

THE CONCEPT OF STATE IMMUNITY UNDER INTERNATIONAL LAW

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Abstract

The concept of state immunity is a fundamental component of international law. It is a legal notion that protects states against foreign court jurisdiction and other legal processes. The objective of this paper is to examine the idea of state immunity within the context of international law. Before discussing the state immunity, the paper will throw some light on diplomatic immunity so that both will not be confused. It is imperative to state that State immunity is founded on the premise that states are equal and independent entities, and that other states must respect their sovereignty. State immunity is intended to protect nations from external interference in their internal affairs while still preserving their capacity to act successfully on the international scene. Immunity assures that states can perform operations without fear of legal consequences from foreign governments or people. State immunity, however, is subject to a number of exceptions and limits that have emerged through time as a result of state practice, customary international law, and international treaties. These restrictions ensure that nations cannot claim immunity in actions involving commercial operations that violate international law and human rights violations. While state immunity shields states from legal punishment, it poses questions about responsibility and recompense for victims of official misconduct. The international legal system remains at odds with how to strike a balance between extending immunity to states and achieving justice for victims. The article relied on doctrinal research method, and the analysis is based primarily on legal documents of relevant national, foreign, regional, and universal Acts and Conventions, as well as the contributions and opinions of various scholars relevant to the topic State Immunity under International Law through textbooks, journals, articles, and online resources which served as secondary sources of information. Furthermore, in recent years, the notion of sovereign immunity has been the subject of debate and reconsideration. Developments in international human rights legislation have called into uncertainty nations' immunity, particularly in circumstances of grave human rights violations. The concept of "no impunity" and the pursuit of justice for victims of serious international crimes have called into question traditional notions of sovereign immunity. In conclusion examination of the concept of state immunity in international law illustrates its importance in preserving state sovereignty while taking into consideration exceptions and restrictions to enable accountability and access to justice. Maintaining peace, stability, and fairness in the international community requires striking a balance between these goals. As international law evolves, the notion of sovereign immunity will surely be a source of continued debate and revision. The paper recommends that sovereign privileges be waived for stakeholders who abuse their sovereign powers, and that acts of torture and war crimes, including violations against humanity, should constitute universal exceptions to state immunity.

1.0 Introduction

The principle of State immunity developed out of customary international law that is based on sovereign equality, non-intervention in the internal affairs of another state, dignity, comity, and international

relations.¹ Traditionally, states were granted absolute immunity before the courts of another, as states enjoyed immunity under all circumstances, overtime states have now moved away from absolute immunity towards a restrictive position whereby immunity is only granted to a foreign state in certain conditions.² State immunity is attached to procedural rules which act as a barrier to the adjudication of disputes that arise at two basic arguments in a proceeding. First, state immunity is usually applied in other to prevent a court from hearing a case against a state, where it has the power to do so. This is referred to as immunity from jurisdiction or immunity from adjudication.³ Secondly, the state's claim to immunity may arise at the moment of the enforcement of a judgment of the court against a state, which is referred to as immunity from enforcement or immunity from execution.⁴

Under international law, the state, its entities, and representatives are granted a certain level of privileges and immunities, which are explicitly beneficial to the state. Meanwhile, the doctrine of state immunity is significantly connected to the principle expressed as *par in parem non habet jurisdictionem* which means "that legal persons of equal standing cannot have their disputes settled in the courts of one of them"⁵ and then no state could be put on trial without its consent.⁶ Certain related persons enjoy certain procedural privileges in court proceedings, particularly concerning service of process. Immunity *ratione materiae* concerns the immunity granted to organs of the State for acts at issue performed in an official capacity. Such immunity is determined by reference to the nature of the acts. Accordingly, functional immunity covers a narrower scope of acts than personal immunity, but potentially covers the official acts of all State officials. Basically, State immunity is the obvious principle that a State as a separate conceptual entity from the personal sovereign and shall not be subject to the jurisdiction of a foreign State. Although the immunities of State officials and State immunity are different in terms of parties before the court, the legal development of both areas has been made in parallel because action against a State official acting on behalf of a State.⁷ It will be important to draw some distinctions between diplomatic immunity which is ascribed to the diplomats, their staff and members of his/her family while representing the state as a diplomat official while state immunity of Heads of State is ascribed to the him or her in his/her capacity as representing the sovereign. The immunities from criminal and civil liability of Heads of State and Senior Government Officials like the Minister of Foreign Affairs are set out in customary international law, not treaties or conventions. The only exception is the UN Convention on Special Missions of 1969 which mentions, in Article 21, "that Heads of State enjoy 'privileges and immunities accorded by international law to Heads of State on an official visit'. By contrast, immunities of diplomats and consular officers popularly known as diplomatic immunities are

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¹V Alebeek, 'State Immunity', *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, Oxford Monographs in International Law (Oxford, online edn,2008), < <https://academic.oup.com/book/3053/chapter-abstract/143799142?redirectedFrom=fulltext> > accessed on 29 June 2023

² H Fox, *The Law of State Immunity* (The Oxford International Law Library, 2002) 2

³L McGregor, *Immunity V. Accountability: Considering the Relationship between State Immunity and Accountability for Torture and other Serious International Crimes*, (The Redress Trust, London, 2005) 9

⁴ *Ibid*

⁵M Caplan, "State Immunity, Human Rights, and Jus cogens: A critique of the normative hierarchy theory" (2003)(97)(4) *The American Journal on International Law*, Cambridge University Press 743

⁶ *Ibid*

⁷ Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), Judgment, I.C.J. Reports 2002

clearly set out in the Vienna Convention on Diplomatic Relations 1961 and the Vienna Convention on Consular Relations, 1963. Though, the exact nature and scope of the immunities is ambiguous considering its meaning in domestic constitutions which extend immunities beyond Heads of State to Governors of State and their Deputies while in office.

