imperii* cannot be placed on a sound logical basis.”<sup>1</sup> He says that it cannot be maintained that a state acts as a private person when it engages in trade. “For the state always acts as a public person. It cannot act otherwise. In a real sense all acts *jure gestionis* are acts *jure imperii*.”<sup>2</sup>

Lauterpacht concludes that the doctrine of absolute immunity has no basis in international law. The doctrine of limited immunity, as based on a distinction between acts *jure imperii* and acts *jure gestionis*, has also no basis in international law, although it is still adhered to by a very large number of courts. The doctrine of limited immunity as based on such a distinction does not offer a definite set of rules capable of general application. Jurisdictional immunity of foreign states is contrary to the general principle that a state should be subject to the rule of law. He therefore advocates the abolition of the rule of jurisdictional immunities of foreign states, subject to certain exceptions as mentioned above.<sup>3</sup>

All the writers, with the exception of Lauterpacht,<sup>4</sup> Lalive<sup>5</sup> and a few others,<sup>6</sup> in their examination of the problem of jurisdictional immunity of foreign states start from the premise that a state is immune from jurisdiction subject to certain exceptions, so much so that, whatever the terminology employed, they find themselves confronted with the impossible task of drawing a satisfactory line of distinction between acts *jure imperii* and acts *jure gestionis*.

The concept of a dual personality of states, as Lalive puts it, is pure phantasy and has nothing to do with law. All acts *jure gestionis* are in a sense acts *jure imperii*, for a state cannot act as a private person.<sup>7</sup>

Lauterpacht starts from the premise that a state enjoys no immunity, subject to certain well-defined exceptions. Lalive considers the proposal of Lauterpacht completely adequate from the point of view of legal technique, although he expresses doubts as to whether it will be acceptable to many states. Lalive, therefore, would like to avoid the harshness of Lauterpacht's proposal, as he puts it. He does not place the emphasis either on immunity in general or on the abolition of immunity, but suggests that a state should be immune only in respect

<sup>1</sup> *ibid.*, p. 224.

<sup>2</sup> *ibid.*

<sup>3</sup> See above, p. 18.

<sup>4</sup> *op.cit.*

<sup>5</sup> *op.cit.*

<sup>6</sup> See below.

<sup>7</sup> Lauterpacht, *op.cit.*, p. 224.

of certain well-defined categories of public acts. The principle, he says, should no longer be that a foreign state is immune from jurisdiction except in matters *jure gestionis*; but that a foreign state enjoys immunity only in respect of certain categories of acts.

The above discussion may now be summed up as follows:

There is a consensus of opinion among writers that the doctrine of absolute immunity of foreign states has no basis in international law.

There is considerable authority in support of the view that a foreign state is entitled to immunity from either suit or execution only in respect of certain categories of public acts.

### C. General principles

The advocates of absolute immunity argue that any exercise of jurisdiction over a foreign government ship is tantamount to an exercise of jurisdiction over the foreign state itself. They say that sovereign states being absolutely independent, one state cannot exercise jurisdiction over an equal; *par in parem non habet imperium*.<sup>1</sup> International comity, as Brett L.J. puts it, requires every sovereign state to respect the independence and dignity of every other sovereign state.<sup>2</sup> Hall says that ships of war and other public ships represent the sovereignty and independence of their state; they can only be encountered by their equals on the high seas; and being equals, one equal cannot exercise jurisdiction over another. Any exercise of jurisdiction over a public ship (while on the high seas) by a foreign state is, according to Hall, an act of war.<sup>3</sup>

The traditional concept of the doctrine of immunity of government ships was admirably stated by Brett L.J. when he said,

as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use . . .<sup>4</sup>

The doctrine of immunity of government ships has its roots in the historical concept of the state being identified with the person of the

<sup>1</sup> See Jaroslav Zourek, *Clunet*, No. 3, 1959, pp. 639, 665; Keilin, A/CONF. 13/40, p. 69 (U.N. pub.); Westlake, *op.cit.*

<sup>2</sup> (1880) 5 P.D. 197, 214-215.

<sup>3</sup> Hall, *A Treatise on International Law*, 8th ed. (1924), p. 307.

<sup>4</sup> 5 P.D. 197 at 214-215.

sovereign. The courts of a country, as the supporters of immunity say, do not exercise jurisdiction over a foreign sovereign either by way of process against his person or by proceedings against his property.<sup>1</sup> A court which seizes or detains a ship belonging to a foreign sovereign, assumes to make that sovereign subject to its jurisdiction. "To implead an independent sovereign in such a way is to call upon him to sacrifice either his property or his independence."<sup>2</sup>

The supporters of absolute immunity argue that any ship employed by a foreign state is not subject to the jurisdiction of courts other than those of the flag state. It does not matter even if the ship is employed in trade.<sup>3</sup> All government ships, whether engaged in trade or in military operations, are privileged and therefore immune from the process of foreign courts.<sup>4</sup>

The courts and writers have, as seen above, often linked the principle of immunity of ships with considerations of the independence, equality, sovereignty and dignity of a foreign state as personified by its sovereign. Any interference with foreign government ships is an affront to the independence, sovereignty and dignity of the flag state.

The writers of a new school of thought, on the other hand, argue that the legal status of government ships ought to be determined not by considerations of independence, equality or dignity,<sup>5</sup> but by rules compatible with the principles of territoriality and legality.<sup>6</sup>

They point out that Chief Justice Marshall, who for the first time laid down the principle of immunity of government ships,<sup>7</sup> placed great emphasis on the fact that the jurisdiction of a nation within its territory is exclusive and absolute, and that all exceptions to it "must be traced up to the consent of the nation itself."<sup>8</sup>

They say that the advocates of absolute immunity who argue that any exercise of jurisdiction over foreign government ships is derogatory to the sovereignty of the flag state overlook the fact that it is even more derogatory to the sovereignty of the coastal state in whose waters the ship lies "to be shorn of vital attributes of sovereignty,

<sup>1</sup> Lord Atkin, [1938] A.C. 490.

<sup>2</sup> Brett L.J. 5 P.D. 197 at 219.

<sup>3</sup> *The Porto Alexandre* [1920] P. 30.

<sup>4</sup> *The Pesaro*, 271 U.S. 562, 570.

<sup>5</sup> This part of the argument is considered in connection with the wider problem of jurisdictional immunities of foreign states; see pp. 16 *et seq.*

<sup>6</sup> See Jean-Flavien Lalive, *op. cit.*

<sup>7</sup> *The Schooner Exchange v. M'Faddon and others*, 7 Cranch 116; see Ch. III.

<sup>8</sup> *ibid.*, at 136.



exercised through administrative and judicial authorities, in order that such immunity may be granted.”<sup>1</sup>

These writers therefore maintain that any legal dispute connected with a foreign ship ought to be determined by the competent courts of the coastal state. There may be exceptions to this rule, but these exceptions must flow from the consent of the coastal state itself; they ought not to be presumed.<sup>2</sup>

These writers contend that the status of foreign government ships ought to be determined in accordance with the principle of legality. They say that a state ought to be subject to the ordinary rules of law except perhaps in certain limited and specified fields of activity. They point out that if merchant ships owned or operated by foreign governments are to be accorded the same immunities as are generally granted to foreign warships, the tribunals of a coastal state will be impotent to determine the rights of nationals of that state in respect of claims against a large number of foreign ships arising out of contract or tort.<sup>3</sup> Moreover, such tribunals will be hindered in their administration of criminal jurisprudence in cases where the arrest of criminals on board such vessels is sought in regard to crimes committed on board while such vessels were lying within the waters of a coastal state.<sup>4</sup> They, therefore, maintain that the immunities of foreign states<sup>5</sup> in respect of their maritime property ought to be strictly construed and limited to certain categories of government ships.

A large majority of the writers who oppose the theory of absolute immunity of government ships endeavour to draw a distinction between two kinds of state activities.

They say that a state acts as a sovereign only when it is engaged in activities of a governmental character (acts *jure imperii*). In respect of such activities a state does not generally submit itself or its property to the jurisdiction of the tribunals of other states. A ship owned or operated by a state for such purposes is, therefore, immune from the jurisdiction of the tribunals of any state other than the flag state.

They further contend that a state acts as a private individual when it engages in trade (acts *jure gestionis*). A state is subject, like a private individual, to the ordinary rules of law in respect of such activities. A

<sup>1</sup> Fred K. Nielsen, *A.J.*, 13 (1919), p. 20.

