

Legal Analysis of Sovereign Immunity in the Light of Restrictive and Absolute Immunity

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DOI: 10.22034/iruns.2025.428283.1138

Received: 2024-01-21

Accepted: 2024-11-02

Abstract

A significant development in contemporary international law is the paradigm shift from doctrines rooted in absolute principles to norms that are responsive to practical and functional considerations. This evolution is particularly evident in the terminology employed to describe the transition from “absolute” sovereign immunity to a more nuanced framework of “restrictive” immunity. Historically, international law has imposed constraints on the judicial jurisdiction that one state may exercise over another state and its instrumentalities. However, in recent decades, a growing number of states have reconceptualized and substantially curtailed the doctrine of sovereign immunity. This article critically examines the two predominant approaches to sovereign immunity: absolute sovereign immunity and restrictive sovereign immunity. It analyses these frameworks across various domains of civil and criminal jurisdiction. The research advances the argument that the doctrine of absolute immunity should be entirely discarded, as its continued application perpetuates hardship, injustice, and inequality before the law.

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Keywords: Sovereign immunity, Absolute immunity, Restrictive immunity, Criminal jurisdiction, Civil jurisdiction.

I. A Brief Introduction to the Principle of State Immunity

State immunity is a fundamental principle of international law. The preamble to the United Nations Convention on Jurisdictional Immunities of States and Their Property adopted by the General Assembly of the United Nations on 2 December 2004 affirmed that “the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law”¹. In accordance with this principle, with some exceptions, a foreign State enjoys immunity from the jurisdiction of courts of another State.² However, the designation of a state as a sponsor of terrorism complicates this framework. While the 2004 Convention outlines specific exceptions to state immunity—such as for commercial activities and violations of international humanitarian law—it does not directly address scenarios involving state-sponsored terrorism. Increasingly, some jurisdictions have permitted civil suits against such states, reflecting a growing view that accountability for egregious acts should take precedence over traditional notions of immunity. This shift raises critical concerns about the stability of international legal norms.³ Eroding state immunity in response to terrorism sponsorship may enhance accountability but could also provoke reciprocal actions and strain diplomatic relations. Thus, any changes to the doctrine of state immunity must carefully balance the need for justice for victims

¹ United Nations, ‘Jurisdictional Immunities of States and Their Property’ (A/RES/59/38, 2004) 2

² See, for example, United States: Foreign Sovereign Immunities Act of 1976, Art 1604; State Immunity Act of 1978 of the United Kingdom, Part I, 1 (1); European convention on State Immunity of 1972, Art. 15.

³ Nollkaemper, A. (2020) State responsibility and the challenge of terrorism: An analysis of recent developments. *Netherlands International Law Review*, 67(1), 1-24

with the foundational principles of sovereign equality and legal certainty in the international legal system.⁴

Sovereign immunity, encompassing both jurisdictional and enforcement aspects, serves as a legal construct aimed at upholding the sovereignty and dignity of states.⁵ Fundamentally, it establishes that a foreign state cannot be subjected to the judicial authority of another state with respect to its acts or property without its explicit consent.⁶ This principle derives from the widely accepted maxim *par in parem imperium non habet*⁷—the idea that one sovereign cannot exercise authority over an equal. Intrinsic to this doctrine is a significant limitation on the otherwise exclusive jurisdiction a state enjoys within its own territory. In cases involving foreign states, domestic courts are precluded from asserting jurisdiction over acts falling within the sovereign prerogatives of another state unless expressly permitted.⁸

Contemporary applications of sovereign immunity reveal a bifurcation among states into two distinct legal categories. The first comprises states adhering to the traditional doctrine of absolute sovereign immunity, while the second group applies a more nuanced, restrictive approach that limits immunity in specific contexts.

⁴ Cohen A (2023). Rethinking state immunity in the context of terrorism: Implications for international law. *Journal of Conflict and Security Law*, 28(1), 67-89.

⁵ Federal Maritime Commission v. South Carolina State Port Authority (2002) 535 US 743, 122 S.Ct. 1864, 152 L.Ed.2d 962.

⁶ International Law Commission. (2022). Report of the International Law Commission on the work of its seventy-third session (A/77/10, Chapter VII). United Nations.

⁷ An equal has no power over an equal; I Congreso del partido [1983] A.C. 244, 262 (Per Lord Wilberforce).

⁸ Satya Talwar Moulana, “Immunities And Arbitration: A New Lex Specialis Regime” (2021) 22 *German Law Journal* 1555, 1566

II. The Absolute and Restrictive Theory of Sovereign Immunity

The ascendancy of the restrictive doctrine of sovereign immunity in the twentieth century is rooted in nearly two centuries of judicial evolution, extensively documented by legal scholars.⁹ While a detailed examination of this historical trajectory is unnecessary to grasp the doctrine's relevance to transitional human rights litigation, a broad overview suffices to contextualize its implications. As noted by Trooboff, the gradual shift toward a restrictive approach to immunity can be attributed to five key factors: (1) the increasing accountability of governments within their own legal systems; (2) the expansion of international commerce; (3) the weakening justification for granting immunity in matters of commercial activity; (4) the growing practice of states voluntarily waiving immunity in business transactions; and (5) the inequities faced by private parties when states are shielded from judicial processes.¹⁰ In response to these concerns, courts in the United States and the United Kingdom began, as early as the nineteenth century, to draw a distinction between public acts (*jure imperii*) and private or commercial acts (*jure gestionis*), restricting immunity to the former.¹¹ In 1924, Marshall CJ held that “when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character and takes that of a private citizen”.¹² Early judicial decisions in the United Kingdom hint at the nascent development of

⁹ David P. Stewart, ‘The Immunity of State Officials Under the UN Convention on Jurisdictional Immunities of States and Their Property’ (2011) 44 *VJTL*. 1047, 1050.

¹⁰ Peter. D Trooboff, ‘Foreign State Immunity; Emerging Consensus of Principles’ (1986) 200 *Recueil des Course* 235, 266-267.

¹¹ Clive M. Schmitthoff, Frank Wooldridge, ‘The Nineteenth Century Doctrine of Sovereign Immunity and the Importance of the Growth of State Trading’ (1972) 2. *Denv. J. Int'l L. & Pol'y* 199, 199-216.

