ЦЕНТР МЕЖДУНАРОДНЫХ
И СРАВНИТЕЛЬНО-ПРАВОВЫХ ИССЛЕДОВАНИЙ
INTERNATIONAL AND COMPARATIVE
LAW RESEARCH CENTER

ЛЕКЦИИ ЛЕТНЕЙ ШКОЛЫ ПО МЕЖДУНАРОДНОМУ ПУБЛИЧНОМУ ПРАВУ

Иммунитет государства и его должностных лиц от иностранной юрисдикции

Филиппа Вэбб

COURSES OF THE SUMMER SCHOOL ON PUBLIC INTERNATIONAL LAW

Immunity of States and their Officials from Foreign Jurisdiction

Philippa Webb

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Настоящее издание содержит материалы лекций Филиппы Вэбб по теме «Иммунитет государства и его должностных лиц от иностранной юрисдикции», прочитанных в рамках Летней Школы по международному публичному праву 2020 года.

The present publication contains the text of lectures by Philippa Webb on the topic “Immunity of States and their Officials from Foreign Jurisdiction”, delivered within the frames of the Summer School on Public International Law 2020.

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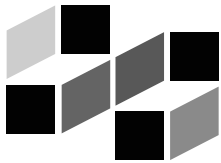

ЦЕНТР МЕЖДУНАРОДНЫХ
И СРАВНИТЕЛЬНО-ПРАВОВЫХ ИССЛЕДОВАНИЙ

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Дорогие друзья!

Центр международных и сравнительно-правовых исследований продолжает публикацию лекций, прочитанных в рамках Летней Школы по международному публичному праву.

Летняя Школа — проект Центра, призванный дать возможность тем, кто изучает международное право, занимается или планирует заниматься им, получить дополнительные знания о предмете и стимулировать самостоятельную работу слушателей. Занятия в Летней Школе состоят из лекций и семинаров общего курса и объединённых рамочной темой специальных курсов, которые проводятся ведущими экспертами по международному праву, а также индивидуальной и коллективной работы слушателей.

В 2020 году Летняя Школа состоялась в третий раз. В связи с пандемией COVID-19 она прошла в онлайн-формате на отдельно разработанной платформе. Специальные курсы были посвящены теме «Национальная юрисдикция и международное право». Их прочитали Седрик Рейнгарт («Национальная юрисдикция и международное право»), Алина Мирон («Экстерриториальная юрисдикция: концепция и пределы»), Филиппа Вэбб («Иммунитет государства и его должностных лиц от иностранной юрисдикции»), Манфред Даустер («Осуществление уголовной юрисдикции Германии и международное право»), Роман Анатольевич Колодкин («Национальная юрисдикция и Конвенция ООН по морскому праву»). Общий курс международного публичного права прочёл сэр Майкл Вуд.

Центр международных и сравнительно-правовых исследований выражает благодарность членам Консультативного совета Летней Школы: Р. А. Колодкину, С. М. Пунжину, Л. А. Скотникову, Б. Р. Тузмухамедову — и всем, кто внёс вклад в реализацию этой идеи, в том числе АО «Газпромбанк» за финансовую поддержку проекта.

Dear friends,

The International and Comparative Law Research Center continues publication of lectures delivered within the Summer School on Public International Law.

The Summer School is a project of the Center aimed at providing those learning, working, or aspiring to work in the sphere of international law, with an opportunity to obtain advanced knowledge of the subject and encouraging participants to engage in independent research. The Summer School's curriculum is comprised of lectures and seminars of the general and special courses under one umbrella theme delivered by leading international law experts, as well as of independent and collective studying.

In 2020, the Summer School was held for the third time. Due to the COVID-19 pandemic, it was held on a tailor-made online platform. The Special Courses were devoted to the topic "National Jurisdiction and International Law". The courses were delivered by Cedric Ryngaert ("National Jurisdiction and International Law"), Alina Miron ("Extraterritorial Jurisdiction: Concept and Limits"), Philippa Webb ("Immunity of States and their Officials from Foreign Jurisdiction"), Manfred Dauster ("Exercise of Criminal Jurisdiction by Germany and International Law"), and Roman Kolodkin ("National Jurisdiction and UNCLOS"). The General Course on Public International Law was delivered by Sir Michael Wood.

The International and Comparative Law Research Center wishes to express its appreciation to the members of the Advisory Board — Roman Kolodkin, Sergey Punzhin, Leonid Skotnikov, and Bakhtiyar Tuzmukhamedov — as well as others who helped implement the project, including Gazprombank (JSC) for their financial support.

Филиппа Вэбб

Филиппа Вэбб — профессор международного публичного права Королевского колледжа Лондона и барристер в Twenty Essex Chambers. Ранее профессор Вэбб была специальным помощником и сотрудником по правовым вопросам при Президенте Международного Суда баронессе Розалин Хиггинс, а также занимала различные должности в Международном уголовном суде и штаб-квартире Организации Объединённых Наций. Она входит в консультативный совет по международному публичному праву Британского института международного и сравнительного права и ранее была членом Совета Европейского общества международного права, а также Международного консультативного совета Американского института права по пересмотру американского закона о международных отношениях. Среди её публикаций: *"The Right to a Fair Trial in International Law"* (совместно с Амалем Клуни, 2020) с учётом подготовительных работ (*travaux préparatoires*) к статье 14 Международного пакта о гражданских и политических правах (2021), *"Oppenheim's International Law: United Nations"* (соавторы: Розалин Хиггинс QC, Дапо Аканде, Сандеш Сивакумаран и Джеймс Слоан, 2017), *"The Law of State Immunity"* (совместно с Леди Хэйзел Фокс QC, 2015) и *"International Judicial Integration and Fragmentation"* (2015). На её работы ссылались ведущие суды Великобритании, Канады, Германии и ЮАР. Филиппа входит в состав редакционных советов таких изданий, как: *International & Comparative Law Quarterly, Leiden Journal of International Law, Journal of International Criminal Justice* и *Oxford University Undergraduate Law Journal*.

Philippa Webb

Philippa Webb is Professor of Public International Law at King's College London and a barrister at Twenty Essex Chambers. Previously, Philippa served as the Special Assistant and Legal Officer to Judge Rosalyn Higgins GBE QC during her Presidency of the International Court of Justice and held positions in the International Criminal Court and United Nations Headquarters. She is on the Public International Law Advisory Panel of the British Institute of International & Comparative Law and previously served on the Board of the European Society of International Law and the International Advisory Panel for the American Law Institute's Restatement Fourth, Foreign Relations Law of the United States. Her publications include: *"The Right to a Fair Trial in International Law"* (2020, with Amal Clooney) with the accompanying *travaux préparatoires* to Article 14 of the International Covenant on Civil and Political Rights (2021), *"Oppenheim's International Law: United Nations"* (2017, with Rosalyn Higgins, Dapo Akande, Sandy Sivakumaran, and James Sloan), *"The Law of State Immunity"* (2015, with Lady Hazel Fox QC) and *"International Judicial Integration and Fragmentation"* (2015). Her work has been cited by the leading national courts in the United Kingdom, Canada, Germany and South Africa. Philippa is on the editorial boards of the *International & Comparative Law Quarterly,* the *Leiden Journal of International Law,* the *Journal of International Criminal Justice* and the *Oxford University Undergraduate Law Journal*.

TABLE OF CONTENTS

LECTURE 4:

LECTURE 5:

PREFACE

It was a pleasure to lecture on the immunity of States and their officials from foreign jurisdiction at the Moscow Summer School on Public International Law in August 2020.

This contribution consists of the written versions of the five lectures I delivered during the summer school.

The law on immunity is a broad topic and one that is subject to dynamic development despite its long history. The material is accurate as of August 2020, but I have updated some material to take into account subsequent events. For this contribution, I draw upon earlier work, which is cited at the start of each lecture.

I extend my gratitude to the staff of the Moscow International and Comparative Law Research Center, and especially to Judge and Professor Roman Kolodkin, and Egor Fedorov. I thank Andrew Brown and Vishal Kumar for excellent research assistance.

LECTURE 1:

Overview of the Law on Immunity: Sources, Rationales and Evolution[1]

In this opening lecture I provide (1) an overview of the sources of the law on immunity; (2) its rationales; and (3) evolution over time. This is a fascinating and dynamic area of law. As Higgins has observed, "[t]he battle for a contemporary international law on sovereign immunity is still being fought".[2]

1. The Sources of the Law on Immunity

Until 2004, there was no universal international treaty on State immunity. The 1926 Brussels Convention, ratified by 29 States, merely removed immunity in respect of State-owned or operated ships and their cargoes engaged in trade. And only eight States (Austria, Belgium, Cyprus, Germany, Luxembourg, Netherlands, Switzerland, and the UK) are parties to the 1972 European Convention on State Immunity (ECSI). Nor, until 2002, was there any direct ruling on State immunity by an international court.

The position has changed in the past two decades. First, the International Court of Justice has delivered a number of important Judgments on the customary international law relating to immunity:[3]

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[1] This is based on H. Fox and P. Webb, *The Law of State Immunity* (OUP 2015), Ch 1 and 2 and my chapter in Malcolm Evans (ed), *International Law* (OUP 2018).

[2] R. Higgins, "Equality of States and Immunity from Suit: A Complex Relationship" (2012) 43 Netherlands Yearbook of International Law 129,148.

[3] The ICJ case *Certain Criminal Proceedings in France (Republic of the Congo* v *France*) concerned the immunities of the President and the Minister of the Interior of the Republic of the Congo, but the case was withdrawn at the request of the Republic of the Congo in 2010. See *Certain Criminal Proceedings in France (Republic of the Congo* v *France), Order of 16 November 2010, ICJ Reports 2010*, p 635.

in the *Arrest Warrant of 11 April 2000* the International Court upheld the immunity from criminal jurisdiction of an incumbent Minister for Foreign Affairs accused of inciting genocide;[4] in *Certain Questions of Mutual Assistance in Criminal Matters,* the Court considered the immunity of the Djibouti Head of State and State officials in relation to acts taken by French authorities in course of a criminal investigation;[5] in the *Obligation to Prosecute or Extradite*, it examined the extent to which universal jurisdiction was exercisable against a former Head of State accused of torture who had sought refuge in a third State, Senegal;[6] in *Jurisdictional Immunities*, it reviewed the law of State immunity in a claim brought by Germany against Italy (with Greece intervening) for the disregard of State immunity by Italian courts in proceedings relating to war damage caused by Nazi Germany during the Second World War;[7] and in *Immunities and Criminal Proceedings*, the Court addressed the legal status of the building said to house the Embassy of Equatorial Guinea in France.[8]

Second, on 16 December 2004 the UN General Assembly adopted the first international convention on State immunity: the UN Convention on the Jurisdictional Immunities of States and their Property (UN Convention or UNCSI). UNCSI enshrines the restrictive doctrine of State immunity in regard to civil and commercial proceedings in national courts.

At the time of writing, UNCSI is not yet in force. It has 22 parties of the required 30 to enter into force under Article 30 of the Convention.

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[4] *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo* v *Belgium), ICJ Reports 2002*, p 3.

[5] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v *France), Judgment, ICJ Reports 2008*, p 177.

[6] *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium* v *Senegal*), *ICJ Reports 2012*, p 442.

[7] *Jurisdictional Immunities of the State* (*Germany* v *Italy*: *Greece Intervening*), *Judgment, ICJ Reports 2012*, p 99. See Van Alebeek, 2012; Keitner, 2013; McGregor, 2013.

[8] *Immunities and Criminal Proceedings (Equatorial Guinea* v *France), Judgment, ICJ Reports 2020*, p 300.

It has however proved to be influential on the development of certain aspects of the law of State immunity and some of its provisions are regarded as codifying customary international law.

