Chapter 6
Equality of States and Immunity from Suit: A Complex Relationship

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Abstract This article takes Pieter Kooijmans' 1964 book as the launching point for a discussion of contemporary issues relating to the legal equality of States in the context of immunity from suit. It assesses the strengths of the '*Grundnorm*' of sovereign equality and examines whether it has any real role to play in providing answers to current problems, including whether immunity should be set aside in the face of claims that a foreign State or its agent has committed human rights violations. Close attention is paid to the 2012 Judgment of the International Court of Justice in the *Jurisdictional Immunities of the State* case. That Judgment demonstrates that sovereign equality has not yet been replaced as the generating principle of law in the realm of immunity. At the same time, there is an emerging alternative approach centered on the individual rather than the State.

Keywords Equality of states · Sovereign equality · State immunity · Human rights · International crimes · International Court of Justice

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6.1 Introduction

Pieter Kooijmans' *The Doctrine of the Legal Equality of States*, published by Sijthoff in 1964, evidences a fine mind and impressive erudition. It already demonstrates the fairmindedness, liberalism and hardheaded realism that was to be present in the remarkable career that has followed.

His book addresses the issue of legal equality through a study of the great legal theories in classic international law and in the post-Grotian period. Pieter Kooijmans then proceeds to a study of legal equality by reference to 'new theories' (in which Kelsen's critical positivism was then ranked) and new doctrines.

Today we particularly associate the concept of the legal equality of States with the post-war prohibition on the use of force, save in self-defence, and with the doctrine of sovereign immunity. As to the latter, there were few problems and little to dispute until midway through the last century.

This essay, however, takes the work that Pieter Kooijmans has done in his book as the basis for a discussion of contemporary issues relating to the legal equality of States in the context of sovereign immunity.

The equality of States is 'a fundamental axiomatic premise of the legal order'.[1] For some, it is the '*Grundnorm*', and those aspects of international law with which we most associate the concept of equality of States – for example, the prohibition of the use of force save in self-defence, non-intervention, sovereign immunity – are seen as rules that flow from this *Grundnorm*. Even for common law lawyers less used to thinking of '*Grundnorms*', the equality of States is indeed the essential starting point.

This essay will attempt to assess the strengths of this norm today and to ask whether the notion of sovereign equality of States has any real role to play in providing the answers to the contemporary stresses bearing upon the concept of sovereign immunity. From this essential point of departure of the equality of States (and respect for their sovereignty) came the original agreement that there was absolute immunity for States from the adjudicative and enforcement jurisdiction of other States.

[1] Kokott 2007, para. 1.

Early cases according immunity to a State frequently cited the principle of sovereign equality of States, and its invocation has not disappeared today.[2] This has been the position in customary international law. Over the years certain 'exceptions' to this principle of immunity have emerged. Some of these exceptions have been to accommodate another principle that flows from sovereign equality of States, namely that a State has jurisdiction over persons within and events occurring within its own territory. Alluding – perhaps in not the clearest terms – to national jurisdiction and State immunity, the International Court of Justice recently said that

> [t]his principle [sovereign equality] has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty, and the jurisdiction which flows from it.[3]

Nonetheless, the national legislation and treaty texts which have sought to address this principle of customary international law do not speak of the primary rule being that of State jurisdiction over its own territory, giving rise to certain exceptions. They speak of sovereign immunity as the point of departure, with 'exceptions' thereto by way of permitted exercise of national jurisdiction.[4]

As the Court of Appeal for Ontario put it in the *Bouzari v. Iran* case that

> the concept of sovereign equality of states … [is] a principle rooted in customary international law. However, over the years, the dictates of justice have led to some attenuation in the absolute immunity of states, through the evolution of certain specified exceptions to the general rule. Nevertheless, the doctrine of restrictive immunity[5] which has emerged continues to have the general principle of state immunity as its foundation.[6]

And in 2002 in *Schreiber v. Canada (Attorney-General)* Lebel J observed that

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[2] See *Underhill v Hernandez* (1897) 118 US 456; *Duke of Brunswick v King of Hanover* (1848) 2 HL Cas 1; *Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening)*, ICJ, Merits, Judgment of 3 February 2012, para. 57; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium),* ICJ, Merits, Judgment of 14 February 2002, paras. 1 and 62. See also the 2009 Naples Resolution of the *Insitut de droit international,* Article II(1): 'Immunities are conferred to ensure an orderly allocation and exercise of jurisdiction in accordance with international law in proceedings concerning States, to respect the sovereign equality of States and to permit the effective performance of the functions of persons who act on behalf of States.'

[3] *Jurisdictional Immunities of the State*, para. 57. This last point had already been emphasized in the Joint Separate Opinion by Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case, para. 3.

[4] See, e.g., 2004 United Nations Convention on the Jurisdictional Immunities of States and their Property, Annex, UN Doc. A/RES/59/38, art. 5 and the 1978 UK State Immunity Act, s 1(1).

[5] See below Sect. 6.2.

[6] *Bouzari et al. v. Islamic Republic of Irani* (2004) 243 DLR (4th) 406, paras. 40-41.

> [d]espite the increasing number of emerging exceptions, the general principle of sovereign immunity remains an important part of the international legal order …[7]

And so it is that all national legislation and international treaties on the matter of State immunity are drafted in terms of 'the rule' (absolute immunity) and 'exceptions' (articulated in the instrument concerned).[8]

6.2 Restrictive Immunity

The transition from the universal acceptance of immunity for States in all circumstances to a confinement of that immunity to *acta jure imperii*[9] is interesting to trace. Of course, as the strangulated wording in the United Nations Convention on the Jurisdictional Immunities of States and their Property of 2004 (UNCSI, still not in force) in Article 10 evidences, it is still not universally agreed that absolute immunity is not available in all cases.

