STATE IMMUNITY IN EMPLOYMENT MATTERS

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I. INTRODUCTION

AN area which has received little attention in the academic literature of foreign State immunity to date is that concerning immunity in employment matters.[1] This omission can probably be explained by the scant case law which has hitherto existed on the subject. However, in recent years the number of decisions has increased due to the fact that employment by States of foreign nationals has become far more common. Developing countries in particular, as they seek to create new industries, have become increasingly reliant on advisers and technicians from the developed world.

In the event of a dispute arising between the parties in which the employee seeks redress from the foreign State employer, a balancing of a number of interests is involved. In particular, the interests of the forum in protecting its own labour force (where the employee is a national or resident) and in adjudicating upon matters occurring within its territory have to be weighed against the interest of preserving good relations with the foreign State by not exercising jurisdiction over sensitive, sovereign matters. A foreign State would not consider it appropriate, for example, that another State's courts investigated its policy with regard to the hiring of heads of diplomatic missions. It will be the object of this article to assess

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1. Among the major works on State immunity the issue of employment is either (i) referred to briefly as a separate category for consideration or (ii) discussed under the rubric of commercial transactions without any recognition of its distinct nature. See, as examples of (i), S. Sucharitkul, *State Immunities and Trading Activities in International Law* (1959), pp.240–242, 322; G. Badr, *State Immunity; An Analytical and Prognostic View* (1984), pp.94–95, 117–119; C. Lewis, *State and Diplomatic Immunity* (3rd edn, 1990), pp.48–51 (looking at the British immunity legislation); D. Greig, "Specific Exceptions to Immunity Under the International Law Commission's Draft Articles" (1989) 38 I.C.L.Q. 560; J. Seyersted, "Jurisdiction Over Organs and Officials of States, the Holy See and Governmental Organisations" (1965) 14 I.C.L.Q. 31, 36–40 and V. Morris, "The International Law Commission's Draft Convention On the Jurisdictional Immunity of States and their Property" (1989) 17 Denver J.I.L. & Poly. 395, 421–423. As examples of (ii), see C. Schreuer, *State Immunity: Some Recent Developments* (1988), pp.13–14, 36, 39; I. Sinclair, "The Law of Sovereign Immunity: Recent Developments" (1980) 167 Hag. Rec. 113; P. Trooboff, "Foreign State Immunity: Emerging Consensus of Principles" (1986) 200 Hag. Rec. 235; L. Lowe, "The International Law Commission's Draft Articles On the Jurisdictional Immunity of States and their Property: the Commercial Contract Exception" (1989) 27 Col. J. Transnat. L. 657 and J. Donoghue, "Taking the 'Sovereign' Out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception" (1992) 17 Yale J.I.L. 489.

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how effectively international law reconciles these competing interests. However, this article will be concerned only with the immunity of foreign States from the *jurisdiction* of another State; there exists also immunity from *execution*, which may be raised as a defence by a foreign State to the enforcement of a judgment. In the context of employment matters, however, the main area of contention has been that of jurisdiction.

In attempting to ascertain the current position in international law reference will be made to both judicial and legislative practice of States, the bulk of which is found in Europe, North America, Australia and New Zealand. Draft conventions of various advisory bodies such as the International Law Commission and the International Law Association will also be considered.

II. BACKGROUND

THE area of public international law known as foreign State immunity has become particularly contentious in the last 60 years. Before that time, it was a well-established customary rule that States could never be impleaded before foreign courts; they were said to enjoy absolute immunity from adjudication.[2] The rationale for this view was that of State sovereignty and equality. It was considered incompatible with its sovereignty for a State to be subject to the jurisdiction of another State's courts without its consent. The rule of absolute immunity began to come under pressure after the Second World War as States (particularly developing countries) began to engage increasingly in commercial activities, commonly with corporations of the developed world.

The idea appeared in the jurisprudence of some European States that it was no longer appropriate for a State to enjoy all the privileges of Statehood where it was acting in a similar manner to a private entity, for example as a party to a commercial transaction.[3] It was felt that the interests of the private parties which dealt with the States had also to be considered. In particular, it was unreasonable for such entities to have to depend on their State of nationality to bring a claim on their behalf in international law in the event of a wrong being inflicted upon them by the foreign State.

Accordingly, a new rule of "restrictive immunity" emerged based on the distinction between acts *jure imperii* and acts *jure gestionis*. Acts *jure imperii* were those acts of a particularly sovereign or governmental nature which no private person would ordinarily perform, whereas acts

2. See e.g. in English practice the decisions of the Court of Appeal in the *Parlement Belge Case* (1880) 5 P.D. 197 and *Krajina* v. *Tass Agency* [1949] 2 All E.R. 274. It should be noted, however, that there were Italian decisions dating from the 1920s which suggested that immunity for foreign States was not unqualified; see cases cited in Sucharitkul, *idem*, p.322, nn.22–23.

3. In particular Belgium and Italy, see Badr, *op. cit. supra* n.1, at chap.2 and I. Brownlie, *Principles of Public International Law* (4th edn, 1990), p.327.

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jure gestionis were those acts which, although performed by governments, were or could be equally performed by private persons. Although this distinction had originated in European civil law countries, it was accepted by common law courts in the 1970s.[4] The distinction between sovereign and commercial acts was first applied in the context of more obvious commercial transactions such as contracts for the sale of goods or loan agreements to impose liability on foreign States which would not have been possible under the previous doctrine of absolute immunity.[5]

In the area of employment disputes it has also been the case that, until recently, foreign States enjoyed absolute immunity from suit.[6] Recent practice shows, however, that the restrictive trend noted in State immunity generally has now entered the area of employment.[7] This change can be explained by the increasing number of persons employed by foreign States and a concern on the part of the employee States that their nationals and residents be adequately protected. Nonetheless, a diversity of views has been expressed as to what form this restrictive immunity should take, and it will be the object here to examine the practice and assess what view or views currently represent(s) customary international law.

Perhaps the most common approach in the judicial practice of States in relation to employment claims has been to apply the *jure imperii/jure gestionis* distinction and to consider whether the foreign State, in entering into the contract of employment, is engaging in "private" or "sovereign" activity. However, in resolving this question courts have taken different approaches. First, there is the view which states that in determining whether a foreign State should claim immunity, primary regard should be had to the *context* or *location* of the employment. Therefore if an employee, at whatever level, is employed in a highly sovereign context such as a military base or an embassy, immunity should be granted on the basis that any enquiry into a foreign State's activities in such places would be excessively intrusive. By contrast, a foreign State-owned school or trading corporation is little different from an equivalent entity in the private sector and allowing an employee's claim to proceed would have little impact on the State's sovereignty. Such an approach has been favoured in the judicial practice of common law countries such as Ireland and New Zealand and civil law countries such as Germany and, until recently, Italy.

4. *Alfred Dunhill of London Inc.* v. *Republic of Cuba* (1976) 15 I.L.M. 735 (US Supreme Court); *Trendtex Trading Corporation Ltd* v. *Central Bank of Nigeria* [1977] 2 W.L.R. 356 (English Court of Appeal).

5. The *Trendtex* case, e.g., involved a contract for the sale of concrete to a foreign State.

6. This was certainly the view of academic writers. See Seyersted, *op. cit. supra* n.1; Sucharitkul, *op. cit. supra* n.1, at p.242 (although noting that some Italian courts have denied immunity in cases involving employment by foreign State railway companies).

7. This can be seen both in terms of the judicial practice of States and in recent national legislation and multilateral treaties on State immunity (e.g. the European Convention on State Immunity of 1972).

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Other States, such as the United Kingdom, South Africa, Singapore, Pakistan and Australia, have enacted legislation on State immunity but, although not adopting the private/sovereign act distinction, have nonetheless recognised that the context or place of employment should be a significant factor in resolving employment disputes. Under this approach the focus is on the nature of the employer.

In other judicial practice courts have, also in applying the sovereign/commercial act test, chosen to determine the issue of immunity primarily on the basis of the *status of the employee*. The premise of this approach is that a finding of immunity should be made only in the case of senior employees with great responsibility on the basis that, by their position, they are closer to the sovereign core of the foreign State. By contrast, employees engaged in routine or menial duties are little different from their counterparts in the private sector and so should be entitled to sue. Under this approach, then, the focus is on the employee. Swiss courts, for example, have taken this position.[8]

A third approach evident in State practice, particularly in the national legislation and multilateral conventions on immunity, is to place emphasis on the *territorial nexus* between the forum and (i) the employee and (ii) the employment contract. This approach has its origins in the doctrine of State jurisdiction, in particular the idea that under international law every municipal forum must have an adequate connection with the subject matter or parties to a claim before it can exercise jurisdiction in either civil or criminal matters. The approach of territoriality is advocated by a number of commentators[9] as a more certain and predictable method of representing the various interests at stake in a dispute over State immunity. This principle typically involves a State making provision for protection of its own nationals and residents by assuming jurisdiction in cases in which such persons are suing as employees of a foreign State and where the employment contract has some connection with the forum. Conversely, this principle recognises that it will be in very few cases that a forum will wish to exercise jurisdiction over a dispute between a foreign State and one of *its* nationals. Such a situation attracts no interest of the forum in protecting the employee but may certainly offend its interest in comity and good relations with the foreign State.[10] There is similarly little interest

8. See e.g. *S* v. *Republic of India* (1984) 82 I.L.R. 13 (Swiss Federal Tribunal).

9. E.g. J. Crawford, "A Foreign State Immunities Act for Australia?" (1983) 8 Aust. Y.I.L. 71, 90; Brownlie, *op. cit. supra* n.3, at p.333; M. Singer, "Abandoning Restrictive Sovereign Immunity: An Analysis In Terms of Jurisdiction to Prescribe" (1985) 26 Harv. I.L.J. 1, 3 *et passim*. A territorial approach certainly eliminates the difficulty of having to differentiate between commercial and sovereign acts.

10. Unless, possibly, if the foreign national has a significant residential tie to the forum; see the Australian Foreign States Immunities Act 1985, s.12(3), where such persons are entitled to sue. Cf. the State Immunity Act 1978 (UK), s.4(2).

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in protecting a national of a third State without any residential ties to the forum.

This principle of exercising jurisdiction in employment matters on the basis of territorial connection has been adopted, most significantly, in the European Convention on State Immunity 1972 ("the Basle Convention") and to a degree in national legislation (for example, the UK State Immunity Act 1978, the Singapore State Immunity Act 1979 and the Australian Foreign States Immunities Act 1985). The US Foreign Sovereign Immunities Act 1976 also requires a link between the employment, as "commercial activity", and the forum.[11]

A fourth approach apparent in the practice is to resolve the immunity issue in employment cases by reference to the *nature of the claim*. Under this head may be distinguished actions the nature of which may intrude upon the sovereignty of the foreign State and actions which relate only to the "economic aspects of the employment relationship". As examples of the former category may be included actions by trade unions seeking union protection for certain employees,[12] and actions which may involve investigation into matters of State security.[13] All these situations involve a court having to enquire into hiring practices and policies of a foreign State to an extent incompatible with that State's sovereignty. By contrast, an action for unpaid wages, for example, would involve little questioning of a State's power to organise its offices.[14]

These four approaches are not to be considered mutually exclusive of one another as courts and national parliaments have often relied upon a combination of the above factors, for example a finding of immunity may be made where an employee is a national of the foreign State (and so lacks sufficient territorial nexus with the forum), is in a senior position (and so satisfies the status test) and is working in a highly sovereign area, such as a military installation. Even within the same legislative provision a mixture of the four approaches is apparent. For example, the UK State Immunity Act, as will be noted, relies upon the elements of both context of employment and territorial nexus. The US position, as reflected in its judicial and legislative practice, also considered below, reveals the influence of all four approaches.

However, it is the approach taken by a State with regard to according immunity to another that determines how well the competing interests of employee protection and international comity are balanced. The variety

11. A detailed consideration of the various legislative practices is made below.

12. *United States* v. *The Public Service Alliance of Canada* (1992) 94 I.L.R. 264 (Supreme Court of Canada).

13. *Van Hulst* v. *United States of America* [1990] Neth. Y.I.L. 379 (Supreme Court of the Netherlands); *Saudi Arabia* v. *Nelson* 113 S.Ct. 1471 (1993) (US Supreme Court).

14. The Italian practice, in particular, has drawn the distinction between economic and non-economic aspects of a dispute; see *infra* nn.68–74 and accompanying text.

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of approaches suggests that States have difficulty in agreeing where the line should be drawn and whether it should be adjusted according to the context of employment.

It is now proposed to consider the extent to which each of the approaches described above is represented in the legislative and judicial practice of States and to discover to what extent State immunity still exists in the employment context. The employee claims to be considered consist of actions either for breach of the contract of employment itself or for infringement of a statute of the forum governing labour relations. In terms of structure the practice will be examined in relation to the typical places of employment of the foreign State: (i) embassies and consulates, (ii) military bases and (iii) other foreign State-owned entities, including representative commercial or cultural offices, schools or universities and trading corporations.

