
STATE IMMUNITY FOR THE ACTS OF STATE OFFICIALS

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ABSTRACT

This article considers the entitlement of a foreign state to assert its jurisdictional immunity in respect of proceedings before the forum state's court in which an individual official of the foreign state is the named defendant and is outwith the limited class of high ranking officials benefiting from a personal immunity. In *Jones v Saudi Arabia* the House of Lords concluded that the legal test for establishing the requisite connection between the impugned acts of the foreign state official and the foreign state as a corporate entity should be supplied by the rules of attribution in the law of state responsibility. Other national courts have relied upon the mere fact of the foreign official's employment in the government of the foreign state. The thesis advanced in this article is that such approaches are wrong in customary international law: the foreign state is entitled to assert its jurisdictional immunity in respect of proceedings relating to acts of the foreign state official performed in the service of the foreign state but acts proscribed by international norms directed to the conduct of individuals cannot be characterised as acts in the service of the foreign state.

Keywords: state or sovereign immunity, state officials, peremptory or *jus cogens* norms, torture, individual criminal responsibility.

I. INTRODUCTION

There are several beneficiaries of an immunity from the jurisdiction of a foreign court in customary international law, namely: states, heads of state and certain ministers of the central government, diplomats and diplomatic staff, armed forces and international organisations. This study is concerned exclusively with the immunity that is afforded to

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the state as a corporate entity by customary international law and, in particular, the question of whether a foreign state official sued in the courts of the forum state is entitled to benefit from the jurisdictional immunity of the foreign state. This must not be confused, although it often is, with the immunity that is conferred upon a limited number of high-ranking state officials by virtue of their special representative functions while they are in office.¹ The immunity of heads of state falls within this category.²

If the forum court has jurisdiction over a foreign state official, the question of whether the exercise of that jurisdiction is barred by virtue of the immunity of the foreign state depends on the existence of a legal relationship between the foreign state and the acts of the foreign state official. The essence of the problem was stated by Diplock LJ (as he then was) in the following terms:

A foreign sovereign government, apart from personal sovereigns, can only act through agents, and the immunity to which it is entitled in respect of its acts would be illusory unless it is extended also to its agents in respect of acts done by them on its behalf. To sue an envoy in respect of acts done in his official capacity would be, in effect, to sue his government irrespective of whether the envoy had ceased to be 'en post' at the date of the suit.³

In articulating the reality that states, as corporate entities, conduct their affairs through the actions of individuals, Diplock LJ was correct to focus on the relationship between the *acts* of the foreign state official in question and the foreign state. The principal difficulty, however, is to define *which* acts of the state official are to be covered by the state's immunity. The immunity cannot extend to *all* acts of the state official for otherwise that individual would in effect be conferred an immunity based upon the *status* of the office held and yet customary international law only recognises personal immunities for a very limited class of state officials. It is this difficulty that is confronted in this study.

It may come as a surprise that the national laws on state immunity in leading common law jurisdictions, such as the United Kingdom and the United States, do not address the circumstances in which the acts of the foreign state official are to be imputed to the foreign state such that

¹ *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* (Merits) [2002] ICJ Rep 3, 20-23 (Hereinafter '*Arrest Warrant Merits Judgment*'). For an example of such confusion: *Abiola v Abubakar* 267 F Supp 2d 907, 916 (ND III 2003) where the defendant, who had occupied positions within the Nigerian military, was said to be 'entitled to head-of-state immunity for his acts during the period that he was Nigeria's head of state'.

² The leading study remains: A Watts, 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers', (1994) 247 *Recueil des Cours de l'Académie de Droit International* 13.

³ *Zoernsch v Waldoch and another* [1964] 2 All ER 256 (CA) 266. This was actually a case relating to the immunity of former employees of an international organisation (the European Commission of Human Rights).

the latter may assert its immunity.⁴ Nor, as will be seen, is the question resolved conclusively or coherently in the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004) (the 'Convention on Immunities').⁵ It is, therefore, a problem that remains largely governed by customary international law.

The problem has come to recent prominence due to attempts by victims of torture to secure a civil remedy in their own courts against the foreign state and/or their officials who are alleged to have perpetrated acts of torture in the territory of the foreign state.⁶ Successive international and national courts have rejected the argument that the immunity of the foreign state from the jurisdiction of the forum court is overridden by the peremptory status of the prohibition of torture such that the procedural bar for civil claims against the state for acts of torture committed by its officials must be removed.⁷ The emerging consensus appears to be that the *substantive* prohibition of torture does not impact upon the *procedural* immunity of foreign states from judicial proceedings in the forum state's court. Apparently these norms do not collide because they address different things and hence the peremptory status of one of the norms has no 'trumping' effect upon the other.⁸ Immunity, according to this view, does not amount to impunity.

The International Court of Justice recently affirmed this position in its judgment in *Jurisdictional Immunities of the State (Germany v Italy)*:

⁴ The exception is Australia: Foreign Sovereign Immunities Act 1985, ss 3(1), 22 (by which a 'natural person' is included in the definition of a 'separate entity' of a foreign state entitled to jurisdictional immunities). Reproduced in (1986) 25 ILM 715.

⁵ United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004, opened for signature 16 December 2004) (2005) 44 ILM 803 (hereinafter 'Convention on Immunities').

⁶ E.g. *Filártiga v Peña-Irala* 630 F 2d 876 (2nd Cir 1980), 77 ILR 169; *Siderman de Blake v Republic of Argentina* 965 F 2d 699 (9th Cir 1992), 103 ILR 454; *Al-Adsani v Government of Kuwait (No 1)* (1994) 100 ILR 465 (CA); *Al-Adsani v Government of Kuwait (No 2)* (1996) 107 ILR 536 (CA); *Bouzari v Islamic Republic of Iran* (2002) 124 ILR 427 (Superior Court of Ontario) and *Bouzari v Islamic Republic of Iran* (2004) 71 OR (rrd) 675 (Ontario Court of Appeal), reported in ILDC 175 (CA 2004); *Jones v Saudi Arabia*; *Fang v Jiang* (2007) NZAR 420, 141 ILR 702 (High Court of New Zealand); *Kazemi v Iran*, No 500-17-031760-062, 25 January 2011 (Superior Court of Québec).

⁷ *Arrest Warrant Merits Judgment*, 58-60; *Siderman de Blake* (Although the Ninth Circuit court noted that the argument 'carries much force', it nevertheless found that it was bound by domestic immunity legislation, the FSIA); *Saudi Arabia v Nelson* 113 S Ct 1471 (1993) 1480; *Al-Adsani v Government of Kuwait*, *ibid*; *Kalogeropoulou v Greece and Germany*, Admissibility Decision of 12 December 2002 (App no 59021/00) (Court (First Section)); *Bouzari v Iran* (Superior Court of Ontario), paras 72-73; *Al-Adsani v United Kingdom* (App no 35763/97) (2002) 34 EHRR 273, paras 61 and 66; *Greek Citizens v Federal Republic of Germany* (2003) 42 ILM 1030, 1033 (German Supreme Court) (Hereinafter '*Distomo Massacre Case*'), ('There have recently been tendencies towards a more limited principle of state immunity, which should not apply in case of a peremptory norm of international law (*ius cogens*) has been violated. ... According to the prevailing view, this is not international law currently in force'); *Bouzari v Iran* (Ontario Court of Appeal), 694-696; *Jones v Saudi Arabia*, paras 43-45, 49; *Margellos v Federal Republic of Germany* (2007) 129 ILR 525 (Special Supreme Court of Greece).

⁸ *Al-Adsani v United Kingdom*, para 48; *Arrest Warrant Merits Judgment*, para 60; *Jones v Saudi Arabia*, para 24.

Greece Intervening)⁹ in relation to admitted violations by Germany of international humanitarian law in occupied Italy during the Second World War. The International Court assessed the legality of several decisions of the Italian courts, by which they had declined to accord a jurisdictional immunity to Germany on the strength of the *jus cogens* quality of the international norms violated by Germany.¹⁰ The Court held that Germany was entitled to immunity in these circumstances and that Italy was responsible in international law for failing to give effect to that right.¹¹

This emerging consensus is not without its detractors. Three judges issued powerful dissents in the *Jurisdictional Immunities Case*.¹² The same issue had earlier divided the European Court of Human Rights in *Al-Adsani v United Kingdom*.¹³ It has also attracted serious and sustained academic criticism¹⁴ and it is not inconceivable that the current trend in judicial opinion may yet be reversed.

For present purposes it will suffice to note that the difficulties that have been encountered by victims in bringing a civil claim against the

⁹ Judgment, 3 February 2012 <<http://www.icj-cij.org/docket/files/143/16883.pdf>> accessed 13 March 2012 (Hereinafter '*Jurisdictional Immunities Case*').

¹⁰ *Ferrini v Federal Republic of Germany* (2006) 128 ILR 658 (Italian Court of Cassation); *Germany v Mantelli & Ors*, Preliminary order on jurisdiction (14201/2008) ILDC 1037 (IT 2008) (Italian Court of Cassation). The ICJ also considered the Greek case arising out of Germany's massacre of civilians in the Greek village of Distomo but made no findings against Greece as to its failure to recognize Germany's immunity as it was not a party to the proceedings: *Jurisdictional Immunities Case*, para 127. The Greek case was *Prefecture of Voiotia v Federal Republic of Germany*, Case No 137/1997, Judgment of 30 October 1997, extracts printed in 50 *Revue Hellenique de Droit International* 595–602 (Court of First Instance of Leivadia) (Hereinafter '*Prefecture First Instance Decision*'). An English summary is provided by Ilias Bantekas (1998) 92 *AJIL* 765–8. Germany's appeal was dismissed by the Hellenic Supreme Court: *Prefecture of Voiotia v Federal Republic of Germany*, No 11/2000, ILDC 287 (GR 2000) (Greek Court of Cassation) ('*Prefecture Supreme Court Decision*') and is discussed by Gavouneli and Bantekas, '*Prefecture of Voiotia v Federal Republic of Germany*, Case No 11/2000, May 4, 2000', (2001) 95 *AJIL* 198. The Greek Minister of Justice then refused to authorize the enforcement of the judgment against Germany in Greece (required under the Greek Code of Civil Procedure). The claimants subsequently challenged that refusal in the European Court of Human Rights and the challenge failed: *Kalogeropoulou v Greece and Germany*. The claimants attempted to enforce the judgment in Germany but the German Supreme Court ruled that it would not give effect to an judgment rendered in violation of Germany's right to jurisdictional immunity: see *The Distomo Massacre Case*.

¹¹ *Jurisdictional Immunities Case*, paras 80–97, 139.

¹² Judges Cançado Trindade and Yusuf. Judge *ad hoc* Gaja dissented in respect of the Court's finding that the 'tort exception' to state immunity does not extend to acts of a foreign military force on the territory of the forum state.

¹³ *Al-Adsani v United Kingdom*, 298–99 ('The acceptance therefore of the *jus cogens* nature of the prohibition of torture entails that a state allegedly violating it cannot invoke hierarchically lower rules (in this case, those on state immunity) to avoid the consequences of the illegality of its actions.')

¹⁴ Eg L McGregor, 'Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty' (2007) 18 *EJIL* 903; N Novogrodsky, 'Immunity for Torture: Lessons from Bouzari v Iran' (2007) 18 *EJIL* 939; A Orakhelashvili, 'State Immunity and Hierarchy of Norms: Why the House of Lords Got it Wrong' (2007) 18 *EJIL* 955. See generally A Bianchi, 'Denying State Immunity to Violators of Human Rights' (1994) 46 *Austrian Journal of Public and International Law* 195.

foreign state as a corporate entity have been confronted in some instances by instituting proceedings against the individual state officials who are alleged to have violated norms of international law. This presupposes, of course, that the court of the foreign state has jurisdiction over the individual state officials under its rules of private international law and that this exercise of jurisdiction is compatible with the rules of international law. More often than not, however, the forum court considers the question of entitlement to state immunity before the question of jurisdiction.

The leading case in England on the application of the foreign state's immunity to the acts of its officials is *Jones v Saudi Arabia*,¹⁵ where the House of Lords upheld Saudi Arabia's immunity in respect of the individual Saudi officials who had been named as defendants in that case as the alleged perpetrators of the acts of torture. The House of Lords thereby reversed the Court of Appeal's decision to reject the extension of Saudi Arabia's immunity to the individual defendants.¹⁶ There is a pending application before the European Court of Human Rights against the United Kingdom to have the judgment of the House of Lords quashed as a violation of the access to justice component of Article 6 of the European Convention on Human Rights.¹⁷

The United States Supreme Court also recently addressed the problem of the scope of the foreign state's immunity for alleged unlawful killings committed by one of its officials in *Samantar v Yousuf*.¹⁸ In considering the definition of a 'state' in §1603 of the US Foreign Sovereign Immunities Act 1976 ('FSIA'), which is identical in substance to the definition in section 14(1) of the UK State Immunity Act 1978 ('SIA'), the Supreme Court held that the question was not regulated by the statutory regime and thus remained governed by the common law.¹⁹

This study commences with an examination of the two principal approaches to the problem of defining the acts of state officials that are covered by the state's immunity. These approaches are, first, the assimilation of the state official to a state organ and, second, the application of the rules of attribution in the law of state responsibility to determine the scope of the state's immunity for the acts of its officials. These techniques are reflected in the Court of Appeal's decision in *Propend Finance v Sing*²⁰ and the decision of the House of Lords in *Jones v Saudi Arabia* respectively.²¹ It will be submitted that both approaches are erroneous.

¹⁵ *Jones v Saudi Arabia* (HL).

¹⁶ *Jones v Saudi Arabia* [2005] QB 699 (CA).

¹⁷ *Jones v United Kingdom* (App no 34356/06); *Mitchell & Ors v United Kingdom* (App no 40528/06).

¹⁸ 560 US 1 (2010).

¹⁹ *Ibid.*, 13-19. Thereby overruling the line of authority based upon *Chuidian v Philippine National Bank* 912 F 2d 1095 (9th Cir 1990).

²⁰ *Propend Finance Pty Ltd v Sing* (1998) 113 ILR 611 (CA).

²¹ *Jones v Saudi Arabia* (HL).

What follows then is an analysis of several misconceptions on the law of state immunity that have unnecessarily contributed to the complexity of the problem under consideration. First, the notion that, if there is an entitlement to immunity, then the court has no jurisdiction *ab initio*. This is important for the question of whether the access to justice component of Article 6 of the European Convention on Human Rights is engaged in cases involving the assertion of an entitlement to state immunity.²² Second, the idea that there is a fundamental distinction between civil and criminal proceedings against state officials such that the absence of immunity in respect of the latter should have no bearing upon the question of entitlement to immunity in respect of the former. Third, and related to the second point, the assertion that the United Nations Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the ‘Convention on Torture’)²³ reflects this distinction between civil and criminal proceedings and compels a certain approach to the question of jurisdictional immunities. Fourth, the argument that the foreign state is impleaded when its state official is a defendant in a civil action before the courts of the forum state.

An account is then provided of the relevant provisions of the Convention on Immunities to determine whether any guidance can be extracted from this instrument and its *travaux préparatoires* in relation to the problem under consideration in customary international law.

This study concludes with a presentation of what is submitted to be the correct approach in customary international law to the question of immunity where proceedings are brought against an individual foreign state official under municipal law before the courts of the forum state. It is submitted that where such proceedings seek to impose liability for acts that are simultaneously proscribed by a norm of international law that is directed to the conduct of individuals, those acts cannot be characterised as acts in discharge of a public duty or function for the purposes of the foreign state’s entitlement to assert its jurisdictional immunity.

Before these substantive points are addressed, it is necessary to expose a problem of terminology that has perhaps been the root of some confusion in the jurisprudence and writing on this topic. This concerns the distinction that is drawn between immunity *ratione materiae* and immunity *ratione personae*.

All jurisdictional immunities ultimately vest in the state as the subject of international law²⁴ and hence can only be waived by the foreign state

²² The access to justice component of art 6 was first elaborated in: *Golder v United Kingdom* (App no 4451/70) (1975) 1 EHRR 524.

²³ Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 85 UNTS 1465 (Convention on Torture).

²⁴ The exception is immunities conferred upon international organizations. See: J Crawford, ‘International Law and Foreign Sovereigns: Distinguishing Immune Transactions’ (1983) 54 BYIL 75, 79 and *Regina v Bow Street Metropolitan Stipendiary Magistrate Ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147 (HL) 265 (Lord Saville) (hereinafter ‘*Pinochet No 3*’).

itself in any proceedings in the forum state.²⁵ In relation to the jurisdictional immunity conferred to the state as a corporate entity by customary international law, it is often said that this immunity extends to the official acts of state officials as an immunity *ratione materiae*.²⁶

The concept of immunity *ratione materiae* is misleading in this context because it presupposes that it is useful to juxtapose an immunity on the basis of the subject matter of the official acts in question and an immunity on the basis of the identity of the beneficiary of the immunity (*ratione personae*). But no such juxtaposition can be made because the immunity in both cases vests in the foreign state and the foreign state alone. This terminology perhaps causes no mischief in analysing the situation where the foreign state is the named defendant in the proceedings in the forum state. But it is very different when proceedings are brought against individual foreign state officials.

Where foreign state officials are the named defendants, they can only benefit from their state's jurisdictional immunity if the foreign state itself is, by operation of a rule of law, the proper defendant in the action. Usage of the term immunity *ratione materiae* in this situation may give the impression that the foreign state's officials have the right to invoke immunity in their own right in respect of their impugned acts. But that is not the case: the immunity vests in the foreign state alone as a corporate entity. If the foreign state elects to assert that immunity, it must be done by an authorized representative of the state for this purpose. (This is not to deny that the forum court may be under a duty to give consideration to the foreign state's immunity *proprio motu*.) Alternatively, the foreign state may elect to waive its immunity to the extent that it would have otherwise covered the impugned acts of its own officials. Such a waiver leaves its officials (or perhaps former officials as the case may be) as defendants in the action before the forum court. The foreign state's officials have no residual claim to an immunity in these circumstances.

It must be remembered that if the forum court ultimately decides that the foreign state's immunity from jurisdiction applies to the proceedings commenced against the foreign state's officials (or former officials) then it follows that the proper defendant to the proceedings is the foreign state. The logical steps for disposing of the case are for the forum court to strike out the action against the state official as against the wrong defendant and simultaneously to decline jurisdiction against the foreign state on the basis of its immunity from that jurisdiction.

²⁵ *Arrest Warrant Merits Judgment*, para 61. Vienna Convention on Diplomatic Relations 1961 (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95 (VCDR), art 32; Vienna Convention on Consular Relations 1963 (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261 (VCCR), art 45; and Convention on Special Missions (adopted 16 December 1969, entered into force 21 June 1985) 1400 UNTS 231 (CSM), art 41.

²⁶ Eg *Jones v Saudi Arabia* (HL).

II. TWO ERRONEOUS APPROACHES TO THE STATE'S IMMUNITY FOR THE ACTS OF ITS OFFICIALS

A. Immunity by virtue of the status of the individual as a state official or agent

It is obviously an error to extend the foreign state's jurisdictional immunity to its officials sued individually in the courts of the forum state simply upon the basis that such officials are in the employment of the foreign state. This would in effect result in expanding the group of high-ranking foreign state officials entitled to absolute immunity from proceedings before the forum court while they are in office to all individuals in the service of the foreign state.²⁷ Such an approach would be contrary to the functional rationale for personal immunities articulated by the International Court in *Arrest Warrant*.²⁸ The minister of foreign affairs is conferred an immunity in respect of any acts while in office to ensure that there is no encumbrance placed upon the discharge of the functions of that office for this is deemed to be essential to the effective conduct of international relations. This is a personal immunity that is accorded to the minister of foreign affairs by customary international law. But when it comes to assessing the position of the chief advisor to the minister of foreign affairs (or the minister himself after leaving office), the immunity in question can only be the immunity of the state as a corporate entity and the legal test must be capable of distinguishing between acts that are covered by the state's immunity and those that are not. The test cannot, therefore, focus upon the status of the individual's office alone.

The device by which individual state officials are absorbed into the organs of state in which they serve must be rejected for the purposes of the law of state immunity. This device is, moreover, responsible for serious errors.

An example is the English Court of Appeal's decision in *Propend Finance Ltd v Sing*,²⁹ which was approved by the House of Lords in *Jones v Saudi Arabia*.³⁰ In *Propend Finance*, proceedings for contempt of court were brought against an officer of the Australian Federal Police,

²⁷ In *Khurts Bat v The Investigating Judge of the German Federal Court* [2011] EWHC 2029 (Admin), [2011] ACD 111 (QB), paras 55-61, the English High Court found that Mr Bat as the Head of the Office of National Security of Mongolia was not entitled to a person immunity afforded to high-ranking foreign state officials.

²⁸ *Arrest Warrant Merits Judgment*, 55 ('... if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office... [E]ven the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions.')

²⁹ *Propend Finance v Sing* (CA).

³⁰ Lord Bingham stated, with reference to *Propend Finance v Sing*: 'A State can only act through its servants and agents; and their official acts are the acts of the state; and the state's immunity in respect of them is fundamental to the principle of state immunity': *Jones v Saudi Arabia* (HL), para 30.