UNCSI was the culmination of 35 years of work by the International Law Commission (ILC), the Sixth Committee of the UN General Assembly, and the *Ad Hoc* Committee on Jurisdictional Immunities of States and their Property. Negotiations were difficult at times, and the decades of work on the Convention have been recognized by judges and academic commentators as evidence of where international consensus exists, and where it remains elusive, on certain issues.

Five substantive issues divided States' views on the draft Convention in the 1990s:

(i) How to define the concept of a State for the purposes of immunity;

(ii) What the criteria are for determining the commercial character of a contract or transaction;

(iii) The concept of a State enterprise or other entity in relation to commercial transactions;

(iv) The nature and extent of an exception to State immunity for contracts of employment;

(v) The nature and extent of measures of constraint that can be taken against State property.

These issues were debated in various Working Groups and in 1999, two more issues were added for consideration:

(vi) What form the outcome of the ILC's work should take (eg, convention, model law, guidelines);

(vii) Whether there is an exception to State immunity for violation of *jus cogens* norms.

In 2002, the Working Group reached compromise solutions on the outstanding issues and published a revised text. It decided that the question of an exception to immunity for violations of *jus cogens* norms was not "ripe enough" for codification. In 2004, the General Assembly adopted the text as UNCSI.

The starting point of UNCSI is Article 5: "A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention." The rest of the Convention can be seen as a means of defining the meaning and exceptions to this principle.

UNCSI is divided into five parts. Part I (Introduction) sets out the use of terms, including the meaning of "court", "State", "commercial transaction". Article 3 clarifies that UNCSI is without prejudice to the privileges and immunities enjoyed by diplomatic and other missions and persons connected with them, the immunity of heads of State *ratione personae*, and aircraft or space objected owned or operated by a State. Article 4 provides for the non-retroactivity of the Convention.

Part II (General Principles) sets out the rules relating to express waiver, participation in court proceedings by the foreign State, and counterclaims. UNCSI follows the widespread practice of treating separately immunity from adjudication (Part III) and immunity from enforcement (Part IV).

Part III contains eight types of proceedings in which State immunity cannot be invoked. These exceptions are modelled on — but not identical to — the ECSI, the US FSIA, and the UK SIA. The exceptions include commercial transactions, employment contracts, personal injuries and damage to property, ownership, possession, and use of property, intellectual and industrial property, participation in companies, ships in commercial use, and arbitration agreements.

Part IV deals with immunity from measures of constraint in connection with proceedings before a court. It contains separate rules on pre-judgment (Article 18) and post-judgment (Article 19) measures of constraint. Article 21 lists five categories of State property immune from attachment, arrest, or execution. Part V contains miscellaneous provisions and Part VI contains the standard final provisions.

The 22 States parties are mainly from western Europe and the commercially developed parts of the Middle East. Certain of its provisions have been held by international and national courts to reflect customary international law. Even where a court may doubt the Convention's customary status, reference to UNCSI has become fairly routine in proceedings involving issues of immunity.

UNSCI's provisions are enacted as national legislation by States including Japan, Spain, and Sweden. Russia, a signatory to the Convention, has a 2016 law that adopts the restrictive doctrine in a manner similar to UNCSI. China, also a signatory, has rejected the presumption that signing the Convention endorses the restrictive doctrine. The Office of the Commissioner of the Ministry for Foreign Affairs has explained in the context of litigation:[9]

> "China signed the Convention on 14 September 2005, to express China's support of the … coordination efforts made by the international community. However, until now China has not yet ratified the Convention, and the Convention itself has not yet entered into force. Therefore, the Convention has no binding force on China, and moreover it cannot be the basis of assessing China's principled position on relevant issues."
>
> After signature of the Convention, the position of China in maintaining absolute immunity has not been changed, and has

[9] *Democratic Republic of Congo and others* v *FG Hemisphere Associates LLC* [2011] HKCFA 43.

never applied or recognized the so-called principle or theory of "restrictive immunity".

The UK, another signatory but not party, has not made any attempt to modify its legislation on State immunity, but the courts have paid attention to UNCSI in some cases. The judicial approach has been to examine UNCSI on a provision-by-provision basis (including the *travaux préparatoires*) to assess whether it reflects customary international law.

The European Court of Human Rights has been willing to embrace UNCSI as an expression of customary international law, in particular Article 11 on the employment contract exception to State immunity, and has held that UNCSI (or its specific provisions) reflect customary international law applicable to any State that has not objected to UNCSI's adoption;[10] has not objected to the adoption of a specific rule in the ILC Draft Articles;[11] signed UNCSI;[12] or was in the process of ratifying UNCSI.[13]

According to the ECtHR, a state's participation in the negotiation or adoption of UNCSI makes it "possible to affirm that [a draft article] applies to the respondent state under customary international law".[14] In the *Oleykinov* Judgment, the Court held that Russia appears to have accepted restrictive immunity as a principle of customary international law even prior to its signature of UNCSI by not (persistently) objecting to the 1991 ILC Draft Articles.[15]

The ICJ, in *Jurisdictional Immunities*, took a more circumspect approach to UNCSI as a reflection of customary international law. The ILC work, negotiations, signing, ratification, and application of

[10] *Cudak* v *Lithuania* [GC], no 15869/02, ECtHR 2010, paras 66–7; *Naku* v *Lituania and Sweden*, no 26126/07, 8 November 2016, para 60.
[11] *Wallishauser* v *Austria*, no 156/04, 17 July 2012, para 69.
[12] *Oleynikov* v *Russia*, no 36703/04, 14 March 2013, para 67.
[13] *Sabeh El Leil* v *France* [GC], no 34869/05, 29 June 2011, para 58.
[14] *Cudak* v *Lithuania* [GC], para 67.
[15] *Oleynikov* v *Russia*, paras 67–8.

the Convention may constitute evidence of State practice and *opinio juris*:[16]

> "In the present context, State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention. *Opinio juris* in this context is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgment, by States granting immunity, that international law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States."

The ICJ considered Articles 12 (territorial tort) and 19 (immunity from post-judgment measures of constraint) of UNCSI, while carefully noting the provisions of UNCSI are "relevant only in so far as their provisions and the process of their adoption and implementation shed light on the content of customary international law".[17]

In sum, international and national courts have been treating UNCSI as a useful, but not definitive, starting point for their analysis of the law on State immunity.

[16] *Jurisdictional Immunities of the State* (*Germany* v *Italy*: *Greece Intervening*), p 99, para 55.
[17] Ibid, para 66.

2. The Rationales for Immunity

State immunity can be, and has been, justified on various grounds. First, and principally, the rule of State immunity "derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order".[18] Second, immunity is enjoyed by certain officials, such as the head of State, because they embody the State and serve a representative function. Third, immunity is regarded as necessary for the smooth functioning and orderly conduct of international relations.[19]

State immunity also serves three main functions. First, it is a method to ensure a "stand-off" between States where private parties seek to enlist the assistance of the courts of one State to determine their claims made against another State. Second, it is a method of distinguishing between matters relating to public administration of a State and private law claims. Third, it is a method of allocating jurisdiction between States in disputes brought in national courts relating to State activities in the absence of any international agreement by which to resolve conflicting claims to the exercise of such jurisdiction.

3. The Evolution of Immunity

The classic explanation of the evolution of immunity is a shift from an absolute doctrine of immunity to a restrictive doctrine that limits immunity to acts in the exercise of sovereign authority (*acte jure imperii*).

The law relating to immunity in common law jurisdictions first developed in cases involving warships. In the leading case of *The*

[18] Ibid, para 57.
[19] *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo* v *Belgium), ICJ Reports 2002*, p 3, para 53.

Schooner Exchange v *McFaddon*,[20] the US Supreme Court rejected a creditor's claim for attachment and ordered the release of a vessel which was undergoing repairs in Philadelphia. The formerly private ship had been seized under a decree of the French Emperor Napoleon and converted into a public armed ship. The court held that a State warship was immune from arrest and process in the courts of another State. Marshall CJ stated the immunity was upon the consent of the territorial State to waive its exclusive jurisdiction. His subtle reconciliation of the territorial State's jurisdiction and the foreign State's independence was expressed as follows:

> "This perfect equality and absolute independence of sovereigns and this common interest impelling them to mutual intercourse and an interchange of good offices with each other, have given rise to a class of case in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation."[21]

The English Court of Appeal in *The Parlement Belge* applied the ruling in the *Schooner Exchange* more widely to cover all ships of a foreign State regardless of whether they were engaged in public service or trade.[22] The absolute rule, declared in *The Parlement Belge*, treating all acts of a foreign State as immune, continued to be observed in English law and applied by English courts until the 1970s.[23]

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[20] *The Schooner Exchange* v *McFaddon* (1812) Cranch 116 (US).

[21] The release of the Argentinian warship, the *ARA Libertad*, after its arrest to enforce an outstanding commercial judgment given by both the New York and Ghana courts indicates this continued enforceability of the international law obligation to respect the immunity of a foreign State's warship. See *"ARA Libertad" (Argentina* v *Ghana), Provisional Measures, Order 15 December 2012, ITLOS Reports 2012*, p 332;
[27] September 2013, Agreement between Argentina and Ghana settling the dispute.

[22] *The Parlement Belge* (1879–90) 5 Prob Div 197 (CA); a packet boat owned by the King of the Belgians involved in a collision in the port of Dover was held to enjoy State immunity although at the time it was carrying both royal mail and passengers and merchandise for hire.

[23] *The Cristina* [1938] AC 485 (HL) per Lord Atkin at 491.

By the late 1970s, the restrictive approach to immunity began to emerge. In 1977, the Privy Council in *The Philippine Admiral*[24] reinterpreted *The Parlement Belge*, declaring that it had not laid down the wide proposition that "a sovereign can claim immunity for vessels owned by him even if they are admittedly being used wholly or substantially for trading purposes". It rejected a plea of immunity in respect of *in rem* proceedings (ie, proceedings for attachment and sale directed against the vessel itself) brought for goods supplied to a vessel operated as an ordinary trading ship in which the Philippine government retained an interest. The next year the Court of Appeal in *Trendtex* v *Central Bank of Nigeria*[25] rejected immunity in proceedings against the Central Bank of Nigeria for failure to honour a commercial letter of credit.[26] The court was unanimous in its view that the bank, by the terms of its establishment, was an independent entity and not to be treated as part of the State of Nigeria; it held by a majority that English law recognized no immunity in respect of proceedings brought for a commercial activity such as the issue of a letter of credit. In accepting a restrictive doctrine of immunity in the common law — a move which was confirmed by the House of Lords in *I Congreso del Partido*[27] — the English courts were influenced by legal developments elsewhere, such as in the United States (US).

In 1952, the US State Department announced in the Tate letter that in future US policy would follow the restrictive doctrine of State immunity. In 1976, in part responding to the need of commercial banks financing sovereign States' debt to have legal recourse, the US Congress enacted the Foreign Sovereign Immunities Act (FSIA), which was the first legislation to introduce the restrictive doctrine

[24] *The Philippine Admiral* [1977] AC 373; [1976] 1 All ER 78; 64 ILR 90 (PC).
[25] *Trendtex Trading Corporation* v *Central Bank of Nigeria* [1977] 1 QB 529; [1977] 1 All ER 881; 64 ILR 111 (CA).
[26] A letter of credit is an undertaking given by a bank to pay a certain sum of money on receipt of documents of title and transport relating to a particular consignment of goods; it may be enforced against the bank independently of the solvency or any refusal to pay on the part of the consignor.
[27] *I Congreso del Partido* [1983]1 AC 244; [1981] 2 All ER 1064 at 1074; 64 ILR 307 (HL).

into the common law. Two years later, in 1978, the UK enacted its own State Immunity Act (SIA). The SIA has served as the model for many jurisdictions, including Singapore, Pakistan, and South Africa. The 2004 United Nations Convention on Jurisdictional Immunities of States and their Property closely followed the SIA in its structure and formulation of exceptions and the UK provided support for the negotiation and drafting of the Convention.