III. CLAIMS BY EMPLOYEES AT DIPLOMATIC AND CONSULAR MISSIONS

A. Practice Favouring Absolute Immunity for Foreign States

There is a considerable body of practice across a number of jurisdictions supporting the view that, in the case of disputes involving employment contracts at embassies and consulates, a policy of *de facto* absolute immunity is in existence on the basis that the embassy or consulate is the most sovereign instrumentality of a foreign State. The context or place of employment is the decisive factor, with criteria such as the nationality or residence status of the employee and his or her rank in the hierarchy given little weight in resolution of the immunity question.[15] The practice of common law countries such as the United Kingdom, South Africa, Pakistan, Ireland and New Zealand and civil law States such as Germany (and, formerly, Italy) supports this approach. In the view of these States, the interest in international comity must take priority over employee protection in this area. By contrast, there is a growing number of countries which advocate a relaxation of this strict exclusion of local jurisdiction in the case of mission employment. The practice of Australia, the United States and most European civil law countries falls into this category. In the view of these States, immunity should be recognised only (if at all) where the

15. This point was made by Seyersted, *op. cit. supra* n.1, at p.36, who argued that, in the context of employment at diplomatic and consular offices, even involving subordinate employees, "the organic jurisdiction of the sending state ... supersedes the combined territorial and personal jurisdiction of the host state. The relationship of employment between the sending state and the employee is subject to the public law of that state and not to the administrative or labour law of the host country."

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employee is in a senior position at a diplomatic or consular mission or else the interest of the employee is not adequately taken into account.

1. Common law countries

In the United Kingdom, as has been noted, questions of State immunity are governed by the State Immunity Act 1978, with contracts of employment being specifically provided for in section 4. Before considering this provision it is worth noting an English judicial decision in the area of embassy employment which was based on the pre-statutory law of State immunity (said by the court to represent customary international law). In *Sengupta* v. *Republic of India*[16] an Indian national employed as a low-grade clerical officer at the Indian Embassy in London was precluded by State immunity from bringing an action against his employer for unfair dismissal. The court acknowledged that a contract of employment by itself was a private act but that a contract to work in a diplomatic mission "at however lowly a level" was "a contract to participate in the public acts of the foreign sovereign". The court considered diplomatic representation to be "one of the classic forms of sovereign acts by a foreign state" and any adjudication upon the fairness of the dismissal of a mission employee would involve an investigation into the internal management of the Embassy, which would be an interference with the sovereign functions of the State.[17] A total exclusion of local jurisdiction over embassy employment was therefore justified.

The approach of section 4 of the UK Act is very similar to that taken in the *Sengupta* decision. The provision begins with a general presumption of non-immunity for a foreign State where an entity of that State is a party to an employment contract made or to be performed, in whole or in part, in the United Kingdom. However, immunity is restored under certain circumstances, including pursuant to section 16(1)(a), where the employee is a "member of a diplomatic or consular mission" within the meaning of the Vienna Conventions on Diplomatic Relations of 1961 and Consular Relations of 1964. Article 1 of both Conventions defines "member of the mission" to include "administrative and technical staff", not merely personnel with diplomatic status.

The intent of the UK legislation is to maintain immunity in respect of all employment contracts at foreign embassies and consulates regardless of the nationality of the employee or the position held. This view is confirmed by examining recent English judicial practice in interpretation of these provisions. The following employees have been held to constitute "administrative and technical staff" and so not entitled to bring proceedings for unfair dismissal against their foreign State employers:

16. [1983] I.C.R. 221 (English Employment Appeal Tribunal).
17. *Idem*, pp.228–229.

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(1) an Egyptian national with British residency, recruited in the United Kingdom and employed as a driver at the Medical Office of the Egyptian Embassy;[18]
(2) a British national employed as an accountant and an Emirates national employed as a medical interpreter (both locally recruited) at the United Arab Emirates Embassy;[19]
(3) a British national, locally recruited, employed as a secretary at the Saudi Arabian Embassy;[20]
(4) a British national, locally recruited, employed as an accounts clerk at the High Commission of the Bahamas.[21]

Hence the intention behind section 16(1)(a) is to create a form of absolute immunity from suit for foreign States in respect of all actions by employees at consular and diplomatic missions. The intention is effected by defining members of the mission as "administrative and technical staff" so as to include persons in quite insignificant and menial positions as well as those who happen to be British nationals or residents. In the *Ahmed* case, for example, the Court of Appeal expressly rejected the argument that foreign States could claim immunity only in the case of actions brought by employees entitled to diplomatic immunity or non-British nationals. The Court, however, did express concern that the effect of section 16(1)(a) was "almost completely to emasculate [the denial of immunity] in section 4"[22] and that "a locally employed person of British nationality without official status was left with no right to complain of unfair dismissal merely because of her place of employment". The Court therefore seems concerned that, in the context of diplomatic and consular missions, the executive's interest in comity towards foreign States has been excessively favoured at the expense of the interest of the employee in obtaining redress. However, the British position is not an isolated one. It is noteworthy that similar provisions imposing absolute immunity in the case of suits by mission employees have been enacted in South Africa (Foreign Sovereign Immunity Act 1981, section 5) and Pakistan (State Immunity Ordinance 1981, sections 6 and 17(1)(a)). The principle therefore has some weight in practice.

Ireland is a common law jurisdiction which has recently emphasised the significance of the place of employment in the context of a suit for damages for unfair dismissal by an Irish national employed as a chauffeur at

18. *Arab Republic of Egypt* v. *Gamal-Eldin* [1996] 2 All E.R. 237 (English Employment Appeal Tribunal).
19. *United Arab Emirates* v. *Abdelghafar & Abbas* (unrep., 10 July 1995, English Employment Appeal Tribunal).
20. *Ahmed* v. *Kingdom of Saudi Arabia* [1996] 2 All E.R. 248 (English Court of Appeal).
21. *Jayetilleke* v. *Bahamas* (unrep., 14 Dec. 1994, English Employment Appeal Tribunal).
22. *Ahmed*, *supra* n.20 at p.256 (*per* Hutchison LJ).

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the Canadian Embassy in Dublin.[23] Ireland has no legislation governing State immunity and so the Supreme Court had to resolve the dispute by applying the principles of the Irish common law, which incorporate customary international law.

A majority of the Court[24] held that the *jure imperii/jure gestionis* distinction represented customary law and so immunity would be found "where the relevant act fell within the sphere of governmental or sovereign activity", that is, where the employee was engaged in the sovereign activities of the foreign State. It is suggested that, in applying this test and deciding that immunity should be recognised, the Court here was strongly influenced by the location of employment, namely that it was an embassy. In the words of one of the judges: "I think once one approaches the embassy gates one must do so on an amber light. Prima facie anything to do with the embassy is within the public domain of the government in question."[25]

Accordingly, in the case of a chauffeur of an ambassador, his employment was *prima facie* sovereign by virtue of its being located at the diplomatic mission. The Court noted that the connection between the employee and the sovereign activities of the mission was particularly strong in the case of a chauffeur because he was in a position of trust and confidentiality. The fact that the individual in question was not in a senior or official position at the embassy or that he had the nationality of the forum State was irrelevant to the decision on immunity. It can be seen, therefore, that this decision, in effect, achieves the same result as that under the British legislation referred to above; one of total exclusion of jurisdiction in the case of mission employees.

In New Zealand a recent decision of the country's highest court appears to have taken a similar approach to employment at diplomatic or consular missions.[26] New Zealand is in the same position as Ireland in that there is currently no legislation on State immunity and so such questions have to be resolved by application of the common law of New Zealand, which again incorporates the principles of customary international law.

The case of *Sutton* involved a New Zealand national, locally recruited, employed as a secretary/typist at the office of the Governor of Pitcairn, a British colony under the jurisdiction of the UK government. The office was similar to the consulate of a foreign State. The Court again saw the relevant question as whether the employee was engaged in the sovereign

23. *Canada* v. *The Employment Appeals Tribunal and Burke* [1992] I.R. 484 (Supreme Court of Ireland).
24. Justices McCarthy and O'Flaherty.
25. *Burke*, *supra* n.23, at p.500 (*per* Justice O'Flaherty).
26. *Governor of Pitcairn* v. *Sutton* [1995] 1 N.Z.L.R. 426 (New Zealand Court of Appeal).

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functions of the foreign State. In upholding the claim to immunity by the British government, the Court admitted that the place of employment was a crucial factor. It would be a rare case when an employee at an embassy or consulate would be entitled to bring suit for the reason that, in such locations, almost all activity involves the sovereign functions of the foreign State in that the individual in question is placed in a position of trust and confidence. It mattered not that such employees had no responsibility for decision-making.[27] The only exception to this principle, the Court said, would be in the case of persons "engaged to maintain the physical fabric", for example those contracted to do repairs.[28] As a result, domestic staff as well as administrative and clerical support staff of a mission would all have difficulty in bringing suits against their employer. Accordingly, the employee in this case, as a typist/clerk, was barred by State immunity from bringing her action. Similar to the *Burke* case, it seems that the location of employment was the decisive factor and criteria such as the nationality of the employee and the level of her position were ignored.

2. *Civil law countries*

German practice in the area of consular/embassy employment disputes also supports the approach of absolute immunity for foreign States based on the location of employment. In one decision[29] a court granted immunity to the United Kingdom in an action brought by a German national employed at the British consulate as a receptionist, switchboard operator, clerical assistant and interpreter. In reaching this decision, the court gave weight to the place of employment in resolving the characterisation: "the performance of duties in a consulate is an exercise of the sovereign rights of the state and so a sovereign act". No reference was made by the court to the status of the employee or the fact that she was a German national. This decision is therefore consistent with the position noted in the common law countries mentioned above.

B. Practice Favouring Restrictive Immunity

1. *Common law countries*

In Australia legislation has been enacted on State immunity which makes special provision for employment at an embassy or consulate but, unlike the British and other legislation referred to above, attempts to steer a middle course between employee and foreign State by allowing certain categories of mission employee to sue. Section 12(1) of the Australian

27. *Idem*, p.431 (*per* President Cooke).
28. *Idem*, p.436 (*per* Justice Richardson). The question of immunity with respect to such persons is discussed in more detail at *infra* nn.82–84 and accompanying text.
29. *Conrades* v. *United Kingdom* (1981) 65 I.L.R. 205 (Hanover Labour Court).

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Foreign States Immunities Act 1985 creates a general presumption of non-immunity in the case of employment contracts where the contract is made in Australia or to be performed (partly or entirely) in Australia. Under subsection (3) immunity is restored where the employee is a national of the foreign State but not a resident of the forum State. Immunity is also reimposed under subsection (5) where the employee is (a) a "member of the diplomatic staff of a mission" as defined by Article 1(d) of the Vienna Convention on Diplomatic Relations 1961 ("the Diplomatic Relations Convention")[30] or (b) a "consular officer" as defined by the Vienna Convention on Consular Relations 1961 ("the Consular Relations Convention").[31] Under subsection (6) immunity is also recognised where (a) the employee is a "member of the administrative and technical staff of a mission" as defined in Article 1(f) of the Diplomatic Relations Convention[32] or (b) a "consular employee" as defined in Article 1(e) of the Consular Relations Convention[33] "*unless the member or employee was at the time the contract was made a permanent resident of Australia*" (emphasis added). Under subsection (7) "permanent residence" includes Australian nationality and persons whose continued presence in the country is not subject to time limitation.

The Australian legislation therefore adopts an intermediate position in the area of embassy and consular employment based on the status of the employee. Instead of imposing immunity in the case of suits by all employees at diplomatic or consular missions, whatever the rank, these provisions make an attempt to divide the employees into two groups: those in executive, policy-related positions and those in routine administrative, clerical or maintenance roles.

In the first group, immunity is absolute on the basis that such persons will almost certainly be engaged in matters of a policy-related or sovereign nature. In the second group, however, immunity will apply only where the employee is not a permanent resident of the forum. This provision is based on the fact that such employees are normally only marginally involved in the sovereign functions of the mission and so, where the employee is a permanent resident of the forum, the interest in protection of the local labour force should prevail over the need for comity.[34]

30. I.e. "a member of staff having diplomatic rank".

31. I.e. a "member of staff having consular rank".

32. I.e. a "member ... employed in the administrative and technical service of the mission".

33. I.e. "any person employed in the administrative or technical service of a consular post".

34. One commentator has, however, criticised this provision on the basis that an employee's status is not always coincident with his or her proximity to the sovereign functions of the foreign State. There may be situations, it is argued, where immunity may be appropriate even where an employee is in the subordinate category. See Greig, *op. cit. supra* n.1, at p.563, n.8.

