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APPRAISAL OF THE CONCEPT OF STATE IMMUNITY IN CONTEMPORARY TIME

By

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Abstract

States are generally not criminally liable for offences committed by them in another states pursuant to the international law concept of state immunity. State immunity is a principle of international law that is often relied upon by states to claim that the particular court or tribunal does not have jurisdiction over it, or to prevent enforcement of an award or judgment against any of its assets. Accordingly, state immunity is usually considered whenever dealing with states or states entities. Derived from the standpoint of sovereign equality, the doctrine of state immunity argues that one state has no right to judge the actions of another by the standard of its national law. The principle of state immunity developed out of customary international law that is based on sovereign equality and principle of non-intervention in the internal affairs of another state, is justified to enable the maintenance of dignity of sovereign and the promotion of international relations.[1]

Keywords: *State Immunity, Contemporary Time*

Introduction

Traditionally, states were granted absolute immunity before the courts of another, as they were projected to enjoy immunity under all circumstances.[2] For many years it was a principle of international law that a foreign sovereign, an expression which includes states, governments and state entities of most kinds was absolutely immune from legal process and that the property of a sovereign or state was absolutely immune from execution or attachment. This rule was restated in 1880 to the effect that "the exemption of the person of every sovereign from adverse suit is admitted to be a part of the law of nations... so also his property. The universal agreement which has made these propositions part of the law of nations has been an implied agreement".[3] However, overtime the global community considered it reasonable to move away from the precept of absolute immunity towards a restrictive immunity allowing for the grant of immunity

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[1] UN Charter, Art. 2 (1)(7); Van Alebeek, *'State Immunity', The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, Oxford Monographs in International Law (Oxford, online edn,2008), < https://academic.oup.com/book/3053/chapter-abstract/143799142?redirectedFrom fulltext > accessed on 29 September 2022

[2] *The Cristina [1938] AC 485, HL.*

[3] Stephan Bird, The State Immunity Act of 1978: An English Update, *International Lawyer*, p. 620

to a foreign state upon the fulfilment of certain conditions.[4] This was predicated on the need to avoid the abuse of the privilege under the guise of state immunity.

This latter position at first did not enjoy overwhelming acceptance. Nonetheless, as the Supreme Court rightly explained in *Benkharbouche*, the principle of absolute immunity was largely founded on an erroneous view of international law, which never warranted immunity extending beyond what sovereigns did in their capacity as such.[5] In other words, the enjoyment of state immunity, especially by officials of foreign states should be determined on the material facts in question as against relying only on the office of the official in question.[6]

Procedurally, state immunity could be argued in two ways to *wit*; state immunity is usually applied to prevent a court vested with jurisdiction from hearing a case against a state, where it has the power to do so. This is referred to as immunity from jurisdiction or immunity from adjudication.[7] Secondly, a state's claim to immunity may arise at the moment of the enforcement of a judgment of the court or tribunal against a state. In other words, issue of immunity could be raised to oust the jurisdiction of the court to determine matters involving the state and in another respect to stop the enforcement of judgment arising from a proceeding affecting the state.[8] A successful plead of state immunity will mean that either the courts will refuse to hear the dispute on ground of lack of jurisdiction or they will be unable to give effect to any judgment or ward made against the state.

Notwithstanding the fact that the restrictive approach to state immunity has been widely accepted, the immunity of states and its officials from prosecution in foreign countries continues to be an unsettled area of international law, especially as the scope of the recognised exceptions varies from state to state.[9] This is more so as state immunity can apply to not only states and governments but also to separate entities including *prima facie* private establishments acting in the exercise of sovereign authority.

Under the UK State Immunities Act (SIA), 1978 the phrase Separate Entity is defined as any entity, which is distinct from the executive organs of the government of the state and is capable of suing or being sued. Separate entities are not as of right entitled to claim immunity unless the proceedings relate to anything done by the separate entity in the exercise of sovereign authority. For example, if entitles such as state owned banks, airlines or shipping lines act in

[4] Hazel Fox QC, T*he Law of State Immunity* (The Oxford International Law Library, 2002) 2
[5] Benkharbouche v. Secretary of State for Foreign and Commonwealth Affairs; Secretary of State for Foreign and Commonwealth Affairs and Libya v. Janah [2017] UKSC 62, per Lord Sumption at [52]. Contra The Philippine Admiral [1977] AC 373 and Trendtex v. Central Bank of Nigeria [1977] QB 529, per Lord Denning.
[6] *Trendtex Trading Corp. v. Central Bank of Nigeria, supra* became the first case involving a Nigeria corporation where the doctrine of restrictive immunity was upheld. cf, UK's Court of Appeal decision in Thai-Europe Tapioca Services Limited v. Government of Pakistan [1975] 1 W.L.R. 1485, [19751 3 All E.R. 961.
[7] Lorna McGregor, *Immunity V. Accountability: Considering the Relationship between State Immunity and Accountability for Torture and other Serious International Crimes, (*The Redress Trust, London, 2005) 9
[8] Ibid.
[9] *Krajina v. The TASS Agency [19491 2 All E.R. 274.*

the exercise of sovereign authority, they would enjoy the immunity of the state against prosecution in foreign countries.[10]

Under international law, the state, its entities and representatives are granted a certain level of privileges and immunities that are clearly intended to benefit the state.[11] The rationale being that the doctrine of state immunity is significantly connected to the principle of *par in parem non habet jurisdictionem* which connote that no state's courts may exercise jurisdiction over a foreign sovereign because equals have no sovereignty over each other"[12]. Thus, no state could be put on trial in another country without its consent.[13] More importantly, functional immunity covers a narrower scope of acts than personal immunity, but potentially covers the official acts of all state officials. State immunity restates the principle that a state as a separate conceptual entity from the personal sovereign shall not be subject to the jurisdiction of a foreign state.