Superintendent Sing, who had breached an undertaking to the English court not to fax certain documents that had come into his possession from the British Police. The Court of Appeal held that Superintendent Sing was entitled to diplomatic immunity as an accredited diplomat serving in the Australian High Commission in London. That ruling is uncontroversial. The Court of Appeal, however, went on to consider whether Superintendent Sing could benefit from the immunity of the State of Australia by equating him with the ‘Government of Australia’ pursuant to section 14(1) of the SIA, which reads:

[R]eferences to a State include references to—

- a. the sovereign or other head of that State in his public capacity;
- b. the government of that State; and
- c. any department of that government,

but not to any entity . . . which is distinct from the executive organs of the government of the State and capable of suing or being sued.

The Court of Appeal held in respect of Superintendent Sing:

[W]e have no doubt that the Superintendent’s activities . . . are covered by State immunity. The Superintendent is a part of the Government of Australia within the meaning of that term in Section 14(1) of the Act.³¹

There is a *non sequitur* connecting these critical sentences in the Court of Appeal’s reasoning. The first sentence identifies the ‘activities’ of the Superintendent as the focus of the inquiry, whereas the second justificatory sentence merely elides the Superintendent (i.e. members of the Australian Federal Police) with the Government of Australia. In other words, the ultimate justification is based purely on the status of the Superintendent as a state official.

Elsewhere in its judgment, the Court of Appeal had found that the undertaking that the Superintendent had given to the English court was a private undertaking and was not made on behalf of the Australian Federal Police. That was the ‘activity’ that required investigation by the Court of Appeal. But no investigation was forthcoming; instead the Court of Appeal in *Propend Finance* effectively conferred a personal immunity upon the Superintendent due to his status as a police officer regardless of the nature of his acts that formed the basis of the claim in the proceedings. It is curious that the Court of Appeal relied upon cases like *Herbage v Meese* in support of its conclusion, in which the US District Court found that: ‘the standard for determining whether immunity is warranted does not depend on the *identity* of the person or

³¹ *Propend Finance v Sing*, 671.

entity so much as the *nature of the act* for which the person or entity is claiming immunity.’³²

The US Supreme Court in its recent judgment in *Samantar v Yousuf*³³ managed to avoid the English Court of Appeal’s error in *Propend Finance*. The Supreme Court considered the meaning of a ‘foreign state’ in §1603 of the FSIA:

- a. A ‘foreign state’... includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
- b. An ‘agency or instrumentality of a foreign state’ means any entity—
 1. which is a separate legal person, corporate or otherwise, and
 2. which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof...

The Supreme Court held that the former defence minister of Somalia, Mohamed Ali Samanatar, was not covered by this definition of the ‘foreign state’ and the question of whether he was entitled to benefit from the immunity of the State of Somalia would be governed by the common law.³⁴ Somali victims of torture and beatings had sued Mr Samanatar, who was alleged to have authorised these acts. On remand to the US District Court, it was held that Mr Samanatar was not entitled to invoke the immunity of the State of Somalia.³⁵

In *Kazemi v Iran*,³⁶ the Superior Court of Justice of Quebec, while recognising that the Canadian State Immunity Act (‘Canadian SIA’) was enacted within a few years of the FSIA and shared the same format,³⁷ nonetheless found that there was, in Canada, ‘no residual application of any common law principles which were not codified into the SIA’.³⁸ Hence the Superior Court rejected the approach of the US Supreme Court in *Samantar* and held that, as the state can only act through individual officials, such individuals must fall within the definition of a ‘foreign state’ for the purposes of the Canadian SIA.³⁹ The Court referred to the earlier decision of the Ontario Court of Appeal in *Jaffe v Miller*⁴⁰ and yet that decision flatly contradicts the premise that the Canadian SIA provides a complete codification of the rules on state immunity to the exclusion of the common law. According to the Ontario Court of Appeal:

The fact that the Act is silent on its application to employees of the foreign state can only mean that Parliament is content to have the determination of which

³² 747 F Supp 60 (DDC 1990) 66 (hereinafter ‘*Herbage v Meese*’).

³³ *Samantar v Yousuf* 130 S Ct 2278 (2010).

³⁴ *Ibid*, 15-6.

³⁵ *Yousuf v Samantar*, No 11-1479, 24 October 2011 (4th Cir).

³⁶ *Kazemi v Iran*.

³⁷ *Ibid*, para 124.

³⁸ *Ibid*, para 137.

³⁹ *Ibid*, para 137.

⁴⁰ *Jaffe v Miller* (1993) 95 ILR 446 (Ontario Court of Appeal)

employees are entitled to immunity determined at common law. It will be a matter of fact for the court to decide in each case whether any given person performing a particular function is a functionary of the foreign state.⁴¹

A legal relationship between the state official and the state alone cannot be sufficient and that is the essence of the fallacious approach under consideration. By way of example, if a foreign state official is sued in the forum court by the counterparty of a contract entered into by the foreign state official in a private capacity, then the fact that the state official is in the employment of the foreign state cannot provide a justification for the foreign state to claim immunity from proceedings. This conclusion has nothing to do with what is known as the 'commercial exception' to the immunity of the foreign state. The contract in question is not a state contract; it is the contract of a private individual. The immunity of the state is no way engaged because it has no legal interest in the subject matter of the proceedings.

In relation to tort claims, and if one takes the position in the United Kingdom as an example, where a servant of the Crown commits a tort in the course of his employment, the servant and the Crown are jointly and severally liable. It has always been the case that individual servants of the Crown are personally liable for any injury or wrongdoing for which they cannot produce legal authority.⁴² Although the position is different in some continental legal systems,⁴³ a rule of customary international law cannot be derived from the internal practices of states to the effect that the proper defendant to a tort claim for the wrongdoing of a state official is in all cases the state itself to the exclusion of the state official.

It is sometimes asserted that the same result of assimilating the foreign state official to the foreign state for the purposes of state immunity is achieved by characterising the relationship between them as one of agent and principal.⁴⁴ This approach is no more persuasive than identifying state officials with 'organs' of the state.

An agency relationship is a legal institution that is sustained by a particular national law. It would be parochial to apply the *lex fori* to whether or not the requisite agency relationship exists but equally it would be inappropriate to give controlling significance to the law of the foreign state on this question in so far as it is immunity from the forum state's adjudicatory jurisdiction which is at stake. It is, moreover, inconsistent with national practices to characterise the relationship between the state and its employees as one of agency. In the United Kingdom, for instance, the Crown is liable in tort 'in respect of torts committed by its servants or agents'.⁴⁵ A 'servant' is defined as someone

⁴¹ Ibid, 459.

⁴² H W R Wade and C F Forsyth, *Administrative Law* (9th edn OUP, Oxford 2004) 819.

⁴³ Eg France: 30 juillet 1873, Pelletier, n^o 00035 (Tribunal des Conflits).

⁴⁴ H Fox, *The Law of State Immunity* (2nd edn OUP, Oxford 2008), 258-60, 458-9.

⁴⁵ Crown Proceedings Act 1947 s 2(1)(a).

who has been appointed by the Crown and was being paid by the Crown at the time of the alleged tort.⁴⁶ It follows that all the cases considered in the present study concerning tort claims against state officials, such as officials would be considered as ‘servants’ under English law and not as ‘agents’.

It is also the case that an agency relationship does not automatically result in responsibility for the acts of the agent being imputed to the principal. For instance, an agent can be sued in tort for an injury to a third party in circumstances where the agent has exceeded its authority.⁴⁷ The difficult cases involving questions of state immunity arise in precisely this situation, *viz.* where the state official has acted unlawfully in the exercise of public powers. Characterising the foreign state official as an agent of the foreign state does not, therefore, lead inexorably to the conclusion that the foreign state is the proper party to the claim such that its jurisdictional immunity can be invoked. No such rule can be extracted from a comparative account of national laws on agency.

The few English cases dealing with agency in the context of claims for state immunity do not suggest otherwise. In *Twycross v Dreyfus*,⁴⁸ the claimant as a holder of bonds issued by the Government of Peru claimed a lien over funds held by the Government’s agent in London in satisfaction of unpaid interest on such bonds. The question before the English Court of Appeal was whether the funds belonged to the agent or to the Government. The Court held that there was no equitable assignment or trust in respect of the funds to divest the funds out of the property of the Government and hence no action could be brought in respect of this property in the absence of the owner (the Government). In accordance with the doctrine of absolute immunity prevailing at that time, the Government of Peru could not be impleaded in the English courts.

The facts in *Rahimtoola v Nizam of Hyderabad*⁴⁹ were similar as involving the property of the foreign state: the question before the House of Lords was whether Mr Rahimtoola, the High Commissioner of Pakistan, received the funds that were the object of the action in a private capacity, as an organ or alter ego of the State of Pakistan or as its agent. Once the first possibility was ruled out, it made no difference whether the High Commissioner was described as an organ or an agent of the State of Pakistan: the funds belonged to the State of Pakistan and the action could not be continued by virtue of the doctrine of absolute immunity then in currency.

⁴⁶ Crown Proceedings Act 1947 s 2(6).

⁴⁷ Eg in England, see *Halsbury’s Laws of England*, vol 1, Agency (5th edn Butterworths, London 2008) para 164 (‘Any agent, including a public agent, who commits a wrongful act in the course of his employment, is personally liable to any third person who suffers loss or damage thereby, notwithstanding that the act was expressly authorised or ratified by the principal, unless it was thereby deprived of its wrongful character.’).

⁴⁸ [1877] 5 Ch D 605 (CA).

⁴⁹ [1958] AC 379 (HL).

The legal relationship under investigation must focus on the acts of the state official rather than the status of the state official *per se*. Immunities that are conferred to individuals based upon their status as state officials, such as head of state and diplomatic immunities, fall into a different category. If customary international law were to require that the forum court's jurisdiction over an individual be declined simply because the individual is in the employment of the foreign state, then the special regime of immunities afforded to certain high ranking state officials and to diplomats would in essence be widened to include the entire civil service of the foreign state. In other words, the forum court's jurisdiction over any individual in the employment of the foreign state would have to be declined regardless of the nature of the individual's acts.

B. Immunity on the basis of attribution of the state official's acts to the state

There is a school of thought that says that if an act of a foreign state official is attributable to the foreign state such that it would be responsible for it on the international plane, then the foreign state is entitled to assert immunity in respect of proceedings in the forum state founded upon the same act if the foreign state official is sued individually. This approach was endorsed by the House of Lords in *Jones v Saudi Arabia*.⁵⁰

According to this approach, the rules of attribution can be deployed to define the class of individuals who are entitled to benefit from the state's immunity even though this is clearly not the purpose of the rules of attribution, which perform a normative function for the law of state responsibility.

The principle underlying this approach is said to rest upon the 'symmetry' between the rules of attribution and the rules of state immunity in this context. The idea was expressed by Lord Hoffmann in *Jones* in the following terms:

It has until now been generally assumed that the circumstances in which a state will be liable for an act of an official in international law mirror the circumstances in which a state will be immune in foreign domestic law. There is a logic in this assumption: if there is a remedy against the state before an international tribunal, there should not also be a remedy against the official himself in a domestic tribunal... To hold that for the purposes of state immunity [an official] was not acting in an official capacity would produce an asymmetry between rules of liability and immunity.⁵¹

⁵⁰ *Jones v Saudi Arabia* (HL) para 68. *Jones v Saudi Arabia* (HL) has since been applied at first instance in New Zealand: *Fang v Jiang*.

⁵¹ *Ibid*, paras 74 and 78. Lord Bingham also relied upon the rules of attribution: *ibid*, paras 12 and 13.

It was for this reason that their Lordships concluded that a foreign state official could not incur individual civil liability for torture so long as that official was acting in an official capacity. It was nonetheless conceded that there must be a category of acts by state officials that do not attract the jurisdictional immunity of the state. Lord Bingham said:

In some borderline cases there could be doubt whether the conduct of an individual, although a servant or agent of the state, had a sufficient connection with the state to entitle it to claim immunity for his conduct.⁵²

Adopting the approach in *Jones*, the ‘borderline’ would presumably have been drawn at the point in which the acts of the foreign state official can no longer be attributable to the foreign state in accordance with the rules of state responsibility.⁵³

Their Lordships in *Jones* assumed that the purpose of the law of immunity is to provide the foreign state with a procedural defence to the forum state’s exercise of adjudicative competence over any act that, in international law, would be attributable to the foreign state. According to Lord Bingham: ‘A state may claim immunity for any act for which it is, in international law, responsible, save where an established exception applies.’⁵⁴

The analysis of the House of Lords elides the essential difference between the international rules on attribution as part of the law of state responsibility and the international rules conferring jurisdictional immunities to states. The rules of attribution apply in determining whether the conduct of a state amounts to an internationally wrongful act. The rules of attribution make no distinction as to the function underlying the exercise of public powers by the state official or state organ in question. The emphasis is rather on the *fact* that the official or organ has exercised public power.

The rules of state immunity operate very differently. They are designed to reconcile a conflict between the right of the forum state to exercise adjudicative competence and the right of the foreign state to exercise sovereign rights without interference from the forum state. Unlike the rules of attribution, the law of state immunity *is* concerned with the function underlying the exercise of public powers because this is essential to the reconciliation of the competing interests of the forum state and the foreign state.

The rules on attribution in the law of state responsibility do not serve to define the state for all purposes in international law. For its part, the ILC gives the following warning in its introduction to Chapter II of its

⁵² Ibid, para 12.

⁵³ For example, *Estate of Marco Human Rights Litigation (Re Trajano v Marcos)* 978 F 2d 493 (9th Cir 1992) 496, cert denied (*Estate of Marco Human Rights Litigation I*) and *Marcos–Manotoc v Trajano* 508 US 972, 113 S Ct 2960 (1993), (1996) 103 ILR 521, 525 where the daughter of the President of the Philippines conceded that she was not acting in exercise of public authority.

⁵⁴ *Jones v Saudi Arabia* (HL), para 12.

Articles on Responsibility of States for Internationally Wrongful Acts, entitled 'Attribution of Conduct to a State':

[T]he rules concerning attribution set out in this Chapter are formulated for this particular purpose [state responsibility], *and not for other purposes for which it may be necessary to define the state or its government.*⁵⁵

There is no principled basis to insist upon a symmetry between the law on state responsibility and the law on state immunity in respect of the legal consequences that attach to the same acts and no such symmetry is reflected in many concrete situations. In respect of a claim for breach of a commercial contract against the foreign state, for instance, the foreign state does not enjoy immunity from the jurisdiction of the forum state.⁵⁶ For the purposes of the rules of attribution, however, the 'the entry into or breach of a contract by a state organ is... an act of the state for the purposes of article 4 [on attribution].'⁵⁷

Acts causing personal injury by officials of the foreign state on the territory of the forum state is another example of a situation where the rules of state responsibility and state immunity produce diametrically opposed results. It is widely recognised that a foreign state is not immune from proceedings in the forum state in respect of its acts that cause personal injury within the territory of the forum state.⁵⁸ But as a matter of state responsibility, such acts are undoubtedly attributable to the foreign state.

It will be recalled that the 'logic' said to underpin the House of Lord's decision in *Jones* was that: 'if there is a remedy against the state before an international tribunal, there should not also be a remedy against the official himself in a domestic tribunal.'⁵⁹ In other words, according to the House of Lords, the civil liability of state officials on the municipal plane and the international responsibility of a state on the international

⁵⁵ International Law Commission, Commentary to the Articles on Responsibility of States for Internationally Wrongful Acts, in (2001) Ybk Int L Commission, Report of the Commission to the General Assembly on the work of its fifty-third session, Vol II, Part II (United Nations, New York 2007), UN Doc A/CN.4/SER.A/2001/Add.1 (emphasis added) (hereinafter 'ILC Commentary to the ASR').

⁵⁶ Eg State Immunity Act 1978 (United Kingdom) s 3(1); Foreign Sovereign Immunities Act 1976 (United States) 28 USC § 1603(d); European Convention on State Immunity (opened for signature Basle, 16 May 1972; entered into force 11 June 1976) CETS No 74, art 7(1); Convention on Immunities, art 10.

⁵⁷ ILC Commentary to the ASR, 41.

⁵⁸ See Convention on Immunities, art 12. Nearly every state law on immunity provides an exception for torts: C Schreuer, *State Immunity: Some Recent Developments* (CUP, Cambridge 1988), 44-62. Eg European Convention on State Immunity, art 11; the US Foreign Sovereign Immunities Act, § 1605(a)(5); the UK State Immunity Act, s 5(a); the South African Foreign States Immunities Act 1981, s 6; the Singapore State Immunity Act 1985, s 7; the Australian Foreign States Immunities Act 1985, s 13; the Canadian State Immunity Act 1985, s 6; Israel Foreign State Immunity Law 2008, s 5; Act on the Civil Jurisdiction of Japan with respect to a Foreign State 2009, art 10; Argentina Law No. 24.488 (Statute on the Immunity of Foreign States before Argentine Tribunals) 1995, art 2(e). The exception is Pakistan: State Immunity Ordinance 1981.

⁵⁹ *Jones v Saudi Arabia* (HL), para 74.

plane are mutually exclusive. But that is simply wrong. There is no rule of international law that excludes liability in municipal law for acts of the state or its officials, even if the state is responsible as a matter of international law in respect of the same acts. According to Verhoeven:

Qu'un acte soit imputable à l'Etat au sens du droit international n'implique pas de soi que la personne à l'intermédiaire de laquelle cet acte a été nécessairement accompli ne puisse pas être tenue d'en rendre compte devant une autorité étrangère et sur la base de droit national. C'est précisément la raison pour laquelle certains 'organes' bénéficient d'immunités.⁶⁰

To the contrary, the effectiveness of the international legal system's prohibition of certain types of conduct is greatly undermined if the individual state officials responsible for such conduct are shielded from proceedings in municipal courts by relying upon the immunity of their state. Lord Nicholls was correct to say in *Pinochet No. 1* that '[a]cts of torture and hostage-taking, outlawed as they are by international law, cannot be attributed to the state to the exclusion of personal liability.'⁶¹

The attribution of acts of state officials to the foreign state on the international legal plane has no impact upon the civil or criminal liability of those officials on the municipal legal plane. An approach that forces symmetry upon concepts that are distinct for compelling reasons of principle cannot be endorsed: the House of Lords in *Jones v Saudi Arabia* was wrong to apply the rules of attribution in state responsibility to determine the scope of state immunity for the acts of state officials.

III. MISCONCEPTIONS UNDERLYING THE ERRONEOUS APPROACHES

In this section, four different misconceptions that influenced in varying degrees the two erroneous approaches to the problem of state immunity

⁶⁰ 'Les immunités propres aux organes ou autres agents des sujets du droit international' in J Verhoeven (ed), *Le droit international des immunités: contestation ou consolidation?* (Librairie générale de droit et de jurisprudence, Brussels 2004), 68. In relation to individual criminal responsibility, it was stated by the ILC's Special Rapporteur: 'Does the attribution to the State of illegal and criminally punishable conduct by a State official (i.e. an individual) mean that this conduct cannot also be attributed to the individual himself? It would seem not. The conduct of a State official, acting in an official capacity, is not exclusively attributed to the State itself. If the illegal conduct of an official in an official capacity were attributed only to the State which the official is serving, the question of the criminal liability of the official could never arise. However, this is not the case.' *Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction by Roman Anatolevich Kolodkin, Special Rapporteur*, UN Doc A/CN.4/601 (29 May 2008), para 89. Available at <http://untreaty.un.org/ilc/documentation/english/a_cn4_601.pdf> accessed 13 March 2012.

⁶¹ *Regina v Bow Street Metropolitan Stipendiary Magistrate Ex p Pinochet Ugarte (No 1)* [2000] 1 AC 61 (HL) 110 (hereinafter '*Pinochet No 1*'). The idea that the act of a state official cannot at once be attributable to a state and form the basis of the personal liability of the individual informed the judgment of Lord Lloyd in *Pinochet No. 1*, 96 ('[O]ne would get to this position: that the crimes of a head of state in the execution of his governmental authority are to be attributed to the state so long as they are not too serious. But beyond a certain (undefined) degree of seriousness the crimes cease to be attributable to the state, and are instead to be treated as his private crimes.').

under consideration will be addressed: (i) if there is an entitlement to immunity then the court has no jurisdiction *ab initio*; (ii) there is a fundamental distinction between civil and criminal proceedings such that the absence of an immunity for state officials in respect of the latter has no bearing on the former; (iii) the Convention on Torture supports this distinction between civil and criminal proceedings; and, (iv) the foreign state is impleaded when its state official is a defendant in a civil action.

A. The question of jurisdiction is antecedent to the question of immunity

The question of whether or not the courts of the forum state have jurisdiction over a foreign state official is always antecedent to the question of whether or not the courts are obliged to decline that jurisdiction by reason of the immunity of the foreign state. As Judges Higgins, Kooijmans and Buergenthal observed in their Separate Opinion in the *Arrest Warrant* case:

Immunity is the common shorthand phrase for ‘immunity from jurisdiction’. If there is no jurisdiction *en principe*, then the question of an immunity from a jurisdiction which would otherwise exist simply does not arise.⁶²

The difficulty is that ‘jurisdiction’ in this context presupposes three different things: the international rules of prescriptive competence,⁶³ the international rules of adjudicative competence and the jurisdictional rules of private international law applied by the forum court.

