

FORTY YEARS ON: STATE IMMUNITY AND THE STATE  
IMMUNITY ACT 1978

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**Abstract** This article addresses some of the changes in international law and foreign relations law which have impinged on the operation of the State Immunity Act 1978 in the first 40 years of its operation and some of the ways in which it has been supplemented by judicial decisions. It addresses, in particular, the initial need for legislation in this field, the circumstances in which agents of a State may be entitled to immunity, the relationship between State immunity in domestic law and Article 6 of the European Convention on Human Rights and Article 47 of the EU Charter of Fundamental Rights, the relationship of State immunity and rules of *jus cogens*, and the respective scope of State immunity and principles of non-justiciability.

**Keywords:** public international law, State immunity, State Immunity Act 1978, foreign relations, *jus cogens*, non-justiciability.

## I. INTRODUCTION

We have just marked the fortieth anniversary of the enactment of the State Immunity Act 1978. This article endeavours to take stock of some of the principal changes in the field of international law and foreign relations law since 1978 which have impinged on its operation. The statute itself is, of course, a huge subject which has been addressed with great distinction by a number of writers—in particular by Lady Fox and Dr Webb in their magisterial work on State immunity<sup>1</sup>. It is beyond the scope of this article to undertake a comprehensive study of the first 40 years of the Act or to engage in a detailed analysis of the statutory provisions. Rather, the aim is to identify certain themes, certain milestones along the road, and in particular to address various ways in which the statute has been applied, modified and supplemented by judicial decisions.

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<sup>1</sup> H Fox and P Webb, *The Law of State Immunity* (3rd edn, Oxford University Press 2015).

## II. THE NEED FOR A STATE IMMUNITY ACT

By 1978 the need for legislation in the United Kingdom to reform the law of State immunity was obvious and urgent.

The common law in this jurisdiction had proceeded on the basis that foreign sovereigns enjoyed a near absolute immunity from actions *in personam*—there were very limited exceptions in respect of immovable property in this jurisdiction and trust funds administered by the court—and it also adhered to an absolute immunity in Admiralty actions *in rem*. No distinction was drawn between sovereign and non-sovereign activities of States. The Supreme Court in *Benkharbouche* has now explained that this was largely founded on an erroneous view of international law which never warranted immunity extending beyond what sovereigns did in their capacity as such.<sup>2</sup> Nevertheless, absolute immunity had found favour with the highest courts in this jurisdiction including the House of Lords in *The Cristina*<sup>3</sup> in 1938.

In the years following the Second World War, however, the trend of the decisions of courts in many other jurisdictions and of academic writings was, as a result of the massively increased involvement of State trading enterprises in international trade, moving towards a more restrictive theory which limited immunity to cases where the subject matter of the dispute was a sovereign activity. In 1952, in the Tate letter, the US State Department had decided to favour restrictive immunity and that line was then taken up by the US Federal courts.<sup>4</sup> In Europe, the German *Bundesverfassungsgericht* adopted a restrictive immunity founded on the juridical character of the conduct in question, in *Claim against the Empire of Iran* in 1963.<sup>5</sup> Thereafter, the general trend worldwide was away from absolute immunity.

In this jurisdiction, in the 1970s, the judges showed themselves willing to adapt to these changed conditions. In November 1975, in *The Philippine Admiral*,<sup>6</sup> the Judicial Committee of the Privy Council, on appeal from Hong Kong, was concerned with an action *in rem* against a vessel engaged in ordinary commercial trading owned by the Reparations Commission, an agency of the Republic of the Philippines. The underlying claims were entirely commercial. The Board concluded that it was wrong in principle to accord immunity in an action *in rem* where the vessel was engaged in ordinary trading activities.<sup>7</sup> The only reason, their Lordships considered, for granting immunity was that to apply the restrictive theory to actions *in rem* while continuing to apply the absolute theory to actions *in personam* would

<sup>2</sup> *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]. A Sanger, 'The Limits of State and Diplomatic Immunity in Employment Disputes' (2018) 77 CLJ 1.

<sup>3</sup> *Cia Naviera Vascongado v SS Cristina (The 'Cristina')* [1938] AC 485.

<sup>4</sup> *Alfred Dunhill of London Inc v Republic of Cuba*, 425 US 682 (1976) 701–703.

<sup>5</sup> *Claim against the Empire of Iran* (1963) 45 ILR 57, 79–82.

<sup>6</sup> *The Philippine Admiral* [1977] AC 373.

<sup>7</sup> *ibid* 402.

be illogical. However, they were not deterred by that, although they added in relation to the continuing absolute immunity to actions *in personam* that 'it is no doubt open to the House of Lords to decide otherwise but it may fairly be said to be at the least unlikely that it would do so ...'.<sup>8</sup>

However, Lord Denning was made of sterner stuff and shortly thereafter, in *Trendtex v Central Bank of Nigeria*,<sup>9</sup> the Court of Appeal denied immunity to the Bank when it was sued on a commercial letter of credit. Lord Denning considered that there was no international consensus on the scope of State immunity. As a result, it was open to the courts of this country to define the rule as best they could, seeking guidance from the decisions of courts of other countries, from jurists, from conventions and by defining the rule in terms which are consonant with justice rather than adverse to it.<sup>10</sup>

The end of the story of the judicial reform of State immunity comes only after the enactment of the State Immunity Act. In May 1981, in *I Congreso del Partido*<sup>11</sup>—a pre-Act case decided on common law principles—the House of Lords accepted that actions, whether commenced *in rem* or *in personam* were to be decided in accordance with the restrictive theory. Lord Wilberforce formulated the appropriate approach in the following terms:

The conclusion which emerges is that in considering, under the restrictive theory, whether state immunity should be granted or not, the court must consider the whole context in which the claim against the state is made, with a view to deciding whether the relevant act(s) upon which the claim is based should, in that context, be considered as fairly within an area of activity, trading or commercial or otherwise of a private law character, in which the state has chosen to engage or whether the relevant act(s) should be considered as having been done outside that area and within the sphere of governmental or sovereign activity.<sup>12</sup>

It is to be noted that the test formulated by Lord Wilberforce is not the same as that employed in Section 3 of the State Immunity Act. Moreover, in *I Congreso* itself, the members of the House of Lords experienced some difficulty in applying that test. Although they were agreed that the withdrawal of the *Playa Larga* from Valparaiso did not involve any exercise of governmental authority or sovereign powers by Cuba, they reached that conclusion in the case of the disposal of cargo of the *Marble Islands* in Vietnam only by a bare majority (Lord Wilberforce and Lord Edmund-Davies dissenting).<sup>13</sup>

It would have been possible for the judges to complete the reform of the law of State immunity in this jurisdiction. This would, however, have required elaboration and fine-tuning in many cases over many years. The common law is well suited to achieving reform by incremental development, but what was required here was the establishment of entirely new structures—a completely

<sup>8</sup> *ibid* 402–403.

<sup>9</sup> *Trendtex v Central Bank of Nigeria* [1977] QB 529.

<sup>10</sup> *ibid* 552–553.

<sup>11</sup> *I Congreso del Partido* [1983] 1 AC 244.

<sup>12</sup> *ibid* 267.

<sup>13</sup> *ibid* 272 and 276 respectively.

new system governing both adjudicative and enforcement jurisdiction in cases involving foreign and Commonwealth States. Whereas a rule of absolute immunity is relatively easy to formulate, once it is decided to adopt a qualified immunity there is almost endless room for debate as to where the line should be drawn, having regard to considerations including the requirements of international law, considerations of jurisdiction, international comity, fairness and justice.