Although the immunities of state officials and state immunity are different in terms of the nomenclature of the parties before the court, the legal development of both areas has been made in parallel. This is so because actions against a state official acting on behalf of a state impleads the state e*rgo*, hence, the scopes and rationales of the two categories are accordingly similar.[14] Additionally, as the concept of immunity *ratione materiae* concerns the immunity granted to organs of the state in the discharge of official functions. Such immunity is determined by reference to the nature of the acts. Furthermore, certain persons also enjoy procedural privileges in court proceedings, particularly concerning service of process. Undoubtedly, the expansion of state immunity to Separate Entities has compounded an appropriate understanding of the scope of persons entitled to activate state immunity.

The Emergence of Principle of State Immunity

The doctrine of state immunity was not simply conceived overnight but was rather gradually developed over a long period by municipal courts. Simply put, the concept became law specifically through reliance of the works of authors, customary international law practices, rules of morality and self-respect as well as judicial activisms.[15] State immunity is a rule of customary international law that has evolved primarily through the gradual accumulation of state practice in the form of domestic court decisions and domestic legislation.[16] As observed by scholars the rule of state immunity reflects remnants of the majestic dignity that once attached to King and Prince as well as remnants of the idea of the incarnation of the state in its

[10] Baccus S.R.L. v. Servicio National del Trigo [1951]1 Q.B. 438
[11] UN Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004), Article 2(1)(b)(iv) defines "State" to include "representatives of the State acting in that capacity. Contra, Sections 1, 14(1) and 20(1)(a), Part III., c of UK State Immunity Act, 1978.
[12] Caplan M, "State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory" (2003)(97)(4) The American Journal on International Law, Cambridge University Press 743
[13] Ibid.
[14] Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), Judgment, I.C.J. Reports 2002
[15] Alina K, Public International law, (5th edn, Routledge Taylor & Francis group, London, 2010)
[16] Whytock C. A, "*Foreign State Immunity and the Right to Court Access*" (Boston University Law Review, 2013) 93

ruler.[17] The concept therefore developed from the personal immunity of sovereign heads of state, which precludes the institution of a suit against the sovereign (government) without its consent.[18]

Internationally, state immunity reflects the English common law that the "King can do no wrong"[19] and that there can be no legal right as against the authority that makes the law because all sovereigns were considered equal and independent.[20] It was a rare exception for a sovereign to exercise authority over another.[21] This was expressed in the latin maxim: "*par in parem non habet imperium"* (an equal has no authority over an equal).[22] However, in the *Schooner Exchange case*,[23] the court considered whether France being a sovereign country could be impleaded or sued in her own name in a foreign court, that is, the U.S. courts. It was held based on absolute or classical doctrine of sovereign immunity that France could arrest ship or possibly resist if the need be for an execution against her property.[24] Chief Marshall who was greatly influenced by naturalist's views and writings on state sovereignty stated that the principle of equality of states is grounded on natural law, the state of nature and natural equality.[25] In the *Schooner Exchange's* case, Chief Marshall delivered the opinion of the court as follows: "a nation would justly be considered as violating its faith, although that faith might not be expressly plighted, that should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him."[26] Clearly by the judgment the sovereign had a representative character, and actions taken on behalf of the sovereign and in the name of the sovereign were capable of attracting the same immunities. This enhanced the

[17] Alebeek V.R, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford: Oxford University Press, 2008) 180
[18] Umozurike U O, *International Law* (3rd, Spectrum Books Limited, 2005) 90
[19] Farooq, S and Yousufi, M, The Application of Legal Maxim "King Can Do No Wrong" In the Constitutional Law of UK & USA: An Analytical Study. Global Legal Studies Review, V(II), 2020 https://www.researchgate.net/publication/346164224_The_Application_of_Legal_Maxim_King_Can_Do_No_Wrong_In_the_Constitutional_Law_of_UK_USA_An_Analytical_Study> accessed on 3 November, 2022
[20] Stephen Bird, The State Immunity Act of 1978: An English Update.
[21] Hillier T, *Sourcebook on Public International Law* (Cavendish Publishing, London,1998) 288.
[22] Bornkamm P C, *State Immunity Against Claims Arising from War Crimes: The Judgment of the International Court of Justice in Jurisdictional Immunities of the State* (2012) 773 at 779
[23] *Schooner Exchange v. McFaddon* 11 US 7 Cranch (18 12).
[24] Alina K, *Public International Law*, 5th edn (Routledge Taylor&Francis group, London, 2010)
[25] Emmerich V, *The Law of Nations or The Principles of Natural Law, Book IV*, (VII) (Lonang Institute, 1758) 449
[26] cf, Article 1, Section 8, Clause 10; *The Schooner Exchange v. McFaddon*, 7 Cranch 116, 1812

contemporary rule of state immunity as a derivative of the sovereign equality of states. In international law, the basic rule is that all sovereign states (bigger and smaller, mightier and weaker) are legally equal, and none is supreme over the other.[27]

Diplock, L.J agreed with this submission when he held in the English Court of Appeal in *Buck v Attorney-General*[28] that "The only subject-matter of this appeal is an issue as to the validity of a law of a foreign independent sovereign state. As a member of the family of nations, the government of the United Kingdom observes the rules of comity, the accepted rules of mutual conduct as between state and state which each state adopts in relation to other states and expects other states to adopt in relation to itself. One of those rules is that it does not purport to exercise jurisdiction over the internal affairs of any other independent state, or to apply measures of coercion to it or its property, except in accordance with the rules of public international law. One of the commonest applications of this rule is the well-known doctrine of sovereign immunity.[29] This statement further confirm the notion that the emergence of the concept of sovereign immunity is predicated on the non-interference theory, principle of equality of states and state sovereignty under international law.