2.0 Diplomatic Immunity

Diplomatic immunity under international law refer to immunities of diplomatic agents from the criminal, civil and administrative jurisdiction of the authorities of the receiving States, and not of the sending States.⁸ Diplomatic missions are traditionally the principal communication link between the country that sends them and the host country.⁹ The staffs of diplomatic missions (embassies) are afforded the highest level of privileges and immunities in the host country in order that they may effectively perform their important duties. Diplomatic immunity is essential for the maintenance of relations between states and is accepted throughout the world by nations of all creeds, cultures and political complexions. Diplomatic envoys enjoy personal inviolability which implies freedom or immunity from arrest, detention and exile, also the properties of a diplomatic agent in the receiving State are also entitled to some form of protection and are otherwise immune from seizure, arrest and attachment, except for certain private properties and the uses or services of which are disentitled from jurisdictional immunities under current international law.

Also, members of their families forming part of their households, provided they are not nationals or permanent residents of a receiving State, enjoy personal inviolability. A receiving State must treat them with due respect and is also bound to ensure complete protection of all members of a foreign mission and their families against physical violence, and attacks on their dignity and freedom. Inviolability is extended to the private residence of a diplomat, his papers, correspondence and his other property.¹⁰

Diplomatic immunity is intended purely for the benefit of the state, and can only be waived by the sending state or a diplomat's superior regardless of his/her own wish.¹¹ Notwithstanding the diplomat do not enjoy immunity in purely private investments these includes recovery of private immovable property or actions relation to succession, or commercial activities.¹² Prosecution and litigation can only be allowed on a diplomatic agent after his/her immunity has been waived.

3.0 The Emergence of Principle of State Immunity

The doctrine of state immunity was not simply conceived overnight but was rather gradually developed over a long period of time by municipal courts. In other words, the concept became law specifically through juridical evolution totally influenced by juridical philosophy.¹³ State immunity is a rule of customary international law that has evolved primarily through the gradual accumulation of state

⁸ United States Department Of State Office Of Foreign Missions, Diplomatic and Consular Immunity: Guidance for Law Enforcement and Judicial Authorities, (US Department of State, 2018) accessed online< https://www.state.gov/wp-content/uploads/2019/07/2018-DipConImm_v5_Web.pdf> 9th July 2023

⁹ *Ibid*

¹⁰ S Sucharitkul, *Immunities from Jurisdiction in Contemporary International Law* (Golden Gate University School of Law, 2002).741

¹¹ A Anthony, *Handbook of international* (Cambridge University Press, New York, 2005) 117

¹² *Ibid*

¹³ K Alina, *Public International Law*, (5th edn, Routledge Taylor & Francis Group, London, 2010)

practice in the form of domestic court decisions and domestic legislation.¹⁴ As observed by scholars the rule of state immunity reflects remnants of the majestic dignity that once attached to kings and princes as well as remnants of the idea of the incarnation of the state in its ruler.¹⁵ The concept therefore developed from the personal immunity of sovereign heads of state, which precludes the institution of a suit against the sovereign (government) without its consent.¹⁶

Internationally, state immunity reflects the English common law that “King can do no wrong”¹⁷ besides there can be no legal right against the authority that makes the law as all sovereigns were considered equal and independent. It was a rare aspect for a sovereign to exercise authority over another¹⁸ and this was expressed in the Latin maxim: “*par in param non-habet*” (an equal has no authority over an equal).¹⁹ However, in the *Schooner Exchange case*,²⁰ the court considered if France being a sovereign country can be impleaded or sued in a foreign court that is the U.S. courts. Or based on the absolute or classical doctrine of sovereign immunity France could arrest suit or possibly resist if the need is an execution against her property and if Napoleon having acquired title by force could be impleaded.²¹ Chief Marshall who was greatly influenced by naturalist views and writings on state sovereignty stated that the principle of equality of states is grounded on natural law, the state of nature and natural equality.²²

In the *schooner exchange*²³ case, he delivered the opinion of the Court as follows: “A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world, This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.”²⁴ Clearly, by the judgment, the sovereign had a representative character, and actions taken on behalf of the sovereign and in the name of the sovereign were capable of attracting the same immunities this enhanced the

¹⁴C Whytock, “*Foreign State Immunity and the Right to Court Access*” (Boston University Law Review, 2013) 93

¹⁵V Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford: Oxford University Press, 2008) 180

¹⁶ U Umozurike, *International Law* (3rd edn, Spectrum Books Limited, 2005) 90

¹⁷S Farooq and M Yousufi, The Application of Legal Maxim “King Can Do No Wrong” In the Constitutional Law of UK & USA: An Analytical Study. Global Legal Studies Review, V(II), 2020 https://www.researchgate.net/publication/346164224_The_Application_of_Legal_Maxim_King_Can_Do_No_Wrong_In_the_Constitutional_Law_of_UK_USA_An_Analytical_Study accessed on 29th June 2023

¹⁸T Hillier, *Sourcebook on Public International Law* (Cavendish Publishing, London, 1998) 288

¹⁹P Bornkamm, *State Immunity Against Claims Arising from War Crimes: The Judgment of the International Court of Justice in Jurisdictional Immunities of the State* (2012) 773 at 779

²⁰*Schooner Exchange v. McFaddon* 11 US 7 Cranch (1812).