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In the Report of the Australian Law Reform Commission on Foreign State Immunity[35] upon which the legislation was based, attention was also drawn to a third category of mission employees, domestic servants. It was expressly stated in the Report[36] that such employees should come within the general presumption of non-immunity under section 12(1), provided that, under subsection (2), they were permanent residents of Australia at the time the contract was made. It was felt by the Commission that such employees should be given as much, if not more, protection than administrative and technical staff.

In the case of embassy and consulate employment, therefore, the Australian legislation relies to some extent on three of the criteria mentioned above for resolving immunity questions. First, it relies partly on the criterion of place of employment in that absolute immunity is preserved in the case of suits by diplomatic and consular officers. However, the status of the employee is also taken into account in that all other employees at the mission may sue their employer provided that they have sufficient residential connection to the forum. In requiring a connection with the forum before such an employee can sue, the criterion of territorial nexus is used.

Both the United States and Canada have had, rather surprisingly, no judicial practice in the area of embassy and consular employment. Both States have, however, enacted legislation on State immunity which would apply to the situation. In the case of the United States, questions of State immunity are governed by the Foreign Sovereign Immunities Act 1976[37] and in Canada the State Immunity Act 1981.[38] Both statutes provide an exception to immunity for a foreign State where it has engaged in "commercial activity". Such activity is to be distinguished from that which is "public or governmental in nature". The legislative history to the US legislation states that "the employment of diplomatic, civil service or military personnel" would be public or governmental in nature but not "the employment of American citizens or third country nationals by the foreign state in the United States".[39] The "engagement of laborers, clerical staff or public relations or marketing agents" is also considered a "commercial activity". Given the similar terms of the Canadian legislation, these guidelines may also be applicable in respect of its provision.

A middle view therefore seems to be taken in the US legislation on the issue of granting immunity to foreign States in the context of actions arising from embassy/consular employment. The reference to "diplomatic and civil service personnel" on the one hand and "laborers and clerical

35. No.24 (1984).
36. Paras.100, 59.
37. S.1605(a)(2).
38. S.5.
39. House Report No.94–1487 as extracted in UN Legislative Series, *Materials on Jurisdictional Immunities of States and their Property* (1982), pp.107–108.

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staff" on the other suggests a distinction based on the status and position of the employee. What seems certain is that all diplomatic and senior staff at such missions would be unable to bring actions (in any event, such persons would almost invariably have the nationality of the foreign State). The position of subordinate or ancillary staff such as clerks and secretaries is not clear. Where such persons have the nationality of the forum or a third State then jurisdiction would probably be upheld, but where they have the nationality of the foreign State it is arguable that immunity would still be found. The legislature appears to have considered that the United States has no interest in adjudicating upon disputes between foreign States and their own nationals, an approach which shows a concern for territorial nexus.

2. Civil law countries

The practice of the vast majority of European countries of the civil law tradition in regard to employment at diplomatic and consular missions now clearly supports the restrictive immunity theory. To some extent this is a legacy of the Basle Convention, which has been ratified and adopted into municipal law by the following countries: Austria, Switzerland, the Netherlands, Belgium and Cyprus.[40] The Basle Convention specifically provides for employment contracts in Article 5, which creates a presumption of non-immunity where the contract is to be performed in the forum State. Immunity is, however, restored where the employee is a national of the foreign State at the time of the proceedings or was not a national or permanent resident of the forum at the time of entering into the contract. Unlike the British legislation and its progeny, however, immunity is not expressly restored in the case of employment at consular or diplomatic missions. The general principle of non-immunity therefore applies in respect of such contracts provided that the territorial nexus requirements are fulfilled. In reality, however, because foreign States rarely admit nonnationals to their diplomatic or consular corps, it is possible that the requirement (to avoid immunity) that the employee not be a national of the employing State may have the effect of allowing routine or menial workers to sue but denying such rights to senior employees. The introduction of an implied distinction based on the status of the employee may well have been accomplished unintentionally.

The Netherlands, which ratified the Basle Convention in 1988, is an example of a State which has changed its attitude to employment contracts at diplomatic and consular missions and now embraces a policy of restrictive immunity. As recently as 1978, however, an approach of absolute immunity based on the place or location of employment was adopted. In the

40. The UK is also a party to the Basle Convention but its State immunity legislation departs significantly from the Convention in the case of employment contracts.

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Gootjes case[41] it was held that Belgium was entitled to immunity from a suit by a Dutch national employed in the administrative service of the Belgian consulate on the basis that a consulate was "a public body in which the state of Belgium was acting in a public capacity".

In 1985, however, another court allowed a claim to proceed by a Dutch national employed as a secretary at the Turkish Embassy.[42] In its reasons the court stated that questions of immunity had to be resolved by determining whether the act in question was "sovereign" or "commercial". In applying this test, however, the court did not focus on the place of employment but instead placed emphasis on the status and position of the employee. Here the employee had no civil service or diplomatic status and was not in a position of responsibility and so the court concluded that the contract involved the foreign State "acting on the same footing as a private individual". Principles of territorial connection were also relied upon by the court in rejecting the plea of immunity. Here, the employee was Dutch and had been recruited in the Netherlands; the Dutch court therefore had an interest in her protection.

The most recent Dutch decision, in 1989, confirms the trend away from immunity in the case of low-level embassy employees evident in the *MK* case, despite the court holding, in the particular circumstances of the case, that the foreign State be granted immunity.[43] *Van Hulst* involved a Dutch national employed as a secretary in the US Embassy. However, her appointment was subject to a security clearance, which was not granted and so resulted in her dismissal. She sought compensation but the court upheld the United States' plea of immunity. Although the general customary international law rule in relation to employment contracts was that a foreign State party could not claim immunity, this rule was subject to an exception *where the foreign State terminated such a contract for work at an embassy or consulate for security reasons*.[44] Allowing a claim to proceed in such circumstances would involve the court investigating the most highly sovereign and sensitive material of the foreign State. So, the key factor for the court in recognising immunity in this case was not so much the place of employment or the status of the employee as the nature of the claim.

Switzerland is a jurisdiction in which support can also be found for a rule of restrictive immunity in the context of employment at diplomatic and consular missions. In a decision in 1984[45] an Italian national employed at

41. *Gootjes* v. *Kingdom of Belgium* (1978) 65 I.L.R. 372 (Local Court of Rotterdam).
42. *MK* v. *Turkey* (1985) 94 I.L.R. 350 (Sub-District Court of The Hague).
43. *Van Hulst*, *supra* n.13.
44. The court did not apply the provisions of the Basle Convention to this case because it involved a suit against a non-contracting party, the US. However, Art.5 was relied upon as evidence in support of the existence of a customary law rule of restrictive immunity in the context of employment agreements.
45. *S* v. *India*, *supra* n.8.

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the Indian Embassy as a radio telegrapher and clerk was held to be entitled to bring an action for damages against his employer. Although Switzerland had ratified the Basle Convention at the time the case was decided its provisions did not directly apply in the case because India was not a party to the Convention. The court saw the question again as whether the conclusion of the contract by the foreign State was a sovereign or private act. In holding the contract to be a private act, it noted that although a diplomatic mission was a particularly "sovereign" place of employment, less weight should be given to this fact and more to the issue of the status and position of the individual employee. For the purposes of immunity, a distinction had to be drawn between the hiring of persons to senior policy posts and the recruitment of subordinate employees,[46] on the basis that the former are more likely to be involved in sensitive matters concerning the foreign State with consequent harm to that State if such an employee's claim were entertained by a local court. By contrast, in the case of junior staff, there was less harm to the foreign State in adjudication, particularly when the employee had no residential or national connection to the foreign State. The court noted that the employee in the case in question was in a subordinate role, had been recruited in the forum where he was a resident and was a national of a third State, Italy. Therefore, on the basis of the employee's status and his territorial nexus to the forum, immunity was denied.

A more recent Swiss decision continues the trend from the *S* v. *India* case in adopting a focus on the status of the employee in immunity determinations.[47] In this decision a plea of immunity was refused in the case of a telephone operator at the US Embassy in Geneva on the ground that the position and work of the employee were not connected with diplomatic or sovereign functions.

In Austria there have been two recent decisions which confirm that it adopts a restrictive approach to immunity in mission employment, so that generally an employee will be entitled to sue where he or she is an Austrian national and is employed in routine or low-level functions. Such an approach is consistent with its ratification of the Basle Convention. In the *British Embassy Driver Case*[48] it was conceded by an Austrian court that an Austrian national employed as a driver at the British Embassy would be entitled to sue his employer on the basis that the contract of employment had not been concluded by the foreign State in the exercise of its sovereign rights. More recently, it was held by an administrative tribunal that an interpreter employed at a foreign embassy in Vienna was entitled to bring proceedings against the foreign State for compensation for unfair

46. *Idem*, p.18.
47. *Landano* v. *United States* [1988] Jahrbuch des Schweizerische Arbeitsrechts 424, 433.
48. (1978) 65 I.L.R. 20 (Superior Provincial Court of Vienna).

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dismissal as the contract of employment was a matter of private law.[49] Even more radically, another recent Austrian decision suggests that its courts may even go further and exercise jurisdiction over suits by *consular officials holding senior posts*. In the *French Consular Employee Claim*[50] a French national employed as head of the visa section was entitled to sue his employer on the basis that all contracts of employment entered into by foreign States, to be performed in the forum, are private acts. This decision represents a high-water mark in restricting the grant of immunity to foreign States in the area of mission employment.

Greek courts also appear to have taken a restrictive view of immunity claims in the context of employment contracts at embassies. In a recent decision[51] it was held that a labour contract between a Greek national and a foreign embassy was subject to the jurisdiction of the Greek courts on the basis that foreign States enjoy immunity only for "sovereign not contractual acts".

In Belgium the restrictive approach also seems to have been accepted, at least in the situation where subordinate employees are involved. In one decision a court refused to grant a State immunity in the context of a suit by a Belgian chauffeur employed at a foreign embassy on the basis that the employment involved manual labour and "so was an act of ordinary affairs rather than an act of public power".[52] This decision is consistent with the Basle Convention, even though its provisions were not applied by the Belgian court because the foreign State (Upper Volta) was not a contracting party. In a more recent decision,[53] again where the court was not obliged to apply the Basle Convention, a Portuguese national employed as a language teacher at the Portuguese Embassy in Brussels was allowed to bring a claim for compensation for unfair dismissal. The court's reasoning was that, under customary international law, immunity is not to be accorded in the context of contracts of employment to be performed in the forum *even where the employee had the nationality of the foreign State*. On the question whether an employee holding the nationality of the foreign State may be able to sue, the court explicitly departed from the terms of Article 5(2) of the Basle Convention. It said that the forum had an interest in protecting employees in general, without regard to nationality, particularly those engaged in subordinate roles (as in this case) and in activities only loosely related to the functions of the embassy. For Belgian courts,

49. This case is noted in (1991) 2 J. de Dr.Int. 441.
50. (1989) 86 I.L.R. 583 (Supreme Court of Austria).
51. *Areios Pagos* 1398/86, noted in (1989–90) 43 Rev. Hell. de Dr.Int. 389.
52. *Rousseau* v. *Republic of Upper Volta* (1983) 82 I.L.R. 118 (Labour Court of Brussels).
53. *De Guieros Magalhaes Abrantes* v. *Republic of Portugal* (1992) 27 Rev. Belge de Dr.Int. 698 (Labour Court of Brussels).

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then, the status of the employees is the decisive issue and immunity can still be overcome where the employee holds the nationality of the employing State.

Spain is also a jurisdiction which allows suits to be brought by employees at diplomatic and consular missions. In two recent decisions the Spanish Supreme Court upheld the claims of a Spanish national employed as a driver at the Equatorial Guinean Embassy[54] and a national of a third State (i.e. not of the employer or forum) employed as a secretary at the South African Embassy.[55] In both cases the Court declared that the conclusion of a contract of employment by a foreign State to be performed in the forum was a private, not a sovereign, act. In reaching this conclusion the Court relied on Article 5 of the Basle Convention, even though Spain was and is not a party to the treaty, as indicative of a customary trend. The Court noted the presumption of non-immunity in Article 5(1) for employment contracts and the exception where the employee had the nationality of the foreign State as provided in paragraph (2).

Spanish academic writers, while agreeing with the results of these cases, have been critical of the reasoning. In their view, it is not correct to suggest, as the Court does in these two cases, that the position in customary international law is that all employees at embassies and consulates should be entitled to sue their employer. They point to legislation in other countries such as the United Kingdom, Pakistan and South Africa, to argue that employment at embassies and consulates is in a special category and requires the application of rules more protective of the foreign State's interest than in other contexts of employment.[56] As has been noted, the approach of these countries has been to impose a standard of near absolute immunity in the case of virtually all employees at missions. However, the Spanish writers consider such a position to be too pro-immunity. In their view a better approach would be to use a test which determines immunity on the basis of the status of the employee:[57]

> In our view it will be necessary to focus on the rank of the employee. The position obviously will not be the same in the case of a person employed as a domestic servant or forming part of the administrative or technical staff, performing secretarial duties, as in the case of a person exercising the prerogatives of public power or involved in sovereign activities.

