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## Jurisdictional Immunity of States and General International Law – Explaining the *Jus Gestionis* v. *Jus Imperii* Divide

by Alexander Orakhelashvili<sup>1</sup>

### I INTRODUCTION

The divide between acts *jure imperii* and *jure gestionis* is inextricably linked with the development of the rationale and rules on State immunity over the past century, especially the demise of the absolute immunity doctrine and the emergence of the restrictive immunity doctrine. State immunity, thought a century ago to be unambiguously established as part of general international law, has come under increased challenge since the 1920s onwards. The expansion of State economic and trade activities initiated the drive for exempting commercial and trade activities from the scope of immunity. More recent decades have witnessed the drive to ensure State accountability for human rights violations and international crimes by seeking to exempt these wrongdoings from the scope of immunity.

It is obvious that political stakes of the grant or denial of immunity to a foreign State, involving the risks of embarrassment and deterioration of inter-State relations, may at times be high. States are definitely better off if not disturbed by litigation abroad. However, the denial of immunity for purely commercial acts is regularly practised, often at far greater material risk to foreign State interests than any possible human rights compensation the foreign State might be induced to pay. And then there are some countervailing policy considerations, such as the need to avoid impunity through immunity.

Prioritising foreign State interests, or relations between foreign and forum States, over the interests of aggrieved individuals and entities is essentially a political position. However, policy considerations do not tell us whether the foreign State is legally entitled to be immune before the forum State's courts, and whether, conversely, the forum State is obliged to grant immunity to that effect. The legal aspect of State immunity is not so much about the rationale of immunities and their utility for the smooth conduct of inter-State relations; rather, it is about the recognition of those immunities under the sources and rules of international law.

Moreover, it is precisely that part of jurisprudence – especially in the UK – which endorses blanket outcomes, unconditionally prioritises the interests of the foreign State over the interests of individuals who have gone through great suffering, and resists the recognition of countervailing considerations – indeed endorsing impunity through immunity – which presents State immunity

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as something unquestionably recognised as part of customary international law.<sup>2</sup> This premise tends to overlook the obvious, yet so frequently and conveniently forgotten, elementary distinction to which Rosalyn Higgins alerted us decades ago, namely that immunities themselves are merely exceptions from the ordinary jurisdictional entitlements of forum States.<sup>3</sup> The basic premise of international law-making referred to by the Permanent Court of International Justice in *Lotus*, to the effect that States are not bound by rules and obligations to which they have not given their agreement,<sup>4</sup> applies with full rigour when examining the issue of whether one State is obliged to forgo the exercise of its own jurisdiction, and thus disrupt the ordinary operation of its own judiciary, in order to accommodate the immunity of another State.

Before embarking on an examination of the scope of acts *jure imperii* and *jure gestionis*, some preliminary points need to be made in order to streamline and delineate the framework of analysis.

First, this contribution focuses on both civil and criminal proceedings in which State immunity is raised, granted or denied, given that immunities must have the same scope in both types of proceedings. The line dividing sovereign from non-sovereign acts indeed falls in the same place in relation to both civil and criminal proceedings, for it would be unsound to pretend that a particular act is an exercise of sovereignty if impleaded in civil proceedings but not if impleaded in criminal proceedings. Opposite impressions are frequently fuelled by patterns in certain national legal systems, especially common law countries, where statutes on State immunity relate to civil proceedings but not to criminal ones. However, such immunity legislation forms a source of domestic law only, and does not determine the content of international law or comity. Similarly, the UN Convention on Jurisdictional Immunities (UNCSI), which is assumed to apply to civil but not to criminal proceedings,<sup>5</sup> is not yet in force,<sup>6</sup> and if and when it does enter into force, it would apply only to relations as between its States parties.

Second, it is assumed that the scope of available immunities is the same for both the State and its officials, as State officials enjoy immunity only for acts for which the State itself would enjoy immunity.<sup>7</sup> Both in criminal and civil proceedings, foreign State officials plead immunity simply because the acts complained of would be attributable to the foreign State as well. Confirming the interdependence between the immunity of the State and of its officials, the Nuremberg International Military Tribunal has observed in relation to individual State officials that '[h]e who violates the laws of war cannot obtain immunity while acting in pursuance of

<sup>2</sup> United Kingdom, House of Lords, *Jones v. Ministry of Interior for the Kingdom of Saudi Arabia and others*, 14 June 2006, [2006] UKHL 26, [2007] 1 AC 270; United Kingdom, Supreme Court, *Belhaj and another v. Straw and others*, 17 January 2017, [2017] UKSC 3, [2017] 2 WLR 456, para. 7 (per Lord Mance).

<sup>3</sup> R. Higgins, 'Certain Unresolved Aspects of the Law of State Immunity' (1982) 29 *Netherlands International Law Review* 265, 271.

<sup>4</sup> *The Case of the S.S. Lotus (France v. Turkey)* (Merits) [1927] PCIJ Series A., No. 10, 25–26.

<sup>5</sup> As per UNGA Res. 59/38 (UN Doc. A/RES/59/38) of 2 December 2004, para. 2; however, such assumption is not inevitably determinative of the meaning of the Convention's text.

<sup>6</sup> On the content of the UNCSI, see Chapter 9 in A. Orakhelashvili (ed.), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar, 2015).

<sup>7</sup> Some of the International Law Commission (ILC) Special Rapporteur's proposals tend to, tentatively at the very least, distinguish between the two categories, for instance by pointing out that the approach adopted in *Germany v. Italy* (n. 18) is not fully transposable into the area of the immunity of officials, especially in terms of the exceptions to immunity; see C. Escobar Hernández, Fifth Report on Immunity of State Officials from Foreign Criminal Jurisdiction, by Concepción Escobar Hernández, Special Rapporteur, UN Doc. A/CN.4/701, 14 June 2016, paras. 84–85.

the authority of the State if the State in authorizing action moves outside its competence under international law'.<sup>8</sup>

Third, some areas, such as the law relating to diplomatic agents and premises, are more specialised and do not directly contribute to the content of the restrictive doctrine of State immunity, or, indeed, to the law of State immunity more generally.<sup>9</sup> The same applies to immunities *ratione personae*, available to a small number of the highest State officials only. These immunities are available to these officials on grounds and for reasons substantially different from those which the restrictive doctrine uses to classify and categorise the relevant State acts and conduct.

The structure of this chapter is as follows. Section II addresses the contrast and difference between the absolute and restrictive doctrines of State immunity. Section III moves to the restrictive doctrine proper and deals with the law applicable to determination of the nature of relevant acts. Section IV deals with the substantive criteria for distinguishing sovereign from non-sovereign acts. Section V addresses the meaning of sovereign authority across the body of international law. Section VI draws implications for the restrictive doctrine from the ILC's work on the immunity of State officials. Section VII examines the state of customary international law on State immunity. Section VIII offers some conclusions.

## II ABSOLUTE AND RESTRICTIVE DOCTRINES OF STATE IMMUNITY

The absolute immunity doctrine refers to the identity of the defendant in litigation and proposes to grant all-encompassing immunity to the State, its departments, its property and its officials alike.<sup>10</sup> The restrictive doctrine, on the other hand, proposes to look at the precise nature of the act or transaction impleaded, on which factor the immunity of the State or its officials should turn.

The issue as to when and how the transition from absolute immunity to restrictive immunity took place has not gone uncontested. According to both the German Federal Constitutional Court and German Federal Supreme Court, the absolute immunity doctrine was dominant right up to the First World War period. Afterwards, a 'process of contraction' arguably took place, as a consequence of which non-sovereign acts are no longer covered by State immunity.<sup>11</sup> While the highest German courts are no doubt right that after the First World War the absolute immunity doctrine was increasingly challenged, it would be an exaggeration to suggest that, as a consequence of that challenge, the restrictive doctrine came to be unambiguously established either as a matter of comity or customary international law. As the analysis below will show, the Italian Constitutional Court's reasoning, tracing the substitution of the restrictive for the

<sup>8</sup> International Military Tribunal, *Trial of the Major War Criminals*, 14 November 1945–1 October 1946, vol. I, www.loc.gov/frd/Military\_Law/pdf/NT\_Vol-I.pdf, 223.

<sup>9</sup> The German Federal Constitutional Court distinguished between the two areas, disagreeing with the Federal Minister of Justice and stating that diplomatic immunity extends further than State immunity; see: Germany, Federal Constitutional Court, *Claim against the Empire of Iran Case*, 30 April 1963, 45 ILR 57, 75. More recently, the UK Supreme Court in *Reyes v. Al-Malki*, 18 October 2017, [2017] UKSC 61, also took the view that diplomatic law as codified in the Vienna Convention on Diplomatic Relations (VCDR) 1961 grants diplomatic agents wider immunities than are available to other State officials.

