Seminar on State Immunity
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INTRODUCTION TO TOPIC

This seminar concerns state immunity. In order to study and understand state immunity, you will first need to understand jurisdiction and how it operates. Therefore the first part of this seminar focuses briefly on the different bases of jurisdiction. You can access Shaw's book entitled *International Law* (see below) and read chapter 11. After briefly studying the bases of jurisdiction, you can them move on to state immunity. I suggest reading chapter 12 of Shaw.
Finally, you can do the two questions at the end to test your knowledge. You are welcome to send your answers to me and I will provide you with feedback (but this is not compulsory).

Access to reading: You can access Shaw, International Law via your MUNI account.
https://www.cambridge.org/core/books/international-law/23403D7B22E800C677D5955FD9110AA8
You may need to long in via Shibboleth/ Athens and select MUNI. If you don't have the MUNI VPN, you may need to download it. Details are here:
https://it.muni.cz/en/services/vpn

NOTES ON JURISDICTION

BASES OF JURISDICTION

Jurisdiction concerns essentially the extent of each state's right to regulate conduct or the consequences of events. Usually, when we refer to jurisdiction we are referring to territorial jurisdiction but jurisdiction can also be extraterritorial. The different bases of jurisdiction are outlined below in sections 1.1-1.3.

The Lotus Case (France v. Turkey) (1927):
'the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial…'
'It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad…Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wider measure of discretion which is only limited in certain cases by prohibitive rules…'

Territorial jurisdiction

This means that a state has territory on its jurisdiction.

Bankovic v. Belgium et al (2001) (ECtHR): 'While international law does not exclude a State's exercise of jurisdiction extra-territorially, [the other principles] are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States…'

Sometimes a state also have jurisdiction outside its territory e.g. where it operates a prison abroad, where it pushes back a ship carrying refugees on the high seas.

Al Jedda (2011) – UK's effective control in Iraq resulted in UK jurisdiction being engaged.

Passive personality

- jurisdiction based on the nationality of the victim
- example: if a national from State A murders a national from State B and this takes place in State C, State B has jurisdiction under the passive personality principle
- rejection by British courts: ***Pinochet*** (cf. Torture Convention)
- ***US v. Yunis*** (1988): hijacking of Jordanian aircraft by Lebanese national
- ***Arrest Warrant*** **Case** (2002) per Judges Higgins, Kooijmans and Buergenthal: 'Passive personality jurisdiction, for so long regarded as controversial, is now reflected not only in the legislation of various countries…and today meets with relatively little opposition, at least so far as a particular category of offences is concerned' i.e. terrorism/international crimes

Universal jurisdiction

- Jurisdiction can be extended in relation to crimes that are so henious that they pertain to humanity itself – and thus justify the application of any state's jurisdiction.
- ***Re Piracy Jure Gentium*** *(*1934): '[the pirate] is no longer a national, but 'hostis humani generis' [enemy of mankind] and as such he is justiciable by any State anywhere'

NOTES ON STATE IMMUNITY

- **Article 2(1)** of the **United Nations Charter** confirms that the principle of sovereign equality is a fundamental principle of the international legal order. Included in sovereignty is the jurisdiction of states over their own people.
- State immunity protects a State and its property from the jurisdiction of the courts of another State. It covers administrative, civil, and criminal proceedings (jurisdictional immunity), as well as enforcement measures (enforcement immunity). It reflects the sovereign equality of States as a main pillar of the contemporary international legal order
- The question of sovereign immunity is a procedural one and is a preliminary issue to be decided in any court case brought against a state

1. HISTORY AND DEVELOPMENT

State immunity evolved in close connection to the development of the concept of sovereignty the territorial **State**.