²¹ K Alina, *Public International Law*, (5th edn Routledge Taylor&Francis group, London, 2010)

²² V Emmerich, *The Law of Nations or The Principles of Natural Law*, (Book IV, (VII) Lonang Institute, 1758) 449

²³ Art 1, s 8, Cl.10, *The Schooner Exchange v. McFaddon*, 7 Cranch 116, 1812

²⁴*Ibid.*

contemporary rule of state immunity a derivative of the sovereign equality of states. In international law, the basic rule is that all sovereign states (bigger and smaller, mightier and weaker) are legally equal, and none is supreme over the other.²⁵

4.0 Theories of State Immunity

The principle of state immunity is categorized into two major theories under international law, these theories are the (a) Absolute Immunity theory and (b) the Restrictive theory of state immunity. These theories will be analyzed hereunder.

4.1 The Absolute Immunity Theory

In the early stages of the development of the doctrine of sovereign diplomatic immunity, the immunity was absolute, total and complete.²⁶ Basically, 'absolute immunity' indicates that States had immunity before foreign tribunals on any subject matter; that is, a State could not be declared a defendant without its consent in the past before a foreign court.²⁷ The theory was prominent in the case of the *Schooner Exchange v Mcfaddon*²⁸ where Chief Justice Marshall of the United States ' Supreme Court declared that the governance of a state within its own home was exclusive and absolute.²⁹ Thus, One sovereign, was in no way amenable to another, and being bound by scores of the loftiest character to degrade the quality of his nation, can be supposed to enter a foreign home only under an express license, or in the confidence that the impunity belonging to his independent autonomous station, though not expressly requested, are reserved by recrimination, and will be extended to him.³⁰

Absolute immunity represents privileges and immunity, granted by one state through its jurisdictional medium in Foreign courts, with regard to any subject matter; that's to say, in history, a State could not without its concurrence be made a defendant before a foreign court.³¹ In *The Parlement Belge*,³² Brett stated that the exemption of the person of every sovereign and also his property from adverse suit is admitted to be a part of the law of nations. So the basis for the position of absolute immunity was founded upon the functions of government in the early days of the doctrine. Similarly, In *Compania Naviera Vascongado v. SS Christina*,³³ Lord Atkin stated that " the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings, whether the proceedings involve process against his person recover from him, specific property or damages."³⁴ In other words, absolute immunity enabled states enjoy immunity in all acts, be it public, private or commercial, which is no longer applied due to contemporary development of international law.

²⁵UN Charter 1945, Art 2(1)

²⁶ C Okosa, *The Limits of Sovereignty and Diplomatic Immunity*, The Constitution (Vol. 4, No. I, March 2004, 89)

²⁷ Y Xiaodong, *State Immunity in International Law*, (Cambridge University Press, New York, 2012) 7

²⁸ *Schooner Exchange v. McFaddon* 11 US 7 Cranch (1812).

²⁹ *Ibid*

³⁰ *Ibid*

³¹ Okosa (n26)

³² *The Parlement Belge*. [1878] 60 O 214

³³ *Compania Naviera Vascongado v. S.S. Cristina*, 1938, 490

³⁴ *Ibid*

4.2 Restrictive Theory of Immunity

The restrictive immunity doctrine was developed as a response to developments in the transnational community particularly of socialist governments, specifically, the increase of state in marketable and trading conditions triggered a departure from the absolute approach to state immunity.³⁵ The restrictive approach implies that immunity is only available in respect of acts performing from the exercise of a Sovereign power, it Confers immunity only on a sovereign for acts of a State ‘*acta jure imperii*’ while acts of a State in respect to private and commercial acts ‘*acta jure gestionis*’ are not covered by immunity but governed by private law in the same way as a private person would not enjoy impunity.³⁶ Lord Wilberforce emphasized in *Congress Del Parside*³⁷ Individuals must have arrangements with the state in order to bring each state before the courts in the interest of justice. Bearing a state to respond a claim based on each transaction does not include a challenge to that state's governmental act. It is, in recognized terms, neither a barrier to the quality of that state nor a hindrance to its independent operation.

The doctrine of restrictive immunity was accepted in Nigeria in the case of *Trendtex TradingCo. Ltd v Central Bank of Nigeria*³⁸ where the Court of Appeal accepted the validity of the restrictive impunity as being consonant with justice, harmony and transnational practice. The court held that the Central Bank of Nigeria was a governmental department but a “ legal ” reality of its own right and, thus, not entitled to jurisdictional immunity.³⁹ The restrictive theory of state immunity is currently the prevailing principle of state immunity as it is applied in most municipal courts as reflected in the ‘State Immunity Act’ and also adopted in universal and regional immunity documents like the United Nations Convention on State Immunity and its properties 2004 (not yet in force) and also the European Convention on State immunity.⁴⁰

5.0 Forms of State Immunity

Two different forms of state immunity would be discussed in this sub-section, these forms are: immunity from jurisdiction and immunity from enforcement (execution).