<sup>10</sup> See below for the development of the 'indirect impleading' thesis as part of the absolute immunity doctrine. The 'indirect impleading' doctrine is also endorsed by the 2004 UN Convention (for discussion see Chapter in Orakhelashvili (n. 6)), but was not applied in *Belhaj v. Straw* (n. 2) by the UK Supreme Court.

<sup>11</sup> See *Empire of Iran* (n. 9); Germany, Federal Supreme Court, *Church of Scientology Case*, Case No. VI ZR 267/76, 26 September 1978, 65 ILR 193, 195–6.

absolute immunity approach back to the early 1960s is, on balance, more realistic.<sup>12</sup> But, most importantly, the process of transition has been neither seamless, nor has it produced any uniform outcome.

Some national jurisdictions, such as the UK, continued to accord absolute immunity to foreign States for decades after the absolute immunity doctrine began to be challenged. Even in the late 1940s, English and French courts still adhered to the doctrine of absolute immunity. The British Court of Appeal in *Krajina v. Tass Agency* observed that ‘the sole question is whether a body called TASS Agency of Moscow has established that it is part and parcel of a sovereign independent State’.<sup>13</sup> French courts repeatedly affirmed the same approach, suggesting that ‘[s]ince each State is autonomous and sovereign, it cannot be subject to foreign courts either with regard to acts accomplished in the exercise of sovereignty or with regard to private law relationships’.<sup>14</sup> That approach even extended to both property and commercial relations.<sup>15</sup> And some States still grant absolute immunity today.<sup>16</sup>

The absolute immunity doctrine is expressed through the maxim *par in parem non habet imperium*. By contrast, the restrictive doctrine precisely provides for cases in which national courts of one State may exercise jurisdiction and authority over another State. Both absolute and restrictive doctrines of immunity purport to regulate the entirety of international legal relations whereby one State may claim to be immune from another State’s jurisdiction. Content-wise, the two doctrines are qualitatively different and mutually incompatible. Either one or the other has to apply, not both together or one under the guise of the other. On balance, as we shall see below, a court’s professed adherence to the absolute or restrictive approach may ultimately be less crucial than its characterisation of the particular act. Only this characterisation can expose which of the two doctrines that court in fact applies.

Another key distinction is that the absolute immunity doctrine is self-operating and formulates a simple rule not to subject a foreign sovereign to national jurisdiction. Put differently, the immunity each State grants to any other State would be identical to the immunity the latter would be required to accord to the former.<sup>17</sup> By contrast, the restrictive immunity doctrine is not self-operating, as it prescribes a seemingly open-ended distinction between sovereign and non-sovereign acts and therefore has the character of a reference rule. The restrictive doctrine provides a court only with the method and criteria for characterising, and making the distinction between, the relevant acts, and the relevant court has to determine whether the relevant act or conduct is an exercise of sovereign authority.

It is characteristic to the debate on State immunity to speak of the general rule on State immunity and of some exceptions to it. Judicial decisions raise the question as to whether there is an exception from otherwise applicable rules of immunity.<sup>18</sup> However, the category of non-sovereign acts (*acta jure gestionis*) is not about exceptions to the category of *acta jure imperii*.

<sup>12</sup> Italy, Constitutional Court, *Condor and Filvem v. Minister of Justice*, Case No. 329, 15 July 1992, 101 ILR 394, 401.

<sup>13</sup> United Kingdom, Court of Appeal, *Krajina v. Tass Agency (of Moscow) and another*, 27 June 1949, (1949) 16 AD 129, 136 (per Tucker LJ).

<sup>14</sup> France, Court of Appeal (Poitiers), *State of Romania v. Aricastre*, 16 June 1949, 16 AD 138, 138–9.

<sup>15</sup> France, Tribunal de la Seine, *Rosignol v. State of Czechoslovakia*, 31 January 1949, 16 AD 140.

<sup>16</sup> E.g., China, Court of Final Appeal (Hong Kong Special Administrative Region), *Democratic Republic of the Congo and others v. FG Hemisphere Associates LLC*, 8 June 2011, [2011] HKCFA 41, [2011] 14 HKCFAR 95.

<sup>17</sup> United Kingdom, House of Lords, *Compania Naviera Vascongado v. Steamship ‘Cristina’*, 3 March 1938, [1938] AC 485, 502–3. This enabled the forum State ‘insisting as a condition of immunity on the adherence of other foreign Governments to the same rule as to immunity’; *ibid.*, 518.

<sup>18</sup> E.g., *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (Merits) [2012] ICJ Rep 99; it was also discussed by the Special Rapporteur in her Fifth Report (n. 7), 74–8.

Nor has the restrictive doctrine developed as a pattern of exceptions from any pre-existing general and absolute rule on immunity. Instead, the restrictive doctrine has emerged as an alternative to, if not as a consequence of, the wholesale abolition of the absolute immunity rule as a general standard. This has amounted to *replacing* one standard by another, not to one standard *evolving into* another.

The ‘general rule versus specific exceptions’ approach is endorsed in national statutes on State immunity and in treaties that are either not in force or have a rather low ratification status,<sup>19</sup> but it has not been recognised as part of general international law.<sup>20</sup> UK courts have repeatedly recognised that the State Immunity Act of 1978 does not represent the restrictive immunity doctrine, but instead endorses the absolute doctrine of State immunity which is then qualified by exceptions stated in the statutory text.<sup>21</sup> National statutes apply only within national legal systems and do not, as such, indicate what the position under international law is. There are currently only few States that have national legislation on State immunity, and thus the ‘general immunity versus special exceptions’ pattern those statutes adhere to cannot be seen as representative of the international legal position on this matter.

Treaties, when in force, bind only their States parties. The UNCSI was counterfactually used by the UK House of Lords in *Jones v. Saudi Arabia* as the most authoritative statement of the generally accepted position on State immunity.<sup>22</sup> The Supreme Court in 2017 again faced the UNCSI in relation to the ‘indirect impleading’ doctrine in *Belhaj v. Straw*. Unlike *Jones*, the UNCSI was not seen in *Belhaj* as securing immunity to a foreign State, but only because the Supreme Court held that the interest the foreign State pleaded was not material enough to be protected in line with the letter of the UNCSI.<sup>23</sup> Presumably because the Supreme Court was unwilling to openly disapprove the reasoning of Lords Bingham and Hoffmann in *Jones*, the overall relevance of the UNCSI was not denied, regardless of the facts that (a) the Convention is not in force; (b) the UK is not party to it; and (c) even if was in force and UK were party to it, treaties are not ordinarily supposed to be applied in English law unless incorporated into English law through an Act of Parliament.

Moreover, if international law were to prescribe a general rule of immunity to which no exception can be admitted unless provided for under a separate and additional rule of customary law, such a general rule could only be one that, in the absence of specific additional rules that would provide for exceptions, endorses precisely absolute immunity. It would no longer be required to assess the nature of the underlying act or conduct. All available or putative

<sup>19</sup> See, e.g., European Convention on State Immunity (ECSI), 16 May 1972, in force 11 June 1976, 1495 UNTS 181 (eight States parties) and the United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCSI), 2 December 2004, not yet in force, UN Doc. A/RES/59/38, 16 December 2004.

<sup>20</sup> Although one must conclude that the ILC Special Rapporteur’s examination of the practice of international and national courts such as the International Court of Justice (ICJ), European Court of Human Rights (ECtHR) and US courts, through the prism of the availability of exceptions to State immunity, is overall correct and leads to the right result, at pages 31–54 of her Fifth Report (n. 7).

<sup>21</sup> United Kingdom, House of Lords, *Alcom Ltd v. Republic of Colombia*, 12 April 1984, [1984] 1 AC 580, 600 (per Lord Diplock); United Kingdom, Supreme Court, *NML Capital Ltd v. Argentina*, 6 July 2011, [2011] UKSC 31, para. 37 (per Lord Phillips). Similarly, the distinction between sovereign and private acts is not the approach adopted in national immunity statutes and the ECSI (n. 19), see I. Sinclair, ‘The European Convention on State Immunity’ (1973) 22 *International & Comparative Law Quarterly* 254, 267, and J. Crawford, ‘International Law and Foreign Sovereigns: Distinguishing Immune Transactions’ (1984) 54 *British Yearbook of International Law* 75, 114.

<sup>22</sup> *Jones v. Saudi Arabia* (n. 2), paras. 26 (per Lord Bingham) and 47 (per Lord Hoffmann).

<sup>23</sup> *Belhaj v. Straw* (n. 2), paras. 24–31 (per Lord Mance); this contrasts with the Court of Appeal in the same case denying that Article 6 of the 2004 Convention embodies customary law: United Kingdom, Court of Appeal, *Belhaj and another v. Straw and others*, Case No. A2/2014/0596, 30 October 2014, [2014] EWCA Civ 1394, para. 47.

exceptions – relating to commercial acts, territorial torts, employment matters, armed forces’ or separate entities’ activities – would then have to be viewed as produced by separate rules of customary international law (and each of them would have to be based on generally accepted practice of States).<sup>24</sup> The question of whether the relevant act or transaction is sovereign or private would, then, be moot.