In practice the forum state’s court is likely to ground its decision on jurisdiction exclusively upon its rules of private international law. But the question of immunity only arises at the point at which the forum court has upheld its adjudicatory competence on the basis of such rules. The forum state’s court may elect, as a matter of its own procedural convenience, to determine the question of the foreign state’s immunity before the question of its jurisdiction over the defendant, but this does not undermine the principle under consideration.

The relationship between the forum state’s own jurisdictional rules and the rules of prescriptive and adjudicative competence in international law is complex⁶⁴ and is best explored by reference to an example. Suppose that a foreign state official is being prosecuted in criminal

⁶² *Arrest Warrant Merits Judgment*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, 64. In similar terms, at para 62, the International Court observed that ‘the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction.’ See also para 46 and Separate Opinion of President Guillaume, 36, para 3.

⁶³ The term ‘competence’ is preferred in this study to the more conventional term ‘jurisdiction’ so as not to confuse international rules of jurisdiction with rules of jurisdiction in private international law.

⁶⁴ See F A Mann, ‘The Doctrine of Jurisdiction in International Law’ in *Studies in International Law* (Clarendon Press, Oxford 1973), 2-31.

proceedings before the courts of the forum state for acts of torture committed in a third state. This prosecution is permitted by the forum state's own jurisdictional rules. As a matter of international law, however, this exercise of jurisdiction presupposes three steps.

First, the forum state must have had the competence, in international law, to criminalise the acts in question. In other words, it must have had the competence to prescribe (e.g. by the enactment of legislation) that acts of torture committed by a foreign national outside the territory of the forum state constitute a criminal offence under the law of forum state.⁶⁵ The international legality of this legislation will depend upon whether a recognised basis for the exercise of prescriptive competence can be properly established (i.e. territory, nationality, passive personality, protective or universal).⁶⁶ In relation to the present example, the inquiry would focus on the legality of reliance upon the passive personality principle (if the victims of the torture were nationals of the forum state) or the universal principle (if not). Moreover, in accordance with the principle *nullum crimen, nulla poena sine lege*,⁶⁷ this legislation must have been in effect at the time of the acts of torture in question, unless the legislation merely confirmed an international norm cognisable by the forum state's courts, which criminalised such extraterritorial conduct at the relevant time.⁶⁸

Second, the forum state's courts must have adjudicative competence over the foreign state official in order to adjudge the criminal responsibility of that individual in respect of the criminal offence created by the act of legislation. Adjudicative competence is the power of the forum state 'to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings'.⁶⁹ The rules of adjudicative competence are concerned primarily with the links of the person or property that is subject to the adjudication with the state in question.⁷⁰ If the accused state official is present within the territorial jurisdiction of the forum state's courts, then the exercise of adjudicative competence in criminal matters appears to be valid under international

⁶⁵ A state's competence to prescribe is 'to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination by a court', *Restatement (Third) of the Foreign Relations Law of the United States* (1987) (hereinafter '*Third Restatement*'), §401(a).

⁶⁶ Draft Convention on Jurisdiction with Respect to Crime (1935) 29 AJIL Supp 439-442, arts 3, 5, 6, 7, 9 and 10; see also *SS 'Lotus' (France v Turkey)* (Merits) PCIJ Rep Series A No 10, 18-29.

⁶⁷ 'No crime, no punishment without a previous law' recognised in the European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) ETS 5, 213 UNTS 221 (ECHR), art 7 and the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 15.

⁶⁸ This was a critical limitation on the temporal scope of the alleged crimes for which Senator Pinochet could be extradited: *Pinochet No 3*. Lord Millett, however, took cognisance of a customary international norm preceding the UK legislation giving effect to the Convention on Torture, and thus, in his view, the requirement of double criminality had been satisfied for the purposes of Spain's request for the extradition of Senator Pinochet (276).

⁶⁹ *Third Restatement*, §401(b).

⁷⁰ See, eg, *ibid*, §421.

law.⁷¹ It may be otherwise if the criminal trial were to proceed in the absence of the accused.⁷²

Third, after satisfying itself that it has jurisdiction over the defendant state official by reference to the applicable rules of private international law, the forum state's court must have been justified in rejecting any plea of immunity by the foreign state official, whether based upon a personal immunity (e.g. if the official is the serving minister of foreign affairs) or the immunity of the foreign state itself.

Several writers argue that the concept of adjudicative competence can be subsumed within prescriptive and enforcement competence.⁷³ This approach perhaps makes sense in respect of criminal proceedings because the forum court will only exercise adjudicative competence over the offences prescribed by the forum state under its criminal law. But this symmetry does not hold true in respect of civil cases, where the forum court will frequently apply rules prescribed by a foreign state in accordance with the choice of law doctrines of private international law. Hence the distinction between prescriptive and adjudicative competence is necessary. Moreover, just as the law on state immunity distinguishes between immunity from jurisdiction and immunity from enforcement, it is also useful to maintain that distinction in respect of the antecedent question relating to the forum state's competence in international law to exercise public powers over the foreign person or entity invoking state immunity. In other words, it is useful to distinguish between the subjection of the foreign person or entity to the adjudicative process of the forum court, and any coercive powers exercised by the court (or other state organ) to facilitate that adjudicative process or compel compliance with the court's judgment. The former is an exercise of adjudicative competence that might be answered by a plea of immunity from jurisdiction. The latter is an exercise of enforcement competence that might be answered by a plea of immunity from enforcement and execution.

The foreign state can thus in theory challenge the international competence of the forum state's prosecution of one of its officials on three separate grounds before an international court or tribunal. It must be recalled, however, that there can be no rejection of an immunity in international law by the forum state's court without a prior assertion of adjudicative competence by that court. State immunity operates as a procedural bar to the normal exercise of adjudicative competence of the forum state. It does not deprive the forum state of adjudicative competence *ab initio*.

⁷¹ See, eg, *ibid*, §421(2)(a).

⁷² See, eg, *ibid*, §422(2); Harvard Draft Convention on Jurisdiction with Respect to Crime (1935) 29 AJIL Supp 436, 596-7, 600, art 12.

⁷³ F A Mann, 'The Doctrine of International Jurisdiction Revisited After Twenty Years' (1984 III) 186 *Recueil Des Cours* 9, 67; V Lowe, 'Jurisdiction' in M Evans (ed), *International Law* (2nd edn OUP, Oxford 2006) 339.

That adjudicative competence can exist irrespective of a potential claim for immunity is demonstrated by the rule that the assertion of a counterclaim by the foreign state or the taking of a step to contest the merits of the claim has the effect of waiving the immunity that the state is otherwise entitled to.⁷⁴ As the European Court of Human Rights stated in *Al-Adsani v United Kingdom*: '[A]n action against a State is not barred *in limine*: if the defendant State waives immunity, the action will proceed to a hearing and judgment.'⁷⁵ It followed that Article 6(1) of the European Convention on Human Rights was engaged where proceedings had been commenced before the English court for damages in tort but terminated by a successful plea of state immunity. In a subsequent case, the European Court has found a breach of Article 6 in circumstances where the French courts upheld Kuwait's jurisdictional immunity in an action brought by a former employee of its embassy in Paris on the basis that 'the French courts failed to preserve a reasonable relationship of proportionality'.⁷⁶

The English courts have expressed doubts about the European Court's position that Article 6(1) of the European Convention is engaged in state immunity cases. For instance, Lord Bingham in *Jones v Saudi Arabia* stated:

Based on the old principle *par in parem non habet imperium*, the rule of international law is not that a state should not exercise over another state a jurisdiction which it has but that (save in cases recognised by international law) a state has no jurisdiction over another state. I do not understand how a state can be said to deny access to its court if it has no access to give.⁷⁷

A successful plea of state immunity has the effect of closing access to the court. But it does not somehow invalidate that access *ab initio*. The rules of the *lex fori* apply to the adjudication of the plea of state immunity⁷⁸ and those rules must be exercised consistently with international

⁷⁴ *Eg National City Bank v Republic of China*, 348 US 356 (1955); European Convention on State Immunity, art 3; and Convention on Immunities, art 8.

⁷⁵ *Al-Adsani v United Kingdom*, paras 48-9. The European Court of Human Rights reached the same conclusion in *McElhinney v Ireland* (App no 31253/96) (2001) 34 EHRR 322, 123 ILR 73 and *Fogarty v United Kingdom* (App no 37112/97) (2001) 34 EHRR 302. See also the judgment of the Federal Court of Appeal of Canada in *Cargo ex the Ship Atra v Lorac Transport Ltd* (1986) 84 ILR 700, 708: 'Although it is sometimes expressed in jurisdictional terms, immunity is not, strictly speaking, a question of jurisdiction in the sense that the court lacks any power to deal with either the subject-matter or the person before it. Jurisdiction can never be acquired by consent, but even the most absolute theory of sovereign immunity admits that it may be waived'.

⁷⁶ *Case of Sabeh El Leil v France* (App no 34869/05), Judgment of the Grand Chamber, 29 June 2011, para 67.

⁷⁷ *Jones v Saudi Arabia* (HL), 283, para 14, endorsing *Holland v Lampen-Wolfe* [2000] 1 WLR 1573 (HL) 1588 (Lord Millett). The same position was adopted by the Superior Court of Quebec in respect of section 2(e) of the Canadian Bill of Rights: *Kazemi v Iran*, paras 173-5.

⁷⁸ *Canada Trust Co v Stolzenberg (No 1)* [1997] 1 WLR 1582 (CA) 1588-9 (Millett LJ). In exercising this power of *competence-competence*, the court is able to rely upon the normal powers incidental to ensuring a fair procedure in disposing of the plea of state immunity, such as making an order for the disclosure of information: *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] 1 Ch 72 (CA) 194 (Kerr LJ) and 252 (Ralph Gibson LJ).

obligations such as Article 6 of the European Convention. Moreover, as will be discussed in more detail in Part E(1) below, Lord Bingham's assertion that the international law of state immunity rests upon the 'old principle' *par in parem non habet imperium* is too simplistic to justify his Lordship's position on the forum court's lack of jurisdiction.

B. There is no proper basis for a distinction between criminal proceedings and civil proceedings in respect of the state's immunity as applied to state officials

Following *Pinochet No. 3*, it is accepted that foreign state officials may not be entitled to benefit from the immunity of their state in criminal proceedings before the forum court in respect of conduct prohibited by international law such as torture.⁷⁹ But according to a theory adopted by the higher courts of several countries and the European Court of Human Rights, it does not follow that, in civil proceedings relating to the same conduct prohibited by international law, state officials should not benefit from their state's immunity from jurisdiction.⁸⁰ This theory rests upon the notion that customary international law makes a distinction, for the purposes of state immunity, between the criminal and civil liability of state officials.⁸¹ It is a theory that cannot be supported by reference to

⁷⁹ See *Pinochet No 3*. The ICJ does not appear to agree, although its language is equivocal: 'Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.' *Arrest Warrant Merits Judgment*, para 61. It is also unclear whether this statement is confined to high-ranking state officials entitled to personal immunities or to state officials generally. Of course, there is no entitlement to immunities before international tribunals: Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute of the ICC), art 27; International Criminal Tribunal for the former Yugoslavia, art 7(2); International Criminal Tribunal for Rwanda, art 6(2); *Prosecutor v. Furundzija* IT-95-17/1, (2002) 121 ILR 213 (ICTY) para 140 ('Individuals are personally responsible, whatever their official position, even if they are heads of State or government ministers: art 7(2) of the Statute and art 6(2) of the Statute of the ICTR... are indisputably declaratory of customary international law.');

Prosecutor v Charles Ghankay Taylor, Case number SCSL-2003-01-I, Decision on Immunity from Jurisdiction, 31 May 2004, para 52 ('the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international tribunal or court'). It was stated by the Nuremberg Tribunal: 'He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law', Trial of the Major War Criminals before the International Military Tribunal, vol I Nuremberg 1947, 223, reprinted in (1950) 2 Ybk Int L Commission, vol II, 375. UNGA Res 1/95 (11 December 1946) UN Doc A/RES/95(1), reprinted in *ibid*, 192 (affirming the principles recognized by the Nuremberg Tribunal) – Principle III: '[t]he fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.'

⁸⁰ Eg *Pinochet No 3*, 254 and 264 (Lord Hutton), 278-9 (Lord Millett), 280-1 and 287 (Lord Phillips); *Bouzari v Iran* (Ontario Court of Appeal), paras 93-5; and *Jones v Saudi Arabia*, paras 31-2 (Lord Bingham). Before the European Court of Human Rights: *Al-Adsani v United Kingdom*, para 61.

⁸¹ In *Al-Adsani v United Kingdom*, the dissenting opinions of Rozakis and Caflisch JJ, joined by Wildhaber, Costa, Cabral Barreto and Vajic JJ, 4, describe this theory as adopted by the majority in the following terms before rejecting it: 'The majority... contend that a distinction must be made

the general concepts of responsibility in customary international law or by reference to the practice of states within their own legal systems.

The international law of state responsibility does not differentiate between civil and criminal responsibility for the breach of international obligations. There is one form of responsibility that a state may incur in international law, namely responsibility for the commission of an 'internationally wrongful act'.⁸² Furthermore, the state's responsibility is the same irrespective of whether individuals may also bear criminal or civil responsibility in respect of the conduct in question.⁸³ Thus it cannot be said that the concept of responsibility in customary international law rests upon a distinction between criminal and civil liability. If such a distinction is to shape the customary international law on jurisdictional immunities, then it must be reflected ubiquitously in municipal legal systems.

The practice of states, however, evidences the lack of a rigid dichotomy between civil and criminal remedies. In civilian legal systems the *action civile* allows victims of crimes to participate in criminal proceedings in order to seek reparation from a perpetrator. In some jurisdictions the victim can even initiate and conduct such proceedings.⁸⁴ Within Europe, the *action civile* procedure is widely practised in Austria,⁸⁵ Belgium,⁸⁶ Denmark,⁸⁷ France,⁸⁸ Germany,⁸⁹ Greece,⁹⁰ Italy,⁹¹

between criminal proceedings, where apparently they accept that a *jus cogens* rule has the overriding force to deprive the rules of sovereign immunity from their legal effects, and civil proceedings, where, in the absence of authority, they consider that the same conclusion cannot be drawn. Their position is well summarised in paragraph 66 of the judgment, where they assert that they do not find it established that "there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State". See further: dissenting opinion of Judge Loucaides, *ibid.* The ILC has started work on the codification of the rules on the immunity of state officials from criminal proceedings. In relation to the distinction under consideration, the Special Rapporteur has expressed a degree of ambivalence: 'On the whole, although at first glance there seems to be a clear distinction between exercising criminal and civil jurisdiction over officials of a foreign State, they do have enough features in common for consideration of the topic to take into account existing practice in relation to immunity of State officials and of the State itself from foreign civil jurisdiction.' *Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, para 55.

⁸² Articles on Responsibility of States for Internationally Wrongful Acts, annexed to UNGA Res 56/83 (28 January 2002) UN Doc A /RES/56/83, art 1 (hereinafter 'Articles on State Responsibility').

⁸³ This is demonstrated by the International Court's judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, 68, where it was held that it was unnecessary for an individual to have committed genocide for a state to incur responsibility for breaching its obligations under the Genocide Convention.

⁸⁴ Eg Germany and Austria. See M Brien and E Hoegen, *Victims of Crime in 22 European Criminal Justice Systems* (Wolf Legal Productions, Nijmegen 2000).

⁸⁵ Austrian Strafprozessordnung (StPO), §47-1.

⁸⁶ Belgium Code on Criminal Procedure, §67 and Criminal Code of the Kingdom of Belgium, §28ter.

⁸⁷ Denmark Administration of Justice Act (Retsplejeloven), §685, Chapter 89.

⁸⁸ French Code of Criminal Procedure, §4.

⁸⁹ German StPO, §§403-406c.

⁹⁰ Greek Criminal Code, §914.

⁹¹ Italian Code of Criminal Procedure, §74.

Luxembourg,⁹² The Netherlands,⁹³ Portugal,⁹⁴ Spain⁹⁵ and Sweden.⁹⁶ In light of this practice, Justice Breyer concluded in *Sosa v Alvarez-Machain* that ‘universal criminal jurisdiction necessarily contemplates a significant degree of tort recovery as well’ because in each of these legal systems the victim is permitted to attach a civil claim for compensation to a criminal prosecution.⁹⁷

An example of the *action civile* being used to secure compensation for acts of torture is the French case of *Prosecutor v Ould Dah*.⁹⁸ The defendant was a Mauritanian army officer who travelled to France to attend a training course at Montpellier Army College. After his arrival a number of victims instituted civil party proceedings against the defendant alleging his participation, while an officer of the Mauritanian army, in acts of torture committed on the territory of Mauritius during the conflict with Senegal in 1989-1991. The defendant was tried (*in absentia* after having absconded) before the Gard Assize Court at Nimes for acts of torture pursuant to Articles 22(1), 303 and 309 of the French Criminal Code which, *inter alia*, implement France’s obligations pursuant to the Convention on Torture. The Assize Court rendered two decisions: the first decision found the Mauritanian army officer guilty of acts of torture and sentenced him to 10 years imprisonment; the second granted compensation and interest to victims as civil parties.⁹⁹

Even in common law jurisdictions, the courts are empowered to order a range of measures against a convicted person other than a custodial sentence, including the payment of compensation to victims. Section 130 of the Powers of Criminal Courts (Sentencing) Act 2000 (UK) provides:

A court by or before which a person is convicted of an offence, instead of or in addition to dealing with him in any other way, may, on application or otherwise, make an order . . . requiring him –

(a) to pay compensation for any personal injury, loss or damage resulting from that offence or any other which is taken into consideration by the court in determining sentence[.]

Thus, pursuant to section 130, victims who have suffered ‘personal injury, loss or damage’ as a result of a criminal offence may apply to a criminal court requesting compensation from a convicted person or the

⁹² Criminal Procedure Code of the Grand-Duchy of Luxembourg, §56 *et seq.*

⁹³ Dutch Code of Criminal Procedure, §51b-1.

⁹⁴ Portuguese Code of Criminal Procedure, §74.

⁹⁵ Spanish Code of Criminal Procedure, §108.

⁹⁶ Criminal code of the Kingdom of Sweden, §1, Chapter 22, RB.

⁹⁷ *Sosa v Alvarez-Machain* 542 US 692, 762-3 (2004)

⁹⁸ Decision No 70/05 and Decision No 71/05.

⁹⁹ *Ibid.* As the defendant had absconded and did not participate in the proceedings, the question of immunity had not been raised on his behalf. But state immunity must be addressed *proprio motu* by the court under French law: French Cour de Cassation, Civ No 1, No 84-16.453, 4 February 1986. It is thus significant that neither the court of first instance, nor the Court of Appeal at Nimes elected to consider it.

court may make such an order in favour of victims *proprio motu*.¹⁰⁰ As a consequence, any damages that are subsequently awarded to victims in civil proceedings in respect of the perpetrator's criminal conduct are, by virtue of section 135 of the Act, to be reduced commensurately.

The distinction between criminal and civil proceedings and its alleged significance for the law of state immunity also overlooks the reality that 'criminal punishment and civil liability both operate, with different intensity, to vindicate important standards and deter future wrongdoing'.¹⁰¹ Especially where those standards are universally recognised, and thus form part of customary international law, there is no reason in principle to approach the question of whether state officials are entitled to their state's immunity in a fundamentally different way depending upon the nature of the liability asserted under municipal law.

An analysis of the circumstances in which state officials are entitled to benefit from the immunity of their state must take into account the reality of state practice across many jurisdictions in permitting claims for compensation against state officials within the context of criminal proceedings. The artificiality of the rigid distinction between civil and criminal proceedings that informed the judgment of the House of Lords in *Jones v Saudi Arabia* is exposed by the fact that a further victim of this episode of torture in Saudi Arabia has commenced proceedings in Belgium where, in an *action civile*, he will be entitled to compensation for those responsible for his injuries in the event that the action is successful.

C. The Convention on Torture removes immunity in both criminal and civil proceedings

In *Jones v Saudi Arabia*, the House of Lords justified its endorsement of immunity in respect of civil claims against state officials by reference to the Convention on Torture.¹⁰² Article 4(1) of the Convention on Torture requires a State Party to criminalise all acts of torture in its national law while Article 4(2) requires that each State Party shall make such offences 'punishable by appropriate penalties'. Further, Article 5 of the Convention obliges States Parties to exercise their adjudicative competence over these offences in enumerated circumstances. The House of Lords accepted that these provisions remove any entitlement to

¹⁰⁰ The purpose of compensation orders in criminal proceedings was addressed by Lord Justice Scarman in *R v Inwood (Roland Joseph)* (1974) 60 Cr App R 70 (CA) 73 who stated: 'Compensation orders were not introduced into our law to enable the convicted person to buy themselves out of the penalties for crime. Compensation orders were introduced into our law as a convenient and rapid means of avoiding the expense or resort to civil litigation when the criminal clearly has means which would enable the compensation to be paid.'

