

JURISDICTIONAL IMMUNITY — THE TANZANIAN EXPERIENCE

Memorandum by the Government of the United Republic of Tanzania

Introduction

In the perspective of world history Tanzania's experience as a modern sovereign State is quite new. We will celebrate our Jubilee anniversary on 9 December, 1986! Within this short period in a life of a nation, Tanzania has had the advantage of experiencing two major types of jurisdictional immunities, firstly that of being a sovereign State with its property immune from suits and legal process in judicial organs of other foreign States. In this regard we are all aware of other 'states' some quite near us at the present venue which the community of nations has categorically refused to recognize and accord them sovereign status. Secondly, Tanzania officials in our missions abroad have experienced diplomatic and consular immunities and privileges accorded to them by foreign States within which they operate.

2. Concurrently with our own States' and officials' experience in foreign States, Tanzania has accorded the same corresponding status and immunity to foreign States, and their property diplomatic and consular immunities and privileges to their personnel accredited to our country.

Diplomatic and Consular Immunities and Privileges

3. It is imperative at the outset to briefly elaborate on Tanzania's experience in relation to diplomatic and consular immunities and privileges. This is a relatively easier and clearer topic to deal with than that of jurisdictional immunity of state and its properties.

4. As a member of the United Nations Tanzania has found no difficulty in complying with the standards set by the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963 when dealing with matters of diplomatic and consular immunities and privileges. The Tanzanian legislation which dealt with diplomatic immunities and privileges [The Immunities and Privileges (Extension and Miscellaneous Provision) ordinance Cap.450] did not adopt the Vienna Convention on Diplomatic Relations of 1961 as a municipal law but was highly influenced by it. In March 1986 this legislation was repealed and re-enacted with certain modifications by the Diplomatic and Consular Immunities and Privileges Act of 1986 which now expressly incorporates the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963 as law in force in Tanzania.

5. We have incorporated these two Vienna Conventions into our municipal law because we believe that the principles enunciated in them correctly state the present position of international law governing matters pertaining to immunities and privileges of diplomats and consul officials of member states.

6. We have not as yet incorporated into our municipal law the Optional Protocol of 1961 concerning the compulsory settlement of disputes arising out of the interpretation or application of the Vienna Convention on Diplomatic Relations of 1961 because we foresee a possibility of having a dispute cropping up at a time when we may not be able for various reasons to utilize fully the services and compulsory jurisdiction of the International Court of Justice as envisaged in the Protocol. Also, we have utmost faith that where a dispute on

the interpretation or application of the Vienna Convention on Diplomatic Relations of 1961 arises we can always amicably work out a settlement agreeable to us and the foreign State concerned. It may be noted here that the Optional Protocol Concerning Compulsory Settlement of Disputes of 1961 took into account only the Vienna Convention on Diplomatic Relations of 1961 and that the Optional Protocol applies only to those party to it (See article 1 of the Optional Protocol Concerning the Compulsory Settlement of Disputes Done at Vienna on 18 April, 1961).

The Diplomatic and Consular Immunities and Privileges Act, 1986

7. The jurisdictional immunity and privileges of High Commissioners, Ambassadors and other Heads of Diplomatic Missions accredited to Tanzania, together with that of their official and domestic staff and families, are provided for in Part II of the aforementioned Diplomatic and Consular Immunities and Privileges Act of 1986.

8. The immunities and privileges of foreign consular officers accredited to Tanzania are covered in Part III of the Act. Part IV of the Act provides for immunities and privileges to the United Nations and all its organs and to other international, regional and bilateral organisations. It may be mentioned here that the only institution of the Commonwealth Secretariat based in Tanzania (The Commonwealth Regional Health Secretariat for East, Central and Southern Africa and Southern Africa Extension Unit - Commonwealth Secretariat) is scheduled under the Act as an inter-regional organisation enjoying diplomatic immunities and privileges. Part V of the Act deals with waiver of immunity and privileges which can only be done by the sending State, organisation etc. or the Head or Representative of the mission or office etc. and such waiver shall be expressed and communicated in writing to the Government of Tanzania.

