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State practice, treaty practice and State immunity in international and English law

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1. Introduction: State immunity at the crossroads of the fragmentation discourse

Approaching State immunity from the perspective of the fragmentation versus convergence debate requires concentrating on whether, under international law, there is one single legal regime applicable to immunities or a multitude of normative regimes. This relates, in the first place, to the relationship between the immunity of States and of their officials. In principle, State officials can claim immunity abroad solely because their own State would be entitled to a coterminous immunity. If the official's immunity were different and invocable on a separate basis, the State would have no claim to raise if immunity were to be denied, nor could it waive that immunity for the official. In such case it would not be the State's immunity in the first place, but instead represent a kind of individual right. There is, anyway, no evidence in practice that such separate official immunity is recognised as a free-standing category.[1]

The next issue relates to immunities in civil and criminal proceedings. In relation to criminal proceedings, the International Law Commission (ILC) Special Rapporteur, Kolodkin, has suggested that 'State officials enjoy immunity *ratione materiae* from foreign criminal jurisdiction,

[1] This issue arises in relation to particular treaty regimes as well. Article 1(b)(iv) of the 2004 UN Convention on Jurisdictional Immunities of States and Their Property equates State representatives acting in that capacity to the State, though it may be open to question whether 'acting in that capacity' means being *de facto* at the service of the State or carrying out the function that is inherently and uniquely associated with the sovereign authority of that State. This point is generically similar to that arising under CAT 1984, on which see section 4 below.

i.e. immunity in respect of acts performed in an official capacity, since these acts are acts of the State which they serve itself.'[2] Again, such multiple terminology confuses the matter, for it becomes unclear whether, for the purposes of immunity, we need to focus on the nature of the act as such, the capacity in which that act was performed, or the broader purpose and interests served by the performance of that act; whether the acts in question should be 'acts of the State which they serve', or acts that fall within the sovereign authority of the State. This question is crucial for immunities in both criminal and civil proceedings (apart from the limited category of *ratione personae* immunities of a very limited number of high-ranking officials, premised on the constitutional position of those officials, as opposed to the nature of the act immunity is claimed for).

The difference between civil and criminal immunities has been maintained by the European Court of Human Rights in *Al-Adsani* v. *UK*,[3] the UK House of Lords in *Jones* v. *Saudi Arabia*,[4] subsequently approved by the Fourth Section of the European Court of Human Rights,[5] and the International Court of Justice (ICJ) in *Germany* v. *Italy*,[6] which have all upheld State immunity for serious human rights violations and for international crimes. Moses LJ has similarly suggested in the case of *Khurts Bat* that '[i]t does not follow that because there is immunity from civil suit, an individual, acting as an official on behalf of his State, is immune from criminal liability'.[7]

Courts have not worked any uniform rationale for this projected distinction. In some cases it is put forward at the level of the scope of acts *jure imperii*, while in other cases, notably in *Al-Adsani*, it is argued at the level of the effect of *jus cogens*. The distinction is certainly popular in some doctrinal circles, but is by no means generally accepted. The Second Report of the ILC Special Rapporteur falls short of subscribing to such distinction. From the other end of the doctrinal spectrum, the Institute of International Law has emphasised in the 2009 Naples Resolution that

[2] *Second Report*, RA Kolodkin, A/CN.4/631, 10 June 2010, para. 94.
[3] *Al-Adsani* v. *UK*, 34 EHRR 11(2002).
[4] *Jones* v. *Saudi Arabia* [2006] UKHL 16, 14 June 2006.
[5] *Jones and Others* v. *The United Kingdom*, Nos. 34356/06 and 40528/06, Fourth Section, 14 January 2014.
[6] *Jurisdictional Immunities of the State* (*Germany* v. *Italy: Greece Intervening*), International Court of Justice, Judgment of 3 February 2012, General List No. 143, esp. para. 87.
[7] *Khurts Bat* v. *Mongolia*, High Court [2011] EWHC 2029 (Admin), 29 July 2011, para. 74.

the criminality of the conduct of a State official should lead to the denial of their immunities in civil proceedings.[8]

A further relevant issue touches upon the sources of law on the basis of which particular judicial decisions are adopted. It may be empirically true that various sources of law can establish different regimes for criminal and civil immunities of States and their officials. For instance, as US Supreme Court has clarified in *Samantar*, that the 1976 US Foreign Sovereign Immunities Act (FSIA) does not apply to State officials.[9] It only covers situations where the foreign State is directly impleaded before American courts. The FSIA and the 1978 UK State Immunity Act (SIA) do not extend to criminal proceedings either. The same holds true for the 1972 European Convention on State Immunity (ECSI) and the above 2004 UN Convention, if and when it enters into force.

But these are merely *situational* and *empirical* differences that do not go to the underlying rationale of immunities, whether that of a State or of an official, whether civil or criminal. In common law systems, legislation displaces the pre-existing common law that incorporates international law. Cases not covered by the statute are subjected to substantially different criteria, as was the case in the decisions of English courts in *Lampen-Wolfe* and *Littrell*.[10] Similarly, *Samantar* would be differently decided by American courts whether it were based on the FSIA, or on common law as the Supreme Court said it should be.

Internationally, if the relevant treaty in force applies *in casu* and *inter se*, it will apply as *lex specialis*. If it is not in force, or the case falls outside its reach *ratione personae* or *ratione materiae*, general international law will apply – again with the possibility of furnishing the outcomes substantially different from ones that could be maintained under the treaties.

With these considerations in mind, the present chapter will first examine the merit of the restrictive doctrine of immunities, its application in criminal and civil proceedings, and its place in customary international law (Section 2). Section 3 will examine the existing or nascent treaty regimes on immunities. Section 4 will focus on the impact of human rights treaties on immunities, notably the 1950 European Convention on Human Rights (ECHR) and the 1984 UN Convention against Torture

[8] *Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes*, IDI, Naples Session, 2009.

[9] *Samantar* v. *Yousuf*, No. 08–1555, 1 June 2010.

[10] *Holland* v. *Lampen-Wolfe* [2000] 3 All ER 845–6; *Littrell* v. *USA* [1995] 1 WLR 182.

(CAT). Section 5 will focus on the impact of normative hierarchy examining, in turn, jurisdictional arrangements under Articles 5, 7 and 14 CAT, and *jus cogens*. Section 6 will examine the extent to which the legal position under the international law on immunities could be received and given effect in English law. Section 7 will offer general conclusions.

The methodology chosen here relies on consensual positivism, premised on ordinary sources of international law, whether or not they reflect the political naturalist perspective as to the sensibility or desirability of granting or denying immunity, or to fears as to some adverse consequences that the denial of immunities is likely to entail. But as the debate is, informally at least, influenced by clichés and pre-conceptions that the pro-immunity position should be privileged as *the* right and correct one in maintaining stability and avoiding chaos, section 6 will also examine how English courts are supposed to deal with the relevant policy considerations.

2. The place of the restrictive doctrine of immunities in international law

A. Statement of the problem

First and foremost, we need to understand what shape of the immunity doctrine is exactly deemed or pretended to be part of customary international law. Both the House of Lords in *Jones* and the ICJ in *Germany* v. *Italy* have asserted this to be the 'restrictive' doctrine that excludes commercial acts but immunises violations of human rights and humanitarian law. This section will demonstrate that the position that such general rule of immunity exists under international law, from which a specific exception related to human rights or international crimes must then be identified, constitutes a fallacy. This is a view that can help reach some politically desirable outcomes, but not one that reflects the actual state of current positive international law.

The ICJ acknowledged in *Germany* v. *Italy* that the existence of *opinio juris* in the area of State immunity requires 'the acknowledgment, by States granting immunity, that international law imposes upon them an obligation to do so'. The Court further asserted that 'States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity.'[11] This is, as we shall see below,

[11] *Germany* v. *Italy*, para. 56.

a questionable thesis, because there is plenty of practice through which States deny the existence of customary rule on immunities, whether of foreign States or of their officials.

B. The scope of the relevant practice

What is the evidence that the 'restrictive' immunity along the above lines is part of customary international law? Without this being the case, any doctrine of immunities could only be an analytical rationalisation at the level of *lex ferenda*, on which phenomenon the International Court has clearly, and repeatedly, maintained the position that it cannot serve as the basis of its decisions.[12]

The issue could only be clarified through the focus on the relevant State practice. Moses LJ suggested in *Khurts Bat* that the practice through which 'States have not claimed immunity is just as much evidence of the absence of State practice as those cases where immunity is claimed but denied by the forum state.'[13] But cases in which States do not claim immunity contribute hardly anything to the development of State practice on immunities and must, for that reason, be excluded from the focus. It is in the essence of immunities that States can freely choose whether or not to claim them; not claiming immunities in a particular case does not prejudice the possibility of doing so in a later case. Only State practice that positively addresses the rationale and scope of immunities must count for ascertaining what the applicable international law is.

To illustrate, and despite suggestions in writings,[14] State practice regarding the prosecution of individuals for espionage, acting at the service of their States, contributes precious little to the practice on State immunity, unless it were to be demonstrated that the relevant agent was tried domestically even if its State of nationality claimed their immunity. The ILC Special Rapporteur suggested that it is difficult for the State to assert immunity for acts of espionage, kidnapping and sabotage committed on the territory of another State.[15] But this is not because there is any firm rule of international law preventing States from doing so, but because doing so would publicly and effectively associate the State with

[12] *Fisheries Jurisdiction* (*UK* v. *Iceland*) Merits, ICJ Reports 1974, 23–4; *Libya* v. *Malta*, ICJ Reports, 1982, 38.

[13] *Khurts Bat*, para. 99.

[14] See, e.g., A. Sanger, 'Immunity of State Officials from the Criminal Jurisdiction of a Foreign State', (2013) 62 *ICLQ*, 193, 212–13.

[15] *Second Report*, para. 85.

those activities,[16] especially in cases where the prosecution can support its case with the plausible evidence.

C. *The general essence of the restrictive doctrine*

It is generally established in international law that, to identify a customary rule on any subject-matter, we have to identify a point in time by which this rule has crystallised through practice. The rights and obligations of States on the relevant subject-matter would, then, be different before and after that point of time.[17] It must be emphasised that neither the House of Lords in *Jones* nor the ICJ in *Germany* v. *Italy* have concentrated on this temporal element to show as of which point in time the 'restrictive' approach they upheld has become part of customary law and thus binding on the relevant States.

Historically, the restrictive doctrine was first developed in relation to civil proceedings. By the time State practice took up the criminal proceedings aspect, the legal position as to the scope of *jure imperii* acts was relatively well established as covering only acts unique to State authority. The public policy dimension based on *jus cogens* or international criminality of the underlying conduct has come to State practice considerably later, with the American cases of *Letelier* and *Marcos* and the English case of *Pinochet*. This latter sub-area does not offer any alternative or a qualitatively new test. It brings moral and ethical dimension to what is already obvious – these acts are anyway of such nature that they do not require the exercise of State authority for their perpetration.

The absolute immunity doctrine, that was deemed to be in force for a long time right up to the mid-twentieth century, enabled States and their officials to evade foreign proceedings merely on the basis of their identity.[18] Lord Wright suggested in the *Cristina* case in the House of Lords that, pursuant to the absolute immunity rule the State:

> renounces *pro tanto* the competence of its Courts to exercise their jurisdiction even over matters occurring within its territorial limits, though to do so is prima facie an integral part of sovereignty. The rule may be said

[16] Cf., *France* v. *Djibouti*, ICJ Reports 2008, para. 196.

[17] For the ICJ's jurisprudence on this point see *Anglo-Norwegian Fisheries* (*UK* v. *Norway*), ICJ Reports, 1951, 116; *The Minquiers and Echrehos Case* (*France* v. *UK*), ICJ Reports, 1953, 47.

[18] Sometimes this has assumed anecdotal dimensions. See, e.g. *Mighell* v. *Sultan of Johore* [1894] QB 149, to the effect that immunities could preclude litigation as to the breach of the promise to marry. The outcome was 'a consequence of the absolute independence of every sovereign authority'.

> to be based on the principle 'par in parem non habet imperium,' no State can claim jurisdiction over another sovereign State. . . . Or it may be taken to flow from reciprocity, each sovereign State within the community of nations accepting some subtraction from its full sovereignty in return for similar concessions on the side of the others.[19]

Each State was thus expected to give as much as it would receive. The rule that went by the identity of the defendant rather than the nature of the act made this easier. The *par in parem* rule, denying jurisdiction of an equal over an equal was therefore an essential premise for the absolute immunity rule.

The restrictive doctrine of immunity requires that the defendant State and its officials additionally demonstrate that their conduct was performed in the exercise of their governmental authority. The judicial endorsement of the restrictive doctrine took place in the *Empire of Iran* case by the German Constitutional Court, suggesting that the distinction between sovereign and non-sovereign acts does not depend 'on whether the State has acted commercially. Commercial activities of States are not different in their nature from other non-sovereign State activities.' What mattered was the nature of the transaction rather than its underlying motive and policy, whether the State acted in the exercise of its sovereign authority or in a private capacity the way that any private person could act.[20]

This approach was later on more comprehensively adopted by the House of Lords in the cases of *Trendtex*[21] and *Congreso*. The House of Lords held in the latter case that the conduct of a State is not a sovereign act and attracts no immunity if it is an act which could be performed by any private actor, even if the situation related to a highly contingent political context.[22] A similar approach was voiced by the US Judiciary in the aftermath of the 1952 Tate Letter that inaugurated the restrictive doctrine in the US. In the *Victory Transport* case, the Court of Appeals for the Second Circuit clearly observed that:

> Sovereign immunity is a derogation from the normal exercise of jurisdiction by the courts and should be accorded only in clear cases . . . fall[ing] within one of the categories of strictly political or public acts . . . :

[19] *Cristina* [1938] *AC* 485 at 502–503; Lord Maugham also approved 'insisting as a condition of immunity on the adherence of other foreign Governments to the same rule as to immunity', *ibid.*, 518.