In looking to see whether the old rule of absolute immunity could have exceptions, various factors were in play, such as the increased participation of States in commercial activities. The Italian courts in the 1880s took the first steps, with the courts of that country basing their judgments on legal policy reasoning, differentiating between the State as a sovereign and as a subject of private law.[10] Belgian courts and the mixed courts of Egypt also endorsed the restrictive doctrine in their judgments at the turn of the twentieth century.[11]

Some considerable years after these judicial decisions, there was the so-called Tate letter of 1952,[12] in which the United States announced, as a matter of policy, that it would no longer grant immunity from US jurisdiction to potential defendants who had been trading.

The English courts in *The Philippine Admiral*,[13] and a stream of cases that then followed, used these events in Italy and the US to show that there was, in the famous words of Lord Denning,[14] a 'trickle' that had become a 'flood' in accepting the *acta jure imperii* limitation to immunity from jurisdiction. The main problem

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[7] *Schreiber v. Canada (Attorney General)* (2002) 216 DLR (4th) 513, para. 17.

[8] See 1978 United Kingdom State Immunity Act s 3(3); 1976 United States Foreign Sovereign Immunities Act s 1605; 1972 European Convention on State Immunity Articles 1-15; UNCSI, arts. 5, 10-17.

[9] For a brief description, see Fox 2008, at 224-226.

[10] See, e.g., *Guttieres v. Elmilik* (1886), Foro It. 1886-I, 913 (cited in Fox 2008, at 224).

[11] *SA des Chemins de Fer Liégeois-Luxembourgeois v. l'Etat Néerlandais*, Pasicrisie belge 1903, I294; Hoyle 1987.

[12] Letter of 19 May 1952 from the Acting Legal Adviser of the Department of State, Jack Tate, to the Acting Attorney-General Philip B. Perlman (reprinted in 26 Dep't St. Bull. 984-985 (1952)).

[13] *Philippine Admiral (Owners) Appellants v. Wallem Shipping (Hong Kong) Ltd and Another* (1977) AC 373.

[14] *Trendtex Trading Corporation v. Central Bank of Nigeria* (I977) QB 529, at 556.

of UK courts of the time, who wished to follow this new line of restrictive immunity, was being able to extract themselves from the precedent of previous cases[15] which affirmed the immunity was total.

Two particular points of interest arise. The first is that, if a widely ratified international treaty text cannot be achieved, then a rule can only be changed if there is evidence of such change in the acknowledged sources of international law, to show State practice. The Italian cases and the Tate Letter (judicial findings and pronouncements of the Executive) were numerically modest examples, but Italy and the US were important trading nations, and the widespread mood in other States in a comparable position was to gain the same protection for themselves.[16] Second, while the principle of sovereign equality of States continued to be invoked by those insisting upon absolute immunity,[17] the argument for the move to restrictive immunity was that States sometimes acted as traders, and the principle of sovereign equality of States had no pertinence.

6.3 Territorial Torts

Where torts are concerned, there is a sharp counterpointing of the principle of *par in parem non habet imperium* with the principle of jurisdiction over one's own territory. So important is the principle of territorial jurisdiction that there is significant evidence in State practice of where it has in effect prevailed. Article 11 of the European Convention on State Immunity of 1972 (ECSI) renders non-immune 'proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred'. The United States Foreign Sovereign Immunities Act of 1976 (FSIA) stipulates that

> [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 …[18]

[15] E.g., *The Tervaete* (1922), at 274; *The Cristina* (1938) AC 485.

[16] Fox 2008, at 226-230.

[17] See, e.g., *FG Hemisphere LLC v. Democratic Republic of Congo*, Hong Kong Court of Final Appeal: Bokhary, Chan and Riberio PJJ, Mortimer and Sir Anthony Mason NPJJ: FACV No. 5, 6 and 7 of 2010, decided 8 June 2011.

[18] FSIA, s 1605(a)(5).

The United Kingdom State Immunity Act of 1978 (SIA) provides that

> A State is not immune as respects proceedings in respect of:
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> (a) death or personal injury; or
> (b) damage to or loss of tangible property,
>
> caused by an act or omission in the United Kingdom.[19]

And it is interesting to see that in the UNCSI it was agreed that

> [u]nless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission, which is alleged to be attributable to the State, if the act or omission occurred in the whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.[20]

The drafting may leave something to be desired, but the general thrust is clear.

There is thus a general consensus that the right of a State to exercise its jurisdiction over personal injuries and damage to property occurring on its territory prevails over the entitlement of a State to insist that the equality of States prevents another State from exercising jurisdiction over its acts.

We will wish to return to the ramifications of the tort exception to immunity. But it is convenient at this juncture that the UK SIA specifies further in Section 3(1)(b) a State is not immune as regards a contract obligation ('whether a commercial transaction or not') which falls to be performed wholly or in part in the United Kingdom.[21] But there does seem to be a more general consensus that there is no immunity in respect of a contract of employment between the State and an individual for work performed or to be performed in whole or in part in the territory of the forum State.[22] The strength of territorial jurisdiction is today outweighing the principle of equality of States – *par in parem non habet imperium* – once thought essential.

And added to that list of exceptions to the general immunity rule are other events that have a close connection with the territory of the forum State: the constitution of companies; ownership, possession and the use of property; and intellectual and industrial property that is under the protection of the law in the forum State.[23]

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[19] UK SIA, s 5.