5.1 Immunity from Jurisdiction

Jurisdiction concerns the power of the state under international law to regulate or otherwise impact upon people, property and circumstances, it reflects the basic principles of state sovereignty, equality of states and non-interference in domestic affairs.⁴¹ The principle of immunity from jurisdiction asserts that in particular situations a court is prevented from exercising jurisdiction over a foreign State. State Immunity from Jurisdiction can also be linked to the prohibition in international law on one State interfering in the internal affairs of another.⁴² However, a state do not fall under the jurisdiction of

³⁵ Xiaodong (n 27)

³⁶K Alina, *Public International Law*, (5th edn Routledge Taylor & Francis Group, London, 2010)

³⁷F Sesan, “Constitutional Immunity Clause and The Fight Against Corruption in Nigeria”, (2017) (8)(2) *Afe Babalola university: Journal of sustainable. Development Law & Policy*, 163

³⁸ *Trendtex Trading v Bank of Nigeria* [1977] 1 QB 529

³⁹Ibid

⁴⁰ Sesan (n37)

⁴¹ S Malcom, *International Law*, (Cambridge, 6th edn, New York, 2008) 645

⁴² D Akande and S Sangeeta, Immunities of State Officials, International Crimes, and Foreign Domestic Courts, [2010][21][4] *European Journal of International Law* <https://academic.oup.com/ejil/article/21/4/815/418198>> accessed on 30th June 2023

foreign courts that is (immunity from jurisdiction) and that its property located in foreign territory is not subject to attachment and execution.⁴³

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

In the US courts proceedings that do not fit into one of the US FSIA limited exceptions must be rejected on the ground of immunity from jurisdiction. In particular, the US Supreme Court has stated that "immunity is granted in those cases involving violations of international law that do not come within one of the FSIA's exceptions."⁴⁴ Whereas under the UK SIA, a "State" is immune from the jurisdiction of the courts of the United Kingdom, unless one of the specific, express exceptions to immunity applies. These exceptions are submission to jurisdiction, commercial transactions and contracts to be performed in the UK, proceedings relating to certain contracts of employment, personal injury or damage to or loss of tangible property, ownership, possession and use of property, intellectual property rights also proceedings relating to an arbitration to which a State has submitted and ships used for commercial purposes and their cargoes taxation.⁴⁵

5.2 Immunity from Enforcement or Execution

On the other hand, immunity from enforcement entails that a State could not be sued, and its assets could not be used for enforcement of judgments, outside its explicit consent. Conversely, a state's claim to Immunity from enforcement (execution) is different from immunity from jurisdiction, it revolves around the question of the actual seizure of assets connected to a foreign state.⁴⁶ Immunity from execution protects the property of a State from being used to satisfy the debts of that State to third parties.

Article 19 of the UN Convention on Jurisdictional Immunities provides that no post-judgment measures of constraint, such as attachment, arrest, or execution, against the property of a state may be taken in connection with a proceeding before a court of another state unless, and except to the extent that, the state has expressly consented to the taking of such measures as indicated by international agreement; an arbitration agreement or in a written contract; or by a declaration before the court or by a written communication after a dispute between the parties has arisen; or where the state has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or where it has been established that the property is specifically in use or intended for use by the state for other than

⁴³L Bouchez, The Nature and Scope of State Immunity from Jurisdiction and Execution. [1979] [10] *Netherlands Yearbook of International Law*, <www.cambridge.org/core/journals/netherlands-yearbook-of-international-law/article/abs/nature-and-scope-of-state-immunity-from-jurisdiction-and-execution> 5th November 2022

⁴⁴ *Argentine Rep. v. Amerada Hess*, [1989] 488 US 428

⁴⁵ Pt 1(3-11) UK SIA, 1978

⁴⁶S Malcom, *International Law*, (Cambridge, 6th edn, New York, 2008)744

government non-commercial purposes and is in the territory of the state of the forum, provided that post-judgment measures of constraint may only be taken against the property.⁴⁷

In *Banamar v. Embassy of the Democratic and Popular Republic of Algeria*,⁴⁸ the Italian Court confirmed the rule that customary international law forbids measures of execution against the property of foreign states located in the territory of the state seeking to exercise jurisdiction and used for sovereign purposes, the court lacked jurisdiction to enforce a judgment against a foreign state by ordering execution against bank accounts standing in the name of that state's embassy. A State can waive its immunity from execution by an international agreement, written contract, or by a declaration before the competent authority of another State handling such proceeding. Domestic laws usually provide that the terms of a waiver have to be express and indisputable.

6.0 Exceptions to State Immunity

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

6.1 Commercial Transactions

The exception made for state commercial operations is intended to deny foreign states, protection when they behave in a way that is based on a commercial nature and purpose outside of their own territorial jurisdiction. This exception has changed as a result of the transition from the absolute doctrine of state immunity, which implied total immunity from it in foreign courts, to the limited approach, which distinguishes between acts of sovereign nature and acts of commercial nature.⁴⁹ Since it is generally believed that when states engage in commercial activities, they are acting as the private sector and are therefore likely to lose their claim to sovereign immunity, there is an exception to the rule regarding commercial transactions to ensure that the state does not conceal commercial activities under its claim to immunity.⁵⁰

International Law Commentary report⁵¹ defines commercial contracts as three categories of contracts or transactions: 1) the selling or purchase of products or the provision of services; 2) financial transactions, including loans and guarantees; and 3) any other commercial, industrial, trade, or professional contract or transaction, with the exception of employment contracts,⁵² Whereas, the term "commercial transaction" is defined in the United Kingdom State Immunity Act 1978, as any contract

⁴⁷ Art 19, United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004

⁴⁸ *Banamar-Capizzi v. Embassy of the Popular Democratic Republic of Algeria*. (1992) 56 ILR 87

⁴⁹ R Alebeek, *State Immunity, The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, (online edn, Oxford Academic, 22 Mar. 2012), <https://doi.org/10.1093/acprof:oso/9780199232475.003.0002>, accessed 30th June 2023.

