

THE POSITION OF FOREIGN STATES BEFORE TURKISH COURTS

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Since 1970s, the law of sovereign immunity has been in process of rapidly changing, to the detriment of the so-called absolute immunity doctrine¹. The European Convention on State Immunity of 1972 was the first comprehensive international instrument to codify what has come to be termed as the restrictive immunity doctrine, as is stated in its Preamble². The Sovereign Immunities Act of 1976 of USA³, The State Immunity Act 1978 of UK⁴, International Law Association Draft Convention on State Immunity of 1982⁵, Act to Provide for State Immunity in Canadian Courts of 1982⁶ and a Draft Convention prepared by the Organization of American States⁷ very recently, all these regulations benefited from and improved on the European Convention. Some **common law** States followed the suit and the others are expected to do so.

In the other major jurisdictions, the restrictive immunity rule has already replaced the absolute one, with the exception of socialist states which still adhere to the absolute rule on the ideological grounds, while adapting themselves to the changing conditions by concluding bilateral treaties with Western States or unilaterally waiving immunity or applying the absolute rule on the basis of reciprocity⁸.

The International Law Commission has been actively considering this subject since 1978. The distinguished Special Rapporteur Sompong Sucharitkul has already prepared and submitted to the Commission many valuable Reports. It seems that the Commission, too, will favor the restrictive rule.

Turkey had been among the states favoring the absolute rule until 1982. Turkish courts had constantly applied the absolute rule. However, the Executive Branch has taken a contrary course which resulted in the enactment, in 1982, of a law entitled "Act concerning International Private Law and Procedure" (hereinafter called the Act)⁹.

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1) On the subject of state immunity the reader is referred, *inter alia*, to the following works: Fitzmaurice, G.G., "State Immunity from Proceedings in Foreign Courts" *B.Y.I.L.*, Vol. xv, 1933, p. 101; Lauterpacht, H., "The Problem of Jurisdictional Immunities of Foreign States" *Ibid.*, 1951, vol. xxviii, p. 220; Lalive, J.F., "L'immunité de juridiction des Etats et des Organisations Internationales", *Recueil des Cours, Academie de Droit International de La Haye* 1953-III, p. 209; Sucharitkul, Sompong, *State Immunity and State Trading in International Law*, 1959; "Foreign States Before National Authorities", *Recueil des Cours*, 1976-I, p. 93. For an up to date study of the subject in Turkish see, Gündüz, Aslan, *Jurisdictional Immunities of Foreign States and International Law (in Turkish)*, 1984.

2) See, 11 *ILM*, 1972, p. 470.

3) See, 15 *ILM*, 1976, p. 1388.

4) See, 17 *ILM*, 1978, p. 1123.

5) See, 22 *ILM*, 1983, p. 287.

6) See, 21 *ILM*, 1982, p. 798.

7) See 22 *ILM*, 1983, p. 292.

8) For further details see, Gündüz *op. cit.*, pp. 312-320

9) For the text see, *Resmi Gazete*, 22 May

The article 33 of the Act clearly codifies the restrictive rule. Thus, Turkey, too, has joined the states favoring the restrictive immunity doctrine.

In the following pages, an attempt will be made to outline the Turkish sovereign immunity law, with special reference to the Act.

1. The Judge-made Turkish State Immunity Law Prior to the Act.

After enactment of the Act, to the best knowledge of this author, the courts have not delivered any directly related verdicts yet. The available case-law prior to the Act is clearly indicative of the absolute immunity accorded to foreign states without any distinctions being made between the acts of foreign states on which the claims were based.

In 1947, a driver in the pay of the United Kingdom Embassy in Turkey, while driving a lorry owned by the Attaché Militaire of the same embassy in the course of his official duty, in violation of the local traffic laws, ran over some Turkish citizens. A monetary compensation not forthcoming to the satisfaction of the successors of the victims, an action for damages was brought against the British Treasury¹⁰. The defendant apparently did not appear before the court. The court below in İstanbul *ex officio* took notice of the fact that the defendant was a sovereign state over which it had no jurisdiction and dismissed the case for lack of jurisdiction¹¹. The plaintiff appealed from the verdict.

The Court of Cassation upheld the judgment of the court below, seemingly for two reasons: (1) as a consequence of the mutual independence of states, the courts of a country are precluded from exercising jurisdiction over other states, (2) under The Decree of the Council of Ministers of 1931¹², the diplomatic representatives of foreign states could not be served with any writ of summons. Therefore, the court was unable to summon the ambassador to Turkey of Great Britain for any claims against him, either¹³.

