

## STUDENT CONTRIBUTION

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# The Restrictive Immunity Doctrine and Employment Claims: Recent Trends in the Face of Competing Interests

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Yasir Gökçe\*

*Absolute immunity means that a State cannot exercise legislative, judicial or executive powers over another State due to the mere fact that the latter is sovereign. Today, it is rejected by a considerable number of States which represent various legal systems. States argue that private acts of a State performed jure gestionis, apart from the conducts performed jure impreeii, are justiciable. It can be asserted that the current State practice embracing the restrictive approach is the direction in which international law has been evolving. That said, States' interests which led to the adoption of State immunity still continue to induce legislative bodies and courts to be cautious in formulating a broad exception to immunity for employment contracts, causing them to refocus on the question of whether the employment relationship is destined for governmental, public, or sovereign purposes.*

### Keywords

Sovereign Immunity, Absolute Immunity, Restrictive Doctrine, Customary International Law, Exceptions to State Immunity, Employment Contracts.

\* Former Diplomat at the Ministry of Foreign Affairs of the Republic of Turkey; John F. Kennedy School of Government of Harvard University. LL.B. (Bilkent Univ.), LL.M. (Ankara Univ.), M.P.A. (Harvard). ORCID: <http://orcid.org/0000-0001-5329-4178>. The author may be contacted at: [gokceyasir@gmail.com](mailto:gokceyasir@gmail.com); [yasir\\_gokce@hks16.harvard.edu](mailto:yasir_gokce@hks16.harvard.edu) / Address: Fatih Mah. Sereflikochisar cad. No.79, Ortakoy Aksaray 68400 Turkey

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## I. Introduction

According to international customary law, a State cannot exercise legislative, judicial or executive powers over another State. This principle has long been grounded on the territorial integrity and political independence of States as one of the most widely-recognized rules of international law since the Westphalian Treaty. Accordingly, as an embodiment of its power, a State's sovereign existence could not be subjected to the jurisdiction of another sovereign, otherwise this would hamper its dignity, equality, and independence, which are the basic pillars of State immunity. Thus, immunity from jurisdiction has obliged States' courts not to exercise jurisdiction upon foreign States' conduct.<sup>1</sup>

The absolutists view is that a State is 'immune' just because it is sovereign. Today, however, this viewpoint is rejected by a considerable number of States representing various legal systems. They are arguing that private acts of a State performed *jure gestionis*, apart from the conducts performed *jure imperii*, are justiciable.<sup>2</sup> An increasing number of States have gradually embraced many treaties on State immunity which codify the restrictive immunity approach,<sup>3</sup> demonstrating the changing priorities of the global society.

This primary purpose of this research is to review the current trend towards the restrictive doctrine of State immunity with respect to employment contracts. This paper is composed of six parts. After careful examination of the national legislation and municipal court decisions suggesting the direction of international law regarding State immunity, this paper will lay out an international understanding on State immunity. This part will examine which criteria has been applied to ascertain the commerciality of a State conduct. In addition, the author explain how differently current States apply criteria when resolving disputes arising out of employment contract. What caused the municipal courts to differently handle an act performed by a State as an employer is also analyzed. He will assert that the current State practice adopting and embracing the restrictive approach is the direction in which international law has been evolving. Additionally, the sensitivities of States which prompted the adoption of the immunity rule in the first place continue to induce the legislatures and the courts to be cautious in formulating a broad exception to

<sup>1</sup> A. KACZOROWSKA, PUBLIC INTERNATIONAL LAW 392 (5th ed. 2015).

<sup>2</sup> E. BANKAS, THE STATE IMMUNITY CONTROVERSY IN INTERNATIONAL LAW: PRIVATE SUITS AGAINST SOVEREIGN STATES IN DOMESTIC COURTS 74 (2005).

<sup>3</sup> X. YANG, STATE IMMUNITY IN INTERNATIONAL LAW 12 (2012).

immunity for employment contracts. This trend incites States to refocus on the question of whether the employment relationship is destined for governmental, public, or sovereign purposes.

Article 38 of the Statute of the International Court of Justice lays down the sources of international law. It stipulates that ‘judicial decisions’ are the subsidiary means of determining the rules of law.<sup>4</sup> Given the lack of decision from international tribunals on the law of State immunity, the rulings of municipal courts reflect the nature of international obligation accepted by the forum States. Thus, municipal courts’ rulings identify whether or not a binding rule regarding State immunity exists or emerges. Likewise, as for the constant and uniform State practice as a consistent ground of customary international law,<sup>5</sup> national legislation and municipal courts’ decisions may also hold evidentiary value in determining the existence, nature or content of ‘international custom’ and ‘general principles of law’ with regard to State immunity.<sup>6</sup> In *The Parlement Belge* in 1880, to determine the rule as to whether or not the public property of a foreign State is immune from jurisdiction, the court looked at “whether all nations have agreed that it shall be.”<sup>7</sup> That said, the European Courts of Human Rights compared different national legislations and court rulings to find the exceptions to State immunity adopted by the majority of States in its several rulings.<sup>8</sup> In a nutshell, this paper frequently resorts to State practice in order to provide sound evidence of customary international law governing State immunity.

## II. The Rationale for State Immunity

A thorough examination of immunity requires comprehension of the compelling policy choices of States within the framework of their values and characteristics in the modern period. The development of sovereign immunity has been influenced by the States’ constitutional values such as independence, equality and dignity, the principles associated with sovereignty.<sup>9</sup> Legal and factual inability of a State to

<sup>4</sup> I.C.J. Statute art. 38(1).

<sup>5</sup> See Statement of Principles Applicable to the Formation of General Customary International Law, London Conference 2000 of the International Law Association, at 8, available at <http://legal.un.org/ilc/reports/2012/english/chp8.pdf> (last visited on Nov. 6, 2016).

<sup>6</sup> I.C.J. Statute art.38(1)(b)&(c). See also G. BADR, STATE IMMUNITY: AN ANALYTICAL AND PROGNOSTIC VIEW 111 (1984).

<sup>7</sup> *The Parlement Belge* (1878-79) 4 PD 129 (Probate, Divorce and Admiralty Division), Robert Phillimore (1879), § 205.