¹² *United States v. Planters Bank of Georgia* (1824) 22 U. S. 904, at 907.

the restrictive theory of state immunity, as courts began differentiating between the public and private nature of state actions. In 1851, immunity was upheld for actions performed by a foreign sovereign “in his public capacity.”¹³ Similarly, in 1873, Justice Phillimore determined that immunity did not extend to proceedings against a sovereign’s property used in commercial trade, though this ruling was subsequently overturned on appeal.¹⁴

Despite these early indications of a willingness to confine state immunity to public acts and property, the absolute theory dominated common law jurisprudence for nearly a century. Its definitive establishment occurred with *The Parlement Belge*,¹⁵ which is widely regarded as the “first clear formulation of a rule of state immunity in English law,”¹⁶ and was later reaffirmed by Lord Atkin in *The Cristina*.¹⁷ For over fifty years, *The Parlement Belge* served as authoritative precedent for an absolute doctrine of immunity.¹⁸ The Court of Appeal’s ruling—asserting the “exemption of every sovereign from the jurisdiction of every court”¹⁹—relied heavily on Chief Justice Marshall’s reasoning in *The Schooner Exchange v. McFaddon*.²⁰ However, many legal scholars argue that *The Schooner Exchange* was concerned primarily with territorial jurisdiction rather than a universal rule of absolute immunity. Marshall’s decision, in fact, foreshadowed the restrictive theory of immunity by

¹³ *De Haber v Queen of Portugal* (1852) 17 Q. B. 171, at 206.

¹⁴ *The Charkieh* (1873) 28 LTR 513, LR 4 Adm. & Ecc. at 59.

¹⁵ *The Parlement Belge* [1880] 5 PD 197.

¹⁶ Hazel Fox, *The law of state immunity* (3rd edn, Oxford University Press, Oxford 2015) 204.

¹⁷ *The Cristina* [1938] AC 485, 490.

¹⁸ *The Parlement Belge* [1880] 5 PD 197, at 207.

¹⁹ Gamal Badr, *State Immunity: An Analytical and Prognostic View* (Martine Nijhoff, The Hague 1984) 11-14; Peter. D Trooboff, ‘Foreign State Immunity; Emerging Consensus of Principles’ (1986) 200 *Recueil des Course* 235, 296.

²⁰ *The Schooner Exchange v. McFaddon* (1812) 7 Cranch 116.

distinguishing between sovereign public acts (*jure imperii*) and private commercial activities (*jure gestionis*).²¹

This raises the possibility that the development of absolute immunity was influenced by historical misinterpretations. As Trooboff observes, “with the benefits of later developments, we can see today that some of the earlier cases were probably read to stand for propositions that, on analysis, their authors did not necessarily intend.”²² Nevertheless, the absolute doctrine was adopted, embedded within the common law, and followed as binding precedent (*stare decisis*) for nearly a century. However, it is important to note that the doctrine was never entirely absolute. Even during its dominance, courts carved out exceptions that limited the application of immunity in certain circumstances. Given its ambiguous origins and inconsistent application by national courts, it is questionable whether the absolute doctrine of state immunity ever truly constituted a principle of customary international law.²³

Nevertheless, the absolute doctrine was adopted into common law and adhered to as a matter of *stare decisis* for nearly a century. Importantly, despite this strict adherence to immunity, courts recognized certain exceptions where immunity could be set aside, particularly in cases involving commercial activities and tortious acts.²⁴ The 2004 United Nations Convention clarifies this framework by affirming that immunity is the basic principle of state sovereignty, with specific exceptions delineated in Articles 7 and subsequent

²¹ Ibid. at 144.

²² Peter. D Trooboff, ‘Foreign State Immunity; Emerging Consensus of Principles’ (1986) 200 *Recueil des Course* 235, 257.

²³ Crawford J (2021) ‘The creation of customary international law and the role of state practice’ *European Journal of International Law*, 32(2), 397-415

²⁴ Carlo Focarelli, "State Immunity and Serious Violations of Human Rights: Judgment No. 238 of 2014 of the Italian Constitutional Court Seven Years on" (2021) 1.1 *The Italian Review of International and Comparative Law* 29-58, 44

provisions. These articles establish that while immunity is the norm, it can be lifted in particular circumstances, thus reflecting a more nuanced understanding of state responsibility in international relations. Given its uncertain historical origins and the inconsistent application by national courts, it remains questionable whether the absolute doctrine of state immunity ever fully conformed to customary international law, especially when viewed through the lens of the exceptions codified in the 2004 Convention.²⁵ This evolving legal landscape underscores the need for a critical reassessment of state immunity principles in light of contemporary international legal standards.

III. Establishing Limitations on the Absolute Nature of Immunities

In the 19th century, the preeminent status of sovereigns was enshrined in the doctrine of absolute immunity. This doctrine presumed that the sovereign of a state was exempt from the civil and criminal jurisdiction of foreign states.²⁶ The principle extended to diplomatic representatives acting on behalf of the sovereign in host states, as well as to all state organs, irrespective of their functions. This immunity was considered to apply even when such organs engaged in commercial activities.²⁷ However, the 20th century

²⁵ In the *Benkharbouche* Judgement the UK Supreme Court has affirmed, upon a thorough analysis of relevant practice, 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”, see Supreme Court (United Kingdom), *Benkharbouche v. Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62 UKSC 2015/0063; *Secretary of State for Foreign and Commonwealth Affairs v. Janah*, [2017] UKSC 62 UKSC 2015/0067, para. 52

²⁶ Joshua D. Groff, ‘A Proposal for Diplomatic Accountability Using the Jurisdiction of the International Criminal Court: The Decline of an Absolute Sovereign Right’ (2000) 14 *Temp. Int'l & Comp. L.J.* 209, 209-210.