¹⁰¹ Statement by the European Commission in its Brief for European Commission as *Amicus Curiae* submitted to the US Supreme Court in *Sosa v Alvarez-Machain* 542 US 692 (2004).

¹⁰² *Jones v Saudi Arabia*, paras 16, 19, 25, 46, 80-1.

immunity in respect of criminal proceedings.¹⁰³ This was the effect of its own judgment in *Pinochet No. 3* because '[i]nternational law cannot be supposed to have established a crime having the character of a jus cogens and at the same time to have provided an immunity which is coextensive with the obligation which it seeks to impose.'¹⁰⁴

In respect of claims for compensation, Article 14(1) of the Convention on Torture provides:

Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.

It is submitted that the best interpretation of Article 14 is that a State Party must ensure that compensatory remedies are available in circumstances where the State Party is obliged by the Convention on Torture to exercise its criminal jurisdiction over the alleged offender. Article 14 does not, therefore, amount to an obligation to provide a remedy for acts of torture in all cases regardless of the jurisdictional link with the forum state but instead is parasitical upon the mandatory grounds for exercising adjudicative jurisdiction in criminal proceedings set out in Article 5. These grounds are: the acts of torture were committed in a territory under the jurisdiction of the State Party or the alleged perpetrator is physically present in such a territory (and is not extradited); the alleged perpetrator is a national of the State Party; or, the victim is a national of the State Party.¹⁰⁵

In respect of the final ground, the Convention on Torture appears to allow a measure of discretion: 'When the victim is a national of that State if that State considers it appropriate.'¹⁰⁶ If the national law of the State envisages the exercise of adjudicative jurisdiction in circumstances where the victim of alleged acts of torture is a national of that State, then a compensatory remedy under Article 14 must be available to complement a hypothetical criminal prosecution under Article 5.

The object and purpose of the Convention on Torture is to make the struggle against torture more 'effective'.¹⁰⁷ This interpretation of Article 14 accords with the simple logic that where a State Party is obliged to prosecute an alleged perpetrator of torture it must also ensure that its

¹⁰³ The United Kingdom has incorporated this aspect of the Convention on Torture into domestic law by the enactment of section 134 of the Criminal Justice Act 1988, which expressly contemplates the prosecution of state officials for acts of torture while acting in an official capacity.

¹⁰⁴ *Pinochet No 3*, 278 (Lord Millett).

¹⁰⁵ Convention on Torture, art 5(1).

¹⁰⁶ *Ibid*, art 5(1)(c).

¹⁰⁷ *Ibid*, Preamble, sixth paragraph.

legal system affords remedies to the victim for otherwise it has failed to secure a just response to the abomination that is torture. The fact that the perpetrator languishes in prison cannot, for instance, be adequate justice to a victim without the financial means of securing appropriate medical care and whose working life has been disrupted or indefinitely curtailed. Criminal sanctions and civil remedies must be seen as complementary aspects of a holistic response to torture that is essential to do justice in any given case. Indeed, state practice more generally on the combination of criminal sanctions and civil remedies in respect of offences against the person indicates that this notion of justice is supported more generally by national legal systems.

This interpretation of Article 14 of the Convention on Torture is without prejudice to the rather sterile debate as to whether Article 14 is limited in scope to acts of torture committed on a territory within the State Party's jurisdiction¹⁰⁸ or whether the obligation extends to acts of torture committed anywhere. The *travaux préparatoires* are inconclusive on the significance of a territorial restriction being removed from an earlier draft.¹⁰⁹ Prior to resorting to the *travaux*, Article 31 of the Vienna Convention on the Law of Treaties¹¹⁰ requires an interpretation of terms in accordance with the context in which they appear and in the light of the treaty's object and purpose. The object and purpose of the Convention on Torture is not to cause injustice to victims of torture, which would inevitably result from their inability to obtain compensatory remedies in circumstances where a State Party is obliged to exercise its adjudicative competence under Article 5. Moreover, the context in which Article 14 appears is a section of the Convention that regulates the State Parties' obligations to establish the facts of an alleged act of torture (Article 13), to prosecute the alleged perpetrator of the torture on the basis of those facts (Articles 4 to 9) and to provide reparation to the victim (Article 14). It makes no sense to interpret the obligation in Article 14 as if it were completely isolated from the comprehensive scheme for dealing with claims of torture that is envisaged by Part I of the Convention. In short, the scope of Article 14 must be informed by the scope of Article 5. Lord Justice Mance (as he then was) was correct to emphasize in *Jones* that 'there is the obvious potential for anomalies, if the international criminal jurisdiction which exists under the Torture

¹⁰⁸ The interpretation favoured by Lord Bingham in *Jones v Saudi Arabia*, para 25 and the Canadian Court of Appeal in *Bouzari v Iran*, paras 69-82.

¹⁰⁹ The 1981 Draft of art 14, para 41, read: 'Each State Party shall ensure in its legal system that the victim of an act of torture committed *in any territory under its jurisdiction* be redressed and have an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation,' (emphasis added): *Report of the Working Group on the Draft Convention Against Torture* (1982) UN Doc E/CN.4/1982/L.40, para 41.

¹¹⁰ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

Convention is not matched by some wider parallel power to adjudicate over civil claims'.¹¹¹

If one accepts that criminal sanctions and civil remedies must go hand in hand then it follows that jurisdictional immunities must follow suit as far as the Convention on Torture is applicable in proceedings in the forum court. If, following the majority of the House of Lords in *Pinochet No. 3*, it would be incongruous to allow a state official to assert a jurisdictional immunity in respect of the very acts that the Convention on Torture seeks to criminalise, then it makes no more sense to permit a jurisdictional immunity where the Convention seeks to compensate in relation to the same acts.

In the Court of Appeal in *Jones v Saudi Arabia*, Lord Phillips recognised the irresistible logic of treating criminal and civil proceedings in the same way for the purposes of deciding whether a foreign state could invoke its immunity in respect of the acts of its officials:

Once the conclusion is reached that torture cannot be treated as the exercise of a state function so as to attract immunity *ratione materiae* in criminal proceedings against individuals, it seems to me that it cannot logically be so treated in civil proceedings against individuals.¹¹²

The House of Lords subsequently rejected this reasoning in *Jones*. Lord Hoffman addressed the point in the following terms:

The Torture Convention, which defines torture as the infliction of severe pain and suffering for various purposes 'when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in a public capacity' was held in *Pinochet (No 3)* [2000] 1 AC 147, by necessary implication, to remove the immunity from criminal prosecution which would ordinarily attach to acts performed by individuals in a public capacity. But the Torture Convention says nothing to remove the immunity of such individuals from civil process.¹¹³

The flaw in this argument is that the Convention on Torture says precisely nothing about the immunity of state officials from criminal proceedings either. The House of Lords in *Pinochet*, a case concerned with criminal proceedings, decided that the object and purpose of the Convention on Torture would be defeated if jurisdictional immunities could be superimposed upon the obligations of the States Parties to exercise criminal jurisdiction over state officials alleged to have committed acts of torture. The object and purpose of Article 14 in relation to civil

¹¹¹ *Jones v Saudi Arabia* (CA) para 79.

¹¹² *Ibid*, 758 (Lord Phillips). This represented a departure from his earlier view in *Pinochet No 3*, 280-1, 287.

¹¹³ *Jones v Saudi Arabia* (HL) 300, para 71.

jurisdiction would suffer the same fate if jurisdictional immunities were to be preserved in a wholesale fashion. If the House of Lords in *Jones* were correct, then a foreign state official would be able to rely upon the foreign state's jurisdictional immunity in relation to a claim for compensation by the victim of torture in circumstances where the same individual has been successfully prosecuted in criminal proceedings in the forum state. This surely cannot have been the intention of the States Parties to the Convention on Torture because it would deprive the obligation in Article 14 of any real utility. It would also create an asymmetry in the treatment of the victims of torture depending upon whether a particular State Party recognises an *action civile* or equivalent remedy within its own legal system that can be invoked by victims to secure a compensatory remedy in the context of criminal proceedings.

D. The Foreign State is not Impleaded by a Judgment Against its Official

It is often said that the foreign state is indirectly impleaded when civil proceedings are brought against one of its officials so that, for instance, the state would be expected to satisfy any judgment of damages awarded against the state official. By way of example, in *Jaffe v Miller*, the Ontario Court of Appeal stated:

To avoid having its action dismissed on the ground of state immunity, a plaintiff would have only to sue the functionaries who performed the acts. In the event that the plaintiff recovered judgment, the foreign state would have to respond to it by indemnifying its functionaries, thus, through this indirect route, losing the immunity conferred on it by the Act.¹¹⁴

The simple answer to this theory of 'indirect impleading', which was also prominent in the House of Lord's judgment in *Jones*,¹¹⁵ is that there is no obligation upon states in international law to indemnify their functionaries in respect of judgments rendered against them by national courts. Judicial pronouncements such as that in *Jaffe v Miller* seem to assume that international law is blind to the principle of *res inter alios acta*, which is not the case.

The Supreme Court of Ireland did not labour under the same misapprehension in *Saorstat and Continental Steamship Co v Rafael de las Morenas*,¹¹⁶ a case in which the head of a commission appointed by

¹¹⁴ *Jaffe v Miller*, 459.

¹¹⁵ Lord Bingham in *Jones v Saudi Arabia* (HL), para 31 ('[A] civil action against individual torturers based on acts of official torture does indirectly implead the state since their acts are attributable to it. Were these claims against the individual defendants to proceed and be upheld, the interests of the Kingdom would be obviously affected, even though it is not a named party.')

¹¹⁶ (1944) 12 ILR 97.

the Spanish Government to purchase horses for its army was sued for breach of contract. Justice O'Byrne said:

It is clear that in the proceedings as framed, no relief is sought against any person save the appellant. He is sued in his personal capacity and the judgment which has been, or any judgment which may hereafter be, obtained against him will bind merely the appellant personally, and any such judgment cannot be enforced against any property save that of the appellant . . .

Where the Sovereign is not named as a party and where there is no claim against him for damages or otherwise, and where no relief is sought against his person or his property, I fail to see how he can be said to be impleaded either directly or indirectly.¹¹⁷

A justification for upholding claims to immunity where the foreign state is a party in civil proceedings is that any judgment of the forum court would not ultimately be enforceable due to the immunity that states enjoy from execution of judgments against their property.¹¹⁸ This justification loses its force where the proceedings in question are against an individual state official because any judgment rendered by the forum court will only be enforceable against that state official's personal assets.

IV. THE UN CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

The Convention on Immunities, which was drafted and prepared by the ILC, has not yet entered into force.¹¹⁹ There are two provisions that are relevant to the problem under consideration: Article 2(1)(b)(iv) on the definition of a 'State' and Article 6(2)(b) on the 'Modalities for giving effect to State immunity'. The precise meaning and scope of these provisions is far from clear and the voluminous *travaux préparatoires*

¹¹⁷ Ibid, 99 and 101. See also Lord Phillips in *Jones v Saudi Arabia* (CA), para 128 ('If civil proceedings are brought against individuals for acts of torture in circumstances where the state is immune from suit *ratione personae*, there can be no suggestion that the state is vicariously liable. It is the personal responsibility of the individuals, not that of the state, which is in issue. The state is not directly impleaded by the proceedings.') In *United States of America and Others v Guinto Valencia and Others* (1996) 102 ILR 132 (Supreme Court of the Philippines) 139 it was stated that 'if the judgment against such officials will require the State itself to perform an affirmative act to satisfy the same . . . the suit must be regarded as against the State itself although it has not been formally impleaded'. This is obviously a narrower basis for upholding state immunity because presumably the burden would be on the state to demonstrate that is under a legal obligation to indemnify the state officials against an adverse judgment in circumstances where it is not a party to the proceedings.

¹¹⁸ See, eg, the Majority in *Al-Adsani v United Kingdom* and Fox, *The Law of State Immunity*, 56.

¹¹⁹ At the time of writing only 13 states had become parties to the Convention on Immunities of the requisite 30 in accordance with art 30(1), see entry at the United Nations Treaty Collection Website, available at <http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtsg_no=III-13&chapter=3&lang=en> accessed 2 April 2012.

generated by the ILC provide little guidance to the interpretative exercise. Each provision will now be considered in turn.

A. Article 2(1)(b)(iv) of the Convention on Immunities

Article 2(1)(b)(iv) reads:

1. For the purposes of the present Convention . . .
- (b) 'State' means . . .
- (iv) representatives of the State acting in that capacity[.]

This provision was not included in the first draft of the definition of a 'state' submitted to the Drafting Committee by Special Rapporteur Sucharitkul. Indeed it was originally thought that no elaboration of the various constituent elements of a 'state' was required at all.¹²⁰ The Special Rapporteur then resolved that 'upon further analysis' it might be necessary to set out 'the essential components which compose or constitute the "foreign state"'.¹²¹ In the list of 'components' that ensued, however, there was no mention of 'representatives' of the foreign state.¹²² This provision appears to have been included at the instigation of the ILC at its Thirty-Fourth Session for the following reason:

Another important group of persons who, for want of a better terminology, will be called agents of State or representatives of government should be mentioned. Proceedings against such persons in their official or representative capacity, such as personal sovereigns, ambassadors and other diplomatic agents, consular officials and other representatives of government may be said to be against the foreign state they represent in respect of an act performed by such representatives on behalf of the foreign Government in the exercise of their official functions.¹²³

The ILC then goes on to distinguish between the so-called *ratione materiae* and *ratione personae* aspects of the immunity in respect of 'such representatives'.¹²⁴

The text of what became Article 2(1)(b)(iv) was adopted by the Drafting Committee at the Thirty-Eighth Session of the ILC.¹²⁵ The ILC commented on this provision in the same session¹²⁶ and this is reproduced almost verbatim in the final text of the commentary to the Articles submitted in the ILC's Forty-Third Session, which reads:

¹²⁰ *Second Report on Jurisdictional Immunities of States and Their Property*, by Mr Sompong Sucharitkul, *Special Rapporteur*, UN Doc A/CN.4/331 and Add.1 (1980) Ybk Int L Commission, vol II(1), A/CN.4/SER A/1980/Add 1, 205.

¹²¹ *Ibid.*

¹²² *Ibid.*, 211 and (1980) Ybk Int L Commission, vol I, A/CN.4/SER A/1980, 194.

¹²³ (1982) Ybk Int L Commission, vol II(2), A/CN.4/SER A/1982/Add 1, 105.

¹²⁴ *Ibid.*

¹²⁵ (1986) Ybk Int L Commission, vol I, A/CN.4/SER A/1986, 166.

¹²⁶ (1986) Ybk Int L Commission, vol II(2), A/CN.4/SER A/1986/Add 1, 14.

The [fourth] and last category of beneficiaries of State immunity encompasses all the *natural persons who are authorized to represent the State in all its manifestations*, as comprehended in the first [three] categories mentioned in paragraphs 1 (b) (i) to [(iii)]. Thus, sovereigns and heads of State in their public capacity would be included under this category as well as in the first category, being in the broader sense organs of the Government of the State. Other representatives include heads of Government, heads of ministerial departments, ambassadors, heads of mission, diplomatic agents and consular officers, in their representative capacity.¹²⁷

That is the extent of the ILC's consideration of this issue throughout the two decades of work on this topic.

What is meant by 'natural persons who are authorized to represent the State in all its manifestations'? This class of persons so defined cannot be taken to mean all state officials employed in the civil service of a particular state and yet it does appear to be broader than those persons who would be deemed to have 'full powers' to express the consent of a state to be bound by a treaty for the purposes of Article 7 of the Vienna Convention on the Law of Treaties. It is also critical to note that most if not all of the 'representatives' mentioned in these two passages from the ILC's Yearbooks enjoy personal immunities in customary international law: the only doubtful case are certain 'heads of ministerial departments'. Following the International Court's judgment in the *Arrest Warrant* case, it would depend upon an assessment of functions performed by the particular head of a ministerial department and whether or not an immunity is necessary for the discharge of such functions.¹²⁸

The ILC's decision to include a reference to 'representatives of the State' in Article 2 is further complicated by Article 3(2), which stipulates that the Convention on Immunities does not deal with immunities accorded to heads of state *ratione personae* despite the fact that heads of state are included within the conception of the 'state' in Article 2(1)(b)(iv). The ILC's commentary to Article 3(2) says that:

[T]he present Articles do not prejudge the extent of immunities granted by States to heads of Government and ministers for foreign affairs. Those persons are, however, not expressly included in paragraph 2, since it would be difficult to prepare an exhaustive list, and any enumeration of such persons would moreover raise the issues of the basis and of the extent of the jurisdictional immunity exercised by such persons.¹²⁹

¹²⁷ ILC Commentary to the ASR, 18 (emphasis added).

¹²⁸ See *Re General Shaul Mofaz*, Judgment of 12 February 2004, District Court (Bow Street) (2004) 128 ILR 789, (2004) 53 ICLQ 773 (immunity granted to Minister of Defence of Israel); *Re Bo Xilai*, Bow Street Magistrates' Court, 8 November 2005, (2006) 128 ILR 714 (immunity granted to Minister for Commerce and International Trade of China); *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (Merits) [2008] ICJ Rep 177 (accepted that Public Prosecutor and Head of National Security would not be entitled to immunity); *Khurts Bat v The Investigating Judge of the German Federal Court* (Head of the Office of National Security not entitled to immunity).

¹²⁹ ILC Commentary to the ASR, 22.

The confused relationship between the mention of ‘representatives’ in Article 2(1)(b)(iv) and the carve out in Article 3(2) was a cause of concern to the ILC’s members at the drafting stage, some of whom recommended that the former provision be deleted altogether:

As for subparagraph (b) (iv), concerning representatives of the State acting in that capacity, some members suggested that it might be deleted, since its application would raise the question of the rules of diplomatic immunity and those of State immunity.¹³⁰

The class of ‘representatives’ contemplated by Article 2(1)(b)(iv) of the Convention on Immunities is, therefore, far from clear. And so is the range of acts undertaken by such ‘representatives’ that is covered by the state’s immunity. The ILC says that:

The reference at the end of paragraph 1(b)[(iv)] to ‘in that capacity’ is intended to clarify that such immunities are accorded to their representative capacity *ratione materiae*.¹³¹

Some writers have equated ‘representative capacity *ratione materiae*’ to any ‘acts performed as acts of the State’.¹³² This approach implicitly rests upon the attribution of any acts performed by a state official to the state and the flaw in that approach was considered in Part B above. It cannot be said that this is a viable interpretation of the text Article 2(1)(b)(iv). First, the ILC insisted in its commentary that the natural persons covered in Article 2(1)(b)(iv) are only those ‘authorized to represent the State in all its manifestations’. Second, the ILC listed, as natural persons that are so authorized, those high ranking officials or members of the diplomatic service that would customarily be ‘representing’ the state in its external relations with other states or international persons. As already noted, most, if not all, of those listed representatives of the state enjoy personal immunities as well. Third, it is surely relevant that the ILC did not employ the language of ‘acts of state’ as for the rules of attribution in Article 2(1)(b)(iv); instead the concept of ‘representation’ was favoured, which is unknown to the law on state responsibility. Consistency of concepts across the laws on state immunity and state responsibility was raised during the debates and rejected as a matter of principle.¹³³ Something more restrictive than the expansive notion of acts of state employed by the rules of attribution for the law on state responsibility was clearly intended for the determination of when the acts of a state official should be covered by the immunity of the state.

¹³⁰ (1989) Ybk Int L Commission, vol II(2), A/CN.4/SER.A/1989/Add.1, 101.

¹³¹ ILC Commentary to the ASR, 18.

¹³² Fox, *The Law of State Immunity*, 460.

¹³³ G Hafner and U Köhler, ‘The United Nations Convention on Jurisdictional Immunities of States and Their Property’ (2004) 35 *Netherlands Yearbook of International Law* 3, 16.

The ordinary meaning of Article 2(1)(b)(iv) suggests that the acts of the 'representative' in question must be connected to the representation of the state in its external relations with other states. A foreign police officer involved in torturing individuals held in custody on the territory of the foreign state is not a representative of the foreign state acting in that capacity if sued in the courts of the forum state.¹³⁴

B. Article 6(2)(b) of the Convention on Immunities

Article 6(2)(b) reads:

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

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

This provision is hopelessly ambiguous. When does a proceeding in the forum state 'in effect seeks to affect' the 'interests or activities' of the foreign state? Should an objective test be applied (which would be problematic as these are not recognised legal terms of art) or should a representation by the foreign state that its 'interests' will be affected be sufficient (in which case the foreign state would be the judge in its own cause)? These problems are identified in the *travaux préparatoires* but were never resolved.

The original text of Article 6(2)(b) read as follows:

A proceeding before a court of a State shall be considered to have been instituted against another State, whether or not that other State is named as a party to that proceeding, so long as the proceeding in effect seeks to compel that other State either to submit to the jurisdiction of the court or to bear the consequences of a determination by the court which may affect the rights, interests, properties or activities of that other State.¹³⁵

When this text was circulated to governments it generated some criticism. Australia, for instance, complained about its unjustified breadth:

Paragraph 2 is too wide. Its effect is that a proceeding will be considered to have been instituted against a foreign State in cases where it could not be said that the State was party to the proceedings but where a determination by the court affects 'the property, rights, interests or activities of that other State'. A narrower formulation would be preferable.¹³⁶

¹³⁴ eg, the facts of *Jones v Saudi Arabia*.