[20] *Empire of Iran*, *Bundesverfassungsgericht*, 30 April 1963, 45 ILR 57 at 80.

[21] *Trendtex Trading* v. *Bank of Nigeria* [1977] 1 QB 529, 552–3.

[22] *I Congreso del Partido* (HL) [1983] I AC 268.

> (1) internal administrative acts, such as expulsion of an alien.
> (2) legislative acts, such as nationalization.
> (3) acts concerning the armed forces.
> (4) acts concerning diplomatic activity.
> (5) public loans
> We do not think that the restrictive theory adopted by the State Department requires sacrificing the interests of private litigants to international comity in other than these limited categories.[23]

A comparable list of sovereign activities was included in the resolution of the Institute of International Law adopted at the proposal of the Special Rapporteur Ian Brownlie.[24]

The further application of the restrictive doctrine by English courts, such as in cases of *Lampen-Wolfe* and *Littrell*,[25] was concerned with the activities of foreign armed forces, has followed the *Congreso* approach, and focused on the nature of the relevant act in the underlying context, rather than it having been authored by armed forces as such, in determining whether immunity should be accorded. The *Congreso* approach was also carefully followed in *Kuwait Air Co* where the governmental authority test was applied to the sequence of acts that were undertaken by public bodies of the foreign State.[26] By and large, then, various jurisdictions have been uniform in applying that pattern of the restrictive doctrine. Its basic essence is that an act that anyone can perform is not one that is unique to State authority (*jure imperii*).

Overall, the restrictive doctrine does not require identifying an exception from the generally applicable immunity. Instead, it requires a careful focus on the nature of each and every relevant act. Rather clear ways of articulating the merit of the restrictive doctrine have been suggested in various areas. In relation to acts of armed forces, the authorship of those acts by armed forces is not sufficient; their nature and relationship must be further assessed. There is a clear distinction between activities within the foreign military base, directly serving the need to maintain the base and, say, their use as a contract workforce or a tool for atrocities (as was the case in *Germany* v. *Italy* below). There is a difference between ownership and control of natural resources by the State and trade in the very

[23] *Victory Transport Inc.* v. *Comisaria General* 336 F.2d 354 (1964), para. 10.
[24] *Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement*, IDI Basel Session, 1991, Article 2(3).
[25] *Lampen-Wolfe* [2000] 3 All ER 845–6; *Littrell* v. *USA* [1995] 1 WLR 182.
[26] *Kuwait Air Co*, Court of Appeal [1995] WLR 1147, 1162–3 (per Lord Goff).

same resources.[27] There is, similarly, a difference between the organisational policy underlying the arrangement of a foreign embassy that falls within the area of sovereignty and may attract sovereign immunity, and a more specific issue of the Embassy's compliance with the employee's contractual rights, which may not.[28]

If this approach is followed, it becomes obvious that serious human rights violations do not fall into the category of sovereign acts, and there is nothing that affiliates them with the essence of sovereign power. Human rights violations meet the criteria repeatedly articulated in jurisprudence that anyone could commit those acts.[29] This runs into Lord Hope's point in *Pinochet* about 'criminal acts which the head of State did under the colour of his authority as head of State but which were in reality for his own pleasure or benefit' not being immune.[30] These acts may be committed by public authorities, often in pursuing what they perceive as public and political interest. But the inherent nature of these acts remains the same: whether a single instance or on a mass scale, their performance does not inevitably require the use of public authority. The crucial distinction is, again, between *performance of the act by the State and its officials* and the same act *being performed as an exercise of public authority*. There is no absolute overlap between the two.

Moreover, in *Letelier*, Chile contended that assassination of a former ambassador by a car bomb, even if committed or ordered by the Chilean government, was an act *jure imperii*, as an act of 'policy judgment and decision', and immunised under the US legislation. The court responded that 'whatever policy options may exist for a foreign country, it has no "discretion" to perpetrate conduct designated to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts recognised in both national and international law'.[31]

Obviously, cases decided by English and American courts on the basis of the SIA and the FSIA could not apply this restrictive doctrine because

[27] For the overview of the American jurisprudence, see G. R. Delaume, 'Economic Development and Sovereign Immunity', 79 *AJIL* (1985), 319 at 325, 327.

[28] *Fogarty* v. *UK*, 37112/97, 21 November 2001, paras. 22, 30, 38.

[29] For criminal proceedings see Joint Separate Opinion of Judges Higgins, Kooijmans and Burgenthal, *Arrest Warrant*, ICJ Reports 2002, paras. 74 and 85; for civil litigation see *Hilao* v. *Marcos*, US Court of Appeals (Ninth Circuit), 104 ILR 122–5; these violations were 'as adjudicable and redressable as would be a dictator's act of rape'.

[30] [2000] 1 AC 242.

[31] *Letelier*, 63 ILR 378 at 388. Chile considered that the act involved was immune under section 1605 of the US Foreign Sovereign Immunities Act (FSIA) of 1976.

the latter, as embodied in common law that incorporates international law, was displaced, in those jurisdictions, by the statute that prescribes that a general immunity persists unless a specific exception from it is identified.[32] The distinction between the sources of national and international law is indeed cardinal, yet not always properly understood or acknowledged in the relevant jurisprudence. Thus the Fourth Chamber of the European Court in *Jones* v. *UK* has referred to national court pronouncements to the effect that a general rule of international law according immunity to State officials for torture – the same way as to States – can be identified because the national legislation extends such immunity to them.[33] On other occasions, this elementary distinction between national and international law has been more properly grasped. To illustrate, American courts accept that 'as a matter of international and domestic law, *jus cogens* violations are, by definition, acts that are not officially authorized by the Sovereign',[34] even if the letter of domestic legislation can prevent them from applying this position domestically. This way, the position in *Siderman* reaching out to international law directly can be a valid instance of State practice the way that several other decisions constrained by national statutes could never be.

This is, however, a purely domestic legal position adopted by the national legislator; there is no evidence whatsoever that it is reflected in customary international law agreed upon as between States. This is the case, contrary to the perception expressed in writings that, after the adoption of the SIA in the UK, the jurisprudence that relies on the restrictive doctrine as part of common (and of international) law could now be accorded only historical significance.[35] In practice, when English and American courts get a chance to adjudicate outside the SIA, they follow a limited functional approach referring to the uniqueness of the act to

[32] As reflected in the argument put forward by J. Crawford, 'A Foreign State Immunities Act for Australia?' (1983) *Australian YIL* 71, 105–6. See further notes 122 and 130 and the accompanying text below.

[33] *Jones* v. *UK*, paras. 203, 210; moreover, the US, British and Dutch practice (*Samantar*, *Pinochet* and *Bouterse*) referred to in paras. 211–12 indicated that the pro-immunity position was not sustainable, yet the Court chose to disregard this practice on the basis of the House of Lords' decision in *Jones* v. *Saudi Arabia* – the very decision that was being appealed.

[34] *Siderman de Blake*, 965 F.2d at 718, as followed in *Samantar*, No. 11-1479, 2 November 2012, 19.

[35] As put forward earlier on by F. A. Mann, 'The State Immunity Act 1978', (1980) 51 *BYIL*, 43; and later on in Martin Dixon, Robert McCorquodale and Sarah Williams, *Cases and Materials on International Law* (2nd edn., Oxford: Oxford University Press 2009), 318.

sovereign authority as per *Congreso*, further applied in *Kuwait Air Co*, *Littrell* and *Lampen-Wolfe*, and by the US Supreme Court and the Fourth Circuit Appeals Court in *Samantar*; as well as earlier in *Marcos* and *Letelier*.

The flipside is that the practice of national courts based on the SIA and the FSIA that require adjudication on immunity issues solely on the basis of national (as opposed to international) law, and regardless of the examination of the nature of underlying acts,[36] cannot validly constitute State practice that could build customary law on the subject. That which excludes international law from the consideration by national courts, cannot feasibly contribute to the development of the very same international law.

D. Restrictive doctrine and criminal proceedings

In this area, the decision by the House of Lords in *Pinochet* was the first major material case. The acts of torture as prohibited by CAT, by a *jus cogens* norm, and as constituting an international crime, did not amount to the sovereign function of any public official.[37] It is important to understand that the House of Lords did not establish the lack of criminal immunity by focusing on the previous practice of domestic criminal prosecutions of foreign officials, because that previous practice was not concerned with immunity and its restrictive doctrine. There was no pre-existing law applicable to criminal immunities alone and such was not identified. The lack of immunity was established through the application of pre-existing functional restrictive doctrine, now to criminal cases.

The importance of this approach for getting the right result was demonstrated by the way immunities were handled in the *Khurts Bat* case later on. Moses LJ referred to the ILC Special Rapporteur to deny that immunity was available in criminal proceedings.[38] However, on a general plane, the Special Rapporteur was of the view that: 'various rationales for exceptions to the immunity of officials from foreign criminal jurisdiction prove upon close scrutiny to be insufficiently convincing. These rationales continue to be discussed in the doctrine. The practice of States is also far from being uniform in this respect'; and that: '[i]t is difficult to talk of exceptions to immunity as a norm of international law that has developed, in the

[36] As happened in the cases at note 126 below.
[37] *Pinochet III*, (HL), [2000] 1 AC 147.
[38] *Khurts Bat*, para. 99.

same way as it cannot definitively be asserted that a trend towards the establishment of such a norm exists'.[39]

And in relation to criminal immunities alone, the Special Rapporteur is perfectly right. There is, quite simply, not enough State practice out there to demonstrate the rule that confers immunity to foreign officials or denies that immunity in relation to criminal proceedings specifically. Nor can it be reinforced by practice of prosecution and exercise of jurisdiction over individuals serving the State where immunity was neither invoked nor denied. But the Special Rapporteur's approach is methodologically erroneous for taking criminal immunities as a separate area and thus only focusing on the part of the area in which State practice regarding immunities is displayed. The Special Rapporteur did not properly focus on the general rationale of immunities that derives from the nature of sovereign authority of States and the scope of this authority – which is by definition the same for both criminal and civil proceedings, in principle as well as in practice.

E. Upholding State immunity through the misapplication of the restrictive doctrine

Courts that have upheld State immunity for serious violations of human rights and humanitarian law have initially professed to follow the restrictive doctrine. But its treatment differs in each particular case. The European Court in *Al-Adsani* has provided no explanation as to the nature of the relevant acts of torture. It merely referred to the immunity that Kuwait enjoyed due to the maxim *par in parem non habet imperium*, and considered this sufficient to prevent the victims from invoking their right to the access to a court under Article 6 ECHR. This way, the European Court has effectively used the absolute immunity approach that does not properly query into and distinguish between the sovereign and non-sovereign acts.

Twelve years later, in *Jones* v. *UK*, the Fourth Chamber of the European Court has not provided any more substantiated explanation of the rationale and basis of State immunity than its derivation from the sovereignty of States either.[40] The issue of how the rule of immunity propagated in *Al-Adsani* and *Jones* has emerged and achieved binding force through State practice still remains unclarified.

[39] *Second Report*, at 30, para. 96. [40] *Jones* v. *UK*, para. 188.

In *Jones* v. *Saudi Arabia*, the House of Lords have specified that the individual defendants allegedly responsible for the acts of torture were public officials, and torture took place in police or on prison premises. Lord Bingham and Lord Hoffmann also referred to Articles 4 and 7 of the 2001 ILC's Articles on State Responsibility, according to which the conduct of whatever organ of the State, including the ones committed in the excess of instructions or authority, are attributable to the State.[41] This has confused State responsibility with State immunity. In reality, there is some way between the act being performed through the exercise of State authority or facilities, and the same act being by its nature a sovereign act. For, if the mere fact of the involvement of public officials and premises were to be enough, the absolute immunity doctrine would be re-introduced through the backdoor, making it impossible to exclude even commercial acts from the scope of immunities if they are perpetrated by State officials or through the use of State premises or facilities.

The ICJ in *Germany* v. *Italy* has queried 'whether the [war crimes] in question fall to be assessed by reference to the law governing the exercise of sovereign power (*jus imperii*) or the law concerning non-sovereign activities of a State, especially private and commercial activities (*jus gestionis*)'.[42] Obviously that has to be international law, not national law. Otherwise each State will be able to unilaterally determine the scope of its own internationally opposable immunities. The Court did not explain what the 'law governing the exercise of sovereign power' was, whether it meant the Third Reich law or international law, or how war crimes in international law could attract immunity as valid exercises of public authority.[43] Instead, the Court relied on the concession made by the Italian government that these acts were *jure imperii* acts. As the judgment did not properly examine the reasons for or against this position, its continuing value for the development of the law on this matter is doubtful. Effectively, as Xiaodong Yang has demonstrated, the Court's reasoning has upheld the absolute immunity doctrine in relation to underlying war crimes.[44]

The International Court's analysis focused on three separate, albeit somewhat interdependent questions: torts committed within the forum's

[41] *Jones* (HL), paras. 11–12 (per Lord Bingham), 76 (per Lord Hoffmann).

[42] *Germany* v. *Italy*, para. 60.

[43] Which obviously is not the same as being lawful, but that is far from being crucial. Legality of the act and its reflection of public authority can be two separate substantial tests that may at times overlap in content, but do not have to do so.

[44] X. Yang, 'Absolute Immunity of Foreign Armed Forces from Tort Proceedings', (2012) 71 *CLJ*, 282.

territory; acts committed by armed forces; and the scope of acts *jure imperii*. When focusing on the practice related to acts of armed forces, the Court's inference was that these attract immunity as far as they are *jure imperii*.[45] Having essentially acknowledged the two-tiered nature of the problem – acts of armed forces *and* their performance as part of sovereign authority – the Court did not really address the second aspect, relying instead on the Italian concession.