Lord Sumption in *Benkharbouche* recently reassessed this narrative and concluded that "there has probably never been a sufficient international consensus in favour of the absolute doctrine of immunity to warrant treating it as a rule of customary international law. All that can be said is that during certain periods, a substantial number of states, but not necessarily a majority, have adopted the absolute doctrine as part of their domestic law."[28]

As regards civil jurisdictions, certain civil law countries, especially in Italy, Belgium, and the Egyptian mixed courts, led the way in adopting a restrictive doctrine of immunity. States enjoyed immunity for proceedings relating to acts committed in exercise of sovereign authority (*acta jure imperii*) but not for trading activities or acts which a private person may perform (*acta jure gestionis*). In 1963, in a decision surveying State practice, bilateral and multilateral treaties, and legal writing, the German Federal Constitutional Court declared that international law permits a restrictive doctrine of State immunity and that the proper criterion for the distinction between sovereign and private acts is the *nature* of the act, not its purpose. The German court allowed proceedings by a builder to recover the cost of repair carried out on the Iranian Embassy, holding the repair contract to relate to a non-sovereign act and hence not to be immune.[29]

[28] *Benkharbouche* v *Secretary of State for Foreign and Commonwealth Affairs and Libya* v *Janah* [2017] UKSC 62, [2019] AC 777, para 52.
[29] *Empire of Iran Case*, 45 ILR 57 at 80 (German Federal Constitutional Court, 30 April 1963).

Further support for the restrictive doctrine is found in the 1926 Brussels Convention for the Unification of Certain Rules concerning the Immunities of Government Vessels and its 1934 protocol, providing that State-owned or operated ships used exclusively for non-governmental commercial purposes do not enjoy immunity and are subject to the same legal rights and obligations as ships owned or operated by private persons for the purposes of trade. In 1972, the European Convention on State Immunity (ECSI) was adopted, which introduced a number of exceptions to immunity from adjudication broadly based on the restrictive doctrine.

What is the era of immunity in which we currently live? On the one hand, there are signs we are in a more exclusionary phase focusing on the technical procedural nature of the plea of immunity, exemplified by the ICJ in the Jurisdictional Immunities judgment. On the other hand, certain national courts are finding immunity inapplicable in the face of allegations of human rights violations on the basis not of customary law but rather on constitutional grounds. Attention should also be paid to the creative use of existing exceptions (such as the commercial transaction or employment contract exceptions) to seek accountability for human rights violations that occur in a business or workplace context.

LECTURE 2:

State Immunity from Jurisdiction[30]

In this lecture I cover the scope of and exceptions to State immunity from jurisdiction. As Judge Yusuf observed in his Dissenting Opinion in the *Jurisdictional Immunities* case, "State immunity is, as a matter of fact, as full of holes as Swiss cheese".[31] After covering the major exceptions to State immunity, I consider two cases on whether there is a human rights exception to immunity: the aforementioned ICJ *Jurisdictional Immunities* case and *Jones* v *United Kingdom* decided by the European Court of Human Rights (ECtHR).[32]

1. The Exceptions to Immunity from Civil Jurisdiction of a Foreign State

Today there is widespread acceptance that the State immunity from jurisdiction is subject to exceptions, whereas immunity from enforcement jurisdiction remains largely absolute.[33]

Widely recognized exceptions include proceedings relating to contracts which a private party may enter, or which are of a commercial nature, contracts of employment other than those with nationals of the sending State engaged in public service, immovable

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[30] This is based in part on my chapter in Malcolm Evans (ed), *International Law* (OUP 2018).

[31] *Jurisdictional Immunities of the State* (*Germany* v *Italy*: *Greece Intervening*), *Dissenting Opinion of Judge Yusuf, ICJ Reports 2012*, p 291, para 26.

[32] *Jones* v *United Kingdom,* App nos 34356/06 and 40528/06 (ECtHR, 14 January 2014).

[33] The ICJ in *Jurisdictional Immunities of the State* (*Germany* v *Italy*: *Greece Intervening*), p 99, para 113 observed that "the immunity from enforcement enjoyed by States in regard to their property situated on foreign territory goes further than the jurisdictional immunity enjoyed by those same States before foreign courts".

property, personal injuries, or damage or loss to property of a tangible nature, and proceedings relating to the operation of seagoing ships and their cargo. The US FSIA stands alone in removing immunity for claims in respect of expropriation of property contrary to international law. Only the US and Canada have a "terrorism exception" to immunity that allows States designated as "sponsors of terrorism" or "supporters of terrorism" and to be sued in domestic courts.[34] Iran brought proceedings against the US in the ICJ alleging that the US has violated international law by denying immunity to Iran in such litigation, but the Court held it did not have jurisdiction to consider the immunity aspects of Iran's application.[35]

Commercial transactions

The most well-known exception relates to commercial transactions between a private party and the foreign State. It has proven difficult to define the criteria for distinguishing a commercial transaction from one "in exercise of sovereign authority". As explained in the *Empire of Iran* case, the "generally recognizable filed of sovereign activity" which remains immune includes "transactions relating to foreign affairs and military authority, the legislature, the exercise of police authority, and the administration of justice."[36] While the significance of the distinction was recognized by the ICJ in the *Jurisdictional Immunities* case, and that "States are generally entitled to immunity in respect of *acta jure imperii*",[37] the Court provided no criteria for distinguishing between them, other than that "the acts in question fall to be assessed by reference to the law governing the exercise of sovereign power (*jus imperii*) or the law

[34] 28 USC § 1605A (US); Justice for Victims of Terrorism Act, SC 2012, c 1, s 2 (Canada).
[35] *Certain Iranian Assets (Iran* v *US), Preliminary Objections, Judgment, ICJ Reports 2019*, p 7, paras 56–8, 62–5, 69–70, 74, 78–80.
[36] *Empire of Iran Case* (German Federal Constitutional Court, 30 April 1963) 45 ILR 57, p 81.
[37] *Jurisdictional Immunities of the State (Germany* v *Italy: Greece Intervening),* p 99, para 61.

concerning non-sovereign activities of a State, especially private and commercial activities (*jus gestionis*)".[38] However, examples of the retention of immunity for acts in the exercise of sovereign authority can be found in the careful drafting of exceptions to State immunity.[39]

The competence of civil courts, such as in France, is restricted to civil and commercial matters, and does not extend to public and administrative matters; it is, therefore, not that difficult to apply the civil court's criterion of an act or transaction in which an individual may engage, as opposed to *"un acte de puissance publique ou un acte qui a été accompli dans l'intérêt d'un service public"* to proceedings brought against a foreign State. Article 4 of ECSI allows an exception for proceedings relating to an obligation of a State by virtue of a *contract* — a contract being a legal transaction in which a private person may engage. Applying the same approach to non-contractual claims of a private law character, immunity was refused by the Austrian Supreme Court when sought by the US in respect of a claim for damages arising out of a road accident due to the negligence of an embassy driver when collecting the mail of the US air attaché.[40] The court distinguished a sovereign act from a private one, such as the operation of a motor car and the use of public roads, where the relationship between the parties was on the basis of equality with no question of supremacy, rather than subordination; in applying the distinction the court looked to the nature of the act

[38] Ibid, para 60. Cf the Court's ruling in respect of immunity from enforcement that the cultural Centre Villa Vigoni "intended to promote cultural exchanges between Germany and Italy", was "being used for governmental purposes that are entirely non-commercial and hence for purposes falling within Germany's sovereign functions" (ibid, para 119).

[39] Thus agreements to which States are the sole parties are excluded from the exception for commercial transactions (SIA s 3(2), UNCSI Article 10(2)(a); contracts of employment with diplomats and agents excluded from the employment exception SIA s. 16(1)(a), UNCSI, Article 11(2)(b); warships and naval auxiliaries excluded from the exception for State ships SIA s 10 and UNCSI Article 16(2)).

[40] *Holubek* v *The Government of United States*, Austrian Supreme Court, 10 February 1961, 40 ILR 73.

of driving as opposed to its purpose, being the collection of mail between government departments.

Common law courts are usually not of limited competence and consequently have no national practice as to what constitutes an act performable by a private person as opposed to a State. But mindful of the underlying rationale of the restrictive doctrine — that States which engage in trade should be amenable to jurisdiction — they have applied a test of commerciality in determining the non-immune nature of the proceedings. Questions concerning contracts made in the territory of the foreign State and governed by its administrative law are expressly excluded from the commercial transaction exception in the UK SIA s 3(2).

Section 1605(a)(2) of the US FSIA removes immunity where claims are based upon a commercial activity and s 1603(d) provides that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by any reference to its purpose". Commerciality is not defined by the FSIA and inconsistent decisions have been given in proceedings relating to development of natural resources, foreign assistance programmes, and government exchange control. Thus, US courts have held immune the cancellation of an agreement licensing the export of rhesus monkeys,[41] and mistreatment by police resulting from a whistle-blowing complaint made in the course of employment under contract in a hospital;[42] and held non-immune a technical assistance contract under which the contractor enjoyed diplomatic immunities and tax exemption,[43] a foreign government's undertaking to reimburse doctors and the organ bank for kidney transplants performed on its nationals in US

[41] *Mol Inc* v *Peoples Rep of Bangladesh*, 736 F.2d 1326 (9th Cir 1994) cert denied 105 S Ct 513.
[42] *Saudi Arabia* v *Nelson*, 123 L Ed 2d 47 (Sup Ct 1993); 100 ILR 544.
[43] *Practical Concepts* v *Republic of Bolivia*, 811 F.2d 1543 (DC Cir 1987); 92 ILR 420.

hospitals,[44] and a restriction on the payment of government-issued bonds due to a shortage of foreign reserves.[45] US courts have avoided determining whether the leasing of prisoners of war as slave labour by the Nazi regime to German industrial concerns constituted a commercial activity.[46]

To avoid such difficulties, the European Convention on State Immunity (ECSI), the UK SIA, and similar legislation of other Commonwealth States use a listing method by which proceedings relating to specific categories of commercial transactions are listed as non-immune; s 3 of the UK SIA lists as non-immune commercial transactions "sale of goods or supply of services", and "loans or other transaction for the provision of finance, guarantee or indemnity of any such transaction or of other financial obligation" (s 3(3)(a) and (b)) (such transactions are not qualified by the condition "otherwise than in the exercise of sovereign activities");[47] and both the SIA and ECSI also make non-immune proceedings relating to certain contracts of employment, to participation in companies or associations, and to claims relating to patents, trademarks, and other intellectual property rights (ECSI Articles 5, 6, and 8; SIA ss 4, 7, and 8). The listing approach is also adopted by UNCSI which sets out exceptions for commercial transactions (Article 10), contracts of employment (Article 11), ownership and use of property (Article 13), intellectual and industrial property (Article 14), companies (Article 15), and ships (Article 16).