In essence, then, the authors propose a middle view between holding that all employees at diplomatic or consular missions be unable to sue

54. *EBM* v. *Equatorial Guinea* (10 Feb. 1986), extracted in A. Chueca Sancho and J. Diez-Hochleitner, "La Admision de La Tesis Restrictiva de Las Inmunidades del Estado Extranjero En La Receinte Practica Espanola" (1988) 40 Rev. Espanola de Derecho Int. 7, 10.
55. *DA* v. *Republic of South Africa* (1 Dec. 1986) extracted in *idem*, p.12.
56. *Idem*, pp.28–30.
57. *Idem*, p.29 (my translation).

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their employers and the Basle Convention approach which allows any employee, not a national of the foreign State but a resident of the forum, to bring an action. This position would equate to the Australian and US positions referred to above. It is significant that in its most recent decision on the issue, the Supreme Court of Spain has again refused to uphold a plea of immunity by a foreign State in the context of an employment dispute at a diplomatic or consular mission—this time involving an American national employed as a secretary at the South African Embassy.[58] The exact basis of the decision is not clear but the result would be consistent with a test based on the status of the employee.

Italy is a jurisdiction in which there has been a very recent movement towards relaxing immunity in the context of employment at diplomatic and consular missions, although its practice remains inconsistent. Apart from being one of the few jurisdictions with scholarly writing in the area,[59] Italy has the greatest amount of judicial practice. However, it has no immunity legislation nor is it a party to the Basle Convention. In the context of employment at missions Italian courts, until recently, invoked the *jure imperii/jure gestionis* test to assess whether the employment relationship was a private or a public act.[60] In applying this test Italian tribunals seem to have adopted a similar approach to the common law countries mentioned above (Ireland and New Zealand) in giving primary emphasis to the place of employment. Immunity has therefore been recognised in all cases of employment at an embassy or consulate with the exception of manual or temporary workers engaged in activities extraneous to the organisation of the mission, such as local contractors providing services. Certainly no distinction is drawn between senior or diplomatic officials and other, more subordinate employees such as clerical staff. Little regard, either, seems to have been paid to the nationality of the employee (in particular that he or she may have been an Italian).

So, immunity has been granted to foreign States from actions for compensation by Italian nationals employed as:

(1) an inspector of luggage of emigrants from Italy at the American Consulate;[61]
(2) a "disinfector" of emigrants from Italy at the same consulate;[62]
(3) an "assistant" at the Brazilian Embassy;[63]

58. *Abbott* v. *Republic of South Africa* referred to in the Proceedings of the 66th Conference of the ILA (1994), p.470.

59. See in particular L. Sbolci, *Controversie di Lavoro con Stati Stranieri e Diritto Internationale* (1987).

60. Italian courts are authorised under Art.10 of the Constitution to apply principles of customary international law in domestic cases.

61. *Calvaruso* v. *Byington* (1928) in Hackworth, *Digest of International Law IV*, p.731.

62. *Mazzucchi* v. *American Consulate* (1931) in *Annual Digest of International Law Cases* (1931–2) Case No.186.

63. *Velloso* v. *Borla* (1979) 65 I.L.R. 328 (Court of Cassation).

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(4) a secretary, accountant and switchboard operator at the Romanian Commercial Office (which was an office of the Embassy);[64]
(5) a clerk at the Panamanian Consulate whose responsibilities involved writing and translating letters;[65]
(6) a commercial officer at the British Consulate involved in promoting the sale of British goods in Italy;[66]
(7) a chancery usher at the West German Embassy.[67]

It is noteworthy that, in the case of the employees in (1) to (6), the action brought was for unfair dismissal. In the case of (7), the chancery usher, the claim was for an unpaid pension entitlement. The type of claim was therefore different, although the courts, in their reasoning, placed no importance on the distinction.

Recently, however, this approach focusing on the context of employment has come under attack by a number of Italian scholars who have argued that, in order truly to implement a doctrine of restrictive immunity, greater attention should be paid to the status of the employee within the institution employing him or her and to the nature of the claim brought by the employee.[68] The view of these writers is that Italian courts have maintained a policy of almost absolute immunity in the area of employment contracts, particularly where diplomatic and consular missions are concerned. Sbolci, in particular, has argued that application of the new criteria is required to give appropriate weight to the interest of the employee in immunity cases.[69] The idea of focusing on the status of the employee has already been considered above and, in essence, involves the court or legislature drawing a distinction between senior officials in official or policy-related positions and subordinate or ancillary staff, such as clerical or secretarial staff.

The idea of focusing on the nature of the claim, however, is new in that it involves drawing a distinction between the economic and non-economic aspects of an employment dispute. Where an employee's claim is solely related to his or her wage or pension entitlement, for example, there can be no question of intrusion into the sovereign activities of the foreign State. Where the claim relates to the merits or otherwise of an act of dismissal, however, entertaining the claim may well implicate a State's sovereignty. This would be particularly the case where an employee is seeking

64. *Luna* v. *Socialist Republic of Romania* (1974) 65 I.L.R. 313 (Court of Cassation).
65. *Rubin* v. *Consul General of Panama* (1977) 77 I.L.R. 593 (Court of Cassation).
66. *Bulli* v. *Foreign and Commonwealth Office of the United Kingdom* (1981) 65 I.L.R. 343 (examining magistrate).
67. *Panattoni* v. *Federal Republic of Germany* (1987) 87 I.L.R. 42 (Court of Cassation).
68. See in particular L. Sbolci, "Jurisdictional Immunity of Foreign States with Regard to Employment" (1980–81) 5 Italian Y.I.L. 227, 238–239; G. Gaja, "Quale immunita degli Stati Esteri per le controversie di lavoro?" [1991] Riv. di Dir. Int. 920; B. Conforti, *Diritto Internazionale* (4th edn, 1992), pp.222 *et seq.*
69. Sbolci, *idem*, p.238.

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reinstatement. It must be said, though, that given that the vast majority of cases involve suits for unfair dismissal, either seeking compensation or (less commonly) reinstatement, the practical application of this principle will be limited, although it would have assisted the chancery usher above.[70]

Nevertheless, in three recent Italian cases involving employment contracts at a consulate or embassy, the Court of Cassation chose to rely on both of these "new" criteria. In the first decision[71] an Italian national employed as an administrative assistant at the British Consulate in Naples was held entitled to a transfer to a higher wage classification owing to the functions he was performing in the Consulate. In the second decision[72] an Italian national employed as a secretary at the Norwegian Embassy was held entitled to a similar wage increase. In the third decision[73] a Sri Lankan national employed at the Embassy of Zaire as a chauffeur and interpreter was allowed to bring a claim for unpaid wages. In all three cases the Court noted that the employee carried out functions of an ancillary or secondary character and that the claim concerned only the economic aspects of the employment relationship; it did not involve any investigation into the merits of the employee's dismissal. A significant trend in Italian practice toward restricting immunity in the context of mission employment therefore seems to have appeared.[74]

C. Practice of International Bodies in the Area of Embassy and Consulate Employment

In July 1991 the International Law Commission ("the ILC") completed its work in relation to State immunity and adopted, on second reading, a number of draft articles. The articles have now been presented to the General Assembly of the United Nations for possible adoption as an international convention.[75] The ILC Draft Articles included a specific provision for employment contracts in Article 11. Similar to Article 5 of the Basle Convention, it provides for a general presumption of non-immunity when the contract is to be performed in the forum and restores immunity when the employee is neither a national nor resident of the forum at the time the contract was made (subparagraph (2)(c)) or was a national of the foreign State at the time of proceedings (subparagraph (2)(d)).

70. *Panattoni*, *supra* n.67.

71. *United Kingdom* v. *Toglia* [1991] Riv. di Dir. Int. Privato e Processuale 687 (Court of Cassation).

72. *Norway* v. *Quattri* [1991] Riv. di Dir. Int. 993 (Court of Cassation).

73. *Republic of Zaire* v. *Sendanayake* [1992] Riv. di Dir. Int. 402 (Court of Cassation).

74. However, it should be noted that in a recent decision of the Court of Cassation the traditional reasoning based on the sovereignty of the workplace was relied upon to reject a claim by an employee for transfer to a higher wage classification. See *Libyan Arab Jamahiriya* v. *Trobbiani* [1990] Riv. di Dir. Int. 402.

75. (1991) II(2) Y.B.I.L.C. 13.

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However, unlike Article 5, immunity is also imposed where "the employee has been recruited to perform functions closely related to the exercise of governmental authority" (subparagraph (2)(a)).

Although there is no explicit reference to employment at diplomatic or consular missions in these provisions, the commentary indicates that subparagraph (2)(a) was intended to apply to such a context and that all employees at such missions would be precluded from bringing suit on the basis of State immunity. An absolutist approach, basing immunity entirely on the place of employment, was therefore the intention in respect of mission employees, with no allowance to be made for the status of the employee or his or her nationality or residence. This position can be seen from the examples of employees considered to "exercise functions closely related to the exercise of governmental authority": "private secretaries, code clerks, interpreters, translators and other persons entrusted with functions related to state security or basic interests of the state ... [as well as] officials of established accreditation".[76] The intention to exclude all staff at missions from the right to sue their foreign State employer is also made clear from comments by the Special Rapporteur of the ILC where he said that subparagraph (2)(a) was aimed at "exclud[ing] administrative and technical staff of a diplomatic mission from the application of paragraph (1)".[77]

Pressure to include the subparagraph had come from a number of representatives of developing countries who felt that, without its inclusion, they would have been exposed to a plethora of suits by employees of their missions who held the nationality of the forum under paragraph (1). These representatives noted that developing countries, unlike developed countries, did not have the resources to employ their own nationals in their overseas missions and had to rely to a much greater extent on locally recruited labour, which meant that they were more vulnerable to actions. Accordingly, a clause providing for immunity from suit in the context of employment at missions was required.[78]

The Committee on State Immunity of the International Law Association ("the ILA") adopted in 1982 its Draft Convention on State Immunity ("the Montreal Draft") which included a specific provision dealing with contracts of employment: Article IIIC. The provision was similar to Article 5 of the Basle Convention in that it relied on a basic presumption of non-immunity (where the contract was to be performed in the forum) which was rebutted where the employee had the nationality of the foreign

76. *Idem*, pp.42–43.
77. *Idem*, p.34.
78. See the comments of Chief Akinjide, Balanda and Mahiou in (1984) I Y.B.I.L.C. 323–324.

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State at the time the proceedings were brought or was not a resident or national of the forum State at the time the contract was entered into. Also like Article 5, Article IIIC made no specific reference to employment at embassies or consulates, the drafters having apparently intended that the above territorial criteria be used to resolve immunity in this instance as well.

However, at the most recent conference of the ILA in 1994, in which the work on State immunity was concluded, an amendment was made to Article IIIC to add a clause (4), providing for immunity to be granted where "the employee was appointed under the public (administrative) law of the foreign state such as, *inter alia*, members of the mission, diplomatic, consular or military staff".[79] In the explanatory commentary to the amendment, the Committee stated that it wished "to make clear that the employment relationship of *any and all* diplomatic and consular staff and *other members of the mission* should be immune from the jurisdiction of the courts of the forum state".[80] It seems, therefore, that the ILA has opted for the approach of *de facto* absolute immunity in the case of all employment at missions similar to the British legislation and its progeny referred to above.

The International Law Institute has also adopted a resolution on State immunity at its 1991 Conference which provides, in Article 2(2)(c), a general presumption of non-immunity for foreign States in respect of employment contracts.[81] However, under Article 2(3)(d) this presumption is qualified by the direction that the courts of the forum should not "assume competence to inquire into the content or implementation of the foreign, security and defence policies of the foreign state". Such a provision is of potentially very wide scope and could easily be interpreted to embrace all employees at a diplomatic or consular mission. It is not clear, however, from the deliberations of the Institute whether this conclusion was intended by the text.

On balance, then, the work of international bodies tends to support the view that local jurisdiction should be completely excluded in the case of suits by employees at diplomatic and consular missions. As to the position overall, it seems fair to say that there is an almost equal split between countries favouring absolute immunity and those supporting a restrictive approach. However, even among those which take a restrictive view there is no single form of reasoning which is followed. Some States rely on the status of the employee, drawing a distinction between those in senior and

79. ILA Proceedings 1994, *supra* n.58, at pp.24–25.
80. *Idem*, p.495 (emphasis added).
81. The resolution was passed by 29 votes to 2 with 17 abstentions; see (1991) 64(II) Ann. Inst. Dr. Int. 214, 276–278.

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those in subordinate positions, while others focus on the connection of the employee to the forum (for example, whether he or she is a resident or national). Still others concentrate on the nature of the particular claim brought by the employee; in particular whether it will involve the court in adjudicating upon sensitive questions of employment policy of a foreign State or whether it is simply about amounts of money. Other States restrict immunity still further by suggesting that all contracts of employment at diplomatic or consular missions, whatever the status or nationality of the employee involved, should be subject to the jurisdiction of the local courts.