<sup>2</sup> See Lalive, *op.cit.*

<sup>3</sup> F. K. Nielsen, *op.cit.*; Lansing, Hackworth, Vol. II, pp. 426-7.

<sup>4</sup> F. K. Nielsen, *op.cit.*; Lansing, *op.cit.*

<sup>5</sup> For a discussion of the problem of jurisdictional immunities of foreign states see above, pp. 16-23.

ship owned or operated by a state for such purposes does not, therefore, enjoy either on the high seas or in foreign jurisdiction any privileges other than those accorded to privately owned ships.<sup>1</sup>

From the above propositions they conclude that the jurisdictional immunities of foreign states do not protect all their ships, but only those which are engaged in governmental and non-commercial activities.<sup>2</sup>

The writers who support the theory of limited immunity of government ships as based on the above distinction between acts *jure imperii* and acts *jure gestionis* derive their argument from the concept of a dual personality of the state. In this argument, it is possible that one may detect a *petitio principii*. When is a sovereign not a sovereign; when does a state act as a public person and when does it act as a private person; when is a government ship destined to public use and when is it not? These are the very questions to be answered. And it is not easy to find the answers.<sup>3</sup> "What is considered a private purpose to-day may be a public purpose and governmental function tomorrow."<sup>4</sup> Moreover, it is not at all certain whether a state ever acts as a private person. As Lauterpacht would put it, all acts *jure gestionis* are in a real sense acts *jure imperii*.<sup>5</sup>

What appears to one court as an act *jure gestionis* is likely to be regarded by another court as a clear example of an act *jure imperii*. To take only a few hypothetical cases: a state may operate ships for the purpose of carrying cargoes consisting of shoes for its army, or wheat for its people in times of emergency, or cement for the rebuilding of its cities after an earthquake or war; or, for the purpose of transporting immigrants under an immigration scheme. In all these cases, there lurks the possibility of wide divergence in the practice of municipal courts in determining whether the state was acting in its sovereign capacity or otherwise.

It is on account of the above difficulties in drawing a clear distinction between acts *jure imperii* and acts *jure gestionis* that the American and English courts have so far professed strict adherence to the doctrine of absolute immunity.<sup>6</sup> On the other hand a few eminent

<sup>1</sup> See J. W. Garner, *B.Y.*, 1925, pp. 128 *et seq.*; the same author, *A.J.*, 20 (1926), p. 759; W. R. Bisschop, *B.Y.*, 1922-23, pp. 159 *et seq.*; the judgment of Sir Robert Phillimore in *The Charkieh*, *Law Rep.*, 4 A. & E. 59; Walton, *J.C.L.* 3rd Ser. 2 (1920), pp. 252 *et seq.*

<sup>2</sup> See Garner, *B.Y.*, 1925, p. 128.

<sup>3</sup> See Edwin D. Dickinson, *A.J.*, 21 (1927), p. 108.

<sup>4</sup> *Paulus v. State of South Dakota* (1924), 201 N.W. 867, 870; see Dickinson, *op.cit.*, at p.

110.

<sup>5</sup> *B.Y.*, 28 (1951), p. 224; see Hyde, Vol. II, pp. 844-8.

<sup>6</sup> *The Pesaro*, 271 U.S. 562; *The Porto Alexandre* [1920], P. 30.

authorities hold the view that all government ships with the exception of warships should be treated on a par with private merchant vessels.<sup>1</sup> Hill J. goes a step further and suggests that even warships should be subject to proceedings *in rem* (not arrest) in the courts of a coastal state. He says:

If arrest of ships of war cannot be permitted, there seems no good reason why proceedings *in rem* should not be allowed, or why some machinery should not be provided whereby an undertaking to pay should take the place of arrest and bail.<sup>2</sup>

As regards trading ships owned or operated by states, Hill J. strongly maintains that they should be assimilated to the position of private ships. He says that the courts of a coastal state should be entitled to exercise jurisdiction over such foreign ships by the "ordinary methods of writ and arrest." He further contends:

it is also matter for consideration whether the like should not apply to state-owned ships not engaged in trade.<sup>3</sup>

It is significant that even Hall, who generally maintains that warships and other government ships when in foreign waters are equally exempt from the territorial jurisdiction, subscribes to a view somewhat similar in effect to the one expressed by Hill J. Hall says:

When acts are done on board a ship which take effect outside it, and which if done on board an unprivileged vessel would give a right of action in the civil tribunals, proceedings in the form of a suit may perhaps be taken, provided that the Court is able and willing to sit as a mere Court of enquiry, and provided consequently that no attempt is made to enforce the judgment.<sup>4</sup>

In one case at least, he says, the British Admiralty has paid damages awarded by a foreign court against the captain of a British warship in a matter arising out of a collision between that vessel and a foreign merchant ship in a foreign port.<sup>5</sup>

The point that emerges from the above discussions is that the doctrine of immunity of government ships is derived from the wider principle of jurisdictional immunities of foreign states. It is the immunity of a foreign state from jurisdiction or execution in respect of

<sup>1</sup> B. C. J. Loder, *C.M.I. Bulletin* No. 57, Oct. 1922, p. 239; Norman Hill, p. 257, *ibid.*; Maurice Hill, p. 230, *ibid.*; Resolution of the International Union of Marine Insurance, 27 Sept. 1922, Baden-Baden (see p. 272, *ibid.*); see Lauterpacht, *B.Y.* 28 (1951), pp. 220 *et seq.*

<sup>2</sup> Note on immunity of sovereign states in respect of proceedings against maritime property submitted to the Comité Maritime International; [see Matsunami, *Immunity of State Ships*, London (1924), pp. 182, 190, 191]; *C.M.I. Bulletin*, No. 48, 1922.

<sup>3</sup> *ibid.*

<sup>4</sup> *A Treatise on International Law*, 8th ed. (1924), pp. 247-248.

<sup>5</sup> *ibid.*

its maritime property that entitles a government ship to certain immunities while outside the waters of its flag state. It is, therefore, clear that an assimilation of the status of certain categories of government ships to that of private ships does imply that a state owning or operating such a ship does not enjoy immunity from jurisdiction or execution in respect of proceedings connected with her in the tribunals of other states.

### III. RECENT DEVELOPMENTS

#### *A. Conventions*

A Convention was signed at Brussels on April 10, 1926, for the unification of certain rules relating to the immunity of state-owned vessels. This Convention (hereafter referred to as the Brussels Convention of 1926) and an Additional Protocol of May 24, 1934,<sup>1</sup> lay down, *inter alia*, the principle that all government vessels, with the exception of military vessels and other vessels used exclusively on government non-commercial service, shall be subject in respect of claims arising out of their operation to the same rules of liabilities, obligations and enforcement measures as are applicable to private vessels. By November 1938, the Convention and the Additional Protocol had been ratified by thirteen states.<sup>2</sup>

A Conference convened by the General Assembly of the United Nations<sup>3</sup> to examine the law of the sea was held at Geneva from February 24 to April 27, 1958. This Conference (hereafter called the Geneva Conference of 1958) was attended by representatives of eighty-six members of the United Nations Organization and "observers" sent by sixteen international agencies. Of the four Conventions prepared by this Conference, the Convention on the Territorial Sea and the Contiguous Zone<sup>4</sup> and the Convention on the High Seas<sup>5</sup> (hereafter referred to as the first and the second Geneva Conventions of 1958 respectively) deal with, *inter alia*, the question of the legal status of government ships.

These two Conventions of 1958 have laid down the principle that

<sup>1</sup> See Ch. IV for a discussion of the provisions of the Convention and the Protocol.

<sup>2</sup> Hackworth, Vol. II, p. 465. See Ch. IV below.

<sup>3</sup> By resolution 1105, XI of Febr. 21, 1957.

<sup>4</sup> A/CONF. 13/38, p. 132 (Doc. A/CONF. 13/L. 52.)

<sup>5</sup> *ibid.*, p. 135 (Doc. A/CONF. 13/L. 53). See Ch. IV below for a discussion of the provisions of the above Conventions.

government ships operated for commercial purposes shall on the high seas or in foreign waters enjoy exactly the same legal status as that enjoyed by private merchant ships. The first Convention was signed by forty-four states and the second Convention by forty-nine states.<sup>1</sup> By July 1961,<sup>2</sup> the two Conventions had been ratified by only nine states.