<sup>8</sup> *McElhinney v. Ireland and UK*, Eur. Ct. H. R., §§ 337-338 (2001).

<sup>9</sup> M. SHAW, INTERNATIONAL LAW 665-6 (7th ed. 2014).

enforce its judgment by forcible measures over another State has long been used as a justification for immunity. Another reason for immunity was the rationale that it was normal for a forum State to ensure that a foreign State could avail privileges the forum State was enjoying before foreign courts. It means that the most recognized justifications for immunity can also be found in the pertinent domestic and international texts governing foreign State immunity.<sup>10</sup>

A municipal court is not able to enforce its judgment over a foreign State.<sup>11</sup> Accordingly, a foreign State's act performed *jure imperii* in the exercise of sovereign power, cannot be adjudicated by the forum State.<sup>12</sup> Building on this ground, the French Cour de Cassation held in 1849 that a purchase of army boots by the Spanish government was among acts performed *jure imperii*, thus could not be adjudicated by French courts.<sup>13</sup> By the same token, the British Supreme Court in *the Parlement Belge* ruled that exercise of jurisdiction over the person of any sovereign or ambassador or any other State's public property had to be declined on the basis of both "the absolute independence of every sovereign authority and international comity which induces every sovereign State to respect the independence and dignity of every other sovereign."<sup>14</sup> However, it is also argued that subjecting a foreign State to the judicial process of the forum State does not impair the equality, independence and dignity of the former, especially in countries where public authorities can be impleaded before their own municipal courts.<sup>15</sup> Considering that even the absolute immunity recognizes the exceptions to immunity for immovables located in the forum State, or for claims related to succession, one may argue that exercising jurisdiction over a foreign State impairs its independence or equality is incoherent. Besides, equality of States can also be preserved through the submission of all States to the jurisdiction of one another, i.e., no immunity is applied to any of them.<sup>16</sup> Some argue that the dignity of a State cannot be served by immunity from judicial proceedings, because a State can equally hamper its dignity and commercial integrity if it persistently evades its commercial obligations. Thus, the restrictive immunity advances States' commercial interests.<sup>17</sup>

The immunity of foreign States has also been justified by reference to the immune

<sup>10</sup> H. FOX & P. WEBB, *THE LAW OF STATE IMMUNITY* 39 (3d ed. 2013).

<sup>11</sup> *Supra* note 4, at 464.

<sup>12</sup> *Supra* note 10, at 666.

<sup>13</sup> *Spanish Government v. Lambege and Pujot*, Jan. 22, 1849, Sirey, 1849 1, 81.

<sup>14</sup> *Supra* note 8, § 212.

<sup>15</sup> R. JENNINGS & A. WATTS (EDS.), *OPPENHEIM'S INTERNATIONAL LAW* 342 (9th ed. 1992).

<sup>16</sup> *Supra* note 11, at 37.

<sup>17</sup> *Id.*

position of the forum State under its own national law. Accordingly, the availing of extensive immunities by the forum State's proceedings has long been the basis for extension of similar immunities to the foreign State.<sup>18</sup> Nevertheless, such an extension would be equaizing the position of the foreign State provided that the forum State enjoys a protected position before its own domestic law. The development of mechanisms aiming at rendering the public authorities transparent and accountable via judicial review has worked against the special protected position of the forum State, thereby invalidating the aforesaid justification of sovereign immunity. To elucidate this, the Crown Proceedings Act of 1947 incrementally dismantled the privileges of the public authorities, representing the position of States that had been advocating for the restrictive doctrine. There was no reason for conferment of immunity to foreign sovereigns since the UK lacked the privileges of the same kind.<sup>19</sup>

### III. The Development of the Restrictive Doctrine

The notion of State immunity was brought by the Westphalian system. It induced the receiving States to grant immunity from criminal proceedings to ambassadors throughout the seventeenth century.<sup>20</sup> The UK took the immunity and inviolability of ambassadors seriously; it declared bringing a civil suit against an ambassador or his servants only as a criminal offense under the Diplomatic Privilege Act 1708.<sup>21</sup> By the late nineteenth century, the British courts recognized the diplomatic privileges and immunities of the ambassadors and other members of the mission, including their private servants, unlike the scheme of the Vienna Convention on Diplomatic Relations, which deprives certain servants of immunities.<sup>22</sup> Likewise, Heads of State such as king, prince, emperor, or char, who were regarded as the embodiment and representative of sovereign powers, retained absolute immunity before the courts of other sovereigns.<sup>23</sup>

The first authoritative decision in common law was *The Schooner Exchange*

<sup>18</sup> *Supra* note 4, at 57.

<sup>19</sup> *Rahimtoola v. Nizam Hyderabad* (1958) AC 379, 418.

<sup>20</sup> *Supra* note 3, at 40.

<sup>21</sup> *Supra* note 11, at 132.

<sup>22</sup> *Id.* at 102.

<sup>23</sup> *Supra* note 10, at 625.

*v. McFaddon* in 1812.<sup>24</sup> It granted immunity to a warship from courts of another State.<sup>25</sup> Then, *the Parlement Belge* case formulated a rule of absolute immunity without exception for commercial activities in English law, based on the established privileges of diplomats, personal sovereigns, and warships owned by State. *The Parlement Belge*, a State-owned ship which was carrying letters, merchandise, passengers and their luggage, was brought before the English courts for the damage arising out of collision suffered by the plaintiff's steam tug. In its ruling, the Court of Appeal held that, in addition to carrying mails, the vessel's partial use for trade did not deprive of its immunity. The ruling also recognized the principle that the immunity enjoyed by warships extends to State-owned public property destined for public use.<sup>26</sup> Later, *The Parlement Belge's* ruling was clarified by *Mighell v. Sultan of Johore*, holding that immunity could only be lost by express submission to the jurisdiction, along with *the Porto Alexandre*, which pronounced that the movable State-owned property destined for public use was immune regardless of its actual use.<sup>27</sup>