The Gordian knot was untied by the State Immunity Act 1978. By this point it had become clear that legislation was essential in this field. There was an urgent need to bring domestic law in the United Kingdom into line with the new international reality. There was a need to establish certainty in what is predominantly an area of commercial law. There was a real danger that if the United Kingdom continued to apply an absolute theory of immunity or if the position remained unclear while the precise limits of a new restricted immunity were worked out in the cases, the adjudication and arbitration of commercial disputes would move away from London. A highly relevant consideration here was that the United States had already given clear effect to a restricted theory of immunity in the Foreign Sovereign Immunities Act of 1976.

There was a need for detailed, comprehensive law reform of a sort which can only be achieved by legislation. The proper limits of immunity of foreign States from adjudicative jurisdiction needed to be set and defined in detail, not simply in commercial disputes, but also in areas such as employment, tort and intellectual property. There was the question of what or who qualified as a State for the purpose of claiming immunity. There was the issue of waiver of immunity, whether by agreement or by conduct. There was the matter of State property and the vexed question of indirect impleader where proceedings related to property in the ownership, possession or control of a foreign State. There was a need for provision in the case of arbitrations. There was a need for new procedural rules. There was the whole question of immunity of a State from enforcement jurisdiction.

There was also a further consideration in play here. The United Kingdom wished to become a party to the European Convention on State Immunity, opened for signature at Basle on 16 May 1972 ('the 1972 Convention').<sup>14</sup> This Council of Europe treaty was concerned not only with State immunity, but also with the reciprocal enforcement of judgments in other Contracting States. As a result, it sought not merely to identify those cases where there should be no immunity but also those cases where there was a sufficient jurisdictional link between the Contracting State and the subject matter of the

<sup>14</sup> ETS 074. The Convention entered into force for the United Kingdom on 4 October 1979. Eight States are currently parties (at 13 February 2019): Austria, Belgium, Cyprus, Germany, Luxembourg, the Netherlands, Switzerland and the United Kingdom.

proceedings. This very sophisticated regime could only be implemented by legislation in the United Kingdom.

### III. WHO CAN CLAIM IMMUNITY? THE POSITION OF INDIVIDUALS

As matters have developed, however, the judges have nevertheless played an important part in the reform of the law of State immunity. In one area, at least, the text of the statute has been overlaid by a body of case law which has been highly influential. This is the situation where an individual acts as an agent of a State.

It is a curious feature of the State Immunity Act that, save for the provisions dealing with the sovereign or other head of State,<sup>15</sup> at no point does it expressly address the question whether an individual may be entitled to immunity. Section 1 provides that ‘a State’ is immune except as provided in Part I. Section 14(1) provides that references to a State include references to the sovereign or other head of that State in his public capacity, the government of that State and any department of that government, but not to any separate entity which is distinct from the executive organs of the government of the State and capable of suing or being sued. Such a separate entity is immune only if the proceedings relate to anything done by it in the exercise of sovereign authority and the circumstances are such that a State would have been immune. There is no express provision governing the situation where proceedings are brought against the servants or agents, the officials or functionaries of a foreign State in respect of acts done by them in that capacity in a foreign State. By contrast, the UN Convention on Jurisdictional Immunities of States and Their Property, 2004 defines ‘State’ to include ‘representatives of the State acting in that capacity’.<sup>16</sup> This is curious because at common law there was some authority that an individual who acted as an agent of a foreign State, or who could be considered an organ of a foreign State, was entitled to immunity. In *Twycross v Dreyfus* in 1877, the Court of Appeal upheld a plea to the jurisdiction where it was attempted to sue agents of the Peruvian Government, the court observing that this would be ‘a monstrous usurpation of jurisdiction’, an attempt to sue a foreign government indirectly.<sup>17</sup> In *Rahimtoola v Nizam of Hyderabad*, the House of Lords contemplated that a plea of sovereign immunity would be available where an individual was sued as an organ or agent of a State.<sup>18</sup> 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

<sup>15</sup> Section 20(1)(a), Part III.

<sup>16</sup> UN Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004), art 2(1)(b)(iv).

<sup>17</sup> *Twycross v Dreyfus* (1877) 5 Ch D 605.

<sup>18</sup> *Rahimtoola v Nizam of Hyderabad* [1958] AC 379, 393; Fox and Webb (n 1) 186.

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. Nevertheless, there is no express provision in the State Immunity Act for the immunity of an individual as agent or organ of a State.

Here the judges have stepped in and, by a bold process of interpretation, have remedied this lacuna in the scheme of the Act. The first post-State Immunity Act case of which I am aware in which an individual successfully claimed State immunity is *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Trawnik*.<sup>19</sup> There, residents of West Berlin sought a *quia timet* injunction in the Chancery Division to prevent the British Army from establishing a shooting range at Gatow in West Berlin. One of the defendants was Major General Gordon Lennox, an officer in the British Army, the British Military Commandant of Berlin and a member of the Allied Kommandatura. The defendant obtained a certificate from the Secretary of State for Foreign Affairs, pursuant to Section 21, State Immunity Act, which certified for the purposes of Part I of the Act that Germany was a State—this was in the days before the reunification of Germany—and that the persons to be regarded as the Government of Germany included the Major General. An attempt to challenge the certificate by judicial review failed. However, no point was taken on the extension of immunity to individuals. This was, I accept, a rather unusual case.

The issue came to the fore, however, in *Propend Finance Pty Ltd. v Sing*<sup>20</sup> where proceedings for contempt of court were brought against, amongst others, the Commissioner of the Australian Federal Police Force in his official capacity. In upholding a plea of immunity, Leggatt LJ, referring to the risk of undermining the State's immunity, concluded that 'section 14(1) must be read as affording to individual employees or officers of a foreign State protection under the same cloak as protects the State itself'.<sup>21</sup> He considered that a broad reading of 'government' in Section 14(1) would correspond with the requirements of comity. In coming to this conclusion, he drew heavily on judicial decisions in other jurisdictions on the scope of sovereign immunity as a concept which covers sovereign activities.<sup>22</sup> The Court of Appeal held, therefore, that the word 'government' should be construed in the light of the concept of sovereign authority and that immunity under Section 14(1) of

<sup>19</sup> *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Trawnik* (Court of Appeal, 18 February 1985).

<sup>20</sup> *Propend Finance Pty Ltd v Sing* (1997) 111 ILR 611.

<sup>21</sup> *ibid* 669.

<sup>22</sup> *Claim against the Empire of Iran case* (1963) 45 ILR 57, 81; *Church of Scientology case* (1978) 65 ILR 193, 198; *Herbage v Meese* (1990) 747 F Supp 60, 66; *Jaffe v Miller* (1993) 95 ILR 446, 457–9; 13 OR (3d) 745, 758–9. See also *Schmidt v Home Secretary of the Government of the United Kingdom* (1994) 103 ILR 322, 323–5; *Prosecutor v Blaskic* (Subpoena) (1997) 110 ILR 607, 707 (International Criminal Tribunal for the Former Yugoslavia).

the Act extends to an individual acting as an organ or agent of a State in the exercise of sovereign authority.<sup>23</sup>

More recently, immunity has also been extended to an official of a separate entity by an expansive interpretation of Section 14(2) of the Act.<sup>24</sup>

The approach of the Court of Appeal in *Propend v Sing* has been criticized by some writers.<sup>25</sup> First, it is said that the employee or agent *qua* State would arguably be able to waive his own immunity by submitting to the jurisdiction in accordance with Section 2 of the Act. It seems to me, however, that there is no inconsistency between accepting that in certain circumstances the immunity may extend to an individual acting as an organ or agent of a State, and maintaining that the immunity is the State's immunity which can be waived only by representatives of the State with authority to do so.<sup>26</sup> Secondly, it is suggested that the requirement that the employee or agent has acted in the exercise of sovereign authority places an unwarranted gloss on the State's immunity which should be judged by the principles in Sections 1 to 11 of the Act and not according to customary international law. I would accept that this approach does import a requirement which otherwise does not apply to a State but only to a separate entity under the scheme of Part I. However, such a requirement is to my mind appropriate in defining the scope of the immunity *ratione materiae* whether of an individual or a separate entity. Moreover, the concept of 'the exercise of sovereign authority' is employed elsewhere in Part I of the Act in the definition of 'commercial transaction' in Section 3(3). In any event, the gloss appears justified in order to give effect to the statutory scheme as a whole. Finally, it is suggested that a better approach would have been to hold that proceedings against a State agent or employee indirectly implead the State. However, that approach is itself highly problematical. This is a matter to which I shall return.

