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Orakhelashvili, Alexander

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The dynamics of statehood in the practice of international and English courts

ALEXANDER ORAKHELASHVILI

1 Introduction

To honour James Crawford on this special occasion, it is proposed to examine statehood in its dynamic aspect, drawing on legal aspects of recognition, State responsibility and State immunity that most prominently feature among the multiple areas of law that he has mastered as a distinguished scholar and practitioner.

From Althusius and Grotius onwards, the study of statehood has focused upon the original derivation of sovereignty and the options to share or alienate it.¹ The doctrinal consolidation along with the positivist approach was led by the nineteenth-century German classical school, notably Paul Laband and Georg Jellinek, to identify the initial criteria of what makes a State.² These criteria – territory, population and government (or public authority) – have eventually developed into the commonly accepted standard for State creation. These have been thoroughly examined,³ there being no pressing need to revisit them.

The focus will instead be upon the continuous exercise of sovereign authority once the above static criteria of statehood are both established and undisputed in relation to the relevant entity. The dynamic aspect of statehood relates to manifesting the State's sovereign character through regular acts of public authority that draw on the patterns of daily operation of the international legal system, and their opposability on the international plane.

¹ Cf. Hugo Krabbe, *The Modern Idea of the State* (New York and London: D. Appleton and Company, 1922), 17–28.

² Paul Laband, *Staatsrecht des deutschen Reiches*, 1st edn (Freiburg and Leipzig: Mohr, 1895), 164 *et seq.*; Georg Jellinek, *Allgemeine Staatslehre* (Berlin: O. Häring, 1914), 394 *et seq.*

³ James Crawford, *Creation of States in International Law*, 2nd edn (Oxford University Press, 2006), chs. 2–3.

2 Introducing the dynamic aspect of statehood

The key conceptual issue is the unity and divisibility of statehood. The commentary to the International Law Commission's (ILC) Article 4 on State responsibility specifies that 'The principle of the unity of the State entails that the acts or omissions of all its organs should be regarded as acts or omissions of the State for the purposes of international responsibility.'⁴ However, in an early but extremely important contribution on State immunity, Crawford has articulated the non-absolute nature of State immunity as following from the divisibility of sovereign authority that every State possesses.⁵

The divisibility or unity of States can be seen either in factual terms of the structural arrangement of States, or in terms of the substantive scope of their sovereign powers. Whether statehood is structurally indivisible, in relation to which question the national law of the State will, according to the principle stated in the ILC's Article 4(2), be an initial starting point, is not a question identical to whether the substantive scope of the sovereign authority encompasses the totality of State activities. For, through any of its structural components, the State can enter into the multitude of dealings and transactions that do not require the exercise of sovereign authority. If, along these lines, sovereignty is divisible, then international law cannot invariably attach identical consequences to all acts performed by the State in both sovereign and non-sovereign areas.

As Krabbe has explained this dilemma, either the State is a power arrangement (*Machterscheinung*) that creates law and thus is not subject to private law or, if it is indeed subjected to private law just like any other private entity, then its essence cannot be explained by reference to sovereign authority alone. The State exercises public authority differently from the way it administers postal services or a railway network. Krabbe proposed relying on the concept of legal sovereignty instead of that of State sovereignty, which would then mean that the legal standing of the State in relation to citizens, including its 'added value' (*Mehrwertigkeit*) in the area

⁴ Report of the International Law Commission on the Work of its 53rd Session, *ILC Yearbook*, 2 (2001), 40. Other possible examples of defining the State structure include Art. 2(1)(b) United Nations Convention on Jurisdictional Immunities of States and their Property (New York, adopted 2 December 2004, not yet in force); the *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, 6 November 2003, ICJ Reports (2003), 191, and Art. 3(e) in UNGA Resolution 3314 (1974) defining aggression, respectively associating with the State structure ships and armed forces lawfully stationed abroad.

⁵ James Crawford, 'International Law and Foreign Sovereigns: Distinguishing Immune Transactions', *British Yearbook of International Law*, 54 (1983), 75.

of public authority proper, would materialise only through the framework of law.⁶ If Krabbe's equation could be exported to the international legal realm when particular acts and transactions of States fall to be assessed for their public and sovereign character, then the sovereign authority of the State would validly exist to the extent that international law recognises it as such.

In any case, the scope and essence of public, sovereign or governmental authority of the State must be seen in prescriptive, not factual, terms, for authority as such is a prescriptive construct, not a fact; it is created and maintained through prescriptive ordering. Whether seen through Sir Henry Maine's articulation of legal fictions,⁷ or through Hans Kelsen's imputation theory,⁸ governmental authority is not what the organ in question is doing factually, but the scope of functions that the legal system bestows upon that organ in its particular capacity as an organ of the State.