### III CRITERIA RELEVANT UNDER THE RESTRICTIVE DOCTRINE: A DIVIDE GOVERNED BY NATIONAL OR INTERNATIONAL LAW?

The restrictive doctrine provides for a single uniform distinction, with the outcome that an act is either sovereign (*jure imperii*) or it is not. There are no dual-nature acts, nor any acts that prima facie fall within one category but should ultimately be placed in the other. There can be various ways to distinguish between various acts, for instance by focusing on their purpose, motive, context or nature. According to the German Federal Constitutional Court, ‘The fact that it is difficult to draw the line between sovereign and non-sovereign State activities is no reason for abandoning the distinction.’<sup>25</sup> Or, as the English Court of Appeal observed decades later: ‘Difficult as the distinction may be at common law, we have to do the best we can to apply it.’<sup>26</sup>

At the same time, unless the criteria separating sovereign from non-sovereign acts are clear and robust, the restrictive doctrine cannot feasibly operate. The distinction between sovereign and non-sovereign acts has to be legal, normative and prescriptive, not purely factual or contextual. To determine whether an act is a sovereign act under the restrictive doctrine, the key question to ask is whether international law regards that particular act to be an exercise of States’ sovereign authority. If the view is taken that an act is a sovereign act simply by virtue of having been performed as part of the State’s official activities, then the restrictive doctrine would have no discrete meaning. For as long as an act was performed by the State and in the State interest, the precise nature of that act would no longer be crucial.<sup>27</sup>

The German Constitutional Court took the view that the distinction between sovereign and non-sovereign acts ‘should not be left, as some authors have proposed, to the municipal legal systems ... Were one to proceed in this way, it would in practice depend on the opinion of the State whose courts are dealing with the matter, whether it desires to grant immunity.’<sup>28</sup> The requirement of having a proper international standard is thus inextricably linked to the distinction between the will, policy and perception of particular States, and the positive law governing the relations between various States.

<sup>24</sup> The use of every single exception to immunity stated, say in the UK State Immunity Act, would risk the violation of international law towards a foreign State unless it is proved that the exception in question discretely commands the general agreement of States.

<sup>25</sup> *Empire of Iran* (n. 9), 79.

<sup>26</sup> United Kingdom, House of Lords, *Holland v. Lampen-Wolfe*, 20 July 2000, [2000] UKHL 40, [2000] 1 WLR 1573, 1580 (per Lord Clyde).

<sup>27</sup> To illustrate, diplomatic immunities are in fact premised on the irrelevance of the nature of particular acts. The UK Supreme Court in *Reyes v. Al-Malki* (n. 9) has held, in a way that is plausible though not incontestable, that diplomatic agents can be immune for acts that they perform beyond their official functions. That outcome was owed entirely to the wording of Article 31 VCDR, which is a widely ratified multilateral treaty applicable to diplomatic immunities specifically (but not to other immunities).

<sup>28</sup> *Empire of Iran* (n. 9), 58–9.

National law could well perform the initial role in this context, because the rights and obligations litigated are in the bulk of cases derived from national law, namely *lex fori*.<sup>29</sup> All private law matters, whether commercial, tort or other, are regulated by domestic private law, and international law is, prima facie at least, unconcerned with them. But this is not really to be construed as deference of international law to national law for at least three reasons.

First, national law only regulates particular private acts such as tort or contract. It does not determine the basic question and applicable standard relating to the (non)sovereign nature of those acts.

Second, contract and tort are, by and large, private law matters in practically all national legal systems. Thus, by such ‘deference’ hardly any nationally distinct outcome ever materialises. There may be some situations where the *lex fori* and foreign law differ in characterising the nature of the act,<sup>30</sup> but that factor could be legitimately used to prioritise the *lex fori* over the foreign law that does not bind the forum State, not over the requirements of international law that bind it.

Third, the ultimate supervisory role of international law is not ruled out. The Federal Constitutional Court in the *Empire of Iran* case made an analogy to nationality as an issue governed by national law,<sup>31</sup> wherein international law nonetheless retains a supervisory role.<sup>32</sup> The Constitutional Court recognised that the disadvantage of leaving States to decide on this matter, which jeopardises the uniformity of the law in this area, is ‘mitigated in that international law restrictions set limits for the qualification of a State activity as an act *jure gestionis* by the national law’. However, the international law restrictions here relate only to the ‘generally recognisable field of sovereign activities’.<sup>33</sup> Following this line of thought, acts that are genuinely sovereign could not legitimately be characterised as private under national laws, or this would be the position at least were State immunity part of customary international law (on the latter issue, see below).

On the other hand, another pattern has emerged in the interaction between international and national law in this area, owing to the relationship between statute law and common law in national legal systems. When a national court is constrained by a strict interpretation of the national immunity legislation, it ends up deciding entirely on the basis of national law, at times even in disregard of international legal requirements. To illustrate, the English Court of Appeal held in *Al-Adsani* that the 1978 State Immunity Act was a ‘comprehensive code’ on State immunity for the purposes of adjudication in the UK. A US Court of Appeals in *Siderman* acknowledged that torture was not a sovereign act under international law, yet concluded that it had to defer to the requirements of the 1976 Foreign Sovereign Immunities Act (US FSIA) which did not include an exception for torture.<sup>34</sup> The Canadian Supreme Court also confirmed that it

<sup>29</sup> Ibid., 81; *Church of Scientology* (n. 11), 197; thus while under English law the exercise of police power was subject to the liability under private law, under German law it was treated as part of sovereign activities. The relevance of national law was also confirmed in *The Charkow*, the *Oder-Neisse Property Expropriation*, the *Arms Sales Commission Agreement* and the *Spanish Tourist Office* cases (see, respectively: Germany, Provincial Court (Bremen), *The Charkow Case*, Q 50/1959, 21 December 1959, 65 ILR 100; Germany, Superior Provincial Court (Munich), *Oder-Neisse Property Expropriation Case*, No. 1 W 1347/75, 12 August 1975, 65 ILR 127; Germany, Superior Provincial Court (Frankfurt), *Spanish State Tourist Office Case*, Case No. 6 U 184/74, 30 June 1977, 65 ILR 140. The two latter cases, however, (at 121 and at 143 respectively) misrepresent the position taken by the Constitutional Court in *Empire of Iran*).

<sup>30</sup> As in *Church of Scientology* (n. 11).

<sup>31</sup> *Empire of Iran* (n. 9), 80.

<sup>32</sup> As in the *Nottebohm Case (Liechtenstein v. Guatemala)* (Merits) [1955] ICJ Rep 4, 22. It is rather curious that the Bundesverfassungsgericht did not allude to *Nottebohm* eight years after it was decided.

<sup>33</sup> *Empire of Iran* (n. 9), 81.

<sup>34</sup> See the following British and American cases: United States, Court of Appeals, *Siderman de Blake and others v. Argentina and others*, 22 May 1992, 965 F2d 699 (9th Cir. 1992), 103 ILR 454; United States, Court of Appeals,



was prepared to use national legislation in disregard of international law. It was national legislation on State immunity, not international law, which precluded the exercise of civil jurisdiction in the case in question.<sup>35</sup> It goes without saying that such practice of domestic courts, openly and professedly placing national legal standards over the criteria elaborated under international comity or international law, cannot sensibly be seen as part of State practice that contributes to the development of international legal aspects of State immunity.<sup>36</sup> The fact that a State may operate a 'dualist' approach indicates precisely that it wants to apply national law, whatever the requirements of international law may be. Ordinarily, the practice of a group of States contravening international law can be seen as contributing to the creation of a new rule of customary international law (subject to the requirements of custom generation prescribed in Article 38(1) (b) ICJ Statute being fulfilled). But what distinguishes this portion of national case law on State immunity, apart from the fact that it represents only a few jurisdictions, is the declared intention not to apply international law when national law conflicts with it.

#### IV CRITERIA RELEVANT UNDER THE RESTRICTIVE DOCTRINE: SUBSTANTIVE CRITERIA

The problem with some relevant judicial decisions is the failure to distinguish between particular acts and the broader process and context within which they are performed. For example, to identify whether torture was a sovereign act, the UK House of Lords in *Jones* referred to the ILC's Articles 4 and 7 on State Responsibility, according to which the acts of whatever organ of the State, including those that are committed in the excess of instructions or authority, are attributable to the State.<sup>37</sup> This decision equated attribution to immunity, and is thus flawed at this basic level. State responsibility is attributed to States for any act that the State agent performs through the use of official position and State resources.<sup>38</sup> This does not mean that anything and everything the State does through the use of State resources and facilities, and is responsible for, constitutes an exercise of its sovereign function. Otherwise, the State would enjoy absolute immunity, including for purely commercial and private acts that serve State interest or are performed in an 'official capacity'. Another flaw in *Jones* is that it equates the use of official capacities and premises by the State official to the 'public duties' of that official.<sup>39</sup> It is, however, plainly absurd to suggest that any official using official premises or capacities to torture a victim is under a public duty to do so, or that an official in his/her 'official capacity' can, as a matter of fact, do nothing but discharge their public duties.