¹³⁵ Texts Adopted by the Drafting Committee (1982) Ybk Int L Commission, vol I, A/CN.4/L.342, 323.

¹³⁶ (1988) Ybk Int L Commission, vol II(1), A/CN.4/SER.A/1988/Add.1, 52.

The ILC and Special Rapporteur Ogiso also questioned the wisdom of employing terms as amorphous as ‘interests’ because such ‘terms were not clearly understood in certain legal systems’.¹³⁷ Some individual members requested that the provision be deleted altogether or at least ‘to delete such terms as “interests”... or replace them with more commonly accepted legal terms.’¹³⁸

When the ILC’s Drafting Committee came to reconsider the text of Article 6(2)(b), it purported to be sensitive to the unduly broad formulation of the existing draft. But its solution to this problem is somewhat bewildering:

The Committee had considered that the words ‘to bear the consequences of a determination by the court which may affect’ created too loose a relationship between the proceeding and the consequences to which it gave rise for the State in question and could thus result in unduly broad interpretations of the paragraph. To make the text more precise in that regard, it had therefore replaced those words by ‘to affect’.¹³⁹

The requirement that the foreign state could be under a legal obligation to comply with the judgment of the forum court in order to satisfy the test for being implicated by proceedings to which the foreign state is not named as a party was an imperfect but solid basis for limiting the scope of Article 6(2)(b). By deleting this text and inserting ‘to affect’, and failing to modify the terms ‘interests and activities’ in the rest of the clause, the ILC’s Drafting Committee has emphatically failed to achieve its stated objective of confining the scope of Article 6(2)(b).

It is also revealing that the ILC’s commentary to Article 6(2)(b) is focused upon the relatively narrow situations in which a foreign state’s property is the subject matter of proceedings in the forum state but the foreign state is not named as a party to the proceedings:

[A]ctions involving seizure or attachment of public properties or properties belonging to a foreign State or in its possession or control have been considered in the practice of States to be proceedings which in effect implicate the foreign sovereign or seek to compel the foreign State to submit to the local jurisdiction. Such proceedings include not only actions *in rem* or in admiralty against State-owned or State-operated vessels used for defence purposes and other peaceful uses, but also measures of pre-judgement attachment or seizure (*saisie conservatoire*) as well as execution or measures in satisfaction of judgement (*saisie exécutoire*).¹⁴⁰

¹³⁷ (1989) Ybk Int L Commission, vol II(2), 105.

¹³⁸ *Ibid*, 105.

¹³⁹ (1990) Ybk Int L Commission, vol I, A/CN 4/SER A/1990, 311.

¹⁴⁰ ILC Commentary to the ASR, 25.

If these situations were the ILC's real concern, then further light is cast on the deficiencies in the final text of Article 6(2)(b), which is not restricted by its terms to proceedings involving the property of the foreign state. Elsewhere in its description of the purpose of Article 6(2)(b), the ILC once again confirms that its drafting does not match its intentions: 'The Court should not so exercise its jurisdiction as to put a foreign sovereign in the position of choosing between being deprived of property or else submitting to the jurisdiction of the Court.'¹⁴¹

In the event that the Convention on Immunities does come into force, it is likely to contribute in no small measure to divergent practices among the States Parties in respect of the problem under consideration; *viz.* the circumstances in which the acts of a foreign state official are to be considered the acts of the foreign state in determining whether proceedings against the former in the forum state should be barred by reason of the immunity from jurisdiction of the foreign state. What can be said with certainty is that the solutions in Articles 2(1)(b)(iv) and 6(2)(b) of the Convention on Immunities, which are novel in their formulation and use of terms, are not a reflection of customary international law and do not contribute much at all to our present understanding of customary international law. It is revealing that there is already a lack of consensus among judges and writers on which theory underpins the state's immunity in respect of the acts of its officials pursuant to Article 2(1)(b)(iv). Three possibilities have already been canvassed: equating state officials with state organs;¹⁴² the existence of relationship of agency or employment between the state official and the state;¹⁴³ and, the attribution of the acts of the state official to the state.¹⁴⁴ Those approaches were analysed and rejected in Part B of this study.

V. THE SOLUTION TO THE PROBLEM OF STATE IMMUNITY FOR THE ACTS OF STATE OFFICIALS

The task for this part of the study will be to define the scope of the acts of foreign state officials in respect of which the jurisdictional immunity of the foreign state can properly be invoked in proceedings in the forum state. The fundamental question to be addressed is whether international law reconciles the competing claims of legal right as between the forum state and the foreign state in favour of the foreign state's immunity in circumstances where other international norms address the individual's conduct that forms the subject matter of the proceedings.

¹⁴¹ Ibid.

¹⁴² *Jones v Saudi Arabia* (HL), para 68 (Lord Bingham).

¹⁴³ Fox, *The Law of State Immunity*, 458.

¹⁴⁴ *Jones v Saudi Arabia* (HL), para 66 (Lord Bingham), referring to *Prosecutor v Blaskic* IT-95-14, (1997) 110 ILR 607 (ICTY) 707.

A. The principle underlying the recognition of jurisdictional immunities

It is frequently asserted that the principle of the equality of states in international law provides the foundation for the existence of jurisdictional immunities. Lord Bingham in *Jones*, for instance, stated:

Based on the old principle *par in parem non habet imperium*, the rule of international law is not that a state should not exercise over another state a jurisdiction which it has but that (save in cases recognised by international law) a state has no jurisdiction over another state.¹⁴⁵

The maxim *par in parem non habet imperium* was originally the bedrock of a doctrine of absolute immunity.¹⁴⁶ It has very little explanatory power for the now prevailing doctrine of restrictive immunity. Once it is admitted that the foreign state is not entitled to immunity from the jurisdiction of the forum state in respect of certain activities, the extent of that restriction cannot be rationalised on the basis of a principle that no state can claim its jurisdiction over another state.

Sovereign equality does not mean that all states are equal in all circumstances. It means rather that every state is equal in having the legal capacity to exercise rights that are incidental to statehood. By virtue of the very principle of sovereign equality, the rights of one state diminish when in conflict with another state's sphere of authority, such as where the forum state's court exercises its adjudicatory competence over a foreign state official who is within the jurisdiction of the forum state.¹⁴⁷ As Chief Justice Marshall of the United States Supreme Court observed in *Schooner Exchange v McFaddon*, the 'content [of the law of state immunity] cannot be constructed so as to protect the autonomy of only one of the disputing states... The problem appears to lie in delimiting or balancing the conflicting sovereignties'.¹⁴⁸ Almost two centuries later, Justice Richardson of the New Zealand Court of Appeal articulated the competing elements of this balancing act:

[T]he doctrine of state immunity is the result of an interplay of two fundamental principles of international law: the principle of territoriality and the principle of state personality, both being two aspects of state sovereignty. Under that first fundamental principle sovereign states have jurisdiction to prescribe rules of law and processes applying within their territory.¹⁴⁹

¹⁴⁵ Ibid, para 14.

¹⁴⁶ Eg *The Cristina* (1938) 60 LR 147 (HL) 162 (Lord Wright).

¹⁴⁷ See generally LM Caplan, 'State Immunity, Human Rights and Jus Cogens: A Critique of the Normative Hierarchy Theory' (2003) 97 AJIL 741.

¹⁴⁸ *Schooner Exchange v McFaddon* 11 US 116 (1812). See also *The Charkieh (No 1)* (1873) LR 4 A & E 59 (Ct of Admiralty) 88 (Sir Robert Phillimore); and Separate Opinion of Judge Keith, *Jurisdictional Immunities Case*.

¹⁴⁹ *Controller and Auditor General v Sir Ronald Davison* [1996] NZLR 278, (1997) 36 ILM 721, 736.

The truth is that the maxim *par in parem non habet imperium* has never come close to providing a satisfactory explanation for the existence of jurisdictional immunities. According to Jennings and Watts, the authors of the ninth edition of *Oppenheim's International Law*:

It is often said that a third consequence of state equality is that—according to the rule *par in parem non habet imperium*—no state can claim jurisdiction over another. The jurisdictional immunity of foreign states has often also been variously—and often simultaneously—deduced not only from the principle of equality but also from the principles of independence and of dignity of states. It is doubtful whether any of these considerations supplies a satisfactory basis for the doctrine of immunity. There is no obvious impairment of the rights of equality, or independence, or dignity of a state if it is subjected to ordinary judicial processes within the territory of a foreign state—in particular if that state, as appears to be the tendency in countries under the rule of law, submits to the jurisdiction of its own courts in respect of claims brought against it.¹⁵⁰

Crawford has also exposed the explanatory limitation of the principle of state equality in this context:

The simple assertion, *par in parem non habet jurisdictionem*, which is said to underlie the principle of jurisdictional immunity, it is itself question-begging. In a world in which some States are equal to anything, with respect to which issues (if not all) are States to be regarded as *pares*, equals—and hence, presumably, susceptible to coercive jurisdiction only with their consent? The notion that a foreign State defendant was always an equal in this sense, while it may have simplified matters, was itself unsatisfactory. Why should not a forum State assume jurisdiction to do justice in a matter occurring within its boundaries and governed by its law?¹⁵¹

Jurisdictional immunities derive from the forum state's concession of adjudicatory competence in accordance with international law and not by virtue of a superior right conferred by international law to the foreign state.

The principle that a foreign state's entitlement to immunity in respect of the acts of its officials must be justified rather than assumed¹⁵²

¹⁵⁰ R Jennings and A Watts, *Oppenheim's International Law* (9th edn OUP, Oxford 1992), 341-2. As Dame Rosalyn Higgins has cautioned: 'It is very easy to elevate sovereign immunity into a superior principle of international law and to lose sight of the essential reality that it is an exception to the normal doctrine of jurisdiction.' R Higgins, 'Certain Unresolved Aspects of the Law of state Immunity' (1982) 29 *Netherlands International Law Review* 265, 271.

¹⁵¹ Crawford, 'International Law and Foreign Sovereigns: Distinguishing Immune Transactions', 77 and also 87.

¹⁵² This approach is consistent with, indeed mandated by, the notion of a restrictive doctrine of jurisdictional immunities which is universally recognised to reflect modern customary international law. According to Professor Crawford, *ibid*, 78: 'The claim must be that international law (once the theory of absolute or general immunity is disposed of) does not *require* immunity to be accorded to foreign State defendants or to their transactions or property in any case. For, as soon as it is conceded that (special rules apart) international law does require some such immunity, then international law distinguishes to that extent between immune and non-immune transactions, and the question becomes on what basis it is doing so.'

arguably comports with the early English judgments on state immunity such as the *The Charkieh*:

Upon what grounds is this exemption [from the territorial jurisdiction of the forum state] allowed? Not upon the possession on behalf of the sovereign of any absolute right in virtue of his sovereignty to this exemption; such a right would be incompatible with the right of the territorial sovereign... The true foundation is the consent and usage of independent states, which have universally granted this exemption from local jurisdiction in order that the functions of the representative of the sovereignty of a foreign state may be discharged with dignity and freedom, unembarrassed by any of the circumstances to which litigation might give rise.¹⁵³

It is also the foundation for the classical statement on the rationale for state immunity in Chief Justice Marshall's judgment in *Schooner Exchange*.¹⁵⁴ Indeed the US Supreme Court recently affirmed that 'Chief Justice Marshall concluded that... the United States had impliedly waived jurisdiction over *certain activities* of foreign sovereigns.'¹⁵⁵ The Supreme Court appeared to recognize that the progression from Chief Justice Marshall's conception of limited state immunity to a general assumption of immunity rests upon a misinterpretation of the original judgment:

The Court's specific holding in *Schooner Exchange* was that a federal court lacked jurisdiction over 'a national armed vessel... of the emperor of France,'... but the opinion was interpreted as extending virtually absolute immunity to foreign sovereigns as 'a matter of grace and comity,'...¹⁵⁶

This progression to a general principle of immunity is reflected in modern instruments like the Convention on Immunities. This approach, which Lauterpacht insists 'finds no support in classical international law',¹⁵⁷ is not dispositive for the specific question under consideration; *viz.* the extension of a foreign state's immunity to the acts of its official

¹⁵³ *The Charkieh*, 88 (Sir Robert Phillimore).

¹⁵⁴ Lauterpacht provided this commentary on the classical doctrine as set out in *Schooner Exchange*: 'It is clear from the language of that decision that the governing, the basic, principle is not the immunity of the foreign State but the full jurisdiction of the territorial State and that any immunity of the foreign State must be traced to a waiver – express or implied – of its jurisdiction on the part of the territorial State. Any derogation from that jurisdiction is an impairment of the sovereignty of the territorial State and must not readily be assumed.' H Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States' in E Lauterpacht (ed), *H Lauterpacht International Law: Collected Papers*, vol 3, Parts II-VI, *The Law of Peace* (CUP, Cambridge 1977), 315, 325. See also: I Sinclair, 'The Law of Sovereign Immunity: Recent Developments' (1980-II) 167 *Recueil des Cours* 113, 215 ('[O]ne does not start from an assumption that immunity is the norm, and that exceptions to the rule of immunity have to be justified. One starts from the assumption of non-immunity, qualified by reference to the functional need (operating by way of express or implied licence) to protect the sovereign rights of foreign States operating or present in the territory.')

¹⁵⁵ *Samantar v Yusuf*, 4 (emphasis added).

¹⁵⁶ *Ibid.*, 5-6.

¹⁵⁷ H Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States', 324-5.

where that official is the named defendant in proceedings in the forum state.

B. The nature of the test for acts of state officials

The test for whether the acts of foreign state officials are covered by the immunity of the foreign state is not simply whether the acts in question were the result of an exercise of public authority. That would produce a test identical in essence to the rules of attribution for state responsibility, the purpose of which are, at base, to identify acts that are the result of the exercise of public authority *in fact*. The rules of attribution are neutral in a way that the rules on state immunity are not: if the acts are attributable to the foreign state, then the international responsibility of that foreign state must be adjudicated on the merits. There are no consequences that follow from the attribution of acts to the state if the state is subsequently found not to have breached the international obligation upon which the cause of action is founded. The rules of attribution are designed to be without prejudice to this question of substantive responsibility as far as possible by ensuring that this initial hurdle to overcome for the adjudication of responsibility is set relatively low. Regardless of how public power is divided among state organs and the human bureaucracy that serves these organs in the particular state in question, an exercise of that power is considered to be an act of state for the purposes of the rules of attribution.

A successful plea of immunity by a foreign state from the adjudicatory jurisdiction of the forum state is, by contrast, tantamount to recognising that one state's claim of legal right should be preferred to another state's claim of legal right. The forum state has a right in international law to adjudicate the civil or criminal responsibility of a foreign state official who is properly within its jurisdiction. The foreign state has a right in international law to insist that no third state interferes with matters within its domestic jurisdiction (as defined by international law). A successful plea of state immunity thus has substantive consequences in the reconciliation of competing claims of legal rights. The decision of a forum court to uphold or reject the foreign state's plea of immunity has substantive consequences that do not attach to the decision of an international court that certain acts are attributable to the foreign state.

The appellate courts of common law jurisdictions have defined the scope of state immunity as extending to the acts of state officials 'in discharge or purported discharge of their public duties'¹⁵⁸ or 'while acting in their official capacity'.¹⁵⁹ In these leading cases, the acts in question were acts of alleged torture and the foreign state's jurisdictional immunity was upheld in respect of the individual state officials named as

¹⁵⁸ *Jones v Saudi Arabia* (HL), para 11 (Lord Bingham).

¹⁵⁹ *Kazemi v Iran*, para 138 and *Jones v Saudi Arabia* (HL), para 78 (Lord Hoffmann).

defendants in the action. Does the law on state immunity really endorse the proposition that acts of torture by state officials are ‘in discharge or purported discharge of their public duties’ or ‘while acting in their official capacity’?

The answer provided by the law of state responsibility is of course affirmative. Such acts unquestionably amount to ‘conduct of the state’ in accordance with the rules of attribution. It would be extraordinary if this were not the case given the purpose that the rules of attribution serve for the law of state responsibility.

For the reasons that have already been articulated, however, it by no means follows that the same answer must be given by the law of state immunity. Indeed, the assumption that a single definition of ‘official acts’ or ‘acts of state’ must be uniformly applied across distinct areas of international law was at the heart of the confusion in the *Pinochet* and *Jones* cases about the relationship between the definition of torture in the Convention on Torture and the law on state immunity.

Article 1 of the Convention on Torture defines torture ‘[f]or the purposes of this Convention’ as severe pain or suffering ‘inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’. This definition is the gateway to the primary obligations upon the State Parties to the Convention. Article 1 is not a rule of attribution for the purposes of the secondary obligations of state responsibility. Article 1 is not a rule defining the acts of a foreign state official that are entitled to immunity (whether it be a personal immunity or the foreign state’s immunity) from the adjudicatory jurisdiction of the forum state. Article 1 is merely a definition of the circumstances in which conduct amounts to torture for the application of the substantive obligations set out in the Convention on Torture.¹⁶⁰

Lord Hoffmann in *Jones* failed to appreciate that three different areas of international law (the law of state responsibility, the law of state immunity and the conventional regime governing torture) could have their own definitions of ‘official acts’ for their own particular purposes. In his analysis of *Pinochet*, his Lordship said:

The acts of torture are either official acts or they are not. The Torture Convention does not ‘lend’ them an official character; they must be official to come within the Convention in the first place. And if they are official enough to come within the Convention, I cannot see why they are not official enough to attract immunity.¹⁶¹

¹⁶⁰ *Jones v Saudi Arabia* (CA), para 71 (Mance LJ) (‘The whole tenor of the Torture Convention is to underline the individual responsibility of state officials for acts of torture... and I do not consider that one can derive from its definition of torture “for the purposes of the Convention” any conclusion on the different question whether a state can assert state immunity in respect of a civil claim against its officials based on allegations of systematic torture.’).

¹⁶¹ *Jones v Saudi Arabia* (HL), para 83 (Lord Hoffmann).

Lord Hoffmann's conclusion was that if an act of torture is an official act for the purposes of the Convention on Torture, then it was an official act that is attributable to the state in accordance with the rules of state responsibility such that, according to his theory of symmetry, it must attract state immunity.

The Convention on Torture only applies to a particular subset of perpetrators of torture: those acting in an official capacity. That does mean that, if the perpetrator falls within that subset as defined by Article 1 by virtue of having acted in an official capacity, that characterisation is definitive for the application of the distinct rules on state immunity or any other rules of international law. In municipal law, a 'minor' might be defined as someone under 12 years old for the purposes of the rules of criminal responsibility, but as someone under 16 years old in respect of the capacity to enter into contracts. There is no contradiction in according different meanings for different purposes to the concept of a 'minor'.

C. International law places limits upon the acts of state officials capable of attracting immunity

Customary international law must have a substantive rule to determine which acts of a foreign state official are to be considered acts in discharge or purported discharge of his official duties, such that the foreign state is the proper defendant to the action and can elect to assert its immunity from jurisdiction.

The international law of state immunity protects the foreign state's right to exercise powers with respect to matters within its domestic jurisdiction free from the interference of the forum state.¹⁶² International law also, however, places substantive limits on the foreign state's exercise of those powers.¹⁶³ The constraints placed upon a state's conduct towards persons within its national territory by international human rights law is the paradigm example.¹⁶⁴ These substantive limitations

¹⁶² International law recognises the right of state to organize its social and economic affairs in ways that are consistent with its own national values. See, eg, art 2(7) of the United Nations Charter ('Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter.') In this study the concept of domestic jurisdiction is neutral as to whether or not the powers exercised by the state in respect of matters within its domestic jurisdiction are exercised within its national territory or outside it.

¹⁶³ It has long been recognised that the boundaries of a state's 'domestic jurisdiction' are defined by international law and not by the state itself: *Nationality Decrees Issued in Tunis and Morocco* (1923) PCIJ Rep Ser B No 4, 24 (the domestic jurisdiction of a state is an 'essentially relative question' that 'depends upon the development of international relations').

¹⁶⁴ Art 2(7) of the UN Charter qualifies the principle of non-interference in matters within the domestic jurisdiction of a State by stating that 'this principle shall not prejudice the application of enforcement measures under Chapter VII.'

may impact upon the foreign state's claim to immunity from the adjudicatory jurisdiction of the forum state.

There is some force in the proposition that acts of a foreign state official cannot be considered the acts of the foreign state for the purposes of the state's immunity if such acts are directed to the commission of an international wrong by that state. Why should the foreign state be entitled to immunity in international law for acts of its officials that violate an international obligation of the foreign state itself?

The proposition is undermined, however, by the distinction that international law maintains between the responsibility of states and the individual responsibility of those acting under the colour of public authority. International law does not impose responsibility upon individuals for the wrongs committed by the state; international law instead has a limited class of norms that are directed to the conduct of individuals. Most international obligations regulate the conduct of states rather than the conduct of individuals and that distinction cannot be eroded in the context of state immunity.