Even with this method, challenging cases regularly come before the English courts. Cases such as *I Congreso del Partido* (whether disposal of a cargo by a State agency contrary to terms

[44] *Rush-Presbyterian-St Luke's Medical Center* v *the Hellenic Republic*, 877 F.2d 574 (7th Cir 1989) cert denied 493 US 937; 101 ILR 509.
[45] *Republic of Argentina* v *Weltover*, 504 US 607 (1992); 100 ILR 509.
[46] *Princz* v *Federal Republic of Germany*, 26 F.3d 1166; (DC Cir 1994); 33 ILM 1483.
[47] *Orascom Telecom Holding SAE* v *Republic of Chad & Ors* [2008] EWHC 1841 (Comm) 2 Lll Rep [2008] 397, citing Lord Diplock in *Alcom Ltd* v *Republic of Colombia* [1984] 1 AC 580, 603.

of the contract of carriage on orders of the State for political reasons was immune)[48] and *Kuwait Airways Corp* v *Iraqi Airways Co* (whether seizure and transfer of Kuwaiti aircraft to Iraq after the invasion of Kuwait with a view to incorporation in the Iraqi civil air fleet was immune)[49] demonstrate the difficulty of distinguishing a commercial transaction from an act in exercise of sovereign authority. The accepted solution applied by English courts is to determine the *nature* and not the purpose of the activity. But when applied to determine the nature of the funds held in a bank account of a diplomatic embassy this test proved arbitrary; such funds could be treated as being used for the purchase of goods and services — clearly commercial acts — or more broadly for the discharge of diplomatic functions, which were clearly activities in exercise of sovereign authority.[50]

Faced with these difficulties, Lord Wilberforce reformulated the test as requiring a court to consider:

> ... the whole context in which the claim against the State is made, with a view to deciding whether the relevant act(s) on which the claim is based should, in that context, be considered as fairly within an area of activity, trading or commercial or otherwise of a private law character, in which the State has chosen to engage or whether the relevant activity should be considered as having been done outside the area and within the sphere of governmental or sovereign activity.[51]

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[48] *I Congreso del Partido* [1983] 1 AC 244; [1981] 2 All ER 1064; 64 ILR 307 (HL).
[49] *Kuwait Airways Corp* v *Iraqi Airways Co* [1995] 3 All ER 694; 103 ILR 340 (HL).
[50] In *Alcom Ltd* v *Republic of Colombia* the Court of Appeal adopted the first view [1983] 3 WLR 906; [1984] 1 All ER 1 and the House of Lords the second [1984] AC 580; [1984] 2 WLR 750; [1984] 2 All ER 6 (HL). See also *NML Capital Ltd* v *The Republic of Argentina* [2011] UKSC 31, where the Supreme Court was split on whether the commercial nature of the underlying transaction rendered enforcement proceedings in respect of a judgment given in New York "commercial" or "sovereign" in nature.
[51] *I Congreso del Partido* [1983]1 AC 244; [1981] 2 All ER 1064, 1074; 64 ILR 307 (HL).

Therefore, when deciding cases both under the SIA[52] and under the common law, a construction of the public/private criterion is now applied which takes account of the whole context, including the place where the persons are alleged to have committed the acts and those who were designed to benefit from the conduct complained of.[53] For example, and although by their nature the acts in question were ones which a private person might have committed, proceedings brought against visiting US forces were barred since on the facts of the cases those acts had been performed in the exercise of sovereign authority by reason of their having been undertaken by service personnel and in pursuance of the purpose of maintaining an efficient fighting force.[54]

The relevance of purpose as well as the nature of the transaction was much debated by the ILC and its final formulation of UNCSI Article 2(2) reads as follows:

> In determining whether a contract or transaction is a "commercial transaction" under paragraph 1 (c), reference should be made to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or, if in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.

The reference to purpose, designed to accommodate developing States' wish to retain immunity for contractual transactions vital to their economy or for disaster prevention or relief, has resulted in a

[52] *Propend Finance Pty Ltd* v *Sing*, 111 ILR 611, 2 May 1997 (CA).
[53] *Dynasty Co for Oil and Gas Trading Ltd* v *Kurdistan Regional Government of Iraq* [2021] EWHC 952 (Comm), [2021] 3 WLR 1095, paras 105–117.
[54] *Holland* v *Lampen-Wolfe* [2000] 1 WLR 1573; [2000] 3 All ER 833; 119 ILR 367 (HL) concerning a complaint of libel contained in a report of a supervising officer of a civilian lecturer engaged to give a course to visiting US forces; *Littrell* v *USA (No 2)* [1994] 4 All ER 203; [1995] 1 WLR 82; 100 ILR 438 (CA) concerning a claim of medical negligence against a service doctor treating an airman on a US base in the UK.

complex piece of drafting strengthening the defendant's immunity by which the national court may be required to engage in a four-stage exercise in determining whether it has jurisdiction in a commercial transaction under Article 2(1)(c)(iii).[55] The Annex of Understandings contains nothing specific with regard to this Article and it would seem that the ambiguities present in the Article constitute an open invitation for reservation or interpretative declaration to any State proposing to give effect to the Convention in its law by ratification. However, it should not be forgotten that the Working Group of the ILC itself in 1999, after an exhaustive review of the whole subject, concluded that "the distinction between the so-called nature and purpose tests might be less significant in practice than the long debate about it might imply".[56]

Employment contract exception

There is also widespread acceptance of an exception to State immunity for employment disputes brought by employees that do not touch on the "three R's" (recruitment, renewal, or reinstatement) and do not implicate the sovereign activities of the State, such as national security.[57] These cases tend to arise when locally recruited employees of a foreign embassy sue for unfair dismissal or discrimination.

The UK SIA is one of the strictest statutes in the world when it comes to the scope for employees to sue a State under the employment contract exception, being matched only by the

[55] These stages being to consider the nature of the transaction, first in the absence and second in the presence of evidence of the purpose of the transaction; third, to take account of such purpose where an agreement of the parties so as to take such purpose into account is proved; and fourth to have regard to purpose if it is relevant in the practice of the forum State, *not* of its law, in determining the non-commercial character of the transaction.

[56] See A/CN.4/L.576, para 60.

[57] P. Webb, "The Immunity of States, Diplomats and International Organizations in Employment Disputes: The New Human Rights Dilemma?" (2016) 27(3) EJIL 745.

legislation of South Africa, Pakistan, and Malawi. In 2017, the *Benkharbouche and Janah* cases[58] exposed sharp differences between UK and international and regional requirements: in particular, SIA ss 4(2) and 16(1)(a) as compared to ECtHR Article 6 and the EU Charter of Fundamental Human Rights Articles 45 and 47.

In the case, two Moroccan nationals were employed as domestic workers by the Libyan Embassy and Sudanese Embassy in London. Both women were dismissed from their employment and brought claims against Libya and the Sudan, respectively. Ms Janah's claims related to failure to pay the National Minimum Wage, breaches of the Working Time Regulations, failure to provide her with payslips or a contract, unfair dismissal, discrimination, and harassment. By the time the case came before the Supreme Court, only Ms Janah participated and it was left to the UK Secretary of State to make the counter-arguments.

The key question was whether ss 4(2)(b) and 16(1)(a) of the SIA are consistent with the ECtHR and the EU Charter of Fundamental Human Rights. Section 4(2)(b) provides that a State is immune as respects proceedings relating to a contract of employment between a State and a person who at the time of the contract is neither a national of the UK nor resident there; s 16(1)(a) has the effect that a State is immune as respects proceedings concerning the employment of members of a diplomatic mission, including its administrative, technical, and domestic staff. The Supreme Court had to decide whether these provisions have any basis in customary international law.

Ms Janah's case was that ss 4(2)(b) and 16(1)(a) of the SIA are incompatible with Article 6 of the ECtHR because "they unjustifiably bar access to a court" to determine her claims.[59] In particular,

[58] *Benkharbouche* v *Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for Foreign and Commonwealth Affairs and Libya* v *Janah* [2017] UKSC 62, [2019] AC 777.
[59] Ibid, para 13.

the immunities being conferred by the SIA on Libya and Sudan were no longer required as a matter of obligation by customary international law. According to Lord Sumption:

> The employment of Ms Janah and Ms Benkharbouche were clearly not exercises of sovereign authority, and nothing about their alleged treatment engaged the sovereign interests of their employers. Nor are they seeking reinstatement in a way that would restrict the right of their employers to decide who is to be employed in their diplomatic missions. As a matter of customary international law, therefore, their employers are not entitled to immunity as regards these claims. It follows that so far as sections 4(2)(b) or 16(1)(a) of the State Immunity Act confer immunity, they are incompatible with Article 6 of the Human Rights Convention.[60]

As a result, ss 4(2)(b) and 16(1)(a) of the SIA were disapplied to the claims derived from EU law (discrimination, harassment, breach of the Working Time Regulations). The Supreme Court upheld the Court of Appeal's declaration of incompatibility under s 4 of the Human Rights Act 1998. At the time of writing, Parliament has not yet removed the incompatibility by revising the SIA.

Territorial torts / personal injuries

In addition to the various exceptions linked to commercial activities, UNCSI and State practice in legislation and court decisions allow an exception for certain non-contractual delictual activities of a foreign State. Article 12 of UNCSI contains an exception from immunity in civil proceedings which "relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State, and if the author

[60] Ibid, Lord Sumption, para 76.

of the act or omission was present in that territory at the time of the act or omission". Three points may be made.

First, the scope of the exception is narrow; the history of the provision makes clear that proceedings relating to false, defamatory, or negligent statements are not included. Second, the exception only relates to wrongful conduct of a foreign State committed in the territory of the forum State.[61] Third, the exception in UNCSI and common law legislation contains no requirement that the injury or damage be caused in the course of commercial activity; injury or damage resulting from an act in exercise of sovereign authority is recoverable, as, for example, proceedings for State-ordered assassination of a political opponent which has been held non-immune under a similar tort exception in the US FSIA.[62] The ICJ was careful in *Jurisdictional Immunities* not to "resolve the question whether there is in customary international law a 'tort exception' to State immunity applicable to *acta jure imperii* in general".[63]

Decisions by Italian courts applying this "territorial tort" exception to award damages for forcible deportation and forced labour of an Italian national by German military authorities during the Second World War, led to Germany bringing the *Jurisdictional Immunities* case to the ICJ.[64] After an extensive survey of State practice, the Court upheld Germany's immunity: "State practice

[61] The UK SIA s 5 merely refers to "(a) the death or personal injury; or (b) damage to or loss of tangible property, caused by act or omission in the United Kingdom"; the US FSIA s 1605(a)(5) is similar with the personal injury, death, or damage to or loss of property occurring in the USA (but excludes any claim based on failure of any State official or employee to exercise or perform a discretionary function); the UN Convention Article 12, following ECSI Article 11, is even stricter, limiting proceedings to where the author is present in the forum State at the time when the facts occurred.

[62] *De Letelier* v *Chile* 488 F. Supp. 665 (DC Cir 1980), 671–673.

[63] *Jurisdictional Immunities of the State* (*Germany* v *Italy*: *Greece Intervening*), p 99, para 65.

[64] *Ferrini* v *Greece and Germany* (Dec), no 59021/00, ECtHR 2002-X, 129 ILR 537; see also *Distomo Massacre Case*, Germany Federal Constitutional Court, 15 February 2006, 135 ILR 185.

in the form of judicial decisions supports the proposition that State immunity for *acta jure imperii* continues to extend to civil proceedings for acts occasioning death, personal injury or damage to property committed by the armed forces and other organs of a State in the conduct of armed conflict, even if the relevant acts take place on the territory of the forum State."[65]

In another case involving Italy, the question of a "territorial crime" equivalent to the "territorial tort" exception arose before an Annex VII tribunal. The background to the case was an incident of 15 February 2012, in which two Italian marines posted as a "Vessel Protection Detachment" on the Italian oil tanker, the *Enrica Lexie*, allegedly fired shots at a vessel, the *St. Antony*.[66] India arrested the two marines and detained them in Delhi. Italy argued that the marines were entitled to immunity *ratione materiae* in their capacity as State officials, acting as such.[67] India contested the entitlement to immunity, and also argued that there was a customary exception to immunity for crimes committed on the territory of the forum State.[68]

The tribunal concluded that the Marines were immune because they were deployed on board the *Enrica Lexie* pursuant to a mandate from Italy, as provided in the Italian Law, to ensure "the protection of ships flying the Italian flag in transit in international maritime spaces at risk of piracy".[69] Even if the Marines' acts were *ultra vires* or contrary to their instructions or orders, that would not preclude them from enjoying immunity as long as they continued to act in the name of the State and in their "official capacity".[70] The evidence

[65] *Jurisdictional Immunities of the State* (*Germany* v *Italy*: *Greece Intervening*), p 99, para 77.
[66] *The Enrica Lexie Incident (Italy* v *India),* PCA Case No. 2015–28, Award, 21 May 2020, paras 81–117.
[67] Ibid, paras 813–829.
[68] Ibid, paras 830–837.
[69] Ibid, para 859.
[70] Ibid, para 860.

demonstrated that during the incident the Marines were under an apprehension of a piracy threat and engaged in conduct that was in the exercise of their official functions as members of the Italian Navy.[71]

On the question of a "territorial crime" exception to immunity, the tribunal noted that national courts in a relatively significant number of States look to UNCSI as a reflection of customary international law, but the fact remains that States that consider that there is immunity for foreign States before other States' national courts do not accept the provisions of this convention, including Article 12.[72]

In its work on the immunity of state officials from foreign criminal jurisdiction, the ILC deleted the "territorial crime exception" from Article 7 of the ILC Draft Articles on Immunity of State Officials (regarding the exceptions to the immunity *ratione materiae* of State officials), which the ILC plenary adopted provisionally on 20 July 2017.[73]

2. Jurisdictional Connection with the Forum State

The limitation of the personal injuries exception to certain acts committed in the forum territory highlights the general question whether the jurisdiction of national courts over foreign States is conditional on some close link with the territory of the forum State.