Furthermore, the doctrine of state immunity over the years have stirred a conflict between two international law norms, namely, sovereign equality of states versus state's exclusive territorial jurisdiction. Sompong Sucharitkut confirms this much when he argued that a contact between two states might result in a clash between two fundamental principles of international law, namely, the principle of territoriality or territorial sovereignty, and, the principle of state or national sovereignty. Normally the principles of territorial jurisdiction and sovereign equality work individually and often collectively to promote order and fairness in the international legal system. The former serves to delineate each state's authority to govern a single geographical area of the world, while the later guarantees to all states, regardless of size, power or wealth, equal capacity for rights under international law.[30]

This conflict arises anytime a forum state seeks legitimately to exercise its right of jurisdiction under international law over a foreign state defendant, regardless of the physical location of the foreign states representatives. For instance, where a plaintiff sues a foreign state in domestic proceedings for alleged human rights abuses that occurred outside the forum state.[31]

Furthermore, there was the uncertainty of the application of immunity to individuals acting on behalf of their states, since most of the legal regimes including the UK's SIA made no express provision to that effect. As Lord Lloyd-Jones[32] rightly argued, state can only function through

[27] Article 2(1) UN Charter, 1945
[28] *Buck v. Attorney-General* (1971) International Law Reports, *42*, 11-26
[29] Ibid.
[30] Sucharitkul S, *Immunities of Foreign States Before National Authorities*, 149 HR 87, 1976 117-119
[31] Okosa C, "*The Limits of Sovereignty and Diplomatic Immunity, The Constitution*. (Vol. 4, No. I, March 2004)89
[32] Lord Lloyd-Jones, 'Forty Years On: State Immunity and the State Immunity Act 19781 British Institute of International and Comparative Law Grotius Lecture, Goodenough College, London 18 October 2018.

individual officials. Moreover, since a State can act only through individuals, if state immunity does not extend to protect officials acting in an official capacity immunity could easily be circumvented by simply bringing an action against the individual actor. If such proceedings were permitted in circumstances where the state itself would be immune if sued, the reality is that in most cases, the state would have to stand behind its servant or agent and its immunity would be defeated.

Forms of State Immunity

There are basically two forms of state immunity to *wit*, immunity from jurisdiction and immunity from enforcement (execution).

i. Immunity from Jurisdiction

Jurisdiction concerns the power of the state under international law to regulate or otherwise impact upon people, property and circumstances and reflects the basic principles of state sovereignty, equality of states and non-interference in domestic affairs.[33] The principle of immunity from jurisdiction asserts that in particular situations a court is prevented from exercising jurisdiction over a foreign State. State immunity from jurisdiction can also be linked to the prohibition in international law on one state interfering in the internal affairs of another.[34]

Notwithstanding, under international law the state's engagement in sovereign and commercial activities determines if the rule of immunity to jurisdiction would be maintained.[35] With regard to commercial activities involving states or its entities, the state may not invoke its immunity from jurisdiction to avoid arbitral proceedings but in the exercise of state sovereignty, the state can invoke its immunity from jurisdiction. A state's agreement to submit a dispute to arbitration means its immunity from jurisdiction is automatically waived. This implicit waiver of immunity from jurisdiction is widely recognized under international and domestic law.

The US Foreign Sovereign Immunities Act 1976, like the UK's State Immunity Act, 1978 is silent on the applicability of state immunity to foreign officials. Section 1603(a) provides that a foreign State include a political subdivision of a foreign State or an agency or instrumentality of a foreign State. It has thus been argued that in the US courts, proceedings that do not fit into one of the US FSIA limited exceptions must be rejected on the ground of immunity from jurisdiction.[36] In particular, the US Supreme Court has stated "immunity is granted in those

[33] Malcom S, International Law, (Cambridge, 6th edn, New York, 2008) 645
[34] Akande D and Sangeeta S, Immunities of State Officials, International Crimes, and Foreign Domestic Courts, European Journal of International Law, Volume 21, Issue 4, November 2010) https://academic.oup.com/ejil/article/21/4/815/418198> accessed on 5th November 2022
[35] Bouchez, L, The Nature and Scope of State Immunity from Jurisdiction and Execution. Netherlands Yearbook of International Law, (10, 1979) Accessed online <ww.cambridge.org/core/journals/netherlands-yearbook-of-international-law/article/abs/nature-and-scope-of-state-immunity-from-jurisdiction-and-execution> 5th February 2023.
[36] *Price v. Socialist People's Libyan Arab Jamahiriya* 294 F.3d 82.

cases involving violations of international law that do not come within one of the FSIA's exceptions."[37]

Whereas under the UK State Immunity Act, a "State" is immune from the jurisdiction of the courts of the United Kingdom, unless one of the specific, express exceptions to immunity applies. These exceptions as we shall discuss hereinafter include submission to jurisdiction, commercial transactions and contracts to be performed in the UK. Proceedings relating to certain contracts of employment, personal injury or damage to or loss of tangible property, ownership, possession and use of property, and intellectual property rights. Also in proceedings relating to an arbitration to which a State has submitted to jurisdiction and ships used for commercial purposes and their cargoes taxation,[38] the state is completely immunes from all civil proceedings in domestic courts unless there is a violation of the basic exceptions provided by laws of state immunity. Simply put, the US Foreign Sovereign Immunities Act codifies the doctrine of sovereign immunity and provide that a foreign state (including a political subdivision, agency, or instrumentality of the foreign state) is presumed immune from the jurisdiction of US courts and may not be forced to submit to the jurisdiction of those courts. There are however exceptions to the activation of the immunity principle.