State officials might be responsible under national law for acts constituting an international wrong by their state.¹⁶⁵ But we are considering here a rule of customary international law to define that circumstances in which the forum state's claim to exercise adjudicatory competence over a foreign state official must defeat the foreign state's claim to non-interference in matters within its domestic jurisdiction. This rule of customary international law cannot rest upon a simple *renvoi* to national laws such that if a particular national law provides a remedy for the acts of the foreign state official, such acts cannot be considered as the acts of the foreign state for the purposes of state immunity. This would create an unacceptable level of uncertainty in the conduct of international relations and would unfairly expose foreign state officials to the vicissitudes of different approaches to civil and criminal responsibility in national legal systems.¹⁶⁶ A high degree of deference to the foreign state's particular choices as to how it organises its internal administration and conducts its affairs is appropriate in line with the concept of reserved matters within the domestic jurisdiction of states.

It is clear that acts of the foreign state official *in the service* of the foreign state must be considered as the acts of the foreign state such

¹⁶⁵ In respect of a tort claim, for instance, the national law applicable to the issue of liability in tort in accordance with the choice of law rules of the forum state.

¹⁶⁶ For this reason, the 'iniquity' exception to state immunity asserted by the New Zealand Court of Appeal as a matter of domestic public policy cannot be endorsed. According to Richardson J in *Controller and Auditor General*, 736, 'It is not a matter of the forum state simply preferring public policies underlying its domestic laws to those of the foreign state. Fundamental values must be at stake. Where the conduct of the foreign state is in question, refusal of a claim to sovereign immunity could be justified only where the impugned activity, if established, breaches a fundamental principle of justice or some deep-rooted tradition of the forum state.'

that the foreign state is the proper defendant to the action and can invoke its immunity from the jurisdiction of the foreign court. The classic statement of the principle that a state official is not generally responsible for acts performed in the service of the state is by the US Secretary of State, Webster, in the *Caroline* and *McLeod* cases: 'whether the process be criminal or civil, the fact of having acted under public authority, and in obedience to the orders of lawful superiors, must be regarded as a valid defence; otherwise, individuals would be holden responsible for injuries resulting from the acts of Government...' ¹⁶⁷ The terminology 'acts... in the service of the foreign state' is preferred to avoid confusion with other branches of international law that define acts of the state for a particular purpose, such as the rules of attribution in the law of international responsibility.

Whether or not the acts of the foreign state official were *ultra vires* the national rules governing the public office in question is not dispositive in defining the boundaries of what constitutes 'acts... in the service of the foreign state'. ¹⁶⁸ The mere characterisation of conduct as *ultra vires* under the national law of the foreign state is not a sufficient basis for defeating the foreign state's claim to non-interference in matters pertaining to its domestic jurisdiction before the courts of the forum state. If the foreign state intervenes in the proceedings in the forum state by representing that the foreign state official had no authorisation to perform the acts in question under the law of the foreign state, then such a representation amounts to a waiver of the foreign state's immunity that might otherwise apply. It does not, however, establish a *renvoi* to the law of the foreign state in order to determine the question under consideration.

In addition, the concept 'acts... in the service of the foreign state' excludes acts of a foreign state official that do not rest upon an exercise of public power. There is uniform state practice in support of the proposition that a state's immunity cannot extend to acts of its officials that are not under colour of public authority. ¹⁶⁹

These two caveats aside, where proceedings are brought against an individual foreign state official to impose liability under national law for acts that are simultaneously proscribed by a norm of international law that is directed to the conduct of individuals, those acts cannot be characterised as acts in discharge of a public duty or function in assessing the foreign state's entitlement to assert its jurisdictional immunity. Such acts cannot be said to be 'in the service of the foreign state' as a matter of

¹⁶⁷ As reported in R Jennings, 'The *Caroline* and *McLeod* Cases' (1938) 32 AJIL 82, 94.

¹⁶⁸ Eg *Jaffe v Miller*, 160.

¹⁶⁹ Eg *Princess Zizianoff v Kahn and Bigelow* (1929) 23 AJIL 172 (Paris Court of Appeal); *Church of Scientology v Herold and Heinrich Bauer Verlag* (1978) 65 ILR 380 (District Court of Amsterdam); *Playa Largo v I Congreso de Partido* [1983] 1 AC 244 (HL); *Chuidian v Philippine National Bank*, 1103, 1106-07; *United States v Noriega* 746 F Supp 1506, 1519 (SD Fla 1990); *Re Estate of Ferdinand E Marcos; Jaffe v Miller; Kuwait Airways v Iraqi Airways* [1995] 3 All ER 694 (HL); *Propend Finance v Sing; Re P (No 2)* (1998) 114 ILR 485, 495 (F); *Kazemi v Iran; Doe v Israel* 400 F Supp 2d 86 (DDC 2005); *Jones v Saudi Arabia* (HL), paras 12 and 74.

international law because international law prohibits the individual from serving the state in that manner. In other words, the boundary for the sphere of acts of a state official which can be imputed to the state for the purposes of the law of state immunity is defined by the norms of international law that are directed to the conduct of individuals. If it were otherwise there would be a direct contradiction between two branches of international law.

The limited class of international norms creating individual responsibility in international law or compelling individual responsibility in national law are within the domain of international criminal law (the international crimes of genocide, crimes against humanity, war crimes and aggression) and international humanitarian law (the grave breaches regime), and also extend to those norms of international human rights law that have attained a peremptory status within the international legal order. These norms will be explored in more detail below.

The contravention of such norms cannot be a state function such that the individual state official is absolved from individual responsibility under the national law of the forum state by virtue of the state's immunity from jurisdiction under international law. It is important to recognise that this is the effect of a successful plea of the foreign state's immunity in an action commenced against an individual state official. It is often claimed that a plea of immunity has no substantive consequences and its effect is strictly 'procedural'. That may be the case when the foreign state is sued because the entity vested by international law with a right to jurisdictional immunity is the defendant in the action. Where the defendant is a foreign state official, however, the effect is substantive:¹⁷⁰ the official no longer has to answer for his conduct because the foreign state is substituted as the proper party to the action. That effect cannot be justified by international law where international law itself proscribes the conduct of the individual official who is the subject of the proceedings.

The situation is different when the acts of the foreign state official are alleged to have been instrumental in the commission of an international wrong by the foreign state in circumstances where the norm of international law is directed exclusively to the state as a corporate entity and not to individuals. There is no reason, as a matter of international law, to disentangle the responsibility of the individual official and the responsibility of the state. The international law of responsibility, in other words, has no special interest in the acts of the foreign state official that would serve to override the interest of the foreign state protected under the international law of immunity. In these circumstances international

¹⁷⁰ This is expressly recognised in comment 'c' to § 454 of the *Third Restatement* on 'Claims in Tort' in Ch 5 on 'Immunity of Foreign States' ('A state is liable for the acts or omissions of its officials or employees within the scope of their office or employment on the same basis as a private employer, but under the FSIA is immune with respect to claims arising out of performance or non-performance by its agents of discretionary acts.')

law imputes the acts of the state official to the state as a corporate entity such that the state is substituted as the proper party and is entitled to invoke its immunity from jurisdiction.

A useful analogy can be drawn here with the approach in the United States to the non-commercial tort exception to immunity of foreign states in the FSIA.¹⁷¹ Courts in the United States cannot exercise jurisdiction in respect of claims ‘based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused’.¹⁷² The concept of ‘discretionary function’ is borrowed directly from the Federal Torts Claims Act, which prescribes the circumstances in which the United States Government can be sued in tort.¹⁷³ Likewise, in their codification of the same rules, the authors of the Third Restatement relied upon the same concept to ‘place foreign states in the same position before United States courts as is the United States itself when sued under the Federal Tort Claims Act’.¹⁷⁴

What is the scope, then, of a ‘discretionary function’? The Supreme Court in *United States v Varig Airlines* held that the United States could not be sued in tort for the alleged negligence of the Federal Aviation Administration in administering air safety standards. The Court reasoned that the ‘discretionary function’ exception was designed to ‘prevent judicial “second-guessing” of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort’.¹⁷⁵ A parallel can be drawn here with the international legal principle of non-interference in matters within the domestic jurisdiction of a state for the purposes of state immunity.

The outer limits of this concept ‘discretionary function’, however, were found in *Letelier v Republic of Chile*.¹⁷⁶ The survivors of two members of an organisation based in the United States which was critical of the Government of Chile brought a tort claim against the Republic of Chile for its alleged role in the assassination of those individuals by the detonation of a bomb. Referring to an earlier Supreme Court decision under the Federal Tort Claims Act that defined a discretionary act as one in which ‘there is room for policy judgment and decision’,¹⁷⁷ the District

¹⁷¹ FSIA, § 1605(a)(5) (‘A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case - in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to - (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused...’).

¹⁷² *Ibid.*

¹⁷³ Federal Torts Claims Act, 28 USC §§ 1346(b) and 2680(a) and (h).

¹⁷⁴ *Third Restatement*, Reporters’ note 3, 410.

¹⁷⁵ *United States v Varig Airlines* 467 US 797, 814 (1984).

¹⁷⁶ *Letelier v Republic of Chile* 488 F Supp 665 (DDC 1980). See also *Liu v Republic of China* 892 F 2d 1419 (1989).

¹⁷⁷ *Dalehite v United States* 346 US 15 (1953) 35.

Court acknowledged that ‘a decision calculated to result in injury or death to a particular individual or individuals, made for whatever reason, would be one most assuredly involving policy judgment and decision’.¹⁷⁸ But there could be no reliance upon the ‘discretionary function’ exception to the exercise of jurisdiction over torts by a foreign state because:

Whatever policy options exist for a foreign country, its has no ‘discretion’ to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law.¹⁷⁹

This is very similar to the approach advocated here. Foreign state officials do not have the ‘discretion’ to serve their state by engaging in acts that violate international norms addressed to their individual conduct.

D. Lessons from the Pinochet cases

It is useful to test the suggested limitations imposed by customary international law upon the scope of acts of state officials benefiting from state immunity against the extensive debates on a similar issue in the *Pinochet* cases.¹⁸⁰ In *Pinochet* the immunity in question was the State of Chile’s immunity in respect of the acts of its former head of state, Senator Pinochet. The proceedings in the English courts against Senator Pinochet were for his extradition to Spain to face criminal charges for acts of systematic torture.

Lord Slynn in *Pinochet No. 1* addressed a submission to the effect that crimes under international law cannot be regarded as functions of a head of state such that immunity could attach to conduct said to constitute such crimes. He rejected this submission:¹⁸¹

[C]learly international law does not recognise that it is one of the specific functions of a head of state to commit torture or genocide. But the fact that in carrying out other functions, a head of state commits an illegal act does not mean that he is no longer to be regarded as carrying out one of his functions.

¹⁷⁸ *Letelier v Chile*, 673. In *Alicog v Kingdom of Saudi Arabia* 860 F Supp 379, 385 (SD Tex 1994) employees of the Saudi Royal Family sued various Saudi officials. The retention of the claimants’ travel papers by Saudi consular officials upon arrival in the US was held to be within the ‘discretionary function’ as was the keeping of the employees in the hotel under the supervision of a guard. The US District Court for the Southern District of Texas distinguished these actions from murder, kidnapping and enslavement that would not be within the ‘discretionary function’.

¹⁷⁹ *Ibid*, 673.

¹⁸⁰ *Pinochet No 1* and *Pinochet No 3*. *R v Bow Street Metropolitan Stipendiary Magistrate Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119 (HL) dealt with the question of whether one of the Law Lords sitting in *Pinochet No 1* had a conflict of interest.

¹⁸¹ As did Lord Lloyd in *Pinochet No 1*, 96-98.

If it did, the immunity in respect of criminal acts would be deprived of much of its content.¹⁸²

Lord Slynn conflates international crimes and criminality under domestic law in this reasoning. International crimes are limited in number to the most serious attacks on humanity. Acts constituting international crimes cannot legitimately be incidental to the functions of any state official. International law cannot, on the one hand, confer immunities on a functional basis to certain state officials, and on the other hand be blind to the nature of the function exercised by those state officials. The concept of international crimes surely imports the idea that acts constituting such crimes cannot be relied upon to invoke a right granted by international law for the proper functioning of international relations—the right to immunity from the jurisdiction of a foreign court. Criminality under domestic law gives rise to different considerations because criminal laws differ from state to state and it would be parochial in most circumstances for a forum state to adjudge the conduct of a state official in accordance with its own criminal law where the acts occurred in another state.¹⁸³

Lord Slynn relied upon the following passage of Watts's Hague Lecture, which makes no distinction between international crimes and domestic criminality and thus does not address the submission made in *Pinochet*:

A head of state clearly can commit a crime in his personal capacity; but it seems equally clear that he can, in the course of his public functions as head of state, engage in conduct which may be tainted by criminality or other forms of wrongdoing. The critical test would seem to be whether the conduct was engaged in under the colour of or in ostensible exercise of the head of state's public authority. If it was, it must be treated as official conduct, and so not a matter subject to the jurisdiction of other states whether or not it was wrongful or illegal under the law of his own state.¹⁸⁴

When Watts came to address the relevance of criminality as a matter of international law, his conclusion was very different:

For international conduct which is so serious as to be tainted with criminality to be regarded as attributable only to the impersonal state and not to the individuals who ordered or perpetrated it is both unrealistic and offensive to common notions of justice... It can no longer be doubted that as a matter of general customary international law a head of state will personally be liable to be

¹⁸² Ibid, 74-76.

¹⁸³ *Pinochet No 3*, 270 (Lord Millett) ('The immunity is available whether the acts in question are illegal or unconstitutional or otherwise unauthorised under the internal law of the state, since the whole purpose of state immunity is to prevent the legality of such acts from being adjudicated upon in the municipal courts of a foreign state.')

¹⁸⁴ Watts, 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers', 56-7.

called to account if there is sufficient evidence that he authorised or perpetrated such serious international crimes.¹⁸⁵

Later in his speech, Lord Slynn goes on to consider whether the concept of international criminal responsibility had created an exception to the immunity.¹⁸⁶ By this stage of his analysis, however, the analytical damage had been done: once he had concluded that acts of torture can be incidental to an official function and thus protected by a state's immunity from jurisdiction, the next question becomes a false one—i.e. to what extent does international law recognise an exception to that immunity? The threshold then becomes higher because state practice and *opinio juris* must be deployed to establish that the right to immunity is capable of being defeated by the same law that vests it.

Lord Slynn's reasoning also suffers from a fallacy of abstraction. History tells us that state officials committing torture or genocide will invariably appeal to the dictates of national security by way of justification if the inculcating evidence rules out a blanket denial.¹⁸⁷ National security is a function of the state *par excellence*. But it does not follow that anything done by a state official under the cloak of national security is a state function entitled to state immunity. What is required in every state immunity case is the individuation of the specific acts forming the basis of the claim.¹⁸⁸ When a state official is charged with torture or a civil claim is pursued against that official for torture, it is the individual acts causing injury or death that must be characterised for the purposes of state immunity. Whether such acts were incidental to a broader security operation that would otherwise be a legitimate response to an external threat, for instance, is irrelevant. The implication of Lord Slynn's reasoning is that so long as the victims of torture were initially detained by state officials in an operation justified by them on the grounds of national security, any acts of those officials are protected by state immunity. In actual fact Lord Slynn was satisfied with a more abstract connection between the alleged acts of torture and the official function of Senator Pinochet as the former head of state. Lord Slynn quoted the allegation in the arrest warrant to the effect that Senator Pinochet as Commander in Chief of the Armed Forces and Head of the Chilean Government issued instructions that enabled the acts of torture to be carried out and then

¹⁸⁵ Ibid, 82, 84.

¹⁸⁶ *Pinochet No 1*, 77-83.

¹⁸⁷ It was submitted on behalf of Senator Pinochet that the acts of torture were carried out for the purposes of protecting the state and advancing its interests. *Pinochet No 3*, 172.

¹⁸⁸ Crawford, 'International Law and Foreign Sovereigns: Distinguishing Immune Transactions', 94 ('Given that some only of the complex activities of foreign States are amenable to local jurisdiction, it is essential to locate, to identify with precision, the act or series of acts giving rise to the particular claim, so that *that* particular act or series of acts can be classified.')

concluded that ‘in the present case the acts relied on were done as part of the carrying out of his functions when he was head of state.’¹⁸⁹

Lord Slynn’s approach was subsequently followed by Lords Bingham¹⁹⁰ and Hoffmann¹⁹¹ in *Jones*.¹⁹² It was rejected, however, by several other Law Lords in *Pinochet No. 1* and *No. 3* in terms consistent with the approach advocated in respect of the foreign state’s immunity in the present study.¹⁹³

Lord Nicholls in *Pinochet No. 1* drew the correct distinction between domestic criminal responsibility and crimes under international law:

International law recognises, of course, that the functions of a head of state may include activities which are wrongful, even illegal, by the law of his own state or by the laws of other states. But international law had made plain that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law.¹⁹⁴

Likewise, Lord Steyn emphasised that the concept of ‘official acts’ for the purposes of the immunity of heads of state was a concept of international law and thus had to be interpreted consistently with the general structure of modern international law:

[T]he distinction between official acts performed in the exercise of functions as a head of state and acts not satisfying these requirements must depend on the rules of international law . . . Given this state of international law, it seems to me difficult to maintain that the commission of such high crimes [genocide, torture, hostage-taking and crimes against humanity] may amount to acts performed in the exercise of the functions of a head of state . . .

¹⁸⁹ *Pinochet No 1*, 74. Similarly, see Lord Hope in *Pinochet No 3*, 241-2.

¹⁹⁰ *Jones v Saudi Arabia* (HL), 281 (‘The conduct complained of took place in police or prison premises and occurred during a prolonged process of interrogation concerning accusations of terrorism (in two cases) and spying (in the third). There is . . . no suggestion that the defendant’s conduct was not in discharge or purported discharge of their public duties.’)

¹⁹¹ *Ibid*, 302 (‘The acts of torture are either official acts or they are not. The Torture Convention does not “lend” them an official character; they must be official to come within the Convention in the first place. And if they are official enough to come within the Convention, I cannot see why they are not official enough to attract immunity.’)

¹⁹² But rejected by the Court of Appeal: *Jones v Saudi Arabia* (CA) 757 (Lord Phillips) (‘I also held that, as a matter of statutory interpretation of the State Immunity Act 1978, the official functions of a head of state could not extend to actions that were prohibited as criminal under international law.’)

¹⁹³ It was accepted by Lord Lloyd in *Pinochet No 1*, 96 (‘Of course it is strange to think of murder and torture as “official” acts or as part of the head of state’s “public functions.” But if for “official” one substitutes “governmental” then the true nature of the distinction between private acts and official acts becomes apparent. . . . I have no doubt that the crimes of which Senator Pinochet is accused, including the crime of torture, were governmental in nature. . . . [I]t would be unjustifiable in theory, and unworkable in practice, to impose any restriction on head of state immunity by reference to the number or gravity of the alleged crimes.’)

¹⁹⁴ *Pinochet No 1*, 109.

The normative principles of international law do not require that such high crimes should be classified as acts performed in the exercise of the functions of a head of state.¹⁹⁵

In *Pinochet No. 3*, Lord Millett also stressed that international law must be internally coherent such that '[i]nternational law cannot be supposed to have established a crime having the character of a jus cogens and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose.'¹⁹⁶ Lord Hutton¹⁹⁷ and Lord Browne-Wilkinson¹⁹⁸ expressed similar points.

Consistent with the analysis in *Pinochet*, the English High Court in *Khurts Bat v The Investigating Judge of the German Federal Court*¹⁹⁹ permitted the extradition of Mr Bat, a Mongolian state official, to Germany where he faced charges of kidnapping a Mongolian national in France and then holding him captive in the Mongolian Embassy in Berlin for subsequent transfer to Ulaan Baator. These were clearly 'official acts' for the purposes of attribution in the law of state responsibility because Mr Bat was acting in accordance with the directions of the Mongolian Security Agencies and yet the High Court held that Mr Bat would not be entitled to assert the immunity of the State of Mongolia in these circumstances. The principal justification for this conclusion was the alleged exception to state immunity in respect of criminal proceedings brought against state officials for acts committed on the territory of the forum state. For the result to be consistent with the approach advocated here, it would be necessary to demonstrate that Mr Bat's actions were inconsistent with international norms directed to an individual's conduct. This point does not appear to have been argued before the High Court.²⁰⁰

¹⁹⁵ Ibid, 115-6. Lord Steyn left no doubt about his views on the merits of the alternative argument, *ibid*, 115 ('It follows that when Hitler ordered the "final solution" his act must be regarded as an official act deriving from the existence of his functions as head of state.')

¹⁹⁶ *Pinochet No 3*, 278.

¹⁹⁷ Ibid, 262 (Lord Hutton) ('The alleged acts of torture by Senator Pinochet were carried out under colour of his position as head of state, but they cannot be regarded as functions of a head of state under international law when international law expressly prohibits torture as a measure which a state can employ in any circumstances whatsoever and has made it an international crime.')

¹⁹⁸ Ibid, 205 ('How can it be for international law purposes an official function to do something which international law itself prohibits and criminalises?').

¹⁹⁹ *Khurts Bat v The Investigating Judge of the German Federal Court*, 101.