The final seal of approval was set on this development in the law of the United Kingdom by the House of Lords in *Jones v Saudi Arabia*.<sup>27</sup> In that case three of the claimants sought to recover, *inter alia*, aggravated damages for assault and negligence at the hands of four named individuals: two police officers, the deputy governor of the prison where they were held and the head of the Ministry of the Interior.<sup>28</sup> Lord Bingham explained that although neither the Act nor the 1972 Convention expressly provides for the immunity of the

<sup>23</sup> See also *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3) [2000] 1 AC 147, 269, 285–286; *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, 1583; *Chuidian v Philippine National Bank* (1990) 734 F Supp 415.

<sup>24</sup> *Grovit v De Nederlandsche Bank NV* per Tugendhat J. [2005] EWHC 2944 (QB); [2006] 1 WLR 3323. See also [2007] EWCA Civ 953; [2008] 1 WLR 51.

<sup>25</sup> A Dickinson *et al.*, *State Immunity: Selected Materials and Commentary* (Oxford University Press 2004) 407–8.

<sup>26</sup> See section 2(7), State Immunity Act for deemed authority.

<sup>27</sup> *Jones v Saudi Arabia* [2006] UKHL 26; [2007] 1 AC 270.

<sup>28</sup> Mr. Jones claimed aggravated and exemplary damages for assault and battery, trespass to the person, false imprisonment and torture against the Ministry of the Interior of Saudi Arabia and Lieutenant Colonel Abdul Aziz.



servant or agents, officials or functionaries of a foreign State, there was, in his view, a wealth of authority to show that in such cases the foreign State was entitled to claim immunity for its servants or agents as it could if sued itself. He accepted that there may be borderline cases in which there may be doubt whether the conduct of an individual, although a servant or agent of the State, had a sufficient connection with the State to entitle it to claim immunity for his conduct. However, this was clearly not a borderline case. These four defendants were public officials and there was no suggestion that their conduct was not in discharge or purported discharge of their public duties.<sup>29</sup> A foreign State is, therefore, entitled to claim immunity for its servants as it could if sued itself. The immunity of the State cannot be circumvented by suing its servants or agents.<sup>30</sup>

Moreover, Lord Bingham's analysis links this outcome with the rules of international law on attribution of the conduct of individuals to States.<sup>31</sup> Drawing on the work of the International Law Commission and its Draft Articles on the Responsibility of States for Internationally Wrongful Acts<sup>32</sup> and on the decision of the International Court of Justice in *Democratic Republic of Congo v Uganda*,<sup>33</sup> he explained that it is immaterial that the conduct may be for an ulterior or improper motive<sup>34</sup> or that it may be in excess of authority. What matters is apparent authority and, where a person who is a State organ acts in an apparently official capacity or under colour of authority, his actions will be attributable to the State. Similarly, the fact that the conduct is unlawful is not a ground for refusing immunity. It is not the legality of an act, but its character as a sovereign act, which gives rise to immunity *ratione materiae*. It is immaterial whether the acts in question are ultra vires or tortious or criminal under the law of the foreign State. Questions of legality or illegality in the law of the State concerned—or indeed in international law—are not relevant to the issue of immunity.<sup>35</sup>

<sup>29</sup> *Jones v Saudi Arabia* (n 27) per Lord Bingham at [10]–[11].

<sup>30</sup> Despite the absence of express provision in the US Foreign Sovereign Immunities Act, US law appeared to be developing along similar lines: *Chuidian v Philippine National Bank*, 912 F. 2d 1095, 1102 (9th Cir. 1990); 92 ILR 480. See also *Trajano v Marcos*, 978 F.2d 493, 496 (9th Cir. 1992); 103 ILR 521; *Hilao v Marcos*, 25 F3d 1467, 1470; 104 ILR 119 *Park v Shin*, 313 F.3d 1138, 1144 (9th Cir. 2002). However, see *Samantar v Yousuf*, US Supreme Court, 130 S.Ct. 2278 (2010) considered below.

<sup>31</sup> *Jones v Saudi Arabia* (n 27) [12]–[13].  
<sup>32</sup> Yearbook of the International Law Commission (2001) vol II, Pt Two; J Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge University Press 2002) 106–9.

<sup>33</sup> *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) 19 December 2005, at [213]–[214].

<sup>34</sup> Thus in *Grovit v De Nederlandsche Bank NV* (n 24) it was immaterial that the alleged defamatory publication was alleged to be malicious.

<sup>35</sup> *I Congreso del Partido* (n 11) per Lord Wilberforce at 272. See also *Herbage v Meese* (n 22); *McElhinney v Williams*, Irish Supreme Court, [1995] 3 IR 382; 104 ILR 691, 702–3; X Yang, *State Immunity in International Law* (Cambridge University Press 2012) 438–40.



This is, therefore, an area in which the courts in this jurisdiction have felt able to adopt an expansive interpretation of legislation in order to reflect the current position in customary international law.<sup>36</sup>

A very different view of the position of individuals has been taken by the US Supreme Court. In *Samantar v Yousuf*,<sup>37</sup> the claimants brought a damages claim against an individual, a former high-ranking official in the Somali Government,<sup>38</sup> alleging that they and their relatives had been the victims of torture and extrajudicial killings by military forces under his command. The US Foreign Sovereign Immunities Act 1976, like the State Immunity Act, is silent as to the position of foreign officials. Section 1603(a) provides that a foreign State includes a political subdivision of a foreign State or an agency or instrumentality of a foreign State.<sup>39</sup> In a careful textual analysis of the US Act, Stevens J., with whom all the other members of the Supreme Court agreed, concluded that, reading the Act as a whole, the terms Congress chose simply did not evidence an intent to include individual officials within the meaning of ‘agency or instrumentality’<sup>40</sup> and there was nothing to suggest that ‘foreign state’ should be read to include an official acting on behalf of that State and much to suggest the contrary.<sup>41</sup> The decision is, however, of narrow scope. The court did not doubt that in some circumstances the immunity of a foreign State extends to an individual for acts taken in his official capacity. However, it did not follow that Congress intended to codify that immunity in the Foreign Sovereign Immunities Act.<sup>42</sup> The Court rejected the submission that this reading would in effect make the statute optional by allowing litigants through ‘artful pleading ... to take advantage of the Act’s provisions or, alternatively, choose to proceed under the old common law’.<sup>43</sup> Even if a suit is not governed by the Act, it may still be barred by foreign sovereign immunity under the common law. Not every suit can successfully be pleaded against an individual official alone and even where a plaintiff names only a foreign official it may be that the State itself, its political subdivision or an agency or instrumentality will be a required party.<sup>44</sup> If this

<sup>36</sup> cf the observations of Lord Neuberger and Lord Mance in *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69; [2016] AC 1355 at [117]–[118], [150]–[151].

<sup>37</sup> *Samantar v Yousuf* 130 S.Ct. 2278 (2010). See Fox and Webb (n 1) 256–8.