D. Claims by Contractors for Services Rendered to a Diplomatic or Consular Mission

So far we have considered the situation of the rights of an employee who is physically located at an embassy or consulate. However, there are often individuals employed by a mission as contractors to perform occasional services to the mission, such as repairs. Would it be possible for a State to rely on the principles of State immunity to defeat a claim for payment by such a contractor? The overwhelming majority of State practice considers that immunity cannot be relied upon in this context. For example, individuals have been allowed to bring claims against the Iranian Embassy for recovery of payments for repairs to the Embassy[82] and the US Mission for unfair dismissal in relation to the organisation of an exhibition at the Mission.[83] In addition, the legislative practice of many States denies immunity to foreign States in respect of contracts for the supply of services.[84]

E. The Relationship Between State Immunity and Diplomatic/Consular Immunity in the Context of Employment Contracts

So far we have been considering the situation where a foreign State has entered into a contract of employment with an individual to work at an embassy or consulate and the employee seeks to bring an action against the State employer. Suppose, however, that a domestic servant, for example, entered into a contract of employment with a consular officer or diplomat *personally*, rather than with the foreign State itself, and then seeks to

82. *Claim Against the Empire of Iran Case* (1963) 45 I.L.R. 57 (Federal Constitutional Court of Germany); see also *Singh* v. *Union of India* (1987) 27 Indian J.I.L. 96 where the Supreme Court of India allowed a similar claim to proceed against the Algerian Embassy.

83. *Tsakos* v. *United States* (1972) 75 I.L.R. 78 (Labour Tribunal of Geneva).

84. See e.g. State Immunity Act 1978 (UK), s.3(2)(a); State Immunity Ordinance 1981 (Pakistan), s.5(3)(a); Foreign States Immunities Act 1985 (Australia), s.11(3)(a); State Immunity Act 1979 (Singapore), s.5(3)(a) and Foreign Sovereign Immunity Act 1981 (South Africa), s.4(3)(a). A contract to supply services is also very likely to be "commercial activity" under the US and Canadian legislation.

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bring an action against *the particular officer*. In this situation the traditional view is that principles of State immunity do not apply as the defendant is not a foreign State.[85] What is involved here is a question of diplomatic or consular immunity. The problem with this conclusion, however, is that the coverage of immunity for diplomats and consular officials is possibly wider than that for the foreign State which they represent, and this has led some commentators to argue that the doctrines should be amalgamated into one test.[86]

For example, Article 31(1)(c) of the Diplomatic Relations Convention provides that a diplomat shall be immune from the civil jurisdiction of the receiving State except in the case of "an action relating to any professional or commercial activity exercised by the diplomat in the receiving state outside his official functions".[87] Such a provision effectively acts as a form of absolute immunity from suit for diplomats because the conclusion of a contract of employment with a domestic servant would rarely be considered an act "outside the officer's official functions". This conclusion receives support from the recent US decision of *Talbion* v. *Mufti*,[88] where an action by a Filipino domestic servant against a Jordanian diplomat failed. Those favouring amalgamation argue that, unless a test of *de facto* absolute immunity is applied in the context of a suit by an employee at a mission against his or her foreign State employer (which, as has been noted above, is the case in only a few jurisdictions), the scope of immunity granted to the State would be narrower than that granted to a diplomat or consular officer employer and so would be discriminatory as between employees. It is illogical, it is argued, that two employees engaged in virtually the same job (for example, a domestic servant) may be subjected to different legal standards merely by accident of employer, and so the principles of State and diplomatic/consular immunity should be merged, at least in the context of civil claims.[89]

The State Immunity Committee of the ILA recently considered this issue but decided that the two regimes, of State immunity on the one hand

85. *Portugal* v. *Goncalves* (1982) 82 I.L.R. 115 (Civil Court of Brussels); *Talbion* v. *Mufti* 877 F. Supp 285 (ED Va. 1995).

86. ILA Proceedings 1994, *supra* n.58. See e.g. the views of J. Crawford at p.479, C. Dominice at pp.479–480, H. Van Houtte at pp.480–481 and J. Salmon at pp.481–482.

87. Art.43 of the Consular Relations Convention is to the same effect.

88. *Supra* n.85; see also *Goncalves*, *supra* n.85, where a Belgian court refused to allow a translator to sue his employer, an accredited diplomat at the Portuguese Mission, again on the basis that the conclusion of the contract of employment had been within the diplomat's "official functions".

89. Another problem is that national courts have, on occasions, confused the doctrines of State and diplomatic/consular immunity. E.g. in the context of a suit by an Italian national employed as the commercial secretary of the Belgian Consul-General in Milan, the Italian Court of Cassation applied the principles of both State and consular immunity to resolve the claim even though the State of Belgium was not a party to the litigation; see *Esposito* v. *Belgian Consulate* (1987) 7 Italian Y.I.L. 298.

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and diplomatic and consular immunity on the other, should remain distinct. In the view of the majority of the Committee[90] the rationales of the two areas were different and so it was not relevant if the scope of diplomatic and consular immunity were, for example, wider than State immunity. The aim of diplomatic immunity is to allow the agent to exercise functions without any restraint or coercion on the part of the receiving State and so a principle of absolute immunity is appropriate. The basis of State immunity, on the other hand, is to prevent a State's sovereign functions being subjected to the scrutiny of another State's courts. Interestingly, however, as noted above, the ILA did amend its provision on employment contracts to provide for a form of absolute immunity for States from suits by employees of missions. In effect, then, the ILA has achieved an amalgamation of State and diplomatic immunity (at least in terms of result) while maintaining that such a conclusion was not warranted in principle.

IV. CLAIMS BY EMPLOYEES AT MILITARY ESTABLISHMENTS

EMPLOYMENT at military establishments is an area where national practice is similarly split but, on balance, probably favours the view that immunity from jurisdiction should apply in the case of suits by both military personnel and civilian employees working on military bases operated by the foreign States in the forum. As with diplomatic and consular missions, the major reason relied upon to uphold immunity in the case of military establishments is their sovereign character. A foreign State's conduct and organisation of its military institutions are areas in which no other States should intrude. The interest of the foreign State in having its sovereignty respected takes precedence over the interest of the forum in enforcing its own labour laws or protecting its own nationals or residents.

In a number of Italian decisions courts have declared that immunity should be recognised in the case of suits by civilian employees of military establishments even where they are nationals or residents of the forum. For example, jurisdiction was declined in an action brought by an Italian citizen in respect of his employment by a US military base established in Italy in accordance with the NATO Treaty[91] and in respect of a suit by an Italian national employed as a lift attendant and messenger at a US naval base in Italy.[92] The court again concluded in both cases that the United States, in establishing and maintaining the bases, had acted in a sovereign capacity and so all its activities there were non-justiciable.

90. ILA Proceedings 1994, *supra* n.58, at p.482. See in particular the views of Lady Fox and P. Nygh at p.480 and H. Hillgenberg and M. Leigh at p.481.

91. *Department of the Army of the United States* v. *Savellini* (1956) 23 I.L.R. 201 (Court of Cassation).

92. *Francischiello* v. *Government of the United States* (1959) 28 I.L.R. 158 (Tribunal of Naples).

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A similar approach was taken by a West German court in the *Immunity of United Kingdom from Jurisdiction* decision.[93] In that case a German civilian was employed as a haulage contractor by the British army of occupation in Germany to enter the Soviet zone and recover arms and military plans. He sought damages from the British army for injuries suffered but the court upheld the plea of immunity on the basis that the army was engaged in the sovereign functions of military intelligence.

Practice also supports the view that suits by military personnel, even where they hold the nationality of the forum, should not be entertained by a local court. In *Friedar* v. *Government of Israel*[94] a US court held that a US citizen was unable to sue the Israeli government for injuries suffered while serving in the Israeli army. The court said that his service in the army did not constitute "commercial activity" within the terms of the US Foreign Sovereign Immunities Act 1976 because government recruitment and training of an army were sovereign activities as only governments could conduct them. This decision also relied on the legislative history to the US statute, in which it was stated that the employment of military personnel was "public or governmental in nature". In the case of military personnel, immunity would seem to be based on the sovereign context of employment.

In the British legislation on State immunity (and other national statutes which adopted its provisions) no specific provision is made for employment at a military establishment, which suggests that such employment falls within the general principle of non-immunity in section 4(1) of the State Immunity Act 1978.[95] However, in each of these statutes it is also provided that the terms of the legislation do not apply to proceedings relating to armed forces of a foreign State while present in the forum (section 16(2) of the British Act).[96] The effect of this provision is to exclude any suit by an employee of such forces, even a national of the forum, from the scope of the legislation. Presumably, however, an employee of foreign armed forces operating outside the forum, whether civilian or military, would be able to bring an action against his or her employer, provided that the employment contract and the employee were sufficiently territorially connected to the forum.

In the context of suits by employees of visiting forces in the forum, however, any question of State immunity may also be affected by application of the principles of any relevant treaty which had been entered into between the forum State and the State of the visiting forces. In the case of

93. (1957) 24 I.L.R. 207 (Court of Appeal of Schleswig).

94. 614 F. Supp 395 (SDNY 1985).

95. This is the conclusion drawn by academic writers. See Badr, *op. cit. supra* n.1, at p.94. Art.5 of the Basle Convention is identical to the British provision on this point.

96. For the equivalent provision in other jurisdictions, see the Singapore State Immunity Act 1979 (s.19(2)(a)) and the Canadian State Immunity Act 1982 (s.15).

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Europe there does exist the Agreement Regarding the Status of Forces to the North Atlantic Treaty 1951 ("SOFA"), which has been enacted into the domestic law of most NATO countries, although not the United Kingdom. The provisions of SOFA divide employees of visiting armed forces into three categories: military, civilians having the nationality of the employing State and local civilian workers, with the courts of the forum having jurisdiction over claims brought by the local employees. Typically, employees in the third category are engaged in routine or menial duties. Italian courts have accordingly upheld jurisdiction in the case of claims brought by Italian nationals employed at US military bases as firemen[97] and wage controllers.[98]

In the area of military personnel, however, particularly where the employee is a foreign national, local courts remain reluctant to assume jurisdiction. In the recent case of *Littrell* v. *United States (No.2)*[99] an English court refused to allow a US serviceman to sue his employer, the US government, for medical negligence caused by another serviceman at a US military base hospital in England. Because the United Kingdom had not enacted SOFA into its law, the court had to apply the principles of customary international law to determine the immunity question. In granting the immunity, the court relied strongly on the fact that the context in which the acts took place was the operation by the United States of an air force base, which is "about as imperial an activity as could be imagined".[100] Also significant was the fact that the suit involved only members of the visiting forces and not nationals of the forum.

The practice of international bodies seems to support the view that employment at military establishments is an immune activity. As discussed above, the ILC grants immunity where the employee is "recruited to perform functions closely related to the exercise of governmental authority".[101] The commentary to such provision suggests that among such employees would be "private secretaries, code clerks, interpreters, translators and other persons entrusted with functions relating to state security or basic interests of the state".[102] Such an inclusive description suggests that all military and most civilian employees at a base would be barred from suit, apart from possibly those engaged as contractors performing occasional services, such as repairs, at the base. By contrast, the ILA Draft

97. *Bruno* v. *United States* (1977) 65 I.L.R. 316 (Court of Cassation).
98. *United States* v. *Gereschi* (1977) 77 I.L.R. 598 (Court of Cassation). These cases may be contrasted with a recent decision of the District Court of Tokyo where a Japanese civilian employed by the US Armed Forces in Japan was held unable to sue his employer for compensation on the basis that the decision to dismiss him was an act within the "official duties" of the employer; see *X* v. *Y1 and Y2* (1992) 35 Japanese Ann. Int. L. 151.
99. [1995] 1 W.L.R. 82 (English Court of Appeal).
100. *Idem*, p.95 (*per* Hoffmann LJ).
101. Draft Art.11(2)(a).
102. See *supra* n.76.

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explicitly refers only to "military staff" as being within the scope of immunity, which may suggest that all civilian employees are to be allowed to sue.[103]

On balance, overall, the customary law position would be that local jurisdiction would be likely not to exist over military personnel, whatever their nationality. However, the position with respect to civilian employees of a military establishment, particularly where they are nationals or residents of the forum, is unclear.

V. CLAIMS BY EMPLOYEES AT OTHER STATE-OWNED ENTERPRISES

IN workplaces other than diplomatic and consular missions and military organisations, legislative and judicial practice now shows a general trend towards withholding immunity from foreign States generally on the basis that the context of employment is insufficiently "sovereign". However, as with the case law in the diplomatic and consular field, at times courts have also supported their conclusions on the immunity question in this area by reference to reasons other than the sovereignty (or lack of sovereignty) of the workplace, such as the status of the employee claimant or the extent to which the nature of the claim impacts upon a State's sovereignty. States which have enacted legislation on State immunity have, almost without exception, additionally made a finding of non-immunity dependent on there being an adequate territorial nexus between the forum and (i) the contract of employment and (ii) the employee in respect of a particular action.