*Prinz v. Federal Republic of Germany*, 1 July 1994, 26 F.3d 1166 (D.C. Cir. 1994), 33 ILM 1485; United States, Court of Appeals, *Smith and others v. Socialist People's Libyan Arab Jamahiriya and others*, 26 November 1996, 101 F.3d 239 (2d Cir. 1996), 113 ILR 534; United Kingdom, Court of Appeal, *Al-Adsani v. Government of Kuwait*, 12 March 1996, 107 ILR 536.

<sup>35</sup> Canada, Supreme Court, *Kazemi Estate v. Islamic Republic of Iran*, Case No. 35034, 10 October 2014, 2014 SCC 62, [2014] 3 SCR 176, para. 170: 'Parliament has the ability to change the current state of the law on exceptions to state immunity, just as it did in the case of terrorism, and allow those in situations like Mr. Hashemi and his mother's estate to seek redress in Canadian courts. Parliament has simply chosen not to do it yet.'

<sup>36</sup> Indeed, national statutes displace the relevance of international law in this area within the pertinent national legal systems, see F. Mann, 'The State Immunity Act 1978' (1980) 51 *British Yearbook of International Law* 43; and J. Crawford, 'A Foreign State Immunities Act for Australia?' (1983) *Australian Yearbook of International Law* 71, 105–6.

<sup>37</sup> *Jones v. Saudi Arabia* (n. 2), paras. 11–12 (per Lord Bingham) and 76 (per Lord Hoffmann).

<sup>38</sup> Art. 4 of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), Annex to UNGA Res. A/56/83, UN Doc. A/RES/56/83, 12 December 2001. See especially the discussion of the *Caire* and *Youmans* cases in (2001) II(2) *Yearbook of the International Law Commission*, 46.

<sup>39</sup> *Jones v. Saudi Arabia* (n. 2), para. 11 (per Lord Bingham).

Moreover, if the context of the performance of the relevant act or the use of State facilities for its performance are treated as key factors, any private act performed in an official context would become an official and sovereign act, or nearly all acts would have a dual nature. Such an outcome is not far removed from the old absolute immunity doctrine. To illustrate, the Canadian Supreme Court as late as 1961 upheld the immunity of State-owned ships engaged in commerce by reliance on English case law from the 1920s and 1930s, on the basis of State ownership of ships and State purposes underlying the relevant activities.<sup>40</sup> It was broadly characteristic for cases premised on this approach that the ‘ownership and control of a vessel rather than its nature and particular use became the key elements that the judges looked to in the equation for determining a justification for immunity’.<sup>41</sup>

An even more blanket affirmation of this approach came from the English Court of Appeal in *Baccus*, where it was suggested, in relation to the relevant entities, that

although their status was a corporate status, their functions were wholly those of a department of State. Are we then to hold that the State of Spain is deprived of sovereign immunity with respect to this activity of importing and exporting grain by reason of the fact that the defendants are a corporate body? In my view that would be plainly wrong.<sup>42</sup>

In both cases, State organs, functions and interests were involved and a purely commercial activity was equated to a sovereign one. The House of Lords’ treatment of human rights issues in *Jones* is hardly different from such an approach. An approach that regards an act as sovereign merely because it is done by the State, or its officials, in the State interest, for State motives and using State resources or facilities, inevitably results in the doctrine of absolute immunity.

On the contrary, the restrictive doctrine focuses on the nature of the relevant act or transaction as the key criterion, not least because this is what causes injury to the affected individual or corporation and forms the subject of their claims in litigation. At the analytical level, the reliance on the broader State activities or the use of ‘official capacity’ to perpetrate a particular act can blur the distinction between sovereign and non-sovereign, immune and non-immune acts, while the allusion to the narrower criteria of ‘sovereign authority’ or ‘governmental authority’ helps to maintain a clear separation between the two. In practice, it is always a particular act whose nature falls to be assessed for its (lack of) public and governmental character. In any litigation process it is a particular act of a government or its officials that is impleaded as a criminal or civil wrong, not any general or generic pattern of State activity. The broader pattern of lawful and governmental State activities, or activities in a State or official capacity, merely constitutes the context or process that may include acts and conduct that are not inherently sovereign or governmental.

In *Djibouti v. France*, the ICJ came closer to such understanding of the restrictive doctrine. In that case, France suggested that national courts should verify whether the relevant acts were acts of public authority performed in the context of the official’s duties. Djibouti had similarly suggested that the issue was not to presume anything whatsoever, but to verify concretely the acts in question, when of course the issue of immunity was raised. The Court’s response was

<sup>40</sup> Canada, Supreme Court, *Flota Maritima Browning de Cuba S.A. v. Republic of Cuba*, 11 June 1962, [1962] SCR 598, 432 ILR 125, 130–1. Contrast this with *The Charkow* case, in which the Landgericht of Bremen used the restrictive theory and denied immunity to the Soviet ship owned by the government and engaged in commerce ‘for the benefit of the State treasury’; see (n. 29), 101–2.

<sup>41</sup> L. Marasinghe, ‘The Modern Law of Sovereign Immunity’ (1991) 54 *The Modern Law Review* 664, 670ff. (discussing the UK practice from *Parlement Belge* onwards).

<sup>42</sup> United Kingdom, Court of Appeal, *Baccus SRL v. Servicio Nacional del Trigo*, 31 October 1956, [1957] 1 QB 438, 466 (per Jenkins LJ).

that ‘it [had] not been “concretely verified” before it that the acts which were the subject of the summonses as *témoins assistés* issued by France were indeed acts within the scope of their duties as organs of State’.<sup>43</sup> In addition, Djibouti did not inform the French authorities that ‘the acts complained of by France were its own acts’ and that ‘the *procureur de la République* and the Head of National Security were its organs, agencies or instrumentalities *in carrying them out*’.<sup>44</sup> The acts being carried out by a State organ or (even high-ranking) official is not sufficient for the purposes of the restrictive doctrine. Acts complained of have to be sovereign acts as well.

It is perfectly possible that commercial or employment transactions are undertaken, entered into or abrogated in the public interest and on official premises. As late as the 1960s, the French Court of Cassation indeed recognised contracts as exempted from national jurisdiction based on the purpose they served.<sup>45</sup> Again, this happened when the restrictive doctrine was still, by and large, in a formative phase.

Under the modern restrictive immunity doctrine, these considerations do not confer the sovereign character to the relevant transactions. A key requirement here is to understand what the exercise of public authority is. There is a limited category of acts whose performance requires the use of public authority and sovereign power, which private entities do not have and cannot use.<sup>46</sup>

As the German Federal Constitutional Court eloquently emphasised in *Empire of Iran*:

The distinction between sovereign and non-sovereign State activities cannot be drawn according to the purpose of the State transaction and whether it stands in a recognisable relation to the sovereign duties of the State. For, ultimately, activities of State, if not wholly then to the widest degree, serve sovereign purposes and duties.<sup>47</sup>

The key criterion referred to the ‘nature of the State transaction or the resulting legal relationships’, focusing on the distinction between sovereign acts, on the one hand, and ‘private rights and duties’, ‘private legal relationships’ and activities in private capacity that any private person could perform, on the other. All ‘thus depends on whether the foreign State has acted in the exercise of its sovereign authority, that is in public law, or like a private person, that is in private law.’<sup>48</sup> In *Church of Scientology*, the German Federal Supreme Court observed that the nature of the particular act was a decisive factor for making a distinction between immune and non-immune acts. The relevant official was performing official investigatory and police activities that only State officials could perform.<sup>49</sup> Similarly, the Belgian Court of Appeal has emphasised that immunity accrues only to ‘an act of government or of executive power, or ... when it is done *jure imperii* ... it loses such immunity when it is done *jure gestionis*’.<sup>50</sup> This refers to the way in which the State performs the particular act, not to that act’s authorship or its broader context.

<sup>43</sup> *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* (Merits) [2008] ICJ Rep 177, 242–3. As we shall see below, in *Germany v. Italy* (n. 18), the need for ‘concrete verification’ was less strictly applied.

<sup>44</sup> *Ibid.*, para. 196 (emphasis added).

<sup>45</sup> France, Court of Cassation, *Entreprise Pérignon v. Gouvernement des États-Unis*, 8 December 1964, 45 ILR 82, 82–3.

<sup>46</sup> See the list of sovereign acts in United States, Court of Appeals, *Victory Transport Inc. v. Comisaria General*, 336 F.2d 354 (2d Cir. 1964), para. 10; Institut de Droit International, ‘Resolution on Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement’, Rapporteur: I. Brownlie, Basel Session 1991, [www.idi-iil.org/app/uploads/2017/06/1991\\_bal\\_o3\\_en.pdf](http://www.idi-iil.org/app/uploads/2017/06/1991_bal_o3_en.pdf).