Specifically, 28 U.S.C 1605 now provides that a foreign state shall not be immune from the jurisdiction of courts of the US or of the states in any case in which:

i. 1605(a)1 – there is explicit or implicit waiver of immunity by the foreign state
ii. 1605(a)(2) – commercial activity carried on in the US or an act performed in the US in connection with a commercial activity elsewhere, or an act in connection with a commercial activity of a foreign state elsewhere that causes a direct effect in the US
iii. 1605(a)(3) – property taken in violation of international law is at issue
iv. 1605 (a)(4) – rights in property in the US acquired by succession or gift or rights in immovable property situated in the US are at issue
v. 1605(a)(5) – suits where money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the US and caused by the tortious act or omission of that foreign state
vi. 1605(a)(6) - action brought to enforce an agreement made by the foreign state or for the benefit of a private party to submit to arbitration
vii. 1605(A)(a)(1) – suits where money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing , aircraft sabotage, hostage taking, or the provision of material support or resources

[37] *Argentine Rep. v. Amerada Hess*, 488 U.S. 428 (1989).
[38] Part 1, Article 3-11, State Immunity Act 1978.

for such an act, if the foreign state is designated as a state sponsor of terrorism under relevant US laws, and

viii. 1605(b) – a suit in admiralty brought to enforce a maritime lien against a vessel or cargo of the foreign state which maritime lien is based upon a commercial activity of the foreign state.[39]

The UK SIA also provide for exemptions against immunity in similar circumstances as the FSIA including commercial transactions such as contracts for the supply of goods and services, financing transactions, indemnities etc; commercial transactions to be performed in the UK and agreement to submit to arbitration in or outside UK. Although the list in the United Kingdom statute seems longer, some of the exceptions are really only subdivisions of commercial transactions, and the only significant difference between the two countries is the special treatment afforded state-owned ships by the United States statute.[40]

In *Germany vs. Italy (Greece Intervening),*[41] Italian civilians brought a number of civil claims in various courts against the German government for the atrocities committed in the latter stages of World War II, including the imprisonment, forced labour, and murder of civilians. The Italian courts ruled in favour of the Italian civilians. Germany filed an application with the International Criminal Court of Justice, seeking to have the judgments set aside on account of the German government's jurisdictional immunity. Italy, as defendant as the ICJ argued that the *jus cogens* rules against the imprisonment, forced labour, and murder of civilians conflicted with the customary international law of immunity. As a result, Italy argued that the *jus cogens* status of the prohibitions must override the law of immunity. The ICJ held that the action of the Italian courts in denying Germany immunity constituted a breach of Italy's international obligations. Furthermore, the court held that the measure of constraint taken against Germany's Villa Vigoni property situates in Italy amounted to a breach of Germany's immunity to the property because the facts indicated that the property were used for governmental purposes that were entirely non-commercial, and that Germany had in no way consented to the registration of the legal charge in question.

In *Al-Adsani v. United Kingdom*[42] Mr. Al-Adsani claimed that State officials in Kuwait had tortured him. He tried to sue the Government of Kuwait in the English courts but the State Immunity Act barred his claim. He then brought proceedings against the United Kingdom before the European Court of Human Rights alleging, *inter alia*, a violation of his right of access to the courts under Article 6 ECHR. The United Kingdom maintained that international law required the grant of immunity and that there was no violation of Article 6. A Grand

[39] *Germany vs. Italy, (Greece intervening),* 2012 I.C.J. 99 decided 3rd February 2012.
[40] Stephen Bird, supra at p. 628. It is important to note that commercial transactions as referred to in the US law must relate to a transaction in US.
[41] *Op cit.*
[42] (2002) 34 E.H.R.R. 11.

Chamber of the European Court of Human Rights comprising 17 judges heard the case. The Court in a split judgment of nine against eight held in favour of the UK upholding the state immunity.[43]

The point made from the above decisions amongst others is that the debate as to the overriding status of *jus cogens* rules over the customary international rule of state immunity is unsustainable. Whereas it is desirable that states be punished for act of torture committed by them, elevating such offences to a *jus cogens* requiring no derogation does not *ipso facto* negate the principle of international law on state immunity. However flagrant or heinous the alleged breach of international law by a State may be, it does not necessarily follow that the courts of other States acquire jurisdiction to investigate or rule on that alleged infringement. The rule of state immunity is not a derogation from the prohibition of torture. It does not authorise torture or absolve its perpetrators from liability. As the International Court of Justice observed in the *Arrest Warrant's case*,[44] the immunity from jurisdiction enjoyed by an individual does not mean that he enjoys impunity in respect of the crimes he has committed.[45]

ii. Immunity from Enforcement or Execution

Article 19 of the UN Convention on Jurisdictional Immunities provides that no post-judgment measures of constraint, such as attachment, arrest, or execution, against the property of a state may be taken in connection with a proceeding before a court of another state unless, and except to the extent that, the state has expressly consented to the taking of such measures as indicated by international agreement; 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.[46] Where the state has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding, or where it has been established that the property is specifically in use or intended for use by the state for other than government non-commercial purposes and is in the territory of the state of the forum; provided that post-judgment measures of constraint may only be taken against the property.[47]

Immunity from enforcement entails that a state could not be sued and its assets could not be used for enforcement of judgments, without its explicit consent. Conversely, a state's claim to immunity from enforcement (execution) is different from immunity from jurisdiction; it revolves around the question of the actual seizure of assets connected to a foreign state.[48]

[43] cf, *The Philippine Admiral*, [19771 A.C. 373, 401-403.
[44] Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (Judgment) [2002] ICJ Rep 2002 at [60].
[45] See Lord Lloyd-Jones, supra (n27).
[46] Article 19, United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004
[47] ibid.
[48] Malcom S, *International Law*, (Cambridge, 6th edn, New York, 2008)744

Immunity from execution protects the property of a State from being used to satisfy the debts of that state to third parties.