²⁷ David P. Stewart, ‘The Immunity of State Officials Under the UN Convention on Jurisdictional Immunities of States and Their Property’ (2011) 44 *VJTL*. 1047, 1050.

witnessed a significant evolution in this legal doctrine. The rigid framework of absolute immunity gradually gave way to the more restrictive theory, which gained widespread acceptance, particularly in the realm of civil litigation. This shift reflected broader legal and societal changes, emphasizing accountability and the need to balance sovereign privileges with private rights.²⁸

a) Immunity of Civil Jurisdiction

Prior to the 20th century, the actions of sovereigns were predominantly confined to matters of state and rarely extended to commercial or private activities. This clear demarcation between the conduct of private individuals and the acts of states, particularly in the context of commerce, ensured that the doctrine of absolute sovereign immunity posed few practical challenges.²⁹ However, with the expansion of state involvement in trade and commercial enterprises, including the operations of nationalized industries, the distinction between state acts and private acts became increasingly blurred.³⁰ As states engaged in activities that could be classified as private or commercial in nature, the application of absolute immunity appeared increasingly inappropriate³¹ and incompatible with principles of stability, fairness, and equity, particularly in the commercial domain.³²

²⁸ Ibid. See also, *Halbank v US - Amicus Brief in Support of Certiorari* (2021) Supreme Court of The United State, No. 21-1450, 7

²⁹ David P. Stewart, 'The Immunity of State Officials Under the UN Convention on Jurisdictional Immunities of States and Their Property' (2011) 44 *VJTL*. 1047, 1051.

³⁰ Bodansky D (2021) 'The role of state immunity in contemporary international law: Between accountability and protection' *International Journal of Law and Justice*, 49(3), 357-375

³¹ Caitlin McCormick, 'The Commercial Activity Exception to Foreign Sovereign Immunity and the Act of State Doctrine' (1984) 16 *Law & Pol'y Int'l Bus.* 477, 489.

³² R. Higgins, 'Asser Institute Lectures on International Law: Certain Unresolved Aspects of the Law of State Immunity' (1982) *Netherlands International Law Review* Vol 29(2) 265.

Absolute immunity in such contexts also granted state entities an unjust advantage over competing private commercial organizations.³³ In response, many nations adopted a more restrictive approach, treating state agencies engaged in commercial activities in the same manner as private individuals.³⁴ This gave rise to the restrictive doctrine, which necessitated a case-by-case analysis to determine whether a given act was public (*jure imperii*) or private (*jure gestionis*). While the overarching principle that a sovereign state is immune from the judicial processes of another state remained intact, immunity was increasingly limited to acts of governance (*jure imperii*), excluding activities of a commercial nature (*jure gestionis*).

Nevertheless, given the extensive and diverse scope of state actions, the distinction between public and private acts is often ambiguous and open to interpretation. This inherent complexity has led to significant challenges in determining the applicability of sovereign immunity in practice.³⁵

Certain rulings by the Italian courts provide valuable insight into the application of the distinction between *acts jure imperii* and *acts jure gestionis*, a distinction Italy was among the first to formally adopt. In its application, the Italian judiciary has sought to determine whether a given act could only be performed by a subject of public law (the state) or whether it could be undertaken by any private individual.³⁶ A leading case in this context is *French Ministry of Finance v. Banca Italiana di Sconto in Liquidation*,³⁷ where the Court

³³ Ibid.

³⁴ Caitlin McCormick, 'The Commercial Activity Exception to Foreign Sovereign Immunity and the Act of State Doctrine' (1984) 16 *Law & Pol'y Int'l Bus.* 477, 489.

³⁵ Michael Brandon, 'Case against the Restrictive Theory of Sovereign Immunity' (1954) 21 *Ins. Counsel J.* 14.

³⁶ *Russian Trade Delegation in Italy v. Kazmann, Italy, Court of Cassation, Annual Digest 1933-1934*, at 178 (1940).

³⁷ *French Ministry of Finance v. Banca Italian di Saconto in Liquidation, 1932, Annual Digest 1931-1932*, at 136 (1938).

of Cassation ruled that transactions involving public loans secured by the French Government and deposited in an Italian bank were of a private law nature.³⁸ The court determined that these actions fell within the jurisdiction of Italian courts, as they were classified as *jure gestionis*. Conversely, in *Little v. Riccio and Fischer*,³⁹ the Court of Cassation found that the administrator of the British cemetery in Naples performed consular functions, thus exempting the administrator from the jurisdiction of Italian courts. The court emphasized that the cemetery was maintained by the United Kingdom *jure imperii* for the benefit of its nationals, not as a private service for individuals.⁴⁰

These cases highlight the complexities of applying the *jure imperii* and *jure gestionis* distinction in practice, revealing that the line between the two is often not sufficiently clear in international legal proceedings. As such, no definitive generalizations can be made regarding the scope of sovereign immunity based solely on this distinction. A fundamental issue in the application of restrictive immunity lies in the absence of consistent criteria to delineate the appropriate scope of government actions.⁴¹ The classification of a particular transaction is unreliable, as the standards used to assess its nature vary across jurisdictions. Moreover, the terminology used to distinguish between public and private acts is not uniform, often leading to further legal ambiguities.⁴²

It could be argued that the absolute immunity doctrine provides a clearer legal framework, despite its disadvantages to private

³⁸ Ibid.

³⁹ *Little v. Riccio and Fischer*, 1934, *Annual Digest 1933-1934*, at 177 (1940).

⁴⁰ Ibid.

⁴¹ Michael Brandon, 'sovereign Immunity of Government -Owned Corporations and Ships' (1954) 39 *Cornell L. Q.* 425, 435.

⁴² William Fox, 'Competence of Courts in Regard to Non-Sovereign Acts of Foreign States,' (1941) 35 *Am. J. Int'l L.* 632.

individuals in certain circumstances.⁴³ An additional critique of restrictive immunity arises in cases where all commercial activities are deemed to fall under a state's *imperium*. In such situations, distinguishing between actions that only the state can perform and those that private individuals may undertake becomes infeasible. As a result, the distinction between *jure imperii* and *jure gestionis* cannot always be applied effectively.⁴⁴

Furthermore, a significant challenge to the restrictive immunity doctrine is its enforcement. While the doctrine allows for immunity to be waived in cases involving *jure gestionis* acts, its practical value is contingent upon the enforceability of judgments against states. Therefore, a sovereign state does not forfeit its sovereignty merely because it engages in activities that could also be performed by private individuals, highlighting the tension between the need for judicial accountability and the preservation of state sovereignty.⁴⁵

b) Civil Limitation for Criminal Acts

Restrictions on the actions of states and their agents also extend to criminal acts, particularly in cases involving human rights violations. For instance, victims of torture and their families may seek compensation through civil courts when the acts of torture are committed by state agents.⁴⁶ Such actions, although carried out by state representatives, can be considered private acts rather than sovereign acts, and therefore fall outside the protection of sovereign

⁴³ G.G Fitzmaurice, 'State Immunity from Proceedings in Foreign Courts' (1933) 14 *Brit. Y.B. Int'l L.* 101, 123.