Both the Brussels Convention of 1926 and the Geneva Conventions of 1958 seem to have divided government ships into three categories; namely, (a) warships (b) non-military ships used only on government non-commercial service; (c) non-military ships operated for commercial purposes. It is in respect of the third category of government ships that the Conventions have rejected the rule of immunity from jurisdiction or execution. In thus classifying non-military ships into two categories, the framers of the Conventions appear to have confirmed, unwittingly though, the already existing divergence in the practice of various municipal courts on the interpretation of the term "government commercial service." The problem of classification of ships is discussed elsewhere in this work.<sup>3</sup>

### *B. Case law and state practice: a general survey*

The case law and state practice in many countries appear to show that the doctrine of absolute immunity of government ships is not a generally recognized rule of international law. Courts and governments of many states have rejected this doctrine. Although there is but scant evidence available regarding the practice and judicial decisions in several other states, it is significant that the states represented at the Geneva Conference of 1958, with the notable exception of the Soviet Union and a few others, have lent their support to the principle of limited immunity of government ships. It is also significant that there has not been any treaty or convention, or any judgment or award of an international court or tribunal, recognizing the immunities of government ships operated for commercial purposes.<sup>4</sup>

An examination of the available evidence is likely to throw light on the attitude of courts and governments in various states towards this question. It may be convenient to start with countries where the principle of limited immunity has found general acceptance.<sup>5</sup>

<sup>1</sup> See Ch. IV, p. 147, on reservations to the Conventions.

<sup>2</sup> *ibid.*, p. 149.

<sup>3</sup> See Ch. IV and V.

<sup>4</sup> As far as the present writer is aware of.

<sup>5</sup> This survey is neither exhaustive nor systematic owing to lack of materials.

*Italy* is considered to be foremost among the states which have rejected the doctrine of absolute immunity.<sup>1</sup> She has ratified the Brussels Convention of 1926<sup>2</sup> and has "given execution to" it by a law of January 6, 1928.<sup>3</sup> At the Geneva Conference of 1958, Franchi of Italy pointed out that since 1926 Italy had not claimed jurisdictional immunities for Italian merchant ships when they were sued in foreign courts. In 1926, he said, a law was passed in Italy which empowered the Italian authorities to "seize property belonging to another state, including ships."<sup>4</sup> The Ministry of Foreign Affairs of Italy, in its comments on the articles concerning the law of the sea prepared by the International Law Commission, declared<sup>5</sup> that government ships should enjoy only such status as has been laid down by the Brussels Convention of 1926.

It would appear that the judiciary in Italy has been even more radical than the executive in limiting the immunity of foreign government ships. The judicial authorities seem to consider that all foreign non-military ships within Italian waters are subject, without distinction, to the jurisdiction of the Italian courts.<sup>6</sup> In *re Fattori*<sup>7</sup> the Court of Cassation remarked that a foreign merchant ship, even if employed by a foreign government for public purposes, was not exempt from local jurisdiction. The Court said:

according to international law, only warships and military aeroplanes which are within the jurisdiction of a foreign country enjoy a special immunity.

*Belgium* has ratified the Brussels Convention of 1926 and has given effect to its provisions by introducing the necessary legislation.<sup>8</sup> It may be mentioned in this connection that the Belgian Government declined to claim immunity in *The Ardennes*,<sup>9</sup> which was an action brought in England against the Government of Belgium as owners of a merchant vessel engaged in commercial activities.

In a number of cases, courts in *France* have assumed jurisdiction of actions against foreign states in respect of claims against their ships,

<sup>1</sup> See Lauterpacht, *op.cit.*, pp. 250 *et seq.*; Walton, *J.C.L.* 3rd Ser., 2 (1920) pp. 255 *et seq.*

<sup>2</sup> Hackworth, Vol. II, p. 465.

<sup>3</sup> Allen, *The Position of Foreign States before National Courts* (1933), p. 261.

<sup>4</sup> A/CONF 13/40, p. 74.

<sup>5</sup> Letter dated 14 June, 1956, Doc. A/CN. 4/99/Add. 8; see *Year Book of the International Law Commission* (1956), Vol. II, A/CN. 4/Ser. A/1956/Add. 1., p. 61.

<sup>6</sup> See Sucharitkul, p. 86 and the authorities cited; Allen, *op.cit.*, pp. 258 *et seq.*

<sup>7</sup> *A-D.*, 1949, Case 43; *Giurisprudenza Italiana*, 101 (1949), Part II, p. 310.

<sup>8</sup> 4th law of 28 November 1928; see *Clunet*, 79 (1952) at p. 262. See *Saez Murua v. Pinillos and Garcia* (1938), *A-D.*, 1938-40, Case 95.

<sup>9</sup> [1950] 2 *All E.R.* 517.

but the courts have refused to go further in these cases by permitting the attachment or seizure of such ships.<sup>1</sup>

French courts do not assume jurisdiction of government ships engaged in non-commercial activities. If, however, their activities are of a non-governmental and commercial nature, courts in France do not as a rule disclaim jurisdiction. Nevertheless, the courts have been very strict in their interpretation of the term "commercial," and have in many cases refused to assume jurisdiction, although the ships in question were engaged in activities which were *prima facie* commercial in character. In *The Hungerford*,<sup>2</sup> the Court of Appeal of Rennes rejected the finding of the Commercial Tribunal of Nantes that S.S. *Hungerford*, belonging to the British Admiralty and operated by a Belfast firm, was engaged in commercial activities. The *Hungerford* at the relevant time was carrying cargoes of wheat and wool for the account of the French and British Governments respectively. The Court of Appeal of Rennes held that the ship was acting in the national interests of the states concerned.

Similarly in the *Ittersum* case<sup>3</sup> the Commercial Tribunal of La Rochelle in 1947 held that a vessel requisitioned and operated by the Netherlands Government "in order to load wheat for the revictualling of the Netherlands" was *not* engaged in activities of a commercial or speculative character. For this reason the Court declined jurisdiction.

*The Mixed Courts of Egypt* (abolished in 1949) consistently refused to grant immunity to foreign States in respect of proceedings connected with government ships operated for commercial purposes.

Thus in *Hall v. Bengoa* (1920)<sup>4</sup> the Mixed Court of Appeal rejected the claim to immunity on the ground that the ship in question was engaged by a foreign state in commercial activities.

Similarly, in *Saglietto v. Tarwill* (1924)<sup>5</sup> the Civil Tribunal of Mansoura assumed jurisdiction of an action against a foreign government

<sup>1</sup> *The Englewood* (1920), 47 *Clunet*, 1920, 621; *The Campos* (1919), 46 *Clunet*, 1919, 747; *The Glenridge*, Rippert, 32 *Rev. Int. du Droit Mar.* 599; see Garner, *B.Y.*, 1925, p. 138. In a number of non-admiralty action French courts have drawn a distinction between acts *jure imperii* and acts *jure gestionis*, and authorized even the arrest, seizure or detention of property used by foreign states for commercial purposes when the original claims against such states arose out of activities considered to be *jure gestionis*. However in admiralty actions French courts have been slow in rejecting the old doctrine of absolute immunity. See Castel, *A.J.*, 46 (1952), pp. 520 *et seq.* and the authorities cited at p. 521, note 5.

<sup>2</sup> *The Hungerford* (*Seabrook c. Société Maritime Auxiliaire de Transports*) 1922 *Darras* 743, 745; see Hamson, *B.Y.*, 27 (1950), at p. 307.

<sup>3</sup> *Étienne c. Gouvernement néerlandais* (1947), *A-D.*, 1947, Case 30; see Ch. III for a discussion of this case.

<sup>4</sup> *A-D.*, 1919-22, Case 107.

<sup>5</sup> *A-D.*, 1923-24, Case 77; see Ch. III below.

in respect of a debt incurred by a vessel belonging to that government and originally designed for coastal defence on the ground that the vessel was at the relevant time engaged in a private enterprise and was actually unarmed. The vessel in question was employed in conveying pilgrims. The Court said: "A public vessel does not possess extritorial character. The extritoriality is a fiction which applies only to certain specific immunities."

On the other hand, the Mixed Court of Appeal in 1923 held in *Stapledon and Sons v. First Lord of the Admiralty and others*:<sup>1</sup>

the immunity from jurisdiction of foreign state vessels extends to merchant ships chartered specially for the transport of troops and commanded by officers of the regular navy.