When confronted with the reality that most of the national practices deny immunity for territorial torts, either generally or in conjunction with the acts of armed forces, the Court simply pleaded its unawareness that those statutory provisions have been applied by national courts to that effect; and has then recast the issue of tort immunity into that of armed forces immunity.[46] This is a rather curious way of excluding from the focus the practice that stood in the way of the desired outcome.

The Court then turned to another part of – rather limited – practice that dealt with the conduct of armed forces during an armed conflict.[47] What makes this odd is the inference, on the basis of judicial decisions adopted in a small number of States,[48] that the conduct performed during an armed conflict provides, under customary international law, a separate basis, distinct from the territorial tort issue, on which immunities can be accorded or denied; and that anything armed forces do during an armed conflict is immune.[49] The restrictive doctrine to which the Court initially alluded was supposed to apply, making immunities dependent on the sovereign nature of the relevant act in each pertinent case. If the context of the occurrence of the act, not the nature of the act, were crucial, then anything committed during an armed conflict – or for that matter in prisons or other official facilities – would be a sovereign act and immune. We call that the absolute immunity doctrine.

To compare, both the *Lampen-Wolfe* and *Littrell* cases drew on the relevant acts as part undertaken within the military base and solely for

[45] *Germany* v. *Italy*, para. 72. [46] *Germany* v. *Italy*, paras. 70–7. [47] *Ibid.*, paras. 73–4.

[48] It should be noted that in *Jones* v. *UK* the same range of limited State practice was alluded to for demonstrating the shape of a generally binding rule on immunity, see *Jones* v. *UK*, paras. 112–49. The Court does not seem to be using this practice to actually justify its own position in the operative reasoning of its Judgment.

[49] A related point could be that even if the International Court's approach on acts committed in war are *ipso jure* immune, that would still not affect the position that the bulk of cases not dealing with acts committed in an armed conflict should still be excluded from immunity. From the national courts' perspective, the reasoning in *Germany* v. *Italy* cannot be a direct legitimation of *Al-Adsani* or *Jones*.

the purpose of organising and maintaining armed forces, as opposed to more far-reaching activities affecting the civilian population. By contrast, the International Court in *Germany* v. *Italy* merely relied on the fact that the relevant acts were authored by German armed forces, as opposed to these acts validly serving their organising and maintenance purposes. Only the State can perform acts related to organising its own armed forces, which is a sovereign affair. The use of armed forces to commit crimes for which sovereign authority is not inherently needed does not, however, transform these crimes into sovereign acts. This becomes obvious if we bear in mind the above-mentioned rationale of the restrictive doctrine: the task is not to clarify whether human rights claims fall within a predetermined – commercial or other – exception, but to assess each act on its own merit to see whether it was undertaken in the genuine exercise of sovereign authority in the first place.

To summarise, the three above cases did not properly address the actual State practice, or have engaged in voluntarist reclassification of what practice was needed and what was not. Apart from the lack of the uniform approach, these three cases convey the impression as if there were two different standards to identify acts *jure imperii*, one applying to human rights claims and the other to the rest of the cases. This position does not represent the restrictive doctrine and thus the current legal position. The only remaining alternative that could reflect the proper legal position consists in carefully and accurately examining the nature of underlying acts and transactions in every pertinent case, to see whether – over and above having been perpetrated by State agents, in public interest or through the use of State facilities – they constitute valid exercises of sovereignty and public authority, instead of relying on the outdated *par in parem* maxim.

Relying on the principle of sovereign equality and on the maxim *par in parem non habet imperium* in *Germany* v. *Italy*, *Jones* v. *UK* and *Al-Adsani* essentially misconstrues the restrictive theory and misdirect the reasoning as to how the parameters of the restrictive immunity rule must be identified. If the broad range of commercial, tort and employment matters is considered, one State could indeed, and frequently, exercise its *imperium* over another. The principle of sovereign equality does precious little to upset this result. Two States would be equal if they can be impleaded before each other's courts just as they would be if they cannot be so impleaded, as long as the underlying legal position applies to them equally.

F. State practice and customary law in the balance

The question now arising is whether and to what extent the restrictive rule in general, or in the shape as propagated in *Al-Adsani*, *Jones* (HL), *Germany* v. *Italy* or *Jones* v. *UK* could be said to be part of positive customary international law. The rule thus construed is too nuanced. It refers to certain kinds of acts being included and others being excluded from the scope of sovereign immunity. Its conceptual justification is not as uniform or straightforward as was the case with the absolute immunity rule. Asserting the customary law status of such a rule thus presumes a substantially more complex legal position than would be presumed with regard to the older absolute immunity rule. It therefore requires a higher threshold of evidence to be cleared in order to identify that the rule of immunity thus shaped is what has been accepted as part of positive international law, being backed by State practice that is sufficiently uniform and consistent, and further supplemented by the requisite *opinio juris*.[50]

This requirement of a higher threshold is further dictated by the aspect of normativity. Under the restrictive doctrine, immunity could only be granted or denied under reference rules, not by substantive rules of conduct. Substantive rules prescribe, clearly and straightforwardly, the relevant right or obligation. Reference rules merely specify the criteria, the application of which will ultimately determine what the relevant rights and obligations are. Given that the requirement of the restrictive doctrine is to further look at the precise nature of the relevant act and transaction, the conclusion follows that immunities could at most be seen to be governed by reference rules.

Therefore, in terms of customary law, the higher burden of proof requires answering the question in relation to what element of that reference rule should the uniform or consistent State practice be identified: the general existence of the immunity rule; a particular conception of the sovereign act; or specific individual acts covered by immunity? And as it happens, States are not to the least agreed in relation to any of those criteria. The ICJ decision in *Germany* v. *Italy* only demonstrates that State practice supporting any aspect of the putative rule – sovereign nature of the act, act by armed forces or the territorial tort aspect – is very limited and thus qualitatively insufficient.

[50] See generally Article 38 of the International Court's Statute; and *North Sea Continental Shelf*, ICJ Reports, 1969, 3.

Concerns this insufficiency of evidence raises are further corroborated by further State practice. To illustrate, the United States of America does not subscribe to such version of the 'restrictive' theory as has been expounded in the cases of *Al-Adsani*, *Jones* and *Germany* v. *Italy*. The US Congress has repeatedly amended the FSIA to enable the victims of terrorist attacks to recover damages from the relevant States;[51] and, more recently, Canada followed suit after the International Court delivered its judgment in *Germany* v. *Italy*.[52] This confirms that these two States do not feel internationally bound to grant immunity to foreign States, let alone subscribe to a particular vision of immunities that has been upheld in the *Al-Adsani/Jones/Germany* v. *Italy* stream of litigation. More broadly, American courts have emphasised that 'the grant of immunity is a privilege which the United States may withhold from any claimant'.[53] On the other hand, China still adheres to the doctrine of absolute immunity, as was demonstrated in a recent litigation.[54] There is room for viewing the Chinese position as that of persistent objection. If so, then in any case dealing with China national courts would first have to query whether there is a well-established customary rule on immunities in the first place (which, as we already saw, would be a difficult task); and then accord immunity to China on the basis of its persistent objection to such rule if the latter could be identified. If China is a persistent objector, it can obtain immunity for all its acts, including commercial ones; if not, then its every pertinent act must be looked at through the prism of the restrictive doctrine *Congreso*-style. If either of these two possibilities were to be displayed within British or American jurisdictions, then in both cases, the international legal requirement in relation to the UK or the USA would be to accord or deny immunity to China in disregard of the 'general immunity versus specific exceptions' pattern to which both the SIA and the FSIA subscribe as sources of domestic law in these two jurisdictions.

[51] See, for an overview, R. Bettauer, 'Germany Sues Italy at the International Court of Justice on Foreign Sovereign Immunity – Legal Underpinnings and Implications for US Law', *ASIL Insight*, 19 November 2009.

[52] See the amendments to the Canadian State Immunity Act (R.S.C. 1985, c. S-18), 13 March 2012.

[53] *Lafontant* v. *Aristide*, 103 ILR 586; see also *United States* v. *Noriega*, 99 ILR 162–3, to the effect that the US does not consider itself bound under international law to accord immunity to foreign States and their agents. See, to the same effect, the Judgment of the US Supreme Court in *Republic of Austria* v. *Altmann*, (2004) 541 US 677.

[54] *Democratic Republic of the Congo* v. *FG Hemisphere Associates*, 8 June 2011, Hong Kong Court of Final Appeal.

Given the absence of a general agreement as to the acts covered by the restrictive immunity rule, and the *Al-Adsani* and *Jones* pretence to the contrary effect notwithstanding, Lord Denning's point that 'there is no consensus whatever' as to the customary law status of immunities still stands.[55] The lack of customary law on immunities compellingly suggests that the restrictive doctrine is at most an interpretative guide for the pre-existing jurisdictional entitlements of States and that they do not have to defer jurisdiction, unless some compelling considerations pointing to the uniquely sovereign activities requires that. And then, this is only a matter of comity, not a strict legal requirement.

In such circumstances, the only legally defensible approach, as a matter of international law, is to grant State immunity for a rather narrow category of official acts that undoubtedly constitute exercises of governmental authority, as specified in the above-examined jurisprudence on the restrictive doctrine of immunities that most prominently includes *Congreso*, and in the scholarly analysis of this area of law.[56] Otherwise, a valid human rights claim could be denied without the forum State actually owing the obligation to the relevant foreign State to accord immunity. As shown above, there is sufficient evidence that this position applies both to criminal and civil proceedings. It would, moreover, stand to no reason to classify an act or transaction as a sovereign act in relation to one kind of proceedings but not in relation to another. The issue of the nature of relevant acts is essentially a pre-proceeding issue. The nature of the act depends on its own merit and characteristics. The initiation of the particular form of proceedings is the victim's choice. It would be absurd to suggest that due to the victim's particular choice as to which proceedings should be used, the nature of an already perpetrated act should change from X to Y.

3. The (IR)relevance of treaties on State immunity

It is generally admitted that treaties can either codify the pre-existing customary law, or embody treaty-specific rules and principles that will subsequently find broader appeal among States, so that they could be seen as part of customary law as well. However, the threshold of proof on

[55] *Trendtex* [1977] 1 QB 552–3; Lord Wilberforce in *Congreso* also disapproved the option of viewing certain national legislation and international treaties as evidence of general customary law.

[56] D. P. O'Connell, *International Law* (London: Stevens & Sons, 1970), 846; R. Higgins, *Problems and Process* (Oxford: Oxford University Press, 1994), 81, 84.

demonstrating this much is quite high, as was the case both in the ICJ's *North Sea* judgment and, with regard to State immunity specifically, in *Congreso*. The relevant treaties on State immunity are unlikely to meet these requirements.

The ECSI is in force as between eight States only and falls short of representing any generally accepted legal position. The 2004 UN Convention could not reflect any pre-existing customary law either, as we already saw through the above focus on State practice. As for the potential generating customary rules anew, the Convention's low ratification status and its prioritisation of the 'general immunity versus specific exceptions' approach makes this highly unlikely.

The judicial treatment of these conventions is not free of problems. In *Al-Adsani* v. *UK*, the Strasbourg Court relied on the ECSI to support the government's position,[57] even though Kuwait was not only not party to it, but not even eligible to become such. Similarly, the House of Lords in *Jones* placed reliance on the 2004 Convention as the 'most authoritative' statement of law in this area,[58] to support the government's position, even though it was not in force. In none of those cases was any effort made to compare the terms of these conventions to the actual state of State practice.

The International Court in *Germany* v. *Italy* pronounced that both the 1972 and 2004 conventions were inapplicable to acts of armed forces. The ECSI includes a saving clause on armed forces, while the 2004 Convention was understood to have been prevailingly interpreted the same way through State practice. The Court also suggested that Article 12 of the 2004 Convention, denying immunity for territorial torts, does not represent customary law.[59] The reason why this could be the case is solely because State practice that matters for identifying any possible customary law in this area – that is practice relating to immunities specifically and that performed against the background of international, not national, law – does not take the locus of the act as the principal point of departure; it merely refers to a simple and straightforward distinction between acts that are unique to public authority and those that are not.

Furthermore, even if Article 12 of the 2004 Convention does not apply to armed forces and acts of the latter are supposedly governed by customary law, this should revert us to the restrictive doctrine theat focuses on acts unique to State authority, *not* on the 'general immunity

[57] *Al-Adsani*, paras. 22, 57–78.
[58] *Jones*, paras. 26 and47 (Lords Bingham and Hoffmann).
[59] As indicated in *Germany* v. *Italy*, para. 64.

versus specific exceptions' approach. Cases on the immunity of armed forces clearly articulate such version of the restrictive doctrine, as is clear from *Littrell* and *Lampen-Wolfe*, decided directly on the basis of English common law that incorporates international law. The International Court was also aware of Norwegian and Swedish positions regarding the scope of the 2004 Convention and used this as one of the justifications for dis-applying the territorial tort principle that Article 12 embodies.[60] But this does not quite represent the overall position of the Nordic States, which is a more pro-accountability one and might as well require denying immunity.[61] Nor, in the same problematic spirit, did the Court address the implications of the Swiss position and that of the ILC's Working Group that the 2004 Convention was not meant to apply to serious violations of human rights and breaches of *jus cogens*.[62]

Therefore, the Court's overall position to the relevant treaties is falsely premised on there being, somewhere in the background, a fall-back customary rule that obliges States to grant immunity pursuant to the approach that the Court's judgment has prioritised.

4. Immunities and human rights treaties

A. Immunities and the European Convention on Human Rights

The context in which State immunity has been discussed in the practice of the European Court of Human Rights relates to the right to access

[60] *Germany* v. *Italy*, para. 69.