The UK initiatives toward the restrictive doctrine began in 1950 with the formation of an interdepartmental committee, which was based on growing dissatisfaction with the absolute rule and a great readiness to deny immunity for trading entities by courts. The Committee disagreed on whether immunity under UK law was broader than under international law, consequently failing to embrace the restrictive doctrine.<sup>28</sup> It was not until the passing of the UK's State Immunity Act ("SIA") in 1978 that the restrictive doctrine was finally adopted.<sup>29</sup>

In *Rahimtoola*, Lord Denning, questioning whether the dignity of a foreign State was impaired by the mere reason of being impleaded, concluded that there was no ground for granting immunity to foreign governments' commercial transactions. This conclusion was rejected by the majority of the House of Lords.<sup>30</sup> Later, *the Parlement Belge* was reinterpreted in *the Philippines Admiral* in 1972 by the Privy Council. It ruled that *the Parlement Belge* did not mean to widely propose that "a sovereign can claim immunity for vessels owned by him even if they are admittedly being used wholly or substantially for trading purposes," concluding that a ship

<sup>24</sup> *The Schooner Exchange v. McFaddon* (1812), 11 US 7 Cranch 116, available at <https://supreme.justia.com/cases/federal/us/11/116/case.html> (last visited on Oct. 5, 2016).

<sup>25</sup> *Id.*

<sup>26</sup> *Supra* note 8, §§ 147-149.

<sup>27</sup> *The Porto Alexandre* (1920) P 30; *Mighell v. Sultan of Johore* (1894) 1 QB 161.

<sup>28</sup> *Supra* note 3, at 86.

<sup>29</sup> *Supra* note 10, at 131.

<sup>30</sup> *Rahimtoola v. Nizam Hyderabad* (1958) AC 379, 422.

owned by an agency of the Republic of the Philippines, possessed and operated by a trade company for commercial purposes, was not immune.<sup>31</sup> A fundamental momentum towards the restrictive doctrine was also seen one year before the enactment of SIA in *Trendex v. The Central Bank of Nigera*. In this case, the Court of Appeal acknowledged that international law conferred no immunity for a government agency in respect of ordinary commercial transactions, stressing that in determining the commerciality of the transaction, its nature, not the purpose, had to be taken into consideration.<sup>32</sup>

Italy and Belgium were among the first countries whose courts embraced a restrictive approach, distinguishing State activities of a sovereign nature from those of a private actor in the market. The Italian Court of Cassation in 1972 held that State activities would not be immune from jurisdiction, if they were conducted in the legal order of the forum State in a similar manner in which a private citizen did.<sup>33</sup>

By the same token, Belgian courts used similar reasoning in ruling in favor of the restrictive doctrine. They asserted that bringing proceedings against a foreign State in respect of its acts resembling to that of a private individual did not hamper the sovereign authority of the State.<sup>34</sup> Likewise, the Belgian courts inferred the foreign State's voluntary conduct of business within Belgian territory as an implied waiver enabling the municipal courts to exercise their jurisdiction over the foreign State.<sup>35</sup>

France clarified its stance in favor of absolute immunity in *Gouvernement Espagnol v. Casaux* in 1849. The French Court de Cassation then declared that a foreign State was immune for its transaction of supplying boots for the army.<sup>36</sup> However, the French Court reversed this stance, switching to a restrictive rule in 1969. In the later decision, the Court ruled that both the nature and the purpose of the activity had to be taken into consideration when determining whether or not to grant immunity, applying the criteria used in administrative law.<sup>37</sup>

Meanwhile, Austria made clear its commitment to a restrictive rule after the Austrian Supreme Court opted for the restrictive doctrine by a ruling that a foreign State was not immune in respect of its *acta gestonis*. In one case, the Court denied immunity for Czechoslovakia on the ground that registration for using trade marks

<sup>31</sup> The Philippines Admiral (1972) Lloyd's Report 497.

<sup>32</sup> *Trendex Trading Corporation v. Central Bank Nigeria* (1977) QB 529.

<sup>33</sup> *Supra* note 4, at 172.

<sup>34</sup> *Supra* note 11, at 153.

<sup>35</sup> *Id.* at 120.

<sup>36</sup> *Gouvernement Espagnol v Casaux Sirey* 1849, Part I, 81 (French Cour de cassation, 1849).

<sup>37</sup> *Id.*

in commerce constituted an *acta gestionis*.<sup>38</sup> In another case, the Court held that the US could not plead immunity in respect of a claim arising out of a motor vehicle accident caused by a US embassy driver's negligent driving. The Court's reasoning was that public roads should be considered as spheres where the US and private individuals existed in equality, and thus there was no question of sovereignty or subordination.<sup>39</sup> This adjudication was noted as grounds for an exception to immunity in the European Convention later.<sup>40</sup>

German case law developed the restrictive doctrine after it ratified the Brussels Convention of 1926. In the *Empire of Iran*, the German Constitutional Court acknowledged the legality of the exercise of territorial jurisdiction over a foreign State in international law. In its decision, the Court also introduced a public versus private law distinction into the immunity doctrine based on its municipal law.<sup>41</sup> It finally rejected Iran's plea of immunity in respect of its act aimed at improving the premises to facilitate the diplomatic functions. Thereafter, the Court concluded that a contract for the repair of the Embassy did not fall within the essential sphere of State authority, by referring to the nature and quality of the transaction as ascertained under German domestic law.<sup>42</sup>

A highly controversial issue regarding State immunity was claims against State vessels destined for different purposes. State vessels have long been granted immunity in several conventions. Article 8 of the 1958 Geneva Convention on the High Seas and Article 95 of the 1982 United Nations Convention on the Law of the Sea ("UNCLOS") preserves immunity for warships in the high seas.<sup>43</sup> The immunity recognized for warships has generally been granted to the State-owned or -operated vessels exclusively allocated for government's non-commercial service.<sup>44</sup> Likewise, the privileged status of State aircraft used "for military, customs and police services" is preserved in the 1944 Chicago Agreement on International Civil Aviation and the 1919 Paris Air Navigation Convention for State Aircraft.<sup>45</sup> Article 27 of the UNCLOS

<sup>38</sup> *Dralle v. Republic of Czechoslovakia*, 17 Austria Supreme Court International Law Report (1950) 155 (1956).