9. The Act empowers the Minister responsible for foreign affairs to confer by order published in the Government Gazette immunities and the collateral privilege of exemption from taxation, rates or fees to persons in the service of a government or agency of foreign power or in the service of a class of officers to be specified in the Gazette who would otherwise have not enjoyed such immunities or privileges if it would appear to the Minister that they perform duties substantially corresponding to those which, in the case of a foreign sovereign power, would be performed by a diplomatic agent. Such provisions give room for the internationally or regionally recognized freedom movements and governments in exile to be accorded diplomatic recognition and the ensuing immunity and privileges in appropriate circumstances.

Problems encountered in respect of diplomatic and consular immunity and privileges

10. Where there is a grant of a right or privilege there is always a possibility of abuse or misuse of the same. We have had a few occasions when Tanzanians enjoying diplomatic or consular immunity and privileges in foreign States have abused or misused such immunity by involving themselves in one way or the other with suspicious criminal activities such as the carriage of contraband materials which are unacceptable or illegal under the laws of States of the forum. In such situations, corrective measures expected of us under international law and under our municipal law or disciplinary proceedings were promptly taken against the culprits.

11. Likewise, we have had the experience of occasional abuse and misuse of diplomatic and consular immunities and privileges being committed by officials of foreign States accredited to Tanzania. The privilege of being exempted from prohibition in importing or paying taxes, duties or fees on certain movable properties for example, has been abused on several occasions by having the same properties passed over by way of contracts of sale, gifts etc. to persons resident in Tanzania who are otherwise not entitled to such privileges. Sections 25 and 26 of our Diplomatic and Consular Immunities and Privileges Act of 1986 have

tried to contain some of these abuses by prescribing for such properties to be sold only to the Government or any person enjoying the same customs franchise privileges, or to be re-exported. In cases of motor vehicles imported free of custom duty in pursuance of diplomatic immunities or privileges, if they exceed four years from the date of registration such vehicles are required to be sold to any person without customs franchise privilege on obtaining a written permission from the Customs Authority.

12. We have experienced foreign States invoking or influencing invocation of diplomatic immunity upon their officials or associates who are under contract of service or employment with the country of the forum and who by virtue of such contract of service or employment become crucial or potential witnesses simply in order to assist their nationals or other suspected criminals without diplomatic immunity escape trial and conviction by our courts. As such in Tanzania the idea of exempting individuals who are attached or under contract of service or employment performed in whole or in part in the state of the forum from enjoying immunity is supported in respect of the following circumstances:

(i) If the suit in court relates to his contract of employment or services or attachment;

(ii) If he is required to give evidence in court in relation to his expatriate knowledge and experience gained or investigation and observations made while on the job in the state of forum;

(iii) If as a result of his contract of service or employment he obtains data, information or makes reports which are relevant and admissible as evidence in the courts of the country of the forum.

13. It is also a matter of concern that some foreign States based in Tanzania have not been forthcoming when it comes to waiver of immunity against their officials who have committed criminal acts or to paying compensation to victims of intentional, reckless or negligent actions or omissions of their officials enjoying diplomatic or consular immunity through the normal diplomatic channels.

14. To overcome part of this problem the 1986 Act aforementioned has provided for compulsory comprehensive insurance cover in respect of any motor vehicle belonging to a person enjoying diplomatic and consular immunities and privileges as a start. It is perhaps desirable, in the long run, to have no immunity from the jurisdiction of courts for personal injuries and damage to property caused by a person who otherwise enjoys diplomatic and consular immunity and privileges.

15. Should that be the case, one problem in this regard is likely to crop up. For instance, a foreign State whose official has been involved in such acts could transfer the official concerned from the state of the forum in order to assist him avoid prosecution. Under the Tanzania court procedures an accused or defendant cannot be tried in absentia or without notice. There is also the fact that the amount of compensation for a similar kind of injury or damage caused greatly vary from country to country. Compensation awarded for a traffic death in Tanzania is not necessarily the same as that which may be awarded for a similar death in a rich western country.