[61] In fact, as the Norwegian Government put it to the Sixth Committee in 2011 on behalf of the Five Nordic Countries, developments including the adoption of the 1946 Nuremberg Principles have made it clear that 'no State official could have been in any doubt about his or her potential personal responsibility if participating in acts regarded by international law as crimes of concern to the international community as a whole'; and that these 'developments relating to international criminal justice as having contributed significantly to the normative production and clarification of rules pertaining to the scope for invocation of immunities. Consequentially, international criminal justice has a bearing on the general state of the law of immunities, which ought to be recognized.' Nordic Statement Delivered to the Sixth Committee of the General Assembly, Ms Margit Tveiten, Deputy Director General, 11 January 2011.

[62] Switzerland 'considers that article 12 does not govern the question of pecuniary compensation for serious human rights violations which are alleged to be attributable to a State and are committed outside the State of the forum. Consequently, this Convention is without prejudice to developments in international law in this regard.' The position of the ILC Working Group is that 'the Convention does not address questions concerning immunity arising from civil claims in relation to acts of a State in violation of human rights norms having the character of *jus cogens*, particularly the prohibition of torture'. Immunity of State Officials, Memorandum by the Secretariat, A/CN/4/596, 31 March 2008, 31–2 (para. 46); for the position of Swiss courts see note 98 below.

to a court under Article 6 ECHR, and whether the grant of immunity to the State impleaded in domestic proceedings will prejudice this right. The three initial immunity cases decided by the Strasbourg Court in 2002 did not offer any uniform approach on this matter. In *Al-Adsani* v. *UK*, the Court justified granting immunity for torture to Kuwait without any proper enquiry into the nature of relevant acts. Two other decisions – *Fogarty* v. *UK*[63] and *McElhinney* v. *Ireland*[64] – adopted a more functional and less blanket approach, offering a more nuanced application of the restrictive doctrine of immunity, to evaluate whether the relevant conduct of the State amounted to acts *jure imperii*.

Later on, the Strasbourg Court has delivered four other decisions on State immunity,[65] in which some questions are posed in a way that was not the case in *Al-Adsani*. In *Sabeh El Leil* v. *France*, the Strasbourg Court explained that:

> It would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6§1 – namely that civil claims must be capable of being submitted to a judge for adjudication – if a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on categories of persons.[66]

Such statement did not appear in *Al-Adsani*. The *Sabeh El Leil* approach is further in accordance with the European Court's general priority that ECHR rights must be secured to individuals in a way that is effective, not illusory.[67]

From here, the text step is to identify whether the grant of immunity would be a proportionate restriction on Article 6 rights. The justification in *Al-Adsani* was that 'measures taken by a High Contracting Party which reflect generally recognised 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'. This was because the ECHR had to be interpreted in line with other principles of international law pursuant to Article 31(3)(c) of the Vienna Convention on the Law of Treaties 1969 (VCLT).[68] This approach to restrict the application of Article 6 in order to comply with

[63] *Fogarty* v. *UK*, 34 EHRR 12 (2002). [64] *McElhinney* v. *Ireland*, 34 EHRR 13 (2002).
[65] *Cudak* v. *Lithuania*, 15869/02, 23 March 2010; *Sabeh El Leil* v. *France*, 34869/05, 29 June 2011; *Wallishauser* v. *Austria*, 156/04; *Oleynikov* v. *Russia*, 36703/04, 14 March 2013.
[66] *Sabeh El Leil*, para. 50.
[67] *Soering*, 14038/88, 7 July 1989, paras. 87–8; *Artico*, 6694/74, 13 May 1980, para. 33.
[68] *Al-Adsani*, para. 56.

other international obligations is not what is required under the VCLT, because the VCLT admits that treaties prevail over custom as *lex specialis*. The Court's approach also conflicts with the priority stated in other cases of the Strasbourg Court that wherever States-parties undertake other international obligations, they should still implement those under the ECHR.[69] It seems that in its practice relating to State immunity the Court adopts the 'deference to other rules' approach, while in all other cases it prioritises the primacy of the ECHR.

Then, under *Al-Adsani*, once a competing obligation under another source of international law is identified, it becomes automatically necessary and proportionate under the ECHR to grant immunity. Contrary to the priorities stated elsewhere in the Strasbourg jurisprudence, no proper examination was undertaken in *Al-Adsani* as to the nature of the relevant measure, available alternatives or the balance of competing interests. In *Jones* v. *UK* in 2014, no further clarification was provided to this issue and the precise nature of the relevant acts of torture was not enquired into either.

In the subsequent jurisprudence that includes *Cudak* v. *Lithuania* and *Sabeh El Leil* v. *France*, things seem to be somewhat different. As *Sabeh El Leil* suggests, 'the grant of immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States'. But a further requirement is then stated that 'the impugned restriction must also be proportionate to the aim pursued', to which end the restrictive immunity doctrine should be used as a point of reference.[70]

The unclear point here – compromising the ability of this projected position to be applicable on a continuous basis – is whether the grant of immunity is legitimate *because* this would ordinarily be done on the basis of the restrictive doctrine; or whether, alternatively, the legitimacy under the ECHR of the grant of immunity, even if allegedly justified under general international law, would *further depend* on the ECHR-specific requirement that such grant of immunity should be proportionate to the 'legitimate aim' pursued. The question thus is thus one of normative

[69] *M & Co* v. *FRG*, Application No. 13258/87, 9 February 1990, 33 *YB ECHR* 1990, 51–2; *Waite & Kennedy* v. *Germany*, 18 February 1999, para. 67; *Matthews* v. *UK*, ECHR 24833/94, 18 February 1999, paras. 26–35; *Bosphorus Hava Yollari Turizm* v. *Ireland*, 45036/98, paras. 155–6; *Soering* v. *UK*, No. 14038/88, Judgment of 7 July 1989; *Al-Saadoon & Mufdhi* v. *UK*, Judgment (4th Chamber), No. 61498/08, 2 March 2010; *Capital Bank* v. *Bulgaria*, 49429/99, 24 November 2005, paras. 38, 43, 110–11.

[70] *Sabeh El Leil*, paras. 52–3.

hierarchy, namely whether the ECHR-specific requirements should be applied subject to the (putative) customary law on immunities; or whether the Convention would apply as *lex specialis* and accommodate the position under that customary law only if it were compatible to those ECHR-specific requirements.

The judgment in *Cudak* v. *Lithuania* suggests that 'in cases where the application of the principle of State immunity from jurisdiction restricts the exercise of the right of access to a court [under Article 6], the Court must ascertain whether the circumstances of the case justify such restriction'.[71]

If this approach is pursued, the relevance of general international law on immunities matters for the Strasbourg Court only for identifying whether immunities pursue a legitimate aim, but does not pre-determine the further issue of whether immunities thus become a proportionate and legitimate restriction on Article 6. This latter issue must be gone into separately, contrary to the above-described deference approach in *Al-Adsani* and *Jones* v. *UK*. Article 6 would, then, prevail as *lex specialis*, and allow the grant of immunities only when these would be proportionate under the ECHR specifically, no matter whether they are mandated or required under general international law. If this is the current approach then, at the level of applicable principles at least, the Strasbourg Court's approach to immunities seems to have shifted towards a more pro-accountability stance. However, the *Jones* v. *UK* Judgment pressingly prompts the question as to whether, regarding the relationship between Article 6 and immunities, the European Court has one single approach or two separate approaches, each of which could be used through the voluntary selection at the relevant opportunity.

A separate issue, pursued in the Strasbourg jurisprudence, relates to the use, in a number of cases, of un-ratified treaties and the ones inapplicable *inter se*, to determine whether the respondent State was bound to grant immunity.[72] As we saw above, the 2004 Convention is not applicable law; it is not in force even for States that have ratified it. The reliance on it in several cases places the European Court on a rather slippery

[71] *Cudak*, para. 59.

[72] *Cudak*, para. 66 ('As to the 2004 Convention, Lithuania has admittedly not ratified it but did not vote against its adoption either'); *Sabeh El Leil*, para. 57; *Wallishauser*, para. 31; *Oleynikov*, para. 66 ('Russia has not ratified [the 2004 Convention] but has not opposed it: on the contrary, it signed the convention on 1 December 2006.') See, in this regard, Article 14 VCLT 1969.

slope. In those cases the outcome was withholding immunity and vindicating Convention rights. But would the European Court accept the relevance of un-ratified treaties if their requirement will be to cut down the scope of ECHR rights, as opposed to enforcing these rights effectively not illusorily? How would the European Court face the claim that the 2004 Convention, not ratified by one or both States involved, and not in force anyway, requires according immunity but the result thus obtained is not a necessary and proportionate restriction of Article 6 rights? This would take matters even further than *Al-Adsani* did under the pretence of applying Article 31(3)(c) VCLT, for un-ratified treaties could hardly represent 'any relevant rules of international law applicable in the relations between the parties'. On a more general plane, would the Court deem all 2004 Convention provisions to be part of customary law and adopt the approach of the absolute deference to the 2004 Convention; and if so, how would it explain it against the background of other cases that the ECHR prevails over other treaties?

B. Immunities and Article 1 of the 1984 Convention against Torture

Article 1 CAT defines torture, specifically for its own purposes, as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The question raised in jurisprudence is whether such definition has any bearing on whether torture could be a sovereign act protected by immunity. Lord Browne-Wilkinson suggested in *Pinochet* that CAT applied Pinochet's activities precisely because he had acted as a public official, namely Head of State.[73] Lord Millett observed that '[t]he official or governmental nature of the act, which forms the basis of the immunity, is an essential ingredient of the offence [under CAT]. No rational system of criminal justice can allow an immunity which is co-extensive with the offence.'[74]

It seems that, under either of these approaches, Article 1 hardly touches upon the issue of immunities. Article 1 mentions the 'act', 'public official' and 'official capacity' as separate categories. The meaning of one cannot pre-empt or pre-determine that of another. The fact that Pinochet

[73] [2000] 1 AC 200. [74] [2000] 1 AC 277.

acted as a public official does not answer the question as to the nature of his acts. Capacity means 'ability or power to do something' and 'a specified role or position'.[75] The adjective 'official' means 'relating to an authority' and 'permitted or done by a person or group in a position of authority'.[76] Therefore, for the purposes of CAT, 'official capacity' should be understood as the use of that potential, resource or facility that the fact of being public official uniquely enables one to possess or use. 'Official capacity' can at most mean acts committed 'while in office' or 'when on duty'. The nature of the 'act' perpetrated in that 'capacity' remains a separate issue.

Lord Hoffmann suggested in *Jones* v. *Saudi Arabia* that if torture was 'official enough' to fall within Article 1 CAT, then it was 'official enough' to attract immunity.[77] But would a breach of contract or another act relating to commercial relations by the official while in office be also 'official enough'? How about withholding salary payment to an embassy employee hired by an employment contract?

Even if a public official acting in official capacity is a requirement for application of CAT to the particular act of torture, this is immaterial for State immunity. Immunities focus on the nature of particular acts, not on what 'capacity' has been used to perpetrate them. A breach of contract can be committed by a person in 'a specified role or position', indeed through the use of 'position of authority' that may distinctively enable that person to commit that breach of contract. That breach will not thereby become an official act, even if 'official capacity' would be used to perpetrate it.

The restrictive doctrine of immunity requires, instead, focusing on the nature of the specific act, in this case 'act by which severe pain' is inflicted on a person, which can be perpetrated by anyone, whether or not acting in official capacity. It is merely the case that, for the purposes of CAT specifically, only 'acts' perpetrated by an official or in official capacity will be covered by other provisions of the Convention, for the purposes of prosecution and accountability. Article 1 CAT is not about immunity, but merely about description and determination of the scope of acts to which the Convention applies, and thus the scope of CAT *ratione materiae*.

That Article 1 does not envisage that torture attracts immunity as an exercise of public or official authority, or act *jure imperii*, is also confirmed by aspects of the drafting history of CAT which were not properly addressed in the relevant cases including *Jones*. The term 'official

[75] *Compact Oxford English Dictionary* (3rd edn., 2005), 139.
[76] *Compact OED*, 703. [77] *Jones*, para. 83.

capacity' was introduced into Article 1 in order to bring non-State actors into the scope of that provision. As this demonstrates, Article 1 refers to torture committed by (a) a 'public official' and (b) an 'other person acting in an official capacity'. The latter was inserted into the Convention's text to cover torture by certain non-State actors, such as rebels, guerrillas or insurgents, rather than limit the State official's responsibility to whatever is done in a strictly official capacity.[78] If this approach is followed, a public official would be liable for any act or torture while other individuals would be liable only for torture committed in that peculiar 'official capacity'. And there still would be no relation between Article 1 and immunities.

5. Immunities and normative hierarchy

A. Conventional rules on the accountability for, jurisdiction over, and prosecution of, international crimes

(i) Criminal jurisdiction and duty to prosecute under CAT

Articles 5 and 7 CAT establish a network of jurisdictional obligations to prosecute acts of torture. Lord Browne-Wilkinson suggested in *Pinochet* that, before the adoption of CAT, *jus cogens* alone was insufficient to remove immunity of officials engaging in torture, for 'not until there was some form of universal jurisdiction for the punishment of the crime of torture could it really be talked about as a fully constituted international crime'.[79]

On the other hand, as Lord Hope observed, 'it would be wrong to regard the Torture Convention as having by necessary implication removed the immunity *ratione materiae* from former heads of state in regard to every act of torture of any kind which might be alleged against him falling within the scope of Article 1'. Immunity for torture should be denied on the alternative basis of criminality pursuant to the developments under customary international law. Contrary to Lord Browne-Wilkinson's view, Lord Hope observed that the denial of immunity was due to the *jus cogens* prohibition of torture, which status was already achieved by the time the Convention became binding in England.[80] Under this view, CAT alone does not make the required difference.

[78] Manfred Nowak and Elizabeth McArthur, *UNCAT – A Commentary* (Oxford: Oxford University Press, 2008), 78–9.
[79] [2000] 1 AC 204–5. [80] [2000] 1 AC 246.