The Schooner Exchange v McFaddon was the first leading case in the US Supreme Court on state immunity decided in 1812. In this case a French naval vessel was in Philadelphia for repairs. The plaintiffs sought possession of the ship, as it was actually a US vessel seized on high seas during the Napoleonic wars. Chief Justice Marshall declared that the jurisdiction of a state within its own territory was exclusive and absolute but it did not encompass foreign sovereigns. He argued that perfect equality and independence of sovereigns meant that every sovereign waived the right of complete and exclusive territorial jurisdiction over the sovereign which meant the state. Therefore, the court found that the vessel in question was exempt from US jurisdiction. This was the ultimate statement of absolute immunity.

Lord Browne-Wilkinson in Ex Parte Pinochet (No 3):
'It is a basic principle of international law that one sovereign state (for forum state) does not adjudicate on the conduct of a foreign state. The foreign state is entitled to procedural immunity from the processes of the forum state. This immunity extends to both criminal and civil liability.'

- When States became increasingly engaged in commerce, it was felt there was a need to secure their accountability in business transactions and thus to limit their **immunity**. At the end of the 19th century, some courts began to restrict **immunity** to acts *iure imperii* (acts of state) and to deny it in case of acts *iure gestionis (private act)*. Later on, this aspect has been expressly ruled upon by legislation pioneered by the UK and the US (US Foreign Sovereign Immunities Act 1976).

- In 1972, the European Convention on State immunity was concluded. It entered into force in 1976 and now has eight members. An Additional Protocol was added which primarily establishes a 'European Tribunal in Matters of **State Immunity**' and which, to date, has six contracting parties.

- It took 13 more years of discussions in the UN General Assembly's Sixth Committee and in an Ad Hoc Committee however, until the General Assembly finally adopted the UN Convention on Jurisdictional Immunities of States and their Property (UNCJISP) with Resolution A 59/38 of 2 December 2004. It has been signed by 28 States and, according to its Art. 30, will enter into force after the 30th instrument of ratification, acceptance, approval, or accession has been deposited. While the UNCJISP is still awaiting the number of ratifications or approvals required for its entry into force, it is already widely acknowledged as an accurate, extensive, learned, and systematic reflection of this field of the law, and is widely used as a basis for legal practice and scholarly reflection.

2. ABSOLUTE IMMUNITY APPROACH

The sovereign was completely immune from foreign jurisdiction in all cases regardless of circumstances. The leading practitioner in this approach was the UK.

Krajina v Tass Agency [1949]: The Court of Appeal held that the Agency was a state organ of the USSR and was thus entitled to immunity from local jurisdiction

Baccus SRL v Servicio Nacional del Trigo [1957]: The Court felt that the defendants, although a separate legal person under Spanish law, were in effect a department of state of the Spanish government. How the entity was actually constituted was regarded as an internal matter, and it was held entitled to immunity from suit.

3. RESTRICTIVE APPROACH

Dralle v Republic of Czechoslovakia ; The Supreme Court of Austria in 1950, in a comprehensive survey of practice, concluded that in light of the increased activity of states in the commercial field the classic doctrine of absolute immunity had lost its meaning and was no longer a rule of international law.

1952 -Tate letter – US Department of State declared that the increasing involvement of governments in commercial activities coupled with the changing views of foreign states to absolute immunity rendered a change necessary and that thereafter 'the Department [will] follow the restrictive theory of sovereign immunity.'

Trendtex Trading v Central Bank of Nigeria *[1977]*
All three judges of the Court of Appeal (UK) accepted the validity of the restrictive approach as being consonant with justice, comity and international practice. A Nigerian bank claimed sovereign immunity. Lord Denning held that the bank was liable for the loan under the doctrine of restrictive immunity, as this case concerned a commercial contract. The relevant act was simply a breach of a commercial contract. In this case the bank was not an agent of the Nigerian government, and therefore there was no immunity at all but, even if it had been an agent, there would be no immunity on account of the commercial nature of the contract.

As a result of the development in the case law, the majority of states have now accepted the restrictive immunity doctrine and this has been reflected in domestic legislation, as in the **US Foreign Sovereign Immunities Act of 1976** and the **UK State Immunity Act of 1978**.