Apart from diplomatic and consular missions and military establishments, foreign State enterprises exist in a number of forms, the common thread being that the entity in question is owned by the State.[104] Among the other common foreign State enterprises may be included institutions run by foreign States to carry out certain policy aims, such as information and commercial offices and cultural agencies, educational bodies such as schools and universities and, finally, trading corporations.

Information and cultural offices, because they often fulfil governmental purposes of the State, are close to the borderline in terms of sovereign or commercial status while trading corporations are often indistinguishable from organisations in the private sector, their only connection with the foreign State being in terms of ownership of capital. However, most overseas offices of a foreign State are, in general, no longer accorded immunity

103. See *supra* n.79.

104. Most national legislation on State immunity (e.g. in the UK, US and Canada) distinguishes between the foreign State itself and "separate entities" or "agencies" of the foreign State. Although such entities are capable of being sued in their own right, they are also entitled to claim the immunity of the foreign State, on the basis of their ownership by the State. However, their often close resemblance to entities in the private sector has made some courts reticent about granting them immunity.

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from suit in employment disputes, according to the majority of judicial practice.[105] Again the reasons for granting or denying immunity are varied. Sometimes the nature of the workplace is emphasised; in other decisions the status of the employee.

So, in the Netherlands, an Italian clerical worker at the Italian Cultural Institute, a body administered by the Italian government, was held entitled to bring proceedings for reinstatement.[106] In its reasons, the court found that the conclusion of the contract of employment by an entity such as the Institute was a private law transaction and not a "typically governmental act". The court's reasoning seemed to focus on the *nature of the workplace* rather than the *status of the employee*.

Similarly, in Belgium, it has been held that a Portuguese national employed at the Portuguese Commercial Office in Brussels could sue for damages for wrongful dismissal[107] on the basis that the act of entering into such a contract by the Office was private and commercial and not an exercise of public power.

In Italy, although there was an early line of authority which suggested that employees of trade delegations or commercial bureaux could not sue their employer,[108] in more recent decisions such suits have been allowed. So, it has been held that an Italian national employed as a clerk in routine administrative duties at the Bulgarian Commercial Bureau could sue her employer on the basis that her duties were of a routine administrative nature and that she was not in an official position.[109] The status of the employee was therefore the decisive factor.

In the context of cultural institutions, the case law of Italian courts has not been consistent on the issue of whether immunity should be accorded. In one decision an Italian national employed at the Hungarian Academy in Rome was held to be entitled to sue his employer.[110] The Academy was responsible for promoting Hungarian painting and sculpture in Italy. The court stressed the fact that although the Academy had sovereign tasks the employee was not in an official position, being responsible only for maintaining the premises and paying the domestic staff. The status of the

105. Cf. the decision of the Supreme Court of Poland in *Maria B* v. *Austrian Cultural Institute* (1987) 82 I.L.R. 1 where immunity was accorded to the Institute on the basis that Austria granted Poland reciprocal immunity before its courts. Given the established trend in Austria towards restrictive immunity, this conclusion seems mistaken.

106. *BV* v. *L'Instituto Italiano di Cultura per i Paesi Bassi and the Republic of Italy* (1990) Neth. Y.I.L. 447 (District Court of Amsterdam). Although the Netherlands is a party to the Basle Convention its provisions could not be applied against Italy, a non-contracting State.

107. *Castanheira* v. *Portugal* (1980) 82 I.L.R. 100 (Labour Court of Brussels). Again, Belgium is a party to the Basle Convention but Portugal is not, so its provisions were not applied.

108. *Tani* v. *Soviet Trade Delegation* (1953) 15 Ann. Digest and Report of Public Int. Law Cases 141.

109. *Parravicini* v. *Commercial Bureau of the People's Republic of Bulgaria* (1969) 65 I.L.R. 282 (Tribunal of Milan).

110. *Hungarian People's Republic* v. *Onori* (1956) 23 I.L.R. 203 (Court of Cassation).

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employee was therefore the key factor in denying immunity. More recently, however, a dual Danish and Italian national employed by the Danish Cultural Institute as a secretary was prevented from seeking compensation arising out of her dismissal.[111] The view of the court was that the Institute exercised sovereign functions of the Danish State in that its mission was to spread knowledge of Danish life and culture throughout the world. In effect, then, a cultural institute was placed on the same footing as a military base or an embassy, a result which does seem at odds with the preponderance of State practice in the area.

However, in the context of a purely political office which is engaged in work very similar to, if not indistinguishable from, that of an embassy or consulate (such as the gathering of sensitive information for a foreign State), two decisions, one from Belgium and the other from Italy, suggest that immunity would also be recognised. Both cases involved persons employed as assistant librarians at the US Information Agency, one a Belgian national[112] and the other a US citizen,[113] who were denied the right to sue for compensation for unfair dismissal. According to the courts, the important factor in both decisions was that the Information Agency was engaged in sovereign activities of the American State under the direct control and supervision of the State Department. Its director was also appointed by the US President. It mattered not that a person employed as an assistant librarian was in an administrative rather than executive position, because of the highly sovereign environment in which she worked. This approach is reminiscent of the absolute immunity view expressed in the diplomatic and consular mission cases. Overall, then, it seems that political offices may be in a special immune category, similar to diplomatic and consular missions.[114]

However, near-universal consensus seems to have been reached that immunity cannot be claimed in the context of employees' actions against State-funded educational institutions. In Austria it was held that an Austrian national was entitled to bring suit for wrongful dismissal against an Indonesian State-owned university after his contract was terminated by government decree.[115] The court held that the conclusion of a contract to teach at a university was a private act not giving rise to State immunity and suggested that the context of employment (being analogous to a private institution) was the main basis for reaching this decision. Likewise, a Dutch court allowed a claim for salary arrears by a Portuguese national

111. *Danish Cultural Institute* v. *Hansen* (1979) 65 I.L.R. 325 (Court of Cassation).
112. *De Decker* v. *United States* (1956) 23 I.L.R. 209 (Court of Appeal of Leopoldville).
113. *De Ritis* v. *United States* (1971) 65 I.L.R. 283 (Italian Court of Cassation).
114. Further support for this principle comes from a 1958 Swedish decision in which the Soviet Union was granted immunity in a suit for unfair dismissal by a Swedish translator employed at the Soviet Information Office; see UN Legislative Series, *supra* n.39, at p.603.
115. *Neustein* v. *Republic of Indonesia* (1958) 65 I.L.R. 3 (Supreme Court of Austria).

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who had been employed by the Portuguese Ministry of Education as a teacher at the Portuguese School of Amsterdam to proceed,[116] on the basis that the process of hiring teachers was the same in State-owned schools as it was in private institutions. No reference was made to the fact that the employee had the nationality of the employing State.

Italian courts have also allowed claims to be brought by employees of educational institutions, again without regard to the nationality of the worker. For example, a French national employed to study the vocational and academic training of pupils at a State-funded high school in Italy was entitled to sue for reinstatement,[117] on the basis that she was not a member of the French public service and the school was not an entity pursuing sovereign objectives of the French State. It was, in fact, indistinguishable from a private school. In reaching its decision on immunity, the court therefore relied on both the private nature of the employer and the relatively insignificant status of the employee.[118]

There have been surprisingly few European cases involving employees of State-owned trading corporations but this is probably because such employment contracts would be considered private acts. This observation is vindicated by a French decision in which a French national company director was granted jurisdiction to sue his employer, the SNTA, an Algerian State-owned company, on the basis that the contract was private.[119]

In the legislative practice on State immunity, no specific reference is made to cultural, political or economic institutions of a State, educational bodies or trading corporations. In the Basle Convention on State Immunity, however, as well as in the legislation of a number of States (for example, the United Kingdom, Singapore and Pakistan), a distinction is drawn between entities of a foreign State "established for commercial purposes" in the forum State and those which are not.[120] However, the difference in

116. *Portugal* v. *De Sousa* (1981) 94 I.L.R. 314 (District Court of Amsterdam).

117. *Mallaval* v. *French Ministry of Foreign Affairs* (1974) 65 I.L.R. 303 (Examining Magistrate of Rome).

118. In a more recent decision an Italian court rather dubiously granted immunity to the same school in a suit by an Italian national employed as a teacher merely on the basis that the school was publicly funded and that its financial management was controlled by the French Treasury. A finding of immunity based on these criteria seems, however, to extend the scope of protection for foreign States too widely and is inconsistent with other practice on educational institutions. See *Republic of France* v. *Jacuzio* (1987) 87 I.L.R. 53.

119. *Société Nationale des Tabacs et Allumettes* v. *Chaussois* (1969) 65 I.L.R.44 (Court of Cassation). There were also a number of Italian cases dating from the 1930s in which Italian employees were allowed to bring suits against foreign State-owned railway companies; see Sucharitkul, *op. cit. supra* n.1, at p.322.

120. One writer has suggested that an information service of a government in which no bookings were taken or fees charged would not be an office "established for commercial purposes"; see Lewis, *op. cit. supra* n.1, at p.50. In *Gamal-Eldin*, *supra* n.18, it was held that a medical office attached to the Egyptian Embassy in London was not "established for commercial purposes".

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treatment between commercial and non-commercial organisations is only in terms of the territorial nexus required for a claim by an employee to be brought, with an employee of a commercial entity operating in the forum having a lesser burden to satisfy.

For example, under Article 5(1) of the Basle Convention the general principle is that there is no immunity under a contract of employment to be performed in the forum. Immunity is restored where the employee is a national of the employing State at the time of suit (Article 5(2)(a)) or is neither a national nor habitual resident of the forum at the time of entering into the contract (Article 5(2)(b)). Under Article 5(3), however, where the work is done for an office or agency, engaged in the same manner as a private person in an industrial, commercial or financial activity in the territory of the forum, then subparagraphs (2)(a) and 2(b) do not apply unless the employee was a habitual resident of the foreign State at the time of entering into the contract.

A similar approach has been taken in section 4 of the UK State Immunity Act with regard to relaxing the territorial nexus requirements for commercial entities operating in the forum. However, the British legislation goes further in extending the general principle of non-immunity in section 4(1) to encompass contracts of employment "made or to be partly performed" in the forum provided that the employee satisfies the same territorial criteria laid down in Article 5(2)(a) and (b) of the Basle Convention. The effect of this extension is to grant a British national, locally recruited but employed abroad with a foreign State entity, rights to sue his or her employer.[121] This provision has been adopted in the legislation of Singapore[122] and Pakistan.[123]

In Australia and South Africa, however, no distinction has been drawn between commercial and non-commercial State employers, but the British extension of non-immunity to contracts made in the forum has been adopted with similar territorial link requirements to be satisfied by the employee.[124] Relevant to the issue of commercial and non-commercial

121. In the parliamentary debates on the British legislation it was emphasised that a large number of British nationals are employed abroad "by reason of their special scientific or technological knowledge or administrative capability... particularly in less developed countries... but [apart from their nationality] their only link with the United Kingdom is the fact that they have been recruited here". Adequate protection of such persons required that they be allowed to sue their employer merely when their contract of employment has been made in the forum. See speech of Baroness Elles, *H.L. Hansard*, Vol.389, cols.1512, 1513 (16 Mar. 1978). Such a principle was also supported because it accorded with the English Rules of Court as to when a court may assume jurisdiction; see speech of Lord McCluskey, *idem*, col.1513.

122. State Immunity Act 1979, s.6.

123. State Immunity Ordinance 1981, s.6.

124. For South Africa, see Foreign Sovereign Immunity Act 1981, s.5. In the case of the Australian provision (s.12 of the Foreign States Immunities Act 1985) the nexus required to be satisfied by the employee is arguably relaxed still further. Under para.(3) the employee need show only that, at the time the contract was made, he or she was not a national of the

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employers, however, there is an Australian case decided under the pre-statutory law of State immunity. In this decision it was held that an Australian national employed as a pilot with the State-owned airline of Nauru was entitled to bring an action for breach of his employment contract.[125] The court found that, in concluding the contract of employment with the pilot, the airline had acted no differently from a private, commercial airline and so was therefore not engaged in sovereign activity. In particular, the duties to be performed by the employee were indistinguishable from those carried out by pilots working in the private sector. This was therefore a decision which emphasised the commercial nature of the foreign State employer.

In the US and Canadian State immunity legislation, as has been noted, there is no specific exception for employment contracts although many of these agreements have been interpreted to fall under the exception for "commercial activity". (In the United States, for immunity to be overcome, an employee's action must be "based upon" a commercial activity of the foreign State and in Canada it must "relate to" such an activity.) To examine whether distinctions are drawn between cultural and political offices on the one hand and trading corporations on the other judicial practice must be considered, the bulk of which comes from the United States. It is also important to consider whether the nature of the employer has been the key feature in resolving the immunity question or if the status of the employee or the particular nature of the action brought has been more significant.