*The Netherlands* has deposited her ratification of the Brussels Convention of 1926.<sup>2</sup> The Convention and the Additional Protocol came into force in the Netherlands on 8 January 1937.<sup>3</sup>

The executive policy in this country on the question of immunity of government ships is clearly stated in the comments made by the permanent Mission of the Netherlands to the United Nations on the articles concerning the law of the sea prepared by the International Law Commission.<sup>4</sup> It stated:

In the opinion of the Netherlands Government there is no reason why Government vessels which are operated for purely commercial purposes should be assimilated, with regard to the immunity of jurisdiction, to warships. In accordance with a general tendency in international law the immunity of foreign states is not recognized in so far as they act in a private capacity.

Although the Netherlands has not yet ratified the Geneva Conventions of 1958, her representatives at that Conference strongly supported the theory of restrictive immunity of government ships. Jonkheer H. F. van Panhuys, a member of the Netherlands delegation, said that his government saw no reason why immunity should be granted to government ships operated for commercial purposes. He said that such ships should not enjoy an advantage over private merchant ships.<sup>5</sup>

The attitude of the Netherlands courts towards the question of

<sup>1</sup> *A-D.*, 1923-24, Case 74; see Ch. III below.

<sup>2</sup> Hackworth, Vol. II, p. 465.

<sup>3</sup> See A. M. Stuyt, *Repertorium van door Nederland tussen 1813 en 1950 gesloten Verdragen* (1953), No. 1438, p. 179. See Allen, *op.cit.*, p. 147.

<sup>4</sup> Letter dated 16, March 1956; Doc: A/CN.4/99/Add.1. See *Year Book of the International Law Commission* (1956), Vol. II, A/CN.4/Ser. A/1956/Add. 1., pp. 63-4.

<sup>5</sup> A/CONF. 13/40 p. 72.



immunity of government ships does not seem to be clear.<sup>1</sup> It may, however, be mentioned that in *The Garbi* (1938)<sup>2</sup> the president of the District Court of Middelburg referred to the possibility of limiting the immunity of a state from the jurisdiction of foreign courts in respect of proceedings connected with the operation of a government ship on the basis of a distinction between acts *jure imperii* and acts *jure gestionis*, although for the purpose of this case any such distinction was held to be irrelevant.

*Germany* has ratified the Brussels Convention of 1926.<sup>3</sup> Prior to this ratification, courts in Germany had in a number of cases upheld the principle of absolute immunity of state-owned ships.<sup>4</sup>

As regards private ships under a charter to a foreign government, but not under the command of a captain in the service of that government, the German courts even prior to the Brussels Convention of 1926 had considered them subject to the jurisdiction of the German courts in actions *in rem*, although such ships were granted immunity from arrest during their governmental service.<sup>5</sup>

In the well known case, *The Visurgis and The Siena* (1938),<sup>6</sup> the Supreme Court of the Reich observed that "international law, or more specifically, German practice in matters of international law," did not even prior to 1926 recognize the immunity of such ships from suit. The Court observed that a ship under a charter to a foreign government but not commanded by a captain in the service of that government enjoyed immunity only from seizure, attachment or detention.

The Federal Republic of Germany seems to have reaffirmed the principles of the Brussels Convention of 1926 when her representative at the Geneva Conference of 1958 declared:

<sup>1</sup> See *Advokaat v. Schuddinck and the Belgian State* (1923), *N.J.* 1924, p. 344; *A-D.*, 1923-4, Case 69. In this case the District Court of Dordrecht upheld the immunity of the Belgian State (the second defendant) in an action arising out of a collision between a steam-tug owned and operated by that State and a vessel of the plaintiff. The Court did not, however, disclaim jurisdiction over the master of the boat (the first defendant), although he was a civil servant of the Belgian State.

<sup>2</sup> *A-D.*, 1919-42, Case 83; *W. and N.J.*, 1939, No. 96; for a discussion of this case see Ch. III below, pp. 111-114. See Ch. III, p. 116, for the Shipping Order of Surinam (1908) which provides for the detention of "any vessel" for the purpose of conducting a search.

<sup>3</sup> Hackworth, Vol. II, p. 465.

<sup>4</sup> *The Schenectady* (1920), referred to in Allen, *op.cit.*, pp. 85-6. *The Ice King* (1921), *ibid.*, pp. 86-92; *A-D.*, 1919-22, Case 102; *The Oituz* (1930), *A-D.*, 1929-30, p. 129.

<sup>5</sup> An action *in rem* is known to the courts in Germany, but in those courts proceedings are always directed against a person and not against a *res*. In the admiralty law of England and the United States, an action *in rem* is directed against the *res*. See Griffith Price, *J.C.L.*, 3rd series, Vol. 27, Parts III & IV (1944-45) p. 21.

<sup>6</sup> *A-D.*, 1938-40, Case 94.

in the view of the delegation of the Federal Republic of Germany, there is no rule of international law that justifies a variation in the status of merchant ships according to whether they are owned by private persons or by a state.<sup>1</sup>

The Federal Republic of Germany, however, did not sign the first Geneva Convention of 1958. She has signed the second Convention, but has not so far ratified it.

*Norway* has ratified the Brussels Convention of 1926,<sup>2</sup> and is therefore deemed to be bound by its provisions.

In a recent case arising out of a collision between *Dneproprogres*, a Russian state-owned merchant ship, and the *Ore Prince*, a Liberian merchant ship belonging to American owners, the Norwegian District Court of Porsgrunn ordered the arrest of the Russian ship at the request of the owners of the Liberian ship. The Court asked the owners of both ships to give each other a guarantee. The ship was later released. The arrest of the ship was ordered on the basis of a law of March 1939 which authorizes the arrest of state-owned merchant ships in certain circumstances. The case did not proceed beyond a provisional arrest, the parties having reached an agreement in the matter.<sup>3</sup>

In 1950 the Court of Appeal of Norway held that a Norwegian ship which had been requisitioned by the German authorities during their occupation of Norway could be detained by a Norwegian shipyard which had on the orders of the German authorities done repairs on the ship.<sup>4</sup> The Germans had apparently failed to pay for the repairs. The Court found that the ship in question was not used "exclusively on governmental and non-commercial service," as provided in Article 3 of the Brussels Convention of 1926.

The Norwegian courts do not, however, assume jurisdiction of cases involving government ships engaged in non-commercial undertakings. The Supreme Court of Norway in 1949 held<sup>5</sup> that a ship requisitioned by the Germans during their occupation of Norway and used by them as an ice breaker in the service of the German Navy at the time of a collision with certain port installations could not be subject to a maritime lien. The Court said that maritime lien could not be acquired against the vessel even in suspense to be executed when she reverted to private hands. The Court pointed out that the ship had been employed for state purposes at the relevant time, and that as execution

<sup>1</sup> A/CONF.13/40, p. 138.

<sup>2</sup> Hackworth, Vol. II, p. 465.

<sup>3</sup> Reported in *The Times* (London), July 8, 1961, p. 6.

<sup>4</sup> *A/S Irania under Public Administration v. A/S Franmaes Mek. Verksted* (1950) N.D.S. 181; *I.L.R.* 1950, p. 168, n.1.

<sup>5</sup> *Fredrikstad Havnevesen v. A/S Bertelsens Mek. Verksted* (1949), *I.L.R.* 1950, Case 42.

could not be ordered against such a ship, no maritime lien could attach to her.

The ship in question, as the Court found, "assisted naval craft, hauled barges with supplies for the German troops in Norway and worked as an ice breaker as directed by the Germans." However, the fact that the crew of the ship were Norwegians and not under military command, and that the ship flew the Norwegian flag and carried Norwegian ship's papers did not deprive the ship of its immunity.