A while later in 1950, the Government of India was sought to be brought before the courts by a Turkish national as to a dispute arising from a termination by the said government of a commercial contract which it had entered with the plaintiff¹⁴. The plaintiff asked the court of first instance to make a decree requiring the defendant to pay damages for the alleged unfair termination of the contract. The court refused to adjudicate upon the dispute and the plaintiff appealed.

1982. The Act came into force 6 months after it was published.

- 10) See, *Ali Haydar v. British Treasury*, 1947, Court of Cassation, Civil Division, 4 th. Chamber, reported in Berki, O. F., -Ergüney, *Yabancılar Hukuku ve Kanun İhtilafları ile İlgili Yargıtay Kararlarının Tahlil ve İzahları*, 1963, at p. 148.
- 11) *ibid.*, p. 149. This decision has been severely criticized by Berki in his book *Devletler Hususi Hukuku*, II, 1966, at p. 341, for having confused diplomatic immunities with those of states. To the same effect, see, Çelik, E., *Milletlerarası Hukuk*, II, 1982 p. 43.
- 12) See, Akipek Ö.İ., *Devletler Hukuku Kaynaklarından ve Belgelerinden Örnekler*, 1966, p. 211-215 Under the Decree no service of process can be effected on diplomatic persons and their suite enumerated in a list published by the Foreign Ministry. Further details of it will be given below.
- 13) In almost an identical case, The Austrian Supreme Court held otherwise. A drunk driver employed by the United States Embassy in Vienna, while driving to the airport to collect the post, crushed a properly parked car and caused damages. Upon an action being brought against US the Supreme Court gave a judgment for the plaintiff on the ground that the act for which the foreign states was sought to be sued was an act which could be done by any individual. See, *Collision with Foreign State-Owned Car (Austria) Case*, 1961, 40 ILR 1970, at p. 73. For a note as to this decision see, Abel, Paul, "State Immunity", 11 ICLQ, 1962, at p. 840.
- 14) See, *Talat, v. Indian Government*, 1950, reported in Berki-Ergüney, *op. cit.*, p. 149. In other jurisdictions the situation seems to be otherwise. With respect

The Court of Cassation upheld the decision of the court below, on the ground that a foreign state was not, under international law, subject to the jurisdiction of the courts of another state without its consent, except when the dispute was related to a real property situated in **the forum** and held by the foreign state for the purposes other than diplomatic uses.

Some five years later, an action was brought against the Chilian Government by a Turkish citizen on a lease contract whereby the ambassador to Turkey of the Chilian Government had, on behalf of his government, rented a building for diplomatic uses¹⁵. Some times later, the Embassy had been shifted to another place. But some of the rent allegedly not having been paid and some of the furnitures being damaged, the plaintiff issued a writ against the State of Chile to recover the money due and damages. At the time when the action was brought against the defendant state, the building was not being used for diplomatic purposes at all¹⁶. A counsel for the defendant made an unconditional appearance in the court and discussed the merits of the case. A while later, the defendant pleaded to the jurisdiction of the court. Thereupon, the court of first instance declined the jurisdiction. Upon being appealed, the Court of Cassation (Yargıtay) considered the case and upheld the court below on the same reason as in the **Talat v. Indian Government**¹⁷. As one dissenting judge pointed out, the defendant, by sending a counsel to the court and discussing the merits of the case, had waived any immunity it might have had. But this argument found no support with the Court¹⁸.

Court of Cassation has accorded jurisdictional immunity to foreign states in disputes arising from labor relations, too. In 1964 The Court, in an action brought against an instrumentality of United States Air Forces in Turkey, allowed and recognized immunity to USA, on the grounds that the action in fact was against USA, that a state could not implead another through its courts, that the decision of the court below condemning USA to pay a sum to the plaintiff was wrong, and

that the United States was right to plead jurisdiction. It may be implied from the decision that the Court would not have recognized the immunity of the instrumentality, had it been an entity of its own personality¹⁹.

to the transactions of selling and buying types, the foreign states have always been considered to be subject to the jurisdiction of local courts in many other states. See, Sucharitul, S., "Foreign States Before National Authorities", Recueil Des Cours, 1976-I at p. 126 et seq. A contract by a foreign state to buy provisions and equipments for its armed forces would probably be considered as a commercial transaction for which it would not be granted state immunity under Foreign Sovereign Immunities Act of 1976 of United States. See, "Congressional Committee Report on the Jurisdiction of United States Courts In Suits Against Foreign States" 15 ILM 1976 at p. 1406. Same result would be reached under the State Immunity Act 1978 of the United Kingdom. See, Mann, F.A., "The State Immunity Act 1978" BYIL, 1979, at p. 52.