<sup>47</sup> *Empire of Iran* (n. 9), 79–80.

<sup>48</sup> *Ibid.*, 80.

<sup>49</sup> *Church of Scientology* (n. 11), 197.

<sup>50</sup> Belgium, Court of Appeal (Brussels), *Société Anonyme “Dhellemes et Masarel” v. Banque Centrale de la République de Turquie*, 4 December 1963, 45 ILR 85, 86–7.

The UK House of Lords took the same approach, indeed capitalising on it, in *Congreso*. Lord Wilberforce agreed that the decision to unload cargo was done by the government of the State in the higher interests of foreign policy, and continued:

Does this call for characterisation of the act of the Republic of Cuba in withdrawing *Playa Larga* and denying the cargo to its purchasers as done ‘*jure imperii*’? In my opinion it does not. Everything done by the Republic of Cuba in relation to *Playa Larga* could have been done, and, so far as evidence goes, was done, as owners of the ship: it had not exercised, and had no need to exercise, sovereign powers. It acted, as any owner of the ship would act, through Mambisa, the managing operators.<sup>51</sup>

The purpose of an act may have been public, but the act itself that was impleaded was private. A similar approach was endorsed by the UK Court of Appeal in *Propend*, where the police superintendent obtained the possession of certain documents in the course of his police activities. This was something only an official and no private person could do.<sup>52</sup>

As an example of generically sovereign activity, the German Oberlandgericht referred to the legislative activities of the Polish State.<sup>53</sup> The Court of Appeal of Brussels has identified the range of regulatory measures, observing that:

Regulating external trade, decreeing measures for the protection of the currency, concluding trade or payments agreements with foreign countries, ordering or forbidding transfers of currency – all these constitute acts of executive power, since, in such cases, the State, whether of itself or through its agents, has a right of decision in the exercise of prerogatives that cannot be called into question, and is exercising its governmental authority.<sup>54</sup>

Thus, even if possibly constituting a breach of international or national law, sovereign acts are still premised on the exercise of legal authority that is available to States and not to private entities. The relevant keywords are ‘right of decision’, ‘exercise of its prerogatives’ and ‘governmental authority’ as preconditions for the performance of public authority, as opposed to the mere use of public office or public facilities for perpetrating the act that any private person can perpetrate. Only such limited understanding of sovereign activities is that on which some international consensus worthy of the name could be identified.

It is also important to see how torts were dealt with in the context of State immunity, before courts began dealing with human rights violations and international crimes in the same context. When dealt with under national legislation, the issue of torts is not considered in the light of the restrictive doctrine, but instead is addressed in terms of the text of the statute and what kind of torts are within or outside the forum State’s jurisdiction. Again, as explained above, domestic courts are at times bound to ignore international law and apply domestic law. In other cases, the national judiciary has confirmed that torts are not sovereign acts.<sup>55</sup>

<sup>51</sup> United Kingdom, House of Lords, *I Congreso Del Partido*, 16 July 1981, [1983] 1 AC 244, 268.

<sup>52</sup> United Kingdom, Court of Appeal, *Propend Finance Pty Limited and others v. Sing and others*, 17 April 1997, [1997] EWCA Civ 1433, 111 ILR 611.

<sup>53</sup> *Oder-Neisse Property Expropriation* (n. 29), 129.

<sup>54</sup> *Société Anonyme “Dhellemes et Masurel” v. Banque Centrale de la République de Turquie* (n. 50), 87.

<sup>55</sup> *Empire of Iran* (n. 9), 80. In the Tate Letter (1952), it was stated that the USA would not claim immunity for torts. In an early contribution Crawford considered it ‘not obviously inappropriate’ under international law for the forum State to exercise jurisdiction over torts committed by a foreign State, as manifestation of their territorial jurisdiction and supremacy, and s.1605(1)(5) US FSIA (United States, Foreign Sovereign Immunities Act 1976, codified at 28 US Code Chapter 97: ‘Jurisdictional Immunities of Foreign States’) is one example of that. See Crawford (n. 21), 110–12. For a similar view suggesting that causing injury through tort is regarded *jure gestionis*, see X. Yang, *State Immunity in International Law* (Cambridge University Press, 2012), p. 229. If that is the case, then the US assumption of jurisdiction is premised on the lack of legal obligation under international law to grant immunity to foreign States, and US

In the US case of *Letelier*, assessing the nature of the act took place against the background of a rather strongly worded provision in the US FSIA, s1605, excluding from adjudication ‘(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused’. The Court of Appeal stated that ‘[w]hatever policy options may exist for a foreign country, it has no “discretion” to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law’.<sup>56</sup>

In other words, assassination is not an act *jure imperii*. Whether it is done manually or by using complex modern technologies such as a car bomb or drone, assassination still remains the kind of activity that, subject to resources needed to accomplish it, could be undertaken by State agents as well as private persons, in the public as well as in the private interest. It may be seen as a policy decision by the State, and also as either use or abuse of State discretion to achieve particular policy or political goals. But State discretion can only derive from State authority, and unless an exercise of State authority is involved, it is not an act *jure imperii*. State organs or agents may have acted out of political interest, but they acted as private persons nonetheless.

The advance of human rights law and international criminal law has further contributed to the coherent development of the restrictive doctrine. The US Court of Appeals in *Marcos* refused to accord immunity in relation to acts of torture, killings and disappearance performed by, under direction or in connivance of, a head of State, and implicating systematic use of State machinery, because no public official, even the head of State, can claim these as his or her functions.<sup>57</sup> The same approach was upheld by the UK House of Lords in *Pinochet*.<sup>58</sup> The Amsterdam Court of Appeal also held in *Bouterse* that ‘the commission of very serious offences as are concerned here – cannot be considered to be one of the official duties of a head of state’.<sup>59</sup> The US Court of Appeals for the Fourth Circuit likewise confirmed in *Samantar* that ‘[b]ecause this case involves acts that violated *jus cogens* norms, including torture, extrajudicial killings and prolonged arbitrary imprisonment of politically and ethnically disfavored groups, we conclude that Samantar is not entitled to conduct-based official immunity under the common law, which in this area incorporates international law’.<sup>60</sup>

The Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case before the ICJ concluded that ‘serious international crimes cannot be regarded as

FSIA s1605 is just one manifestation of the broader pattern exemplified by other pieces of US legislation (as addressed below). However, the exclusion of territorial torts from the scope of State immunity cannot be a general position under international law merely on the basis of a few national statutes and treaties with limited participation which deal with territorial torts. Under general international law, especially in relation to States that are not bound by State immunity treaties nor have national immunity statutes, a tort – whether territorial or not – can be excludable from the scope of immunity only on the account of it not being a sovereign act. For it is the nature of acts rather than the *locus* of their occurrence that counts. If included within the scope of immunity on the account of the restrictive doctrine, any tort whatsoever would be rather absurdly and counterfactually presented as a sovereign act.

<sup>56</sup> United States, Court of Appeals, *Letelier v. Chile*, 20 November 1984, 748 F.2d 790 (2d Cir. 1984), 63 ILR 378, 388. Chile considered that the act involved was immune under US FSIA s1605.

<sup>57</sup> United States, Court of Appeals, *Hilao v. Estate of Marcos*, 17 December 1996, 103 F.3d 767 (9th Cir. 1996), 104 ILR 122, 122–5.

<sup>58</sup> United Kingdom, House of Lords, *R v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No. 3)*, 24 March 1999, [1999] UKHL 17, [2000] 1 AC 147.

<sup>59</sup> The Netherlands, Court of Appeal (Amsterdam), *Re: Bouterse (Desire)*, Case Nos. R 97/163/12 Sv and R 97/176/12 Sv, 20 November 2000, (2001) 32 *Netherlands Yearbook of International Law*, 276, para. 4.2.

<sup>60</sup> United States, Court of Appeals, *Yousuf and others v. Samantar*, 2 November 2012, 699 F.3d 763 (4th Cir. 2012), 23.

official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform. This view is underscored by the increasing realization that State-related motives are not the proper test for determining what constitutes public state acts.<sup>61</sup> In all these cases it is not the context, motive or use of State capacity or resources, but the nature of the underlying act or conduct, that is crucial for its qualification.<sup>62</sup>

It was against this background that *Al-Adsani v. UK*, *Jones v. Saudi Arabia* and *Germany v. Italy* were decided. The European Court's decision in *Al-Adsani v. UK* did not contain any discussion of the distinction between sovereign and non-sovereign acts, and thus it contributed nothing to the development of the restrictive doctrine. The Court simply restated the old *par in parem* approach, and the outcome looks more similar to the adoption of the absolute doctrine.<sup>63</sup>

The House of Lords judgment in *Jones* did not contain much discussion as to the nature of the acts of torture, constraining itself to a mere allusion to *Al-Adsani*.<sup>64</sup> In *Germany v. Italy* before the ICJ, Italy conceded the *jure imperii* nature of war crimes, and the Court did not perform any full-fledged analysis of the nature of war crimes as sovereign or non-sovereign acts. Consensus between litigating parties is not the same as 'general practice accepted as law' for the purposes of Article 38(1)(b) of the ICJ Statute. Moreover, *Germany v. Italy* turned not on where the divide between sovereign and non-sovereign activities lies, but on the more discrete ground for immunity based on armed forces' activities, for the support of which it could identify the practice of a rather small number of States. In addition, there is nothing inherently sovereign in the transfer of prisoners of war and the use of forced labour. These acts would require extensive resources that could be available to a private corporation as well, but they would not require any State authority for them to be carried out.