Both ECSI and the US FSIA require that there be a nexus or jurisdictional connection with the forum State in respect of each

[71] Ibid, paras 861–862.
[72] Ibid, para 866.
[73] International Law Commission, "Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction", provisionally adopted by the International Law Commission, in "Report of the International Law Commission on the Work of its 69th Session" (1 May — 2 June and 3 July — 4 August 2017) U.N. Doc. A/72/10, p. 231 (Draft Article 7 and Annex).

of the recognized exceptions to State immunity. That jurisdictional connection for some exceptions, as with employment contracts and personal injuries, is stricter than those recognized in private international law for private party litigation. The UK and other common law jurisdictions have also accepted additional jurisdictional links for the employment, tort, and other exceptions; only in respect of the commercial transaction exception, the arbitration, and State ships exceptions is there an absence of a connection other than those required in ordinary litigation for the exercise of extraterritorial personal jurisdiction under Civil Procedure Rules or like common law procedures.

The UK Supreme Court in *NML* v *Argentina* endorsed the omission in s 3(1)(a) of a jurisdictional link between the foreign State's commercial transaction and the UK jurisdiction. In the leading judgment Lord Phillips said, and with which point all their Lordships concurred:

> I can see no justification for giving section 3(1)(a) a narrow interpretation on the basis that it is desirable to restrict the circumstances in which it operates to those where the commercial transaction has a link with the United Kingdom. The restrictive doctrine of sovereign immunity does not restrict the exemption from immunity to commercial transactions that are in some way linked to the jurisdiction of the forum.[74]

UNCSI adopts a neutral position, referring in Article 10(1) to the determination of jurisdiction over the commercial transaction exception to "the applicable rules of private international law" of the forum State.[75]

For proceedings which are clearly identical to those brought in private litigation, there may be no need to require any special additional jurisdictional link where the defendant is a foreign State.

[74] *NML Capital Ltd* v *The Republic of Argentina* [2011] UKSC 31, para 39.
[75] See also ILC Commentary to Article 10(1), para (3) and (4).

But for proceedings which relate to conflicts of jurisdiction between States, the plea of immunity serves to demarcate the limits of State jurisdiction exercisable over the public acts of another State.

3. A Human Rights Exception?

A series of decisions by international, regional and national courts has rejected, under customary international law as it presently stands, the existence of an exception to state immunity for grave human rights violations.

In 2012, the ICJ in the *Jurisdictional Immunities* judgment held that "under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict".[76] Italian nationals were barred from suing Germany for compensation for war crimes and crimes against humanity committed during the Second World War.

In 2014, the Fourth Section of the ECtHR held in *Jones* v *United Kingdom* that the UK's grant of immunity to Saudi Arabia, and the named officials in civil suits for torture brought by four individuals, did not interfere disproportionately with their right of access to court. The Court treated the ICJ's *Jurisdictional Immunities* judgment as "authoritative" for the proposition that "no *jus cogens* exception to State immunity had yet crystallised" under customary international law.[77]

Later, in 2014, the Supreme Court of Canada in *Kazemi* v *Iran* endorsed the reasoning in *Jones* v *United Kingdom* and *Jurisdictional Immunities*.[78] Seeking justice for the torture and death of his mother

[76] *Jurisdictional Immunities of the State* (*Germany* v *Italy*: *Greece Intervening*), p 99, para 91.
[77] *Jones* v *United Kingdom,* para 198.
[78] *Kazemi* v *Islamic Republic of Iran*, [2014] SCC 62.

in prison in Iran, Stephan Hashemi had sued the Islamic Republic of Iran, Iran's head of state, the chief public prosecutor of Tehran, and a former deputy chief of intelligence, claiming damages for his mother's suffering and death and for the emotional and psychological harm that this experience had caused him. His claims were barred by immunity.

This chain of cases, reflecting customary international law as it presently stands, sits in tension with some other national decisions that have set aside immunity on the basis of domestic constitutional provisions. In 2014, the Italian Constitutional Court declared that the customary rule on jurisdictional immunities of States, as determined by the *Jurisdictional Immunities* judgment of the ICJ in, and the implementation of this judgment itself in the Italian legal order, would be unconstitutional. It would be contrary to fundamental principles of the Constitution, such as the right to a judge (Article 24) and the basic rights of persons (Article 2), which cannot in any manner be displaced.[79] And in 2021, the Brazilian Supreme Court ruled there is no jurisdictional immunity for unlaw acts connected to human rights violations in a case concerning a fishing boat sunk in 1943 by a German submarine near Rio de Janeiro.[80] By six votes to 5 the Supreme Court held that "wrongful acts committed in violation of human rights do not enjoy immunity from jurisdiction" because the Constitution gives priority to human rights as a principle that governs Brazil in its international relations (Article 4, II) and the Court must make this effective.[81]

[79] See http://www.qil-qdi.org/relationship-international-municipal-legal-order-reflections-decision-no-2382014-italian-constitutional-court/ and Judgment no 238 — Year 2014, English translation provided by the Italian Constitutional Court, www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf.

[80] See http://portal.stf.jus.br/processos/downloadPeca.asp?id=15347973404&ext=.pdf.

[81] See ejiltalk.org/the-immunity-saga-reaches-latin-america-the-changri-la-case/.

LECTURE 3:

State Immunity from Enforcement and Execution[82]

A foreign State is largely immune from forcible measures of execution against its person or property, and the rules on immunity from enforcement must be applied separately from those on immunity from jurisdiction.[83] In this lecture I cover (1) the general rules of immunity from enforcement; (2) the three exceptions to this immunity; (3) the five categories of immune property.

1. General Rules on Immunity from Enforcement

Three general principles may be stated for immunity from enforcement: it is absolute for State property in use for public purposes; it is restricted for State property used for a non-governmental commercial purposes; and the test is the *purpose* of the property not its nature.

State practice and UNCSI recognize an exception to the general rule of immunity from enforcement in respect of State property in use for commercial purposes.[84] English law permits the recognition and enforcement of a foreign judgment given against a State (other than the UK or the State to which that court belongs), provided the foreign court would have had jurisdiction if it had applied the UK rules on sovereign immunity set out in SIA ss

[82] This is based on H. Fox and P. Webb, *The Law of State Immunity* (OUP 2015), Ch 16 and 17 and my chapter in M. Evans (ed), *International Law* (OUP 2018).
[83] *Jurisdictional Immunities of the State* (*Germany* v *Italy*: *Greece Intervening*), *Judgment, ICJ Reports 2012*, p 99, para 113.
[84] The principle was stated four decades ago in *The Philippine Embassy Bank Account* case, German Federal Constitutional Court, 13 December 1977, 46 *BverfGE*, 342; 65 ILR 146, 184.

2 to 11,[85] but execution without the consent of the State remains solely in respect of State property shown to be "in use or intended for use for commercial purposes" (SIA s 13(4)).

UNCSI draws a distinction between measures of enforcement against the property of a State that are taken pre-judgment and post-judgment; the rule of immunity is absolute in both scenarios unless the State has consented, or allocated or earmarked the property for the satisfaction of the claim. An additional exception to immunity, somewhat narrower than SIA s 13(4), is permitted in respect of post-judgment measures for State property in use for commercial purposes, Article 19(c) UNCSI.

In *Jurisdictional Immunities*, the ICJ, when deciding whether Germany's immunity from enforcement had been infringed by the Italian court's imposition of a legal charge on the Villa Vigoni owned by the German government, referred to Article 19 UNCSI. Without deciding whether it reflected current customary international law, the ICJ noted that it provided for three exceptions to immunity — express consent, allocation by the State, and the use of State property "for an activity not pursuing governmental non-commercial purposes". Finding that Villa Vigoni was used for cultural purposes, the Court concluded that it was used entirely for non-commercial governmental purposes and was thus immune from measures of constraint.[86]

[85] Civil Jurisdiction and Judgments Act 1982 s 31, *NML Capital Ltd* v *The Republic of Argentina* [2009] 1 Lloyd's Rep 378, reversed [2010] EWCA Civ 41; appeal allowed [2011] UKSC 31. For registration of a judgment against the UK see SIA Part II ss 18–19; no procedure is available for registration of a judgment given by a court against a State to which that court belongs *AIC Ltd* v *Federal Government of Nigeria and Attorney-General of Federation of Nigeria* [2003] EWHC 1357 (QB); 129 ILR 871.
[86] *Jurisdictional Immunities of the State* (*Germany* v *Italy*: *Greece Intervening*), p 99, paras 118–20.

2. Three Exceptions to Immunity from Enforcement

The first exception is express consent. For example, UNCSI Articles 18(a) and 19(a) provide that such consent may be provided in an international agreement, by an arbitration agreement or in a written contract, or by a declaration before the court or by a written communication after a dispute between the parties has arisen. Consent may be given generally with regard to measures of constraint or property, or may be given for particular measures or particular property.

A second exception is where the property has been allocated or earmarked for the satisfaction of the claim that is the object of the proceeding (see, eg, UNCSI Articles 18(b) and 19(b). Here the consent is demonstrated by an act (allocation or earmarking) rather than an express statement. An example would be a State setting up a bank account to settle liabilities arising from commercial transactions.

The third and probably the most litigated exception is where the property is in use or intended for use for commercial, non-governmental purposes (see, eg, UNCSI Article 19(c)). The test of the use/intended use is at the time the proceeding for attachment is instituted.

What proof is needed of property in use for commercial purposes? In the *Philippine Embassy* case the German court considered that it would constitute unlawful interference in matters within the exclusive competence of the sending State for any inquiry, beyond obtaining the Ambassador's certificate, to be instituted as to the intended use of funds held in a diplomatic mission's bank account.[87]

[87] *The Philippine Embassy Bank Account* case, German Federal Constitutional Court, 13 December 1977, 46 *BverfGE*, 342; 65 ILR 146, pp 188–91.

Cases can be quite borderline, such as *LR Avionics Technologies Ltd.* v *The Federal Republic of Nigeria*.[88] The Federal Republic of Nigeria was the owner of office premises at 56/57 Fleet Street in London. It granted a lease to a company called Online Integrated Solutions Ltd for the purpose of providing visa and passport services (although other office use is also permitted) in exchange for an annual rent of £150,000. When an Israeli company sought to enforce an award against Nigeria by attaching the Fleet Street property, Nigeria's Acting High Commissioner issued a certificate which stated that the property was "in use … for commercial purposes". The court held that the leasing of foreign-State-owned premises to a third party for the facilitation of passport and visa applications did not fall within "in use … for commercial purposes" under s 13(4) of the SIA.