[20] UNCSI, art. 12 headed 'Personal injuries and damage to property'.

[21] This provision does not appear in the UNCSI nor FSIA. It is included in ECSI in Article 4.

[22] UNCSI, Article 11; UK SIA, s 4.

[23] See Articles 12-13 UNCSI; s 6-8 UK SIA; Articles 6-8 ECSI; s 1605(a) FSIA.

6.4 Current Problems

With this much recounted, it can be seen that the concept of immunity, save for territorial contracts and torts, and save for when a State is acting commercially, today leaves many problematic areas.

- The first relates to crimes under domestic law in the forum State.
- The second relates to crimes under international law, in the forum and elsewhere.
- A third relates to claims that the grant of immunity denies rights granted to individuals under human rights treaties.

These problems will be briefly deployed, along with the underlying question of whether the principle of equality of States has any real role in resolving them.

6.4.1 Crimes by a Foreign State, or Agent of the State, in the Territory of the Forum

Why, it may be asked, if there is no immunity for contracts for performance within the forum State (the test of *acta jure gestionis* having no relevance), and for torts occurring within the forum State, should immunity continue for *crimes* performed within the forum?

It can indeed be argued that, in the balance to be struck between the law of immunity and the exercise of territorial jurisdiction, the tipping of the balance in favour of the latter is even stronger where a violation of the territorial State's criminal law is concerned.

The International Court approached this question in somewhat complex circumstances in the case of *Djibouti v. France*.[24] Among the many claims, it was asserted that those claiming to be in the service of Djibouti had entered France with the intent of tampering with witnesses in a domestic litigation relevant to the case before the ICJ. Did a State have to afford immunity to agents of a foreign State who are performing criminal acts – clearly going beyond mere torts – on its territory?

The Court in effect sidestepped this difficult issue. The persons concerned did not benefit from the Vienna Convention on Diplomatic Relations of 1961. Moreover, none of the normal diplomatic exchanges that would have been expected had occurred. Thus the claim for immunity of persons said to be State organs is really, said the International Court, a claim for the immunity of the State concerned, Djibouti. And, said the Court, '[t]he State which seeks to claim immunity for one of its State organs [would be] expected to notify the authorities

[24] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, ICJ, Merits Judgment of 4 June 2008.

of the other State concerned.'[25] And, added the Court – pointedly in the light of the claims about the actions of the persons concerned –

> the State notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its State organs, is assuming responsibility for any internationally wrongful act in issue committed by such organs.[26]

So, in the event, the question was not directly answered as to whether there was not – notwithstanding an absence of pertinent clauses in the relevant treaties and national legislation – a greater policy interest in the principle of territorial jurisdiction over crimes than in the principle of the equality of States.

The *Pinochet* case[27] cannot safely be read as determinative of general principles, partly because of the very specific facts of the case, including that Spain, Chile and the UK were parties to the UN Convention against Torture at the relevant time (since 1988) and that Pinochet was no longer in public office at the time of the request for extradition. The influence of the case is also constrained by the very different reasoning offered in the speeches of their Lordships. But later, in *Jones v. Saudi Arabia*,[28] Lord Bingham of Cornhill, making allusion to the fact that it concerned criminal proceedings, observed that certain members of the House of Lords had said that immunity for such acts in civil proceedings remained unaffected.[29]

6.4.2 Crimes Under International Law on the Territory of the Forum

This matter, which has long been festering, has come to the fore again, in more striking form, in the recent case of *Germany v. Italy*. At the heart of this case was the question of whether Italy had violated international law by allowing claims against Germany to proceed in Italian courts.[30] These were certainly not *acte jure gestionis* and did not fall within any of the acknowledged exceptions to immunity. For its part, Italy claimed that it is not for violations of the law of armed conflict

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[25] Ibid., at 244, para. 196.

[26] Ibid., at 244, para. 196.

[27] *Regina v. Bow Street Metropolitan Stipendiary Magistrate (Pinochet III)*, 1 A.C. 61 (2000) AC 147.

[28] *Jones v. Saudi Arabia (*2006) UKHL 26.

[29] See, e.g., Lord Hoffman, who commented that there was nothing in the Torture Convention which creates an exception to immunity in civil proceedings. *Jones v. Saudi Arabia*, at 23.

[30] The claims fell into three categories: victims and their relatives of the large-scale killing of civilians in occupied territory as part of a policy of reprisals; members of the civilian population who were deported from Italy to what slave labour in Germany; and members of the Italian armed forces who were denied the status of prisoner of war to which they were entitled and who were also used as forced labourers. *Jurisdictional Immunities of the State*, para. 52.

that international law accords immunity to a State. It also insisted that vile crimes could simply not constitute *acte jure imperii* – the sovereign acts of a State. These were not the sovereign acts that were ever intended to be protected by this doctrine. The Court, in its detailed judgment, observed that

> [t]he rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1 of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order.[31]

However, sovereign equality

> has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory.[32]

The Court went on to say that exceptions to the immunity of a State 'represent a departure from the principle of sovereign equality'.[33] All the relevant treaties and acts say that the rule is immunity, although there are exceptions.[34] But the Court hinted at territorial jurisdiction as the 'prime rule': 'Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it.'[35]

Perhaps we begin to see a small movement away from sovereign equality as a norm for all seasons in the present world… There has long been the feeling that although immunity is described in the relevant acts and treaties as 'the' rule, with increasing numbers of exceptions, the 'reality' is that a State has no immunity unless it can show it is engaged in *acta jure imperii*.