- 15) See, Şükrü Ali Özen v. Samuel Sepulveda, 1955, Court of Cassation, Commercial Division, Reported in Berki-Ergüney, *op. cit.*, at p. 147.
- 16) Compare with, Republic of Latvia Case, Federal Republic of Germany, 1955, *International Law Reports*, vol. 22, 1955, at p. 230.
- 17) See, Berki-Ergüney, *op. cit.*, at p. 148.
- 18) As the controversy was over the payment of the rent of a rented building which ceased to be a diplomatic premise of a foreign state the inviolability of diplomatic premises of the foreign state concerned was irrelevant. The dispute had turned into a claim for payment of a debt due to the plaintiff, in respect of which, it is submitted, there should be no immunity for the defendant. See, the case cited in *supra* not 16.
- 19) For further details see, Orhaner, *Türk-İş Hukuku Yargıtay Emsal Kararları*, 1968, s. 215. This case reminds one of some decisions given by Japanese Courts in similar contexts, see, Masatoshi Suzuki et Al. v. Tokyo Civilian Open Mess, *International Law Reports*, 1957, s. 226, and *In Re Hoover*, 23 ILR 1956, p. 265.

wever, the Court of Cassation has recently delivered a verdict about a foreign diplomatic representative, making an analogy with the article 33, parag 1, of the Act³⁰. It appears from the verdict that a cultural attaché of a foreign state had rented a building for his personal use, and a dispute had arisen from that relationship. The landlord brought a case against the cultural attaché for the possession, alleging that he needed the premises himself as a residence, a ground on which the lessor is entitled, under the Real Estate Rental Law, to bring an action for eviction against the lessee. The court of first instance refused to hear the case on the ground that the defendant had the diplomatic status. The plaintiff took the case to the Court of Cassation. The Court reversed the case, on the grounds that the dispute had arisen from a private law relationship which had nothing to do with the official duties of the diplomatic agent, that the diplomatic immunities and privileges were granted under international law for better performance of the diplomatic functions, not for the personal benefits of the representatives, referring to the preamble of the Vienna Convention on Diplomatic Relations. Proceeding on this line, the Court concluded that renting of a building for personal residence is not an action for which a person with diplomatic status could be granted immunity from process. The Court continued to say that as the Act did not recognize immunity to foreign states themselves in cases where the dispute had arisen from a private law relationship, the same, a priori, applied to the persons who simply represented those states.

While the comparison made by the Court between the states and diplomatic representatives, so far as jurisdictional immunities are concerned, seems to have been based on a misunderstanding of the distinct nature of the two institutions, and on a misinterpretation of the article 33, parag 1, of the Act, it seems fair to conclude that the court would not accord immunity to the foreign states in respect of their disputes with individuals which has arisen from a private law relationship.

3. Service of Process

The first domestic instrument which has regulated the service of process on foreign diplomatic persons in Turkey is the Decree of the Council of Ministers of 1931 (hereinafter called the Decree)³¹ which has its aim to prevent the service of process from being effected upon diplomatic representatives of foreign states. The Decree is still in force and it contains an enumerated list of foreign diplomatic representatives upon whom the service cannot be effected. The Ministry of Justice has also issued a Circulation giving effect to this Decree³².

Some Turkish courts has interpreted, from time to time, the provisions the Decree as prohibiting service of the writs on foreign states, too. In consequence, the already rigid application of absolute rule became more aggravated. It was partly this misinterpretation of the Decree that inspired and spurred the Legislator to include a paragraph in the article 33 of the Act which reads as follow :

"In such cases, the writ may be served upon the diplomatic representatives of foreign states in Turkey" (parag. 2).

The phrase "in such cases" refers to the cases arising from the private law relations of foreign states with individuals. Before commenting on the merits or demerits of that provision, it is apt to have a brief look at the situation under international law.

Under international law, the normal way of service of process is through the diplomatic channels. The recent Acts and Conventions on the sovereign immunity question have clearly codified this practice³³.

30) See, *X. v. the Cultural Attaché of Italy, the Sixth Civil Panel of the Court of Cassation, Judgment numbered 1984/5731, dated 8.5.1984. Reproduced in Yasa Dergisi, vol. VII, Year 1984, Nr. 6, p. 851.*

31) For the text of the Decree, see; *supra*, footnote 12.