It is indeed doubtful whether the international criminalisation of torture is due solely and exclusively to CAT, which does not mention the word 'crime' and creates obligations that States have to implement within and through their national legal systems. Obligations are international, while the area to which they apply is national. That torture is an international crime may be due to elements arising under other sources of international law.

One possible argument is that of the primacy of CAT jurisdictional requirements over general international law. But the relative flexibility of CAT prosecution and extradition arrangements and the logical antecedence of jurisdiction to immunities could still leave room for the argument that all CAT requires is to find the place where the torturer can be tried when requirements of its Article 7 are met, not necessarily that they can be tried anywhere within the Convention's spatial remit even if they can invoke immunity in the forum.

Overall, their Lordship's treatment of CAT leaves plenty to guess on what basis CAT can override immunities in criminal proceedings: because it relates to torture committed in 'official capacity', because it establishes extra-territorial jurisdiction over torture, alone or together with customary law and *jus cogens*, or because it is complemented by the alternative basis that international law regards torture as a crime that no longer fits within official authority of the State. *Pinochet* offers no uniform *ratio decidendi* on this point and more Law Lords adopted the view of complementation and convergence as between CAT and *jus cogens* than those who saw the effect of CAT alone as crucial. Most of the Law Lords in favour of the denial of immunity have not subscribed to the exclusively CAT-centred view.

Moreover, the existence of jurisdiction under CAT does not dispose of the immunity issue, because jurisdiction is antecedent to, and essentially different from, immunities, the latter to be additionally gone into once the former is duly established. As the ILC Special Rapporteur suggested in relation to treaties such as CAT: 'If it is argued that immunity is not compatible with universal jurisdiction, then it is not fully clear why this should not relate not only to functional but also to personal immunity.'[81]

Thus, the 'jurisdictional' line of argument[82] effectively puts the cart before the horse. That there is jurisdiction established speaks merely of the entitlement of the State to prosecute a crime or adjudicate on a

[81] *Second Report*, paras. 74–7. [82] Sanger, 'Immunity of State Officials', 223–4.

tort; it does not directly relate to the nature of the act which is being subjected to that State's jurisdiction, nor to the status of the defendant. As the International Court has observed in *Arrest Warrant*, jurisdiction is essentially antecedent to immunities.[83]

And the bulk of the opinion – carrying greater weight than academic writings, even if not any inherently binding force – is still unconvinced by the argument that CAT qua treaty displaces immunities. Both the ILC Analytical Group and Special Rapporteur on immunities were quite sceptical regarding the immunities being displaced by extra-territorial jurisdiction.[84] The 2005 Institut de droit international (IDI) Resolution did not exclude immunities for crimes falling under universal jurisdiction either.[85] The same approach was adopted by the ICJ in the *Arrest Warrant* case, where it did not admit that treaties such as CAT displace immunities, even though the particular focus was on immunities *ratione personae*.[86]

But surely, as a matter of treaty interpretation pure and simple, if a treaty such as CAT impliedly incorporates one immunity exception, or defers to it hierarchy-wise, there is no reason to assert that it does not similarly accommodate other kinds of immunities. The argument on CAT versus immunity is essentially that of normative hierarchy, whether acknowledged by its proponents or not; its essence is that rules under one source of international law can and must override those under another. What matters for normative hierarchy is not the conferral of jurisdiction, which is anyway permissive. In relation to CAT specifically, the crucial factor could be the overall framework under Articles 5 and 7 that imposes on States-parties a duty to prosecute and brings together multiple elements of State jurisdiction (territorial, nationality and universal).

Unfortunately, the national and international practice is divided on this aspect of normative hierarchy. In *Germany* v. *Italy*, the International Court attempted to *a posteriori* recast the reasoning in *Pinochet* (in its turn divided on its point) as based primarily on CAT.[87] This puts *Germany* v. *Italy* in conflict with *Arrest Warrant*, where such impact of treaties like CAT was not admitted.

On the one hand, CAT has no immunity reservation in it and cannot have been intended to defer to it. It could prevail over immunities as *lex*

[83] *Arrest Warrant*, ICJ Reports 2002, para. 59.
[84] Immunity of State Officials, Memorandum by the Secretariat, A/CN/4/596, 31 March 2008, paras. 204–7; *Second Report*, 50–1.
[85] IDI Resolution on Universal Jurisdiction, Krakow Session, 2005.
[86] *Arrest Warrant*, para. 59. [87] *Germany* v. *Italy*, para. 87.

posterior. But then, immunities might be seen as *lex specialis*, referring to a particular class of torture suspects that could claim immunities, which not all torture suspects can. While the International Court's approach is not entirely satisfactory, the evidence for viable alternatives is not straightforwardly available either. This may explain why most fora are unconvinced about extra-territorial jurisdiction displacing immunities, for immunities *ratione personae* would also be at risk.

It has to be concluded that the position that CAT (a) classes torture as an official act whereby it (b) ranks it as an act *jure imperii* and then (c) removes immunity for that very same act through establishing extra-territorial criminal jurisdiction over it is a too nuanced and complex rule, the straightforward support for which cannot be found in the *ratio decidendi* of *Pinochet*. It moreover stands to no reason why the Convention would pronounce on the issue of the scope of immunity, if it does not on its face, and was never intended to, deal with the subject-matter of immunities. Or alternatively, if jurisdiction established under CAT displaces applicable immunities, why could it not displace *ratione personae* immunities of acting heads of State and government?

The proper approach for the *ratione materiae* immunities would, therefore, be to revert, after establishing that jurisdiction over the person under CAT exists, to the above-examined restrictive doctrine of immunity under international law to see whether the act of torture involved could be classed as a sovereign act. CAT does not address, let alone provide the answer to, this latter question.

(ii) Universal civil jurisdiction under Article 14 CAT

According to Article 14(1) CAT: 'Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation.' This clause includes no restriction *ratione loci*. Redress should be made available to any victim of torture, regardless of the locus of the act.

In *Bouzari* and *Jones* this extra-territorial effect was not accepted, not because the relevant national courts denied the inherent potential of Article 14 to displace immunities, but because Article 14 was seen to relate only to torture committed within the forum State's territory.[88] But the UN Committee against Torture has confirmed, in the aftermath of

[88] *Bouzari* v. *Islamic Republic or Iran* (Court of Appeal for Ontario), 30 June 2004, Docket: C38295, paras. 72–82, (per Goudge JA); *Jones* (HL), paras. 20 (*per* Lord Bingham), 46 (per Lord Hoffmann).

Bouzari, that the scope of Article 14 is not limited to torture committed within the forum's territory.[89]

More recently, the Committee's General Comment No. 3 specified that 'the application of Article 14 is not limited to victims who were harmed in the territory of the State party or by or against nationals of the State party'.[90] The duty to implement Article 14 in line with General Comment No. 3 has then been reiterated in relation to the UK specifically.[91]

National courts in *Bouzari* and *Jones* have, therefore, effectively engaged in a unilateral interpretation of Article 14, reading in the limitation that is not there. That the Committee's views are not inherently binding is, quite simply, immaterial. The Committee has been set up through the agreement of all States-parties to CAT and is, on that basis, in charge of implementing the Convention. Its views as to its content are supposed to be better than those of States-parties put forward unilaterally. This is all the more obvious if all the Committee has done, both in relation to Canada and the UK, is to reaffirm the duty of both States to act in line with the plain and ordinary meaning of the obligation contained in Article 14.

B. State immunity and jus cogens

The essence of peremptory norms of international law (*jus cogens*) is their hierarchical superiority over conflicting rules of international law. Consequently, if and to the extent international law includes a rule on State immunity, it should be disapplied whenever the enforcement of a peremptory norm is at stake. A general statement of incompatibility between *jus cogens* and immunities has been given by Lord Millett in *Pinochet* to the effect that:

> The international community had created an offence for which immunity ratione materiae could not possibly be available. International law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose.[92]

[89] UN Committee against Torture, Observations of the Report of Canada, CAT/C/CO/34/CAN, paras. 4(g) and 5(f).

[90] General Comment No. 3 (2012), para. 22.

[91] Concluding observations on the fifth periodic report of the United Kingdom, adopted by the Committee at its fiftieth session (6–31 May 2013), para. 17.

[92] [2000] 1 AC 278.

One way in which immunities are impacted upon by *jus cogens* is that the acts prohibited by *jus cogens* offend against the public policy of the international legal system and therefore cannot count as sovereign acts that attract immunity. This reasoning fits perfectly with the overall rationale of the restrictive doctrine of immunity, as discussed above, as relating to acts not unique to State authority. Instead, these acts can be committed by anyone, whether or not in a position of authority, for which reason they should not attract immunity.

Another way *jus cogens* impacts immunities is the direct hierarchical primacy. This line of reasoning was put forward by the minority in *Al-Adsani*, to the effect that the rules of *jus cogens* prevail over all conflicting rules. Therefore:

> The prohibition of torture, being a rule of *jus cogens*, acts in the international sphere and deprives the rule of sovereign immunity of all its legal effects in that sphere. The criminal or civil nature of the domestic proceedings is immaterial. The jurisdictional [and procedural] bar is lifted by the very interaction of the international rules involved, and the national judge cannot admit a plea of immunity.[93]

Courts that have denied the primacy of *jus cogens* over immunities have not advocated any coherent basis for such approach. The European Court in *Al-Adsani* has adopted an evidentiary approach that while in relation to criminal proceedings the impact of *jus cogens* on immunities was recognised in international practice, the same was not the case in relation to civil proceedings. The House of Lords in *Jones*, and the ICJ in *Germany* v. *Italy*, have considered that immunities are of procedural character and not affected by substantive rules of *jus cogens*. All three courts have, however, distinguished the criminal proceedings aspect as per *Pinochet* rather than contradicting it. But their reasoning rang hollow, given that criminal immunities are just as 'procedural' as civil immunities, and if *jus cogens* can bite on the former, there is no reason why it cannot bite on the latter. This runs, then, into the issue that the (non)sovereign nature of acts for the purposes of the restrictive doctrine is a pre-proceeding issue and that if an act contradicting *jus cogens* is not *jure imperii* in one type of proceedings, it cannot be so in other kind of proceedings either.

The approach in *Arrest Warrant* that immunities are of a procedural nature was premised on the availability of alternative remedies to which condition the subsequent pro-immunity judicial practice did not adhere.

[93] Joint Dissenting Opinion, *Al-Adsani*, paras. 1, 3–4.

Lords Bingham and Hoffmann suggested in *Jones* that State immunity does not really contradict the *jus cogens* prohibition of torture but merely diverts its enforcement to other fora.[94] In the same spirit, criminal immunities would be no less procedural and jurisdictional so as to merely divert, in the language of pro-immunity proponents, the issue to another forum. That is pretty much the Special Rapporteur's position.[95] This is one more instance evidencing that the frequently repeated civil/criminal distinction does not work.

The reality is, moreover, that no diversion of the issue to another mode of settlement ever takes place in practice in cases where immunity is upheld. The outcome of the upholding of immunity in the cases of *Al-Adsani* v *UK*, *Bouzari*, *Jones* and *Germany* v. *Italy* is that the victims were left without any available remedy. This position leads precisely to the condonation and encouragement of the initial act of torture and total legal security for future acts of torture. If the grant of immunity to the State establishes the legal position that – as between the forum State and the perpetrating State – there are no legal consequences for the relevant act of torture, then this position automatically entails the position that in the mutual relations of those two States the prohibition of torture does not operate as a legal prohibition and takes no effect as a legal rule. The overall essence of the substance-jurisdiction divide is, therefore, conceptually incoherent, ethically controversial and practically unsound.[96]

The principal and mainline effect of *jus cogens* norms is always consequential, that is relates to facts, situations, rights and entitlements established, or purported to be established, after a substantive peremptory rule has been breached. In all areas where *jus cogens* applies, it deals with situations arising after the wrongful act. In addition to the VCLT, the areas of State responsibility, statehood and recognition, unilateral acts, waiver and acquiescence, or acts of international organisations, are virtually

[94] *Jones* (HL), paras. 24 and 44 (both referring to H. Fox, *The Law of State Immunity* (1st edn., Oxford: Oxford University Press, 2001)).

[95] The Special Rapporteur suggests that 'Peremptory norms criminalizing international crimes lie within the sphere of substantive law. The norm concerning immunity is, as noted above, procedural in character, does not affect criminalization of the acts under discussion, *does not abrogate liability for them* and does not even fully exclude criminal jurisdiction in respect of these acts', at 39, para. 64 (emphasis original).

[96] This view is also developed in cases and in writings without properly addressing the underlying issues of normativity, normative hierarchy and normative conflict. On which see A. Orakhelashvili, 'The Classification of International Legal Rules: A Reply to Stefan Talmon', (2013) 26 *LJIL*, 89.

unanimous in recognising the effect of *jus cogens* in relation to situations produced after the violation of the relevant peremptory norm.[97] The principal effect of *jus cogens* is to consequentially deny the rights, privileges and qualifications the relevant State action would command but for the peremptory status of the rule that the conduct in question violates. Indeed, Article 41 of the Articles on State Responsibility refers to a 'situation created by the breach' of *jus cogens*, which is impunity and lack of remedies as an immediate consequence of the denial of immunities in comparable situations. The whole approach in *Jones*, as well as *Germany* v. *Italy*, recognises precisely that situation as lawful, and is essentially aimed at perpetuating that situation.

This runs precisely into the issue of derogation from *jus cogens* through the grant of immunities. The non-derogability of peremptory norms is not limited to the ambit of Article 53 VCLT. Instead, Article 53 is one specific expression of non-derogability that operates throughout the international legal system covering the areas highlighted above. Derogation can be initiated through unilateral acts or practice, formally or informally.