⁵⁰ *Ibid*

⁵¹ M Virginia, The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and Their Property (1989) (17) *Denver. Journal. International Law. & Policy*, 403

⁵² *ibid*

for goods or services, any loan or financial transaction, or any other transaction or activity of a commercial, industrial, financial professional, or other similar nature that does not involve the exercise of sovereign authority.⁵³ Similar provisions are found in the laws of Australia, Pakistan, Singapore, and South Africa.⁵⁴ In other words, the scope of a commercial activity covers either a regular course of commercial conduct or a particular commercial transaction or act and includes any activity or transaction into which a foreign State enters or in which it engages otherwise than in the exercise of sovereign influence.

There are two main tests to ascertain whether an activity is commercial. The first is the nature of the act and the second is the purpose of the act.⁵⁵ Although in many cases the courts may use the purpose of the transaction test to determine whether the action is commercial, in property cases there is a presumption that the activity in itself is commercial. However, the rationale of the commercial transaction exception is clear. Where the State engages in business activities as partner or competitor of private individuals, it shall not enjoy a privileged position as compared to private traders and shall be accountable for this private commercial conduct in the courts of the country where the business is conducted.⁵⁶

6.2 Ownership, Possession and Use of Property

The earliest widely accepted exceptions to State immunity, whether an absolute or restrictive rule was observed, were in respect of proceedings relating to immovable located in the territory of the forum State and to succession or inheritance rights.⁵⁷ Traditionally, immovable property acquired by a sovereign, but located within a different sovereign, is not immune from suit. Rather, it is to be treated the same as any other private property located within a sovereign's jurisdiction. This is because "property ownership is not an inherently sovereign function" but a private function.⁵⁸

The exceptions to a State claiming immunity in national courts is based on the ownership, possession and use of immovable property, interests of a foreign State in movable or immovable property by way of succession, gift, or administration or insolvency, this exception is derived from the commercial exception to State immunity and are based on the non-sovereign nature of the State activities that fall within the commercial sphere.⁵⁹ The ownership of property involves a set of associated rights and duties governed by local property law. When a foreign state owns property overseas, it must obey all of the same regulations that apply to private owners of such property, unless it can point to specific exclusions in that country's agreements with the United States, treaties, or other sources of law.⁶⁰

⁵³ Pt1(3)(a) UKSIA, 1978

⁵⁴ *Ibid*

⁵⁵ Art 2, UN Convention of Jurisdictional States and Properties, 2004

⁵⁶ H Fox and P Webb, *Law of State Immunity*, (Oxford University Press, 3rd edn, New York, 2013) 272

⁵⁷ B Susan and others, *State Practice Regarding State Immunities*, (Martinus Nijhoff Publishers, Leiden / Boston, 2006) 113

⁵⁸ *Ibid*

⁵⁹ *ibid*

⁶⁰ A Roger, *Immovable Property Exception to the FSIA*, 2006, <http://opiniojuris.org/2006/05/16/second-circuit-rules-on-meaning-of-immovable-property-exception-to-the-fsia/> accessed on 2 July 2023

6.3 Contracts of Employment

Employment exception typically arise from the issues relating to hiring and employment at foreign embassies, missions, bases of operations, state-owned businesses, educational institutions, and cultural organizations. It was earlier regarded as absolute and has undergone major developments in the case law of most domestic Court.⁶¹ The appointment, employment, use, and dismissal of personnel are incidental features of any business operation, so one might assume that they should be categorized like the business itself as a commercial or private law transaction.⁶²

Currently, municipal courts have observed a development in international law that restricts the use of State immunity in this aspect which is usually when the appointment, extension, or recall of an employee is at issue; also when the employee is a citizen of the employer State and also when the employer and employee have a written agreement to that effect.⁶³ Competing interests of the parties involved in a labour dispute brought before the domestic court of a State by an individual or an employer State, while the individual seeks redress from his employer, the forum State is concerned with the enforcement of its labor laws and the legal protection of person's subject to its jurisdiction, particularly its citizens, in labor disputes.⁶⁴ In the UK State Immunity Act the exception to employment contracts is considered as a separate exception to State immunity.⁶⁵ Whereas in the US Foreign State Immunity Act it is considered as a category of commercial activity. The UK idea of treating contract of employment as a separate exception to immunity, the UK Model has the advantage of freeing the court from the problem of having to decide whether a contract of employment belongs to the realm of commercial activities for which immunity will not be available for the foreign State, since the contract of employment is, by virtue of statutory provision, explicitly not immune from local jurisdiction. The foreign State will thus automatically be denied immunity unless certain exceptions can be established.