In the case of *Germany v. Italy*, there were three points canvassed of very particular importance. The first is whether the terrible acts behind this litigation could ever be described as *acta jure imperii*. The second was whether permitted jurisdiction in the case of acts by a State amounting to torts on the territory of the forum State should not *a fortiori* allow jurisdiction in the case of crimes committed by a State on the territory of the forum State. And the third – and slightly different contention – was that fearful acts, often contrary to *jus cogens*, were not protected by the law of immunity. Put differently, (which was the way the Court chose to cast it) it is not the terrible nature of the acts involved that provide a foundation for jurisdiction.

Some words may be said on each of these. Could acts contrary to international law ever constitute *acta jure imperii* on which a State could rely in an immunity

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[31] Ibid., para 57.

[32] Ibid., para. 57.

[33] Ibid.

[34] UNCSI, ECSI, the 1983 draft Inter-American Convention on Jurisdictional Immunity of States, and the national legislation of Argentina, Australia, Canada, Israel, Japan, Singapore, South Africa, UK, and USA.

[35] *Jurisdictional Immunity of the State*, para. 57.

claim? The Court did not find this hard to answer. Indeed, Italy, in response to a question by a member of the Court, acknowledged that the acts concerned were *acta jure imperii*, notwithstanding that they were unlawful.[36] And the fact that Germany admitted throughout that the acts were unlawful 'does not alter the characterization of those acts as *acta jure imperii*'.[37] This must be right: the tests for *acta jure imperii* do not relate to legality. The tests are different ones.

On the matter of torts by States on the territory of another, there appeared to be mixed practice as to whether relevant legislation or treaties applied *at all* to foreign armed forces.

The Court, in a very thorough analysis on this point, noted that in no national legislation was the 'tort exception' limited in terms to the *acta jure imperii*. And Article 31 of the ECSI had the effect that the acts of armed forces in the territory of another fell outside the Convention and were to be decided by customary international law. Although there was no comparable clause in the UNCSI, no one had challenged certain ratifying States which had stated their understanding that the Convention does not apply to military activities.[38] The Court's trawl of national legislation showed variation in terminology, but

> in none of the seven States in which the legislation contains no general exception for the acts of armed forces, have the courts been called upon to apply that legislation in a case involving armed forces of a foreign States …[39]

The Court found that State practice in the form of judgments of national courts 'suggest[s] that a State is entitled to immunity in respect of *acta jure imperii* committed by its armed forces on the territory of another State.'[40] This conclusion was reached after very thorough survey of State judicial practice. The Court found that this is also confirmed by judgments of the European Court of Human Rights.[41]

As explained above, this analysis is thorough and can be regarded as correct. At the same time, we have noted that the principle of sovereign equality has bowed in the face of sovereign exercise of jurisdiction over events within a State's own territory. But the Court's (entirely correct) analysis of the law of immunity with respect of armed forces suggests that the sovereign exercise of jurisdiction over acts in one's own territory tips back in favour of *par in parem non habet imperium* where foreign military acts are concerned.

This situation has to be seen as curious and in the view of this writer is unlikely to stand the test of time. It is inherently anomalous that the exercise of territorial

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[36] Ibid., para. 60.

[37] Ibid.

[38] Ibid., para. 69. Moreover, when presenting to the Sixth Committee of the General Assembly the Report of the Ad Hoc Committee, the Chairman of the Ad Hoc Committee stated that the draft UNCSI 'had been prepared on the basis of a general understanding that military activities were not covered'. UN doc. A/C.6/59/SR.13, para. 36.

[39] *Jurisdictional Immunity of the State*, para 71.

[40] Ibid., para. 72.

[41] Ibid., para. 71.

jurisdiction prevails over immunity where torts are concerned, but not where criminal acts of a foreign military are concerned. There will surely be more to this legal story in the years to come.

So far as what we may term 'regular crimes' by the foreign military are concerned (i.e., theft, rape, etc.), very often bilateral and multilateral status of forces agreements (SOFAs) allocate jurisdiction and provide for the settlement of disputes between the visiting armed forces of the sending State, sent under agreement, with sovereign equality intact, and the receiving State which had consented to its presence on its territory.

But where a foreign military unlawfully enters the territory of another State, and there commits heinous crimes, the same issues are surely not in play.

6.4.3 *The Claim that Immunity Removes Other Substantive Rights*

Without purporting to enter into this topic in any detail, it may be recalled that a tension has arisen between the international law doctrine of sovereign immunity and Article 6(1) of the European Convention on Human Rights, which guarantees to an individual 'access' to court. It has been contended in a series of cases[42] that where a court denies that it has jurisdiction for reasons of immunity, the applicant individual has been denied his entitlement to access to a court.

The European Court of Human Rights has responded that European Convention rights are to be interpreted within the framework of general international law, and not as an instrument existing outside of it.[43] It has been assisted in reaching this conclusion by observing that the reasons for the immunity 'restriction' upon Article 6(1) are not in themselves objectionable.

A more terse analysis was offered by Lord Bingham in the *Jones v. Saudi Arabia* case, where – supporting an observation made elsewhere by Lord Millet – he commented that in his view, there was 'no access to give'.[44] He did not see this as a conflict of norms, rather as the fact that, without jurisdiction, there are no substantive rights at play.