⁴⁴ William Fox, 'Competence of Courts in Regard to Non-Sovereign Acts of Foreign States,' (1941) 35 *Am. J. Int'l L.* 632.

⁴⁵ Micheal Brandon, 'Sovereign Immunity of Government -Owned Corporations and Ships' (1954) 39 *Cornell L. Q.* 425. 429.

⁴⁶International Law Commission. (2021). Draft Articles on Crimes Against Humanity (A/74/10, Chapter IV). United Nations

immunity.⁴⁷ These acts are typically classified as *jure gestionis* rather than *jure imperii*. In many jurisdictions, sovereign immunity is restricted in cases where state agents engage in tortious conduct while acting within the scope of their official duties,⁴⁸ especially when such acts result in harm to individuals, or damage or loss to property. These exceptions reflect a growing trend to hold states accountable for violations of international human rights law and civil rights, despite the traditional immunity afforded to state actions.⁴⁹

Following the case of the Supreme Court in *Argentine Republic v. Amerada Hess Shipping Corp*⁵⁰, all actions initiated against a foreign state or its agents are governed by the Foreign Sovereign Immunities Act (FSIA). The Supreme Court emphasized that the FSIA serves as the ‘sole basis for obtaining jurisdiction over a foreign state’. Moreover, the Court noted that ‘immunity is granted in those cases involving alleged violations of international law that do not come within one of the FSIA’s exceptions’.⁵¹ This decision underscores the principle that foreign sovereign immunity is the default rule in U.S. law, with specific exceptions defined by the FSIA, which delineate circumstances under which a foreign state may be subject to U.S. jurisdiction. In a similar case, the UK Court of Appeal in *Al Adsani v. Government of Kuwait*⁵² ruled that the tort exception under the UK State Immunity Act (SIA) could only apply if the tortious act occurred within the United Kingdom. The court’s decision, which aligns with the provisions of the 1978 Act, holds that a foreign state is immune

⁴⁷ Emanuela Piccolo Koskimies (2021) *Norm Contestation, Sovereignty and (Ir)responsibility at the International Criminal Court: Debunking Liberal Anti-Politics* (Springer Nature, Berlin)102.

⁴⁸ State Immunity Act 1978, Art. 4.

⁴⁹ Ibid. Art. 5 Also see, *Letelier v Republic of Chile* (1980) 488 F. SUPP. 655, (1980) 502 f. Supp. 259. 259.

⁵⁰ *Argentine Republic v. Amerada Hess Shipping Corp* (1988) 488 U.S. 428,424,436.

⁵¹ Ibid.

⁵² *Al Adsani v Government of Kuwait* (1996) 107 I.L.R. 536.

from personal injury claims unless the alleged actions took place within the UK.⁵³ This ruling, however, is inconsistent with broader international principles of state immunity, which generally allow for limited exceptions to immunity, particularly in cases of human rights violations or tortious acts committed abroad.⁵⁴

This approach aligns with broader discussions on state immunity within the International Law Commission (ILC), particularly its work on the immunity of state officials from foreign criminal jurisdiction. The ICJ's 2012 judgment in *Germany v. Italy*⁵⁵ further reaffirmed that state immunity is a customary international law principle, holding that a state cannot be sued in the courts of another state for acts *jure imperii*, even if those acts involved grave violations of international law. Article 12 of the 2004 United Nations Convention reflects this balance, confirming that immunity remains the rule, with exceptions like those for commercial activities and specific torts, but carefully delineating the limits to ensure that state immunity remains intact in cases of sovereign functions.

c) Immunity of Criminal Jurisdiction

It is a well-known rule within international law that, although not in an absolute sense, certain state officials are entitled to immunity from criminal prosecution in the court of another state.⁵⁶ This customary rule is based on the fundamental principles of state sovereignty and

⁵³ Ibid. para 66.

⁵⁴ Emanuela Piccolo Koskimies (2021) *Norm Contestation, Sovereignty and (Ir)responsibility at the International Criminal Court: Debunking Liberal Anti-Politics* (Springer Nature, Berlin)102.

⁵⁵ Republic of Italy v. City of New York (2012) 20 N.Y.3d 246

⁵⁶ Chanaka Wikremasinghe, 'Immunities Enjoyed by Officials of States and International Organizations', in M.D. Evans (ed.), *International Law* (Oxford University Press, Oxford 2018) 387.

sovereign equality⁵⁷ and on extensive state practice. The concept of immunity for governmental representatives has its foundation in the doctrine that, by means of their domestic jurisdictions, foreign authorities should not be able to hinder the official performance of those acting for or on behalf of another State.⁵⁸ Naturally, among those holding a status of immunity are Heads of State, whose positions, as constitutional figures, are central to ‘the structure and functioning of the ... State.’⁵⁹

Under international law, Heads of State are generally afforded both functional and personal immunity. Functional immunity (*ratione materiae*) protects state officials from legal accountability for acts performed in their official capacity or in service to the state.⁶⁰ This principle is based on the understanding that actions taken by a state representative are attributable to the state itself, thereby shielding the individual from personal liability. The scope of functional immunity is limited to acts conducted on behalf of the state, meaning that actions carried out by the individual outside of this capacity—either prior to or after holding office, or in a private capacity—are excluded from its protection.⁶¹ Personal immunity (*ratione personae*), on the other hand, provides protection to high-ranking state officials solely due to the position they hold. This immunity allows such officials to perform their duties in the international sphere without interference from

⁵⁷ Malcolm N. Shaw, *International Law* (9th edn., Cambridge University Press, Cambridge 2021) 697.