Nevertheless, the US emphasis on the subject of employment contract implies that in the US court it is assumed that what matters is not that the foreign State has entered into an employment contract, but that the foreign State has entered into a contract with a private individual. In fact any dealing between a foreign State and a private individual on the basis of private law will be *prima facie* evidence that the State has acted not as a subject of international law but on the same footing as a private person, and this is what precludes it from claiming immunity from local jurisdiction.⁶⁶ In *El-Hadad*,⁶⁷ an Egyptian citizen employed as an auditor and supervising accountant in the Cultural Attache's Office at the Embassy of the United Arab Emirates in Washington brought an action for breach of employment contract and defamation, having been dismissed on the basis of allegedly trumped-up charges of dishonest behavior. The district court denied immunity on the ground of third country nationality.⁶⁸ The circuit court remanded the case for further inquiry, concluding that 'a per se rule of non-immunity for

⁶¹P Jörg, *State Immunity under International Law and Current Challenges*, (Public International Law and Treaty Office Division, France, 2017) 23

⁶² *ibid*

⁶³ *ibid*

⁶⁴Xiaodong (n 27) 158

⁶⁵ UKSIA 1978, s4(1)

⁶⁶ Xiaodong (n 27) 171

⁶⁷ *El-Hadad v. United Arab Emirates* (2007) 496 3d DC Cir 658

⁶⁸ *ibid*.

a foreign state's employment of third country nationals is inconsistent with Congress' intent to immunize foreign governmental activity from suit in American courts'.⁶⁹

Apparently, the nationality of the employee had little or no impact upon the final determination of the nature of the employment relationship, since the court turned mainly to the job title and the duties performed by the employee. The factor of third country nationality comes at the end of the list and, whatever it might have done for the case, it is obvious that it cannot, contrary to the legislators' suggestion, automatically render an employment relationship non-immune.

6.4 Non-Commercial Torts

The term "Non-commercial Torts" is an appropriate umbrella word encompassing incidents of bodily harm, wrongful death, or loss of or damage to property, which are typically protected by a number of national statutes and other instruments on State immunity.⁷⁰ The non-commercial torts exception seeks to bring consistency and predictability to a previously ambiguous area of tort law.⁷¹ In general, the idea of a tort entails either attributed to (i) a person's death or injury or (ii) harm to or loss of tangible property brought on by an action or inaction that may be attributed to a State. Although the term "personal injury" is not specifically defined in the context of international agreements on State immunity, it typically refers to any disease or other damage of a person's physical or mental health.⁷²

Although caused by the same conduct, exceptions from immunity only apply where there is physical harm or damage to tangible property; they do not apply in circumstances of simply non-material damage. The rule of non-immunity, equally applies to any concurrent claims for non-material damage emanating from the same acts whether there has been bodily harm or property damage.⁷³ The non-commercial torts exception do not hold the distinction between sovereign capacity or commercial capacity. Whatever the activities of a State giving rise to personal injuries or damage to property within the territory of another State, whether in connection *with acta jure imperii or acta jure gestionis*, the fact remains that injuries have been inflicted upon and suffered by innocent persons. The exercise of jurisdiction by the court of the place where the damage has occurred is probably the best guarantee of sound and swift justice.⁷⁴ This exception to state immunity holds a territorial consideration and the required consideration to lift state immunity is usually based on idea that the incident that caused the injury or damage must have taken place on the territory of the forum State, and the injury or damage's perpetrator must have been present in that territory at the time the facts took place.⁷⁵ In any case, there is a strong jurisdictional link between the act/author of injury or damage, as well as the forum State territory, are required to lift State immunity.

The most compelling argument is that compensation should be made available to a victim of an accident for which a representative of a foreign State may be held accountable. An equally valid justification can

⁶⁹ *Ibid*

⁷⁰ Xiaodong, (n 27) 198

⁷¹ M Badr, *State Immunity; An Analytical and Prognostic View*, (Martinus Nijhoff Publishers, 1984)14

⁷² Xiaodong (n 27) 200

⁷³ B Susan and others, *State Practice Regarding State Immunities*, (Martinus Nijhoff Publishers, Leiden/Boston, 2006)

⁷⁴ Xiaodong (n 27)198

⁷⁵ L Abbott, The Non-commercial Torts Exception to the Foreign Sovereign Immunities Act,(1985)(9)(1) *Fordham International Law Journal* 148

be found in the ready availability of local remedies without the need to involve a foreign sovereign or government.⁷⁶ The majority of incidents resulting in personal injuries or physical damage to tangible property could be resolved using insurance system. Once insured, insurable interests will not be required to impair or impede the performance of any governmental functions of a foreign State within the territories of the insured.⁷⁷

7.0 Beneficiaries of State Immunity

Under international law, there are several beneficiaries to immunity from the jurisdiction of a foreign court in customary international law, they are heads of state and certain ministers of the central government, diplomats and diplomatic staff, armed forces and also international organisations.

7.1 Heads of State

Under international law, the actions of the head of State in his/her official capacity can be attributed to the State itself and therefore any breach of international law committed by a head of State is considered as a breach of the international obligations of that State for which the State may be held accountable.⁷⁸ In the Case Concerning Armed Activities on the Territory of the Congo (*Democratic Republic of Congo v Rwanda*)⁷⁹ the ICJ stated that "it is a well-established rule of international law that the Head of State is deemed to represent the State merely by virtue of exercising his functions, including for the performance, on behalf of the said State, of unilateral acts having the force of international commitments."⁸⁰

Serving heads of State enjoy *ratione personae* immunity⁸¹, which according to the ICJ in the *Arrest Warrant Case*, is absolute. When they vacate their office, they still benefit from immunity in respect of official acts performed while in office, but immunity is removed with regard to conduct performed in their private capacities before they attained office, during their term as heads of State and after they have left office.⁸²

Meanwhile, despite leaving office, former heads of States will continue to enjoy *ratione materiae* immunity in respect of all official acts performed while in office. Although heads of state immunity is still considered as special procedural rules which may attach to the official capacity of a person, whether under national or international law, it do not bar the court from exercising its jurisdiction over such a person.⁸³ However it is noteworthy that due to the contemporary development of international law, there is a tendency that the attempt for a head of State, either incumbent or former, to rely on immunity once when they have been indicted or an arrest warrant has been issued against them by an international criminal court, or they have been brought before such a court would fail.