In the previous year the Supreme Court of Norway held in a case involving a "public ship" in the service of the German state that the rules of the maritime law of Norway (of 1893) concerning liens could not be applied to "warships or other ships exclusively used for public purposes of a public law nature." <sup>1</sup>

*Sweden* has ratified the Brussels Convention of 1926 <sup>2</sup> and has given effect to its provisions by enacting the law of 17th June, 1938, which authorizes the Swedish courts to assume jurisdiction over merchant ships owned or operated by foreign states in respect of certain claims. This law authorizes the executive authorities to take the necessary measures against such ships for the purpose of safeguarding a claim.<sup>3</sup> According to this law a foreign state cannot claim immunity for its ships if they are engaged "in carriage with no idea of profit but still for a purpose such as providing supplies for the population, which does not entail purely state activity *per se*." <sup>4</sup>

The Government of Sweden in 1928 declared that the old doctrine of absolute immunity of foreign states was "becoming more and more unsatisfactory as states extend their activities in the industrial and commercial sphere and in that of transportation." <sup>5</sup>

*Denmark* is another of the countries that have ratified the Brussels Convention of 1926.<sup>6</sup> The present executive policy of this country was stated by the Danish representative at the Geneva Conference of 1958 <sup>7</sup> when he declared that the immunity granted to warships and other ships used for strictly governmental purposes should not be extended to ships engaged in commercial activities, irrespective of their ownership. He said that in the opinion of the Danish delegation, international

<sup>1</sup> *The Hanna*, 1, (1948), A-D., 1948, Case 46.

<sup>2</sup> Hackworth, Vol. II, p. 465.

<sup>3</sup> See *The Rigmor*, A-D., 1941-42, Case 63.

<sup>4</sup> *The Rigmor*, see A.J., 37 (1943), at p. 150.

<sup>5</sup> Reply to the questionnaire sent out by the League of Nations Committee for the progressive codification of international law. [Doc. A.15.1928, v.p. 83].

<sup>6</sup> Hackworth, Vol. II, p. 465.

<sup>7</sup> A/CONF.13/40, pp. 5-6.

law did not warrant the assimilation of state-owned commercial ships to other state-owned ships.

Denmark is a signatory state to both the first and the second Geneva Conventions, 1958. She has not, however, ratified them.

The judicial practice in *Portugal* on the question of the status of government merchant ships does not appear to be clear. In the *Cathelamet* case<sup>1</sup> the Court of Appeal in Lisbon in 1926 assumed jurisdiction and authorized the arrest of a merchant ship belonging to the United States Shipping Board on the ground that the documents produced failed to prove that the ship was the property of the United States Government. However, the same Court granted immunity in 1922 in the *Curvello* case<sup>2</sup> to a Brazilian ship which was at the relevant time primarily engaged in the carriage of goods and passengers, and partially employed for carrying governmental mails. The judgment was confirmed by the Supreme Court of Justice.

Portugal has signed both the first and the second Geneva Conventions of 1958, but has not ratified them.

The Government of *India* does not seem to support the principle of absolute immunity of government ships. The representative of India at the Geneva Conference of 1958 observed that prior to independence the legal status of ships which belonged to the East India Company or the ruling princes was controversial. However, he said that the problem had been solved on the basis of the activities of a ship, irrespective of her ownership.<sup>3</sup>

It is significant that at the first session of the Asian Legal Consultative Committee, held in New Delhi in 1957, India's representative advocated the abolition of the immunity of foreign states in respect of their commercial activities.<sup>4</sup>

The provisions of the Merchant Shipping Act, 1958, of India and the Indian Ports Act, 1908, seem to suggest that the principle of absolute immunity of government ships is not acceptable to India.<sup>5</sup>

<sup>1</sup> *A-D.*, 1925-26, Case 133.

<sup>2</sup> *ibid.*, p. 185, note 1.

<sup>3</sup> Sikri, *A/CONF.* 13/40, p. 12. India has not signed the Geneva Conventions.

<sup>4</sup> *The Japanese Annual of International Law*, No. 2 (1958), p. 110. See also the statement of the representative of India on the sixth Committee of the sixteenth session of the U.N. General Assembly. (Publication of the Permanent Mission of India to the U.N., 3 East 64th St., New York 21, N.Y.)

<sup>5</sup> See Ch. III, pp. 117-119. It is interesting to note that the Indian Ports Act of 1908 which provides for the punishment of persons and arrest and sale of vessels in certain circumstances would seem to apply to all foreign ships with the sole exception of warships. It is possible that in 1908 the legislators could not have foreseen cases in which foreign non-military government ships would be involved. It is, however, significant that the Act has not been amended so as to provide for the immunity of such ships.

It is probably correct to assume that the governments of *Burma* and *Ceylon* have rejected the doctrine of absolute immunity of government ships, in view of the opinions expressed by their delegates to the Asian Legal Consultative Committee held in New Delhi in 1957 on the question of the jurisdictional immunities of foreign states.<sup>1</sup> Of the countries represented at this Conference, *Indonesia* alone professed strict adherence to the doctrine of absolute immunity; the representatives of *Syria* and *Iraq* could not make up their minds on the question. It is, however, significant that *Indonesia* has signed (not ratified) the second Geneva Convention of 1958 without reservation to Article 9. *Ceylon* has signed both the first and the second Geneva Conventions of 1958, but has not ratified them.

The present executive policy of *Japan* appears to be opposed to the doctrine of absolute immunity of government ships. The Japanese representative at the Asian Legal Consultative Committee strongly advocated the abolition of the doctrine of absolute immunity of foreign states.<sup>2</sup> *Japan* has concluded a bilateral treaty with the United States of America subjecting her government agencies and instrumentalities in the latter country to the jurisdiction of the local courts in respect of all liabilities and obligations arising out of their commercial, industrial, *shipping* or other business activities.<sup>3</sup>

In this connection it may be mentioned that in a recent case arising out of certain violations of the administrative regulations of *Japan*, the District Court of *Asahikawa* remarked that there was no established international custom which granted non-military ships the extraterritorial rights that are accorded to warships.<sup>4</sup>

*Senegal*, *Malaya* and *Haiti* are parties to the first and the second Geneva Conventions of 1958; *Cambodia* is a party to the first Convention and *Afghanistan* to the second Convention. As parties to one of or both the above Conventions, all the five states may be considered to have accepted the principle of assimilating the status of government merchant ships to that of private merchant ships.

Article 34 of the *Argentine* Civil Code authorizes the *Argentine* courts to assume jurisdiction in actions against foreign states arising out of commercial activities.<sup>5</sup> The Federal Court of Appeal of the capital in 1924 held that the *Argentine* courts had jurisdiction over merchant

<sup>1</sup> *The Japanese Annual of International Law*, No. 2 (1958), p. 110.

<sup>2</sup> *ibid.*

<sup>3</sup> See below under U.S.A.

<sup>4</sup> *Japan v. Kulikov, I.L.R.* (1954), p. 105; see Chapter III for a discussion of this case.

<sup>5</sup> *Lauterpacht, B.Y.*, 28 (1951), p. 265.

vessels owned by the United States Shipping Board.<sup>1</sup> On the other hand the Supreme Court of Argentina in 1937 in the *Ibai* case refused to sanction the attachment of the ship *Ibai* which had been requisitioned by the Government of the Republic of Spain by a decree of October 29, 1936, and added to the Auxiliary Fleet of the Spanish Navy. It appears that one of the reasons why the Court declined jurisdiction was that the ship's voyage "had nothing to do with speculation or gain, but was wholly prompted by the necessity of providing efficiently for the defence of the State."<sup>2</sup>

It would seem that in matters of criminal offences, courts in Argentina assume jurisdiction to try offenders who belong to the crew of any foreign government ship with the sole exception of military ships. In the case of *Re Jorge Alejandro Jackson* (1919),<sup>3</sup> the Federal Court of Appeal confirmed the decision of the Court of First Instance which held that the Court had jurisdiction to try the offender who belonged to the crew of *Iddesleigh*, a non-military ship in the service of the British Admiralty.

The accused in the above case committed homicide on board the ship while she was lying in the port of Buenos Aires, and then fled ashore. The lower Court assumed jurisdiction on two grounds: namely, (a) the accused belonged to the crew of a non-military ship in the service of a foreign state, and not of a warship; (b) the accused had come ashore of his own accord. It is significant that the Federal Court of Appeal, confirming the decision of the lower Court, attached particular importance to the first ground.

The Federal Court of Appeal said :

... the judgment must be confirmed. The *Iddesleigh* was not a war vessel, and its crew were not in military service. Accordingly, the crime came within the territorial jurisdiction of the port authorities.

Argentina has signed (not ratified) both the first and the second Geneva Conventions of 1958.