The involvement of State machinery was established in all these three cases. The sovereign and official nature of the act of torture or war crimes was not. For this reason, Xiaodong Yang's observation that absolute immunity was endorsed for the acts of armed forces in *Germany v. Italy* is entirely accurate.<sup>65</sup>

On the whole, the range of acts that only a State can perform is discrete, clear and predictable in showing the difference between sovereign and non-sovereign acts. The range of acts that both individuals and States can perform is comprehensive and encompasses nearly every area of economic, social, political and military activity. Were international law to require States to grant immunity to foreign States in relation to that range of acts, it would in essence require from them the adherence to absolute immunity.

<sup>61</sup> *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal) [2002] ICJ Rep 63, para. 85.

<sup>62</sup> See also practice of British (*Prince Nasser*), Belgian and Dutch courts to the same effect, as discussed in C. Escobar Hernández, Fourth Report on the Immunity of State Officials from Foreign Criminal Jurisdiction, by Concepción Escobar Hernández, Special Rapporteur, UN Doc. A/CN.4/686, 29 May 2015, paras. 56–58.

<sup>63</sup> ECtHR, *Al-Adsani v. The United Kingdom*, Judgment, App. No. 35763/97, 21 November 2001. A similarly selective approach was used in ECtHR, *Jones and others v. the United Kingdom*, Judgment, App. Nos. 34356/06 and 40528/06, 14 January 2014: when the US, British and Dutch practice (*Samantar*, *Pinochet* and *Bouterse*) referred to in paragraphs 211 and 212 of the judgment indicated that the pro-immunity position was not sustainable, yet the Court chose to disregard this practice on the basis of the House of Lords' decision in *Jones v. Saudi Arabia* – the very decision that was being appealed.

<sup>64</sup> *Jones v. Saudi Arabia* (n. 2), para. 18 (per Lord Bingham).

<sup>65</sup> X. Yang, 'Absolute Immunity of Foreign Armed Forces from Tort Proceedings' (2012) 71 *The Cambridge Law Journal* 282.

V THE MEANING OF 'SOVEREIGN AUTHORITY' ACROSS THE BODY OF  
INTERNATIONAL LAW

The meaning of a sovereign or governmental act for the purposes of State immunity could be informed by its meaning across other areas of international law, because the meaning of sovereignty and sovereign authority across the body of international law is the same.

To illustrate, in the domain of international investment law, if a State merely breaches a contract, that is not the same as the expropriation of contractual rights.<sup>66</sup> While the outcome could be practically the same in both cases in terms of the impact on the investor's position, resources and interests, the qualification of State conduct would not be. Breach of contract would be actionable as a commercial matter, though it would involve no internationally wrongful act. Expropriation may well involve an internationally wrongful act, but as an exercise of sovereignty it would be covered by State immunity.<sup>67</sup> It is not inconceivable that some other acts amounting to breaches of bilateral investment treaties could also enjoy immunity if they are undertaken as part of State's sovereign activities. On that basis, a State could enjoy immunity for some of those breaches, for instance breaches of 'fair and equitable treatment' or 'full protection and security' clauses. Denial of police protection, inherently relating to sovereign tasks of the State, could be an example.

The International Centre for Settlement of Investment Disputes (ICSID) Arbitral Tribunal observed in *Siemens v. Argentina* that, 'for the behavior of the State as a party to a contract to be considered a breach of an investment treaty, such behavior must be beyond that which an ordinary contracting party could adopt and involve State interference with the operation of the contract', i.e., action through the exercise of public authority.<sup>68</sup> More specifically, 'the mere fact that there is some government involvement in the events that lead to the termination of a contract does not necessarily mean that such termination is the result of an exercise of sovereign powers.'<sup>69</sup> Similarly, in *Suez v. Argentina* the ICSID Tribunal ruled that 'Argentina's behavior in ending the Concession Contract seems not unlike the behavior of a private contracting party faced with the threatened termination of an important long-term supply contract: it quickly made other provisions for supply of the needed commodity or service and then took steps to end the deteriorated contractual relationship itself.'<sup>70</sup>

The above-mentioned practice mirrors the conception of sovereign authority which is relevant for the purposes of State immunity. To illustrate, the Court of Cassation of Italy has concluded in one case that 'Libya enjoys the right to State immunity since, by confiscating the harbour equipment of the Italian firms, it has exercised its sovereign powers.' Libya acted 'in the sphere of public law'.<sup>71</sup>

And yet, despite being an act *jure imperii*, foreign expropriation can still be impleaded before national courts, as provided for under s1605(3) US FSIA. The US Congress felt free to thus legislate even in relation to an act *jure imperii* proper, which is in line with the broader US approach covering its Congress as well as its courts, that does not see State immunity as part of customary

<sup>66</sup> *Waste Management Inc. v. United Mexican States*, Award, Case No. ARB(AF)/00/3, 30 April 2004, para. 174.

<sup>67</sup> Obviously this applies to proceedings before national courts only, not to international arbitration.

<sup>68</sup> *Siemens A.G. v. the Argentine Republic*, Award, Case No. ARB/02/8, 17 January 2007, para. 248.

<sup>69</sup> *Suez and others v. the Argentine Republic*, Decision on Liability, Case No. ARB/03/19, 30 July 2010, para. 153.

<sup>70</sup> *Ibid.*, para. 154.

<sup>71</sup> Italy, Court of Cassation, *Arab Republic of Libya v. SpA Imprese Marittime Frassinetti and SpA Italiana Lavori Marittimi e Terrestri*, Case No. 3062, 26 May 1979, 78 ILR 90, 90-1.

international law imposing legal obligations in the US legal order, and consequently as limiting the legislative freedom of the USA.

International trade law is another area where the concept of sovereign authority has been elaborated upon. Article 1(3)(b) of the General Agreement on Trade in Services (GATS) provides that “‘services’ includes any service in any sector except services supplied in the exercise of governmental authority’.<sup>72</sup> Subsection (c) provides that “‘a service supplied in the exercise of governmental authority’ means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers’.

This endorses the clear distinction between government as a public arrangement and commerce as a private matter. Anything that a government chooses to do on the same basis as private entities, i.e., on the basis of profit, competition, demand and supply, is not a governmental transaction but a private transaction undertaken by a government.<sup>73</sup> A government may be undertaking these activities in the public interest, and by using State resources, but that does not make it an exercise of governmental authority. It has been pointed out that, for the purposes of international trade law, public authority implies a notion of command and control and the power to make decisions binding on others. It also implies a subordinate relationship.<sup>74</sup> The same is the case with regard to the rest of the body of international law. In particular, serious breaches of human rights and humanitarian law, such as torture or war crimes, do not involve any official subordination and binding decision. The perpetrator may have a factual control over the victim, but their activities involve no binding decisions over the victim, nor place the victim in official subordination to the perpetrator.

## VI CLASSIFICATION OF STATE ACTS AND THE ILC’S WORK ON THE IMMUNITY OF FOREIGN STATE OFFICIALS FROM CRIMINAL JURISDICTION

The UN ILC has been engaged in its work on the immunity of foreign State officials from criminal jurisdiction for about a decade.<sup>75</sup> A key question on this issue is to see how the distinction between sovereign and non-sovereign acts works in relation to State officials. For the purposes of the restrictive doctrine as discussed above, the pertinent area is that of the immunity *ratione materiae*, or functional immunity, which requires drawing a distinction between acts that attract immunity and those that do not. Owing to the fact that the scope of immunities for State officials is coextensive with the scope of State immunity, the officials’ acts should be qualified as sovereign or non-sovereign in the same way as the conduct of the State itself. The State official should be granted immunity to the same extent as the State itself. Otherwise, and quite simply, the officials’ immunity would be no emanation of State immunity but an entirely separate phenomenon, the functional, legal and normative basis of which would be difficult to identify. However, the ILC’s (ongoing) work on immunities of officials from foreign criminal jurisdiction employs divergent and multiple terminologies that do not have a coherent meaning across the board.

<sup>72</sup> General Agreement on Trade in Services (GATS), 15 April 1994, in force 1 January 1995, 18969 UNTS 183.