<sup>39</sup> *Supra* note 11, at 122. *See also* *Holubek v. The Government of the United States*, Austrian Supreme Court, Feb. 10, 1961, UN Legal Materials 203.

<sup>40</sup> Explanatory Report to the European Convention on State Immunity, art. 11, § 48, European Convention on State Immunity of 1972, Basel, 16.V.1972, European Treaty Series - No. 74, available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?CL=ENG&NT=074> (last visited on Oct. 10, 2016).

<sup>41</sup> *Empire of Iran case*, German Federal Constitutional Court, Apr. 30, 1963, BvG, Vol 16, 27, UN Legal Materials, 282, 45 I.L.R. 57.

<sup>42</sup> *Id.*

<sup>43</sup> Geneva Convention on the High Seas, art.8.

<sup>44</sup> *Supra* note 3, at 36.

<sup>45</sup> Convention relating to the Regulation of Aerial Navigation of 1919, art. 30, available at <http://www.spacelaw.olemiss>.



allows a State to exercise its jurisdiction over foreign State-owned or –operated vessels exclusively used in commercial service.<sup>46</sup> A similar restrictive approach was adopted in the 1926 Brussel Convention relating to the Immunity of State owned Vessels, equating State-owned or –operated vessels and their cargoes engaged in trade to that of private vessels and cargoes.<sup>47</sup> Attempts to restrict immunity of government ships continued in the Protocol of the UK/USSR Treaty on Merchant Navigation of 1968, allowing the master and crews of State-owned or –operated vessel to bring their claims against the State to which the vessel belonged.<sup>48</sup>

The question of State immunity was dealt with in some bilateral treaties, requiring one party to submit to the jurisdiction of the courts of another State or to waive its immunity in respect of some acts or transactions. In that regard, the peace treaties after the First World War with Germany, Austria, Turkey, Bulgaria, and Hungary barred States from pleading immunity in respect of their acts performed in their engagement in international trade.<sup>49</sup>

The first multilateral understanding based on the restrictive doctrine was the 1972 European Convention on State Immunity (“ECSI”), which was ratified by eight European States including Austria, Belgium, Cyprus, Germany, Luxembourg, the Netherlands, Switzerland, and the UK, along with Portugal which only signed the Convention.<sup>50</sup> Though the restrictive approach of ECSI was not adopted by a great number of States, its impact on national legislatures and the decisions of national courts is undeniable.<sup>51</sup> Diverse approaches to immunity by the participating States representing different legal regimes required ECSI to compromise, leading it to adopt a cautious text.<sup>52</sup> Generally, the Convention maintained the immunity of the foreign State, but introduced certain defined categories of exceptions for which States do not enjoy immunity. Under this Convention, a foreign State shall enjoy no immunity if it engages in the forum State’s industrial, commercial, or financial activities in the manner as a private person.<sup>53</sup> In their decisions, domestic courts,

edu/library/aviation/IntAgr/multilateral/1919\_Paris\_convention.pdf; Convention on International Civil Aviation of 1944, art. 3(b), available at [http://www.icao.int/publications/Documents/7300\\_orig.pdf](http://www.icao.int/publications/Documents/7300_orig.pdf) (all last visited on Oct. 7, 2016).

<sup>46</sup> *Supra* note 44, art. 27(1).

<sup>47</sup> *Supra* note 3, at 41.

<sup>48</sup> *Supra* note 11, at 110.

<sup>49</sup> *Id.* at 78.

<sup>50</sup> European Convention on State Immunity of 1972.

<sup>51</sup> *Supra* note 10, at 644.

<sup>52</sup> *Supra* note 11, at 95.

<sup>53</sup> European Convention on State Immunity of 1972, art. 7.

influenced by the Convention's category of non-immune activities, regarded the principles embodied in the Convention "as an expression of the direction in which contemporary international law is developing" and applied them to non-party States.<sup>54</sup> National legislations such as SIA were modeled on the scheme of the Convention.

The International Law Commission ("ILC") contributed to the development of international law on State immunity, which was crystalized into the Draft Articles for a Convention on State Immunity. It had been, by and large, modeled on the SIA (UK) and pioneering case-law of some other Western States and culminated in the United Nations Convention on Jurisdictional Immunities of States and Their Property. The Draft Articles which was adopted at the ILC's Montreal Conference of 1982, recognized the absolute immunity for acts in exercise of sovereign authority. It also incorporated the exceptions laid down in not only the SIA, but also the US law regarding property obtained in violation of international law.<sup>55</sup> In the draft articles, some guidance was provided in order to differentiate *acta jure imperii* and *acta jure gestionis*, thereby offering a leeway that would enable international law to develop in a liberalizing direction.<sup>56</sup>

As of today, 75 out of 118 States are following the restrictive doctrine. It is a dramatic rise from 1980 when only 19 States maintained it. This shows the restrictive rule is dominant across the world.<sup>57</sup>

## IV. State Practice on Commercial or Private Law Exception to Immunity

States with the restrictive doctrine have introduced their own commercial or private law exception into their legislation and case-law. However, it is hard to formulate the exceptions acceptable to all because the ways of determining the commercial

<sup>54</sup> *Supra* note 11, at 99.

<sup>55</sup> Draft Articles for a Convention on State Immunity of 1982, art. III (C, D & E).

<sup>56</sup> *Supra* note 3, at 125. Fox expanded the meaning of the term 'liberalizing direction' as "the direction of narrowing the scope of immunity," which would enable the adjudicator to deny immunity and proceed on the case. For details on the liberalization encompassing a recognition of lacunae in the substantive or jurisdictional coverage of national regulation, see J. TRACHTMAN, *THE FUTURE OF INTERNATIONAL LAW: GLOBAL GOVERNMENT* 276 (2013).

<sup>57</sup> P. Verdier & E. Voeten, *How Does Customary International Law Change? The Case of State Immunity*, 58 INT'L STUD. Q. 6 (2014), available at <https://blogs.commons.georgetown.edu/crikvoeten/files/2011/10/VoetenVerdier.pdf> (last visited on Oct. 10, 2016).

character of an act is too diverse among States. Nevertheless, there has been a convergence of reasoning used to ascertain the exceptions to State immunity.<sup>58</sup>

One widely-accepted criterion to describe the distinction between acts in sovereign authority and those in private person is the nature and purpose of those acts.<sup>59</sup> It used to be criticized because of the presumption that States can only act for public purposes.<sup>60</sup> This test, however, has been widely used by courts to determine the sovereign character of the act.