3. State Property Generally Recognized as Immune

Diplomatic and military property have generally been recognized as categories of State property used for sovereign purposes and consequently have enjoyed immunity from seizure, even when there is a general waiver by the State of its immunity from enforcement. The property of central banks has also been recognized as enjoying special immunity in numerous jurisdictions. UNCSI adds two relatively new categories: property forming part of the cultural heritage of a State or of its archives, and property forming part of an exhibition of objects of scientific, cultural, or historical interest (Articles 21(1)(d) and (e)).[89]

[88] *LR Avionics Technologies Ltd.* v *The Federal Republic of Nigeria* [2016] EWHC 1761 (Comm).

[89] The immune categories may lose their immunity by express consent or specific allocation.

Property of the diplomatic mission

In *The Philippine Embassy* case, immunity was recognized when attachment was sought of the account of the Philippine diplomatic mission in Bonn to satisfy a judgment for unpaid rent of an office. Article 22(3) of the Vienna Convention on Diplomatic Relations states: "[t]he premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution."

Although the bank account of the mission is not expressly mentioned in the Vienna Convention, State practice, confirmed by Article 21(1)(a) of UNCSI which refers to "any bank account", overwhelmingly recognizes that an account of a diplomatic mission held in a bank in the forum State enjoys immunity unless it can be affirmatively shown that the sums deposited have been specifically allocated to meet commercial commitments.

Military property

Ships of war were recognized as immune from local jurisdiction from the eighteenth century or earlier, but the modern category of military property, as defined in UNCSI as "property of a military character or used or intended for use in the performance of military functions" (Article 21(1)(b)), is capable of a wider meaning.[90] The US FSIA adopts a similar definition of property used or intended to be used "in connection with a military activity", which includes not only all types of armaments and their means of delivery but also basic commodities such as food, clothing, and fuel to keep

[90] The UNGA *Ad Hoc* Committee decided in view of the uncertainty of the law to exclude aircraft and space objects by stating in Article 3 that the 2004 UN Convention is without prejudice to the immunities enjoyed by a State under international law with respect to aircraft and space objects owned or operated by a State. This would seem to exclude this type of State property from the category of military property declared immune in Article 19(1)(c).

a fighting force operative.[91] The existence of such an immune category exposes sales of military equipment to a plea of immunity from jurisdiction. Such a possibility would seem to be avoided in English law and come within the SIA s 3 definition of a commercial transaction provided the sale is in ordinary private law form and not pursuant to an agreement between States.

Central bank property

Several jurisdictions take the position that central bank property is assumed to be used for government non-commercial purposes, including the UK, China, Japan, and South Africa. This is also the approach in UNCSI Article 21. Other jurisdictions accept that central bank property is immune in circumstances where it is in fact used for "central banking functions/purposes", and that this immunity is only lifted if the primary or sole purpose for which the property is held is commercial. The US FSIA s 1611(b)(1), for example, extends a priori immunity from execution only to property of a central bank "held for its own account". This is intended and taken to mean that the funds "are used or held in connection with central banking activities, as distinguished from funds used solely to finance the commercial transactions of other entities or of foreign states".[92]

In a case relating to State property held by a private corporation in the name of the State's central bank, the English court construed the term "property of the State" in the SIA to "include all real and personal property and will embrace any right, interest, legal, equitable or contractual in assets that might be held by a State or any 'emanation of the State' or central bank or other monetary

[91] FSIA s 1611(b)(2); Legislative History of the Foreign Sovereign Immunities Act 1976, House Report no 94–1487, 94th Cong, 2nd Sess 12 reproduced in (1976) 15 ILM 1398, 30–1.

[92] *Jurisdiction of United States Courts in Suits Against Foreign States*, H Rep no 94–1487, 94th Cong. reproduced in (1976) 15 ILM 1398, 1414.

authority that comes within sections 13 and 14 of the Act".[93] The growing practice of placing of excess foreign exchange reserves in Sovereign Wealth Funds, often with a declared purpose of "use for future generations", has raised issues relevant to their enjoyment of immunity from enforcement, particularly where invested in equities, derivatives, or short-term commercial assets (Truman, 2007). Such Sovereign Wealth Funds, whether held in the name of the State or its central Bank, currently enjoy, under US, UK, and Chinese legislation and UNCSI, complete immunity from enforcement. Where, however, such a Fund is used for wealth enhancement by "playing the markets", it would seem arguable, at least as regards the fees of brokers, banks, and other third parties which such transactions generate, that for the purposes of attachment these credits in the Fund might be treated as for "commercial purposes" despite the overall long-term intention of the Fund to serve as a reserve for the State and its people.

Cultural heritage of the State

The immunity accorded to the cultural heritage of the State is designed to deter pillage and illegal export of scientific, cultural, or historical treasures (Gattini, 2008). The immunity of property forming part of the cultural heritage of a State is complicated by applicable laws of ownership, State regulation of privately owned national treasures, and claims of individuals to property expropriated in time of armed conflict.[94] Where the presence of

[93] *AIG Capital Partners Inc & Anor* v *Kazakhstan (National Bank of Kazakhstan intervening*) [2005] EWHC 2239 (Comm); [2006] 1 All ER (Comm) 1; [2006] 1 WLR 1420; 129 ILR 589.

[94] The ruling by the US Supreme Court in *Republic of Austria* v *Altmann* 541 US 677 (2004), that there was no limitation on the retroactive operation of the FSIA, renders applicable the restrictive doctrine including the expropriation exception to State immunity in s 1605(a)(3) to such claims for war damage. In that case Austria sought to rely on the rule of absolute immunity in force prior to 1952 as a bar to a claim by the owner of several Klimt paintings confiscated by the Nazis and exhibited by the Austrian national gallery.

cultural objects is restricted to their temporary public exhibition, State practice seems more favourable to conferring immunity. In 2004, the Swiss Ministry of External Affairs declared that cultural property of a State on exhibition was immune and overruled a court order on the application of a creditor of Russia, the Swiss trading company NOGA, for the seizure of paintings from the Moscow's Pushkin Museum on exhibition in Switzerland, and ordered their return to Russia.[95] The US Immunity Seizure Act of 1966 and the UK Tribunals and Courts Act 2007 Part 6 confer protection from seizure or attachment on objects in possession of a foreign State sent for exhibition subject to prior notification of their intended exhibition, though the UK Act does not bar museums in the UK or lenders being subject to proceedings, other than specific restitution, in respect of exhibited works of art.

Property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale

As commentators have observed, this category is likely in practice to overlap with cultural heritage.[96] States often lend items from their national collections to museums or galleries in other States for inclusion in exhibitions, including in those for a fee-paying public.[97] Many States have in place legislation declaring, or permitting the declaration of, cultural exhibits on loan as immune *per se* from post- and pre-judgment measures of constraint in order to encourage such cultural exchanges.[98]

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[95] RSDIE 14 (2004) 674.

[96] Brown and O'Keefe, "Article 21" in Tams and O'Keefe (eds), *The UN Convention on Immunity: Commentary* (OUP 2013).

[97] Ibid.

[98] Ibid, citing 22 USC § 2459 ("Immunity from seizure under judicial process of cultural objects imported for temporary exhibition or display"); Part 6 ("Protection of Cultural Objects on Loan") Tribunals, Courts and Enforcement Act 2007 (UK). Austria, Belgium, France, and Germany have similar legislation. See N. van Woudenberg, "Immunity from Seizure: A Legal Exploration", in S. Pettersson *et al*.

LECTURE 4:

Diplomatic and Consular Immunities[99]

In this lecture I address (1) the purposes of diplomatic and consular relations; (2) the sources of diplomatic and consular law; (3) the diplomatic mission; (4) diplomatic immunities, consular immunities, and special missions immunity. I focus largely on the diplomat rather than the consular official.

1. Appendix A. Purposes of Diplomatic and Consular Relations

Diplomatic relations aim to protect the interests of sending State while consular relations protect the interest of nationals.

A key distinction between diplomatic and consular functions: "whether the function is carried out through contacts with the central government, the ministry of foreign affairs of the receiving State or other central government ministries (diplomatic functions) or through contacts with local authorities such as regional governments, police, prison, or commercial officials (consular functions)."[100]

As regards diplomatic relations, the recognition of a State and the establishment of diplomatic relations *usually* go hand in hand.

(eds), *Encouraging Collections Mobility: A Way Forward for Museums in Europe* (2010), 184, 188 (http://www.lending-for-europe.eu/fileadmin/CM/public/handbook/Encouraging_Collections_Mobility_A4.pdf). See also, generally, N. van Woudenberg, *State Immunity and Cultural Objects on Loan* (The Hague: Martinus Nijhoff, 2011).

[99] This is based in part on my lectures for the UN Audio-Visual Library of International Law.

[100] I. Roberts, "Functions of Diplomatic Missions and Consulates" in I. Roberts (ed), *Satow's Diplomatic Practice* (7th edn, OUP 2016), para 5.23.

An offer to establish relations with a newly formed State constitutes an implied recognition of the State.[101] Similarly, the disappearance of a sovereign State — usually on fusion with another State — is followed by the ending of its separate diplomatic relations with other States as they recognize the new situation (eg, reunification of Germany).[102] There are examples, however, where States have recognized each other without establishing diplomatic relations.[103]

As regards consular relations, these do not require the recognition of a State (or its government) because the consul deals with regional/local authorities, not with the government.[104] For many years before 1973 the United Kingdom maintained a consulate in Hanoi without recognizing North Vietnam as a State.[105] The UK also continued to maintain a consular post in Taiwan after its recognition of the government of the People's Republic of China (in 1950).[106]

2. Appendix B. The Sources of Diplomatic and Consular Law

Unlike many other areas of international law, diplomatic and consular relations have two long-established, widely ratified treaties that are considered to reflect customary international law. This makes the Vienna Convention on Diplomatic Relations 1961 (VCDR) and the Vienna Convention on Consular Relations 1963 (VCCR), the starting point and key reference for these areas of law.

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[101] Ibid, para 5.3; for examples, see Roberts, "Functions of Diplomatic Missions and Consulates", para 5.4.
[102] Other examples given in Roberts, "Functions of Diplomatic Missions and Consulates", para 5.8.
[103] Examples in Roberts, "Functions of Diplomatic Missions and Consulates", para 5.2.
[104] J. Foakes, E. Denza, "The Appointment and Functions of Consuls" in Ivor Roberts (ed), *Satow's Diplomatic Practice* (7th edn, OUP 2016), para 8.7.
[105] Roberts, "Functions of Diplomatic Missions and Consulates", para 5.18.
[106] Foakes, Denza, "The Appointment and Functions of Consuls", para 8.7.

The two treaties were adopted within two years of each other in the early 1960s. The articles were prepared by the International Law Commission, with the aim of codifying the existing practice and rules of customary international law on diplomatic and consular relations. The Conventions also contained progressive developments of the pre-existing law.

According to Article 73 of the VCCR, treaties in force before the convention remain in place, and new bilateral agreements that confirm or supplement, extend or amplify the existing rules can be concluded. There is no equivalent provision in the VCDR.

In addition to these treaties, diplomatic and consular relations are governed by customary international law, general legal principles, bilateral agreements, interaction with domestic law. The preambles to the Conventions expressly provide that "the rules of customary international law should continue to govern questions not expressly regulated by the provisions" of the treaties.

3. Appendix C. The Diplomatic Mission

Diplomatic relations can exist between States without the establishment of a permanent diplomatic mission. A permanent mission will be established when: It is necessary for the conduct of diplomatic functions and the conditions in the receiving State permit its representatives to exercise such functions safely and effectively.[107] A State may also decide it does not require a permanent embassy where it has limited political or commercial interest or where few of its nationals reside.[108]

Other options are available to maintain diplomatic relations,[109] such as diplomatic contacts in the capital of a third State or in the

[107] Roberts, "Functions of Diplomatic Missions and Consulates", para 5.17.
[108] Ibid, para 5.17.
[109] Ibid, para 5.18.

margins of international organizations — in particular the United Nations occasional special missions sent to discuss specific issues of mutual interest; multiple accreditation (governed by Articles 5 and 6 VCDR); protection of the interests of the sending State by a third State which is represented in the receiving State (governed by Article 45(b)-(c) and Article 46 VCDR).