<sup>38</sup> Mr. Mohamed Ali Samantar had been Vice-President and Minister of Defence of Somalia from 1980 to 1986 and Prime Minister from 1987 to 1990.

<sup>39</sup> Section 1603(b) defines ‘an agency of instrumentality of a foreign state’ as meaning any entity (1) which is a separate legal person, corporate or otherwise and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

<sup>40</sup> *Samantar v Yousuf* (n 37) 2287.

<sup>41</sup> *ibid* 2288–2899.

<sup>42</sup> *ibid* 2290.

<sup>43</sup> *ibid* 2292 quoting *Chuidian v Philippine National Bank*, 912 F.2d 1095, 1102 (CA9 1990).

<sup>44</sup> Because that party has ‘an interest relating to the subject of the action’ and ‘is so situated that disposing of the action in the person’s absence may ... as a practical matter impair or impede the person’s ability to protect the interest’. Federal Rules of Civil Procedures, Rule 19(a)(1)(B).

is the case and the entity is immune from suit under the Foreign Sovereign Immunities Act, a court may have to dismiss the suit, regardless of whether the official is immune or not under the common law.<sup>45</sup> The Supreme Court also left open the possibility that some actions against an official in his official capacity should be treated as actions against the foreign State itself as the State is the real party in interest.<sup>46</sup> The Supreme Court considered, however, that the claim before it, in which the claimants sued Samantar in his personal capacity and sought damages from his own pockets, was properly governed by the common law because it was not a claim against a foreign State within the meaning of the Foreign Sovereign Immunities Act. The case was remanded to the District Court for further proceedings. The District Court held that Samantar was not entitled to immunity at common law and the 4th Circuit Court of Appeals affirmed the decision. In coming to that conclusion, it attached substantial but not controlling weight to a suggestion by the State Department that there was no entitlement to immunity.<sup>47</sup>

By contrast, in this jurisdiction, the State Immunity Act has been supplemented by quite a bold process of statutory interpretation in order to give effect to the overall scheme of the statute and to ensure that it cannot be circumvented by the device of suing an individual as opposed to the State. In the process, emphasis has inevitably been placed on the character of the act as opposed to the identity of the actor. In his masterly analysis in *Jones v Saudi Arabia*, Lord Bingham has set this interpretation firmly in the context of the rules of attribution in public international law. This approach is, in my view, to be preferred to that taken by the US Supreme Court in *Samantar v Yousuf*, not least because it promotes certainty in the law.

#### IV. ARTICLE 6 ECHR, ARTICLE 47 EU CHARTER OF FUNDAMENTAL RIGHTS AND STATE IMMUNITY

Since the enactment of the State Immunity Act, Article 6 ECHR and its more vigorous younger brother Article 47 of the EU Charter of Fundamental Rights have come to exercise a considerable influence over the law of State immunity within Europe and this interrelationship has given rise to some intriguing issues. Most notably, in *Benkharbouche* and *Janah*, it resulted in declarations of incompatibility of Section 4(2)(b) and Section 16(1)(a) State Immunity Act with Article 6 and in the disapplication of those provisions to those claims founded on EU law.

By Article 6, which provides guarantees in relation to the fairness of legal proceedings, the Contracting States have also established a right to have any claim relating to civil rights and obligations brought before a court for

<sup>45</sup> See *Republic of Philippines v Pimentel*, 553 U.S. 851, 867 (2008).

<sup>46</sup> cf *Kentucky v Graham*, 473 U.S. 159, 166 (1985).

<sup>47</sup> *Yousuf v Samantar* 699 F. 3d 763 (4th Cir 2012).

decision. Clearly, procedural guarantees would be meaningless in the absence of a right of access to courts. This right under the Convention is not absolute but may be subject to limitations provided they pursue a legitimate aim by proportionate means and provided they do not impair the essence of the right.<sup>48</sup> State immunity, by contrast, is a restriction imposed by international law on the power of domestic courts to decide certain kinds of claims in which foreign States are directly or indirectly impleaded. It might be thought that the parties to the European Convention of Human Rights were agreeing to confer a right of access to the jurisdiction which national courts enjoy in international law. That was certainly the view of the House of Lords in *Holland v Lampen-Wolfe*<sup>49</sup> where Lord Millett explained that Article 6 forbids a Contracting State from denying individuals the benefit of its powers of adjudication; it does not extend the scope of those powers.<sup>50</sup>

That, however, is emphatically not the view of the Strasbourg court. In a line of cases starting with *Al-Adsani v United Kingdom*,<sup>51</sup> it has consistently held that Article 6 is applicable notwithstanding State immunity. In the Court's view, State immunity operates as a procedural bar which restricts the claimant's right of access to a court under Article 6.<sup>52</sup> This does not mean, however, that State immunity is defeated in every case by Article 6. Rather, the Strasbourg court's approach is to enquire whether in each case the restriction on access to the courts imposed by national law rules pursues a legitimate aim and is a proportionate restriction. In *Al-Adsani*, it held that the grant of State immunity in civil proceedings pursues the legitimate aim of 'complying with international law to promote comity and good relations between States through the respect of another's sovereignty' and concluded that it follows that 'measures taken by a High Contracting Party which reflect generally recognized rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to [a] court as embodied in Article 6(1)'.<sup>53</sup> On this approach, it is necessary to justify the grant of immunity in national law both by reference to the legitimate aim of compliance with international law and by reference to the concept of proportionality of response.

The Strasbourg court's approach to this issue has been much criticized by courts in this jurisdiction: by the House of Lords in *Matthews v Ministry of Defence*<sup>54</sup> and *Jones v Saudi Arabia*<sup>55</sup> and by the Court of Appeal in *Benkharbouche*.<sup>56</sup> State immunity is not a restriction which a State chooses

<sup>48</sup> *Golder v United Kingdom* (1979–80) 1 EHRR 524; *Ashingdane v United Kingdom* (1985) 7 EHRR 528. <sup>49</sup> *Holland v Lampen-Wolfe* [2000] 1 WLR 1573. <sup>50</sup> *ibid* 1588.

<sup>51</sup> *Al-Adsani v United Kingdom* (2002) 34 EHRR 11. <sup>52</sup> *ibid* [48].

<sup>53</sup> *ibid* [54], [56]. The Court adopted identical reasoning in two other cases decided at the same time: *McElhinney v Ireland* (2001) 34 EHRR 13 and *Fogarty v United Kingdom* (2002) 34 EHRR 12. <sup>54</sup> *Matthews v Ministry of Defence* [2003] 1 AC 1163.

<sup>55</sup> *Jones v Saudi Arabia* (n 27).

<sup>56</sup> [2015] 3 WLR 301. cf *Fawaz Al Attiya v Hamad Bin-Jassim Binjaber Al Thani* [2016] EWHC 212 (QB) Blake J.

to adopt, but a limitation arising in international law on the power of national courts to decide cases. As Lord Bingham observed in *Jones v Saudi Arabia*:

Based on the old principle *par in parem non habet imperium*, the rule of international law is not that a state should not exercise over another state a jurisdiction which it has but that (save in cases recognised by international law) a state has no jurisdiction over another state.

When *Jones v Saudi Arabia* resulted in proceedings in Strasbourg, the United Kingdom once again advanced the argument that Article 6 could not require a State to claim powers of adjudication which it did not possess under international law. Once again, the Strasbourg court rejected the argument but gave no reason for doing so.<sup>57</sup>

Most recently, the point arose in the Supreme Court in *Benkharbouche* but Lord Sumption, with whom the other members of the Court agreed, was unwilling to resolve the controversy, save in a case where there was a binding rule of international law denying jurisdiction.<sup>58</sup>

So, the stand-off between Strasbourg and the Supreme Court continues. As matters currently stand, judges in this country are bound by *Holland v Lampen-Wolfe*, from which the Supreme Court has not resiled. The question whether Article 6 applies where international law requires the grant of immunity remains unresolved.