In *Berizzi Bros v. SS Pesaro*, the US Supreme Court granted immunity to a State-owned ship carrying grain, acknowledging its public purpose to be “the maintenance and advancement of the economic welfare of a people.”<sup>61</sup> Such a traditional approach of the US Supreme Court was later abandoned with the enactment of the US Foreign Sovereign Immunity Act 1976 (“FSIA”), which incorporated the restrictive principles laid down in the Tate Letter of the State Department.<sup>62</sup> Section 1603(d) of FSIA expressly stipulates that: “The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by any reference to its purpose.”<sup>63</sup> Though an early draft of FSIA envisaged that foreign States “[shall] enjoy immunity in respect of a public debt for general government purposes,” no such a provision was included in the final text.<sup>64</sup> The House Report, elaborating the section, sets forth that “a contract by a foreign government to buy provisions or equipment for its armed forces or ... to make repairs on an embassy building ... would be considered commercial contracts, even if their ultimate object is to further a public function,” on the ground that these contracts might equally be performed by a private person, as well.<sup>65</sup>

The US Supreme Court declared in *Republic of Argentina v. Weltover* that the nature of the conduct would determine the commerciality as opposed to its purpose.<sup>66</sup> In *Dunhill of London Inc. v. Republic of Cuba*, the Supreme Court applied the nature test by answering whether the actions carried out by a foreign State

<sup>58</sup> *Supra* note 3, at 153-4.

<sup>59</sup> *Id.* at 215.

<sup>60</sup> *Supra* note 4, at 130.

<sup>61</sup> *Berizzi Bros v. SS Pesaro*, 271 US 562 (1925).

<sup>62</sup> T. Holt, Jr., *Sovereign Immunity - A Statutory Approach to a Persistent Problem*, 1 B.C. INT'L & COMP. L. 233 (1977), available at <http://lawdigitalcommons.bc.edu/iclr/vol1/iss1/11> (last visited on Oct. 7, 2016).

<sup>63</sup> United States: Foreign Sovereign Immunities Act § 1603(d), Oct. 21, 1976, 90 STAT. 2891 Public Law 94-583, 94<sup>th</sup> Cong.

<sup>64</sup> *Supra* note 11, at 198.

<sup>65</sup> H.R. REP. 94-1487, H.R. Rep. No. 1487, 94<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 1976, 1976 U.S.C.A.N. 6604, 1976 WL 14078 (Leg. Hist.).

<sup>66</sup> *Republic of Argentina v. Weltover*, 504 US 607.

were akin to those by a private person engaged in commerce.<sup>67</sup> In another occasion, the Supreme Court gave weight to the governmental character of a foreign State's conduct over its nature. It finally held that Saudi Arabia had to enjoy immunity against a claim of detention and torture in prison by Saudi police, justifying the policing of a foreign State as 'sovereign' in nature.<sup>68</sup>

Switzerland used the nature test as determinative of jurisdiction in 1928. It pronounced that the inherent nature of the act had to be taken into consideration, as opposed to its ultimate purpose. Using the nature test to distinguish *acta jure imperii* from *acta jure gestionis*, the German Federal Constitutional Court held that the purpose of contract was to maintain the embassy properly functioning, so it was not qualify as *acta jure imperii*.<sup>69</sup>

The Swiss and Austrian courts adopted the same nature test by the 1960s.<sup>70</sup> In *I Congreso del Partido*, the UK House of Lords restricted the immunity doctrine so as to exclude trading and commercial activities from immunity, because contract termination for delivery of sugar to Chile due to the broken relationship between the former and the latter did not change the commercial nature of the transaction.<sup>71</sup> Facing the difficulties of strict adherence to the nature test, Lord Wilberforce introduced a broader contextual approach to the courts, enabling them to decide whether the relevant acts were within the area of commercial - private law activity, or within the sphere of sovereign activity. Later, adopting Wilberforce's approach, the UK courts have been taking into account both the nature and the purpose of the relevant acts, ranging from the identity of the parties involved to the place where it occurred, as well as other related factors.<sup>72</sup>

Whether to consider the nature or the purpose of the act of a foreign State as determinative of 'commerciality' had long been a subject of debate in the ILC meetings. Under Article 12 of the Draft Articles for a Convention on State Immunity proposed in the Fourth Report of 1982, the ILC sets forth the rule: "A State is not immune from jurisdiction of another State in respect of proceedings relating to any trading or commercial activity conducted by it." Thus, the ILC envisaged an interpretive provision which suggested that the nature of the transaction rather than

<sup>67</sup> *Dunhill of London Inc. v. Republic of Cuba*, 425 US 682 (1976).

<sup>68</sup> *Saudi Arabia v. Nelson*, 123 L. Ed 2d 47, 113 S ct 1471 (1993).

<sup>69</sup> *Supra* note 42, at 80.

<sup>70</sup> *Supra* note 11, at 288.

<sup>71</sup> *I Congreso del Partido*, (1983) 1 AC 244, (1981) 2 All ER 1062 HL, 64 I.L.R. 307.