⁵⁸ Emanuela Piccolo Koskimies, Norm Contestation, Sovereignty and (Ir)responsibility at the International Criminal Court: Debunking Liberal Anti-Politics (Springer Nature, Berlin 2021) 129

⁵⁹ Tams C J (2020) ‘The law of state immunity: Past, present, and future’ In C. J. Tams & J. A. O. von Hase (Eds.), *The Cambridge Handbook of International Law and State Immunity* (Cambridge University Press) 988.

⁶⁰ State Immunity Act 1978, Art. 14.

⁶¹ Dapo Akande, ‘International Law Immunities and the International Criminal Court’, (2004) 93 *AJIL* 3, 413.

foreign jurisdictions.⁶² *A Ratione persona ensures* that foreign states cannot unduly restrict or impair the official's ability to carry out their responsibilities, thereby granting them a form of absolute immunity. However, this immunity is temporally limited to the duration of the official's tenure and applies only while the individual holds the specific office.⁶³

While functional immunity has deep historical roots, the 20th century witnessed a significant shift away from granting absolute functional immunity. This change was largely driven by the atrocities committed during the Second World War, which highlighted the potential abuse of such immunity by state officials.⁶⁴ As a result, it became increasingly accepted that functional immunity should not extend to senior officials implicated in committing international crimes, such as war crimes and crimes against humanity.⁶⁵

The restriction of functional immunity is grounded in two key considerations. First, it aligns with the well-established principle of individual criminal responsibility, particularly in the context of international crimes, which rejects the defense that an official capacity exempts perpetrators from accountability.⁶⁶ Second, this limitation prevents an irreconcilable conflict between the grant of functional immunity for international crimes and the principle of universal jurisdiction over such offenses.⁶⁷ If international law were to accept

⁶² Salvatore Zappalà, 'Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation' (2001) 12 *Eur. J. Int'l L.* 595, 598.

⁶³ Steffen Wirth, 'Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case' (2002) 13 *Eur J Int Law* 877, 885.

⁶⁴ Salvatore Zappalà, 'Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation' (2001) 12 *Eur. J. Int'l L.* 595, 599.

⁶⁵ *Ibid.*

⁶⁶ *In re Goering* (1946) 13 ILR 203, 221.

⁶⁷ Dapo Akande, 'International Law Immunities and the International Criminal Court', (2004) 93 *AJIL* 3, 415; Andrea Bianchi, 'Immunity Versus Human Rights: The Pinochet Case', 10

that conduct performed in an official capacity could never result in individual responsibility, the concept of transnational prosecution for crimes like genocide and torture would be rendered ineffective, thereby undermining the power of universal jurisdiction. Instead, the evolution of this *lex specialis* to the general rule of immunity *ratione materiae* into a customary law principle has been widely accepted. This development has been significantly affirmed in landmark cases, such as the English House of Lords case *Ex Parte Pinochet*,⁶⁸ along with numerous other examples from national case law.⁶⁹ Additionally, it has garnered substantial support within academic circles.⁷⁰ The trend toward limiting functional immunity for international crimes has been even more pronounced at the supranational level. Following the 1945 London Agreement,⁷¹ which established the International Military Tribunal, each subsequent international criminal tribunal⁷² —culminating in the International Criminal Court (ICC)—has included provisions that explicitly remove

EJIL 2 (1999), 237-77, at 261, ‘International law cannot grant immunity from prosecution in relation to acts which the same international law condemns as criminal and as an attack on the interests of the international community as a whole’.

⁶⁸ See among others the statement made by Lord Browne-Wilkinson in *R. v. Bow Street Stipendiary Magistrate and Others, ex parte Pinochet (Amnesty International and Others intervening)* (No. 3) [1999] 2 All E.R. 97 (House of Lords), (hereafter ‘*Ex Parte Pinochet*’) at 111: ‘the first time ... when a local domestic court has refused to afford immunity to a head of state or former head of state on the grounds that there can be no immunity against prosecution for certain international crimes’.

⁶⁹ See among others the judgment in *Attorney-General of the Government of Israel v Eichman* (1961) 36 ILR 5 (District Court Jerusalem); *Fédération Nationale des Déportés et Internes Résistants et Patriotes v Barbie* (1985) 78 ILR 125.

⁷⁰ Malcolm N. Shaw, *International Law* (9th edn., Cambridge University Press, Cambridge 2021) 738.

⁷¹ London Agreement (1945) Art. 7; United Nations, ‘Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (“London Agreement”)’, 8 August 1945, available at: <http://www.unhcr.org/refworld/docid/3ae6b39614.html> [accessed 21 January 2021].

⁷² Charter of International Military Tribunal for the Far East, Art. 6 (although the Art. does not make a specific referral to the position of a Head of State).

the possibility for Heads of State to invoke functional immunity as a defense when charged with violations of international law.

In the context of personal immunity, it is essential to differentiate between proceedings at the national level and the jurisdictional scope of international criminal tribunals. At the national level, personal immunity remains crucial to ensuring the effective functioning of a Head of State within a country's internal affairs and promoting an efficient system of international cooperation. It is generally accepted that this immunity persists even in instances where the official is charged with international crimes.⁷³ The customary status of this principle is supported by a substantial body of domestic case law,⁷⁴ as well as the pivotal *Arrest Warrant* case before the International Court of Justice (ICJ). In that case, which extended Head of State immunity analogously to Ministers of Foreign Affairs, the Court affirmed that it could not identify an exception under customary international law to the general rule of full immunity from criminal jurisdiction and inviolability, even in cases involving allegations of war crimes or crimes against humanity.⁷⁵

However, recognizing that immunity should not equate to impunity, the Court outlined four notable exceptions to the principle of absolute personal immunity. Immunity *ratione personae* would not preclude criminal prosecution in the following situations: (i) within the official's own state, (ii) if the state represented by the official were to waive the immunity, (iii) if

⁷³ United Nations General Assembly. (2021). Sixth Committee Debate on State Immunity, Summary of the Sixth Committee's Discussions. United Nations.