Does it make any difference which approach is adopted? In many cases it does not.<sup>59</sup> The Strasbourg approach gives effect to international law rules on State immunity but takes account of them at a later stage in the analysis by addressing them through the prism of Article 6.

In *Benkharbouche*, the Supreme Court came to the conclusion that there was no rule of international law which required the grant of immunity in Embassy employment disputes in the circumstances of the two cases before the court. The point was clearly made, moreover, by Lord Sumption<sup>60</sup> that this is not a situation in which the UK court, considering the international law obligations of the United Kingdom, may properly limit itself to asking whether the United Kingdom has acted on a tenable view of those obligations. This is not, for example, a case where the rationality of a public authority's view of a point of international law may depend on whether it was tenable rather than whether it was right.<sup>61</sup> On the contrary, the Supreme Court has made clear

<sup>57</sup> *Jones v United Kingdom* (2014) 59 EHRR 1, at [162], [164].

<sup>58</sup> *Benkharbouche* (n 2) [75].

<sup>59</sup> cf *Rahmatullah v The Ministry of Defence* [2014] EWHC 3846, per Leggatt J at [90].

<sup>60</sup> *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 [35]–[36].

<sup>61</sup> cf Sir Philip Sales and Joanne Clement, 'International Law in Domestic Courts: The Developing Framework' (2008) 124 LQR 388, 405–7; *R (Corner House Research) v Serious Fraud Office* [2009] 1 AC 756, per Lord Brown of Eaton-under-Heywood at [68]; *R (Badger Trust) v Welsh Ministers* [2010] EWHC 768 (Admin), reversed on other grounds [2010] EWCA Civ 807; *R (ICO Satellite Limited) v The Office of Communications* [2010] EWHC 2010 (Admin).

that in the present context the national court has to decide what are the requirements of international law. As Lord Sumption put it:

If it is necessary to decide a point of international law in order to resolve a justiciable issue and there is an ascertainable answer, then the court is bound to supply that answer.<sup>62</sup>

That, as he pointed out, is what the Strasbourg court did in *Cudak* and in *Sabeh El Leil* and what it criticized the Lithuanian Supreme Court and the French Cour de Cassation for not doing in those cases.<sup>63</sup>

What is to happen, however, in circumstances where there is no ascertainable answer? In *Benkharbouche*, the Supreme Court took the view that the limits of State immunity are set by the distinction between sovereign and non-sovereign activities of States. But that distinction is not always easily drawn. The scope of immunity may be a matter of controversy among States and there may be a lack of consensus among States as to what are the requirements of international law. Again, it is not always easy to determine which aspects of a claim are decisive in categorization.<sup>64</sup> In *Benkharbouche*, the Supreme Court was able to conclude that there was an ascertainable rule applicable to the situations before it, because of the work of the International Law Commission in producing its Draft Articles on Jurisdictional Immunities of States and Their Property.<sup>65</sup> However, that was not the position in the three cases decided by the Strasbourg court on the same day in 2001. In *Al-Adsani v United Kingdom*, the majority did not find it established that there was, as yet, acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State. It therefore concluded that the State Immunity Act 1978, which grants immunity to States in respect of personal injury claims, unless the injury was caused by an act or omission in the United Kingdom, is not inconsistent with those limitations generally accepted by States as part of the doctrine of State immunity.<sup>66</sup> Its observations in the other two cases are also of interest in this regard. In *Fogarty v United Kingdom*, the majority considered that there was too much diversity of State practice in the area of embassy staff disputes to enable it to say that the restrictive doctrine

<sup>62</sup> *Benkharbouche* (n 2) [35].

<sup>63</sup> *ibid* [36] referring to *Cudak v Lithuania* (2010) 51 EHRR 15, paras 67–74 and *Sabeh El Leil v France* (2012) 54 EHRR 14, paras 58–67. In both cases the Strasbourg Court found national rules of State immunity to be disproportionate and in breach of art 6 where the rule was more restrictive than customary international law required.

<sup>64</sup> A point made by Lord Sumption in *Benkharbouche* (n 2) at [53].

<sup>65</sup> *Benkharbouche* (n 2) [29].

<sup>66</sup> *Al-Adsani* (n 51) [66]. This approach is difficult to reconcile with that of the Supreme Court in *Benkharbouche* (n 2) at [52] where it was considered that the restricted doctrine has not proceeded by accumulating exceptions to the absolute doctrine.

applied.<sup>67</sup> In *McElhinney v Ireland*, the majority noted that there was a trend in international law towards limiting State immunity in respect of personal injury caused by an act or omission within the forum State. However, that practice was by no means universal.<sup>68</sup> Accordingly, in both cases the majority concluded that, in granting immunity, the State concerned could not be said to have exceeded the margin of appreciation allowed to States in limiting an individual's access to the courts.

It may be, therefore, that in cases where the rule of international law is not ascertainable, it is sufficient for compliance with Article 6 that the State has taken a tenable view of the requirements of international law and has acted within its margin of appreciation. Given the difficulties which are frequently encountered in ascertaining rules of customary international law, this would seem a sensible approach in such cases. Moreover, it would accord with the principle, stated by the House of Lords in *Jones v Saudi Arabia* that municipal courts should exercise restraint in recognizing new rules of customary international law and should not force the pace in areas of international controversy where there is no consensus among States. As Lord Hoffmann put it:

It is not for a national court to 'develop' international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states.<sup>69</sup>

Or, as Lord Bingham put it, 'one swallow does not make a rule of international law'.<sup>70</sup>

#### V. THE JUS COGENS CONTROVERSY

Those observations in *Jones v Saudi Arabia* were, of course, made in the context of the controversy over the relationship of State immunity and rules of *jus cogens*. For some years there was a growing body of support among human rights groups and some commentators for the view that a State should not be entitled to claim immunity in civil proceedings in respect of alleged conduct amounting to a violation of *jus cogens* on the part of the State or its officials committed outside the forum State. The paradigm case was that of torture. The argument ran as follows: The prohibition on torture is a peremptory norm of international law i.e. a rule of *jus cogens* from which no derogation is permitted. Within the hierarchy of rules of international law, such rules of *jus cogens* are superior and should prevail over lesser rules which are not *jus cogens*. As a result, the rule prohibiting torture should prevail over any rule which would grant immunity before national courts to a State engaging in

<sup>67</sup> *Fogarty v United Kingdom* (2002) 34 EHRR 12 [37]–[39]. In *Benkharbouche* (n 2) at [36] Lord Sumption found surprising the view expressed in *Fogarty* that there was no relevant and identifiable rule of international law.

<sup>68</sup> *McElhinney v Ireland* (2001) 34 EHRR 13 [38].

<sup>69</sup> *Jones v Saudi Arabia* (n 27) at [63]. <sup>70</sup> *ibid* [22].

torture or to an individual engaging in torture on behalf of a State. It is essentially a ‘trumping’ argument: the higher status of the rule prohibiting torture trumps any rule conferring immunity.

It is superficially an attractive argument and would lead to a result which many would see as desirable—the withdrawal of immunity from State torturers. However, the argument suffers from two grave defects and the House of Lords in *Jones v Saudi Arabia* was right to reject it. First, it is based on fallacious reasoning. Secondly, State practice does not support any such development in customary international law. Nevertheless, it was for a time, a highly influential argument.