<sup>72</sup> *Id.* See also *supra* note 3, at 219.

the purpose had to be applied to determine its commerciality.<sup>73</sup> Due to criticism from many States, this proposal was weakened, leading the 1986 draft and the final 1991 draft which envisaged: “Reference shall be made primarily to the nature of the transaction, but the purpose of that transaction shall also be taken into account if, in the practice of that State, that purpose is relevant to determining the non-commercial character of the contract.”<sup>74</sup>

Apart from Yugoslavia supporting the proposal without reservation, and Canada and Brazil with some reservations, Germany, Norway, Sweden, Finland, Denmark, Iceland, the UK, Mexico, Spain, and Qatar opposed the incorporation of the purpose test as determinative of the commerciality.<sup>75</sup> Some developing States especially supported the inclusion of the purpose test in the definition of commercial transaction so as to retain immunity for their contractual transactions destined for public purposes, such as the supply of medicaments to combat a spreading epidemic, or procurement of food supplies to feed a population.<sup>76</sup>

The 1999 draft proposed deleting all references to the nature and purpose of the transaction due to the disagreements as to which test should prevail. Opting for the adoption of the highly recognized nature test, some States then supported it, arguing that courts or practitioners would lack guidance if there was no reference to both the nature or the purpose test.<sup>77</sup>

In addition to applying the nature and the purpose tests while deciding the *jure imprii* or *jure gestionis* character of the act, the criterion of whether or not a private individual is able to perform that act has long been used by courts. In this regard, Belgian Cour de Cassation in 1903 articulated that the purchase of goods, engagement in commerce, and State’s operation of public utility services were activities in which a private person could equally perform. Consequently, the Court concluded that a State exercising a private right in these domains could be sued before Belgian courts.<sup>78</sup> This method has shifted focus from the aim or purpose of State’s activity, to the questions of: (1) whether a private person can perform the activity; (2) whether the State places itself on the same level with a private person;

<sup>73</sup> 4th Report, [1982] II Y.B. Int’l L. Comm’n, pt. 1, 228, U.N. Doc. A/CN.4/357.

<sup>74</sup> 8th Report, [1986] II Y.B. Int’l L. Comm’n, pt. 1, 24.

<sup>75</sup> *Id.* at 51.

<sup>76</sup> Draft Articles on Jurisdictional Immunities of States and Their Property, with Commentary, ¶ 26, [1991] II Y.B. Int’l L. Comm’n pt. 2, U.N. Doc. A/46/10, available at [http://legal.un.org/ilc/texts/instruments/english/commentaries/4\\_1\\_1991.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/4_1_1991.pdf) (last visited on Nov. 6, 2016).

<sup>77</sup> Report of the Chairman of the Working Group, ¶ 20, 6<sup>th</sup> Comm., 54<sup>th</sup> Sess., U.N. Doc. A/C.6/54/L.12 (No. 12, 1999).

<sup>78</sup> *Société anonyme Compagnie des chemins de fer Liégeois Limbourgeois v. The Netherlands*, Belgium Cour de Cassation (Ire ch.), 1903, Pasicrisie Belge, 1903-II-294.

and (3) whether the State faces a private person on a basis of equality.<sup>79</sup> While deciding the character of a contract in which a private person can engage, the French courts widely apply the basic principles to distinguish civil law and administrative law, and to that end, search for whether the clauses of a contract contain prerogatives involving unilateral powers of coercion.<sup>80</sup> In *Spanish State v. Societe Anonyme de George V Hotel*, the French Court de Cassation concluded that the private law obligations assumed by the Spanish Tourist Agency were of a commercial nature a private person could equally undertake.<sup>81</sup>

## V. State Practice as to the Exception for Employment Contracts

Current State practice reflects widespread differences regarding employment contracts of a foreign State. It appears to favor absolute immunity for an employer's claim against a foreign State. Judging from the shift towards the restrictive doctrine, one might conclude that employment contracts are among ordinary contracts that are inherently part of private law or commercial nature, leading the State to deny immunity. However, legislatures and adjudicators have been considerably cautious in formulating a broad exception to immunity for employment contracts. They have been inclined to invoke the rationale of sovereign immunity as they justify the retention of immunity for proceedings issued against a foreign employer State.<sup>82</sup> In other words, current State practice as to employment contracts has resisted the general trend, which has focused on the nature of the conduct and rejected the absolutist view of treating State as always immune on the mere basis of its status being sovereign.<sup>83</sup> The municipal courts have come to justify their rulings in favor of immunity for a State as an employer by the following reasons:

1. the sovereign status of a foreign State as an employer;
2. the purpose of the employment relationship with governmental, public, or sovereign character;

<sup>79</sup> *Supra* note 75, at 277; *supra* note 10, at 629.

<sup>80</sup> *Supra* note 11, at 34.

<sup>81</sup> *Supra* note 4, at 163.

<sup>82</sup> *Supra* note 10, at 647.

<sup>83</sup> *Supra* note 4, at 132.

3. the functions of an employee closely related to the exercise of governmental authority;
4. the prerogatives in the contract clauses involving unilateral powers of coercion; and
5. the customary rule that the internal organization of a State is governed by the internal law of the State.

Lastly, it should also be noted that there have been some court decisions restraining State immunity: (1) when certain substantive rules of their labor law came into play; and (2) when an employee lacked the legal remedy within the territorial jurisdiction of both the forum and the foreign States, for her loss arising out of the conduct of her employer, foreign State.<sup>84</sup>

The UN Convention on Jurisdictional Immunities of States and Their Property of 2004 incorporates a delicate balance between the interests of the forum State, which are protecting the employee by applying its labor law and subjecting its employees to its internal law.<sup>85</sup> Article 1, paragraph 1 of CJIS lays down the general principle that a foreign State is not immune in employment contract proceedings to be performed in the forum State.

Article 11, paragraph 2 sets forth a number of broad exceptions to this principle. In particular, paragraph 2(b) stipulates that a State can invoke immunity if the subject-matter is the recruitment, renewal of employment, or reinstatement of an individual. Presuming that the connection between the employer State and the employee is stronger than the one between the employee and the forum State, paragraph 2(d) confers immunity to the foreign State if the employee instituting the proceedings is State's citizen. Meanwhile, paragraph 2(a) of Article 11 grants State immunity to employer "if the employee has been recruited to perform particular functions in the exercise of governmental authority." This sub-paragraph is the most contested one since it is possible to widen the scope of the exception to all employees if liberally interpreted. During the ILC's drafting process of the Convention, some urged the Commission to craft a more cautious text which restricts exception to diplomatic and consular agents as defined in the Vienna Conventions on Diplomatic and Consular Relations, while other States construed this exception so as to expand its scope to administrative and technical staff.<sup>86</sup>

<sup>84</sup> J. Brower, *State Practice on Sovereign Immunity in Employment Disputes Involving Embassy and Consular Staff*, A Report of the Yale Center for Global Legal Challenges 19 (2015); R. Babu, *Foreign State Immunity in Contracts of Employment with Particular Reference to Indian State Practice*, 49 J. INDIAN L. INST. 5 (2007).