In *First National City Bank v. Banco Para El Comercio Exterior de Cuba*,[49] the court held that there would be no immunity concerning property taken in violation of international law. Because of the growing acceptance of the restrictive theory of state immunity, the state is not liable to claim immunity for properties used for commercial purposes. This does not apply to a state's central bank or other monetary authority. In the *Philippine Embassy case*,[50] the court confirmed that claims against a general current bank account of the embassy of a foreign state which exists in the state of the forum and the purpose of which is to cover the embassy's costs and expenses are not subject to forced execution by the state of the forum.

In *Banamar v. Embassy of the Democratic and Popular Republic of Algeria*,[51] the Italian Court confirmed the rule that customary international law forbids measures of execution against the property of foreign states located in the territory of the state seeking to exercise jurisdiction and used for sovereign purposes. The court lacked jurisdiction to enforce a judgment against a foreign state by ordering execution against bank accounts standing in the name of that state's embassy.

A state can however waive its immunity from execution by an international agreement, written contract, or by a declaration before the competent authority of another state handling such proceeding. However, domestic laws usually provide that the terms of a waiver have to be express and indisputable.

State Immunity in Civil Proceedings

Civil jurisdiction may be exercised on individuals connected to a State. This is because of the idea that the institution of a civil suit against a state representative who is acting in that capacity constitutes institution of a suit against the state.[52] Accordingly, consideration of the nature of a suit by the court amounts to exercise of civil jurisdiction over a State.[53] According to the restrictive doctrine of immunity, the state is made subject to municipal law when it acts as a private person under international law.[54]

This distinction between *acta de jure imperii*,[55] acts in exercise of the public or sovereign powers of a state, and *acta de jure gestionis*[56] acts performed as a private person or trader, is crucial to the present law of state immunity. The distinction help in determining whether a state

[49] *First National City Bank, Petitioner V. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611
[50] *Philippine Embassy Bank Account Case*. (1984). ILR, *65*, 192.
[51] *Banamar-Capizzi v. Embassy of the Popular Democratic Republic of Algeria* (1992)(56) *International Law Report, 87*
[52] Philippa W, United Nations Convention on Jurisdictional Immunities of States and Their Property,(King's College London,2017) https://legal.un.org/avl/ha/cjistp/cjistp.html accessed on 15th November 2022
[53] Fox H and Webb P, Law of State Immunity, (Oxford University Press, 3rd edn, New York,2013)
[54] ibid.
[55] Acts of a sovereign nature and are subject to immunity.
[56] Commercial acts in respect of which the state is not immune but is subject to the jurisdiction of the territorial sovereign.

is entitled to immunity from the jurisdiction of another State's courts in respect of a particular act.[57] In *Prefecture of Voiotia v Federal Republic of Germany*,[58] for the first time, a Supreme Court of a State, in the context of civil proceedings, removed immunity in respect of *acta jure imperii,* which were in breach of *jus cogens*. In this case, the Greek Supreme Court gave a judgment in which it decided that Germany could not rely on state immunity in respect of *acts jure imperii* in breach of *jus cogens*. In other words, state immunity is usually waived in civil proceedings when the nature of the action committed falls under one of the exceptions provided in the state immunity legislation. These primary exceptions that constitute civil proceedings are usually considered as non-sovereign acts under international law which includes commercial transactions, proceedings out of employment contracts, ownership of properties, and non-commercial torts.

State Claim's in Criminal Proceedings

States do not bear criminal responsibility under customary international law; however, criminal jurisdiction is exercised over individuals rather than the state. Lord Bingham stated in *Jones v. Ministry of Interior*[59] that "a state is not criminally responsible in international or English law, and thus cannot be directly impleaded in criminal prosecution." According to Fox, the justification for this narrative is based on states' immunity from jurisdiction: "The exercise of criminal jurisdiction directly over another state violates international law's requirements of equality and non-intervention."[60] Applying domestic public law with penalties to another country violates international law in two ways. It seeks to subject another state to penal codes based on moral guilt, as well as seeks to use its criminal law to regulate another's economy.

However, this situation is distinct for state officials and other people operating on behalf of the state since the exercise of criminal jurisdiction against a state official has an impact on the state that official represents, whether directly or indirectly.[61] This is especially evident when high-ranking government officials are being criminally prosecuted, particularly the head of state or government, the foreign minister, or other officials who represent their country abroad and/or carry out crucial duties for the country in order to maintain its sovereignty and security.[62] They do not have personal immunity, with the exception of serving heads of State and other senior ministers of State. If a foreign state intervenes to assert its immunity, servants or agents of that state may benefit from its immunity for criminal proceedings involving official acts, subject to

[57] Clifford C, State Immunity and State-Owned Enterprises, 2008, 4 < https://media.business-humanrights.org/media/documents/files/media/bhr/files/Clifford-Chance-State-immunity-state-owned-enterprises-Dec-2008.PDF> accessed on 5th November 2022
[58] Gavouneli, M., & Bantekas, I, *Prefecture of Voiotia v. Federal Republic of Germany*. (2001) *(95)*(1), Case No. 11/2000. *The American Journal of International Law*.
[59] *Jones v Ministry of Interior of Kingdom of Saudi Arabia* [2006] 2 WLR 1424.
[60] Fox H and Webb P, Law of State Immunity, (Oxford University Press, 3rd edn, New York,2013) 505
[61] Akande D, Sangeeta S, Immunities of State Officials, International Crimes, and Foreign Domestic Courts, European Journal of International Law, (2010)(21)(4) Pages 815–852, https://academic.oup.com/ejil/article/21/4/815/418198 accessed on 10 November 2022.
[62] Ibid.

circumstances in which an express exception to immunity is created as a necessary concomitant of a duty under treaty or customary international law to assert jurisdiction.