It is no doubt correct that the prohibition on torture has achieved the status of a rule of *jus cogens*. That was recognized by the House of Lords in *Pinochet (No. 3)*.<sup>71</sup> The implications of that conclusion were authoritatively explained by the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v Furundzija*<sup>72</sup> in terms approved by Lord Bingham in *A v Secretary of State for the Home Department (No 2)*.<sup>73</sup> The ‘trumping’ argument, however, confuses substantive prohibitions on conduct in the area of criminal responsibility with the distinct procedural question of whether a State may lawfully be subjected against its will to the adjudicative jurisdiction of another State in respect of that conduct. 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 authorize torture or absolve its perpetrators from liability. As the International Court of Justice observed in the *Arrest Warrant*<sup>74</sup> case, the immunity from jurisdiction enjoyed by an individual does not mean that he enjoys impunity in respect of the crimes he has committed.

For present purposes, however, what is more relevant is the question whether international law had developed in such a way as to require that the rule prohibiting torture should prevail over rules granting immunity in civil cases. In 2001 the matter came before the European Court of Human Rights in Strasbourg in *Al-Adsani v United Kingdom*.<sup>75</sup> Mr Al-Adsani claimed that he had been tortured by State officials in Kuwait. He tried to sue the Government of Kuwait in the English courts but his claim was barred by the

<sup>71</sup> *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147, 197–199.

<sup>72</sup> *Prosecutor v Furundzija* (Judgment) IC 95-17/1-T, (10 December 1998) [153]–[157].

<sup>73</sup> *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71; [2006] AC 221 at [33].

<sup>74</sup> *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) ICJ Rep 2002 [60]. See also *R v Lama*, [2014] EWCA Crim 1729; [2017] QB 1179 at [37].

<sup>75</sup> See also *Kalogeropoulou and Others v Greece and Germany*, (2002) ECHR Rep 2002 X p 417; 129 ILR 537.



State Immunity Act. 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. The case was heard by a Grand Chamber of the European Court of Human Rights comprising 17 judges. In the event, the United Kingdom won the case—by the barest majority of 9 to 8.

I have already referred to the reasoning of the majority. They considered that Article 6 was engaged, but that a measure which reflected generally recognized rules of international law on State immunity could not be a disproportionate restriction on the right of access to a court under Article 6(1). In coming to that conclusion, the majority accepted that *Furundzija* and *Pinochet* demonstrated that the prohibition of torture had become a peremptory rule of international law. However, they distinguished those cases on the ground that they were concerned with criminal liability whereas the case before them concerned civil liability. The majority was unable to discern in the international instruments, judicial authorities or other materials before it, any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.<sup>76</sup> Accordingly, there was no unjustified restriction on the applicant's access to a court.

The opinion of the minority,<sup>77</sup> which included a number of eminent international lawyers, is a straightforward application of the line of reasoning I have outlined. In the view of the minority, the basic characteristic of a rule of *jus cogens* is that it overrides any other rule which does not have the same status. Rules of State immunity are not rules of *jus cogens*:

The acceptance therefore of the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions.<sup>78</sup>

Judge Ferrari Bravo, who had been a judge of the International Court of Justice, in a separate dissenting opinion, was left to lament the lost opportunity to deliver a courageous judgment:

What a pity! The Court, whose task in this case was to rule whether there had been a violation of Article 6(1), had a golden opportunity to issue a clear and forceful condemnation of all acts of torture.<sup>79</sup>

In my opinion the decision of the majority is correct in the result, but flawed by its reliance on a distinction between criminal and civil proceedings. As the

<sup>76</sup> *Al-Adsani* (n 51) [54–56], [61], [66–67].

<sup>77</sup> Dissenting Opinion of Judges Rozakis and Cafiſch Joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic. <sup>78</sup> At O-III3. <sup>79</sup> At O-IV1.

minority was quick to point out, it is not the nature of the proceedings which determines the effects that a *jus cogens* rule has upon another rule of international law. The real point here is not that the status of the rule prohibiting torture as a rule of *jus cogens* overrides immunity only in criminal cases, but that it does not have the effect of overriding immunity at all. The *Al-Adsani* case was not concerned with the substantive prohibition on torture, but with the distinct question as to which courts had jurisdiction to hear cases concerning it. The *jus cogens* status of the prohibition on torture was irrelevant so far as that was concerned.

The need for judicial restraint in developing international law beyond what is accepted by States, and the role of the Strasbourg court in that regard, are touched on in the opinion of Judge Pellonpaa, who was joined by Judge Sir Nicholas Bratza, concurring in the majority opinion. He observed:

... when having to touch upon central questions of general international law, this Court should be very cautious before taking upon itself the role of a forerunner.<sup>80</sup>

Judge Pellonpaa referred to the concern expressed by Sir Robert Jennings about 'the tendency of particular tribunals to regard themselves as different, as separate little empires which must as far as possible be augmented'. In Judge Pellonpaa's view, the Strasbourg court in *Al-Adsani* had avoided the kind of development of which Sir Robert warned.

Judge Pellonpaa's warning was entirely appropriate. In the event, the international community has not accepted the drastic limitations on State immunity for which the minority in *Al-Adsani* contended. This has since been made clear by a series of decisions in the International Court of Justice. In the *Armed Activities* case, it held that the fact that a rule has the status of *jus cogens* did not confer upon the Court a jurisdiction which it would not otherwise possess.<sup>81</sup> In the *Arrest Warrant* case, the Court held, albeit without expressly referring to the concept of *jus cogens*, that the fact that a Minister for Foreign Affairs was accused of criminal violations of rules which undoubtedly possess the character of *jus cogens* did not deprive the Democratic Republic of the Congo of its entitlement, as a matter of customary international law, to demand immunity on his behalf.<sup>82</sup> More recently, in the *Jurisdictional Immunities* case<sup>83</sup> in 2012, the ICJ held that, by allowing claims based on violations of international humanitarian law by the German Reich during World War II to be brought against the Federal Republic of Germany before Italian courts, and by allowing enforcement of judgments in such claims against German State assets, Italy violated

<sup>80</sup> At O-II9.

<sup>81</sup> *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)* (Jurisdiction and Admissibility, Judgment) ICJ Rep 2006 [64], [125].

<sup>82</sup> *Arrest Warrant* (n 74) [58], [78].

<sup>83</sup> *Jurisdictional Immunities of the State (Federal Republic of Germany v Italy, Greece intervening)* (Judgment) 3 February 2012, ICJ Rep 2012.

international law by denying immunity. The Court, proceeding on the assumption that the breaches of international humanitarian law constituted breaches of *jus cogens*, rejected the submission that there was a conflict between such breaches and according immunity to Germany. In its opinion there was no such conflict because the two sets of rules address different matters:

The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.<sup>84</sup>

Similarly, it rejected an argument that to allow immunity in these circumstances would hinder the enforcement of a *jus cogens* rule:

The rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess *jus cogens* status, nor is there anything inherent in the concept of *jus cogens* which would require their modification or which would displace their application.<sup>85</sup>

It appears, therefore, that the Strasbourg court in *Al-Adsani* narrowly avoided taking what would have been a wrong turn, a false and unprincipled step in the development of international law. In fact, the notion that a rule of *jus cogens* can override an immunity in international law has now been widely discredited. It has been rejected not only by the International Court of Justice but also by the national courts of the United Kingdom,<sup>86</sup> France,<sup>87</sup> Canada,<sup>88</sup> Poland,<sup>89</sup> Slovenia,<sup>90</sup> New Zealand<sup>91</sup> and Greece.<sup>92</sup> The exception, which perhaps proves the rule, is Italy, where a decision of the Constitutional Court in 2014 to contrary effect has been severely criticized.<sup>93</sup>

<sup>84</sup> *ibid* [93].

<sup>85</sup> *ibid* [95].

<sup>86</sup> *Jones v Saudi Arabia* (n 27). See, generally, *Jurisdictional Immunities* (n 83) at [85], [96].