An additional requirement to be established to overcome immunity, which exists in the United States but not in Canada, is that, where the commercial activity did not take place in the United States, it nonetheless must have had a "direct effect" there. The American legislation therefore demands, in addition, a form of territorial nexus.

A US decision denying immunity to a government office abroad was *Segni* v. *Commercial Office of Spain*.[126] In this case an Argentine national was allowed to sue his employer, an agency of the Spanish government responsible for promoting Spanish exports to the United States, on the basis that his employment was a commercial and not sovereign activity. The court took an approach focusing on the status and position of the employee rather than the nature of the employing entity. Although the Office had a number of sovereign tasks, the employee was engaged in merely providing services in the area of product marketing. As the court said, "he had no role in the creation of government policy or its administration ... he simply carried it out". Immunity was therefore

foreign State (although if also a permanent resident of Australia this bar does not apply) or a habitual resident of the foreign State.

125. *Reid* v. *Republic of Nauru* [1993] 1 V.R. 251 (Supreme Court of Victoria).

126. 835 F.2d 160 (7th Cir. 1987).

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inappropriate. This decision is consistent with the European practice referred to above.

Likewise, in a recent Canadian decision, a Canadian national employed as a marketing officer for a foreign State tourist board was not precluded by State immunity from suing his employer for compensation for wrongful dismissal.[127] Without much reasoning, the court held that the contract of employment in this case was a "commercial activity" and, as the proceedings "related to" such activity, no immunity could be claimed. Such a conclusion is also consistent with the European and common law practice in relation to commercial offices, above.

In the area of educational institutions it has been recently held by a US court that the dismissal of a US national employed as a lecturer in chemistry at a foreign State-owned university was an actionable "commercial activity".[128] The court's reasoning emphasised the nature of the claim, noting that "there was nothing peculiarly sovereign about unilaterally terminating an employment contract. Private parties often repudiate contracts in everyday commerce and may be held liable therefor."[129] In effect, then, the court focused entirely on the cause of action here, breach of contract, to deny immunity to the university. No reference was made to the nature of the workplace or the status of the employee. Although the reasoning differs from the European cases on educational institutions discussed above, the finding of non-immunity is in accord.

The great majority of US case law has, however, involved claims by employees against foreign trading corporations. Because there has been little practice of other countries in this area, it is likely that the American case law will be very authoritative as to what represents the customary international law position with regard to employment claims against such entities. In *Gazder* v. *Air India*[130] a US-resident employee of a foreign State-owned airline operating in the United States was not precluded by State immunity from bringing an action against his employer for statutory age discrimination. The court held that the airline was a commercial enterprise, largely indistinguishable from its private sector counterparts, and so engaged in "commercial activity". The nature of the workplace was therefore the determining factor in denying immunity. This case has been applied in a later decision, again involving an action by an American national for employment discrimination against a foreign State-owned airline.[131]

127. *Covell* v. *New Zealand Tourist Board* (unrep., 22 Dec. 1992) (British Columbia Supreme Court).
128. *Janini* v. *Kuwait University* 43 F.3d 1534 (DC Cir. 1995).
129. *Idem*, p.1537.
130. 574 F. Supp 134 (SDNY 1983).
131. *Starrett* v. *Iberia Airlines of Spain* 756 F. Supp 292 (SD Tex. 1989); see also to the same effect, *Grappo* v. *Alitalia Linee Aeree Italiane SpA* 56 F.3d 427 (2nd Cir. 1995).

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The status of the employee was the key factor in denying immunity to a foreign State-owned navigational shipping corporation in *Zveiter* v. *Brazilian National Superintendency of Merchant Marine*,[132] where a dual American/Brazilian national was held entitled to bring a claim of sexual harassment against her employer. The court's view was that the employment of a secretary was a "commercial activity", on the basis that clerical staff, even in highly sovereign places of employment, tend to be engaged in routine duties. The court referred to the legislative history to the American statute as support for this conclusion.

In a number of cases, however, where employment has taken place abroad, employees have established an actionable commercial activity but have failed to show a "direct effect" of such activity in the United States sufficient to give the court jurisdiction. For example, in *Zedan* v. *Saudi Arabia*[133] an American national employed by the Saudi Ministry of Communications as an engineer on a roadway in Saudi Arabia was unable to show that his work (conceded to be a commercial activity) had a direct effect in the United States. Financial hardship suffered by him after returning home through the Ministry's breach of contract was insufficient. Similarly, in *Ebrahim* v. *Syrian National Petroleum*[134] an American oil rig employee was unable to sue his employer, a Syrian trading corporation, for injuries suffered during employment because although his employment was a "commercial activity" there was no direct effect of such activity in the United States. The fact that the accident happened to an American national and so reduced the "healthy American workforce" was too remote and tangential a connection.

Perhaps the most interesting North American case is the decision of the Supreme Court of the United States in *Saudi Arabia* v. *Nelson*.[135] *Nelson* involved a US national employed as a systems engineer at a Saudi Arabian State hospital in Riyadh who brought an action for compensation for personal injury arising from the Saudi government's unlawful detention and torture of him after he had made complaints about safety defects at the hospital. The employee argued that the action arose out of his employment and therefore was "based upon a commercial activity" in the terms of the US statute. The Supreme Court disagreed, stating that, although the contract of employment between the parties was "commercial activity" and that any action for breaches of such a contract would be permissible, the basis of the claim here was not breach of contract but tort, that is, the abuse of power by the police of the Saudi government. Actions in tort for

132. 833 F. Supp 1089 (SDNY 1993).
133. 849 F.2d 1511 (DC Cir. 1988).
134. 847 F. Supp 65 (SD Tex. 1994).
135. 113 S.Ct. 1471 (1993).

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personal injury were outside the scope of the commercial activity exception and so the foreign State was immune from suit. The reasoning of the majority in this case can probably be best explained in terms of the *nature of the claim*. In their view the case was about personal injury caused by one of the most sovereign parts of the foreign State—the police force—not about breach of an employment contract by the hospital.[136]

Before leaving the area of employment at government offices, educational or medical institutions and trading corporations, the work of international bodies should be noted. As discussed above, the ILC accords immunity to a foreign State where the employee is "recruited to perform functions closely related to the exercise of governmental authority".[137] It is possible that this clause may apply to prevent an employee at a governmental office from suing his or her employer, especially where the employee is in an official position, but the commentary on the Article is not entirely clear.[138]

Based on the national practice referred to above, however, it seems unlikely that employees at schools or trading corporations would fall under this exclusion. The question whether immunity would be accorded in these contexts would therefore be resolved on the basis of the territorial nexus between the forum and (i) the employment contract and (ii) the employee, the same approach taken in the national legislative practice referred to above. Likewise, the ILA Draft Convention allows any employee (outside the context of diplomatic and consular missions and the military) to bring an action against a foreign State provided that adequate territorial nexus exists.

Apart from those jurisdictions without immunity legislation, the criterion of territoriality is therefore likely to be the most significant factor in determining whether immunity applies in the case of employment in areas which are typically considered to be "non-sovereign". This conclusion is consistent with the view that a forum State will have a greater interest in exercising jurisdiction over employment contracts made or performed within its borders and involving its residents or nationals as employees.

VI. COLLECTIVE CLAIMS BY TRADE UNIONS AND STATE IMMUNITY

So far we have considered the situation where an individual employee has brought an action against a foreign State employer, either (most

136. Justice White, although concurring in the result, took a different but, it is suggested, preferable approach. He argued that the action arose out of the performance of the employee's duties under his contract in that his injuries were suffered as a result of his complaints about the quality of his workplace. The action therefore was based upon commercial activity. However, no claim could be brought in any case, because the activity had no "direct effect" in the US and so failed the territorial nexus requirement.

137. Draft Art.11(2)(a).

138. See *supra* n.76.

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commonly) for breach of the employment contract or for infringement of a labour relations statute of the forum. A different type of case is where a trade union registered in the forum State brings an action against a foreign State employer on behalf of a body of employees, almost always nationals of the forum State. In resolving the question of immunity in this instance, a court has to undertake a slightly different balancing exercise: the forum's interest in the protection of a segment of its workforce has to be weighed against the interest of maintaining good relations with the foreign State.

In the legislative practice of States on employment matters and State immunity, the position of collective claims is ambiguous, since no express reference is made to them. This omission can be explained either by oversight or because no distinction was thought to exist in substance between individual and collective claims. For example, in section 4 of the UK legislation[139] a foreign State is granted no immunity "as respects proceedings relating to a contract of employment between the state and an individual". None of the preparatory materials to the enactments sheds any light on whether collective actions were intended to be covered but there must be some doubt if recent judicial practice is considered.

There have been court decisions involving collective employee claims in the United States, Canada and Italy. In the United States and Canada, as has been noted above, there is no specific provision in their legislation on immunity for employment contracts but there is an exception to immunity for "commercial activity" which has been interpreted as extending to certain types of employment relationships.

In the United States there have been two decisions concerning an application by a trade union for certification of certain American nationals employed by foreign States. The *State Bank of India*[140] case involved a union claim for representation of employees of a foreign State-owned bank in the United States. The claim was brought before a labour tribunal, the National Labor Relations Board (NLRB). The Bank objected to the jurisdiction of the tribunal on the basis of State immunity. In resolving the immunity question it was necessary for the court to decide whether the action arose out of a "commercial activity" on the part of the Bank under section 1605 of the Foreign Sovereign Immunities Act 1976. The court answered this question in the affirmative, on the basis that the Bank "engaged in the same full range of commercial banking services usually provided by American banks and had employed American residents in furtherance of these commercial activities".

139. To similar effect, note s.6 of the Singaporean State Immunity Act 1979, s.6 of the Pakistani State Immunity Ordinance 1981, s.5 of the South African Sovereign Immunity Act 1981, s.12 of the Australian Foreign States Immunities Act 1985 and Art.5 of the Basle Convention.

140. *State Bank of India* v. *National Labor Relations Board* 808 F.2d 526 (7th Cir. 1986).

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What is interesting about this decision is that attention is focused on the place of employment and the nature of the activities engaged in by the employer to resolve the immunity question, with little regard being paid to the nature of the claim, that is, that it was a collective union action rather than a suit by an individual employee. In effect, then, the court considered there to be no difference between individual and collective actions for the purposes of establishing immunity.

The same result was reached by the Court of Appeals for the Second Circuit in the *Goethe House* case.[141] This case involved a petition to the NLRB for union representation on behalf of non-German employees at Goethe House, a non-profit organisation for cultural, educational and information exchange subsidised by the German government. Goethe House pleaded immunity to jurisdiction. The Court of Appeals rejected the immunity plea in a rather perfunctory way without even referring to the legislation on State immunity. The Court said that the claim by the union did not involve German workers and would not "interfere with Goethe House's implementation of West German cultural foreign policy". All that was involved in the union's petition were economic issues—wages, hours and other conditions of employment—and so the cultural mission of the centre would be unaffected.

The Court therefore took a different approach from the *State Bank* case. Rather than focusing on the place of employment and the extent to which the State entity was engaged in sovereign activities, here the Court gave primary significance to the nature of the claim, in particular whether the action in question would intrude upon sovereign activities of the State employer. Here the action touched only upon the economic aspects of the relationship between employer and employee and so a finding of immunity was felt inappropriate.

Since these two cases there has been the recent decision of the Canadian Supreme Court in *United States* v. *The Public Service Alliance of Canada*.[142] This case concerned a military base in Canada controlled by the United States in which, in addition to US and Canadian military personnel, a number of Canadian civilians were employed. The civilian staff were engaged in routine maintenance support although the base itself was a highly sensitive communications installation. In 1987 the Canadian public service union filed an application for union certification of the civilian personnel to a labour tribunal, the Canada Labor Relations Board. The United States pleaded immunity from jurisdiction. The Supreme Court of Canada, on appeal, upheld the claim to immunity by a majority of three to two.[143]

141. *Goethe House (German Cultural Center)* v. *National Labor Relations Board* 869 F.2d 75 (2nd Cir. 1989).
142. *Supra* n.12.
143. LaForest, L'Heureux-Dube and Gonthier JJ; Sopinka and Cory JJ dissenting.