Lord Bingham explained in *Jones v. Saudi Arabia*[63] that "The prosecution of a servant or agent for an act of torture within article 1 of the Torture Convention is founded on an express exception from the general rule of immunity." It is, however, clear that a civil action against individual torturers based on acts of official torture does indirectly implead the state since their acts are attributable to it.[64] Were these claims against the individual defendants to proceed and be upheld, the interests of the Kingdom would be obviously affected, even though it is not a named party.

In the *Arrest Warrant case*,[65] the Court held that certain high state officials are immune from prosecution before the domestic courts of other states, and that this immunity for individuals applies to the head of state, the head of government and the foreign minister. The reasoning used by the ICJ, that such immunity is granted to enable the official to perform his function, means that state immunity arguably applies to other ministers of state. Whereas the court ruled in *Pinochet Case* No. 3 that the former President of Chile lacked immunity from extradition to Spain to face prosecution for acts of torture committed while in power.[66] In other words, it is inappropriate to claim that it is for the benefit of a state, for an official to act in ways that the law itself prohibits and criminalizes. Senator Pinochet's' alleged tortures were not carried out by him in his private capacity, for his private gratification, yet in such scenario the state official cannot be blamed for criminal acts which clearly violates international law, since the action of a state official is considered under international law as the actions of the state.

Analysis of the Exceptions to State Immunity

Under international law, certain exceptions are put in place to enable the maintenance of the state equality doctrine, as well as to ensure that the rights to claim immunity are guided and limited. These exceptions are primarily the result of the state or its entities' involvement in commercial activities that may result in damages. These exceptions, however, are not intended to diminish a state's sovereignty, but rather to ensure that the state's activities are carried out in accordance with the applicable laws. The major aspects of these exceptions will be discussed below:

I. Commercial Transactions

The US law defines a commercial activity to means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity

[63] *Jones v Ministry of Interior of Kingdom of Saudi Arabia* [2006] 2 WLR 1424.
[64] Geoffery N, Head of State Immunity,a Useful Relic? Lectures by the Gresham Professor of Law, 7 May 2014 < https://www.gresham.ac.uk/watch-now/head-state-immunity-useful-relic> accessed on 10th Novemer 2022
[65] Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*)
[66] *Ex Parte Pinochet V Bartle and Ors*, Appeal, [1999] UKHL 17.

shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.[67]

In the United Kingdom,[68] commercial transaction means: (a) any contract for the supply of goods or services; (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a state enters or in which it engages otherwise than in the exercise of sovereign authority. It also include separate provisions for contracts of employment, patents, trademarks and copyrights, and for proceedings arising from a state's membership in United Kingdom companies, partnerships, and the like.[69]

The exception made for state commercial operations is intended to deny foreign states, protection when they behave in a way that is based on a commercial nature and purpose outside of their own territorial jurisdiction. This exception has changed because of the transition from the absolute doctrine of state immunity, which implied total immunity from it in foreign courts, to the limited approach, which distinguishes between acts of sovereign nature and acts of commercial nature.[70] Since it is generally believed that when states engage in commercial activities, they are acting as the private sector and are therefore likely to lose their claim to sovereign immunity, there is an exception to the rule regarding commercial transactions to ensure that the state does not conceal commercial activities under its claim to immunity.[71]

International Law Commentary Report defines commercial contracts as three categories of contracts or transactions to include the selling or purchase of products or the provision of services; financial transactions, including loans and guarantees; and any other commercial, industrial, trade, or professional contract or transaction, with the exception of employment contracts.[72] Similar provisions are found in the laws of Australia, Pakistan, Singapore, and South Africa.[73] In other words, the scope of a commercial activity covers either a regular course of commercial conduct or a particular commercial transaction or act and includes any activity or transaction into which a foreign State enters or in which it engages otherwise than in the exercise of sovereign influence.

[67] 28 U.S.C. 1603(d) (1976).
[68] SIA, art. 3(1).
[69] SIA, 1978, art. 4, 7, 8.
[70] Alebeek R, *State Immunity, The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, (Oxford Monographs in International Law, Oxford, 2008) online edn, Oxford Academic, 22 Mar. 2012), https://doi.org/10.1093/acprof:oso/9780199232475.003.0002.
[71] Ibid
[72] Virginia M, *The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and Their Property* (1989)(17) Denver. Journal. International Law. & Policy, 403
[73] Ibid

There are two main tests to ascertain whether an activity is commercial. The first is the nature of the act and the second is the purpose of the act.[74] Although in many cases the courts may use the purpose of the transaction test to determine whether the action is commercial, in property cases there is a presumption that the activity in itself is commercial. However, the rationale of the commercial transaction exception is clear. Where the State engages in business activities as partner or competitor of private individuals, it shall not enjoy a privileged position as compared to private traders and shall be accountable for this private commercial conduct in the courts of the country where the business is conducted.[75] Apart from this pragmatic justification, it is also argued that by engaging in commercial activities the foreign State implicitly waives its jurisdictional immunity.

II. Ownership, Possession and Use of Property

The earliest widely accepted exceptions to state immunity, whether an absolute or restrictive rule was observed, were in respect of proceedings relating to immovable located in the territory of the forum State and to succession or inheritance rights.[76] Traditionally, immovable property acquired by a sovereign, but located within a different sovereign, is not immune from suit. Rather, it is to be treated the same as any other private property located within a sovereign's jurisdiction. This is because "property ownership is not an inherently sovereign function" but a private function.[77]