<sup>87</sup> *Bucheron*, Judgment of the Court of Appeal of Paris, 9 September 2002, and Cour de Cassation, No. 02-45961, 16 December 2003, Bulletin civil de la Cour de Cassation (Bull. civ.), 2003, I, No. 258, at 206; *X*, Cour de Cassation, No. 03-41851, 2 June 2004, Bull. civ., 2004, I, No. 158, at 132; *Grosz*, Cour de Cassation, No. 04-47504, 3 January 2006.

<sup>88</sup> *Bouzari v Islamic Republic of Iran*, Court of Appeal of Ontario, DLR, 4th Series, Vol 243, at 406; 128 ILR 586; *Kazemi Estate v Islamic Republic of Iran* [2014] 3 SCC 62.

<sup>89</sup> *Natoniewski*, Supreme Court (2010) 30 Polish Yearbook of International Law 299.

<sup>90</sup> Case No. Up-13/99, Constitutional Court of Slovenia.

<sup>91</sup> *Fang v Jiang*, High Court, [2007] NZAR, at 420; 141 ILR 702.

<sup>92</sup> *Margellos*, Special Supreme Court, (2002); 129 ILR 525. See also the judgment of the French Cour de Cassation of 9 March 2011 in *La Réunion aérienne v Libyan Arab Jamahiriya* (case No. 09-14743, 9 March 2011, Bull. civ., March 2011, No. 49, at 49) considered by the ICJ in *Jurisdictional Immunities* (n 83) [96]. cf *Ferrini v Federal Republic of Germany* (2004) decision 5044/04 which gave rise to the *Jurisdictional Immunities* case before the ICJ.

<sup>93</sup> Judgment 238 of the Italian Constitutional Court (2014) 168 ILR 529. See A Tanzi, 'Un difficile dialogo tra Corte internazionale di Giustizia e Corte costituzionale' (2015) 70 *La Communauté internationale* 13; O Sender and M Wood, 'Jurisdictional Immunities of the State' in E Borge and C Miles (eds), *Landmark Cases in Public International Law* (2017) 564, 575–7. See also *Yousuf v Samantar* (n 47) [14], [15].

## VI. STATE IMMUNITY AND NON-JUSTICIABILITY

Standing back from these developments, it appears that there has been a change of emphasis in the law of State immunity which is apparent in various ways. The move to a restricted principle of State immunity in this jurisdiction necessarily involved a shift of focus. If you have an absolute principle of immunity, the focus is necessarily on the identity of the defendant or the party indirectly impleaded. However, once you accept restrictions on immunity, the subject matter of the proceedings moves to centre stage and requires close scrutiny. Similarly, as we have seen, in a parallel development it has come to be accepted in this jurisdiction that individuals performing official functions of a foreign State may be entitled to immunity, with the result that the focus there too is not on the identity of the defendant but the nature of the activity.<sup>94</sup> As a result, the terms ‘immunity *ratione personae*’ and ‘immunity *ratione materiae*’, relating respectively to status-based immunity and conduct-based immunity, have entered common legal usage in this jurisdiction.

In this regard, I turn to a recent unsuccessful attempt to expand the scope of State immunity. Traditionally, State immunity has been available at common law where a foreign State (however broadly you define that) is directly impleaded i.e. where it is sued, or where it is indirectly impleaded i.e. where the proceedings relate to property in the State’s ownership, possession or control.<sup>95</sup> Although this terminology is not employed by the State Immunity Act, both categories survive under that Act, Section 6(4) preserving rules on indirect impleader with some modifications.<sup>96</sup>

In *Belhaj v Straw*,<sup>97</sup> the claimants brought claims in tort against various UK government departments and against UK officials, alleging that they had assisted officials of Malaysia, Thailand, the United States and Libya in the unlawful rendition of the claimants to Libya. The defendants sought to challenge the proceedings on grounds not only of non-justiciability and act of State but also on the ground of State immunity. They submitted that State immunity is wide enough to cover cases where it is integral to the claims made that foreign States or their officials must be proved to have acted contrary to their own laws. This, they said, indirectly impleaded the United States because the proceedings sought to affect the interests and activities of the United States. Here, they placed particular reliance on Article 6, UN

<sup>94</sup> *Propend Finance Pty v Sing* (n 20); *Jones v Saudi Arabia* (n 27) per Lord Bingham at [31], per Lord Hoffmann at [69]; *Belhaj v Straw* [2017] UKSC 3 per Lord Mance at [17]; *Rahmatullah v Ministry of Defence* [2017] UKSC 3; [2017] AC 964 per Lord Mance at [17].

<sup>95</sup> *Cia Naviera Vascongado v SS Cristina (The ‘Cristina’)* [1938] AC 485, per Lord Atkin at 490; *United States of America and Republic of France v Dollfus Mieg et Cie SA and Bank of England* [1952] AC 582; *Rahimtoola v Nizam of Hyderabad* [1958] AC 379.

<sup>96</sup> The whole concept of indirect impleader and its retention in the State Immunity Act 1978 was criticized by Dr FA Mann, ‘The State Immunity Act 1978’ (1979) 50 BYBIL 43, 55–7.

<sup>97</sup> *Belhaj* (n 94); [2017] AC 964.

Convention on State Immunity,<sup>98</sup> which provides that proceedings shall be considered to have been instituted against another State if the proceedings in effect seek to affect the property, rights, interests or activities of that other State, and submitted that this should inform the reading of Section 6(4) of the State Immunity Act.

The Supreme Court roundly rejected the submission. Lord Mance referred<sup>99</sup> to the views of academic commentators that “‘interests’ [in Article 6] should be limited to a claim for which there is some legal foundation and not merely to some political or moral concern of the State in the proceedings’.<sup>100</sup> He pointed out that the appeals involved no issues of proprietary or possessory title. All that could be said was that establishing the defendants’ liability in tort would involve establishing that various foreign States, through their officials, were the prime actors in respect of the alleged torts. But that would have no second order legal consequences for the relationship between the claimants and the foreign States in question or their officials. None of the domestic or international cases to which the court had been referred carried the concept of ‘interests’ so far as to cover any reputational or like disadvantage that could result to foreign States or their officials from findings as to the allegations on which the claim was based. On the contrary, the pains which the House of Lords took in *Dollfus Mieg* and *Rahimtoola v Nizam of Hyderabad* to identify a potential legal effect of the litigation on the relevant State rights point against any broader conception of interest.<sup>101</sup> In *Belhaj*, the relevant foreign States would not be affected in any legal sense by the proceedings to which they were not party.

The point is an interesting one because of what it says about the scope of State immunity. The argument on State immunity advanced in *Belhaj* trespassed beyond the outer limits of any concept of State immunity. The argument was essentially one of non-justiciability and it was with that concept and with act of State that the enormous judgments in the Supreme Court in *Belhaj* were predominantly concerned.

<sup>98</sup> United Nations Convention on Jurisdictional Immunities of States and Their Property, supra. Article 6 Modalities for giving effect to state immunity

1. A State shall give effect to State immunity under article 5 by refraining from exercising jurisdiction in a proceeding before its courts against another State and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected.

A proceeding before a court of a state shall be considered to have been instituted against another State if that other State:

- (a) is named as a party to that proceeding; or
- (b) is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State.’

<sup>99</sup> *Belhaj* (n 94) at [26].

<sup>100</sup> Fox and Webb (n 1) 307; and R O’Keefe, and CJ Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property* (Oxford University Press 2013) 110–11.

<sup>101</sup> Per Lord Mance at [26], [31]. See also Lord Sumption at [195], [197].