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[42] E.g., *McElhinney v. Ireland,* ECtHR, No. 31253/96, 21 November 2001, para. 39; International Law Reports, vol. 123, para. 38; *Grosz v. France,* ECtHR, No. 14717/06, 16 June 2009; *Al-Adsani v. United Kingdom*, ECtHR, No. 35763/97, 21 November 2001, para. 61; International Law Reports, vol. 123, at 24. *Jones v. Saudi Arabia* is now pending before the ECtHR as *Jones v. UK*.

[43] *Al-Adsani v. United Kingdom*, para. 55.

[44] *Jones v. Saudi Arabia*, para. 14.

6.5 Immunity from Jurisdiction and Perpetration of International Crimes

Here the focus of discussion has been whether there is now an emerging trend to link the alleged crime with the availability of jurisdiction in the hands of the forum State.

Such issues as immunity in the face of heinous crimes; alternative recourse for injured parties; how to gauge whether 'new' customary law now exists; the distinctions between procedure and substantive law; and the question of whether crimes under international law can ever be *acta jure imperii*, are all at issue here. These are important, and difficult: but the principle of equality of States plays little part in resolving them.

The jurisprudence of the International Court of Justice is replete with dicta to the effect that it is not the nature of acts complained of that establishes jurisdiction. It will be recalled that the background to *Germany v. Italy* (2012) was that the Italian Court of Cassation in the *Ferrini* Judgment of 11 March 2004 had held that immunity did not apply in circumstances in which the act complained of constituted an international law crime.[45] The reasoning of the *Ferrini* Judgment was confirmed in other cases where the Italian Court of Cassation held that with respect to crimes under international law, the jurisdictional immunity of States was to be set aside.[46]

In *Germany v. Italy,* the ICJ at the outset acknowledged that the particular acts in issue of the German Reich had caused untold suffering, and that the vile acts concerned had displayed a complete disregard for elementary considerations of humanity.[47] After recounting in detail the events concerned, the Court noted that both parties acknowledged that immunity is a matter of international law and that it is not a matter of mere comity. As between Germany and Italy, any entitlement of the former to immunity would have to be derived from customary international law. Italy was not a party to the ECSI; neither Italy nor Germany were parties to the UNCSI, which in any event is not in force.

In the second of its arguments, Italy claimed that the acts of the German Reich amounted to war crimes and crimes against humanity, and there had indeed been violations of peremptory norms. In Italy's view this deprived Germany of any entitlement to immunity.

The Court points out the flaw in logic in acceding to this proposition:

> immunity from jurisdiction is an immunity not merely from being subjected to an adverse judgment but from being subjected to the trial process. It is, therefore, necessarily preliminary in nature.[48]

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[45] *Ferrini v. Federal Republic of Germany*, Decision No. 5044/2004 Rivista di diritto internazionale, vol. 87, 2004, at 539; International Law Reports, vol. 128, at 658.

[46] *Giovanni Mantelli and others* and the *Liberato Maietta* cases (Italian Court of Cassation, Order No. 14201 (Mantelli) Foro italiano, vol. 134, 2009, I, at 1568); Order No. 14209 (Maietta) Rivista di diritto internazionale, vol. 91, 2008, at 896).

[47] *Jurisdictional Immunities of the State,* para. 52.

[48] Ibid., para. 82.

The Court goes on to explain that a court cannot establish whether a serious violation of human rights law has been committed before deciding on whether immunity is available.[49] The dilemma is that

> [i]f immunity were to be dependent upon the State actually having committed a serious violation of international human rights law or the law of armed conflict, then it would be necessary for the national court to hold an enquiry into the merits in order to determine whether it had jurisdiction. If, on the other hand, the mere allegation that the State had committed such wrongful acts were to be sufficient to deprive the State of its entitlement to immunity, immunity could, in effect be negated simply by skilful construction of the claim.[50]

I fully agree that, as things stand today in State practice (national decisions, relevant treaties), it is not the heinousness of the offence that makes immunity unavailable. And this is even the case with offences that violate *jus cogens*. But the arguments of logic do not in fact seem to be insurmountable: it is really the will of States to develop the law, rather than principles of logic, which is *pro tem* the insurmountable hurdle. When international law supported the doctrine of absolute immunity, it could have been argued that to move to a doctrine of qualified immunity would require entering into the merits to see if the act in question was *gestionis* or *imperii* – thus putting matters relating to the merits ahead of the immunity decision.

In the event, this turned out to be a quite manageable transition. When it is contended that the forum courts have jurisdiction over acts of a foreign State or State company, and the State insists that the acts in question are *jure imperii*, attracting immunity, the forum courts hear arguments of the parties on precisely *that* question: namely the character of the acts as *imperii* or *gestionis*. And insistence by a sovereign State in a foreign court that the acts in question are not *gestionis* is neither a waiver of its claimed immunity nor does it necessitate going into the merits beyond ascertaining the nature of the acts. In other words, preliminary arguments on the categorization of certain acts claimed to have been perpetuated by the foreign State could take place with it being agreed that entitlement to immunity is not thereby waived, and without entering into the merits to decide if those acts *did* in the event occur, and at whose hands.[51]

In short, the constant contention by the International Court that alleged violations of international human rights law or the law of armed conflict necessarily fail to attract immunity, without entering into the merits before jurisdiction, is not

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[49] See *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ, Advisory Opinion, 29 April 1998, where the Malaysian courts intended to hear the legal actions in defamation against Mr Cumaraswamy first, and then revert to the question of his entitlement to immunity.

[50] *Jurisdictional Immunities of the State,* para. 82.