Article 3 VCDR sets out the functions of the mission in a non-exhaustive manner:

1. The functions of a diplomatic mission consist, *inter alia*, in:
    a. Representing the sending State in the receiving State;
    b. Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
    c. Negotiating with the Government of the receiving State;
    d. Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
    e. Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.
2. Nothing in the present Convention shall be construed as preventing the performance of consular functions by a diplomatic mission.

Developing economic relations (Article 3(1)(e) VCDR) refers to the promotion of trade between the two States and with the promotion and protection of direct investment between them. In light of Article 42 VCDR, this activity may not be carried out with the purpose of generating profit.[110]

[110] Ibid, para 5.20.

The diplomatic mission acts on the instructions received from the government of the sending State and on its behalf. [111]

There are limits to functions of diplomatic mission. A State cannot use mission premises "in a manner incompatible with the functions of the mission as laid down in the [VCDR] or by other rules of general international law or by any special agreements in force between the sending and the receiving State" (Article 41(3) VCDR). States must act within the limits permitted by international law (Article 3(1)(b) VCDR). Duties are owed to the receiving State, namely to respect the laws and regulations of the receiving State (Article 41(1) VCDR) and not to interfere in the internal affairs of the receiving State (Article 41(1) VCDR). Practice shows that diplomats have been willing, on occasion, to speak out against human rights violations.[112]

4. Appendix D. Diplomatic Immunities, Consular Immunities and Special Missions Immunity

Diplomats enjoys broad immunities from the jurisdiction of the receiving State (Art. 31 VCDR). At the same time, Art. 41 provides that they have to respect the laws and regulations of the receiving State.

As regards criminal jurisdiction, diplomatic agents are absolutely immune from the criminal jurisdiction of the receiving State (Art. 31 (1) VCDR). They cannot be submitted to "a*ny form of criminal trial or investigation*".[113] The diplomat is immune from any form of law enforcement, like arrest, detention, search. But as the ILC has recognized, "[t]his principle does not exclude either self-

[111] Ibid, para 5.19.
[112] A. Clooney, "Human Rights" in Ivor Roberts (ed), *Satow's Diplomatic Practice* (7th edn, OUP 2016), para 17.99.
[113] *United States Diplomatic and Consular Staff in Tehran (US* v *Iran), Judgment, ICJ Reports 1980,* p 3, para 79.

defence or, in exceptional circumstances, measures to prevent the diplomatic agent from committing crimes or offences".[114]

As regards civil proceedings, there are 3 exceptions (Art. 31(1) (a)–(c) VCDR). First, there is an exception for a real action relating to private immovable property situated in the territory of the receiving State, unless the diplomatic agent holds the property on behalf of the sending State for the purposes of the mission. Denza says it is controversial whether in addition to mission premises, the principal private residence of a diplomatic agent is also outside the scope of the exception.[115] Second, there is an exception for an action relating to succession in which the diplomatic agent is involved as a private person and not on behalf of the sending State. Third, there is an exception for an action relating to a professional or commercial activity exercised in the receiving State outside of the diplomat's functions. This exception does not cover to day-to-day commercial dealings as purchase of goods or the entering into a tenancy agreement, but rather activity engaged in on a continuous basis.[116]

In 2017, an important judgment of the UK Supreme Court opened the door to the application of the commercial exception to provide a remedy to victims of domestic servitude in diplomatic households.[117] A domestic worker from the Philippines sued her employer, a Saudi diplomat in London, before the Employment Tribunal alleging discrimination, excessive working hours, low pay and other charges.

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[114] See *Report of the International Law Commission covering the Work of its Ninth session, 23 April–28 June 1957, Official Records of the General Assembly, Twelfth Session, Supplement No. 9 (A/3623)* UN Doc. A/CN.4/110, p 138; see also *United States Diplomatic and Consular Staff in Tehran (US* v *Iran), Judgment, ICJ Reports 1980,* p 3, para 86.

[115] E. Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (4th edn, OUP 2016) 294.

[116] *Reyes* v *Al-Malki* [2017] UKSC 61, [2019] AC 735, paras 26–38, 51.

[117] *Reyes* v *Al-Malki*.

She claimed that she had entered the United Kingdom with a contract showing that she would be paid £500 per month by Mr Al-Malki, a diplomat at the embassy of Saudi Arabia in London.[118] She obtained her visa at the British Embassy in Manila by producing documents supplied by Mr Al-Malki, including the contract. Ms Reyes stated that she was paid nothing, she was made to work excessive hours, had her passport confiscated, did not have proper accommodation, and was prevented from leaving the house or communicating with others.[119] After two months, she managed to escape. The United Kingdom Visas and Immigration had found that there were reasonable (and later, conclusive) grounds for concluding that Ms Reyes was a victim of human trafficking.[120]

By the time the case came before the UK Supreme Court, Mr Al-Malki had left his diplomatic post. On that basis, the 5 Judges held that under Article 39(2) of the Vienna Convention, the employment and mistreatment of Ms Reyes were not acts performed by Mr Al-Malki "in the exercise of his functions as a member of the mission" and he was therefore not immune.[121]

The Court also commented, *obiter dictum*, on whether Mr Al-Malki would have had immunity if he had been a sitting diplomat in the UK. The Court looked at the two elements of the exception under Art 31(1)(c): "commercial activity" and "outside of official functions".

On "outside of official functions", the five Justices agreed. The domestic duties of Ms Reyes were not considered done for or on behalf of Saudi Arabia. Even if such domestic duties were "conductive" to the performance of his official functions, "that

[118] Ibid, para 1.
[119] Ibid.
[120] *Al-Malki* v *Reyes* [2015] EWCA Civ 32, [2016] 1 WLR 1785, para 1.
[121] *Reyes* v *Al-Malki*, para 45.

could be said of almost anything that made the personal life of a diplomatic agent easier".[122]

The division of views came with the "commercial activity" test. Two of the justices held that if the diplomat would have still been in post, he would have been immune, "because the employment and treatment of Ms Reyes did not amount to carrying on or participating in carrying on a professional or commercial activity".[123]

However, the majority view in the Supreme Court differed. For Lord Wilson (Lady Hale and Lord Clark agreeing), the words "… commercial activity exercised…" must be interpreted "tak[ing] into account any relevant rules of international law applicable in the relations between the parties".[124] In identifying the relevant rules for the case, he referred to "the universality of the international community's determination to combat human trafficking", the ratification of the Palermo Protocol 2000[125] by the UK and Saudi Arabia, the Council of Europe Trafficking Convention (acceded to by the UK) and the Arab Charter on Human Rights (ratified by Saudi Arabia).[126]

More specifically, Lord Wilson referred to the definition of trafficking of the Palermo Protocol, as one that "endeavours to encompass the whole sequence of actions that leads to the exploitation of the victim".[127] He called it a "rational view" to characterise the relevant activity for the purposes of Article 31(1)(c) as "not just the so-called employment but the trafficking".[128] As Lord Wilson observed "in addition to the physical and emotional cruelty

[122] Ibid, para 48.
[123] Ibid, para 51.
[124] Ibid, para 66.
[125] This refers to the "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children", supplementing the United Nations Convention against Transnational Organized Crime.
[126] *Reyes* v *Al-Malki*, para 60.
[127] Ibid, para 61.
[128] Ibid, para 62.

inherent in [the exploitation], the employer's conduct contains a substantial commercial element of obtaining domestic assistance without paying for it properly or at all".[129]

This interpretation of Article 31(1)(c) considers the employer of the migrant as "an integral part of the chain, who knowingly effects the "receipt" of the migrant and supplies the specified purpose, namely that of exploiting the victim, which drives the entire exercise from her recruitment onwards".[130] It includes the trafficking and exploitation of a domestic worker under the commercial exception to diplomatic immunity, allowing victims to overcome one of the key barriers to redress.

In addition to Article 31(1)(c), Article 42 VCDR provides "A diplomatic agent shall not in the receiving State practise for personal profit any professional or commercial activity".

The diplomatic agent is immune from execution except in the cases coming under the exceptions to immunity from civil jurisdiction, provided that execution does not infringe the inviolability of his person or residence (Art. 31(3) VCDR).

As regards the time scale of immunity, the immunity of the diplomat starts from the moment he enters the territory of the receiving State to take up his post or, if he is already within the territory, from the moment of notification of his appointment (Art. 39 (1) VCDR). The immunity ends after his functions end and he leaves the country, or after the "reasonable period" in which to do so expires (Art. 39 (2) VCDR). The Convention does not provide what would constitute a reasonable period, and State practice on this point varies.[131]

[129] Ibid.
[130] Ibid.
[131] *A Local Authority* v *X* [2018] EWHC 874 (Fam), [2019] Fam 313, para 43.

The end of the functions of the diplomatic agent does not affect the immunity for "acts performed … in the exercise of his functions as a member of the mission" (Art. 39 (2) VCDR). This immunity for acts committed on behalf of the sending State, or "official acts", has no time limit.

Articles 33 to 36 VCDR also provide for certain privileges that diplomats enjoy in the receiving State: exemption from social security regulations; from dues and taxes; from personal and public services; from import restrictions, custom duties, and taxes on articles for personal use; and from baggage inspection, unless there are "serious grounds for presuming that it contains articles not [for personal use] or articles, the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State" (Art. 36 (2) VCDR).

Many privileges and immunities extend to family members forming part of the diplomat's household, provided that they are not nationals of the receiving State (Art. 37 (1) VCDR). States generally agree that the rule applies to the spouse and minor children, but otherwise vary in their approach.[132]

Consular immunities include immunity from jurisdiction for "acts performed by a consular officer or a consular employee in the exercise of his functions". As with residual diplomatic immunity for official acts, this is without a time limitation (Art 53(4) VCCR).[133]

A special mission is a temporary mission, representing a State, which is sent by one State to another with the consent of the latter, in order to carry out official engagements on behalf of the sending State.

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[132] *Apex Global Management Ltd* v *Fi Call Ltd* [2013] EWCA Civ 642, [2014] 1 WLR 492, paras 19–23; *Apex Global Management Ltd* v *Fi Call Ltd* [2013] EWHC 587 (Ch), para 76; Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* 320–324.

[133] See further Luke T. Lee, John B. Quigley, *Consular Law and Practice* (3rd ed, 2008).

Sir Michael Wood and Andrew Sanger have explained: "the immunities of the members of special missions are not governed by any widely ratified convention (the Convention on Special Missions has only 38 States Parties) and remain in some respects uncertain under customary international law."[134]

In their view, with which the English Court of Appeal agreed, the rules of customary international law concerning special missions are clear regarding the inviolability of the person and immunity from criminal jurisdiction.[135] The Court also gave a functional justification for finding the existence of this rule: "Special missions have performed the role of *ad hoc* diplomats across the world for generations. They are an essential part of the conduct of international relations: there can be few who have not heard, for instance, of special envoys and shuttle diplomacy. Special missions cannot be expected to perform their role without the functional protection afforded by the core immunities. No state has taken action or adopted a practice inconsistent with the recognition of such immunities. No state has asserted that they do not exist. We do not, therefore, doubt but that an international court would find that there is a rule of customary international law to that effect…"[136]

Beyond this "core immunity", there are uncertainties: the precise scope of missions in respect of which immunity arises (with some States recognising immunity for all missions, regardless of their level and function); and whether and if so how far customary law requires States to grant immunity from civil jurisdiction.