The exceptions to a state claiming immunity in national courts based on the ownership, possession and use of immovable property, interests of a foreign State in movable or immovable property by way of succession, gift, or administration or insolvency, is derived from the commercial exception to state immunity and are based on the non-sovereign nature of the state activities that fall within the commercial sphere.[78] The ownership of property involves a set of associated rights and duties governed by local property law. When a foreign state owns property overseas, it must obey all of the same regulations that apply to private owners of such property, unless it can point to specific exclusions in that country's agreements with the host state, treaties, or other sources of law.[79] In the case of *City of New York v. Permanent Mission of India*[80] the Second Circuit addressed the "immovable property" exception (28 U.S.C. § 1605(a)(4)), which provides that a foreign state shall not be immune from jurisdiction in any case in which "rights in immovable property situated in the United States are in issue." New York law exempts real property owned by a foreign government if it is used exclusively for diplomatic offices or for the quarters of high-ranking diplomats. However, Indian Mission on

[74] Article 2, UN Convention of Jurisdictional States and Properties, 2004
[75] Fox H and Webb P, *Law of State Immunity*, (Oxford University Press, 3rd edn, New York,2013) 272
[76] Susan B and others, *State Practice Regarding State Immunities*, Martinus Nijhoff Publishers, Leiden / Boston, 2006)
[77] ibid
[78] Susan B and others, State Practice Regarding State Immunities, Martinus Nijhoff Publishers, Leiden / Boston, 2006) 113
[79] Roger A, Immovable Property Exception to the FSIA, 2006, http://opiniojuris.org/2006/05/16/second-circuit-rules-on-meaning-of-immovable-property-exception-to-the-fsia/accessed on 20th November 2022
[80] *City of New York v. Permanent Mission of India*, 446 F.3d 365 (2006)

East 43rd is a 26th floor complex in which the first six floors are used for diplomatic offices while the remaining 20 floors are used to house low-level employees of the mission. New York City has been taxing the Indian Mission for the use of the top 20 floors, and the Indian Mission has refused to pay these taxes, resulting in a claim for $16 million in unpaid taxes. If a sovereign entity is immune from arrest, taxes and all legal actions, it is typical that his personal property outside sovereign nature do not enjoy the same internationally applied privileges and immunities.

III. Employment Contracts

Employment exception typically arise from the issues relating to hiring and employment at foreign embassies, missions, bases of operations, state-owned businesses, educational institutions, and cultural organizations. It was earlier regarded as absolute and has undergone major developments in the case law of the Court.[81] The appointment, employment, use, and dismissal of personnel are incidental features of any business operation, so one might assume that they should be categorized like the business itself as a commercial or private law transaction.[82]

Currently municipal courts have observed a development in international law that restricts the use of state immunity in this aspect, which is usually when the appointment, extension, or recall of an employee is at issue. It also apply when the employee is a citizen of the employer's state and when the employer and employee have a written agreement to that effect.[83] Competing interests of the parties involved in a labour dispute brought before the domestic court of a state by an individual or an employer state, while the individual seeks redress from his employer, the forum state is concerned with the enforcement of its labour laws and the legal protection of person's subject to its jurisdiction, particularly its citizens, in labour disputes.[84] In the UK's SIA, the exception to employment contracts is considered as a separate exception to state immunity.[85] Whereas in the US FSIA it is considered as a category of commercial activity. The UK idea of treating contract of employment as a separate exception to immunity has the advantage of freeing the court from the problem of having to decide whether a contract of employment belongs to the realm of commercial activities for which immunity will not be available for the foreign state, since the contract of employment is, by virtue of statutory provision, explicitly not immune from local jurisdiction. The foreign State will thus automatically be denied immunity unless certain exceptions can be established.

Nevertheless, the US emphasis on the subject of employment contract implies that in the US court it is assumed that what matters is not that the foreign state has entered into an employment

[81] Jörg P, State Immunity under International Law and Current Challenges, (Public International Law and Treaty Office Division, France,2017) 23
[82] ibid
[83] Jörg P, State Immunity under International Law and Current Challenges, (Public International Law and Treaty Office Division, France,2017) 23
[84] Xiaodong Y, State Immunity in International Law, (Cambridge University Press, New York, 2012) 158
[85] Section 4(1) State Immunity Act 1978

contract, but that the foreign state has entered into a contract with a private individual. In fact, any dealing between a foreign state and a private individual based on private law will be *prima facie* evidence that the state has acted not as a subject of international law but on the same footing as a private person, and this is what precludes it from claiming immunity from local jurisdiction.[86] In *El-Hadad*, an Egyptian citizen employed as an auditor and supervising accountant in the Cultural Attache´'s Office at the Embassy of the United Arab Emirates in Washington brought an action for breach of employment contract and defamation, having been dismissed because of allegedly trumped-up charges of dishonest behaviour. The district court denied immunity on the ground of third country nationality.[87] The circuit court remanded the case for further inquiry, concluding that 'a per se rule of non-immunity for a foreign state's employment of third country nationals is inconsistent with Congress' intent to immunize foreign governmental activity from suit in American courts'.[88]

Apparently, the nationality of the employee had little or no impact upon the final determination of the nature of the employment relationship, since the court turned mainly to the job title and the duties performed by the employee. The factor of third country nationality comes at the very end of the list and, whatever it might have done for the case, it is obvious that it cannot, contrary to the legislators' suggestion, automatically render an employment relationship non-immune. Other factors to be considered in regards to this exception includes, the characterization of the employment relationship, the status and functions of the employer, the status, duties and functions of the employee; the activity on which the claim is based; the choice of law clause in the contract; and the remedies sought by the plaintiff.[89]

IV. Non-Commercial Torts

The term "Non-commercial Torts" is an appropriate umbrella word encompassing incidents of bodily harm, wrongful death, or loss of or damage to property, which are typically protected by a number of national statutes and other instruments on state immunity.[90] The non-commercial torts exception seeks to bring consistency and predictability to a previously ambiguous area of tort law.[91] In general, the idea of a tort entails attributed to either a person's death or injury or harm to or loss of tangible property brought on by an action or inaction that may be attributed to a state. Although the term "personal injury" is not specifically defined in the context of international agreements on state immunity, it typically refers to any disease or other damage of a person's physical or mental health.[92]