*Brazil* and *Chile* are both parties to the Brussels Convention of 1926, and are therefore deemed to be bound by its provisions.<sup>4</sup>

A decision of the Supreme Federal Court of Brazil in 1944<sup>5</sup> seems to show that the Brazilian courts would exercise jurisdiction on board

<sup>1</sup> *Cia Introdutora De Buenos Aires v. Capitán Del Vapor Cokato* (1924), A-D., 1923-24, Case 71; 14 *Jurisprudencia Argentina* 705.

<sup>2</sup> A-D., 1938-40, Case 96; 59 *Jurisprudencia Argentina* 20.

<sup>3</sup> *Gaceta del Foro*, (jan. 1920), Vol. 24, p. 95; A-D., 1919-22, Case 69.

<sup>4</sup> Hackworth, Vol. II, p. 465.

<sup>5</sup> *The Lone Star*, A-D., 1947, Case 31; see Ch. III, pp. 82-83.

any foreign non-military ship within Brazilian waters for the purpose of arresting persons in connection with crimes committed on board any such ship within the internal or territorial waters of Brazil.

In this connection it is of interest to note that Bolivia, Brazil, Costa Rica, Cuba, Chile, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, Dominican Republic and Venezuela are parties to the Bustamante Code of 1928 which seems to have treated all non-military ships of the contracting states alike for the purpose of exercising criminal jurisdiction.<sup>1</sup>

It may be mentioned that the representative of *Mexico* at the Geneva Conference of 1958 supported the doctrine of absolute immunity of government ships.<sup>2</sup>

It has been pointed out above<sup>3</sup> that the *United States* courts profess strict adherence to the doctrine of absolute immunity of government ships. However, it is important to note that the attitude of the judiciary has undergone certain significant changes in recent years. Certain restrictive tendencies have become apparent in their recent decisions.

In the first place, the United States courts, as already pointed out, do not grant immunity to a state-owned ship which is not in the possession and service of a foreign state. The courts attach great importance to the fact of actual possession and service.

In the second place, the United States courts have ingeniously introduced certain restrictive principles in the procedural law that governs the methods of claiming immunity. Immunity has to be claimed positively and properly. When a ship belonging to a foreign state is sued in an American court, the government of that state may either ask the United States Department of State to allow its claimed immunity or present its claim to the court by appearance in the suit and by way of defence to the action.<sup>4</sup>

As the United States Supreme Court held in *Ex parte Muir* (1921),<sup>5</sup> the foreign government as of right is entitled to appear in the suit and claim immunity from the jurisdiction of the United States courts. Its accredited and recognized representative might also appear with its

<sup>1</sup> Code of Private International Law annexed to the Convention on Private International Law, signed at the sixth International Conference of American States, Habana, 20 Feb. 1928; see *Laws and Regulations on the Regime of the Territorial Sea*, U.N. pub. (1957), pp. 710-11; see also Ch. III below, p. 85. The same principle seems to have been accepted by the Montevideo treaties of 1889 and 1940 (the latter treaty has not yet come into force); see U.N. pub., *ibid.*, pp. 720-1; also Ch. III below, pp. 85-86.

<sup>2</sup> A/CONF. 13/40, p. 68.

<sup>3</sup> pp. 11 *et seq.*

<sup>4</sup> *Republic of Mexico v. Hoffman* (1945), 324 U.S. 30; see Ch. III below.

<sup>5</sup> 254 U.S. 522, 532-33.

consent and take the same steps in its interest. If the foreign government has any objection to appear as a suitor, it may, as the Court said, make the asserted public status and immunity of the vessel the subject of diplomatic representations to the end that, if that claim was recognized by the Executive Department of this government, it might be set forth and supported in an appropriate suggestion to the court by the Attorney General, or some law officer acting under his direction.

Immunity claimed by the master of a ship, or a "suggestion" filed by a counsel for the flag state is not recognized by the courts.<sup>1</sup> Appearance in a suit entered by a Consul-General of a foreign state for the purpose of claiming immunity is not recognized unless he is specially authorized by his government to do so.<sup>2</sup>

In the third place, the Supreme Court of the United States has categorically stated that it shall not allow an immunity which has not been recognized by the Department of State. If the Department of State has a guiding policy in the matter, the courts shall accept the "suggestions" filed by the Department.<sup>3</sup>

The Department of State has been following a policy of restrictive immunity since as early as 1916. In 1916 Secretary Lansing wrote to the Italian Embassy in connection with the *Attualità* case that, according to the principle laid down in the *Exchange* case, a merchant ship requisitioned by a foreign state and not in its possession was not entitled to immunity from territorial jurisdiction. Referring to the communication from the Italian Embassy he said:

If those contentions were admitted, American tribunals might become impotent to determine even the rights of American citizens in cases of maritime torts, salvage, and contracts involving such vessels.<sup>4</sup>

Similarly, in 1918 Secretary Lansing stated:

Where (government-owned) vessels were engaged in commercial pursuits, they should be subject to the obligations and restrictions of trade, if they were to enjoy its benefits and profits.<sup>5</sup>

The Department of State has been following this policy ever since.<sup>6</sup> In 1952 the Acting Legal Adviser Jack B. Tate stated<sup>7</sup> in the clearest of terms that it would be the Department's policy to follow the re-

<sup>1</sup> *The Gul Djemal* (1921), 264 U.S. 90; *Ex p. Muir*, 254 U.S. 522.

<sup>2</sup> *The Secundus, A-D.*, 1925-26, Case 136.

<sup>3</sup> *Republic of Mexico v. Hoffman*, 324 U.S. 30; see Ch. III.

<sup>4</sup> Hackworth, Vol. II, pp. 426-7.

<sup>5</sup> *ibid.*, p. 429.

<sup>6</sup> *ibid.*, pp. 426-440.

<sup>7</sup> Tate Letter, May 19, 1952.



strictive theory of sovereign immunity. This policy, he said, was consistent with the long established policy of the United States Government in not claiming immunity for its merchant vessels in foreign jurisdictions.<sup>1</sup>

In this connection it is significant that the United States Government subjects itself to suit in the United States courts in respect of litigation arising out of claims against its own merchant ships.<sup>2</sup>

The current treaty practice of the United States is in line with the present policy of the State Department. The United States has signed a number of bilateral treaties subjecting its agencies and instrumentalities to foreign jurisdictions in respect of their commercial activities. The treaty of Friendship, Commerce and Navigation with Japan of April 2, 1953, is an interesting example. Article 18(2) of this treaty provides:

No enterprise of either party, including corporations, associations, and government agencies and instrumentalities, . . . shall, if it engages in commercial, industrial, *shipping* or other business activities within the territories of the other party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability . . .<sup>3</sup>

Similar treaties have been signed with Italy,<sup>4</sup> Ireland,<sup>5</sup> Israel<sup>6</sup> and Greece.<sup>7</sup>

The United States of America has now ratified the first and the second Geneva Conventions of 1958,<sup>8</sup> and is, therefore, deemed to be committed to its provisions. In the light of what the Chief Justice of the United States stated in *Republic of Mexico v. Hoffman*<sup>9</sup> it may be concluded that the courts of the United States are most unlikely in future to grant jurisdictional immunity to merchant ships owned or operated by foreign governments.

It has been shown above<sup>10</sup> that, since the decision of the Court of Appeal in *The Parlement Belge*, the courts of *England* have been following a policy of absolute immunity of government ships. Nevertheless,

<sup>1</sup> *The Department of State Bulletin*, Vol. 26, p. 984 (June 23, 1952): see Ch. III below, pp. 107-108. See, however, Leo M. Drachsler, "Some observations on the Current Status of the *Tate Letter*," *A.J.*, 54 (1960), pp. 790 *et seq.*

<sup>2</sup> Federal Tort Claims Act, 1947; see Oppenheim, *International Law*, 8th ed. (1955), Vol. 1, p. 859, note 1.

<sup>3</sup> *Treaties and other International Acts Series*, No. 2863; *italics* supplied.

<sup>4</sup> dated 2/2/1948, Art. 24, para. 6, see *ibid* No. 1965.

<sup>5</sup> dated 21/1/1950, Art. 15(3), *ibid.*, No. 2155.

<sup>6</sup> dated 23/8/1951, Art. 18(3), *ibid.*, No. 2948.

<sup>7</sup> dated 3/8/1951, Art. 14(5), *ibid.*, No. 3057.

<sup>8</sup> See Ch. IV, p. 120.