⁷⁶ Abbott (n7)

⁷⁷ S Sucharitku, *Immunities from Jurisdiction in Contemporary International Law*, (Golden Gate University School of Law, 2002) 729

⁷⁸ (n77)

⁷⁹ Armed activities on the territory of the Congo (*DR Congo v. Rwanda*), 10 Jul 2002 <https://refworld.org/docid/3a68621d.html> accessed on 18th November 2022

⁸⁰ *Ibid*

⁸¹ K. Alina *Public International Law*, (4th edn, Routledge Taylor & Francis group, London, 2010) 396

⁸² *Arrest Warrant (Democratic Republic Congo v. Belgium.)*, [2002] ICJ Rep 3.

⁸³ Statute Of The ICC 1998, art 27(7)

7.2 Foreign Ministers

The foreign minister can act internationally on behalf of his state. He is the head of the Ministry for Foreign Affairs, the department of a state which communicates with other states, and he is in charge of his state's ambassadors and consuls. Under article 10 of the Vienna Convention on Diplomatic Relations, the Ministry of Foreign Affairs has to be notified of the appointment of members of diplomatic missions, their arrival and departure,⁸⁴ unless states agree otherwise, all official diplomatic business is conducted with the foreign ministry of the receiving state.⁸⁵ A foreign minister is one of the persons who hold full powers, and needs no further accreditation to represent a state for the purposes of adopting or authenticating the text of a treaty.⁸⁶ Statements made by a foreign minister on behalf of his government are binding upon his state.⁸⁷ A foreign minister is an internationally protected person within the meaning of the Convention on Crimes Against Internationally Protected Persons. If a crime were committed against him, it would constitute a threat to the maintenance of normal international relations

In the *Arrest Warrant Case*,⁸⁸ between Congo and Belgium. The court considered the preamble to the Vienna Conventions on Diplomatic Privileges and Immunities stating that the purpose of diplomatic privileges and immunities is "to ensure the efficient performance of the functions of diplomatic missions as representing States",⁸⁹ and the corresponding provision in the Vienna Convention on Consular Relations. From this the court inferred that the immunities accorded to ministers for foreign affairs are similarly not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective states. The court held that in order to determine the extent of these immunities, the court must therefore first consider the nature of the functions exercised by a minister for foreign affairs.⁹⁰

8.0 Waiver of State Immunity

A state that has voluntarily submitted to the jurisdiction of the courts in another state means such state has waived its immunity from suit. This suggests that the State's desire to revoke its immunity has been made clear and unmistakable. Alternately, the State must have done something to make it clear that it will not claim immunity.⁹¹ In other words, for a state to claim immunity, both immunity must be present and the defendant State must actively choose not to claim immunity. Such volition may be overtly displayed or inferred from specific behavioural patterns.⁹² Generally, the expression of a state waiver could be "either explicitly or by implication".⁹³ By implication it means a foreign state has (i) consented to arbitration in another nation,⁹⁴ (ii) agreed that a contract will be governed by the law of another

⁸⁴Vienna Convention Diplomatic Relations, 1961 art 10

⁸⁵VCDR 1961, Art 41(2)

⁸⁶Vienna Convention of the Law of Treaties 1969 art. 7.

⁸⁷C I, *Ihlen Declaration*, 22 July 1919, PCIJ, Legal Status of Eastern Greenland (*Norway v. Denmark*) 1933

⁸⁸ *Arrest Warrant (Democratic Republic Congo v. Belgium.)*, [2002] ICJ Rep 3.

⁸⁹ Preamble Vienna Convention on Diplomatic Relations, 1961

⁹⁰ H Elizabeth, *Immunity, Individuals and International Law*, (Unpublished Ph.D. thesis, London School of Economics, London, 2009)

⁹¹ Xiaodong (n 27) 316

⁹² *ibid*

⁹³ S 1605(1) FSIA 1976

⁹⁴ *Ministry of Def. v. Cubic Def* 495 F.3d 1024 (9th Cir. 2007)

foreign nation,⁹⁵ or (iii) has filed a responsive pleading in a case without mentioning the sovereign immunity defence.⁹⁶ Whereas by express waiver it implies that the foreign State's desire to waive its immunity plain in a way that is comprehensive, unambiguous, unequivocal, and unmistakable.⁹⁷

In international legal treaties, waivers are frequently portrayed as declarations of state consent.⁹⁸ As a result, in order to properly waive immunity, a State authority must do so through an international agreement, a written contract or arbitration agreement, an ad hoc declaration before the court, or by writing to the other party after a disagreement has developed.⁹⁹ In the case of *Ahmed v. Saudi Arabia* decided by the Court of Appeal in the United Kingdom, the issue of the criterion for a written waiver of immunity was considered. The court held that a solicitor's letter setting out that staff would have rights under English law for unfair dismissal did not constitute a waiver of immunity.¹⁰⁰ This case supports the necessity for express waiver and a finding that a clause in a contract specifying the law that governs the contract is not a specific waiver of immunity