<sup>85</sup> United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004, art. 11, U.N. Doc. A/RES/59/38. See also *supra* note 4, at 441.

<sup>86</sup> Vienna Convention on Diplomatic Relations of 1961, 500 U.N.T.S. 95; Vienna Convention on Consular Relations of

Both the EC Treaties and the European Convention of Human Rights grant immunity to a State for claims brought by its employee regarding his/her duties in the exercise of governmental authority. The Court of Justice of European Union (“CJEU”) held, in *Commission v. Bleis*, that public service involves “direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State and other public authorities.”<sup>87</sup>

ECSI has an exclusive provision for employment contracts. Article 5 of the ECSI deprives a foreign State’s immunity during proceedings regarding an employment contract between the State and its employee to be performed within the forum State. Nevertheless, by virtue of the subsequent paragraphs, the employer State is entitled to immunity if the employer is its own citizen or if the employer is neither the forum State’s citizen, nor habitually resident of the forum State. This is on the ground that “the links between the employee and the employer State (in whose courts the employee may always bring proceedings) are generally closer than those between the employee and the State of the forum.”<sup>88</sup> Lastly, under the said article, a contracting State shall enjoy immunity in proceedings related to the employment contract if the parties to the contract have agreed so in writing, provided that the courts of the forum State lack exclusive jurisdiction by subject-matter.

In addition, the Belgian Labor Court of Brussels and the Swiss Federal Tribunal have concluded that ECSI does not reflect customary international law. The Belgian Labor Court of Brussels refused to grant immunity to a foreign State which terminated an employment contract. The Belgian Court held that it had jurisdiction over claims for compensation of wrongful dismissal of a chauffeur and a technician in *Kingdom of Morocco* and *Francois v. Canada*, respectively.<sup>89</sup> Likewise, the Swiss Federal Tribunal questioned ECSI, which retains immunity for junior staff engaged in subordinate functions, claiming that this provision was not supported by the customary international law.<sup>90</sup> Nevertheless, courts have been abstaining from any order for reinstatement or recruitment, observing the customary rule that internal administration of a State is governed by its domestic law.<sup>91</sup>

Section 4 of the SIA enshrines the restrictive rule that a State is not immune in

1963, 596 U.N.T.S. 261. For details, see R. O’KEEFE & C.TAMS, THE UN CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY: A COMMENTARY 191 (2013).

<sup>87</sup> *Commission v. Bleis*, 4/91, 1991 E.C.R. 5627.

<sup>88</sup> *Supra* note 11, at 306.

<sup>89</sup> *François v. State of Canada*, May 23, 1989, 115 I.L.R. 418; *Kingdom of Morocco v. DR*, Nov. 8, 1989, 115 I.L.R. 421.

<sup>90</sup> *Evgeny Adamov v. Federal Office of Justice, Switzerland Federal Tribunal, First Public Law Chamber*, No 1A.288/2005, Judgment, Dec. 22, 2005, § 3.4.2.

<sup>91</sup> *Supra* note 10, at 528.



respect of proceedings related to an employment contract. A foreign State is thus not immune in respect of claims arising out of employment relationship, which are brought by the nationals of the foreign State, or of third State, unless they are the UK resident. The Act also defines another group of employees who are not entitled to launch proceedings, such as the staff of a diplomatic mission. They include lower grade administrative, technical, and domestic staff, regardless of their nationality.<sup>92</sup>

In a claim brought by Ms. Fogarty, an Irish employee in the US embassy, whose contract was not renewed upon a successful sexual harassment suit she had previously brought against the US, the plaintiff was notified by the British authorities that she had no remedy in domestic law due to the immunity the US Government enjoys.<sup>93</sup> Afterwards, Ms. Fogarty brought the case before the European Court of Human Rights (“ECHR”), maintaining that the UK infringed her right of due process. The ECHR found the appeal unwarranted, so dismissed the case, articulating that it “was not aware of any trend in international law towards relaxation of State immunity rules in the case of recruitment to foreign missions, which missions, by their very nature involve sensitive and confidential issues, related to the diplomatic and organization policy of the foreign State.”<sup>94</sup>

The Berlin Labour Court (Arbeitsgericht) dismissed a case brought by an Algerian-German dual citizen named Mahamdia working in Algerian Embassy in Berlin as a driver. The Court rejected his claim to overtime compensation, along with the claim to be reinstated.<sup>95</sup> It declared that the plaintiff’s activities were functionally connected to the diplomatic activities of the embassy. Thereon, Mahamdia appealed the verdict to the Berlin-Brandenburg Higher Labour Court (Landesarbeitsgericht). Referring to the jurisprudence of the Federal Labour Court (Bundesarbeitsgericht),<sup>96</sup> the Berlin Higher Court ruled that German courts had jurisdiction over the dispute between the embassy and its employee under the Labour Law, if the activities of the employee did not form sovereign acts of the foreign State.<sup>97</sup> The Berlin Higher Court referred the case through preliminary ruling to CJEU, asking whether the Embassy was established by virtue of EU Regulation No. 2011/44 which determines the jurisdiction of EU Courts.<sup>98</sup> After acknowledging that sovereign immunity is a

<sup>92</sup> The State Immunity Act §16(1)(a), 1978, c.33, U 2-11, *reprinted in* 17 I.L.M. 1124-6.

<sup>93</sup> *Fogarty v. United Kingdom*, Eur. Ct. H. R., at § 10 (2001).

<sup>94</sup> *Id.* § 38.