<sup>9</sup> *Supra.*

<sup>10</sup> See pp. 10, 13-15.

certain marked restrictive tendencies are seen in the opinions expressed *obiter* by the majority of the Law Lords of the House of Lords in their decision in *The Cristina*.<sup>1</sup>

The United Kingdom has now ratified the first and the second Geneva Conventions of 1958<sup>2</sup> without reservation to any of the relevant Articles. In thus ratifying the Conventions, the United Kingdom Government is deemed to have abandoned the rule of immunity of government merchant ships. As soon as the Conventions have come into force on the deposit of a sufficient number of ratifications,<sup>3</sup> it may be expected that the United Kingdom Parliament will enact suitable legislation to give effect to the provisions of the Conventions.

In the meantime, in view of what the Law Lords have said *obiter* in *The Cristina*,<sup>4</sup> it is possible that the House of Lords in England will overrule the decision of the English Court of Appeal in *The Porto Alexandre*,<sup>5</sup> should a case arise in future involving a merchant ship owned or operated by a foreign government.

In this connection, it is important to note that since the enactment of the Crown Proceedings Act, 1947, the Crown in England is deemed to be in the same position as a private shipowner before English courts in respect of litigation connected with claims against state-owned ships. Such ships are, however, immune from proceedings *in rem* or from arrest or detention in regard to any claim against the Crown.<sup>6</sup>

In *The Ramava* (1941) the High Court of *Eire* examined a number of English and American cases and arrived at the conclusion that there was "no rule or usage of public international law granting immunity from process to state-owned trading vessels." The *Ramava* was a vessel apparently in the possession of the Soviet Union.<sup>7</sup>

Although it has been pointed out above that the judiciary in *South Africa* has been following a policy of absolute immunity of government ships,<sup>8</sup> the executive policy in this country seems to have undergone a thorough change on this question. The present official view of the

<sup>1</sup> [1938] A.C. 485; see Ch. III; see also *Rahimtoola v. Nizam of Hyderabad*, [1958] A.C. 379 at pp. 417-18, *per* Lord Denning; *Sultan of Johore v. Abubakar Tunku Aris Bendahar*, [1952] A.C. 318, 343.

<sup>2</sup> See Ch. IV, p. 120.

<sup>3</sup> The Conventions shall come into force as between the contracting parties when 22 ratifications have been deposited. See Art. 29 of the first Convention and Art. 34 of the second Convention.

<sup>4</sup> *Supra*.

<sup>5</sup> [1920] P. 30; see Ch. III.

<sup>6</sup> Oppenheim, *op.cit.*, Vol. I, p. 859, note 1.

<sup>7</sup> *The Irish Law Times*, 75 (1941), p. 153; *A-D.*, 1941-2, Case 20.

<sup>8</sup> *De Howorth v. The S.S. India*, *A-D.*, 1919-22, Case 105; *Ex P. Sulman*, *A-D.*, 1941-42, Case 64.

South African Government is stated in their comments on the articles concerning the law of the sea prepared by the International Law Commission.<sup>1</sup> They say:

The situation might arise where a state-owned ship is employed on a commercial basis and engaged in ordinary trading activities. Although such a ship might be owned by the State and technically employed on Government Service, it does not seem desirable that it should be assimilated to a warship and enjoy the immunities granted to warships.

The representatives of the U.S.S.R. at the Geneva Conference of 1958 professed strict adherence to the doctrine of absolute immunity of government ships.<sup>2</sup> According to them this doctrine is rooted in the maxim *par in parem non habet imperium*. They say that the immunity of government ships is "one of the oldest-established principles of international law."<sup>3</sup>

The U.S.S.R. has ratified the first and the second Geneva Conventions of 1958 subject to certain reservations. These reservations show that she still adheres to the doctrine of absolute immunity of government ships while on the high seas. In so far as government merchant ships in the waters of foreign states are concerned, it would seem from the nature of the reservations that it is only from the civil, and not any other, jurisdiction of the coastal states that the Soviet Union recognizes their immunity.<sup>4</sup>

In this connection reference may be made to the Soviet Criminal Law. It is laid down that the provisions of this law are applicable to crimes committed in the Soviet territory.<sup>5</sup> The definition of territory for this purpose includes: (a) warships of the U.S.S.R. wherever they may be; (b) non-military ships of the U.S.S.R. except when they are in foreign waters. This provision seems to show that the Soviet Union does not claim extritoriality for its non-military vessels in foreign waters in regard to crimes committed by persons on board while such vessels are in foreign waters. The law does not for this purpose draw any distinction between non-military ships engaged in commercial activities and other non-military ships.

<sup>1</sup> Letter dated 12 March 1956 from the Permanent Mission of the Union of South Africa to the U.N.; Doc/A/CN.4/99/Add.1. See *Year Book of the International Law Commission, op.cit.*, p. 78.

<sup>2</sup> A/CONF.13/39 and 40.

<sup>3</sup> *ibid.*, 40 at p. 69.

<sup>4</sup> See Ch. IV below, pp. 120, 147-148.

<sup>5</sup> *Soviet Criminal Law, General part*, § 28, p. 177; [Sovetskoe Ugolovnoe Pravo, čast' obščaju, Leningrad 1960, eds. Šargorodskij, M.D. + Beljaev, N.A.]; translated by Dr. Feldbrugge, Documentation Office for East European Law, University of Leyden.

It is significant that the Soviet authorities are empowered to exercise jurisdiction on board all foreign ships within the waters of the U.S.S.R., with the sole exception of warships, for the purpose of punishing persons for several specified offences arising out of violations of administrative regulations of the U.S.S.R.<sup>1</sup>

It may also be mentioned that it is only on the basis of reciprocity that foreign government merchant ships enjoy immunity from arrest in respect of civil claims while in the waters of the U.S.S.R.<sup>2</sup> It would seem that no distinction has been recognized for the above purpose between merchant ships carrying commercial cargoes and those carrying non-commercial cargoes.<sup>3</sup> It appears that the Soviet Union has adopted the practice of owning its merchant ships through limited companies and does not generally claim any immunity for such ships.<sup>4</sup>

*Byelorussia and Ukraine* have ratified the first and the second Geneva Conventions of 1958 with reservations similar in effect to those entered by the Soviet Union.<sup>5</sup>

*Bulgaria* has signed the first and the second Geneva Conventions of 1958 with reservations similar to those made by the Soviet Union.<sup>6</sup> She has not so far ratified the Conventions.

It is, however, significant that Bulgaria too, like the Soviet Union, does in practice exercise jurisdiction over all foreign ships within her waters, with the sole exception of warships, for the purpose of punishing offenders or for the enforcement of payment of dues and fines in

<sup>1</sup> Act No. 431 of July 24, 1928; the Rules of 20 August 1940; the Regulations of 15 June, 1927; [See Chapter III below, p. 116].

<sup>2</sup> Merchant Shipping Code of the U.S.S.R. (1929); § 239 read with §§ 1, 2; see the English translation of the Code by Z. Szirmai and J. D. Korevaar, *Law in Eastern Europe*, A. W. Sythoff, Leyden, (1960), Vol. 4. § 239 says: "The harbour-master of a merchant sea-port may arrest a ship or its cargo at the request of any person who has a claim arising out of general average, collision or salvage services until such time as the shipowner or the cargo-owner has given sufficient security. The arrest will not be for longer than a period of 72 hours, unless previously confirmed by a decision of the Court. . . . The provisions of this section do not apply to ships belonging to Soviet state organisations or enterprises, *nor to ships of foreign states which recognize a reciprocal immunity.*" *Italics supplied.*

<sup>3</sup> See Section 1 (a), *ibid.*

<sup>4</sup> See the remarks of Lord Maugham in *The Cristina* [1938] A.C. 485, 523. He says that the Soviet Union ". . . does not claim - even if it could, which for my part I should doubt - *any immunity whatever* in relation to such ships" (*italics supplied*); See also Z. Szirmai and J. D. Korevaar, *op.cit.*, pp. 120-121, note 25a. The learned writers say: ". . . in recent years Soviet Shipping enterprises, in cases of collisions at sea, have not been pleading the immunity of their vessels when these are arrested in (*in casibus* Dutch) territorial waters." The Soviet Union has not claimed immunity in connection with a claim against *Moskowsky Festival*, a state-owned merchant ship of the U.S.S.R. This case was decided by the Netherlands Court of Appeal; see *Schip en Schade* 1961, nr. 6. This appears to be the general practice of the U.S.S.R. in regard to claims against her merchant ships brought before the Netherlands courts.