[51] Article 8(2) of UNCSI provides that '[a] State shall not be considered to have consented to the exercise of jurisdiction by a court of another State if it intervenes in a proceeding or takes any other step for the sole purpose of:

(a) invoking immunity; or

(b) asserting a right or interest in property at issue in the proceeding.'

wholly persuasive. Logic does not stand in the way of a change in the law of State immunity as regards major violations of human rights and the law of armed conflict. But I do fully accept that there is no sign yet that States are willing to embark upon this change.[52] Indeed, even when opportunities for change have been put to them, as in the drafting of the UNCSI, they appear determined to defend the *status quo*.

There have been attempts to resolve, in different ways, the disturbing ethical dilemma presented by the law of State immunity posited when a State, or a State entity, or those for whom a State has responsibility, engages in heinous crimes. Some have contended that the driving rationale for State immunity has been the inappropriateness of the courts of one State pronouncing on the *acta jure imperii* of another: *par in parem non habet imperium*. Perhaps most of the repugnance in the face of immunity in respect of international crimes could be resolved by a naming of the concept of what constitutes *acta jure imperii*.

For some, therefore, it is inconceivable that acts of savagery could be 'governmental acts' properly so-called. This contention has been heard in many cases.[53] In the *Pinochet* case in the United Kingdom House of Lords this argument was embellished by some judges[54] by the contention that a government which had just ratified the Torture Convention, which specifically prohibited certain acts, could not have intended that such acts be designated *acta jure imperii*, attracting immunity. The argument has immediate attraction – but it has to be remembered that parties to the Torture Convention have committed themselves to not engaging in torture; not to insisting that non-parties would have forfeited any claim to insist that such acts could in certain circumstances be seen as *acta jure imperii*.

The matter can be put differently. Before the changes initiated in Italy, in the United States and the United Kingdom, it was generally accepted that absolute immunity prevailed, by virtue of the principle of equality of States. The exception that came to be widely (but not totally)[55] accepted was that jurisdiction could be exercised when a State was acting as a trader, and not as a sovereign.[56]

To return to today's preoccupation with impunity in the face of heinous crimes, such acts are not *acte jure gestionis*, the permitted exception. The question of whether such dreadful acts can properly be characterized as *acta jure imperii* is an important and interesting one. In the *1º Congreso Partido* case in the House of

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[52] '… someone some time has to make the first move. One country alone may start the process. Others may follow. At first a trickle, then a stream, last a flood.' Lord Denning in *Trendtex Trading Corporation v. Central Bank of Nigeria,* para. 556.

[53] See cases cited in *Jurisdictional Immunities of the State*, para 85.

[54] For example, Lord Nicholls of Birkenhead.

[55] *FG Hemisphere LLC v. Democratic Republic of Congo*. See also the challenges during the negotiation of the UNCSI's exception for commercial transactions, which Fox observes was '[t]he most intractable problem on which there was sharp disagreement in the [International Law Commission] and through the discussion in the UNGA Sixth Committee.' Fox 2008, at 537.

[56] There were, of course, considerable problems about trading that was done through State companies: and in the eyes of the State concerned, sovereign activity was still being engaged in.

Lords, Lord Wilberforce (the then presiding judge) held that an *actus jure imperii* was 'an act that could not have been performed by an actor other than a State'.[57] Thus a State order to turn a ship away from a port, for political reasons, was *not* in his view an *actus jure imperii*: anyone could have ordered the turning around of a vessel. And the question of *purpose*, as is now well-established, is irrelevant to the characterization of the act. The UNCSI regresses from this established position; while it specifies the 'nature of the contract or transaction' is the primary criterion for the commercial transaction exception in Article 10, it adds 'purpose' as a second criterion to be taken in account

> if the parties to the … transaction have so agreed or if, in the practice of the State of the forum, that purpose is relevant to determining the non commercial character of the contract or transaction.[58]

In many UK cases, 'purpose' is rejected as a criterion.

If one accepts the Wilberforce definition of an *actus jure imperii* being an act that could not have been performed by an actor other than a State – which I find attractive, as limiting the scope of possible *acta jure imperii* claims – then one is inevitably faced with what degree or quantum of activity that falls within that definition. I have always thought it possible to argue in *Jones v. Saudi Arabia*[59] (now in the European Court of Human Rights) that the ill-treatment inflicted upon the claimants is not an *actus jure imperii*, as it *could* have been performed by any one, and not just by a State. The deference of immunity to jurisdiction was thus not necessarily to be accorded.

Regrettably, however, little attention has been paid to the Wilberforce dictum illuminating what is to be understood by an *actus jure imperii*. It has simply been accepted that State acts are immune from the exercise of jurisdiction in other States, no matter how contrary to international law and violative of human rights they might be. This is made crystal clear in *Germany v. Italy.* And, while correct, it is disturbing. The pattern is for a court or tribunal to intone (as did the ICJ in *Germany v. Italy*) that, although the forum court could not exercise jurisdiction, the State protected by immunity must accept its responsibility for the act and that the acts concerned cannot be formally exonerated. And that is then the end of the matter. There is no real redress for the injured State.[60]

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[57] *Playa Larga (Owners of Cargo Lately Laden on Board) Appellants v. I Congreso del Partido (Owners) Respondents, Marble Islands (Owners of Cargo Lately Laden on Board) Appellants v. Same Respondents* (1983) 1 AC 244, at 262.

[58] UNSCI, Article 2(2).

[59] *Jones v. Saudi Arabia*.

[60] See also the Court's remarks, devoid of operational reality, stating that a bar to jurisdiction because of immunity 'does not represent a bar to criminal prosecution' in certain circumstances. *Arrest Warrant*, para. 61.