16. To a limited extent, the Tanzania Act provides retaliatory measures against a foreign State which disregards diplomatic or consular immunity and privileges. It allows for withdrawal and restriction of immunities and privileges in situations where a foreign State or her officials fail to accord corresponding immunities and privileges as conferred under the Act to such a foreign State or her officials to Tanzania.

Jurisdictional Immunities of States and Their Property

17. There is no special legislation in Tanzania dealing with the question of jurisdictional immunities of States and their property. This, it will be appreciated, is not peculiar to Tanzania alone because it obtains also in some other jurisdictions. The U.N System too has not yet come up with any convention or treaty in this regard, though proposals for codification of principles applied in customary international law concerning jurisdictional immunities of States and their property is currently being worked out by the International Law Commission. With keen interest we look forward to having the accomplishment of the work done by the International Law Commission in drafting articles on this important subject in the near future.

18. The participatory role played by different States of varying political and economic stands in the work of the International Law Commission and the United Nations is in itself a reassuring fact that the Commission will take into account the immunity interests of all the States on the general basis that a sovereign State cannot exercise jurisdiction over another sovereign State except where there is reciprocity, waiver, or agreement to the contrary. Otherwise, state immunity invariably is susceptible to various conflicting interests between equal sovereign States if not guided by agreeable principles of operation. There are some areas in which there is general consensus on the immunity of a State and its property. For example, it is accepted all over the world that any municipal courts by their process shall not implead a foreign State or foreign sovereign. To the contrary all national courts have always denied state or sovereign immunity in suits for title over real property.

Restriction and Immunity

19. The traditional absolute theory of immunity which exempted a state in every way from the jurisdiction of other countries of late has been greatly curtailed. It is common knowledge that under this concept the government of a particular state could neither be sued abroad under any circumstances nor its property be attached and its public vessels were as it were "floating islands" wherever located.

20. The curtailment of this absolute theory of immunity is partly due to the fact that in the course of the 20th century there has emerged socialist and developing States which conduct state monopoly in foreign trade and shipping.

21. Furthermore, apart from the socialist and developing States it is an acknowledged fact that all governments as a whole, whether capitalist or socialist in their policies, are in today's world directly or indirectly involved in commercial activities both within their countries and internationally with foreign States.

However, in spite of this reality, it is curious to note that the draft of the International Law Commission under the provision of article 19 does not prescribe the granting immunity to state owned or state operated ships undertaking commercial activities. Socialist and developing countries may see this approach as the Commission's inclination to lean towards a limited scope of immunity. This, no doubt, is disadvantageous to them for most of their commercial and shipping activities are undertaken by their governments. On the other hand industrialized capitalist countries might interpret this concept of state immunity as a threat likely to work to the detriment of their countries' privately owned companies which are party to private contracts.

22. In such circumstances, Tanzania would rather wait for further developments in Tanzania and in customary international law on the field before enacting any municipal law covering jurisdictional immunity of States and their property. Meanwhile, the principle of reciprocity or comity would still adequately form the basis for according immunity to States and their property.

Conclusion

23. Tanzania has benefited a lot from the principles and ideas of jurisdictional immunity and privileges of diplomatic consuls, States and their properties as well as of international or regional organisations long established by other nations.

24. In today's world where there is tremendous increase in commercial activities and global ventures by States as well as private individuals the question of restrictive jurisdictional immunity assumes even greater magnitude. In order to justify this doctrine within the context of modern times, sufficient time and experience is pre-requisite before any meaningful conclusion can be drawn.

25. Consequently, it is no gainsay that a forum of this kind, where distinguished Law Ministers and other luminaries of the legal profession from the Commonwealth are meeting, provides an invaluable opportunity for exchanging ideas and experiences with a view to enhancing further development on this important subject. Tanzania supports any move in this direction.