⁷⁴ Qaddafi Cour de Cassation, Arrêt No. 1414 (Mar. 13 2001) 125 ILR 456; Tachione v. Mugabe, 169 F.Supp.2d 259, 296 (S.D.N.Y. 2001); Prosecutor v. Anto Furundzija, Case No. IT-95-17/1-T, 10 December 1998 ('Furundzija Judgment'), at 140, 156; R. v. Bow Street Stipendiary Magistrate and Others, ex parte Pinochet (Amnesty International and Others intervening) (No. 3) [1999] 2 All E.R. 97 (House of Lords), (hereafter 'Ex Parte Pinochet') at 149, 179, 189.

⁷⁵ Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), ICJ Reports 2002, at 3, 58

the official ceases to hold office, and most importantly for the purposes of this discussion, (iv) before certain international criminal courts.⁷⁶

Some scholars argue that the restrictive theory of immunity has been in existence for many years. Pecoraro references the English civil case *Empson v. Smith*,⁷⁷ where it was determined that the loss of immunity due to the termination of a diplomatic appointment, waiver,⁷⁸ or other causes allowed proceedings to be initiated once the inviolability afforded to an officeholder ended.⁷⁹ In another case involving the Chinese Legation in Japan, the defendants were denied diplomatic immunity despite being affiliated with the Legation when they violated local firearms laws. The Japanese Supreme Court ruled that since their diplomatic employment had been terminated before the prosecution, they had forfeited their immunity.⁸⁰ The Court opined that while the individuals could not be tried while employed by the Chinese Legation, upon the termination of their employment, they lost both their personal immunity (*ratione personae*) and the protection afforded by functional immunity (*ratione materiae*), as their acts were not considered official state acts.

From this, it can be inferred that international criminal law has eroded the absolute nature of sovereign and diplomatic immunity, particularly with regard to *ratione materiae* for incumbent state officials. Moving forward, state officials must recognize that international crimes will no longer be viewed as acts of state, and

⁷⁶ Ibid. at 61.

⁷⁷ *Empson v Smith* [1965] 2 ALL ER 881.

⁷⁸ Rome Statute of the International Criminal Court (A/CONF.183/9, 1998) Art. 98.

⁷⁹ Bradley Larschan, 'The Abisinio Affair: A Restrictive Theory of Diplomatic Immunity' (1988) 26 *Colum. J. Transnat'l L.* 283, 286.

⁸⁰ *The Empire v. Chang et al* AD 1919-22, Case No. 205; See, Dapo Akande, Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21 *Eur J Int Law* 815, 847.

immunity from prosecution for such crimes is limited to the duration of their official capacity, grounded in immunity *ratione personae*. Immunity for other official acts, however, will continue to be recognized.

IV. Challenges in Changing the Customary Rule of Immunity for State Officials

The of the customary rule of sovereign immunity for state officials is a complex and evolving transformation issue within contemporary international law. This evolution poses various challenges that must be addressed to reconcile the principle of state sovereignty with the growing demand for accountability in cases of serious human rights violations.

a) The Tension Between Absolute Sovereign Immunity and Human Rights Obligations

Emerging norms challenging the doctrine of absolute immunity have become central to the evolution of international law. This shift reflects a growing movement away from traditional practices where state officials were afforded complete protection from foreign jurisdictions for acts performed in an official capacity. Increasingly, there is a push for accountability in cases of serious human rights violations, questioning whether such crimes should be shielded under the principle of state sovereignty.

Recent developments in international law, including the influence of key treaties and conventions, have driven this shift. For example, the Convention Against Torture obligates states to ensure that acts of torture are prosecuted, regardless of where they occur, asserting that no individual, including state officials, should benefit from immunity in such cases. Similarly, the Rome Statute of the International Criminal Court challenges the idea that official capacity can exempt

individuals from responsibility for crimes like genocide or crimes against humanity, contributing to evolving norms that prioritize accountability over absolute immunity.

On the domestic front, some states have adjusted their legislation to reflect these changes. For instance, Spain's 2009 reform to its Universal Jurisdiction Law and Germany's provisions under the Code of Crimes Against International Law (VStGB) represent moves towards accepting the prosecution of international crimes, even when committed by foreign officials. Conversely, several jurisdictions continue to uphold absolute immunity, particularly in regions where traditional legal principles remain deeply rooted, creating inconsistencies in how sovereign immunity is applied across the international legal landscape.

The European Court of Human Rights has similarly grappled with the tension between state sovereignty and individual rights. In rulings like "Nait-Liman v. Switzerland (2018)," the Court underscored the importance of providing remedies for victims of human rights abuses, even as it recognized the traditional claims of state immunity. This trend, coupled with increasing advocacy from human rights organizations and pressures from international bodies, suggests a movement towards redefining the balance between sovereign immunity and accountability.

Although these trends signal an evolving international norm, establishing a universally accepted legal framework remains a challenge. The integration of restrictive immunity principles into customary international law is still in its early stages, with significant debate over when exceptions should apply, especially for grave human rights violations. The ongoing dialogue in international courts and legislative reforms reflect a global struggle to reconcile the principles of state sovereignty with the demands for justice.

b) Judicial Precedents and the Role of the ICJ

The International Court of Justice (ICJ) has been instrumental in shaping the discourse on sovereign immunity through its rulings. In recent years, several important cases reflect the evolving understanding of sovereign immunity in the context of human rights.

- *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France) (2019)*: The ICJ ruled on issues related to the applicability of sovereign immunity in the context of criminal investigations. The Court reaffirmed the principle that state officials enjoy immunity for official acts, yet also acknowledged the necessity of balancing this immunity with obligations under international human rights law. This case highlighted the importance of ensuring that states cannot invoke sovereign immunity to evade accountability for serious crimes.

- *Al-Adsani v. United Kingdom (2001)*: Although this case was decided by the European Court of Human Rights, it has significant implications for the ICJ's approach to sovereign immunity. The Court held that the UK's refusal to allow a civil claim against a foreign state for torture violated the applicant's right to access a court, illustrating the tension between sovereign immunity and individual rights.