6.6 Where are Immunity Issues Decided?

A phenomenon that is worth marking is the contemporary reluctance of States, in contrast to what has traditionally been done, to protest that the courts of the forum State lack jurisdictional competence to proceed and robustly to explain there (without in any way waiving immunity) why that is so. Developing States, in particular, do not feel that they wish to advance their arguments about immunity in this time-honoured way, especially when the courts of the forum are those of former colonial powers. Instead – and this brings us back to the question of respect for State sovereignty – they insist rather that the issue of a summons to a State official to attend as a witness,[61] the issue of a warrant for a witness hearing,[62] or the issue of a warrant against a State official[63] is an affront to State sovereignty, for which affront recourse to the ICJ is necessary.

Recent cases of the Court, which in former times would have been disposed of in national courts, include: *Arrest Warrant, Certain Criminal Proceedings in France* (since withdrawn), and *Djibouti v. France*.[64] At a certain level this is unfortunate, as national courts are the natural repository for findings on the law as it relates to State immunities. One only has to look at paragraphs 73 to 77 of *Germany v. Italy* Judgment to see this point illustrated. Too ready recourse to the ICJ for affronts to sovereign dignity is not a desirable path to embark upon. National courts still have a major role to play in the development of the law on State immunity.

There is a widespread and understandable clamour today to limit the immunity that States still have in respect of their *acta jure imperii* if such acts manifestly violate human rights. Why, it may be asked, if the great change from absolute to qualified immunity occurred in the last century on the basis of such few acts that could be claimed as 'sources of law', could a further limitation not be achieved today?

In my view, it cannot be done by the International Court alone. Although it should give judgments in a way that is conducive to the progressive development of international law, it cannot achieve desirable policy objectives if the way is not

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[61] *Djibouti v. France.*

[62] *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, ICJ, withdrawn on 16 November 2010.

[63] *Arrest Warrant.* See also *Application by Rwanda against France*, ICJ, 18 April 2007, which has not yet been entered on the General List pending the consent of France to the jurisdiction of the Court under Article 38(5) of the Rules of Court.

[64] See also *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (pending since 19 February 2009), regarding Senegal's compliance with its obligation to prosecute the former President of Chad, Hissène Habré, or to extradite him to Belgium for the purposes of criminal proceedings.

paved by the relevant sources of international law: treaties, and State practice in the form of relevant national legislation and national judicial decisions.[65] But there does not exist national legislation which envisages that immunity before the courts of another States should be waived if the claim is of massive violations of human rights. And the *only* judicial cases which made such a finding were exactly the Italian cases challenged by Germany in the *Germany v. Italy* case. And why, it is interesting to ask, should these Italian cases not perform exactly the same catalyzing role as did the cases of the 1880s in the move to rejecting immunity for *acta jure gestionis*?

The answer would seem to lie in the fact that in the move from absolute immunity to qualified immunity, the idea was taken up by others, such as the US and the UK. But the concept of an exception to the immunity rule for serious violations of human rights has not only not been followed elsewhere, but has not been introduced into the text of the UNCSI of 2004, even when that possibility was canvassed.[66] It also is nowhere suggested in the various national legislation that today exists on the question of State immunity.[67] Indeed, all such legislation – as well as the UNCSI and ECSI – is in fact still drafted in terms of absolute immunity of States with certain limited exceptions. And an exception to immunity by reference to the nature of the claim concerned is, with one exception,[68] nowhere to be found.

It is out of kilter with the times that States are immune from process in respect of acts generally agreed to be among the most vile, and abhorred by international law. But change will have to come from the legislating and executive acts of States, and perhaps the treaties they draw up. The ICJ can then, if the right type of legal dispute comes before it, seize upon trends to throw its weight behind a new limitation. But it cannot so act with no assistance in the actions of States, whether judicial or treaty regulation. It is a narrow line between international judicial activism in interpreting the law – which may on policy grounds be welcome – and the pure making of law, which is not the role of the Court.

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[65] This point is made with great clarity in O'Keefe 2011.

[66] The UNGA Sixth Committee Working Group stated that the question was of current interest, but 'the existence or non-existence of immunity in the case of violation by a State of jus cogens norms of international law' did not really fit into the present draft nor did it seem 'ripe enough … to engage in a codification exercise'. UNGA Sixth Committee Convention on Jurisdictional Immunities, Report of the Chairman of the Working Group, 12 November 1999, UN Doc. AC.6/54/L.12, paras. 46–8.

[67] E.g., UK SIA, US FSIA, 1981 South Africa Foreign States Immunities Act; 1985 Canada State Immunity Act; 1985 Australia Foreign States Immunities Act; 1985 Singapore State Immunity Act; 1995 Argentina Law No. 24.488 (Statute on the Immunity of Foreign States before Argentine Tribunals); 2008 Israel Foreign State Immunity Law; Japan, 2009 Act on the Civil Jurisdiction of Japan with respect to a Foreign State; Pakistan, 1981 State Immunity Ordinance.

[68] Torts committed on the territory of the forum state, see above.

Activists have the wrong target in their sights. They should bring pressure to bear on States, rather than berate the Court for conservatism, as they have done so in the wake of the *Germany v. Italy* case.

6.7 A Different 'Primary Rule' or '*Grundnorm*'?

So far, we have been examining the current state of sovereign immunity in international law, a matter which admits of no generalized answer – and testing the current standing of 'sovereign equality of States', as the generating principle of law. But there is, of course, a different approach altogether, which should be mentioned in concluding this essay.