It may be questioned as to who is qualified to waive the immunity of a head of state because state immunity granted to officials and representatives is only for the benefit of the state and not the individual. It has been argued that the head of state should be acknowledged as the appropriate person to make decisions since, from the standpoint of international law, the head of state is the highest authority in the nation. In *Doe v United States*, the successor government of the Philippines expressly waived the immunity of a former head of state, Ferdinand Marcos, and he was then sued in the courts of the United States for alleged embezzlement of funds while in office.¹⁰¹ Additionally, in the *Arrest Warrant Case* ruled that a current or former minister of foreign affairs loses their legal protections "if the State they represent or have represented decides to waive that protection".¹⁰²

9.0 Conclusion

Finally, the examination of the idea of state immunity under international law demonstrates the complex nature and difficulties of this legal doctrine. The analysis of many instances, treaties, and scholarly literature reveals that sovereign immunity plays a critical role in ensuring international peace, stability, and fairness. State immunity affirms states' sovereign equality and seeks to shield them from the jurisdiction of international tribunals. It permits governments to function without fear of being interfered with or harassed by other states, encouraging peaceful cohabitation and relations with one another. State immunity also protects states independence and autonomy by allowing them to use their sovereign rights without interference from other nations.

The idea of state immunity, however, is not without controversy and challenges. While it strives to balance different governments' interests, it can also obstruct access to justice for those who have

⁹⁵ *World Wide Demil. v. Nammo, A.S* 405 (4th Cir. 2002)

⁹⁶ *Haven v. Polska*, 215 727 (7th Cir. 2000) 731

⁹⁷ *ibid*

⁹⁸ Art 5(1) of the Resolution on Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement, 1991, Institut de Droit International (IDI)

⁹⁹ Act on the Civil Jurisdiction of Japan with respect to a Foreign State, Act, 2009, s17(1)

¹⁰⁰ *Ahmed v. Saudi Arabia*, [1996] 2 ALL E.R. 248

¹⁰¹ *Doe v United States* (In re Doe), 860 F.2d 40, 45 (2d Cir.1988)

¹⁰² *Arrest Warrant (Democratic Republic Congo v. Belgium.)*, [2002] ICJ Rep 3.

experienced injustice at the hands of foreign powers. The contradiction between State Immunity and accountability raises critical considerations about the extent states should be exempt from judicial processes. It is important to find a balance between granting nations immunity and holding them accountable for human rights atrocities, violations of international law, and other injustices and this delicate balance necessitates careful analysis of state immunity exceptions and limits.

The growth of international law in this regard reflects the continual effort to improve and adapt the notion of state immunity to satisfy the international community's increasing demands and concerns. Given these concerns, it is clear that an examination of the notion of sovereign immunity under international law necessitates a thorough study of its historical context, legal framework, and practical ramifications. A detailed knowledge of state immunity can be acquired by closely reviewing relevant case law, scholarly opinions, and state actions. Finally, the idea of state immunity under international law is still under study and development. As the international legal system changes, it is critical to constantly assess and adjust the ideas and practices that govern the state. To preserve accountability and access to justice as the international legal system advances, it is critical to regularly assess and adjust the principles and procedures regulating state immunity. Finding the correct balance between these goals will help to ensure the international community's peace, stability, and fairness.

State immunity is a basic issue of international law that allows sovereign governments, their institutions, and their possessions to enjoy extraterritorial immunity when performing official and sovereign obligations in another nation. The doctrine of state immunity is a foundational element of international law that upholds the sovereign equality of all nations by implying that one state cannot be sovereign over another, and thus a state cannot be forced to submit to the jurisdiction of a foreign court, nor can a foreign judgement be enforced on a state unless the state consents to the foreign judgment by waiving its immunity.

Nonetheless, it may appear that the doctrine of state immunity entitles the state to immunity in all of its actions because it revolves around the state's sovereignty, but today all of the state's actions fall somewhere between absolute immunity and restricted immunity, owing to the state's increased involvement in commercial activities, which essentially constitute an exception to the state's immunity.

Furthermore, the states' exceptions to immunity include cases involving physical injury and property damage, ownership of property in a foreign state, the state cannot be forced to compensate for damages, and the court cannot impose monetary charges on the state's property outside its territory, unless the action falls under civil or criminal liability. Instead, the state must have openly agreed to the judgment's enforcement. In other words, state immunity forbids domestic courts from settling conflicts involving other nations and is not meant to protect governments from the consequences of violations of international law.

Although actions against the head of state, diplomatic mission, foreign minister, or other official mentioned above (beneficiaries of state immunity) can also be considered actions against the state, the subject of state immunity has become contentious in terms of its application in cases where there is a violation of human rights and jus cogen. In most circumstances, it appears that the idea of state immunity is also an issue of state responsibility and accountability, because state immunity may

eliminate the prospect of having to answer to court for its sovereign acts, including the most heinous of human rights violations. As a result, providing the State with protection may result in unforeseen effects.

The idea of state immunity is largely contested in terms of the breadth and depth to which it may be applied, because in the past, the odds of seeking justice for a crime related to a state's sovereign nature were quite limited. Although the 2004 United Nations Convention on the Jurisdictional Immunities of States and Their Property (based on the 1972 European Convention on State Immunity, the United Kingdom's State Immunity Act, and the United States' Foreign State Immunity Act) has not yet taken effect, there is a growing probability that the contemporary application of state immunity for crimes against human rights, as well as the express exceptions to state immunity, will become clearer.