It is critical to note that they still provide a general rule of immunity with exceptions for commercial activities.
This was also the approach adopted in the **European Convention on State Immunity of 1972**.
The last countries that clung on to the theory of absolute immunity were the states of the former Soviet Union. However in practice they entered into many bilateral agreements which encompassed the theory of restrictive immunity.

4. SOVEREIGN AND NON-SOVEREIGN ACTS

A State enjoys immunity in respect of itself and its property, from the jurisdiction of the courts of another state subject to the provisions of the present convention.

What is an act of state? UNCJISP Convention-
Art 2(1)(b): A State is

(i) The state and its various organs of government
(ii) Constituent units of a federal state or political subdivisions acting in that capacity
(iii) Agencies or instrumentalities of the state or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the state
(iv) Representatives of the state acting in that capacity.

The predominant approach looks at the nature rather than purposes. However, see Art 2(2) of the Convention- reference should primarily be to the nature of the act but purposes should also be taken into account.

I Congreso del Partido (1981) (in the House of Lords)

- In this complex case there was consideration of the activities of two ships. The issue was whether the action was commercial and therefore an area of non-immune activity, or whether the ships were involved in sovereign activity. This case followed the nature and purpose of the act test to determine this important question. Lord Wilberforce emphasized that in considering whether immunity should be recognized one had to consider the whole context in which the claim was made in order to identify the relevant act which formed the basis of that claim. Was it an act jure gestionis or in other words 'an act of a private law character such as a private citizen might have entered into?'
- In this case, two vessels operated by a Cuban state-owned shipping enterprise were supposed to deliver sugar to a Chilean company. However, the ships were ordered by the Cuban government to stay away from Chile after the Allende government was overthrown. The Cuban government pleaded sovereign immunity on the grounds that the breach of contract was a foreign policy decision.
- Appropriate test – 'it is not just that the purpose or motive of the act is to serve the purposes of the state but that the act is of its own character a governmental act, as opposed to an act which any private citizen can perform.'
- Majority held that the Cuban government had acted in the context of a private owner and had not acted itself in acting in the exercise of sovereign powers. Everything had been done in reliance of private law rights. Therefore no sovereign immunity.

A **State** may waive its **immunity** or consent to the exercise of jurisdiction. It is required that the **State** does so explicitly. Art. 7 UNCJISP addresses this issue in detail. Furthermore, a **State** cannot invoke **immunity** in a case where it itself instituted the proceedings, intervened in such proceedings, or has taken any other step relating to the merits

5. EXCEPTIONS TO IMMUNITY

5.1 Commercial transactions

In essence, the restricted approach to **immunity** implies that **immunity** cannot be invoked where a **State** engages in commercial activities. While the principle has been very much agreed upon, the details and particularly the definition of such commercial transactions have been the subject of much uncertainty.

Eg sale of goods, supply of services, Financial transactions, such as loans, obligations of guarantee, or obligations of indemnity, are considered commercial transactions

To determine whether it is commercial, there is a tendency to take into account the purposes of transaction. States often use means of commercial transactions to achieve public goals.

Republic of Argentina v Weltover Inc (1992)

- Mexican bank refused to redeem a certificate of deposit.
- Was it a commercial activity? (it was a state bank)
- Supreme court said that the act of issuing government bonds was a commercial activity and the unilateral rescheduling of payment of these bonds was also a governmental activity.

Other cases-
Purchase of military equipment by Haiti for use by its army and a military training agreement whereby a foreign soldier was in the US were not held to be commercial activities.

5.2 Employment contracts

- Another specific restriction on **State immunity** relates to contracts of employment; for contracts on work performed or to be performed, in whole or in part in another **State**. Such contracts are not considered commercial transactions.

- The reason to restrict **immunity** results from the legitimate interest of the forum **State** to see its laws and public policies respected, as far as they relate to labour relations. This interest has to be balanced against the legitimate interest of the employer **State** concerning the management and treatment of its employees.