These are, of course, distinct principles. State immunity is a principle of customary international law. It derives from the principle of the sovereign equality and independence of States in international law.<sup>102</sup> Although its precise scope is often the subject of uncertainty or dispute, where it applies it is a principle with which States are required to comply. The foreign act of State principle, by contrast—although it also has its roots in notions of the independence and sovereignty of States—is not a principle of customary international law<sup>103</sup> and many States have no such rule. As Lord Sumption observed in *Belhaj*, ‘[t]he foreign act of State doctrine is at best permitted by international law. It is not based upon it.’<sup>104</sup>

The foreign act of State principle is clearly a portmanteau concept. It now seems that it includes three or possibly four different principles: the Supreme Court was not in total agreement on this point. First, there will be many situations in which the application of established rules of private international law—the conflict of laws—will provide a complete answer and it will not be necessary to have regard to any wider principle of act of State. Secondly, there is authority—at least up to the level of the Court of Appeal—for a principle of act of State whereby the court will not inquire into the legality of an act of a foreign government within its own territory.<sup>105</sup> The majority view in *Belhaj v Straw* was that, if it exists, this category is limited to acts in relation to property and does not extend to personal torts. Moreover, this second category is clearly subject to certain exceptions: *Yukos v Rosneft (No. 2)*.<sup>106</sup> Thirdly, there

<sup>102</sup> *Jurisdictional Immunities* (n 83); *The Parlement Belge* (1880) 5 PD 197, per Brett L.J. at 214–215; *Belhaj* (n 94) per Lord Mance at [12].

<sup>103</sup> *Banco Nacional de Cuba v Sabbatino* (1964) 376 US 398.

<sup>104</sup> *Belhaj* (n 94) per Lord Sumption at [200].

<sup>105</sup> *Luther v Sagor* [1921] 3 KB 532; *Princess Paley Olga v Weisz* [1929] 1 KB 718.

<sup>106</sup> In *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2012] EWCA Civ 855 the Court of Appeal listed the following at [68]ff. See also *Belhaj* (n 94) per Lord Mance at [73].

- (1) The act of State must, generally speaking, take place within the territory of the foreign State itself.
- (2) ‘[T]he doctrine will not apply to foreign acts of State which are in breach of clearly established rules of international law, or are contrary to English principles of public policy, as well as where there is a grave infringement of human rights’. *Oppenheimer v Cattermole*, per Lord Cross [1976] AC 249, 277–278; *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883; *Yukos* at [69].
- (3) Judicial acts will not be regarded as acts of State for the purposes of the act of State doctrine. *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 WLR 1804.
- (4) The doctrine does not apply where the conduct of the foreign State is of a commercial as opposed to a sovereign character. *Empresa Exportadora de Azucar v Industria Azucarera Nacional SA (The Playa Larga)* [1983] 2 Lloyd’s Rep 171; *Korea National Insurance Corp v Allianz Global Corporate & Specialty AG* [2008] 2 CLC 837.
- (5) The doctrine does not apply where the only issue is whether certain acts have occurred, as opposed to where the court is asked to inquire into them for the purpose of adjudicating on their legal effectiveness. *WS Kirkpatrick & Co Inc. v Environmental Tectonics Corp International* (1990) 493 US 400. It only applies where the invalidity or unlawfulness of the State’s sovereign acts is part of the very subject matter of the action in the sense that the issue cannot be resolved without determining it. *Belhaj v Straw* per Lord Sumption at [240].

is the wider principle of non-justiciability recognized by Lord Wilberforce in *Buttes Gas v Hammer*<sup>107</sup>—a principle of non-justiciability relating to transactions of sovereigns on the international plane. And fourthly—although this is highly controversial—the door may not be entirely closed on a possible further category in which a court should decline jurisdiction for fear of embarrassment of the executive or, at least, damaging national interests of the United Kingdom.<sup>108</sup>

On any view, the net of act of State and non-justiciability extends far more widely than does that of State immunity. Moreover, the precise scope of these principles of act of State and non-justiciability still remains to be worked out. This, in my view, is a process particularly suitable for incremental development and clarification by judicial decision. If this is right, it provides a further contrast with State immunity where, 40 years ago, the State Immunity Act was urgently required in order to effect a wholesale reform of the law in this jurisdiction.

#### VII. CONCLUSION

I would suggest that, over the last 40 years, the State Immunity Act 1978 has done good service. Parliament did not intend to create a completely comprehensive code covering every aspect of State immunity<sup>109</sup> but in the areas which it covers it provides a sound legal framework of rules.

- (6) The act of State doctrine has been held not to extend to all sovereign acts of foreign States. In *Lucasfilm Ltd. v Ainsworth* [2011] UKSC 39; [2012] 1 AC 208 the Supreme Court concluded that the act of State doctrine should not be an impediment to an action for infringement of foreign intellectual property rights, even if validity of a grant is in issue, simply because the action calls into question the decision of a foreign official. *Yukos* at [63], [64].

To this list might be added a further exception to which Lord Mance drew attention in *Belhaj*:

- (7) Courts in the United Kingdom are entitled to determine whether a foreign law is legal, for example under the local constitution. The foreign law will not be regarded as an act of State which cannot be challenged—*Belhaj v Straw* per Lord Mance at [73] (iii); *Buck v Attorney General* [1965] Ch 745, 779; *Al-Jedda v Secretary of State for Defence* [2010] EWCA Civ 758, [2011] QB 773 at [74], [189]—at least where that is not the purpose of the proceedings. *Belhaj v Straw* per Lord Neuberger at [140].

<sup>107</sup> *Buttes Gas v Hammer* [1982] AC 888.

<sup>108</sup> See *Yukos* (n 106) per Rix L.J. at [65]. *Belhaj* (n 94) per Lord Neuberger at [149] where he referred to *In re Westinghouse Electric Corp'n Uranium Contract Litigation MDL Docket No. 235* [1978] AC 547, 616–617 and 639–640, and *Adams v Adams* [1971] P 188, 198. *Belhaj* (n 94) per Lord Mance at [105]. A different view was expressed by the Court of Appeal in *Belhaj v Straw*, [2014] EWCA Civ 1394; [2015] 2 WLR 1105. See also *Kawasaki Kisen Kaisha Ltd. v Nippon Yusen Kaisha Ltd.* [1939] 2 KB 544, per Sir Wilfred Greene MR at 552: 'I do not myself find the fear of the embarrassment of the Executive a very attractive basis upon which to build a rule of English law ...' cf *R (Khan) v Secretary of State for Foreign and Commonwealth Affairs* [2014] EWCA Civ 24; [2014] 1 WLR 872.

<sup>109</sup> See, for example, *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, at 1585–1586; *R v Lema* [2017] QB 1171.



It has not been perfect. In the *Pinochet* litigation the provisions in Section 20 in relation to the immunity of foreign heads of State proved rather impenetrable.<sup>110</sup> More recently, in *Benkharbouche*, the Supreme Court held that Sections 4(2)(b) and 16(1) are incompatible with Article 6 ECHR and Article 47 of the Charter of Fundamental Rights of the European Union. There remain unresolved issues. In particular, there remains the fascinating question of the precise relationship of our domestic law on State immunity and Article 6 ECHR, a matter on which our courts and the Strasbourg court clearly hold very different views.

Nevertheless, the State Immunity Act has enabled the courts to give effect to a restricted principle of State immunity in accordance with the requirements of international law. It has provided a clear structure which has enabled litigants to know where they stand and has, as a result, promoted certainty in this area of the law where it was much needed. At the same time, it has shown itself adaptable to changing conditions and the judges have made an important contribution by a process of judicial interpretation—in particular in relation to the immunity of State agents.

As the State Immunity Act enters early middle age, I think it is worth recording that, in general, it has stood the test of time reasonably well.

<sup>110</sup> *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147.