32) The official text appears in *Resmi Gazete (Official Gazette), March 17, 1980.*

33) See, Gündüz, *op. cit.*, p. 307 et seq.

The personal service of, Legal process is prohibited by the terms of the article 22 of the Vienne Convention, whether it occurs on the premises of the mission or at the door of mission^{33a}.

The question whether it is a good law to serve the writs on the diplomatic representative of foaign states is answered mostly in negative.

However, the courts in the various countries have had the problem of service of process, when a diplomatic representative of a foreign state is involved. In the **Hellenic Lines Limited v. Moore** (1965)³⁴, it was categorically declared that a diplomatic representative of a foreign state could not be served with any writ. This law seemed to have been approved by many jurisdictions.

The question whether it is possible to serve by mail on a diplomatic representantive was discussed at some length and answered positively by the International Law Commission³⁵. It has also found some support with some writers³⁶, though in the Vienna Conference the point was raised and, without being voted was withdrawn by the Japanese Representative, on the understanding that there was a unanimity among the delegates that the service by mail on diplomatic persons was possible³⁷. This view was held by the United States authorities for some times^{37a} but later abandoned for the reason that such pratice was against the article 22 of the Vienna Convention on Diplomatic Relations³⁸. Under the Sovereign Immunities Act of 1976, this possibility has been excluded. The State Immunity Act 1978 of United Kingdom and other arrangements following it have also excluded the service of process of diplomatic persons.

It seems that at least a minority opinion exists that, as long as the process is not served on diplomatic agents by an act of authority or in diplomatic premises by a process-server, the service by mail is not in contra-vention of the article 22 of the Vienna Convention on Diplomatic Relations.

Now, turn to that provision of the Act which regulates the service of process, the following observations may be made³⁹:

Firstly, the question may arise whether or not this provision go against the article 22 of the Vienna Conveniton. In this respect, the observations we have made above are applicable here, too.

Şecondly, there may arise some difi-culties in applying this provision, as it requires the judge to decide in advance whether or not the contamplated case has arisen from a private law relation of the foreign state, without hearing the later views as to it.

Thirdly, the provision seems to have been based on a misunderstanding of the concept of sovereign immunity, and of the rationale of the diplomatic immunities. Because, the prohibition of the service of process upon the diplomatic persons has nothing to do with the question whether or not a case brought against a foreign state could be adjudicated by the local courts. It serves quite different purposes.

However, that provision could be sustained by interpreting it as providing for a general direction that the diplomatic persons can be served with the writs, without indi-

33a) Denza E., *Diplomatic Law*, 1976, p. 89.

34) See, *American International Law Cases*, edited by F. Deak 1783-1968, vol. 9, p. 174.

35) See, *The Yearbook of the International Law Commission*, 1957, vol. I, p. 65; vol. II, p. 137; and 1958 vol. I pp. 130-132; vol. II, p. 95.

36) For example, Friedmann, W., -Lizzistyn, O. J., -Pugh, R.G., *International Law Cases, Materials*, 1969, p. 644.

37) See, Keerly, E.J., "Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities", 56 *AJIL* 1962, p. 82, 102.

37a) See, Denza, *op. cit.*, p. 89.

38) See, Martin, J. N., *A Note in Harvard International Law Journal*, 1977, vol. 18, p. 429, 443.

39) This aspect of the Act has been elaborated in the following works: Gündüz, *op. cit.*, pp. 307-310; Nomer, E., "Devletin Yargı Muafiyeti ve Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun", *Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni*, 1982, sayı 1. s. 8.; Toluner, *op. cit.*, p. 320 et seq.

cating how this is to be done. Thus, the service through the diplomatic channels would remain the main method, as it was before while the service by mail may be contemplated.

CONCLUSION

The judgments delivered by the Turkish courts prior to the Act, in cases against foreign states, clearly show that the courts had constantly accorded to foreign states absolute immunity.

On the other hand, the Executive Branch has always tried to put some restrictions on the state immunity. The Act is the best example of this trend. Thus, Turkey has already joined the states favoring the restrictive rule.

The courts have not yet given any directly related judgments after the Act came into operation. They are bound to apply it but the question how they will apply it is still open.

However, it is almost certain that the litigants would be allowed to sue foreign states in Turkish Courts if the dispute has arisen from a private law relationship.

As to the problem of service of process on foreign states, the things have gone a long way towards the interests of individual litigants, although some frictions may be expected to arise between the Turkish Foreign Ministry and the diplomatic agents of foreign states.

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