Derogation is inherently a phenomenon that intends to preserve, on a general plane, the validity of the rule derogated from, yet prevent its applicability to a case, or class of cases, to which the derogation in question relates. Immunities attempt doing to relevant peremptory norms just that. For our purposes, derogation from *jus cogens* norms through the grant of immunity to the defendant projects – *inter se* and *in casu* – the putative legal position that the prohibition under the relevant *jus cogens* norm shall take no legal effect and an act committed in contravention with that norm shall operate as a lawful act attracting privileges and rights that lawful acts could ordinarily attract. If *jus cogens* norms were merely substantive prohibitions, it could be argued with the same effect that a treaty contrary to *jus cogens* could be upheld as valid because it does not go to the primary norm containing prohibition of the relevant act but merely prevents the rule that outlaws that act from being invocable and enforceable in mutual relations between States-parties to that treaty. Or that an entity established through the aggressive war could be recognised as a State, much as the prohibition of the use of force remains intact on a general plane.

[97] ILC's Articles 40–1 on State Responsibility, ILC Report (2001), GAOR, Fifty-sixth session, Supplement No. 10 (A/56/10). States shall not 'recognise as lawful a situation created by a serious breach' of *jus cogens* (Article 41). ILC Guide on Unilateral Acts, A/61/10, Article 8; Articles 41–2, ILC Articles on the Responsibility of International Organisations, 2nd reading, 2011, A/66/10.

If, as was the case with *Al-Adsani* and *Jones*, the UK gives Kuwait or Saudi Arabia total legal security for their acts of torture as far as UK–Saudi and UK–Kuwaiti bilateral relations are concerned, the effect is the same as would be if a treaty with Saudi Arabia and Kuwait were to be concluded to the effect that the international prohibition of torture has no effect in UK–Saudi and UK–Kuwaiti relations. The only difference would be one of form, consisting in a written agreement as opposed to the agreement through State practice. If the outcome in question could be lawfully secured through informal practice, it could also be secured through a written agreement. In either case, and in both criminal and civil proceedings, liability for the breach of a *jus cogens* rule would be abrogated, in a way opposite to the ILC Special Rapporteur's above thesis.

Furthermore, if it were correct that peremptory norms are merely substantive rules incapable of affecting the immunity, it has to invariably apply to civil and criminal proceedings, and State and official immunity alike. Yet, the position of several courts as well as the Institute of International Law demonstrates that such generalised assumption is unsustainable.

Apart from misreading the impact of *jus cogens* in *Pinochet*, the ICJ in *Germany* v. *Italy* did not address the 2009 Naples IDI Resolution, which upholds the lifting of immunity in civil proceedings for conduct that constitutes international crime (Article III). It relies on 'the underlying conflict between immunity from jurisdiction of States and their agents and claims arising from international crimes', and intends to contribute to 'a resolution of that conflict' (preamble). The Resolution thus refers to the existence of normative conflict between the two sets of rules. On what basis other than *jus cogens* would, one wonders, the criminality of a relevant act prevail in this normative conflict? And the Resolution specifies no such alternative basis, speaking instead of the normative hierarchy pure and simple.

After *Germany* v. *Italy* judicial practice has continued confirming the incompatibility between immunities and *jus cogens*, and the latter's primacy over the former. The Swiss Federal Tribunal reiterated the same view.[98] The US Court of Appeals for the Fourth Circuit likewise confirmed in *Samantar* that: 'Because this case involves acts that violated *jus cogens norms*, including torture, extrajudicial killings and prolonged arbitrary imprisonment of politically and ethnically disfavored groups,

[98] Judgment of 25 July 2012 (case no. BB.2011.140), paras. 5.3.5 and 5.4.3.

we conclude that Samantar is not entitled to conduct based official immunity under the common law, which in this area incorporates international law.'[99]

The assertion of substance versus jurisdiction dichotomy is, therefore, premised on a *political choice* made by a court or by a writer to support the grant of immunity that is *politically desirable* under the circumstances. The view that requires denying immunity on the basis of *jus cogens* is, on the other hand, premised solely on the continuation of the normative effect that *jus cogens* already has in other areas of international law.

There are further advantages of the *jus cogens* approach over the above-examined 'jurisdictional' approach, in that the latter focuses on exercising jurisdiction then and there, while the former focuses on the normative integrity of the relevant peremptory norm. As we saw above, the jurisdiction-based treaty primacy over immunities could be too blanket, and set at risk the *ratione personae* immunities of an acting Head of State. On the other hand, the impact of *jus cogens* is not that blanket, for it only requires preventing immunity rules from derogating from *jus cogens* rules, and thus fits comfortably with the approach developed in paragraph 61 of the *Arrest Warrant* case, preserving *ratione personae* immunities of acting high-level officials intact, not as a permanent state of affairs perpetuating impunity, but only preventing prosecution in particular jurisdictions, and then only while the official's term of office lasts. The whole question is not about whether the State in question should exercise jurisdiction over the relevant person in the particular place and time, but whether the exercise or decline of that jurisdiction will prevent the operation of the relevant *jus cogens* rules as legal rules, undermine their normative content and effect, and make them inoperable in relation to the relevant internationally wrongful act. Immunities *ratione personae* could thus be preserved without causing a derogation from *jus cogens*.

Overall, whether immunities are admitted for a violation of *jus cogens* on a permanent and general, or temporary and special, basis cannot be without importance to the question whether a derogation from the relevant *jus cogens* rule takes place. Immunities *ratione personae* do not inevitably derogate from *jus cogens* because they: (a) do not require that the relevant acts are official functions, as they are not premised on that basis at all; (b) they inherently admit the possibility of prosecution in other jurisdictions or in the same jurisdiction after the official ceases to be in office; and (c) they do not entail impunity. On the other hand,

[99] *Bashe Abdi Yousuf* v. *Mohamed Ali Samantar*, No. 11-1479, 2 November 2012, at 23.

immunities *ratione personae* do derogate from *jus cogens* because they: (a) project the relevant crimes and violations as official and sovereign acts; (b) project a permanently opposable legal position that the act of the State in question could never be adjudicated upon abroad; and (c) invariably entail impunity and the lack of remedies.

This way *jus cogens* offers a compromised view further compatible with developments in judicial practice, because both *Pinochet* and *Arrest Warrant* did single out *ratione personae* immunities as a special category. *Jus cogens* can accommodate and preserve *ratione personae* immunities of a limited number of high-level officials, while displacing *ratione materiae* immunities of both States and their officials.

C. *Convergence between CAT and* jus cogens

The above analysis still leaves one aspect of CAT to be gone into because, as we saw above, the ordinary meaning of Articles 5 and 7 CAT establish the duty to prosecute torturers and should, in principle, require displacing any applicable immunity, much as this was not straightforwardly accepted in judicial practice. The principal dilemma produced by the divergent practice is that while CAT as a treaty should prevail over immunities, the latter could in principle be seen as *lex specialis*, in relation to which the primacy of treaties over other rules may not necessarily help.

On the other hand, if we view Articles 5 and 7 CAT as expressive of the general doctrine of *jus cogens* in relation to prosecution of core international crimes, they could, then, secure the outcome that a treaty qua treaty is unlikely to achieve. This general doctrine was mirrored in Lord Hope's observation in *Pinochet* that:

> the prohibition of [torture] which has acquired the status under international law of jus cogens . . . compels all states to refrain from such conduct under any circumstances and imposes an obligation erga omnes to punish such conduct.[100]

And as it happens, Articles 5 and 7 CAT do very much the same thing.

There is increasing recognition in practice of the growing and sustained convergence as between normative regimes under CAT and under *jus cogens*, and their interchangeable use. The European Court in *Othman* specified that 'UNCAT reflects the clear will of the international community to further entrench the ius cogens prohibition on torture by

[100] [2000] 1 AC 242.

taking a series of measures to eradicate torture and remove all incentive for its practice'.[101] This point further undermines the argument that the denial of the immunity of a former head of State by the House of Lords in *Pinochet* was undertaken on the basis of CAT as completely separate from *jus cogens*. CAT and *jus cogens* were also interchangeably used by the House of Lords in *A* v. *Secretary of State*.[102]

Under this approach, the effect on immunities under Articles 5 and 7 CAT is merely to reflect and reinforce whatever consequences obtain from the fact that torture is a wrongful act and crime outlawed under a rule of *jus cogens*. Once jurisdiction under CAT would be established over the case, the denial of immunity would be justified only if doing otherwise would entail impunity for the underlying crime or atrocity, which in terms of normative hierarchy would amount to a derogation from the underlying rule of *jus cogens* the way that makes that rule unenforceable and imapplicable in relation to that relevant case. *Ratione personae* immunities would be preserved as per *Arrest Warrant*, unlike *ratione materiae* immunities.

6. The position at English law

The outcome obtained through the above analysis of international law applicable to immunities needs now to be applied to the position under the ordinary sources of English law. In relation to common law, we need to see how far the international legal position is incorporated into the English common law. In relation to statutory law, we need to ascertain the impact of the SIA. As we are also addressing the continuing effect of previous court decisions, we need to examine the doctrine of precedent for that purpose.

A. State immunity and policy considerations before English courts

When focusing on the decisions of English courts regarding State immunity, it is not easy to ascertain to what extent the political risks thought to be involved in the relevant case are among those that enter the minds of those who adjudicate. Yet it is undeniable that transnational human rights claims inevitably look different from ordinary torts, in terms of the remoteness from the forum, identity of perpetrators and applicable law.

[101] *Othman* v. *UK*, 8139/09, 17 January 2012, para. 266.
[102] *A* v. *Secretary of State* [2005] UKHL 71, 8 December 2005.

All this cannot fail to generate fears as to possible adverse consequences of the relevant litigation that both decision-makers and commentators would, subconsciously at least, be concerned with. The treatment on these issues would therefore be incomplete without addressing these policy considerations.

This process could also involve a complex balance of interests entailing morally controversial outcomes, for instance by prioritising political factors over humanitarian considerations. It is, among others, for this reason, that the express articulation of policy argument in judicial reasoning is considerably rare; where it appears it is mostly used as part of applying already established legal principles[103] and in relation to the foreign State immunities it is practically absent. Ordinarily, English courts are expected to separate law from politics and not to enter into assessing the political merits of the issues underlying the relevant litigation. They are expected to leave political considerations to other branches of the government, and only apply the existing law to underlying facts.[104] In relation to international law specifically, the use of policy arguments could not suitably happen in English courts. Unlike areas of English law such as tort law, English courts do not create and develop public international law the way they do with common law. They merely reflect the law consensually adopted at the inter-State level, which the national authority cannot unilaterally curtail or modify.[105]

As for the specific risks, it may be suggested that allowing civil claims against foreign sovereigns could lead to the deterioration of inter-State relations. But it is far from obvious how far it could be a judicial task to draw the balance on complex issues of the dynamics of international relations on which the Judiciary possesses no obvious expertise. More generally, there is no clear evidence to suggest that any serious deterioration of inter-State relations is likely if immunity is denied. In some other contexts, the possibility of the deterioration of UK-Saudi relations *might* have motivated the outcome in the *BAE* case before the House of Lords, but the outcome of the House of Lords decision was framed, however unsustainably, in legal terms, namely through reading the national security exception in the relevant international agreement that, quite simply,

[103] See *McLoughlin* v. *O'Brian* [1983] 1 AC 410 at 430 (per Lord Scarman); see more generally John Bell, *Policy Arguments in Judicial Decisions* (Oxford: Oxford University Press, 1983).

[104] See Lord Templemann in *Nottinghamshire County Council* v. *Secretary State for the Environment* [1986] AC 240 at 265–6.

[105] See more specifically subsection B below.

was not there.[106] If policy considerations were used here as premise, then the outcome of the case was based not just on the use of those policy considerations but on letting them bend the applicable law.

On a broader plane, not every irritant could inevitably entail a deterioration of inter-State relations. As deterioration is a bilateral matter, it must also be queried whether the outcome of cases like *Al-Adsani* and *Jones* and the payment of the – rather modest if the income and revenues of the relevant States are considered – compensation to victims would amount to grounds sufficient for Kuwait and Saudi Arabia to revise their traditionally good relations with the UK. Fears like these are based on no more than speculation. The deterioration of bilateral relations, or interference with the defendant State's sovereignty in relation to its resources, is not more likely than in the case of litigation drawing on the relevant State's commercial interests and resulting in much higher expense and damages, yet falling within the letter of the SIA, such as commercial, territorial tort or employment-related exceptions. A more recent instance of Gary McKinnon not being extradited to the United States, having been wanted there for the allegations of the unlawful access to sensitive military computers of the US government, could be just as irritating at the inter-State level as would be the transnational human rights litigation involving the United States as defendant. For, McKinnon was wanted in the United States in the public interest, while granting compensation to Al-Adsani and Jones would never have gone as far as impeding Kuwait and Saudi Arabia in pursuing the line of their foreign and domestic policies that they determine in the exercise of their sovereignty.[107]

The projected risk of the multiplication of claims known as litigation flood is, too, merely theoretical. The denial of immunity would in practice have the preventive impact on the governments engaging in torture whose assets abroad would be exposed, and could lead to reforms in the relevant State's domestic law and practice that will reduce the occurrence of torture by the same State in the future.[108] Less torture means less litigation abroad. Moreover, English courts have been generally sceptical about such fears as

[106] *BAE* (HL), [2008] UKHL 60, 30 July 2008, para. 46 (per Lord Bingham).

[107] More recently, the UK seems to have accepted the risk of irritation in bilateral relations as a consequence of domestic judicial proceedings in the UK, in relation to Mongolia and Nepal, as in *Khurts Bat*. See also the report regarding the prosecution of a Nepalese official for torture: www.guardian.co.uk/law/2013/jan/06/uk-defends-prosecute-nepalese-colonel?INTCMP=SRCH.