<sup>73</sup> See P. van den Bossche and W. Zdouc, *The Law and Policy of the WTO*, 3rd edn (Cambridge University Press, 2012), p. 339.

<sup>74</sup> M. Krajewski, ‘Public Services and Trade Liberalization: Mapping the Legal Framework’ (2003) 6 *Journal of International Economic Law* 341, 350; also specifying that public services are not always provided in the exercise of governmental authority.

<sup>75</sup> See also Chapter 25 on ‘Functional Immunity of State Officials from the Criminal Jurisdiction of Foreign National Courts’ by Rosanne van Alebeek.



It will be recalled that Article 1 of the 1984 Convention against Torture uses the term ‘official capacity’ to define the international crime of torture.<sup>76</sup> However, under the Convention ‘official capacity’ does not predetermine the nature of every single act in the course of the exercise of that ‘capacity’,<sup>77</sup> nor does it necessarily relate to the activities of State officials,<sup>78</sup> nor does the Convention touch upon the theme of State immunity as such. Nevertheless, the existing debate on immunities including that within the ILC has accorded some significance to the notion of ‘official capacity’.

In her Fourth Report, the Special Rapporteur seems to have suggested that the distinction between private acts and acts performed in an official capacity is not the same as the distinction between acts *jure imperii* and *jure gestionis*, adding that the meaning of an ‘act performed in an official capacity’ is ambiguous.<sup>79</sup> Still, Draft Article 2(f) provisionally adopted by the ILC defines ‘an act performed in an official capacity’ as ‘any act performed by a State official in the exercise of State authority’.<sup>80</sup> However, Article 5 as provisionally adopted by the ILC confusingly suggests that State officials, acting ‘as such’, should enjoy immunity. And then, Article 6(1) again refers to ‘acts performed in an official capacity’ as determinative of the scope of the immunity of State officials.<sup>81</sup> This differs from the criterion of the nature of the acts to which the restrictive doctrine refers. Instead, Article 6(1) refers to the context of the performance of the act. State officials ordinarily act in their official capacity whether or not they commit a particular act for which they are before the court, and if anything perpetrated in an ‘official capacity’ is immune, then practically all acts of State officials are immune.

Moreover, in the commentary to Draft Article 2, the Commission has equated acts committed in an official capacity to those attributable to the State.<sup>82</sup> The difficulty with this approach is that the attribution of an act to the State does not determine whether that act is an exercise of sovereign and public authority.

The Commission has also opted against using the terms ‘governmental authority’ or ‘sovereign authority’ in Draft Article 6, despite the fact that analytically, as well as in practice, these terms have been crucial in identifying the meaning and scope of State immunity. Instead, the Commission held that acts performed in an ‘official capacity’ are central to the issue of immunity *ratione materiae*.<sup>83</sup> It looks, therefore, as though the Commission was embarking on the path of formulating a new standard, qualitatively different from what is prioritised in practice that coherently addresses the distinction between immune and non-immune acts.<sup>84</sup>

The Special Rapporteur also suggests that the identification of the scope of immunity *ratione materiae* can be undertaken on the basis of the distinction between acts performed in official

<sup>76</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 10 December 1984, in force 26 June 1987, 1465 UNTS 85.

<sup>77</sup> Capacity means ‘ability or power to do something’ and ‘a specified role or position’: *Compact Oxford English Dictionary of Current English*, 3rd edn (Oxford University Press, 2005), p. 139.

<sup>78</sup> Instead, ‘official capacity’ in Article 1 CAT relates to the activities of non-State actors such as rebels and insurgents; see M. Nowak and E. McArthur, *The United Nations Conventions Against Torture – A Commentary* (Oxford University Press, 2008), pp. 78–9.

<sup>79</sup> Escobar Hernández, Fourth Report (n. 62), 11.

<sup>80</sup> International Law Commission, Report of the Sixty-Eighth Session, UN Doc. A/71/10, 2 May–10 June and 4 July–12 August 2016, 353.

<sup>81</sup> The Commission acknowledges this problem; *ibid.*, 360 (commentary to Article 6, para. 4).

<sup>82</sup> *Ibid.*, 354 (commentary to Draft Article 2, para. 3).

<sup>83</sup> *Ibid.*, 362 (commentary to Draft Article 6, para. 8).

<sup>84</sup> However, eventually, the Special Rapporteur proposed merging the official capacity and sovereign authority standards, and acknowledged that the latter criterion is additional to the former; see Escobar Hernández, Fourth Report (n. 62), paras. 95 and 118, as well as the rationale stated in para. 126.

capacity and acts performed in a private one.<sup>85</sup> However, this approach does not merely broaden the extent of the immunity available, but also rests on the – essentially unidentified – basis that fails to link immunities to the official, State and sovereign authority available to State officials, because the distinction as to the capacity in which the act is performed is not the same as the distinction between the underlying acts. Consequently, given the Special Rapporteur's and the ILC's approach, an official is supposed to be immune for certain acts which do not constitute the exercise of sovereign authority by the State and thus for which the State would not, under international law or comity, enjoy immunity. State practice endorses no such approach.<sup>86</sup>

Official capacity is merely the (purely factual, most of the time) context wherein a particular act is performed. Consider, for example, the distinction between an assault committed by a State agent during a trip abroad as part of an official State delegation vis-à-vis one committed during a personal holiday. State authority is, by definition, something that non-State and private entities do not have. A State official can act in an 'official capacity' and perform an act that is either sovereign, such as an expropriation or malicious prosecution, or an act that is not sovereign, such as an abrogation of contract or commission of a tort. It would be laughable to assert that an assault becomes a sovereign act because it is committed in the official capacity; the nature of both assaults is the same regardless of the capacity or context in which they are committed. Nor would, for instance, an expropriation become less of an exercise of the sovereign power of a State official were it to be decreed while being off-duty or on a holiday.

Therefore, the ILC's equation of 'official capacity' with State authority under Draft Article 2(f) is not devoid of methodological and analytical problems. The formulation of the scope of immunity under Draft Article 6(1) consequently lacks coherence and would be difficult to apply in practice.<sup>87</sup> However, and more constructively, the Special Rapporteur seems to have recognised that the perpetration of an act in an 'official capacity' may not be a sufficient condition for that act to lead to immunity, by suggesting that

the characterization of international crimes as 'acts performed in an official capacity' does not mean that a State official can automatically benefit from immunity *ratione materiae* for the commission of such crimes. On the contrary, given the nature of those crimes and the particular gravity accorded to them under contemporary international law, there is an obligation for them to be taken into account for the purposes of defining the scope of immunity from foreign criminal jurisdiction.<sup>88</sup>

The criterion for determining the scope of immunity in such cases could only be one that focuses on the presence or absence of the use of governmental sovereign authority in the perpetration of the relevant act.

<sup>85</sup> Ibid., paras. 11–12.

<sup>86</sup> In that respect, it is noteworthy that, for identifying the scope of 'official capacity', the Special Rapporteur focuses on the practice of both *ratione materiae* and *ratione personae* immunities, also including practice which does not pronounce on immunities, such as *Djibouti v. France*, reading it as possibly endorsing the equation of attribution with immunity; see C. Escobar Hernández, 'Third Report on Immunity of State Officials from Foreign Criminal Jurisdiction', by Concepción Escobar Hernández, Special Rapporteur, UN Doc. A/CN.4/7673, 2 June 2014, paras. 35 et seq. However, it is only the practice on immunity *ratione materiae* that needs to be focused on for this task. The Special Rapporteur has also acknowledged that the practice, of national courts at least, refers to the scope of public functions and public duties, and also the public nature of an act; Escobar Hernández, Fourth Report (n. 62), paras. 53–54.

<sup>87</sup> But see also the Special Rapporteur's proposed draft article 7 detailing the crimes that are not covered by immunity (Escobar Hernández, Fifth Report (n. 7), 95). During the 2017 session this provision was adopted; see UN Doc. A/CN.4/L.893, 10 July 2017.

<sup>88</sup> Escobar Hernández, Fourth Report (n. 62), para. 126.