<sup>5</sup> See Chapter IV, pp. 120, 147-148.

<sup>6</sup> Chapter IV, pp. 147-148.

certain specified cases arising out of violations of administrative regulations.<sup>1</sup>

As in the Soviet Union, it is only on the basis of reciprocal arrangements that "ships belonging to foreign states" enjoy immunity from arrest in Bulgarian waters in connection with certain civil claims.<sup>2</sup>

*Romania* has signed the first and the second Geneva Conventions of 1958 with reservations similar to those entered by the Soviet Union. She has not yet ratified either of the Conventions.<sup>3</sup>

*Hungary and Czechoslovakia* have signed the first and the second Geneva Conventions of 1958 with reservations wider in scope than those entered by the Soviet Union. Their reservations show that they, unlike the Soviet Union, object to the exercise of not merely civil but also criminal jurisdiction on board government merchant ships by foreign states while such ships are within the waters of foreign states.<sup>4</sup>

*Poland* ratified the Brussels Convention of 1926.<sup>5</sup> However, it appears that she has now denounced that Convention.<sup>6</sup>

Poland did not sign the first Geneva Convention of 1958. She has signed the second Convention with a reservation similar in effect to the one made by the Soviet Union.<sup>7</sup> Poland has not yet ratified that Convention.

In this connection it may be of interest to note that a Polish Decree of 23 March 1956 concerning the protection of the State boundaries<sup>8</sup> empowers the frontier protection authorities to arrest, in certain specified cases connected with matters of administration, any ship<sup>9</sup> with the exception of warships.<sup>10</sup>

It is reasonable to presume from the wording of the above Decree that it applies to all foreign non-military ships, irrespective of their ownership.

*Yugoslavia* has signed the first and the second Geneva Conventions

<sup>1</sup> Decree of 10 Oct. 1951, Art. 14; see Chapter III below.

<sup>2</sup> Decree of 4 April 1952, Article 14, n; see Chapter III below, pp. 108-109

<sup>3</sup> See Chapter IV, pp. 147-148.

<sup>4</sup> See Ch. IV, pp. 147 *et seq.*

<sup>5</sup> Hackworth, Vol II, p. 465.

<sup>6</sup> By a governmental declaration of 26 April, 1952, with effect as from 17 March, 1953; *Dziennik Ustaw*, 1952, No. 23, point 100 (Cited by Roman M. Jasica in his unpublished paper submitted to the Hague Academy of International Law, Centre for Studies and Research in International Law and International Relations, 25. VIII-3.X.1959; see p. 4, note 31).

<sup>7</sup> Ch. IV, p. 46.

<sup>8</sup> *Dziennik Ustaw*, 1956, No. 9, Item 51; *Laws and Regulations on the Regime of the Territorial Sea*, U.N. pub. (1957), pp. 236-7.

<sup>9</sup> Article 22(1).

<sup>10</sup> Article 25.

of 1958. Although she has not yet ratified them, it is significant that the Conventions were signed without any reservation.

In this connection it may be pointed out that the port authorities in Yugoslavia are empowered to exercise a certain measure of administrative jurisdiction over foreign ships within the waters of the Republic, with the sole exception of foreign naval vessels or other vessels assimilated to the status of foreign naval vessels.<sup>1</sup>

The representatives of *Spain* and *Turkey* at the Geneva Conference of 1958 declared that ships owned or operated by states and used for commercial purposes should not enjoy any privileges other than those accorded to private merchant ships.<sup>2</sup> These countries did not, however, sign the Conventions. It is possible that the views expressed by their representatives on the question of immunity indicate the present policy of Spain and Turkey in this matter.

Australia, Austria, Bolivia, Canada, China, Colombia, Costa Rica, Cuba, Dominican Republic, Finland, Ghana, Guatemala, Holy See, Iceland, Iran, Ireland, Israel, Liberia, Nepal, New Zealand, Pakistan, Panama, Switzerland, Thailand, Tunisia, Uruguay and Venezuela signed both the first and the second Geneva Conventions of 1958 without reservations to any of the relevant articles. Lebanon signed the second but not the first Convention. She too did not enter any reservation to Art. 9. None of these countries has, however, ratified either of the two Conventions. Nevertheless, the very fact that the representatives of the above countries have signed the Conventions without reservation to any of the relevant articles is symptomatic of new developments in their executive policy.

### C. Summary

In view of the fact that only a small number of states have ratified the Brussels Convention of 1926 and the Geneva Conventions of 1958 and that of the states which attended the Geneva Conference of 1958 nearly half did not sign the Conventions, it can hardly be said that the question of jurisdictional immunities of government ships has been settled beyond dispute. The fact that the Soviet Union and a few other states at the Geneva Conference of 1958 have lent their support to the principle of according immunity to all government ships without

<sup>1</sup> Act of 1 Dec. 1948 concerning the coastal waters of the Federal People's Republic of Yugoslavia; *Sulžbeni List*, Vol. 4, No. 106, 8 Dec. 1948, C 876, p. 1739; U.N. publication, *op. cit.* p. 313; see Art. 13.

<sup>2</sup> A/CONF.13/40, pp. 18, 20.

distinction clearly demonstrates the acutely controversial nature of this problem.

Nevertheless, as has been shown above, the courts of a large number of states do in practice assume jurisdiction of cases concerning foreign government ships operated for commercial purposes.

Although states have in general shown reluctance to disclaim immunity for their merchant ships by means of international agreements, they do in fact show an even greater reluctance to let foreign ships within their waters violate the local laws and regulations with impunity.

Considering the fact that the doctrine of absolute immunity is not recognized by the governments and courts of a large number of states, it is difficult to maintain, as the Soviet Union and a few other states endeavour to do, that the rules of international law require immunity to be extended to government ships operated in commercial undertakings.

It would, however, appear that there is no general agreement among states as to what categories of foreign government ships should continue to enjoy immunity from the jurisdiction of the local tribunals.<sup>1</sup>

The divergence and inconsistency seen in the judicial practice of several states in drawing a distinction between the commercial and non-commercial activities of foreign governments and their instrumentalities seem to suggest that the same difficulty is likely to arise if jurisdictional immunities of government ships were to be limited on the lines recommended by the Brussels Convention of 1926 and the Geneva Conventions of 1958.<sup>2</sup>

The difficulty of distinguishing government ships engaged in commercial activities from other government ships (apart from military ships) seems to lend support and force to the argument that the only logical alternative to absolute immunity is the complete abolition of the immunity of all non-military ships with certain exceptions and safeguards.

In connection with offences against administrative regulations, several states do in fact exercise jurisdiction on board all foreign non-military ships within their waters, irrespective of the ownership or the

<sup>1</sup> See for example the decisions in: *re Fattori* (Italy) A-D., 1949, Case 43; *Japan v. Kulikov* (Japan) I.L.R., 1954, p. 105; *Re Jorge Alejandro Jackson* (Argentina) A-D., 1919-22, Case 69; *The Lone Star* (Brazil) A-D., 1947, Case 31. See also the practice of the Soviet Union and Bulgaria.

<sup>2</sup> See for example the divergence in the practice of the French Courts and the Mixed Courts of Egypt in interpreting the term "commercial."

purpose or nature of the activities of such ships.<sup>1</sup> The same principle seems to hold good in several states in regard to criminal offences committed on board such ships within their waters.<sup>2</sup> The fact that several states do not recognize any distinction between non-military ships of foreign states for the purpose of exercising jurisdiction in the above matters appears to suggest that there is no binding rule of international law which grants any particular category of non-military ships the same status as that of military ships from the point of view of immunity. This is especially so in the absence of any international judgment or arbitral award granting them such status.

#### IV. CONCLUSION

The conclusion that may be *provisionally* drawn in the light of the above discussion is that there is no rule of international law which compels the extension of the immunities of military ships to government merchant ships, and consequently the legal status of the latter is deemed to be the same as that of private merchant ships.

<sup>1</sup> For example, see above for the laws and regulations in the Soviet Union, Bulgaria, Poland, Yugoslavia and India. See also Ch. III.

<sup>2</sup> For example, see the decisions of Courts in Argentina, Brazil and Italy. See the Criminal law of the U.S.S.R.; see also the Bustamante Code of 1928 and the Montevideo treaties of 1889 and 1940.