[108] To illustrate other related contexts, proceedings in the *Pinochet* case before English courts played the role of the catalyst towards altering the domestic perception to accountability

to floods of litigation. As Lord Edmund-Davies observed in *McLoughlin* v. *O'Brian*, concerned with the extension of tortuous liability, he was 'unconvinced that the number and area of claims in "shock" cases would be substantially increased or enlarged were the respondents here held liable'. He had 'often seen [the floodgates argument] disproved by later events'. Lord Scarman seconded that '[t]he "floodgates" argument may be exaggerated'.[109]

Ordinarily, thus, English courts refuse letting policy reasons affect the outcome of the case so as to modify the applicability of the established sources of law. In *Dorset Yacht*, Lord Reid referred to the American case-law that exempted prison officials from civil liability because of the heavy risky nature of their jobs, but observed that 'Her Majesty's servants are made of sterner stuff', and had 'no hesitation in rejecting this argument' seeing 'no good ground in public policy for giving this immunity to a government department'.[110]

B. Common law and the doctrine of incorporation

From the eighteenth century onwards, the view championed by Sir William Blackstone and accepted in the English legal system has been that international law as such and as a whole forms part of English law. The doctrine of incorporation served as the basis on which English courts initially applied the absolute doctrine of State immunity.[111] Subsequently, in the *Trendtex* and *Congreso* litigation, the incorporation approach has been applied to the newer restrictive doctrine as part of international, and now of English, law.

Dealing with the older rule of absolute immunity in *Cristina*, Lord Atkin referred to the 'propositions of international law engrafted into our domestic law which seem to me to be well established and to be beyond dispute'. That position applied both to the sovereign's person and to their property, both to *in rem* and *in personam* claims.[112] Lord Macmillan similarly entertained no doubt as to the direct effect of international

in Latin American countries, see generally N. Roht-Ariazza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (Philidelphia, PA: University of Pennsylvania Press, 2005). More recently, the litigation saga concerning Abu-Qatada caused the Jordanian Government to amend the Constitution and ban the use in courts of the evidence obtained through torture: www.bbc.co.uk/news/uk-20295754.

[109] *McLoughlin*, 425 (per Lord Edmund-Davies), 431 (per Lord Scarman).

[110] *Dorset Yacht* [1970] AC 1004, 1032–3.

[111] See, e.g.,*Gagara* [1919] P 95; *Porto Alexandre* [1920] P 30.

[112] *Cristina* [1938] AC 485, 490–1.

law in the English legal system, with the implication that the domestic effect should be given to international legal rules to the extent that they have been agreed upon as between sovereign States. For, 'such a principle must be an importation from international law'. The position was more complicated when 'there is no proved consensus of international opinion or practice to this effect' and when 'the subject is one on which divergent views exist and have been expressed among the nations'.[113]

In *Cristina*, their Lordships have managed to avoid resolving the conflict as between the earlier cases of *Parlement Belge*, where the outcome as to immunities had been differentiated in terms of the function of a ship involved in the relevant proceedings,[114] and *Porto Alexandre*, where a more absolute approach was adopted; for the ship involved in *Cristina* had been requisitioned by the Spanish government for public purposes.[115]

The signs of the acceptance of the restrictive doctrine were already shown by English courts in the nineteenth century, considerably earlier than the absolute immunity rule was definitely abandoned. In the *Charkieh* case, Sir Robert Phillimore – adjudicating, again, from the perspective of the incorporation doctrine – considered that:

> I am not prevented from holding, what it appears to me the justice of the case, would otherwise require, that proceedings of this kind, *in rem*, may in some cases at least be instituted without any violation of international law, though the owner of the *res* be in the category of persons privileged from personal suit . . . [however] a proceeding *in rem* cannot be instituted against the property of a sovereign or ambassador if the *res* can in any fair sense be said to be connected with the *jus coronae* of the sovereign.[116]

This provided at least an initial inference that sovereign activity is what the sovereign is ordinarily meant to be doing, not what he in fact does. Most importantly, Sir Robert Phillimore specified that:

> No principle of international law, and no decided case, and no dictum of jurists of which I am aware, has gone so far as to authorize a sovereign to

[113] *Ibid*., 497–8; the incorporation approach was also upheld by Lord Wright, *ibid*., 502.

[114] On which the House of Lords has subsequently observed in *Philippine Admiral* that 'the judgment of the Court of Appeal [in *Parlement Belge*] – delivered by Brett LJ. – has sometimes been taken as saying that a sovereign can claim immunity for vessels owned by him even if they are admittedly being used wholly or substantially for trading purposes. In their Lordships' view the judgment does not lay down that wide proposition at all', *Philippine Admiral* [1977] AC 373, 392 (*per* Lord Cross).

[115] *Cristina*, 496, 498 (per Lords Thankerton and Macmillan); but see *Philippine Admiral*, 394, for drawing the contrast between those two earlier cases. Therefore, *Porto Alexandre* was not followed.

[116] *Charkieh* [1872–75] 4 LR 59, 93.

> assume the character of a trader, when it is for his benefit; and when he incurs an obligation to a private subject to throw off, if I may so speak, his disguise, and appear as a sovereign, claiming for his own benefit, and to the injury of a private person, for the first time, all the attributes of his character; while it would be easy to accumulate authorities for the contrary position.[117]

This reasoning leads to the consideration of the issue of how, in the first place, the sovereign enters the marketplace, or more generally private relations. In whichever way you enter it, so you carry on. This approach got further developed in *Congreso* where Lord Wilberforce emphasised that if an act can be performed by private persons it is no longer a sovereign act. Applying this test to serious human rights violations would also exclude them from the scope of *jure imperii* acts.

The 2006 House of Lords decision in *Jones, Milling & Pritchard* has suggested some qualifications to the doctrine of incorporation. The principal findings were that the international crime of aggression was not automatically criminalised under English law to enable domestic prosecutions to take place; and, more generally, international law was not part of English law, but one of its sources.[118] However, the judgment has not explained the difference between the two options. It is indeed difficult to see how international law could be a source of English law without being its part, and vice versa. This obscurity in reasoning compromises the potential of *Jones, Milling & Pritchard* to impact our continuous understanding of the doctrine of incorporation. Even assuming, for the sake of argument, that the approach in this case was correct, it is only about the specific issue of criminalisation. Therefore *Jones* must be seen as being constrained to its context and as having little legal relevance for other areas of public international law including the law of immunities.

On a broader plane, English courts are unlikely to abandon the incorporation doctrine, even in the face of some of the current thinking that the 'dualistic' approach should be used to separate the domestic application of international law from the accountability of the United Kingdom for the breaches of international law on the inter-State plane and before international courts and tribunals.[119] The abandonment of the fuller version of the doctrine of incorporation would entail two negative implications. In the first place, declining to apply the relevant international law

[117] *Ibid.*, 99–100.

[118] *R* v. *Jones, Milling et al.*, House of Lords [2006] UKHL 16, 29 March 2006.

[119] See, for instance, P. Sales and J. Clement, 'International Law in Domestic Courts: A Developing Framework', (2008) 124 *LQR*, 388.

domestically could, under circumstances, constitute the evidence that a breach of international law has been committed and that domestic courts have essentially ratified it.[120] In the second place, such 'dualism' could potentially lead to isolationism, diminishing the potential of English courts to contribute to the development of State practice internationally. For, as Brierly has wisely reminded us, 'international law is a customary law and it is developed by agencies which include, but are not limited to, the English Courts'.[121] Evading the domestic effect of customary international law, whether through the *Jones, Pritchard & Milling* route, or through the application of the SIA,[122] essentially evidences the unwillingness of domestic courts to apply international law to underlying facts. It is highly presumptive, to say the least, that the cases decided on the basis of that which excludes international law from the judicial focus could validly amount to State practice as part of custom-generation internationally.

Dualism, on its valid version, relates to the origin and sources of relevant rules. For the purposes of English law dualism only means that international law is not produced by the same sources of English law as are domestic legislation and common law. It is produced elsewhere, internationally, and then incorporated into English law. The traditional version of the incorporation doctrine is essentially premised on the dualist tradition, which means that English courts give domestic effect to the set of rules that has not been produced by the domestic law-giver, and make it part of English law.[123] This is different from the domestic transformation of international treaties where, unlike the common law incorporation of customary international law, the domestic legislator creates a new domestic legislative rule to reflect that which has been internationally enacted on a separate basis.

C. The impact of the 1978 State Immunity Act

When the selection as between common and statutory law is conducted in terms of which of them should be applied to the underlying claims

[120] According to Article 4 of the ILC's Draft on State responsibility, a breach of international law can be committed by any State organ, including judicial organs. See 2 *ILC Yearbook* (2001), 40 (Article 4 and its commentary).

[121] J. L. Brierly, 'International Law in England', (1935) 51 *LQR*, 24 at 34'.

[122] See the next sub-section for the SIA more generally.

[123] This is further reflected in the principle, expounded by Dicey, that English law is not necessarily limited to rules produced exclusively by domestic authorities but includes all rules that English courts apply, regardless of their origin. A. V. Dicey, *A Digest of the Law of England with the Reference to the Conflict of Laws* (London: Steven & Sons, 1896), 6ff.

relating to sovereign immunity, two important issues are at stake. In the first place, as we already saw, the common law standard that incorporates general international law requires the application of the functional approach to immunities under which the acts that constitute the proper exercises of governmental authority do attract immunity and the ones that do not fall within such category do not. The SIA eschews such classification and instead turns to the 'general rule versus specific exceptions' approach, under which all that does not fall within the specified statutory exceptions, and whatever the underlying nature of the relevant act or transaction, will attract immunity under the general statutory rule of immunity. Results could then be substantially different depending on which of these approaches is taken.

In the second place, the adherence to the SIA could entail the legitimation, through the backdoor, of the domestic standing and applicability of some international conventions that may not be apt for the use in domestic courts, given that internationally they do not constitute the applicable law as between the UK and the relevant foreign States. This concerns, in the first place, the ECSI. This also applies to the 2004 Convention, which, despite some enthusiastic references in judicial practice,[124] is neither signed nor ratified by the substantial number of States to turn it into the applicable law. Even if it were to gather the required thirty ratifications, it would only be applicable law *inter se*.

Apart from these treaties that are either not in force or have a rather limited scope of application *ratione personae*, there is no evidence whatsoever that the general, or customary, international law – which still, and inevitably, prevails apart from the narrow scope of inter-State relations where the relevant convention could prevail as *lex specialis* – subscribes to any version of that 'general immunity versus specific exceptions' approach that the two conventions uphold. Again, this may lead foreign States being accorded immunity where applicable international law does not require doing so or, alternatively, denying such immunities as may be due to be accorded. In fact, Article 24 of the ECSI effectively recognises that the Convention regime is the special one that purports to derogate from the general international law that applies in relation to non-parties and would, but for the Convention regime, apply *inter se* as well. The possibility is thus provided for to part, for the purposes of the relevant case, with the 'general immunity versus specific exceptions' approach and revert to the fall-back position under general international law that focuses on the

[124] E.g. by Lords Bingham and Hoffmann in *Jones* (HL), paras. 27 and 46.

sovereign and non-sovereign acts. As Sir Ian Sinclair has suggested: 'This optional regime was included because certain States already applying the rule of relative immunity were afraid that some acts *jure gestionis* might fall outside the catalogue of cases of non-immunity, thereby restricting the jurisdiction of their courts',[125] and thus manifesting the understanding that the underlying regimes of immunity are dual.

Ways for resolving the dilemma within the English legal system have been suggested. As Lord Phillips has pointed out in *NML* v. *Argentina*, the SIA was enacted to give domestic effect to the ECSI. However, '[t]he ECSI does not give effect to the restrictive doctrine of sovereign immunity'.[126] As Lord Goff had earlier observed in *Kuwait Air Co*, the overall impact of Article 24 ECSI, which enables States-parties to declare accordingly, entails the 'inapplicability in English law of the principle of sovereign immunity in cases in which the sovereign was not acting *jure imperii*'.[127]

The SIA is obviously the outcome of Parliament's exercise of its legislative supremacy. However, the ascertainment of the content of legislation, and the impact thereof on common law, is an entirely judicial task. In the English legal system, legislative supremacy operates subject to the requirements of the rule of law,[128] and law is what courts say it is.[129]

In order not to let domestic proceedings distort the outcomes required under international law, the proper interpretation of the SIA assumes a major importance. Purely as a matter of statutory construction, the underlying classical rules – literal, mischief and golden – are not arranged in a hierarchical manner. The literal approach seems to have prevailed in some previous cases before English courts, to the effect that the SIA was deemed to be a 'comprehensive code' on State immunity, precluding domestic courts from addressing the distinction between sovereign and non-sovereign acts as international law requires to be taken into account.[130] On the other hand, other means of statutory interpretation

[125] I. Sinclair, 'The European Convention on State Immunity', (1973) 22 *ICLQ*, 254 at 268.

[126] *NML* v. *Argentina* [2011] UKSC 31, 6 July 2011, para. 37 (per Lord Phillips).

[127] *Kuwait Air Co* [1995] 1 WLR 1147 at 1158 (per Lord Goff).

[128] *Jackson* v. *Attorney General* [2005] UKHL 56, para. 107 (per Lord Hope).

[129] H. R. W. Wade and C. F. Forsyth, *Administrative Law* (10th edn., Oxford: Oxford University Press, 2009), 26.

[130] See the following British and American cases: *Siderman de Blake* v. *Argentina*, 103 ILR 455; *Princz* v. *Federal Republic of Germany*, 33 ILM (1994), 1483; *Smith et al.* v. *Libyan Arab Jamahiriya*, 36 ILM (1997), 100; *Al-Adsani* v. *Kuwait*, 107 ILR 536. The point made here is the same as above in note 118 and the accompanying text.

could be helpful to understand what options are available to apply or not to apply the SIA to the relevant immunity claim.