Some clues as to the substance of the prescriptive standard are provided in the ILC's commentary to Article 5 on State responsibility. This suggests that the 'governmental authority' of the State does not cover situations where domestic law confers powers upon, or authorises conduct by, citizens or residents generally, or as part of the general regulation of the affairs of the community, but only where it specifically authorises the conduct as involving the exercise of public authority. 'Governmental authority' does not attach to private activities. As for the specific content of this standard, the ILC has observed that '*Beyond a certain limit*, what is regarded as "governmental" depends on the particular society, its history and traditions.'⁹

The ILC's is a nuanced statement, which effectively suggests that there may be a complementary international standard with respect to the valid and internationally opposable exercise of governmental authority. A shared international understanding of public, sovereign and governmental authority would, in the first place at least, be premised on the inherent nature of States that all States share and aspire to maintain. As Hans Kelsen has observed, the State is similar to the individual in its aspiration

⁶ Hugo Krabbe, *Die Lehre der Rechtssouveränität – Beitrag zur Staatslehre* (Groningen: J. B. Wolters, 1906), 29–31, 38.

⁷ Henry Sumner Maine, *Ancient Law* (London: J. Murray, 1920), 31.

⁸ Hans Kelsen, *General Theory of Law and State*, tr. Anders Wedberg (New York: The Lawbook Exchange, 1945), 196 *et seq.*

⁹ Report of the International Law Commission on the Work of its 53rd Session, 43 (emphasis added).

to achieve its aims, to develop and prosper.¹⁰ Philip Jessup has similarly observed that States, too, have 'feelings'.¹¹

But these factors are not among the immediate concerns of international law. Whether we take a dualist position that States are at the roots of the international legal system, or subscribe to Kelsen's monist approach that statehood is the characterisation imputed by international law to the entities that qualify, it obtains in either case that international law does not initially create States as socio-political realities. It merely attaches certain consequences to the fact of their existence. The State initially gets organised on a basis unrelated to international law; the latter has hardly any say as to the reasons and factors – historical, socio-economic, trade-related, cultural and so on – that motivate the organisation of an entity as a State,¹² still less does it pronounce on the ultimate justification of statehood. The formation, transformation and related development of States constitute a complex socio-political process displayed through the specificity of individual situations that do not lend themselves to a crude generalisation. International law can, then, only take cognisance of the essence of statehood as is inherent to it across the board; it cannot construct the substantive rationale of statehood afresh.

In a way that applies to all States, Ludwig Gumplowicz has described the State as the organisation of power and domination through the legal order.¹³ Similarly, if we follow Max Weber's approach, statehood relates to the organised use of coercion, legitimating and monopolising the use of force within the relevant territorial boundaries, and the corresponding obedience from men and women. The justification of domination – and depending also on its extent – can be explained through religious considerations, habitual traditional obedience, charisma and grace or alternatively through legality that consists in the validity of the legal rules that the State enacts by virtue of its functionally delimited authority. In

¹⁰ Hans Kelsen, *Hauptprobleme der Staatsrechtslehre Entwickelt aus der Lehre vom Rechtssatze*, 2nd edn (Tübingen: Mohr, 1923), 496.

¹¹ Philip C. Jessup, *A Modern Law of Nations* (New York: The Macmillan Company, 1948), 28.

¹² The reasons are diverse, and often contested or obscured. For instance, in a somewhat unlikely manner, one reason that led to the unification of North American colonies into the United States of America was the need to raise the Navy adequate to deal with the Barbary piracy threat from North Africa, Michael B. Oren, *Power, Faith and Fantasy: America in the Middle East, 1776 to the Present* (New York: W. W. Norton & Company, 2007). See more generally, Francis Fukuyama, *The Origins of Political Order: From Prehuman Times to the French Revolution* (London: Profile Books, 2011).

¹³ Ludwig Gumplowicz, *Allgemeines Staatsrecht* (Innsbruck: Wagner, 1907), 24.

all those cases obedience could in practice be determined by what Weber denotes as 'highly robust motives of fear and hope – fear of the vengeance of magical powers or of the power-holder'.¹⁴

What Weber thus focuses upon is how the power-holder sells the justification and how that justification comes across to people. The two may not always overlap in practice, and the visions of legitimation may thus diverge at the opposing ends of the equation. Nor does that actual process of legitimation always have to be concomitant with the 'terms and conditions' officially stated in the relevant State's constitution, but could also embrace more informal but widely perceived grounds.

Out of the approximately 200 States to which international law applies, not all operate in the same way. Some States are premised on a more or less straightforward constitutional pattern of representation and accountability, the use of coercion being limited to carefully demarcated instances of violating legal prescriptions, beyond which individuals retain complete freedom of choice as to their activities in various areas of social life without fearing coercion, oppression or reprisal. Other States, however, are dominated by more unspoken premises that often divide rather than unite communities and, in order to survive, carry on and command submission, either in terms of domestic governance or of occupation and colonisation of foreign territories. The political systems in question need to rely on fear and violence. For instance, the concept of public and sovereign authority underlying Denmark or the Netherlands shows no viable similarity with that on which the current political regime in Zimbabwe or the Turkish domination of Northern Cyprus (created through massive eviction of inhabitant and importing settlers) are premised. The latter will, quite simply, not survive without oppression and continuing efforts to consolidate the fruits of those oppressive efforts factually, and validate them both domestically and internationally.