- *Italy v. Germany (Jurisdictional Immunities of the State) (2012)*: In this case, the ICJ emphasized that while sovereign immunity is a fundamental principle, it does not serve as an absolute barrier to accountability. The Court underscored that the protection of human rights must be considered, especially in cases involving serious violations such as war crimes.

c) Inconsistencies in Application Across Jurisdictions

One of the significant challenges in the evolution of sovereign immunity is the inconsistency in its application across various

jurisdictions. While some states have moved toward a restrictive approach to sovereign immunity, others continue to uphold the doctrine of absolute immunity, especially when considering cases involving state officials accused of human rights violations. This divergence creates a fragmented legal landscape, complicating efforts to establish a coherent international standard.

In some regions, such as Western Europe and North America,⁸¹ courts have increasingly adopted a restrictive view on sovereign immunity, particularly in civil cases involving allegations of torture and other grave abuses. For instance, courts in these areas have sometimes permitted claims against foreign states or officials when it can be demonstrated that the acts in question fall outside the scope of official duties, particularly when involving serious human rights violations. These trends reflect a broader shift toward prioritizing justice for victims over the traditional protections afforded by sovereign immunity.

Conversely, many other jurisdictions, including some in Eastern Europe and Latin America,⁸² continue to adhere to a more traditional

⁸¹ In Western Europe and North America, several countries have adopted a more restrictive approach to sovereign immunity, particularly in cases involving serious human rights violations:

Western Europe: Countries such as the United Kingdom and France have seen legal developments where courts allow exceptions to sovereign immunity, especially in civil cases involving allegations of torture or other serious abuses. For example, the UK's State Immunity Act 1978 provides for certain exceptions to immunity in commercial matters, and there have been instances where courts considered limiting immunity for acts involving human rights violations. North America: In the United States, the Foreign Sovereign Immunities Act (FSIA) allows for exceptions to sovereign immunity, including cases related to state-sponsored terrorism or commercial activities. There have been instances where U.S. courts permitted lawsuits against foreign states or officials when the acts in question were deemed to violate international human rights norms, such as torture.

⁸² Eastern Europe: Countries like Russia and Belarus have generally upheld principles of absolute immunity, emphasizing state sovereignty and non-interference. Their legal systems often reflect a cautious approach towards allowing exceptions to immunity, particularly in cases involving foreign states and officials. Latin America: In Brazil and Argentina, while there have been legal developments concerning human rights, sovereign immunity is still largely observed in traditional terms, especially in cases involving foreign governments.

view of absolute immunity. These states often emphasize the importance of state sovereignty and the non-interference principle, arguing that sovereign immunity is a cornerstone of international law that should not be undermined, even in cases of serious international crimes. The preference for absolute immunity in these regions is influenced by legal traditions, concerns over diplomatic relations, and the potential for reciprocal legal actions.

The inconsistency in the application of sovereign immunity is further complicated by the lack of uniform standards at the international level. The absence of a binding international treaty specifically addressing exceptions to sovereign immunity leaves states to interpret customary international law differently. While some states are inclined to integrate evolving human rights norms and international legal obligations into their practices, others remain resistant to changes, fearing that any weakening of immunity could disrupt international relations and lead to retaliatory measures.

Moreover, the ICJ's rulings have not entirely resolved these disparities, as the Court often emphasizes the customary nature of sovereign immunity without offering a comprehensive framework for its exceptions. The *Germany v. Italy (Jurisdictional Immunities of the State)* case, for example, reaffirmed the traditional understanding of immunity while leaving open questions about the potential for future exceptions in cases involving gross human rights violations.

These inconsistencies pose significant challenges for individuals seeking justice for international crimes, as legal outcomes can vary considerably depending on the jurisdiction. This fragmented approach not only undermines the predictability of international law but also the

Courts in these countries may prioritize diplomatic considerations and the principle of non-interference over restrictive approaches to immunity.

principle of equality before the law, potentially allowing perpetrators of serious crimes to evade accountability by exploiting disparities between national legal systems.

Efforts to harmonize the application of sovereign immunity continue, with ongoing discussions in various international forums about the potential for a multilateral treaty to clearly define exceptions for human rights violations. However, achieving consensus remains challenging due to the diverse legal, political, and cultural perspectives on state sovereignty and international law

d) Political Implications and Diplomatic Relations

The political dimensions of sovereign immunity present significant challenges when it comes to holding state officials accountable, especially for serious international crimes. The principle of sovereign immunity is not only a legal doctrine but also a diplomatic tool that affects how states interact with each other. The complexities arise when the pursuit of justice for human rights violations conflicts with the desire to maintain stable diplomatic relations.

One of the key political concerns is the fear of reciprocity and retaliatory legal actions. States may hesitate to prosecute foreign officials due to the risk that their diplomats or officials could face similar legal actions abroad. This concern is particularly pronounced in cases involving high-profile officials or politically sensitive incidents. The potential for retaliatory measures often leads states to adopt a cautious approach, upholding traditional immunity doctrines to avoid diplomatic conflicts.

Additionally, political considerations often influence legal decisions in cases involving foreign officials. Governments may intervene in legal proceedings to protect diplomatic interests or to maintain good relations with other states. For instance, when legal cases involve officials from powerful countries or key allies, there

may be political pressure to dismiss the case or uphold immunity to avoid damaging bilateral relations. This can result in inconsistencies in the application of sovereign immunity, where political priorities overshadow legal principles.

Furthermore, international politics and geopolitical dynamics can shape the way sovereign immunity is applied. For example, states may be more willing to challenge the immunity of officials from countries with which they have strained relations while being more protective when it comes to allies or states with significant economic ties. This selective approach can undermine the credibility of international law, as it suggests that the application of legal principles may be subject to political convenience rather than consistent legal standards.

Efforts to reconcile these political considerations with the need for accountability have led to proposals for enhanced international cooperation and the establishment of multilateral frameworks. Such initiatives aim to create more predictable standards for when immunity should be lifted in cases involving serious crimes. However, these efforts face resistance from states concerned about compromising their sovereignty or setting precedents that could be used against them in the future.

In summary, the political implications of sovereign immunity pose significant barriers to achieving a balanced approach that ensures accountability while respecting state sovereignty. The influence of diplomatic relations and political interests often leads to the uneven application of immunity principles, highlighting the need for a more consistent and principled international framework.