- Generally speaking, **immunity** prevails when the employee is recruited to perform functions exercising government authority. This applies if he or she is a diplomatic agent, consular officer, a member of a permanent mission to an international organization or of a special mission, or represents a **State** at an international conference. **Immunity** also applies if the employee enjoys diplomatic **immunity** through his function in the work for the employer **State**.

- Aside from upholding **immunity** for proceedings relating to these groups of employees, **immunity** prevails in view of certain subject matters. Art. 11 UNCSI provides some detailed rules on this. **Immunity** is maintained in proceedings relating to the recruitment, renewal of employment, or reinstatement of an individual, and in proceedings concerning the dismissal or termination of employment of an individual, if such a proceeding would interfere with the security interests of that **State**, which has to be determined by the head of **State**, the head of government, or the minister for foreign affairs of the employer **State**.

Cases concerning employment:

- UK: In ***Sengupta v Republic of India*** **65 ILR 325** the Employment Appeal Tribunal held on the basis of customary law that immunity existed for a contract of employment involving the workings of a mission since that constituted a form of sovereign activity.
- The Supreme Court of Canada decided ***United States of America v Public Service Alliance of Canada and others*** and held that the conduct of labour relations at a foreign military base was not a commercial activity.
- House of Lords, ***Holland v Lampen Wolfe*** **(2000)**. In this case the House of Lords considered the case of a US citizen who was a teacher on a US air force base in the United Kingdom. The plaintiff was arguing that a memorandum written by her superior was libel. The House of Lords granted immunity to the United States, arguing that the act concerned took place in the context of the provision of education on a military base, which was an activity serving the needs of the US military and therefore a sovereign activity. This case also cited with approval the ***Littrell v United States of America (No. 2)*** case which held that military treatment for US personnel on a US base in the United Kingdom was a sovereign activity.
- ECtHR: has adopted a cautious approach bearing in mind the importance of right of access to a court under Art 6 ECtHR. Noting that immunity depended in the exercise of governmental functions. E.g. a switchboard operator in the Polish embassy in Vilnius , Lithuania and an accountant at the Kuwaiti empassy in paris could not be prevented from getting redress.
- CJEU, C-154/11 ***Ahmed Mahamdia v People's Democratic Republic of Algeria*** (Grand Chamber). He concluded an employment contract with the Ministry of Foreign Affairs of Algeria to work as a driver at the Embassy. The contract contained a jurisdiction clause (Art 21) giving exclusive jurisdiction to the Algerian courts. Much later, he brought proceedings against Algeria in Berlin seeking to be paid for his overtime work. Following this, he was dismissed. He then added to his principal claim before the Berlin Labour Court a claim concerning unfair dismissal. Algeria challenged the German courts' jurisdiction by relying on state immunity and the jurisdiction clause in the contract. The court dismissed the claim based on state immunity. (para 13 of 33/78 Somafer). CJEU said that state immunity may be excluded if the legal proceedings relate to acts performed iure gestionis not falling within the exercise of public powers. On the second question, the CJEU took account of Art 21's wording and purpose. It observed that it does not follow either from the wording or from the purpose that a jurisdiction agreement may not confer jurisdiction on the courts of a third State, provided that it does not exclude the

jurisdiction conferred by Brussels I. It thus held that a jurisdiction agreement concluded before a dispute arises falls within Art 21(2) in so far as it gives the employee the possibility of bringing proceedings, not only before the courts ordinarily having jurisdiction under the special rules in Arts 18 and 19, but also before other courts, which may include courts outside the EU.

5.3 Pecuniary compensation for personal injuries or damage to property
Under Art. 12 UNCJISP, **immunity** is also excluded in proceedings concerning pecuniary compensation for the death or injury of a person and for damage or loss of tangible property, where the act or omission causing such injuries can be attributed to the **State** at hand and took place 'in whole or in part in the territory of' the forum **State**. This provision covers **State** conduct *iure imperii* as well as *iure gestiones*.