If, as observed above, international law does not specify the nature of States and their political regimes in any *a priori* or comprehensive manner, nor should it be the task of courts to draw themselves into those complex processes. It was in this spirit that Lord Wilberforce warned against 'involv[ing] English courts in difficult and delicate questions as to the motivation of a foreign State, and as to the concept of public good, which would be unlikely to correspond with ours'.¹⁵ Nor has a top-down attempt at excluding, totally or partially, States from the international legal

¹⁴ H. H. Gerth and G. Wright Mills (eds.), *From Max Weber: Essays in Sociology* (London: Routledge, 1948), 78–9.

¹⁵ *Czarnikow Ltd v. Rolimpex* [1979] AC 351, 364.

system proposed, for instance, by liberal theory,¹⁶ succeeded in its aims any more than radical monism succeeded in ensuring the supremacy of international law. The task of international law and of the courts that apply it seems to be more modest, namely to evaluate the nature of particular State activities when it comes to the application of international law to facts.

3 Applying the dynamic aspect of statehood

(a) *The law of recognition – addressing the Namibia exception*

In its Advisory Opinion on *Namibia* the International Court of Justice had to examine the legal consequences of the illegal presence of South Africa in Namibia. The Court pronounced the duty of third States not to accord recognition to official acts of South Africa in Namibia, so that its sovereign powers there would not be given effect. That, however, did not extend to acts such as ‘the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory’.¹⁷ The Court thus effectively proposed a two-pronged guideline for applying this test: whether the recognition of the relevant act serves the interests of the inhabitants; and whether such recognition permits the illegal occupier to assert such public authority as the occupation purports to generate.

The litigation before English courts in the case of *Hesperides*¹⁸ dealing with property deprivation by the illegal authorities of the Turkish Republic of Northern Cyprus (TRNC) addressed the whole matter through the prism of private international law and applied, in relation to title to property, the law of the place where the property was situated. The Court of Appeal did not address the public international law issue of the legality of the TRNC’s status, which was antecedent to those private law questions. The *Namibia* two-pronged guidance was not addressed either. Instead, Lord Denning was content to observe that the Northern Turkish administration was factually effective and that was enough for its laws – the inherently public acts validating the initial invasion and separation – to be recognised internationally.

¹⁶ See Anne-Marie Slaughter, ‘International Law in a World of Liberal States’, *European Journal of International Law*, 6 (1995), 504.

¹⁷ *Legal Consequences of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276*, Advisory Opinion, 21 June 1971, ICJ Reports (1971), 16, 56, para. 125.

¹⁸ *Hesperides Hotels v. Aegean Holidays* [1978] QB 205, 221 (*per* Lord Denning).

The European Court of Justice took a more properly strict position in *Anastasiou*, by denying the TRNC the power to issue export certificates for exporting goods to the EU market, which was essentially a public power available, in relation to the territory of the whole of Cyprus, only to the government based in Nicosia.¹⁹ Strasbourg jurisprudence has also addressed the matter, but what was at stake there was not the legality of the TRNC's public law authority that it had effectively stolen from the Republic of Cyprus, but merely the remedies available to individuals within the TRNC before they could take their cases to the European Court of Human Rights. *Cyprus v. Turkey* addressed this one single aspect head on.²⁰ This narrow focus of adjudication, coupled with the Court's stated policy to admit the *Namibia* exception only to the extent necessary not to strip inhabitants of their basic rights,²¹ is a possible countervailing factor that could constrain this exception within its proper limits. That much is also obvious from the subsequent case of *Demopoulos*.²²

The difference between public authority and private law is what is at stake in this area, for it is essentially a legislative exercise beyond the gift of international tribunals, to expand the *Namibia* exception from private law to public law relationships, and correspondingly to trim down the scope of the duty of non-recognition that is reflected in Article 41 of the Articles on State Responsibility (ASR), or actually render that duty nugatory.

That the *Namibia* exception does not extend to public acts was also confirmed by the Court of Appeal in *Kibris Turk Hava Yollari v. Secretary of State for Transport*. As Richards LJ most pertinently observed:

It is almost certainly true that the opening up of international flights to northern Cyprus would be of great practical significance for persons resident in the territory . . . But that does not bring the case within the [*Namibia*] exception. The mere fact that the impugned public law decision has a knock-on effect on private lives cannot be sufficient for the purpose.²³

The standard upheld by the European Court of Human Rights is thus different from that under *Hesperides* and that which was advanced, but

¹⁹ *R v. Minister of Agriculture, Fisheries and Food, ex p. S. P. Anastasiou*, Case C-432/92, 100 ILR 258, 296.

²⁰ *Cyprus v. Turkey*, Application No. 25871/94, ECtHR, Judgment, 10 May 2001.

²¹ *Ibid.*, para. 96.

²² *Demopoulos and others v. Turkey*, Application No. 46113/99, ECtHR, Admissibility Decision, 1 March 2010, para. 96.

²³ *Kibris Turk Hava Yollari v. Secretary of State for Transport* [2010] EWCA Civ 1093, 12 October 2010, para. 80.

rejected, in *Anastasiou* and subsequently by the Court of Appeal of England and Wales in *Kibris*. This latter position, most prominently represented by *Hespreides*, tries to modify the initial legal position by reference to, and effectively in support of, the factual realities on the ground, most profoundly including the illegal occupation. As every State displays in time and space, recognising sovereign prerogatives in illegal entities essentially amounts to stealing the same prerogatives from the rightful owner – the State, or prospectively the non-State entity seeking to become a State – that has the rightful title to the relevant territory. The very purpose of the valid version of the *Namibia* exception is to safeguard the scope of sovereign authority that the rightful owner legally retains.