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The issue for the Court was, in the terms of section 5 of the Canadian State Immunity Act, whether the proceedings "relate[d] to any commercial activity of the foreign state". The Court first noted that the entry by the United States into a contract of employment with an individual Canadian civilian maintenance worker was a commercial activity, on the basis that a "bare" contract of employment was commercial in nature.[144] This conclusion was not affected by the sovereign context of the base. Therefore, had the present action involved a suit by an individual employee against the United States for, say, unfair dismissal, no plea of immunity could be maintained. However, the issue in this case was different: here a trade union was making a *collective* claim for certification on behalf of *all* civilian workers at a highly sensitive place of employment. While an action by an employee in respect of an individual contract may have little impact on the management of military operations at the base, the imposition of a scheme of collective bargaining in respect of all employees could be highly intrusive.[145] For example, under such a scheme the employer would be powerless to terminate a strike called by employees and the Labor Relations Board would have extensive powers to enquire into aspects of the internal affairs of the base.[146]

In the Court's view, then, the decisive factor here for granting immunity was the *nature of the claim*: a collective action on behalf of all employees in such a sensitive place would interfere far more substantially in the sovereign activities of the employer than a claim brought by a single individual. The trade union had also sought to rely on the *Goethe House* case to rebut the plea of immunity but the Court distinguished this decision on the ground that a military base and a cultural centre "involve state activities of a completely different order", with the base operating "in an environment of secrecy, discipline and security".[147] It was therefore the combination of sovereign context of employment and intrusive nature of claim which led to the grant of immunity.[148]

In a recent Italian decision another type of collective trade union claim was found to give rise to a finding of State immunity, this time in the context of a consulate.[149] In this case an action was brought by a union against the United States on behalf of Italian administrative and clerical workers at the consulate. The claim alleged that the United States had

144. *Supra* n.12, at p.283.
145. *Idem*, p.284.
146. *Idem*, p.285.
147. *Idem*, p.288.
148. By contrast, the minority judges, in denying immunity, focused on the status of the civilian workers at the base. In their view, because the employees were neither privy to sensitive information nor secure personnel and "served no purpose critical to the operation of the base", jurisdiction over their claim should have been granted. See *idem*, p.303.
149. *Italian Trade Union for Embassy and Consular Staff* v. *United States* (1981) 65 I.L.R. 338 (examining magistrate).

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discriminated against union members in contravention of Italian labour law. The examining magistrate upheld the plea of State immunity on the basis that, if such a claim were allowed to proceed, the court would be required under Italian labour law to conduct investigations into employment practices of the foreign State and issue mandatory orders with respect to them. The effect would be to interfere substantially in the power of the employer to organise its offices and hence erode its sovereignty, particularly in the context of a consulate. This case is therefore similar to the *Canadian Civil Service* decision in the magistrate's reliance on the particular nature of the claim and the place of employment as factors pointing to immunity.

So, overall, in the case of collective claims it is suggested that a customary rule may exist that where such a claim is brought in a highly sovereign context, immunity will be accorded to the foreign State.

VII. MISCELLANEOUS ISSUES

A. Exclusion of Forum Jurisdiction and Local Mandatory Rules

It is provided in a number of national immunity statutes, as well as in the Basle Convention, that an employee and foreign State employer may choose, in their contract, to exclude the jurisdiction of the forum State which would otherwise have existed. For example, under section 4(2)(c) of the UK State Immunity Act 1978 the general rule of non-immunity for contracts made or performed in the forum is displaced where the parties have otherwise agreed in writing. The intention behind such a provision would seem to be to preserve freedom of contract and enable parties to opt for an alternative jurisdiction for resolution of their disputes. Clauses conferring exclusive jurisdiction upon a foreign court are common in commercial agreements and regularly enforced,[150] and it is possible that clauses *depriving* a local court of jurisdiction would be similarly interpreted.[151]

However, the right of parties to exclude the jurisdiction of the forum is not unqualified. In both the Basle Convention and the UK immunity legislation there is a recognition of the inequality of bargaining power between foreign State employer and individual employee and a concern that an

150. See e.g. *The Eleftheria* [1970] P.94.

151. However, in the European context, the European Convention on Jurisdiction and Enforcement of Judgments of 1968 (enacted in the UK in the Civil Jurisdiction and Judgments Act 1982) may be relevant. Art.5(1) grants an employee the right to sue his or her employer in the jurisdiction "where the employee habitually carries out his or her work". Art.17(5) then provides that an agreement conferring exclusive jurisdiction upon a foreign court will not be enforced in a suit involving an individual contract of employment unless the agreement was entered into after the dispute had arisen. These provisions may, possibly, provide an employee with a basis for avoiding a clause in an employment contract conferring immunity from local jurisdiction on a foreign State employer.

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employee should retain the protection of his or her local courts in certain situations.[152]

So, section 4(4) of the UK legislation provides that the right of parties to exclude the jurisdiction of the forum "does not apply where a law of the UK requires the proceedings to be brought before a court of the UK". Article 5(2)(c) of the Basle Convention is similar, in allowing parties to contract out "unless in accordance with the law of the state of the forum the courts of that state have exclusive jurisdiction by reason of the subject matter". Article 11(2)(e) of the ILC Draft Articles is to the same effect although, interestingly, the ILA Draft grants parties a totally unqualified right to contract out.[153]

The effect of these provisions is to render void any contractual stipulation of the parties excluding the jurisdiction of the forum where a local statute confers upon its courts exclusive jurisdiction in respect of the matter which is the subject of the dispute between the parties. In practice, however, it is rare for a legislature (at least in the common law system) to make a positive grant of exclusive jurisdiction to its courts in relation to an issue; what is more common is for a statute to prohibit parties from *ousting* the jurisdiction of the local courts.[154] Although the wording of the Basle Convention and the UK provisions suggests that the forum has to be *granted* exclusive jurisdiction by a statute before the parties' decision to contract out can be overridden, it is to be hoped that statutory provisions prohibiting the ouster of the forum's jurisdiction will also be interpreted to have that effect or else the aim of protecting employees may be thwarted.[155]

B. The Position of Foreign-State and Third-State Nationals where Immunity Is Retained

Under both Article 5 of the Basle Convention and section 4 of the UK State Immunity Act, where an employee is a national of the foreign employer State at the time of suit or is a national of the employer State or a third State (and not a resident of the forum) at the time the contract of employment was made, the employer State retains immunity.

152. Report of the Australian Law Reform Commission No.24 (1984), p.58 (para.99).

153. ILA Draft Art.III.C.3. It is not clear from the Commentary why this position was taken; see Proceedings of the 60th Conference of the ILA (1982), p.331.

154. Greig, *op. cit. supra* n.1, at pp.565–566; Lewis, *op. cit. supra* n.1, at p.51. In the employment context there are many examples of statutory provisions precluding the ouster of jurisdiction of certain industrial tribunals, e.g. in the UK, s.140 of the Employment Protection (Consolidation) Act 1978.

155. The equivalent Australian provision is perhaps better expressed: parties are entitled to exclude the local jurisdiction by contractual provision "where a law of Australia does not avoid the operation of, or prohibit, or render unlawful the inclusion of the provision" (Foreign States Immunities Act 1985, s.12(4)(b)).

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Commentators have been critical of this restriction, saying that in a world of increased mobility of labour differential treatment of employees on the basis of nationality is hard to justify.[156] Other writers, however, have argued that the forum has little interest in protecting employees with only a slender connection to the jurisdiction and that the forum's concern for comity with the employer State should take priority in such situations.[157]

The question which arises, however, is whether an employee in either of the above categories (national of the foreign employer State or third State) who is denied jurisdiction to sue under the Basle Convention and the UK legislation may have a right to challenge these provisions (or judicial decisions taken under them) as discriminatory, under principles of international or European law. This is a difficult question which, for reasons of space, can be dealt with only in outline here.

There would seem to be two possible bases for a challenge: that the provisions discriminate against aliens by (a) denying them equal access to the tribunals of the forum and (b) by subjecting them to conditions of employment which are worse than those granted to nationals of the forum.

Considering the issue of access to adjudication first, in the area of international human rights there exist convention provisions which require a contracting State to grant equality before its law to aliens and nationals alike; for example, Article 26 of the International Covenant on Civil and Political Rights 1966. The scope of this provision may well extend to guaranteeing equality of access to tribunals, since this latter principle has itself been said to form part of customary international law.[158] The importance of access to adjudication is reinforced by Article 2(3)(a) of the Covenant, which requires contracting States to grant individuals an effective remedy for breaches of the Covenant's provisions. In practice, however, it is difficult for individuals to obtain redress for breach of a convention provision, even where the offending State is a party to the instrument, unless the convention has been incorporated into the municipal law of a country.[159]

Under European human rights law Article 6 of the European Convention on Human Rights of 1950 states that "everyone is entitled to a fair and

156. See the comments by G. Ress in Proceedings of the 65th Conference of the ILA (1992), p.316.

157. J. Crawford, Australian Law Reform Commission Research Paper No.3, "Basic Principles of Foreign State Immunity", p.53.

158. F. Dawson and I. Head, *International Law: National Tribunals and the Rights of Aliens* (1971), p.110.

159. In most cases, the individual would have to rely upon the doctrine of diplomatic protection, i.e. that his or her State of nationality take up the claim against the offending State, which is far from certain. Although under the Optional Protocol to the ICCPR an individual may bring a claim directly before the Human Rights Committee against a contracting State, such a process is also protracted and uncertain.

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public hearing by a tribunal in the determination of his civil rights", which has been interpreted to include a right of access to a State's courts.[160] Again, this right of access to adjudication is strengthened by the requirement, under Article 13, on contracting States to provide an effective remedy for breaches of the Convention. With regard to enforcing the provisions of the Convention, if the forum State is a party to the Convention but has not incorporated its provisions into domestic law (for example, the United Kingdom),[161] an aggrieved employee would have to bring his or her complaint before the European Commission on Human Rights.

In the area of conditions of employment, there exist universal treaties which provide that States parties must endeavour to provide equal treatment in working conditions between nationals and aliens, which includes rights of redress.[162] In the absence of domestic incorporation of these instruments, however, an individual employee would have difficulty in bringing an action based upon them.[163]

Under European law there is an obligation on all member States of the European Union to provide for free movement of workers within the Union, although this protection extends only to EU and European Economic Area nationals. Under Article 48(2) of the EC Treaty the right to free movement includes the right to non-discrimination on the basis of nationality in working conditions. This provision has been held by the European Court of Justice to prohibit national legislation which attaches different terms to the conditions of employment of national and alien employees.[164] Article 48 has also been held to be "directly applicable" in the domestic law of member States[165] and so would provide an employee with a more secure basis for challenging the forum's retention of immunity.

VIII. CONCLUSION

IN conclusion, it is unlikely that the area of employment contracts will remain neglected in the literature on State immunity, given the significant increase in recent State practice. An attempt has been made here to consider the practice of a number of jurisdictions in the various contexts in

160. *Golder* v. *UK* (1975) 57 I.L.R. 200 (European Court of Human Rights).

161. In *Jayetilleke*, *supra*, n.21, an attempt was made before an English court to rely upon the ECHR to overturn a decision granting a foreign State employer immunity. The court rejected the argument on the basis that the ECHR had not been incorporated into English law.

162. E.g. ILO Convention (No.97) Concerning Migration for Employment (1949), Art.6; UN International Convention on Protection of All Migrant Workers (1990), Art.54. See J. Niessen, "Immigrants and Migrant Workers", in A. Eide *et al.* (Eds), *Economic, Social and Cultural Rights* (1995), p.323.

163. Given the uncertainty of the doctrine of diplomatic protection, see *supra* n.159.

164. *Marsmann* v. *Rosskamp* [1972] E.C.R. 1243 (ECJ).

165. *Commission* v. *French Republic* [1974] E.C.R. 359 (ECJ).

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which employee claims against foreign States have arisen. The underlying issue now evident is the existence of competing interests which must be balanced. Not only do the interests of employer and employee have to be considered in respect of the particular case but also the forum's concern for protection of its own labour force as against its interest in good relations with foreign States. These interests are rarely articulated in either the legislative or judicial practice of States but nonetheless underlie the various approaches adopted by them for resolving disputes in this area.

Given the diversity of approaches, is it possible to discern a customary law position with regard to employment claims? Considering the practice as a whole, there is a discernible trend towards restricting State immunity to the situation in which a claim is brought by a senior employee at a highly sensitive place of work, such as a diplomatic or military establishment. This conclusion is unsurprising because rarely would such an employee have the nationality or residence of the forum State and so engage any of its protective interests. For most States the value placed on international comity is too great to be sacrificed by entertaining the claims of all employees. Reciprocity is also an influential factor. Every State has its own particularly sovereign places of employment which it would prefer to keep free from other States' adjudication. A cautious approach by a State to exercising jurisdiction over another is therefore likely to be reciprocated.

Outside the area of senior employment in sensitive locations, practice remains divided as to which precise approach to follow, although in terms of outcome there seems a general trend in favour of withholding immunity. The nation States which have enacted legislation on immunity, as well as those which are party to the Basle Convention, would, in addition, make the grant of immunity dependent on the existence of a territorial nexus between the action and the forum. This approach has the advantage of simplicity, certainty and consistency with the principles of State jurisdiction but limits the scope for creative approaches or any future development of customary law on the topic. The Italian experience shows that leaving the law of State immunity in the hands of judges and scholars, while not always conducive to consistency, is perhaps the best way of maintaining novelty and dynamism in the area.

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