V. The Path Forward: Towards a Balanced Approach

Finding a balanced approach to sovereign immunity requires addressing the tensions between state sovereignty and the imperative for accountability in cases of serious human rights violations. As the international community continues to grapple with these challenges,

several potential pathways can help guide the development of a more coherent and equitable framework.

- **Clarifying the Scope of Immunity through International Legal Instruments:** There is a growing call for the development of an international convention or multilateral treaty that explicitly outlines exceptions to sovereign immunity in cases involving grave human rights abuses. Such a treaty could build on existing international human rights obligations, providing clearer guidance on when immunity should be lifted. This would help to reduce inconsistencies in the application of sovereign immunity across different jurisdictions and ensure that accountability is not undermined by gaps in the legal framework.
- **Strengthening International and Regional Cooperation:** Enhanced cooperation between states, regional organizations, and international bodies such as the United Nations and the International Court of Justice (ICJ) can facilitate the prosecution of serious international crimes. Regional human rights courts, like the European Court of Human Rights or the Inter-American Court of Human Rights, have played pivotal roles in shaping the discourse on sovereign immunity and human rights, influencing national legal systems to consider exceptions in cases of torture, enforced disappearances, and other gross violations. Encouraging similar regional mechanisms in other parts of the world could further promote consistency and accountability.
- **Developing National Legal Reforms to Reflect Evolving International Norms:** National legislation in some countries has already begun to incorporate exceptions to sovereign immunity for international crimes. For instance, laws that

allow civil claims against foreign states for acts such as torture or genocide reflect an evolving understanding of the limits of sovereign immunity. Encouraging more states to adopt similar reforms could help align national practices with emerging international standards.

- **Engaging with Non-Governmental Organizations (NGOs) and Civil Society:** NGOs and civil society organizations have been instrumental in advocating for the rights of victims and pressing for legal reforms to limit the scope of sovereign immunity. Their efforts can help shape public opinion and influence policymakers to support a balanced approach that considers both the rights of victims and the principles of state sovereignty. Involving these groups in discussions about international legal reforms can bring valuable perspectives to the debate.
- **Balancing Diplomatic Interests with the Pursuit of Justice:** While diplomatic concerns often influence the application of sovereign immunity, finding ways to balance these interests with the need for justice is crucial. One possible approach is to establish mechanisms for diplomatic dispute resolution in cases where immunity is contested, allowing for the resolution of sensitive legal issues without escalating political tensions. Additionally, states could consider adopting policies that waive immunity for certain officials accused of international crimes, while still protecting lower-level diplomatic staff from prosecution.
- **Encouraging Judicial Dialogue and Cross-Jurisdictional Learning:** Courts across different jurisdictions can benefit from examining each other's decisions and reasoning on sovereign immunity cases. This judicial dialogue could promote a more

consistent application of international principles and encourage the development of common standards. The ICJ's recent jurisprudence, for example, has begun to reflect a more nuanced approach to balancing immunity with human rights obligations, and further dialogue between courts could help solidify these trends.

By pursuing these pathways, the international community can work towards a more predictable and principled approach to sovereign immunity, one that respects the rights of states while also addressing the legitimate demands for accountability in cases of serious human rights violations.

The evolution of the customary rule of sovereign immunity for state officials reflects broader shifts in international law as it grapples with reconciling traditional principles with contemporary demands for accountability. While absolute immunity was once a well-established norm grounded in respect for state sovereignty, emerging international human rights standards challenge this position, particularly in cases involving grave violations.

The challenges discussed illustrate that the transformation of customary law regarding sovereign immunity is neither linear nor uniform across jurisdictions. Divergent practices among states, influenced by varying legal traditions, political considerations, and regional contexts, underscore the complexity of forging a universally accepted approach. Recent jurisprudence from the International Court of Justice and other judicial bodies indicates an increasing willingness to consider exceptions to immunity, especially when confronted with serious international crimes.

Moving forward, the customary rule of sovereign immunity will likely continue to evolve as states, courts, and international organizations engage in ongoing dialogue. The development of legal

frameworks that balance state sovereignty with obligations under international human rights law is essential to creating a coherent approach that reflects the changing landscape of international norms. The role of customary law, therefore, remains vital in shaping a more adaptable and just legal system, where the boundaries of immunity are continuously reassessed in light of evolving global values.

Conclusion

The doctrine of sovereign immunity has undergone significant transformation, reflecting broader shifts in the landscape of international law. The historical foundation of absolute immunity, which conferred near-universal protection on states and their officials from foreign judicial processes, is increasingly seen as incompatible with contemporary legal principles that prioritize accountability, justice, and the rule of law. The shift toward restrictive immunity, particularly in the 20th century, was necessitated by the growing involvement of states in commercial activities and the corresponding recognition that sovereign immunity should not shield states from legal consequences arising from acts beyond purely governmental functions.

The restrictive approach, which differentiates between acts *jure imperii* (sovereign or public acts) and *jure gestionis* (private or commercial acts), has brought greater alignment with principles of fairness and equity in international law. However, the application of this distinction remains

problematic, as the boundaries between public and private acts are often blurred, leading to inconsistent judicial interpretations and uncertainty in state practice. Additionally, the evolving nature of international human rights law has further challenged the traditional

scope of immunity, with increasing recognition that certain grave violations—such as torture and crimes against humanity—cannot

be shielded by sovereign immunity, even when committed by state officials acting in an official capacity.

The present legal framework, while evolving, lacks a coherent and universally accepted standard for delineating the limits of sovereign immunity, particularly in cases involving serious human rights violations. This inconsistency underscores the need for a more refined legal approach that can reconcile state sovereignty with the imperative for accountability in international law. Moving forward, there must be a concerted effort to develop clearer guidelines, possibly through international treaties or customary international law, that establish well-defined exceptions to immunity. Such efforts should aim to harmonize state practice, reduce legal fragmentation, and ensure that the principles of sovereign equality do not obstruct access to justice.

Ultimately, the international legal community must continue to engage in dialogue to strike an appropriate balance between respecting state sovereignty and advancing the protection of human rights. The progressive development of the law of sovereign immunity must be grounded in a commitment to upholding the rule of law and facilitating the pursuit of justice for victims of state misconduct, while also maintaining the stability and predictability essential for international relations.