²⁰⁰ One potential source of relevant international norms had the acts in question occurred after 23 December 2010 is the International Convention for the Protection of All Persons from Enforced Disappearance (20 December 2006, entered into force 23 December 2010) No 48088, Doc A/61/488, CN 737 2008, adopted by UNGA Res A/RES/61/177 on 20 December 2006 ('Convention on Enforced Disappearance'). 'Enforced disappearance' is defined in art 2 as: 'the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.' Art 4 imposes an obligation on State Parties to criminalise such conduct. Mongolia is a party to the Convention.

E. State immunity for acts for foreign state officials in US Cases under the Alien Tort Statute and the Torture Victim Protection Act

The most fertile source of domestic cases dealing with the problem under consideration has been litigation under the Alien Tort Statute²⁰¹ ('ATS') and the Torture Victim Protection Act²⁰² ('TVPA') in the US courts. The ATS vests US district courts with 'original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States' and in essence allows non-US citizens to seek civil damages from defendants who commit gross violations of international law anywhere in the world. The Supreme Court has clarified in *Sosa v Alvarez-Machain* that the ATS is a jurisdiction-conferring enactment but does not itself create a new cause of action for torts in violation of international law.²⁰³ A tort pleaded under the ATS appears to be a hybrid of the common law (supplying the remedy for instance) and international law (providing the standard for actionable conduct). In *Sosa*, the Supreme Court ruled that it is impermissible to draw from the entire corpus of modern international law in fashioning a new cause of action in the common law. Instead: 'courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.'²⁰⁴ Those paradigms are torts corresponding to three primary offences set out in Blackstone's Commentaries: violation of safe conducts, infringement of rights of ambassadors, and piracy.²⁰⁵ Whilst the Supreme Court declined to provide an exhaustive account of the modern norms of international law that meet this test, it did endorse the decisions of inferior courts that recognised a cause of action for torture²⁰⁶ and for the violation of 'definable, universal and obligatory norms'.²⁰⁷

The TVPA establishes a civil action for victims of torture or extrajudicial killing by an individual acting under actual or apparent authority or colour of law of any foreign nation. The Senate Report noted in respect of the TVPA that 'because no state officially condones torture or extrajudicial killings, few such acts, if any, would fall under the rubric of "official actions" taken in the course of official duties'.²⁰⁸

The following does not purport to be an exhaustive account of all the important ATS and TVPA cases but rather a survey of those cases in

²⁰¹ 28 USC § 1350.

²⁰² 106 Stat 73.

²⁰³ *Sosa v Alvarez-Machain*, 714-5.

²⁰⁴ *Ibid*, 725.

²⁰⁵ *Ibid*, 721.

²⁰⁶ *Ibid*, 732; referring to *Filártiga*, 890.

²⁰⁷ *Ibid*, 732; referring to *Tel-Oren v Libyan Arab Republic* 726 F 2d 774, 781 (DC Cir 1984) and *Estate of Marco Human Rights Litigation* 25 F 3d 1467, 1475 (9th Cir 1994) (hereinafter '*Marco Human Rights Litigation II*').

²⁰⁸ S Rep No 102-249 (1991) 8.

which US courts that have exercised jurisdiction under these statutes have dealt with questions of foreign state immunity for the acts of individual defendants.

In *Samantar v Yousuf et al*²⁰⁹ a number of claimants sued the defendant, a former defence minister of Somalia, in his personal capacity seeking damages under the TVPA in respect for acts including, *inter alia*, extrajudicial killing for which they alleged the defendant was responsible. The defendant sought to have the allegations dismissed on grounds that such acts, even if true, would amount to official acts and as such attract state immunity under the FSIA. The Supreme Court rejected this application holding that the claim 'is properly governed by the common law because it is not a claim against a foreign state as the [FSIA] defines this term'.²¹⁰ As a result of this finding, many judgments rendered by inferior US courts must now be examined in a different light.

Although the Supreme Court did not exclude the possibility that the defendant may be able to assert immunity at common law, the Court stated that 'we do not doubt that in *some* circumstances the immunity of the foreign state extends to an individual for acts taken in his official capacity'.²¹¹ Hence, the Court implicitly recognised that the test for the scope of acts of a foreign state official that attract the immunity of the foreign state is not akin to attribution in the law of international responsibility. When the case was remanded to the District Court, Mr Samantar's claim of immunity was rejected.²¹²

In the earlier judgment of the Court of Appeal of the Ninth Circuit in *Chuidian v Philippine National Bank and Paul Daza*²¹³ (not an ATS case), Mr Daza, a member of a public commission established to recover assets accumulated by the former President of the Philippines, had instructed the Philippine National Bank not to make payment under a letter of credit with the claimant, Mr Chuidian. This action was taken because Mr Daza had suspected that Mr Chuidian had entered into a fraudulent arrangement with the former President. The Court held that Mr Daza would 'not be entitled to sovereign immunity for acts not committed in his official capacity'²¹⁴ and that 'sovereign immunity will not shield an individual who acts beyond the scope of his authority ...'²¹⁵ The Supreme Court in *Samantar*²¹⁶ noted, albeit in *obiter dictum*, that these findings 'may be correct as a matter of [United States Federal] common-law principles'.²¹⁷

²⁰⁹ *Samantar v Yousuf*.

²¹⁰ *Ibid*, 19.

²¹¹ *Ibid*, 16 (emphasis added).

²¹² *Ibid*.

²¹³ *Chuidian v Philippine National Bank*.

²¹⁴ *Ibid*, 1103.

²¹⁵ *Ibid*, 1106.

²¹⁶ *Samantar v Yousuf*.

²¹⁷ *Ibid*, 17.

The first finding rests upon the uncontroversial proposition that a foreign state's immunity does not extend to acts of its officials not taken under colour of public authority.

The second finding is potentially more controversial. The Court of Appeals referred to the Supreme Court's earlier judgment in *Larson v Domestic and Foreign Commerce Corp.*,²¹⁸ where it held:

[T]he officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief.²¹⁹

This was, however, a domestic action against a US governmental officer. For the reasons stated above, the rule of customary international law cannot simply reflect the doctrine of *ultra vires* in national legal systems. In subsequent cases the US courts have fallen into the same error by adopting this as the basis for imputing the acts of foreign state officials to the foreign state for the purposes of immunity.

In *Hilao v Estate of Marcos*,²²⁰ for instance, the Court of Appeals of the Ninth Circuit contrasted the immunity of the foreign state as defendant in *Siderman de Blake v Republic of Argentina*²²¹ with the claims for torture under the ATS brought against 'the estate of an individual official who is accused of engaging in activities outside the scope of his authority.'²²² The Court concluded that the estate of former President Marcos was not entitled to immunity under the FSIA because 'Marcos's acts of torture, execution, and disappearance were clearly acts outside of his authority as President.'²²³ According to the Court:

Immunity is extended to an individual only when acting on behalf of the state because actions against those individuals are 'the practical equivalent of a suit against a sovereign directly' . . . A lawsuit against a foreign official acting outside the scope of his authority does not implicate any of the foreign diplomatic concerns involved in bringing suit against another government in the United States Courts.²²⁴

This decision was not rationalised on the basis of international norms prohibiting the conduct in question, but appears to rest primarily upon the evidence of the Philippine Government (which intervened in the proceedings) to the effect that former President Marcos's acts were contrary to the law of the Philippines. It has been argued that a *renvoi* to

²¹⁸ 337 US 682 (1949).

²¹⁹ *Ibid.*, 689.

²²⁰ 25 F 3d 1467 (1994) (hereinafter '*Hilao v Estate of Marcos*').

²²¹ *Siderman de Blake*.

²²² *Hilao v Estate of Marcos*, 1472.

²²³ *Ibid.*

²²⁴ *Ibid.*

national law is not appropriate in fashioning the rule of customary international law as to the circumstances in which the acts of a foreign state official are to be imputed to the foreign state, such that the latter is the appropriate defendant to the action. International law does impose individual responsibility for acts of torture and forced disappearance and that would have been a more solid foundation for declining to uphold the immunity of the Philippines in respect of those acts. Alternatively, given that the Philippine Government expressly endorsed the action against Marcos's estate,²²⁵ it waived the immunity that vests in the State of the Philippines (and not the former President's estate). This should have been sufficient to dispose of the claim to immunity. It was surely, moreover, the real reason why, in the circumstances of this litigation, that '[a] lawsuit against a foreign official acting outside the scope of his authority does not implicate any of the foreign diplomatic concerns involved in bringing suit against another government in the United States Courts'.

In *Xuncax v Gramajo*,²²⁶ the US District Court for Massachusetts was concerned with the applicability of the FSIA to claims of torture, summary execution and arbitrary detention against the former Minister of Defence of Guatemala, Mr Gramajo. In holding that foreign state immunity was unavailable to an individual in respect of such acts, the Court stated that 'the acts which form the basis of these actions exceed anything that might be considered to have been lawfully within the scope of Gramajo's official authority'.²²⁷ This finding was not accompanied by an examination of the laws in Guatemala regulating the Minister of Defence's conduct at the relevant. It is a finding that would have been on a firmer basis had the Court referred to the dictates of customary international law in respect of the conduct of individuals.

In *Cabiri v Assasie-Gyimah*,²²⁸ the claim was once again for acts of torture. The US District Court for the Southern District of New York held that: 'the alleged acts of torture committed by Assasie-Gyimah fall beyond the scope of his authority as the Deputy Chief of National Security of Ghana. Therefore, he is not shielded from Cabiri's claims by the sovereign immunity provided in the FSIA.'²²⁹ The Court was impressed by the universal condemnation of torture by states and the fact that 'no state claims a right to torture its own citizens'.²³⁰ As in *Xuncax*, however, the Court also paid (unnecessary) lip service to the law of Ghana: '[the defendant] does not argue that such acts are not prohibited by the laws of Ghana; nor could he.'²³¹

²²⁵ Ibid.

²²⁶ 886 F Supp 162, 167 (D Mass 1995).

²²⁷ Ibid, 176.

²²⁸ 921 F Supp 1189, 1191 (SDNY 1996) (hereinafter '*Cabiri v Assasie-Gyimah*')

²²⁹ Ibid, 1998.

²³⁰ Quoting *Siderman de Blake*, 717.

²³¹ *Cabiri v Assasie-Gyimah*, 1198.

In contrast, the US Court of Appeals of the Seventh Circuit was more explicit in its reliance upon the *jus cogens* quality of the prohibition of torture in *Enahoro v Abubakar*.²³² Several Nigerian nationals pursued claims against Nigeria's former head of state for atrocities committed by the military junta that ruled Nigeria from November 1993 until May 1999. In relation to Mr Abubakar's claim to the immunity of the State of Nigeria, the Court held that 'officials receive no immunity for acts that violate international *jus cogens* human rights norms (which by definition are not legally authorized acts)'.²³³

In *Belhas v Ya'alon*,²³⁴ an action was brought by victims of the Israeli bombing of the UN compound in Qana in Southern Lebanon during 'Operation Grapes of Wrath'. The defendant was the former Head of Army Intelligence and the action was commenced against him while he was visiting the United States. It was submitted on behalf of the claimant that General Ya'alon acted outside the scope of his authority because he allegedly violated Israeli law and/or committed a violation of a *jus cogens* norm. Both submissions were rejected by the Court of Appeals of the District of Columbia on the basis that the FSIA does not create an exception to the foreign state's immunity for either type of transgression.²³⁵ These findings, which are reflected in several other decisions of the US Federal Courts,²³⁶ must now be reconsidered in light of the Supreme Court's decision in *Samantar* on the non-applicability of the FSIA to foreign state officials. Following the approach advocated in this study, a violation of the law of the foreign state would not be sufficient as

²³² 408 F 3d 877 (7th Cir 2005).

²³³ *Ibid*, 893. The Court of Appeals held that the Nigerian claimants had to pursue their claims for torture and extrajudicial killing under the TVPA rather than the ATS and hence were subject to the exhaustion of remedies requirement in the TVPA.

²³⁴ 515 F 3d 1279 (DC Cir 2008) (hereinafter '*Belhas v Ya'alon*').

²³⁵ *Ibid*, paras 22-23.

²³⁶ *Eg Doe v Israel; Herbage v Meese; Chuidian v Philippine National Bank*, 1103 ('We thus join the majority of courts which have similarly concluded that section 1603(b) can fairly be read to include individuals sued in their official capacity'); *Kline v Kaneko* 685 F Supp 386, 389 (SDNY 1988) (FSIA applies 'to individual defendants when they are sued in their official capacity'); *Marcos Human Rights Litigation II*, cert denied, *Marcos-Manotoc v Trajano*, ('agency or instrumentality of a foreign state' includes individuals acting in their official capacity); *Bryks v Canadian Broadcasting Corp* 906 F Supp 204, 210 (SDNY 1995) (FSIA immunity extends to agents of a foreign state acting in their official capacities); *Rios v Marshall*, 530 F Supp 351, 371 (SDNY 1981) (official of foreign government instrumentality protected by FSIA); *American Bonded Warehouse Corp v Compagnie Nationale Air France* 653 F Supp 861, 863 (ND III 1987) (defendants sued in their capacities as employees of state instrumentality are protected by FSIA); *Velasco v Indonesia* 370 F 3d 392, 398 (4th Cir 2004) ('courts have construed foreign sovereign immunity to extend to an individual acting in his official capacity on behalf of a foreign state'); *Park v Shin*, 313 F 3d 1138, 1144 (9th Cir 2002) ('Individual government employees may be considered "foreign states" within the meaning of the FSIA.');

Keller v Central Bank of Nigeria 277 F 3d 811, 815 (6th Cir 2002) ('Normally foreign sovereign immunity extends to individuals acting in their official capacities as officers of corporations considered foreign sovereigns.');

Byrd v Corporacion Forestal y Industrial De Olancho SA 182 F 3d 380, 388 (5th Cir 1999) ('Normally, the FSIA extends to protect individuals acting within their official capacity as officers of corporations considered foreign sovereigns.');

El-Fadl v Central Bank of Jordan 75 F 3d 668, 671 (DC Cir 1996) ('An individual can qualify as an agency or instrumentality of a foreign state when acting in his official capacity on behalf of the state.').

a basis for claiming that the foreign state official was not acting in the service of the foreign state for the purposes of state immunity. The violation of a peremptory norm of international law, however, would provide such a basis.²³⁷ It is clear on the facts of the *Belhas* case, however, that it would not have assisted the claimant. The Court of Appeals reasoned:

[O]ur rejection of the purported jus cogens exception in no way intends to imply that the alleged inaction by a military officer against whom there are no allegations of personal acts of illegality would fall within such an exception even if we were to recognize the existence of such an exception to the FSIA immunity.²³⁸

Following the approach advocated in this study, in cases where the acts of the foreign state official are not addressed by international norms directed to the conduct of individuals, those acts must be considered to be acts in the service of the foreign state such that the foreign state is the proper defendant and entitled to assert its immunity from the proceedings before the courts of the forum. A good example is provided in *Herbage v Meese*²³⁹ (not an ATS case). It was asserted by the claimant, Herbage, that a number of British law enforcement officers had provided false information to a magistrate in London, who caused him to be arrested and extradited from the United Kingdom. The US District Court of Columbia found that:

[T]he actions of which Herbage complains are ones that those defendants could have taken only in their official capacities. These officials were acting as law enforcement officers. Indeed, it is difficult to see how these persons could be sued, and held potentially responsible, in their individual capacities for actions they took at the behest of their government or at the very least 'under color of law.'²⁴⁰

Whilst the Court (incorrectly) based its decision on the lack of an exception to the FSIA, this finding would be sufficient to dispose of the immunity question in favour of the defendants and the United Kingdom.

Likewise, in *Kline and Ors v Kaneko and Ors*,²⁴¹ the allegation was that Mexico's Secretary of Government, Bartlett Diaz, organised for the claimant to be abducted from her apartment in Mexico and expelled from the country without due legal process. It was demonstrated by evidence submitted by Mexican Government officials to the US District Court for the Southern District of New York that the Secretary of Government is responsible for the implementation and enforcement of Mexican immigration laws and that Bartlett Diaz exercised the powers vested in his office when he expelled the claimant. The

²³⁷ A contrary finding was made in: *Matar v Dichter* 563 F 3d 9 (2d Cir 2009).

²³⁸ *Belhas v Ya'alon*, para 22.

²³⁹ *Herbage v Meese*.

²⁴⁰ *Ibid*, 66.

²⁴¹ *Kline v Kaneko*.

claimant argued that the expulsion had occurred without an extradition hearing and with no due process, but had failed to challenge the defendant's affirmation that he acted in his official capacity. The Court correctly affirmed Mexico's state immunity from the proceedings in these circumstances, such that the claim against the Secretary of Government had to be dismissed.²⁴²

In some cases under the ATS, the nature of the acts of the foreign state official was considered in the context of the act of state doctrine rather than the non-commercial tort exception pursuant to the FSIA. In these instances the US courts followed a similar approach by rejecting the possibility of shielding acts for foreign state officials from judicial scrutiny when such acts violated fundamental human rights principles enshrined in the constitution of the relevant state. It would have been more consistent with the approach advocated here to ground the justification by reference to peremptory norms of international law such as the prohibition of torture but it is clear that the result would have been the same.

In the first modern claim asserting jurisdiction under the ATS, *Filártiga v Peña-Irala*,²⁴³ Dr Joel Filártiga alleged that Mr Peña-Irala, a former police inspector-general in Paraguay, had tortured to death his son whilst in Paraguay under colour of state authority. Dr Filártiga was a well-known opponent of the Stroessner Government in power at the time. Both Dr Filártiga and Mr Peña-Irala were resident in the United States at the time of the suit. The Appeals Court of the Second Circuit found that 'deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties'²⁴⁴ and that the ATS gave jurisdiction over an action asserting such a tort committed in violation of the law of nations.²⁴⁵ Peña-Irala sought to rely upon the act of state doctrine and in response to this submission, the Court of Appeals stated: 'We note in passing, however that we doubt whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could properly be characterised as an act of state.'²⁴⁶

Likewise, in *Kadic v Karadzic*,²⁴⁷ claims were brought under the ATS for genocide, war crimes and other instances of inflicting death, torture

²⁴² Ibid, 390.

²⁴³ *Filártiga v Peña-Irala*.

²⁴⁴ Ibid, 878.

²⁴⁵ Ibid.

²⁴⁶ Ibid, 889-90. When the case was remanded to the District Court, the Act of State doctrine was found not to be applicable: 577 F Supp 860 (1984) 861. This echoes the judgment of the Israeli Supreme Court in *AG of Israel v Adolf Eichmann* (1962) 36 ILR 277, 312 ('The very contention that the systematic extermination of masses of helpless human beings by a Government or regime could constitute "an act of state", appears to be an insult to reason and a mockery of law and justice.')

²⁴⁷ 70 F 3d 232 (1995).

and degrading treatment against the self-proclaimed leader of 'Srpska', an entity that exercised *de facto* control over part of Bosnia-Herzegovina. The US Court of Appeals for the Second Circuit stated that: '[W]e doubt that the acts of even a state official, taken in violation of a nation's fundamental law and wholly ungratified by that nation's government, could properly be characterised as an act of state.'²⁴⁸

F. International norms impacting upon the scope of acts of foreign state officials entitled to state immunity

Whether or not the acts of the foreign state official in question were in the service of the foreign state is a question governed by customary international law and must be answered on the basis that customary international law is internally coherent. In other words, the rule under consideration must be consistent in operation with the three sets of international norms that are directed to the conduct of individuals. These norms are summarised in this section.

1. Norms creating individual responsibility in international law

The first set of norms are those which create individual responsibility in international law for the proscribed conduct of state officials (or individuals generally). International criminal law is the most fertile ground for such norms. There must be coherency in the interpretation of different specialised areas of international law and there would be a direct contradiction between the law of state immunity and international criminal law, for instance, if national courts were disabled from securing remedies for the victims of such crimes because the acts of the individual perpetrator were considered to be acts in the service of the perpetrator's foreign state. This would be inimical to the whole concept of individual responsibility in international criminal law that was stated so clearly by the International Military Tribunal at Nuremberg in 1946:

Crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced... *individuals have duties which transcend the national obligations of obedience imposed by the individual state.*²⁴⁹

If a foreign state official owes duties in international law that '*transcend the national obligations of obedience imposed by the individual state*', then it follows that a criminal or civil action in national law with the object of directly or indirectly enforcing such duties against the foreign state

²⁴⁸ Ibid, 250.

²⁴⁹ International Military Judgment at Nuremberg, Judgments and Sentences, 1 October 1946, reproduced in (1947) 41 AJIL 172, 220-1.

official cannot be simultaneously blocked by a rule of customary international law that has the effect of making the foreign state answerable for a transgression of those duties and not the individual state official.²⁵⁰ That would be the result of treating the acts of the foreign state official said to be in breach of the international norm as acts in the service of the foreign state such that the latter becomes the proper defendant in the proceedings and can then assert its jurisdictional immunity. Indeed, the Nuremberg Tribunal itself expressed the incompatibility between the notion of a foreign state official's individual responsibility and a claim to be protected by the immunity of the foreign state:

The principle of international law which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.²⁵¹

The leading source of norms under consideration is Article 25 of the Rome Statute of the International Criminal Court, which upholds individual criminal responsibility for the crimes within the jurisdiction of the Court.²⁵² The crimes within the jurisdiction of the Court are: the crime of genocide;²⁵³ crimes against humanity;²⁵⁴ war crimes;²⁵⁵ and, the crime of aggression.²⁵⁶ The Statute is silent on whether individuals are responsible under customary international law for the commission of such crimes, but it is generally accepted that this is the case in accordance with the Nuremberg Principles.²⁵⁷

²⁵⁰ *Prosecutor v Blaskic*, para 41.