When the SIA was being enacted and deliberated upon in Parliament, Lord Wilberforce and Lord Denning expressed some misgivings about it. Both their Lordships spoke against universalising the regional regime of the ECSI and making it applicable to all States.[131] Lord Denning went further and suggested that the State immunity bill had to be put on hold because (a) it did not reflect international law as it then stood (along with the distinction between functional and statutory tests as detailed above); and (b) it aimed at conserving the legal position which was in a constant state of development.[132]

The key question for the construction of the SIA should thus be to ascertain whether the legislator would have intended to universalise the very restricted regime of the ECSI, that is make it internationally opposable to States that neither signed nor ratified it, with the far-reaching implications contradicting the *pacta tertiis* principle. What militates against this assumption is that there is no entitlement to impose, through the sources of domestic law, on foreign States the law that is not internationally opposable to them. In the *WHO-Egypt* case, the ICJ applied this approach to the relationship between the World Health Organization (WHO) and Egypt in terms of relocating the WHO regional office from Alexandria. Neither the WHO nor Egypt could externalise their unilaterally produced law on each other, and the matter of the relocation of the WHO office could only be governed by international law that bound the two entities together, not by Egyptian law, nor by the WHO's internal rules.[133] This pattern is even more pressing with inter-State relations. The law applicable between the UK and foreign States impleaded before English courts is that which binds the UK and those foreign States together: those rules of public international law to which both relevant States have given their consent. The persistence with the application, through the domestic legislation, to foreign States of the rules to which they may not have consented could prove counter-productive. Despite the dogma of 'dualism', when applying the SIA, English courts effectively pronounce on international and inter-State relations, which are governed by public international law in the first

[131] It will be noted that the ECSI has only eight States-parties and thus it was not applicable to the major controversies focused upon in this chapter.

[132] See, generally, the Hansard (HL) volume 388 cc51–78, 17 January 1978; and volume 949 cc405–20, 3 May 1978 (interventions by Lords Wilberforce and Denning).

[133] Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion of 20 December 1980, ICJ Reports, 1980, 73.

place, and which may not always overlap with the position that the SIA purports to establish.

To illustrate, China, which adheres to absolute immunity, would grant the requisite protection to the United Kingdom while in its turn it could be subjected in English courts to inconvenience, expense and possibly embarrassment when some of its acts would come within one of the exceptions that the SIA admits. The same could possibly apply to Kuwait: it was granted immunity by the Court of Appeal in *Al-Adsani* on the basis of the SIA, but if it came to the application to Kuwait to one of the SIA's statutory exceptions, it would be far from certain that English courts would be conducting adjudication in accordance with the law in force as between the UK and Kuwait; for there is no clear-cut evidence that Kuwait consents to the international law of immunities in the shape identical to that regulated under the SIA.

It has to be made clear that the present reasoning does *not* advocate the interpretative use of *Hansard* the way its relevance has been admitted in the House of Lords' decision in *Pepper* v. *Hart*.[134] It is obvious that the legislative purpose of the SIA could not be validly identified through this approach, for the interventions by Lords Wilberforce and Denning do not fit within the *Pepper* v. *Hart* requirements in that they were not presented in the capacity of the sponsor of the legislation, nor could these interventions be used, in any straightforward manner, to identify the ambiguity or obscurity in the terms of the Act. Their Lordships were concerned with the overall rationale of the Act, rather than the clarity of the meaning to be attributed to its specific provisions.

The essence of statutory construction goes precisely to the overall rationale of the SIA and to the construction of the legislator's intention accordingly. The sponsoring statement by the Lord Chancellor during the House of Lords meeting on 17 January 1978 contained the observation that the purpose of the State immunity bill was to secure immunity to sovereign States when acting in their sovereign capacity and exclude it in relation to non-sovereign acts.[135] This approach differs from and contradicts the subsequent assertion by the Court of Appeal in *Al-Adsani* that the SIA constitutes a 'comprehensive code' on immunities, precluding courts from inquiring into whether the relevant act or transaction possesses the sovereign character. There is, thus, at least the possibility to make a prima facie case that the initial rationale behind the SIA does not completely overlap with its subsequent use in courts.

[134] *Pepper* v. *Hart* [1993] AC 593. [135] See, for the record of the meeting, above note 132.

This approach is further supported by more specific considerations. While the SIA has been enacted by Parliament to give domestic effect to the ECSI, Parliament must be deemed to have been aware of the two material considerations. Firstly, the enactment of the SIA could have the effect of generalising the particular regime designed to apply to a few States only. Secondly, given that the ECSI has itself acknowledged that the general law of immunities was not being prejudiced by its special regime, the enactment of the SIA to give effect to the ECSI could justify viewing, for the purposes of statutory interpretation, the legislative purpose behind the SIA as not prejudicing the applicability of the restrictive doctrine recognised under common law and general international law.

Therefore there is a legal and judicial option that, in relation to non-signatory States at least, the SIA can be treated as a sort of codifying statute that reflects existing common law,[136] rather than universalising an effectively sub-regional legal framework of the ECSI. Its content could then be applied to be somewhat reflective of the restrictive doctrine as accepted under customary international law and correspondingly under the pre-SIA common law in England. One example of this approach is *NML* v. *Argentina*, which has essentially approved this vision by interpreting the 'commercial exception' under section 3 of the SIA in the light of the broader context of the restrictive immunity doctrine. This way, common law may provide a background that could inform the meaning of statutory provisions to make them operate as part of the broader legal context.[137]

D. The doctrine of precedent

Historically, the English common law has been premised on the two underlying – constitutional if you wish – principles: securing the continuity and predictability of legal regulation and protecting individual freedom. The doctrine of precedent has provided a major tool to serve these aims. As has been sufficiently detailed above, the application of State immunity to human rights in English (and other) courts has produced a fairly inconsistent, at times obscure, picture. Some decisions have relied on common law while others have relied on statutory law, advancing different functional and normative justifications for immunities. This

[136] Cf. Francis Bennion, *Statutory Interpretation* (London: Butterworth, 1997), 465–6 (section 212).

[137] *NML* v. *Argentina*, para. 39 (per Lord Phillips).

militates against applying the doctrine of precedent to those previous decisions in any straightforward manner.

There are a number of options available to English courts to deal with the previous inconsistent case-law. A superior court can select between the two inconsistent decisions of the lower courts. For instance, the Court of Appeal can choose which of the two conflicting High Court decisions to apply.[138] More broadly, the doctrine of precedent does not cover previous decisions reached without argument, when a superior court merely assumes the correctness of a particular approach to the relevant legal position without addressing and examining it, even if the proposition in question was essential to the previous case.[139] The precedential force of *Jones* v. *Saudi Arabia* (having in its turn relied on *Al-Adsani* that offered no meaningful analysis of the relevant issues) is compromised by the fact that, as we saw above, on the two crucial issues – the scope of the acts *jure imperii* and the state of customary international law on immunities – it has not backed up its conclusions with the analysis of the evidence or engagement of the opposite approach. This applies, *a fortiori*, to the International Court's decision in *Germany* v. *Italy*, relying on Italian concessions both in relation to *jure imperii* acts and to the customary law status of immunities.

In *Young* v. *Bristol Aeroplane*,[140] the Court of Appeal has examined the matter of conflicting judicial decisions, and has, among others, singled out the cases which conflict with each other and those that were delivered *per incuriam*. As for the former case, it was 'beyond question that the previous decision is open to examination', and 'the court is unquestionably entitled to choose between the two conflicting decisions'.[141] More specifically:

> Where the court has construed a statute or a rule having the force of a statute its decision stands on the same footing as any other decision on a question of law, but where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different.[142]

This approach has been applied to the law of State immunity especially, as we saw above, at the stages when the issue of State-owned ships was

[138] Cf. S. H. Bailey, J. P. L. Ching and N. W. Taylor, *The Modern English Legal System* (London: Sweet & Maxwell, 2007), 484–5, 493.

[139] R. Cross and J. W. Harris, *Precedent in English Law* (Oxford: Oxford University Press, 1991), 158–9, 161.

[140] *Young* v. *Bristol Aeroplane* [1944] KB 718. [141] *Ibid.*, 725, 729–30. [142] *Ibid.*, 729.

being addressed in the context of the then applicable absolute immunity doctrine, and subsequently when English courts had to address the transition, as a matter of English common law, from absolute towards restrictive State immunity. In a manner somewhat at odds with *Bristol Aeroplanes*, it has thus been possible to prioritise a Court of Appeal decision over a prior inconsistent House of Lords decision,[143] and effectively state the preference for the restrictive as opposed to the absolute doctrine of immunities.

This process also demonstrates that the selection between conflicting decisions is entirely a judicial choice, there being no binding statutory or other regulation of this matter; and also that the duty to observe past precedents is not as strict in relation to international legal issues as it is with purely domestic cases.[144] As also has been demonstrated through some detailed evidence,[145] English courts are divided on several other issues regarding the scope and customary law status of sovereign immunities. Therefore, the issue of prioritising some and disregarding other judicial decisions is not unlikely to arise before English courts in the future.

In future cases courts could either exclude international law (in which case they need to find the proper English law on immunities which does not exist, unless the SIA is used on exclusive terms); or they have to examine anew, *de novo* as it were, the state of State practice and *opinio juris* that would help properly ascertain the position under international law, and then apply it as part of English law. The latter option would, on the whole, be more suitable for reflecting the international legal position in English law, being at the same time compatible with the ordinary patterns in which the sources of English law operate.

The House of Lords in *Jones* has granted immunity to Saudi Arabia for torture, even though the law as identified in *Pinochet* would not justify this approach. In *Bat*, Moses LJ was not inclined to see himself bound by the majority in *Pinochet* regarding the point 'that the former Head of State would have immunity from prosecution for murder and conspiracy to murder in Spain'.[146] Could it be argued that subsequent English cases have upset the effect of *Pinochet*?

[143] Cf., R. Higgins, 'The Death Throes of Absolute Immunity: The Government of Uganda before the English Courts', (1979) 73 *AJIL*, 465 at 469 (focusing, among others, on *Tapioca* [1974] 1 WLR 1485 and *Trendtex* cases).

[144] As also confirmed in *Trendtex*.

[145] R. Higgins, 'Recent Developments in the Law of Sovereign Immunity in the United Kingdom', (1977) 71 *AJIL*, 423.

[146] *Khurts Bat*, para. 99.

Familiarity with the elementary principles of English common law can easily demonstrate this is not the case. In relation to the way in which common law operates, Lord Reid has observed in *Dorset Yacht* that 'when a new point emerges [in a subsequent case], one should ask not whether it is covered by authority but whether recognised principles apply to it'.[147] The question to be asked is whether *Jones* and *Bat* have contradicted the principles on which the *ratio decidendi* in *Pinochet* has turned.

The reason why *Jones* cannot override *Pinochet* is that it has expressly distinguished it and has not contradicted the principles underlying the latter's *ratio decidendi*. Both *Jones* and *Bat* are clear that they adhere to the civil/criminal divide, and therefore show no intention to overrule *Pinochet*, either on the matter of the scope of acts *jure imperii*, or in relation to the effect of *jus cogens*. The elementary distinction between overruling and distinguishing past cases will inevitably make it clear that the fact that in *Pinochet* immunity was denied while in *Jones* it was upheld is not what English common law would ordinarily place emphasis on.

Principles of law that matter for the doctrine of precedent apply not to facts and situations involved in a particular case, but to issues that could arise, over and over again, in multiple cases involving facts and situations of that kind. If the subsequent court pronounces over the issue that is different from the issue confronted on its head in the previous case, then the subsequent case could not be reasonably seen to have overruled that previous case. Nor could the ordinary pattern of overruling apply to the issues of international law which, as we saw above, is created through agreement between States, independently of English law, and then incorporated into it, as opposed to having been created unilaterally by courts as they do with ordinary rules of common law. All *Pinochet* has done, as we saw above, was to follow the restrictive doctrine and impact of *jus cogens* already accepted in international, and in common, law. It would be plainly beyond the House of Lords' gift in *Jones* to overrule this position, even if it had an inclination to do so.

7. Conclusion

The above analysis can lead us to the conclusion that international law relating to State immunity does not experience any fragmentation, but merely works on the ordinary pattern of sources of law and of the hierarchy of norms, including *lex specialis* and *jus cogens*. Immunities *ratione*

[147] *Dorset Yacht*, at 1026–7 (per Lord Reid).

materiae of States and their officials rely on a single and uniform justification – to protect genuinely sovereign activities of States. State practice shows no evidence that the regime applicable to immunities in civil and criminal proceedings is different from each other. In both types of proceedings, and in the absence of any applicable treaty provision requiring the opposite, the underlying functional test refers to acts unique to State authority. On balance, there is no customary law obligation of one State to accord immunity to another State, but the restrictive doctrine that aspires to be customary law is quite narrow anyway, even as a matter of comity. Even if one agrees that this narrow restrictive doctrine, referring to acts unique to State authority, is part of customary law, its use in practice would still not mandate the approach adopted in *Al-Adsani*, *Jones* and *Germany* v. *Italy*. The absence of fragmentation is obvious at the level of actual State practice, where the outcome obtains that State immunity is not available for human rights violations. The imitation of the opposite position in the decisions of national and international courts cannot substantiate such a position in relation to immunities when such has not been agreed in practice as between States.

Treaty-specific regimes can have normative impact on immunities, requiring the denial of immunity, even if otherwise available. This concerns the finding of the right balance of underlying interests as a matter of jurisprudence of the Strasbourg Court under Article 6 ECHR. Both ECHR and *jus cogens* clearly prevail over the immunity of States and their officials in both criminal and civil proceedings. The adjudication standards under ECHR and *jus cogens* are flexible enough, and offer reasonable ways for balancing conflicting interests. This contrasts to the pro-immunity view that is premised on the blanket, and thus irrational, prioritisation of the interests of the impleaded State over that of its victims, thereby raising legal concerns as well as reinforcing the increasing moral disrepute of this 'traditional' school of thought.