(b) The law of State responsibility

As it happens, the approach of the law of State responsibility to State activities is, in the first place at least, highly factual, referring to the factual connection between the act of the State and breach of an international obligation, without at that stage introducing any further requirement as to the sovereign or other nature underlying the relevant act. Attribution requirements under Article 4 ASR follow from the already established premise that the organ in question acts as a State organ. However, in relation to non-State entities, whose status as an organ of the State is not obvious, the nature of the activity assumes predominant importance in ascertaining whether their conduct entails the responsibility of the State for which they act.

Whether we are dealing with contexts involving States with different socio-economic systems, or the increasing pattern of privatisation and outsourcing of multiple State activities, whether through the prisons system or the use of private military companies, the issue as to the extent to which the State can alienate its sovereign functions and therefore evade responsibility becomes pressing. For outsourcing of public functions to non-State entities whose identity is separate from that of the State, importantly raises the question as to the precise (non-)sovereign nature of the relevant activities, ultimately to answer the question whether the relevant State should still be held responsible for what has, strictly speaking, been done by someone else. A positive answer to this question is possible only if the non-State entity in question has been given the powers to act in lieu of the State – that is, to do whatever would not be doable but for being a State.

Commentary to the ILC's Article 5 suggests that to attract responsibility, 'the conduct of an entity must accordingly concern governmental activity';

and the person or entity [must be] acting in that capacity in the particular instance.²⁴ The criterion seems to be whether the relevant entity has been doing that for which the State would have to use its sovereign capacity were it to perform the same act itself. An inevitable conclusion, however contextual, is that even if the law of State responsibility does not associate the responsibility of the State as such (under Article 4) with the governmental, public or sovereign nature of its activities, it still provides for the test to identify the scope of such activities.

Other, more specialised, areas of responsibility follow suit. The requirement of ‘official capacity’ under Article 1 of the 1984 UN Convention Against Torture (CAT),²⁵ to regulate the responsibility of non-State entities for torture²⁶ is quite similar in essence to ‘governmental authority’ the way Article 5 ASR addresses it. In this particular case, it is about non-State entities (rebels, insurgents and other *de facto* arrangements) that, although not being a State nor having been delegated official functions from any State, have come to exercise the relevant public functions that would, were other things equal, be exercised in that dimension of time and space by one or another State.

The involvement of private military companies (PMC) in various conflicts has given rise to a debate as to how attribution and ‘governmental authority’ works in relation to them.²⁷ The factual context, including at its most extreme a PMC being drawn into combat situations, may not, as such, be crucial. It depends upon the purpose for which force is being used and the nature of that force. The example of food supply or premises security is invoked,²⁸ arguably to emphasise that PMCs should enjoy security in performing their tasks. It is not the PMCs’ but rather the State’s public authority, of which a PMC is merely a dedicated servant, that holds the key in determining responsibility. Even the use of force in self-defence, provided that its proper limits under the relevant domestic law are observed, may not be that different from a similar action undertaken by a private individual on the streets of an average town in

²⁴ Report of the International Law Commission on the Work of its 53rd Session, 43.

²⁵ Art. 2 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, adopted 10 December 1984, entered into force 26 June 1987), 1465 UNTS 85.

²⁶ Manfred Nowak and Elizabeth McArthur, *The United Nation Convention Against Torture: A Commentary* (Oxford University Press, 2008), 78–9.

²⁷ Chia Lenhardt, ‘Private Military Companies and State Responsibility’ in Simon Chesterman and Chia Lenhardt (eds.), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (Oxford University Press, 2007), 139.

²⁸ *Ibid.*, 148.

Texas. What matters is whether the State has tasked the company to perform the activities that only States can perform as part of their public authority, either as ordinary State functions in peacetime, or those related to war and foreseen under humanitarian law treaties, such as the interrogation of prisoners or maintaining law and order in occupied territories; and then also whether the PMC's particular conduct is performed at the service of that public authority.

The Arbitral Award in *United Postal Service of America Inc. (UPS) v. Canada* provides a rare example of judicial articulation of the 'governmental authority' test.²⁹ Canada Post – operating as part of the Canadian State machinery – prevented the United Postal Services from having access to the Canadian postal market the way it had enabled other operators, arguably breaching Canada's obligations under sections 1102 and 1105 of the North American Free Trade Agreement (NAFTA).³⁰ The tribunal had to assess whether the acts of Canada Post were attributable to Canada directly and, if not, whether Canada could be held responsible pursuant to Articles 1502(3)(a) and 1503(2) NAFTA, which requires parties to ensure that government-owned or designated monopolies, or State enterprises exercising certain delegated authority, comply with Chapter 11 of the same Agreement.³¹ The relevant NAFTA provisions, 'read as a whole [led] the Tribunal to the conclusion that the general residual law reflected in Article 4 of the ILC text' was replaced by 'the special rules of law stated in chapters 11 and 15'.