²⁵¹ *Re Goering* (1946) 13 ILR 203 (IMT) 221.

²⁵² Rome Statute of the ICC, art 25(2). Art 25(3) also stipulates the forms of participation in such crimes that are actionable.

²⁵³ *Ibid*, art 6.

²⁵⁴ *Ibid*, art 7.

²⁵⁵ *Ibid*, art 8.

²⁵⁶ According to *ibid*, art 5(2): 'The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with arts 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.' The Assembly of State Parties of the International Criminal Court adopted Resolution RC/Res.6 (16 June 2010) on 'The Crime of Aggression' at the Review Conference of the Rome Statute, 13th Plenary Session, on 11 June 2010, which introduces addenda to the ICC Statute on the crime of aggression. It is now open to ratification by the State Parties. It cannot enter into force until after 1 January 2017 and requires a further vote.

²⁵⁷ In 1946, the UN General Assembly adopted by unanimous vote Resolution 95(I), *Affirmation of the Principles of International Law recognised by the Charter of the Nuremberg Tribunal*, adopted on 11 December 1946, UN Doc A/64/Add 1 ('The General Assembly...[a]ffirms the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal.'). I Brownlie, *Principles of Public International Law* (7th edn OUP, Oxford 2008), 598 ('... the provisions of the Statute of the International Criminal Court constitute good evidence of the offences forming part of general international law').

2. *International norms obliging states to exercise prescriptive jurisdiction competence in respect of the conduct of foreign state officials*

The second set of norms are those which define prohibited conduct of state officials (or individuals generally) under international law and simultaneously compel states to establish individual responsibility within their national legal orders in respect of such conduct.²⁵⁸ It is not necessary that the obligation to exercise prescriptive jurisdiction competence be an obligation to exercise universal jurisdiction competence. It is sufficient that the forum state is obliged to prohibit certain conduct by an international norm and that prohibition extends, in accordance with the obligation, to the conduct of foreign state officials. Acts of a foreign state official that fall within the scope of the prohibition are not entitled to be considered as acts in the service of the foreign state in addressing an assertion of immunity.

One source of relevant norms is the grave breaches regime established by the Geneva Conventions and the Additional Protocol of 1977 in respect of international armed conflicts.²⁵⁹ Whilst the relevant provisions of the Geneva Conventions do not create individual responsibility in international law, they do compel states to 'enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed' grave breaches and to prosecute or extradite those persons.²⁶⁰ These provisions clearly contemplate the prosecution of foreign state officials. It also appears to be accepted that such norms form part of customary international law. The International Committee for the Red Cross, for instance, maintains that '[i]ndividuals are criminally responsible for war crimes they commit'²⁶¹ at least in respect of '[s]erious violations of international humanitarian law'²⁶² which presumably would include grave breaches of the Geneva Conventions and Additional Protocol I as well as war crimes under customary international law.

²⁵⁸ It has been estimated that there are some 300 treaties imposing obligations to proscribe certain acts as criminal offences under national law and to extradite or prosecute alleged offenders in the territory of the state party. A Clapham and S Marks, *International Human Rights Lexicon* (OUP, Oxford 2005) 227.

²⁵⁹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (GC I), art 50; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (GC II), art 51; Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (GC III), art 130; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GC IV), art 147.

²⁶⁰ GC I (ibid), art 49; GC II (ibid), art 50; GC III (ibid), art 129; and GC IV (ibid), art 147.

²⁶¹ ICRC Study on Customary International Humanitarian Law, available at: <<http://www.icrc.org/customary-ihl/eng/docs/home>> accessed 5 October 2011, Rule 151.

²⁶² Ibid, Rule 152.

Other examples include the Convention on Torture, which has already been analysed in some detail,²⁶³ and the International Convention for the Protection of All Persons from Enforced Disappearance (2006). Both conventions expressly define the prohibited conduct in terms of acts by state officials and compel state parties to exercise prescriptive jurisdiction competence to criminalise such conduct within their national legal orders.²⁶⁴

3. *International norms with a peremptory status*

The third relevant set of norms is those with a peremptory status in international law. The overlap with the first and the second set of norms is considerable, but nonetheless the justification in respect of peremptory norms is subtly different. In the case of peremptory norms,²⁶⁵ it is not the substitution of the foreign state for the state official as the proper defendant that is incoherent given that the foreign state is simultaneously responsible in international law for violations of peremptory norms by its officials. Nor is it the conflict between the obligation to prohibit certain conduct of foreign state officials as a matter of national law, on the one hand, and the obligation to recognise such conduct as in the service of the foreign state, on the other. It is rather that any authority to commit acts in violation of an international norm with peremptory status under the national law of the foreign state is void and such acts can never be ratified by the foreign state.²⁶⁶ The conferral of authority for the acts in question is no longer a matter within the domestic jurisdiction of the foreign state. Whatever the objective or purpose served by the authorisation of the acts on behalf of the foreign state, the authorisation is not entitled to recognition by customary international law (or indeed in any national law) because 'international law postulates that it is impossible for a State to sanction an act that violates its severe prohibitions'.²⁶⁷ An act contrary to a peremptory norm is not entitled to be considered an act in the service of the foreign state for the purposes of the foreign state's immunity.

This normative consequence of *jus cogens* is the best explanation of how US courts have decided the question of foreign state immunity in proceedings against state officials alleged to have committed torture, kidnapping, summary executions and so on. It will be recalled that in

²⁶³ See Part 3 above.

²⁶⁴ The Convention on Enforced Disappearance stipulates that the crime of 'enforced disappearance' defined in art 2 can only be committed by 'agents of the State' or 'persons acting with the authorisation, support or acquiescence of the State.'

²⁶⁵ Without entering into the perpetual debate as to which norms of international law have peremptory status, there is consensus that the following are included within that category: the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination: ILC Commentary to the ASR, Commentary to art 26, 85, para 5.

²⁶⁶ *Furundžija*, para 155.

²⁶⁷ *AG of Israel v Adolf Eichmann*, 309-10.

Xuncax v Gramajo,²⁶⁸ the Court stated that ‘the acts which form the basis of these actions exceed anything that might be considered to have been lawfully within the scope of Gramajo’s official authority’.²⁶⁹ The law of Guatemala, which defined General Gramajo’s official authority, was not consulted by the Court. But this conclusion was entirely justified because the acts in question violated peremptory norms of international law and hence, from the perspective of a US court applying a rule of customary international law, the law of Guatemala was irrelevant. The same approach was taken in *Cabiri v Assaie-Gyimah*,²⁷⁰ where the Court held that: ‘the alleged acts of torture committed by Assaie-Gyimah fall beyond the scope of his authority as the Deputy Chief of National Security of Ghana.’ More explicit in its reliance on the peremptory quality of the international norms in question was the Court of Appeals in *Enahoro v Abubakar*, which held that ‘officials receive no immunity for acts that violate international *jus cogens* human rights norms (which by definition are not legally authorized acts)’.²⁷¹

It is important to distinguish this conception for the role of a peremptory norm of international law within the context of foreign state immunity from the more familiar argument that a peremptory norm trumps the conflicting norm of state immunity. According to the analysis advocated in this study, there is no conflict between international norms and thus no reason to assert a hierarchical relationship between them. The task as formulated in this study is to provide the best interpretation of the international norm regulating the scope of acts of foreign state officials that are imputed to the foreign state such that the foreign state is deemed by law to be the proper defendant in the action. The best interpretation of this norm must take into account the systemic claims of other branches of international law. As previously stated, it would be logically inconsistent for international law to impose individual responsibility in respect of certain acts and at the same time impute those acts to the foreign state to the exclusion of the individual’s responsibility for the purposes of state immunity. Nor would it be rational for international law to defer to the domestic jurisdiction of states in respect of acts that cannot have international validity even within that domestic jurisdiction. Acts of foreign state officials that transgress peremptory norms of international law cannot be considered as acts in the service of the foreign state because no authorisation for such acts under the law of the foreign state is entitled to recognition by international law. The international norm that defines the scope of such acts for the purposes of state immunity must be interpreted consistently with the concept of peremptory norms of international law.

²⁶⁸ *Xuncax v Gramajo*.

²⁶⁹ *Ibid*, 176.

²⁷⁰ *Cabiri v Assaie-Gyimah*.

²⁷¹ *Enahoro v Abubakar*, 893.

G. Procedural aspects of the proposed solution

It must always be remembered that the immunity under consideration vests in the foreign state as a corporate entity. If the foreign state elects to assert that immunity, then such an assertion must be channelled through an authorised representative of the state. If proceedings are commenced against a state official who is not a member of the class of high ranking officials or diplomatic representatives in the forum state, then that state official is very unlikely to be an authorized representative for the purpose under consideration. This gives rise to a procedural difficulty that is overcome in practice by two devices.

The first is the generally accepted principle that a foreign state's immunity must be considered *proprio motu* by the forum court even where the foreign state is not named as a defendant or does not otherwise participate in the proceedings.²⁷² In circumstances where proceedings are commenced against a foreign state official for acts that appear *prima facie* to rest upon an exercise of public authority, the forum state should raise the question of the foreign state's immunity *proprio motu*. The second device can be regarded as the logical procedural consequence of the first. Once the question of the foreign state's immunity is raised, the foreign state should be entitled to join the proceedings as a third party.²⁷³ If the forum court ultimately decides that the foreign state's immunity from jurisdiction applies to the proceedings against the foreign state's official then, as a corollary, the proper defendant to the proceedings is the foreign state. The court should then dispose of the proceedings by striking out the proceedings against the state official as being against the wrong defendant and declining jurisdiction in the proceedings against the foreign state on the basis of its immunity from that jurisdiction.

Where the claimant or prosecutor in proceedings before the courts of the forum state can establish a *prima facie* case that the acts of the foreign state official violate an international norm directed to the conduct of foreign state officials, then such acts cannot be treated as acts in the service of the foreign state by the courts of the forum state. The foreign state is not the proper defendant to such proceedings and no jurisdictional immunity can be asserted. The forum court will proceed to hear the merits of the criminal prosecution or the civil claim.

An objection might be raised as to the fairness or desirability of adjudicating the question of whether an international norm may have been violated at a preliminary phase of the proceedings before the evidence substantiating the allegations against the foreign state official has been laid out before the court.²⁷⁴ This objection loses much of its force,

²⁷² *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion of 29 April 1999) [1999] ICJ Rep 62, para 67: national court must consider the question of immunity 'as a preliminary issue to be expeditiously decided *in limine litis*. See, in the UK, the State Immunity Act, s 1(1).

²⁷³ See, eg, *Re P (No 2)* (1999) 114 ILR 488 (CA).

²⁷⁴ A concern raised by the ICJ in the *Jurisdiction Immunities Case*, para 82.

however, if the nature and the context of the adjudication on this question are properly understood.

First, in respect of the context, foreign state immunity is an exception to adjudicatory competence in international law. For the court of the forum state to have reached the point at which it is deciding whether a *prima facie* case can be made that the acts of the foreign state official violate the international norm, it must have logically satisfied itself pursuant to the *lex fori* that there has been a proper exercise of prescriptive competence in respect of the acts in question by the forum state and that the court has a proper basis for exercising adjudicative competence over the defendant. In a criminal prosecution this will entail that the alleged conduct is sanctioned by the criminal legislation of the forum state and the defendant is present in the territory of the forum state. In a civil action this means that the forum court has upheld exercised its jurisdiction over the defendant and the action under its own jurisdictional rules and, in certain instances, has concluded that the applicable substantive law discloses a serious issue to be tried on the merits.²⁷⁵

National courts frequently consider the question of state immunity in the abstract for reasons of perceived procedural efficiency: if state immunity is upheld then the question of jurisdiction becomes moot. The International Court of Justice followed the same approach in considering the legality of the position taken by the Belgian courts in the *Arrest Warrant* case. This practice is undesirable because it places undue pressure on the test for state immunity by denying the doctrine of jurisdiction in international law its role as a filter on the cases that can properly be subject to the adjudicative competence of the forum state's courts.

In *Jones v Saudi Arabia*, it was claimed that the relevant connection with England for jurisdictional purposes was psychological harm suffered in England in circumstances where the physical injuries were inflicted in Saudi Arabia by a Saudi official. The Master of the High Court denied the claimant permission to serve out of the jurisdiction upon the Saudi official on grounds of Saudi Arabia's state immunity without determining whether the High Court would have jurisdiction over the individual in question. At the Court of Appeal, Lord Justice Mance (as he then was) was correct to underscore the importance of considering the question of jurisdiction at least in conjunction with the question of state

²⁷⁵ If the defendant foreign state official is not present within the jurisdiction of the English court, then permission to serve out on the defendant would be required and the claimant would have to satisfy the court that: (i) there is a serious issue to be tried on the merits; (ii) there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given; and (iii) the English court is clearly or distinctly the appropriate forum for the trial of the dispute in all the circumstances. *Seaconsar Far East Ltd v Bank Markazi Jomhourī Islāmī Iran* [1994] 1 AC 438, 453-7 (HL). In relation to a tort claim, requirement (ii) would entail a good arguable case that damage was sustained within the jurisdiction or the damage sustained resulted from an act committed within the jurisdiction: CPR, Practice Direction 6B – Service Out of the Jurisdiction.

immunity.²⁷⁶ He was also correct to emphasize the role of the English court's jurisdictional rules (such as the doctrine of *forum non conveniens*) in acting as a filter upon claims against foreign state officials.²⁷⁷ One might take some comfort from the prophecy of one of the most experienced international jurists, Elihu Lauterpacht, as to 'what would happen if the immunity of foreign States in national courts were totally abolished':

In theory, the way would be open to proceedings against States in respect of acts *jure imperii*. But what would this amount to in practical terms? [...] The probability is that most actions involving acts *jure imperii* would, on the application of generally accepted rules of private international law, be dismissed either because the substantive law applicable to the matter was found to give rise to no cause of action, for example, because the *lex loci delicti* did not treat that particular kind of conduct as a wrong, or because the forum was *non conveniens*.²⁷⁸

Second, the determination of whether the foreign state official has violated a norm of international law such that the acts in question are incapable of characterisation as acts in the service of the foreign state is not a determination on the substantive issues underlying the cause of action in national law. The cause of action will either be for criminal liability under a domestic statute or for civil liability for an intentional tort. A determination at a preliminary phase of the proceedings that there is a *prima facie* case that the acts of the foreign state official are censured by an international norm has no relevance to the court's adjudication on the merits of the prosecution or claim, should the court decline to uphold a plea of foreign state immunity. Even where the international norm actually supplies the cause of action before the forum court in those jurisdictions where international law may be directly applicable, the determination of this preliminary question will be without prejudice to the responsibility or liability of the foreign state official on the merits.²⁷⁹

This is not to deny that there are reputational and political consequences that attend a finding that a foreign state official must stand trial in the forum state because his or her acts cannot be regarded as

²⁷⁶ 'In a case in which it is sought to advance a limited theory of state immunity, a firm understanding of the extent or limits of English domestic jurisdiction may, it seems to me, be a useful starting point.' *Jones v Saudi Arabia* (CA) 721, para 30. Elsewhere he appeared to express regret in relation to the manner in which the case had been dealt with at first instance: 'The difficulty we face is that the limited basis on which the present cases were decided below means that there was no argument there or before us about either the basis on which or circumstances in which jurisdiction could or should be exercised if state immunity is not an absolute bar to the claims against individuals.' *Ibid*, 754, para 80.

²⁷⁷ *Ibid*, 752-3, para 97.

²⁷⁸ E Lauterpacht, *Aspects of the Administration of International Justice* (Grotius, Cambridge 1991) 56.

²⁷⁹ An analogy can be drawn with an international tribunal's power to indicate provisional measures. A *prima facie* case of jurisdiction must be established by the moving party to obtain provisional measures. If provisional measures are ordered by the international tribunal, it is nonetheless at liberty to disregard its initial finding on a *prima facie* basis and subsequently decline its jurisdiction once it has heard the full submissions of the parties.

acts in the service of the foreign state. Against this consideration, however, must be weighed the pernicious erosion of the international rule of law that follows adherence to a position whereby acts expressly censured by international norms directed to individual conduct are simultaneously accepted as acts in the service of the foreign state and thus entitled to immunity. Lord Greene once said in the Court of Appeal that 'I do not myself find the fear of the embarrassment of the Executive a very attractive basis upon which to build a rule of English law'.²⁸⁰ Fear of the embarrassment of a foreign state is no more an attractive basis upon which to build a rule of customary international law, especially when other rules of the same legal system would be irreparably undermined if that path were to be taken.

VI. CONCLUSIONS

The principal conclusions of this study can now be summarised:

- a. In circumstances where a foreign state official is the defendant in proceedings before the forum state's court, it is necessary to determine by reference to customary international law whether the particular acts of the official that form the basis of the proceedings can be imputed to the foreign state such that the foreign state is the proper defendant to the exclusion of the individual official and can assert its immunity from the jurisdiction of the forum state's court.
- b. The rules of attribution in the law of international state responsibility cannot be relied upon to determine this question. The rules of attribution are concerned with identifying whether there has been an exercise of the state's public power in fact. No consequence in law attends a positive identification of the exercise of the state's public power by an individual or entity unless and until the state is found to have breached an international obligation.
- c. By contrast, the rules of state immunity serve to reconcile competing claims of legal right: the forum state has a right to adjudicate the civil or criminal responsibility of a foreign state official who is properly within its jurisdiction whereas the foreign state has a right not to have matters properly within its domestic jurisdiction reviewed by the courts of other states. Where proceedings are brought against a foreign state official in his individual capacity, moreover, the application of the rules of state immunity have substantive consequences in respect of the cause of action for criminal or civil liability: the foreign state is substituted for its official as the proper party to the action. The liability of the foreign state official is thereby extinguished in respect of that cause of action at least in so far as the *lex fori* applies to that cause of action.

²⁸⁰ *Kawasaki Kisen Kabushiki Kaisha of Kobe v Batham Steamship Company Ltd* [1939] 2 KB 544 (CA) 552.

- d. There is, therefore, no principled basis for insisting upon a symmetry between the rules of attribution and the rules of state immunity in this context. Both serve distinct normative functions and their application results in divergent normative consequences.
- e. There is also no principled basis for insisting upon different approaches to the question of immunity for the acts of foreign state officials in criminal and civil proceedings. There is no rigid dichotomy in many national legal systems in terms of the remedies available in criminal and civil proceedings as is evidenced by the institution of the *action civile*. Nor does responsibility in international law rest upon such a distinction. Both criminal punishment and civil liability operate to vindicate important standards and must be considered as complementary aspects of a holistic response to a particular wrong.
- f. The Convention on Torture reflects this conception of the relationship between criminal punishment and civil liability by ensuring that victims of torture have access to compensatory remedies in circumstances where a State Party is obliged or has undertaken to prosecute the perpetrators of torture, in accordance with Article 14.
- g. The Convention on Torture only applies to a particular subset of perpetrators of torture: those acting in an official capacity. That does mean that, if the perpetrator falls within that subset as defined by Article 1 by virtue of having acted in an official capacity, that characterisation is definitive for the application of the distinct rules on state immunity or any other rules of international law. Article 1 is simply the gateway provision to the substantive obligations upon the State Parties to the Convention.
- h. The best interpretation of the relevant state practice against the background of the fundamental principles underlying the international legal system is that acts of the foreign state official in the service of the foreign state must be considered as the acts of the foreign state such that the foreign state is the proper defendant to the action and can invoke its immunity from the jurisdiction of the foreign court. The formulation 'acts of the foreign state official in the service of the foreign state' does not encompass: (i) acts of a foreign state official that do not rest upon an exercise of public power; or, (ii) acts of a foreign state official proscribed by international norms directed to the conduct of individuals. The formulation does encompass acts that are *ultra vires* the national rules governing the public office in question but which are not otherwise proscribed by international norms directed to the conduct of individuals.
- i. Where proceedings are brought against an individual foreign state official to impose liability under national law for acts that are simultaneously proscribed by a norm of international law that is directed to the conduct of individuals, those acts cannot be characterised as acts in discharge of a public duty or function in assessing the foreign state's entitlement to assert its jurisdictional immunity. Such acts cannot be said to be in the service of the state as a matter of international law because international law prohibits the individual from serving the state in that manner.
- j. With respect 'to acts of a foreign state official proscribed by international norms directed to the conduct of individuals', the limited class of international norms creating individual responsibility in international law or compelling individual responsibility in national law are most prominent within

the domains of international criminal law (the international crimes of genocide, crimes against humanity, war crimes and aggression) and international humanitarian law (the grave breaches regime) and also extend to those norms of international human rights law that have attained a peremptory status within the international legal order.