<sup>95</sup> *Vgl. Arbeitsgericht BAG v. 02.07.2008 - 86 Ca 13143/07.*

<sup>96</sup> *See, e.g., Bundesarbeitsgericht (German Federal Labour Court), BAG, Urteil vom 1. 7. 2010 - 2 AZR 270/09.*

<sup>97</sup> *Vgl. Einzelnachweise bei BAG v. 1.7.2010- 2 AZR 270/09, Rz. 13.*

<sup>98</sup> *Ahmed Mahamdia v Algeria*, Judgment, 2012 E.C.J. Case C-154/11 (July 19).

customary rule of international law, CJEU held that an act of a State performed *jure gestionis* did not fall within the exercise of public powers and thus did not enjoy immunity. The EU Court also maintained that the embassy was an establishment within the meaning of EU Regulation No. 2011/44 with respect to the proceedings issued by its employee who did not exercise public powers. Lastly, the Court concluded that the national court should determine the precise nature of the functions carried out by the employee.<sup>99</sup>

Likewise, an individual employed as a kavass in the Consulate General of Turkey in Cologne filed a case due to her unjust dismissal from the Consulate. First, the Cologne Labor Court reiterated the principle that sovereign acts of a foreign State could not be subjected to the jurisdiction of another State. The Court stated that any judicial review by a court on sovereign acts of delegations or agents would nullify the functions of embassies or consulates. Referring to the plaintiff's duties, ranging from accessing the personal information of Turkish citizens, to signing the official documents, and to visiting the citizens in the rest homes and prisons, the Labor Court determined that her functions in the Consulate fell within the exercise of public powers. Eventually, the German courts lacked jurisdiction.<sup>100</sup>

Similarly, in a dispute brought before the Croatian Courts by a former employee, Leila Husein, who was dismissed from the Embassy of Turkey in Zagreb, both Zagreb Municipal Labor Court and the Croatian Supreme Court, considering the inconveniences caused by a possible verdict ordering a foreign State to reinstate its former employee, required Turkey to merely pay compensation and other financial losses incurred by the plaintiff.<sup>101</sup>

Additionally, the Canadian Labor Court dismissed, on similar grounds, a case filed by a former employee of the US Consulate General in Toronto who had been working for 12 years and then was dismissed due to his accounting errors and unexcused absence. The Court rejected the plea of State immunity, since the US' act in question had not form a sovereign act which fell within the exercise of the public powers. Instead, the Court viewed the act as a commercial activity which was of private law nature.<sup>102</sup>

A claim filed before Indian Supreme Court by Ali Akbar against the United Arab

<sup>99</sup> *Id.* § 67.

<sup>100</sup> ArbeitsgerichtKöln (Köln Labour Court), *Demirel v. Türkei*, BAG v. 01.02.2012- 2 AZR 270/09, Rz.11; R. Aybay, *Yargıtay İçtihatlarına Göre Devletin Yargı Bağısıklığı*, TBB Dergisi, Sayı 72, (2007), at 113.

<sup>101</sup> *Leyle Hüsein v. RepublikaTurska, Republika Hrvatska Općinski Gradanski Sud u Zagrebu*, Poslovniborj: 3 Ovr-2629/13-2, 25.02.2013.

<sup>102</sup> *Zakhary v United States of America*, 2012 CanLII 15690 (ON LA).

Emirates (“UAE”) arising out of a commercial contract between the two also sheds light on the issue. The Court rejected the plea of State immunity of the UAE, on the ground that a person incurred a commercial loss had to be given a legal remedy as a resort by which she could claim her damages.<sup>103</sup>

Legislation and judgments appear to be consistent and coherent in the sense that they have adopted similar criteria applied in proceedings related to employment contracts. They especially tend to justify this shift from the restrictive doctrine to the absolute one by bringing to the fore the sovereign nature of employee’s functions performed within the exercise of public powers. However, the issue of how to differentiate the functions performed *jure imperii* from those performed *jure gestionis* remains to be debated.

## VI. Conclusion

In the nineteenth century, bringing a law suit against an ambassador was penalized, because ambassadors’ conducts as representatives of kings, princes, emperors, or chas were deemed to be the embodiment of sovereign powers. This traditional doctrine started changing from the late twentieth century. Today, States enjoy broad exceptions to immunity, trending toward the restrictive doctrine. One can observe the State practice highlighting this trend in national legislation and municipal court decisions, as well as in the drafting processes of regional and international texts relating to State immunity. These source point the direction in which international law governing State immunity is evolving. However, whether the restrictive doctrine, beyond merely being a trend, can mature into a binding rule of international law still remains as a point of contention. Also, State immunity is still an important research area for international lawyers. Though the restrictive doctrine is evidenced by consistent State practices, recent controversies on its exact scope suggests otherwise, as seen in the differences among States which emerged during the ILC meetings convened for codification of the sovereign immunity. It is mainly due to divergent national legislation as well as diverse application of the criteria with respect to commerciality, private law nature, or justiciability of a State conduct. All this may suggest that the restrictive doctrine is still in the process of being codified.

States which have adopted the restrictive doctrine are prone to transpose into

<sup>103</sup> Mirza Ali Akbar Kashani v. United Arab Republic and Another (AIR 1966 SC 230).

the international texts their own commercial or private law exceptions. However, the criteria for the commercial character of an act is so diverse that it is difficult to formulate exceptions that are acceptable to all. Although there is a clear shift toward the nature of transaction as determinative of its commerciality, some developing countries are still in support of incorporating the purpose test in the definition of commercial transaction so as to retain immunity for their contractual transactions destined for public purposes. These transactions have included supply of medicaments to combat a spreading epidemic, or procurement of food supplies to feed a population.

As for the disputes arising out of employment contracts, several interests and sensitivities of States which led to the adoption of the rule of State immunity in the first place still continue to induce legislatures and adjudicators to be notably cautious in formulating a broad exception to immunity for employment contracts. Such caution causes States to refocus on the question of whether the employment relationship is destined for governmental, public, or sovereign purposes. In other words, while courts do not contemplate the purpose of a boots purchase, whether or not it be destined for military use, they tend to consider what purpose a secretary's typing in an embassy serves. Courts may go through these considerations, because courts cannot predict the subject being which State may inflict damages upon. After all, the subject being may be human rather than an object, such as a ship. Courts' considerations are also based on the direct link between the functions of employee and the governmental, public, or sovereign purpose. This might continue to prompt the courts to be cautious about employment contracts. More studies should work through the current State practice to figure out as to what extent they have converged, with a view to extricating the minimum commonalities on which an international treaty on this field can be built.