The particular provisions of chapter 15 themselves distinguish in their operation between the Party on the one side and the monopoly or enterprise on the other. It is the Party which is to ensure that the monopolies or enterprises meet the Party's obligations stated in the prescribed circumstances. The obligations remain those of the State Party; they are not placed on the monopoly or enterprise.

Thus, the Canadian State and Canada Post each possessed separate identities; the latter's acts would not per se become the former's for the purposes of NAFTA, even if they could be attributable to Canada under the general law of responsibility.³² The principle of the 'unity of the State' was effectively derogated from.

²⁹ *United Postal Service of America, Inc. v. Canada*, ICSID Arbitration, Award on the Merits (24 May 2007).

³⁰ North American Free Trade Agreement, Canada–Mexico–United States (adopted 17 December 1992, entered into force 1 January 1994), 32 ILM (1992), 605.

³¹ *United Postal Service of America, Inc. v. Canada*, paras. 45–6.

³² *Ibid.*, paras. 55, 59, 62.

All then turned on whether Canada Post exercised ‘governmental authority’. Sections 1502 and 1503 were contingent on ‘establish[ing] that the monopoly or State enterprise in question is exercising a “regulatory, administrative or other governmental authority that the Party has delegated to it”’, so that ‘a State Party does not avoid its own obligations under the Agreement as a whole . . . by delegating governmental authority to a monopoly (private or public) or to a State enterprise’. Thus, not all acts inconsistent with NAFTA were caught; the two ‘provisions operate[d] only where the monopoly or enterprise exercises the defined authority and not where it exercises other rights or powers. They have a restricted operation’. The tribunal observed that ‘[t]o be contrasted with the exercise of that [governmental] authority is the use by a monopoly or State enterprise of those rights and powers which it shares with other businesses competing in the relevant market and undertaking commercial activities’. Therefore, in relation to access to market and use of infrastructure, Canada Post was not acting on terms foreseen under the ILC’s Article 5.³³ Liability would materialise if Canada Post would act not just in contradiction to Canada’s NAFTA obligations, but *additionally* do so in the exercise of governmental powers that the Canadian government would have delegated to it.

The tribunal’s observation as to the general scope of public authority is also instructive:

In terms of the instances listed in [sections 1502 and 1503] the body exercising this authority *expropriates* the property, *grants* the license, *approves* the commercial transaction (such as a merger), or *imposes* the quota, fee or charge – in all cases by the unilateral exercise of the governmental authority delegated to it. While that list of authorities is not exhaustive, it helps to identify a genus which involves binding decision-making. So too does the word ‘authority’ when read with its three adjectives – ‘regulatory, administrative or governmental’.

The tribunal’s open-ended approach is further instructive in the sense that responsibility does not depend on whether outsourced activities involve the exercise of coercive powers.³⁴

(c) *The Law of State Immunity*

Addressing the area of sovereign immunity requires focusing on the restrictive immunity doctrine, which centres on distinguishing sovereign

³³ *Ibid.*, paras. 68, 70, 72–4, 78. ³⁴ *Ibid.*, para. 79 (emphasis original).

from non-sovereign acts. What matters is the nature of State acts rather than their perpetration by organs of a sovereign State.

As an instance illustrating underlying distinctions, socialist States ordinarily used to claim absolute immunity, for the restrictive doctrine did not admit immunity 'in those cases in which a state performs acts that are also open to private persons'. Socialist States entered 'into a whole series of such contracts on the ground of its state monopoly of foreign trade', and it was thus 'impossible to split up the socialist State into two subjects: a sovereign power and an entity subject to private law rules'.³⁵ Even after the demise of the Socialist Camp, this problem retains its relevance, for both directions of interaction between the State and private activity – the State entering the private marketplace and the State outsourcing its public functions – remain part of modern socio-economic life.

Although the restrictive doctrine is deemed to have been introduced into international law since the mid-twentieth century, its roots can be found in the pronouncements by Sir Robert Phillimore in *The Charkieh*, to the effect 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 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.³⁶

This reasoning addresses how and in what manner the sovereign enters the marketplace, or more generally into private relations, that are available to any private actor. In whichever quality or capacity they enter it, so they are supposed to carry on. If the State as a public entity ventures into private dealings the way that everyone else can act, that demonstrates that it can be subjected to the ordinary law applicable to individuals. This approach was further crystallised in the *Congreso* case where Lord Wilberforce clearly emphasised that if an act can be performed by private persons it is no longer sovereign act.³⁷ The purpose of immunities under the restrictive doctrine is to protect privileges inherently deriving from statehood, not the totality of State activities.

³⁵ M. M. Boguslavsky, 'Foreign State Immunity: Soviet Doctrine and Practice', *Netherlands Yearbook of International Law*, 10 (1979), 169–70.

³⁶ *The Charkieh* (1872–5) 4 LR 59, 99–100.

³⁷ *I Congreso del Partido* [1983] 1 AC 244, 268.

It is on this narrower version that immunity shields acts contradicting international law. When the act in question is a valid exercise of sovereign authority in the first place, the immunity for it will not fall away merely for the reason that the same act violates international law; not that the unlawful could attract immunity without its sovereign nature being demonstrated in an antecedent manner.