[86] Y Xiaodong, *State Immunity in International Law*, (Cambridge University Press, New York, 2012) 171
[87] El-Hadad, ET AL *V. United Arab Emirates, et al 96-1943* -
[88] Ibid.
[89] Xiaodong Y, *State immunity in international law*, (Cambridge University Press, New York, 2012) 197
[90] ibid 199
[91] Badr M, *State Immunity; An Analytical and Prognostic View*, (Martinus Nijhoff Publishers, 1984) 10–14
[92] (N87) 200

Exceptions from immunity only apply where there is physical harm or damage to tangible property; they do not apply in circumstances of simply non-material damage. The rule of non-immunity, equally applies to any concurrent claims for non-material damage emanating from the same acts whether there has been bodily harm or property damage.[93] The non-commercial torts exception do not hold the distinction between sovereign capacity and commercial capacity.

Whatever the activities of a State giving rise to personal injuries or damage to property within the territory of another state, whether in connection with acta jure imperii or acta jure gestionis, the fact remains that injuries have been inflicted upon and suffered by innocent persons. The exercise of jurisdiction by the court of the place where the damage has occurred is probably the best guarantee of sound and swift justice[94] This exception to state immunity holds a territorial consideration and the required consideration to lift state immunity is usually based on idea that the incident that caused the injury or damage must have taken place on the territory of the forum State, and the injury or damage's perpetrator must have been present in that territory at the time the facts took place.[95] In any case, there must be a strong jurisdictional link between the act/author of injury or damage, as well as the forum state territory.

The most compelling argument is that compensation should be made available to a victim of an accident for which a representative of a foreign state may be held accountable. An equally valid justification can be found in the ready availability of local remedies without the need to involve a foreign sovereign or government.[96] The majority of incidents resulting in personal injuries or physical damage to tangible property could be resolved using the current insurance system. Once insured, insurable interests will not be required to impair or impede the performance of any governmental functions of a foreign state within the territories of the insured.[97]

In the case, *Letelier v. Republic of Chile*[98]a Chilean dissident leader and his secretary were killed in Washington D.C. when a bomb planted in their car exploded. Despite the fact that the assassination order presumably occurred in Chile, rather than the United States, the district court granted jurisdiction under the non-commercial torts exception.[99] The court ruled that a foreign country had no right to engage in such heinous behaviour as an assassination attempt, which was clearly contrary to established humanitarian principles recognized in both national and international law.[100] Whenever injury has been caused, the cause of the injury will be

[93] Susan B and others, *State Practice Regarding State Immunities*, (Martinus Nijhoff Publishers, Leiden / Boston, 2006)
[94] Xiaodong Yang, State immunity in international law, (Cambridge University Press, New York, 2012)
[95] Abbott L, *The Non-commercial Torts Exception to the Foreign Sovereign Immunities Act*,(1985)(9)(1) (Fordham International Law Journal 148
[96] *Ibid*.
[97] Sucharitku S, *Immunities from Jurisdiction in Contemporary International Law*, (Golden Gate University School of Law, 2002) 729
[98] *Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984)
[99] Xiaodong Yang, State immunity in international law, (Cambridge University Press, New York, 2012)
[100] Abbott L, The Non-commercial Torts Exception to the Foreign Sovereign Immunities Act, (1985)(9)(1) *Fordham International Law Journal*, 148

regarded as *jure gestionis*, regardless of whether the act in the course of which injury has been caused is *jure imperii or jure gestionis*. Except in cases where foreign armed forces are involved, apparently, in the event of actual injury being caused in the state of the forum, a court will deny jurisdiction on the sole ground that the act in question is *jure imperii*.

V. Ships Owned by States

Warships have traditionally been exempted from legal actions under international law, foreign authorities' procedure, execution, or other jurisdictional measures.[101] Nevertheless, shipping engaged in trading activity cases substantially contributed to the development of the law of restrictive immunity. Marshall CJ in *The Schooner Exchange*[102] case recognized the immunity of a public warship of a foreign state; but he indicated that such implicit consent could not be construed to extend to a "merchant vessel who enters for purposes of trade"[103] and that such vessels should be amenable to local jurisdiction, not being in national pursuits.[104] Similarly, in The *Philippine Admiral case,*[105] in 1977 the Privy Council held that foreign state-owned merchant vessels were not immune from suit in an admiralty action arising from their use in trade. In other words, when a state engages in a commercial transaction, it ceases to act in public capacity; it acts as a trader, not as an independent sovereign state and consequently no immunity attaches to such commercial activities.

Conclusion

State immunity is a creature of customary international law and derives enormous justification from the principle of equality of sovereign states.[106] It is not a self-imposed restriction on the jurisdiction of its courts, which the state has chosen to adopt. It is a limitation imposed upon the sovereignty of the states themselves.[107] It is a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state. The foreign state is entitled to procedural immunity from the processes of the forum state. This immunity extends to both criminal and civil liability.[108] Perfect equality and absolute independence of sovereigns have given rise to a class of cases 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". [109]

[101] Susan B and others, *State Practice Regarding State Immunities*, (Martinus Nijhoff Publishers, Leiden / Boston, 2006) 126
[102] *Schooner Exchange v. McFaddon* 11 US 7 Cranch (18 12).
[103] ibid
[104] ibid
[105] W Paul Case Comment: *The Phillipine Admiral*, (1976)(3) *Brook Journal. International Law* 99
[106] Shaw's International Law, supra, n.47, p. 699.
[107] Lord Millett in *Holand Vs. Lampen-Wolfe*
[108] Lord Browne-Wilkinson in *Ex Parte Pinochet (No. 3)*
[109] Chief Justice Marshall in *The Schooner Exchange Vs. Mcfaddon.*