As early as 2007, Kokott writing in the Max Planck Encycopedia of International Law, observed that

> another, rivaling Grundnorm of the international legal order is gaining ground, that States are no more than instruments whose inherent function is to serve the rights of individuals. The transformation from inter-state law to an individual-centered system has not yet found a definitive new equilibrium …[69]

It is this idea that is elaborated so robustly – and alone of all the Judges – by Judge Cancado Trindade in his dissenting Opinion in the *Germany v. Italy* case.

Judge Cancado Trindade's Opinion is not predicated upon one or more of the claimed 'exceptions' to the State immunity rule, itself based on the principle of *par in parem non habet imperium*. It comes at matters from a different direction entirely. He says that he seeks to rescue some doctrinal development, forgotten in our days.[70] In a learned discourse, based on 'the teachings of the most highly qualified publicists', as a 'source' in Article 38(1)(d) of the ICJ Statute, he points to individuals and to learned institutions who have emphasized fundamental human values as the most profound element in our understanding of international law.

Judge Cancado Trindade, with great thoroughness, goes through all expected issues, including the tensions in the case law of the European Court of Human Rights between issues of State immunity and right of access to justice. He performs the same task for national courts (which are an important source of law for State immunity).

Having done this in a systematic fashion, he then moves to new territory, surveying the tensions at play 'in the Age of Rule of Law at National and International Levels'. He writes of the rule of law as an idea that moves away from

[69] Kokott 2007, para. 4.

[70] *Jurisdictional Immunity of the State*, para. 3.

legal positivism and 'comes closer to the idea of an "objective justice", at national and international levels'.[71] And – here comes the big departure point for other liberally minded lawyers – he is not impressed by the contention that issues of jurisdiction always come ahead of substance. He writes that we are witnessing

> *jurisdictionalization* of the international legal order itself, with the expansion of international jurisdiction (as evidenced by the creation and co-existence of multiple contemporary international tribunals), the reassuring enlargement of the *access to justice* - at the international level - to a growing number of *justiciables* …[72]

Judge Cancado Trindade speaks of the distortions of the State-centric outlook of the international legal order.[73] His rejection of the availability of sovereign immunity to Germany in the particular case is attacked on a variety of fronts. Above all, for him the central norm of the international legal system is the individual's entitlement to justice, with reparation as the reaction of law to grave violations.

He finds that the Court's analysis in parsing

> incongruous case-law of national courts and the inconsistent practice of national legislations … [is an] exercise … characteristic of the methodology of legal positivism, overattentive to facts and oblivious of values.[74]

In a striking passage, he speaks of this tracing of cases and legislation as 'positivist exercises leading to the fossilization of international law, and disclosing its persistent underdevelopment'.[75] He speaks with a certain contempt about the counterpositions of 'primary' to 'secondary' rules, or of 'procedural' to 'substantive' rules. He comments, '[w]ords, words, words … where are the values?'[76] He rejects the Court's distinction between procedural law, where it 'situates immunity, … as it did in 2002 in the *Arrest Warrant* case' and substantive law. He observes:

> To me, the separation between procedural and substantive law is not ontologically nor deontologically viable: *la forme confound le fond*. Legal procedure is not an end in itself, it is a means to the realization of justice.[77]

All of these powerful arguments are impressively summarized in his Concluding Observations.

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[71] Ibid., para. 150.

[72] Ibid., para. 151 (footnotes omitted).

[73] Ibid., para. 161.

[74] Ibid., para. 293.

[75] Ibid., para. 294.

[76] Ibid., para. 294.

[77] Ibid., para. 295.

I have not thought here to offer a reasoned analysis of the views of Judge Cancado Trindade. I believe, for the reasons I have stated above relating to the various elements in play, that the Judgment of the ICJ in the *Germany v. Italy* case correctly reflects current international law. And, as I have made clear, I regard those NGO voices criticizing the failure of the Court to apply 'a human rights exception' as misdirected.

Everything thus far said has been based on what flows from the concept of equality of States, so carefully analyzed by Pieter Kooijmans in his book. While most writers are insisting that there is/should be an exception to equality of States in the context of human rights violations, Judge Cancado Trindade posits the interesting thought that the *Grundnorm* itself may be changing – towards a *Grundnorm* that replaces emphasis on sovereign equality by the test of access to justice at the international level and the individual's entitlement to justice. So here we have a more profound difference of view and time will tell whether it will develop in the practice in the States and in the literature.

6.8 Conclusion

Pieter Kooijmans' final pages in *The Doctrine of the Legal Equality of States* traverse, in a stimulating fashion, what he terms the 'practical elaboration of the principle of the legal equality of States'. But, understandably, the question of sovereign immunity was not there included. This essay has sought, somewhat presumptuously, to add to what he has written in these last pages.

It has to be borne in mind that States have an enormous stake in seeing the continuation of equality of States as an underlying norm. That principle continues to be seen as a protection for weaker States against the stronger. And all States are nervous of intervention by others in their own affairs, which possibility is minimized by the norm of sovereign equality of States. Our conclusion is that the notion of sovereign equality has had a key role in the formation of the doctrine of sovereign immunity; but that no comparable role is to be expected from it in the formulation of solutions to the complicated issues arising today in the field of sovereign immunity. The battle for a contemporary international law on sovereign immunity is still being fought. And the issues that are most intractable seem unlikely to find assistance in the notion of sovereign equality in arriving at an outcome satisfactory to all. More likely, it is other principles, together always with policy-oriented judicial decision-making – that in due course might do so.

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