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[134] A. Sanger and Sir M. Wood, "The Immunities of Members of Special Missions" in T. Ruys, N. Angelet and L. Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019) 453; M. Wood, A. Sanger and Council of Europe (eds), *Immunities of Special Missions* (Brill 2019) 7; M. Wood, "The Immunity of Official Visitors" (2012) 16(1) Max Planck UNYB 35.

[135] *R. (on the application of Freedom and Justice Party)* v *Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ 1719, [2019] QB 1075, paras 78–112; *R. (on the application of Freedom and Justice Party)* v *Secretary of State for Foreign and Commonwealth Affairs* [2016] EWHC 2010 (Admin), paras 163–165.

[136] *R. (on the application of Freedom and Justice Party)* v *Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ 1719, [2019] QB 1075, para 79.

LECTURE 5:

Immunity of State Officials from Foreign Criminal Jurisdiction[137]

In this lecture I address the immunity *ratione personae* and *ratione materiae* of State officials from foreign criminal jurisdiction. This topic is related to the ongoing work of the International Law Commission (ILC). Although I focus on immunity from prosecution, I also briefly address recent developments regarding immunity from civil proceedings.

1. Immunity *Ratione Personae*

Under international law, certain holders of high-ranking office in a State enjoy immunity *ratione personae*. While it is agreed that the circle of office holders concerned is narrow, there are different views concerning its scope under existing customary international law (the *lex lata*). Some argue that the circle of officials entitled to immunity *ratione personae* is limited to the Head of State, Head of Government and Minister for Foreign Affairs (sometimes referred to as "the troika"). Others take the view that the circle is wider than the troika, and encompasses other high officials, in particular those whose office and functions require frequent travel abroad.[138]

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[137] This is based in part on my contribution to the AJIL Unbound symposium in 2018: https://www.cambridge.org/core/journals/american-journal-of-international-law/ajil-unbound-by-symposium/the-present-and-future-of-foreign-official-immunity.

[138] As for immunity *ratione personae* before international courts, on 6 May 2019, the Appeals Chamber of the International Criminal Court ("ICC") held that Article 27(2) of the ICC Rome Statute, stipulating that immunities are not a bar to the exercise of jurisdiction, reflects customary international law. It concluded that there is no Head of State immunity under customary international law *vis-à-vis* an international court: *The Prosecutor* v *Omar Hassan Ahmad Al-Bashir, Judgment in the Jordan Referral re Al-Bashir Appeal*, Case No. ICC-02/05–01/09 OA2 (6 May 2019), paras 1, 114.

The most authoritative statement concerning the range of high officials who are entitled to immunity *ratione personae* from criminal proceedings is to be found in the judgments of the ICJ in the *Arrest Warrant* and *Certain Questions of Mutual Assistance in Criminal Matters* cases. In *Arrest Warrant*, the ICJ stated that

> *in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.*[139]

This statement was repeated in *Certain Questions of Mutual Assistance*.[140]

Draft Article 3 of the ILC's current draft articles on *Immunity of State officials from foreign criminal jurisdiction* is entitled "Persons enjoying immunity *ratione personae*", and reads as follows:

> *"Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity* ratione personae *from the exercise of foreign criminal jurisdiction."*

There was significant debate within the ILC regarding this draft article. Differing views were expressed as to which State officials enjoy immunity *ratione personae* under customary international law. In particular, attention was drawn again to the ICJ's pronouncement in the *Arrest Warrant* and *Certain Questions of Mutual Assistance*

[139] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v *Belgium), Judgment, ICJ Reports 2002*, pp. 20–21, para 51 (emphasis added).
[140] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v *France), Judgment, ICJ Reports 2008*, pp 236–237, para 170. In a recent ICJ case, the Applicant (Equatorial Guinea) argued at length that its Vice-President was entitled to personal immunity (he was prosecuted on money-laundering charges in France): see the Chapter 7 of the Memorial available at https://www.icj-cij.org/files/case-related/163/163–20170103-WRI-01–00-EN.pdf. The ICJ found it had no jurisdiction over that part of the case: *Immunities and Criminal Proceedings (Equatorial Guinea* v *France) Preliminary Objections, Judgment,* 6 June 2018.

cases, and to the significant endorsement of this view by States (including by their national courts). Against this background, the ILC Special Rapporteur summarized the debate by stating her understanding that the Commission should approach the matter "from the dual perspective of *lex lata* and *lege ferenda*".[141]

There was also a debate in the UN General Assembly (Sixth Committee) debate in 2014 on draft Article 3. This has been summarized by the UN Secretariat as follows:

> *"Some delegations agreed with the limitation of immunity* ratione personae *to heads of State, heads of Government and ministers for foreign affairs. The possible extension of immunity* ratione personae *to other high-ranking officials was viewed as having no sufficient basis in the practice. It was asserted that such officials were appropriately treated as members of special missions. While acknowledging that only a small circle of high-ranking officials enjoyed immunity* ratione personae*, some other delegations doubted that the limitation as proposed was supported in the practice of States and in the case law. Whether such persons would enjoy immunity* ratione materiae *or immunity deriving from special missions was viewed as not conclusive as to the exclusion of such persons from the draft article. It was pointed out that the extension of immunity* rationae personae *to other high-ranking officials was justified for the same representational and functional reasons given by the Commission for the troika; and any extension could be so as a matter of progressive development of international law."*[142]

[141] *Yearbook of the International Law Commission 2013*, Vol. I, p 41, para 4 (3170th meeting).
[142] Topical summary, (A/CN.4/666), para 23.

2. Immunity *Ratione Materiae*

Immunity *ratione materiae* ("functional immunity" or "official act immunity") applies to all State officials. It applies only to acts performed in an official capacity. It may be subject to certain exceptions, in particular for "crimes under international law" (though this is controversial). It continues to subsist after the person concerned ceases to hold the official position. It may also be waived by the State of the official.

There is an ongoing debate about whether immunity *ratione materiae* enjoyed by State officials is an integral part of State immunity or a discrete immunity that could be enjoyed by individuals in cases where the State has no immunity.[143] There are questions regarding the relationship between attribution of responsibility and the definition of acting in an official capacity, whether the sole ability of the State to waive immunity means that immunity *ratione materiae* is an inseparable element of State immunity, and the extent to which the exceptions to immunity *ratione materiae* track those of restrictive doctrine.

In its *Jurisdictional Immunities* Judgment, the ICJ referred to the possibility of an immunity of a different scope being available to a State official in criminal proceedings in respect of the commission of the same acts as a State:

> the Court must emphasize that it is addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not an issue in the present case.[144]

[143] For a good overview, see J. Foakes, *The Position of Heads of State and Senior Officials in International Law*, pp 8–9.
[144] *Jurisdictional Immunities of the State* (*Germany* v *Italy*: *Greece Intervening*), *Judgment, ICJ Reports 2012*, p 99, para 91.

Other courts have followed and applied the *Jurisdictional Immunities* Judgment in cases concerning the immunities of international organizations[145] and State officials from civil proceedings.[146]

In its work on *Immunity of State officials from foreign criminal jurisdiction*, the ILC has provisionally adopted draft Article 7 which provides that immunity *ratione materiae* shall not apply in respect of genocide, crimes against humanity, war crimes, *apartheid*, torture and enforced disappearance.[147] This was another controversial Article and there were divergences within the ILC (as seen in the plenary debates in 2016 and 2017, the recorded vote on whether to refer the matter to the ILC's drafting committee, and the commentary).[148] A key concern was whether there was sufficient state practice and *opinio juris* in favour of the exceptions in draft Article 7.[149]

3. Recent Developments Regarding State Officials[150]

As regards immunity from criminal proceedings, in *Alex Nain Saab Moràn* v *Republic of Cabo Verde*[151] the Applicant said he was

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[145] *Stichting Mothers of Srebrenica* v *The Netherlands*, App no 65542/12 (ECtHR, 11 June 2013), para 158.

[146] *Jones* v *United Kingdom,* App nos 34356/06 and 40528/06 (ECtHR, 14 January 2014), para 92; *Kazemi Estate* v *Islamic Republic of Iran* 2014 SCC 62.

[147] ILC Report on the work of the sixty-ninth session, UN Doc. A/72/10 (2017), p 177.

[148] For a discussion of the process leading up to adoption of draft Article 7 and its commentary, see Sean D. Murphy, *Crimes against Humanity and Other Topics: The Sixty-Ninth Session of the International Law Commission*, 111 AJIL (2017).

[149] Sean D. Murphy, "Immunity *Ratione Materiae* of State Officials from Foreign Criminal Jurisdiction: Where is the State Practice in Support of Exceptions?" (2018) AJIL Unbound, see https://www.cambridge.org/core/journals/american-journal-of-international-law/article/immunity-ratione-materiae-of-state-officials-from-foreign-criminal-jurisdiction-where-is-the-state-practice-in-support-of-exceptions/3D1ABE7C62EBD475BC45BCFF41A1A23B.

[150] These developments post-date the delivery of the lecture in August 2020.

[151] *Alex Nain Saab Moràn* v *Republic of Cabo Verde* [2021] Court of Justice of the Economic Community of West African States ECW/CCJ/JUD/07/2021.

appointed Special Envoy of the Government of Venezuela. He said he was given a mission of traveling to Iran to purchase food and medicines for Venezuela. Due to obstacles put in place by the United States, he said his mission was kept secret (eg, his name was not on the passenger list of the plane). While in transit through Cabo Verde, he was detained by the authorities for the purpose of extradition to the United States to face criminal proceedings. He challenged his arrest on several grounds including on the ground that he allegedly enjoyed the same personal immunities as the Head of State would have enjoyed, as he was sent on a "special mission". The ECOWAS Court of Justice rejected this argument.[152] The Court separately considered whether there was immunity under Articles 29 and 21 of the VCDR and held that diplomatic agents enjoy immunities and privileges only after accreditation and he could not prove such accreditation.[153] The Applicant also did not meet requirements for a special mission because Cabo Verde had not been informed in advance of his transit.[154]

Immunity from criminal proceeding was also upheld by the French Cour de Cassation in a case seeking to prosecute US officials for torture and other ill-treatment of detainees in Guantanamo Bay.[155] The Cour de Cassation had no difficulty concluding that the alleged acts, even if unlawful, were acts in the exercise of sovereign authority and were therefore immune.[156] However, the German Federal Court of Justice took a different approach, finding an exception to immunity *ratione materiae* for "subordinate State officials" accused of war crimes. In its words: "In addition to the corresponding unanimous State practice, there is a general conviction that, according to international law, national courts may prosecute at least low-ranking officials for war crimes or certain

[152] Ibid, [100].
[153] Ibid, [103].
[154] Ibid, [116].
[155] [2021] Cour de Cassation 20–80.511.
[156] Ibid, [19].

other crimes affecting the international community as a whole, even if one were to assume a general rule of functional immunity for sovereign acts of foreign State officials irrespective of their rank."[157]

As regards immunity from civil proceedings, in the *Ziada* case[158] the Dutch Court of Appeal held that there is no *jus cogens* exception to immunity *ratione materiae* from civil jurisdiction. The defendants held high positions in the Israeli army in 2014, when the Palestinian Applicant's close relatives were killed in a bombing. He sued for damages. The Court upheld immunity, noting that "national and international case law does not support the proposition that an exception to the immunity from jurisdiction of (former) public officials should be made for war crimes or crimes against humanity in civil cases".[159]

It is probably this aspect of immunity — unregulated by treaty — that will be the site of the most dynamic and diverse practice in national and international courts in the coming years.

[157] See https://gpil.jura.uni-bonn.de/2021/07/federal-court-of-justice-rejects-functional-immunity-of-low-ranking-foreign-state-officials-in-the-case-of-war-crimes/.
[158] *Ziada* [2021] Court of Appeal — Court of Justice of the Hague Civil Division 200.278.760/01.
[159] Ibid, [3.8].

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from Foreign Jurisdiction

На английском языке

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