The ways of identifying the connection between the relevant act and the scope of sovereign powers have been articulated in jurisprudence. In the practice of American courts, this has been done in relation to the ownership and control by the State of its natural resources. It was observed in the *Pemex* case that:

The Court must regard carefully a sovereign's conduct with respect to its natural wealth. A very basic attribute of sovereignty is the control over its mineral resources and short of actually selling these resources on the world market, decisions and conduct concerning them are uniquely governmental in nature.³⁸

In the case of *International Association of Machinists and Aerospace Workers v. OPEC*, another US court has similarly observed that:

The control over a nation's natural resources stems from the nature of sovereignty. By necessity and by traditional recognition, each nation is its own master in respect to its physical attributes. The defendants' control over their oil resources is an especially sovereign function because oil, as their primary, if not sole, revenue-producing resource, is crucial to the welfare of their nations' peoples.³⁹

The sovereign nature thus accrued only to that narrow area of sovereign activity and decision-making process. This narrow area of control – initial and ultimate decision-making if not the day-to-day administration – is a cardinally important aspect of sovereignty; not least because it essentially follows from the permanent sovereignty over natural resources in line with Resolution 1803(1962) adopted by the UN General Assembly. There can be no serious doubt about this falling within sovereign authority before many other activities will be so labelled.

³⁸ *Pemex Corporación Mexicana de Mantenimiento Integral, S. De R.L de C.V v. Pemex-Exploración y Producción*, No. 10 Civ. 206 (AKH), 2013 WL 4517225 (SDNY Aug 27, 2013).

³⁹ For the overview of both cases and other relevant jurisprudence see G. R. Delaume, 'Economic Development and Sovereign Immunity', *American Journal of International Law*, 79 (1985), 325, 327.

The same principle was upheld by the European Court of Human Rights in a different context, distinguishing between the organisational policy underlying the arrangement of a foreign embassy that falls within the area of sovereignty and may attract sovereign immunity, and the more specific issue of the embassy's compliance with an employee's contractual rights, which may not.⁴⁰

The restrictive immunity doctrine does not always overlap with the way national immunity legislation, for instance the 1978 UK State Immunity Act (SIA), regulates the relevant matters. As Lord Diplock emphasised in the *Alcom* case, the SIA does not codify the restrictive doctrine that requires examining the precise (non-)sovereign nature of the relevant act, but grants foreign States absolute immunity unless the matter falls within the specific exceptions set out under the same Act.⁴¹ However, States are not bound by these statutory standards internationally. Court decisions based on the letter of domestic statutes are premised on the exclusion of international law from judicial consideration. They are thus not constitutive of State practice that could possibly build customary law on immunities.⁴² States can amend their legislation the way that the United States and Canada have done in relation to terrorist activities,⁴³ effectively manifesting their position that there is no such indivisible concept of sovereignty which requires that States should be able to claim their sovereign privileges in relation to terrorist activities.

One area where restrictive doctrine and the ensuing sovereign authority test can be used even within domestic statutory frameworks relates to 'separate entities' under section 14(2) of the SIA, which prescribes that the entity affiliated with the governmental apparatus of the foreign State is immune only if 'the proceedings relate to anything done by it in the exercise of sovereign authority'. This was confirmed in *Kuwait Air Co.*, where Lord Goff emphasised that 'it is not enough that the entity should have acted on the directions of the State, because such an act need not

⁴⁰ *Fogarty v. UK*, Application No. 37112/97, ECtHR, Judgment, 21 November 2001, paras. 22, 30, 38.

⁴¹ *Alcom v. Republic of Colombia* [1984] AC 580, 600.

⁴² F. A. Mann, 'The State Immunity Act 1978', *British Yearbook of International Law*, 51 (1980), 43; James Crawford, 'A Foreign State Immunities Act for Australia?', *Australian Yearbook of International Law*, 8 (1983), 105–6.

⁴³ See, for an overview, Ronald 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; and the amendments to the Canadian State Immunity Act (RSC 1985, c. S-18), 13 March 2012.

possess the character of a governmental act. To attract immunity under section 14(2), therefore, what is done by the separate entity must be something which possesses that character.⁴⁴ Thus, section 14(2) requires the Court first to identify the character of the organ and then to apply the restrictive doctrine to its action.

The issue was addressed before the SIA came into force, in the *Trendtex* case where Shaw LJ and Stephenson LJ refused to consider the Central Bank of Nigeria as an organ of the Nigerian State, for the relevant legislative amendments that drew on the Bank's status fell short of revealing legislative intention to that effect.⁴⁵ A similar philosophy underlies the pronouncements in *Rolimpex* that the entity in question was not part of the Polish State since, even if it 'bought and sold for the State', it retained a considerable freedom in relation to day-to-day commercial activities.⁴⁶ To some extent, then, the very status of a 'separate legal entity' as *Trendtex* had it, will depend on the nature of its tasks and the degree of its affiliation with the sovereign functions of the State. In *Rolimpex* the entity in question was confirmed in that status, enabling it to claim a substantive defence against non-compliance with contractual obligations due to government intervention beyond its control – an issue unrelated to immunities. But the underlying test of State public authority remained the same in both areas of law; in both cases the core issue was, and was answered in the negative, whether the entity in question was acting as part of the State and exercising its sovereign functions. Capitalising on previous jurisprudence, Lord Goff concluded in *Kuwait Air Co.* that 'in the absence of such [governmental] character, the mere fact that the purpose or motive of the act was to serve the purposes of the state will not be sufficient to enable the separate entity to claim immunity under section 14(2) of the Act'.⁴⁷

As for the governing law on this issue, it was emphasised in *Trendtex* that:

the constitution and powers of a Nigerian corporation must be viewed in the light of the domestic law of Nigeria. But its status in the international scene falls to be decided by the law of the country in which an issue as to its status is raised. In civilised states that law will derive from those principles of international law which have been generally accepted among such states.⁴⁸

⁴⁴ *Kuwait Air Corporation v. Iraqi Airways Company and others* [1995] 1 WLR 1147, 1160 (per Lord Goff).