## VII RESTRICTIVE DOCTRINE AND CUSTOMARY LAW

Despite repeated endorsements in practice, the general rule of State immunity does not form part of customary international law. As has been cogently explained:

it is now almost impossible to speak of ‘customary international law’ of foreign State immunity given the divergences in State practice. Immunity has, in fact, become little more than a sub-branch of each State’s domestic law. In particular, there is disagreement among States subscribing to the restrictive theory as to the circumstances in which immunity should be excluded.<sup>89</sup>

This view appears valid even today, owing to the low ratification status of the UNSCI, and the lack of identification of sufficient State practice in decisions which support the maintenance of State immunity in cases of breaches of human rights and humanitarian law rules (e.g., *Germany v. Italy* or *Belhaj*). It thus appears that after the absolute understanding of immunity has been replaced by restrictive immunity, international law has ‘not prescribed an alternative rule’<sup>90</sup> and, as a consequence, States are no longer under a legal duty under general international law to accord immunity to each other. That practice which pretends to be guided by customary international law on State immunity is itself only a modest part of what could feasibly amount to ‘general practice accepted as law’ in the sense of the ICJ’s Statute. In fact, the same strict and rigorous focus needs to be applied to the criteria of custom-creation in relation to the putative general rule on State immunity, as the proponents of the customary law nature of State immunity expect in relation to the identification of the exceptions from that customary law rule. Quite simply, this does not always happen in practice. In *Al-Adsani*, the customary law aspect of the general immunity rule was not focused upon, and State practice was not examined. In *Jones v. Saudi Arabia*, there is also no allusion to the proof of the customary law status of the general immunity rule. Nor were these issues focused upon in *Germany v. Italy*, which instead relied on the Italian concession to that effect. Once it was thus pretended that a general rule of immunity was part of customary law, it became easier to require (and deny) the existence of a specific human rights or *jus cogens* exception from that mainline rule. But if State practice does not agree as to the existence of the mainline immunity rule, how could it possibly form a view as to exceptions from that mainline rule?

It is true that the ‘general immunity versus specific exceptions’ standard is endorsed by a number of national statutes on State immunity. However, it would be erroneous to regard these statutes as an indication of the state of international law on this matter. Quite apart from the fact that national statutes are no indication of any international legal position,<sup>91</sup> national statutes on State immunity are so few in number that their potential to shape the international law aspects of State immunity is almost negligible.<sup>92</sup> There is also another part of practice, manifested notably in French courts, which place emphasis on the purpose underlying the relevant act or transaction. On that approach, private contracts including those involving sale of cigarettes, can

<sup>89</sup> R. Garnett, ‘Should the Sovereign Immunity Be Abolished?’ (1999) 20 *Australian Yearbook of International Law* 175. Lack of uniformity and consistency of practice is also emphasised in R. Higgins, *Problems and Process* (Oxford University Press, 1994), p. 81.

<sup>90</sup> M. Karagiannakis, ‘State Immunity and Fundamental Human Rights’ (1998) 11 *Leiden Journal of International Law* 13.

<sup>91</sup> Which has been affirmed specifically in relation to State immunity, for instance by the highest courts in the UK and Ireland: *I Congreso Del Partido* (n. 51), 268; Ireland, Supreme Court, *McElhinney v. Williams and Her Majesty’s Secretary of State for Northern Ireland*, Case No. 276, 15 December 1995, [1996] 1 ILRM 276, 104 ILR 691, 701.

<sup>92</sup> The ILC Special Rapporteur lists ten such national statutes, i.e., about 5 per cent of all States in the international community; see Escobar Hernández, Fifth Report (n. 7), para. 44.

be classed as immune transactions.<sup>93</sup> If this approach is used, torture or war crimes may also be classed as immune transactions, yet this would be the case on the basis of the use of a standard substantially different both from the ‘general immunity versus specific exceptions’ approach adopted in national statutes, and from the restrictive doctrine proper that places emphasis on the distinctly sovereign nature of the act or transaction complained of. Under these conditions, the existence of general practice or agreement of States on the scope of State immunity is simply unrealistic.

Overall, after the abrogation of the absolute immunity doctrine, it is not obvious at all that the restrictive rule on immunity has become part of general (customary) international law. State practice is neither enthusiastic nor uniform in this respect. Put simply, the number of States upholding it is not high enough, and some States still adhere to absolute immunity. Lack of generality and uniformity of State practice is a factor that prevents the emergence of customary law regarding restrictive doctrine of State immunity.

Lord Denning’s point that ‘there is no consensus whatsoever’ as to the customary law status of immunities still stands.<sup>94</sup> In *Austria v. Altmann*, the US Supreme Court held that State immunity forms part of international comity, not of customary international law.<sup>95</sup> The United States and Canada have repeatedly legislated over recent years in a way that is incompatible with the putative legal position stated in *Jones v. Saudi Arabia* and *Germany v. Italy*.<sup>96</sup> The lack of acceptance of State immunity as part of customary law is obvious, because States do not behave as if they are bound by those rules of immunity. By and large, *Jones* and *Germany v. Italy* have failed to reimport into international law the older absolute immunity rule, and thus to achieve the result for which they were celebrated by some.<sup>97</sup>

However, the scope of State immunity and its normative status under a particular source of international law do not have to be seen as mutually determinative. Even if not part of customary law, there may still be a restrictive doctrine of immunities with an intelligible scope and meaning. Even if such doctrine is not binding as customary law, it still has its utilities. First, it could show some degree of consensus as to where the divide runs between the sovereign and non-sovereign acts and conduct of States; national and international jurisprudence formulating the parameters of the restrictive doctrine could serve as a template to this end. Second, it would carry an adverse inference against the existence of a customary rule of a different content. For in

<sup>93</sup> D. Greig, ‘Forum State Jurisdiction and Sovereign Immunity under the International Law Commission’s Draft Articles’ (1989) 38 *International & Comparative Law Quarterly* 243, 258–9.

<sup>94</sup> United Kingdom, Court of Appeal, *Trendtex Trading Corporation v. Central Bank of Nigeria*, 13 January 1977, [1977] QB 529, 552–3; Lord Wilberforce in *Congreso* (n. 51) also disapproved the option of viewing certain national legislation and international treaties as evidence of general customary law.

<sup>95</sup> United States, Supreme Court, *Austria and Austrian Gallery v. Altmann*, 7 June 2004, 541 US 677 (2004). This capitalises on the previous US practice, such as United States, District Court for the Eastern District of New York, *Lafontant v. Aristide*, 27 January 1994, 844 F.Supp. 128 (E.D.N.Y. 1994), 103 ILR 581. See also United States, District Court for the Southern District of Florida, *United States v. Noriega*, 8 December 1992, 808 F Supp 791 (SD Fla. 1992), 99 ILR 143, 162–3, to the effect that the USA does not consider itself bound under international law to accord immunity to foreign States and their agents.

<sup>96</sup> For an overview of pieces of US legislation and judicial practice, see R. Bettauer, ‘Germany Sues Italy at the International Court of Justice on Foreign Sovereign Immunity – Legal Underpinnings and Implications for US Law’ (2009) 13 *ASIL Insights*; and E. Bankas, *State Immunity Controversy in International Law*, Springer 2005, pp. 293ff. See the amendments to the Canadian State Immunity Act (RS. 1985, c. S-18) on 13 March 2012. Most recently, in 2016, the US Congress adopted the Justice Against Sponsors of Terrorism Act by overriding President Obama’s veto; see K. Daugirdas and J. Mortenson, ‘Contemporary Practice of the United States Relating to International Law’ (2017) 111 *The American Journal of International Law* 155, 156–62.

<sup>97</sup> See, e.g., P. Stephan, ‘Sovereign Immunity and the International Court of Justice: The State System Triumphant,’ in J. Moore (ed.), *Foreign Affairs Litigation in United States Courts* (Martinus Nijhoff, 2013).

practice at least, even if not on analytical terms, there cannot be one pattern of State immunity admitted under comity and another forming part of customary law.

#### VIII CONCLUSION

The above analysis has shown that the category of acts *jure imperii* encompasses only acts that are uniquely sovereign and can be performed by States and their officials only. It has also been shown that, under general international law, States are not under any legal obligation to grant immunity to foreign States. As elaborated upon above, State practice is not uniform on this matter. There were expectations in some quarters that the UNCSI, endorsing the general State immunity subject to stated exceptions, would influence State practice.<sup>98</sup> By contrast, it has never produced such an effect on State practice, nor has it acquired binding force. Indeed, State practice in defiance to the Convention's standards has persisted.

Therefore, the current debate on State immunity would benefit from embracing the conclusion that more obviously follows from the coherent use of required positivist methodology, namely that general international law contains no legal requirement for States to accord immunity to foreign States in their courts. Consequently, it should refrain from recurring attempts to construct and reconstruct the visions of generally applicable international law on the basis of partial, fragmented and inconsistent practice of States.

The above conclusion is relevant also for the ILC's current work on this matter, conducted under its relatively narrow mandate, covering criminal and not civil proceedings. Criteria elaborated upon in State practice are, however, similar to both types of proceedings. Owing to the scope of its mandate, the extent to which the ILC may be able to do justice to the complexity of this problem remains to be seen. On the other hand, the fact that the ILC as a body consisting of 34 members is or is not able to agree on the particular criteria does not resolve all problems of analytical or normative coherence and consistency that may arise with regard to the outcome agreed within that body.

<sup>98</sup> G. Hafner, 'Accountability and Immunity: The United Nations Convention on Jurisdictional Immunity of States and Their Property and the Accountability of States' (2005) 99 *ASIL Proceedings* 237, 242; H. Fox, 'In Defence of State Immunity: Why the UN Convention on State Immunity Is Important' (2006) 55 *International & Comparative Law Quarterly* 399, 405.