In a way, this restriction of **immunity** mirrors the *locus delicti commissi* rule. It secures that the injured person can undertake proceedings in the forum at hand. One area of application will be traffic accidents, and it has been understood that insurance will be available in most cases (ILC Commentaries 45 at para. 4).

Due to its rather broad wording, the exemption will also cover 'intentional physical harm such as assault and battery, malicious damage to property, arson or even homicide, including political assassination' (ILC Commentaries 45 at para. 4).

As the provision is confined to damages caused by **State** conduct which took place at least partly within the territory of the forum **State**, it may not cover cases where proceedings are brought against individuals responsible for human rights violations in the forum of another **State**.

Jurisdictional Immunities of States (Germany v Italy: Greece Intervening).

- Germany issued a claim in the International Court of Justice against Italy alleging that by allowing civil claims based on violations of international humanitarian law by the German Reich during World War II, it had violated its obligations under international law by failing to respect the jurisdiction immunity which the Federal Republic of Germany enjoyed under international law.
- The court begins by classifying the acts alleged to have been committed by German soldiers (in this case murders and forced labour) as *acta jure imperii*. These are acts of a state's sovereign power and whether they were lawful or not is not relevant to the consideration of state immunity. In this case the parties and the court agreed that states are generally entitled to immunity in respect of *acta jure imperi*
- Italy argued that customary international law had developed to the point where a state was no longer entitled to immunity in respect of acts occasioning death, personal injury, or damage to property on the territory of the forum state (the state in which the court case is launched), even if the act in question was performed *jure imperii*.

The court examined Article 12 of the UNCJISP

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.

- The court also considered a three-part Italian argument of why the courts should be entitled to deny state immunity for these acts *jure imperii*.
    i. Italy argued that the acts giving rise to the claims were serious violations of the principles of international law applicable to the conduct of armed conflict, amounting to war crimes and crimes against humanity. The court said: other than the Italian decisions, there was almost no state practice which might be considered to support the proposition that a state is deprived of its entitlement to immunity in such a case
    ii. Italy maintained that the rules of international law thus contravened were peremptory norms *(jus cogens)*. The court held that in fact there is a substantial body of practice, as confirmed in the ICJ. In addition, there is a substantial body of state practice from other countries which demonstrates that customary international law does not treat a state's entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated
    iii. Italy argued that the claimants having been denied all other forms of redress, the exercise of jurisdiction by the Italian courts was necessary as a matter of last resort. The court held that national courts have to determine questions of immunity at the outset of the proceedings, before consideration of the merits. Immunity could not be made dependent upon the outcome of a balancing exercise of the specific circumstances of each case to be conducted by the national court before which immunity is claimed. Lack of reparation, then, could not be a factor in considering state immunity.

This important decision closes the door on state liability in other countries for acts of its officials, even though those officials may face international criminal prosecution. As Fox (quoting Justice Guillaume) states: 'to confer on all national courts jurisdiction against a foreign State for violation of fundamental human rights affecting the physical integrity of the person would . . . risk creating total judicial chaos'.

QUESTIONS

1. Until recently, Jane, a citizen of Ruritania, has been employed in Appolonia as a teacher on the Ruritanian air force base located in Appolonia. She was fired because her immediate superior did not like the fact that she wore short skirts to work. She wishes to bring an action in Appolonia against her employer for unjust dismissal. Ruritania appears before the employment tribunal at the first instance and claims state immunity. Neither party is yet a party to the United Nations Convention on Jurisdictional Immunities of States and their Property and there is an understanding

that military activities will not be covered by that convention. You are counsel for Jane. Advise her on the prospects of the matter proceeding in an Appolonian court**.**

2. You are a lawyer for the Australian Attorney-General's department. It has come to your attention through the media that a group of Australian ex-service members and relatives of service members, who were prisoners of war of Germany during the Second World War, intend to bring civil claims of torts on claims of torture and murder. Prepare a memorandum on whether Australian courts could take jurisdiction in the wake of the judgment of the International Court of Justice in *Jurisdictional Immunities of States (Germany v Italy: Greece Intervening)*