⁴⁵ *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] 1 QB 529, 565, 573.

⁴⁶ *Czarnikow Ltd v. Rolimpex*, 364 (per Lord Wilberforce), 367 (per Viscount Dilhorne).

⁴⁷ *Kuwait Air Corporation v. Iraqi Airways Company and others*, 1160.

⁴⁸ *Trendtex Trading Corporation v. Central Bank of Nigeria*, 575 (per Shaw LJ).

It is therefore affirmed that the domestic forum must, whenever possible, select international law as the law determining the (non-)sovereign status of the entity. As Shaw LJ observed, even if the Bank was a sub-serving agent for government departments, that was not sufficient to make it part of the government.⁴⁹ Domestic law provided the initial point of reference, while international law assessed the nature of the relevant domestic legal arrangements, and ultimately determined where sovereign authority lies.

Similar choice-of-law issues are confronted in cases where States themselves, or their officials, claim immunity. The use of the restrictive doctrine under international law in the criminal case of *Pinochet* crucially determined the scope of sovereign functions and that they do not include international crimes.⁵⁰ It may be tempting to conclude that, after the thread of jurisprudence culminating with the International Court's judgment in *Germany v. Italy*, civil cases are different.⁵¹ Care should be taken, however, not to take this jurisprudence in a casuistic manner, for the nature of judicial reasoning must always be put above judicial statistics. If we use this approach, it will be easily discovered that all pertinent cases confirming immunity in civil proceedings fail to focus on the requirements under the restrictive doctrine. The Strasbourg decision in *Al-Adsani* did not utter a single word regarding the (non-)sovereign nature of torture, the way the restrictive doctrine as detailed above would require it to do.⁵² The House of Lords in *Jones* did not focus on the restrictive doctrine either, instead asserting that once the relevant acts were attributable to Saudi Arabia under the law of State responsibility these acts attracted immunity as well.⁵³ In other words the House of Lords concluded that attributing an act to the State will invariably lead to according it immunity. The *Germany v. Italy* judgment did not examine the restrictive doctrine in any detail, and instead relied on the Italian concession that German war crimes were sovereign acts. When focusing on the acts of armed forces,

⁴⁹ *Ibid.*, 575.

⁵⁰ *Regina v. Bow Street Metropolitan Stipendiary Magistrate and others, ex p. Pinochet Ugarte (No. 3)* [2000] 1 AC 147.

⁵¹ *Cf. Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, General List No. 143, para. 87.

⁵² *Al-Adsani v. UK*, Application No. 35763/97, ECtHR, Judgment, 21 November 2001, 34 EHRR 11 (2002). 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 (*Jones and others v. UK*, Applications Nos. 34356/06 and 40528/06, ECtHR, Judgment, 14 January 2014, not reported yet).

⁵³ *Jones v. Saudi Arabia* [2006] UKHL 16, 14 June 2006, paras. 11–2 (*per* Lordingham), 76 (*per* Lord Hoffmann).

the International Court focused on the identity of the perpetrator, not the nature of acts, and essentially accorded immunity to Germany on the basis of the – now outdated – absolute immunity doctrine.⁵⁴

Thus, all the three above cases – *Al-Adsani*, *Jones* and *Germany v. Italy* – fall short of being good law, for they allowed the relevant States to claim immunity for what are not acts of their sovereignty. It is furthermore odd, to say the least, to contend that the relevant crime could be a sovereign act for civil but not for criminal proceedings. It is a misconception that the denial of immunity for serious violations of human rights and humanitarian law contradicts the State-centric nature of international law. Protecting the internationally recognised valid scope of statehood and public authority is just as much – and as little – as the State-centric nature of international law actually requires.

4 The three areas evaluated

The dynamic aspect of statehood addresses the extent to which a State can validly use its sovereign authority or rely on it to evade responsibility. Obviously the test of governmental or sovereign authority is bound to be the same for all pertinent areas of international law, focusing on the authority available only to States, not acts or rights that can also be performed by private or other non-State entities. A State cannot be more or less sovereign in different areas or contexts. To operate viably and predictably, the three above areas of international law rely on that single overarching concept of public authority for their own purposes and focus upon the aspects of it to be applied to each of those areas, thereby reinforcing the unity of that test and mutual interconnectedness of its various elements.

The law of recognition and State responsibility law are concerned only with situations when the entity other than the State acts in a legitimate or purported exercise of State authority. The law of immunities aims not just to prove facts of State involvement but to classify them for the further additional purpose, and to delimit the extent to which the ordinary course of justice can be evaded. In the end, the historical process of elaboration upon all these standards has served the common and overriding goal to secure efficient accountability.

⁵⁴ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, paras. 60 et seq.

Furthermore, the notion of ‘separate entity’ operates to enable the State to get away from foreign proceedings when the relevant act is *jure imperii*. Thus, in the law of immunities, ‘governmental authority’ assumes the same dimension as in the law of State responsibility as per *UPS*, the way that it includes – and in this case immunises – actions performed within the valid scope of sovereign authority as recognised under international law, and excludes other actions.⁵⁵ The application of section 14 SIA in *Kuwait Air Co.* broadly fits within this approach.

Thus, if a State delegates public authority to a ‘separate entity’ for whatever purpose, that State is responsible for everything factually done in the exercise of that delegated or outsourced authority; even though, depending on its substance, the actual specific act performed within the area covered by Article 5 ASR, that is under the guise of ‘governmental authority’, may or may not be a genuine exercise of that authority. The ILC commentary does not require that it should be. Nor does it have to be, for the use of the ‘governmental authority’ test in Article 5 is merely to channel the factually occurred incidences back to the State so that the latter’s liability materialises. Again, Article 5 is not about the governmental or official nature of specific acts, it is about the *a priori* generalised conferral, by the State to a non-State entity, of the authority to perform activities in that particular area.

If the ‘governmental authority’ test is used in terms of defining the nature of a particular wrongful act, it could be used homogeneously for the purposes of both State responsibility and State immunity. For Article 5 purposes, the delegating State does not, at the point of delegation or conferral, determine unilaterally what ‘governmental authority’ covers; it merely ends up transferring to the non-State entity the powers that under international law and independently of State will expressed at the point of delegation, already possess such governmental character. The underlying formula is not ‘I determine if X is governmental and then delegate it’, but ‘I delegate what already is governmental.’

The outcome specifically for the purposes of immunities is that the State can claim immunity for acts of a ‘separate entity’ only if those acts were validly performed as part of that delegated ‘governmental authority’, with the effect that the outsourcing State itself would, as a matter

⁵⁵ After all, the articulation of this test in *United Postal Service of America, Inc. v. Canada*, para. 79 is fairly similar to the criteria of *jure imperii* acts in *Contemporary Problems Concerning the Immunity of States*, Institute of International Law, Basel Session, 1991, Art. 2(3) (Special Rapporteur Ian Brownlie).

of international law, be validly entitled to claim immunity for those acts under the restrictive doctrine of immunity. For, the restrictive doctrine addresses not just general systemic and constitutional patterns of delegation and outsourcing, but also crucially focuses on the governmental or private nature of that very specific act in relation to which immunity is being claimed.

The relevant activities can initially be described as governmental or private: compare an arrest with the sale of tickets. What also matters, however, is whether individual acts are undertaken within the area that broadly involves governmental authority, whether by the State or delegated to a non-State entity. We can thus contrast a general context of policing or maintenance of discipline in prisons to the supply of food or torture of inmates, which are specific acts undertaken within the broader task of governmental authority to run prisons. If the government outsources to a private entity the broader governmental authority to run the prison, particular acts performed within this framework will be channelled back to the State through the principle stated in Article 5 ASR. For the private entity would not commit these acts if governmental authority had not been delegated to it from the State. Once attribution to the State is determined, however, its responsibility will attach to individual acts, not to that overall framework of governmental authority. Correspondingly, for the purposes of the law of immunities, it is these specific acts that fall to be assessed for their sovereign or private character. Thus, for instance, acts perpetrated by a PMC and channelled to the State through Article 5 ASR would not, under the restrictive doctrine, attract immunity.

A PMC interrogating prisoners and torturing them enters the field through the use of conferred public authority, but the act in question does not become sovereign for the purposes of State immunity. For immunities focus on specific acts, not general authority; the latter does not cover, nor would be intended at the point of conferral to authorise, those specific acts. Similarly, the State torturing in peacetime enters the field through the private activity in the first place and is thus not immune. The State would not thus be immune for the PMC's torture either.

5 Conclusion

The advantage of focusing on the dynamic aspects of statehood, as developed in judicial practice and the ILC's work, is to promote effective accountability of States in various contexts, on inclusive terms and through the application of the existing law. The areas examined above

demonstrate that in the twenty-first century there could hardly be room for the absolute and indivisible version of statehood. The reasoning that preaches pragmatism, and alludes to imaginary needs of stability that could be threatened by human rights litigation, in effect tries to superimpose a preconceived ideology over the merit of legal evidence, and is essentially a reasoning developed from the position of intellectual and evidentiary weakness.

The comparative advantage, and thus power, of judicial reasoning is that it holds the grip on the continuous process of the application of established rules and principles of international law. Instead of projecting some liberal transnational compact and on that basis discriminating between States, the focus on the role of courts is premised on the inclusive approach that applies to all States, great or small, liberal or 'rogue', integrating them all within the same process of lawmaking and law-enforcement. It is not completely free of inconsistencies, but the difference it has already made is undeniable. Following this route is far more feasible than unrealistically waiting for some great systemic changes leading to a constitutional revolution – especially if it is a revolution that most of us do not want to happen.