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State Immunity and English Courts: Examining Trends and Engagement with Public International Law

Chinmayi Sharma

Introduction

Despite being intrinsically intertwined, the international legal order and the domestic legal order operate in fundamentally different ways. The former operates on a horizontal plane, recognising the sovereign equality of all actors involved,¹ while the latter operates vertically, with law trickling down from the dominant, overarching power known as the 'State'.² Given that all states are conferred equality and independence under international law, at first glance it seems inconsistent that domestic judicial bodies of one state may exercise jurisdiction over another sovereign state. This question of state immunity before domestic courts acutely reflects the tensions that arise in the interaction of domestic and international law and forms the primary focus of this article.

The original conceptualisation of the state immunity doctrine is best explained by the Latin maxim of '*par in parem non habet imperium*', which mandates that one state shall not exercise jurisdiction over another state.³ This principle is consistent with the traditional Westphalian notion of sovereignty: there is no authority superior than the nation state.⁴ However, over time, the doctrine has seen a considerable degree of evolution and notably, the scope of its application has seen greater restriction. As a result, three separate theoretic models of state immunity have now emerged – the absolute model, the restrictive model, and state immunity as a procedural plea.

The ample jurisprudence before English courts over the past few years has, in particular, evinced dynamic changes in the law of state immunity across a variety of contexts ranging from conflicts with human rights law to questions of immunity in arbitral proceedings. As questions of state behaviour continue to be examined by English Courts,⁵ not only are there important developments occurring in the law of state immunity, but the jurisprudence in this area also provides considerable insight into the manner in which public international law principles are engaged and treated. The state immunity doctrine, which is intrinsically linked

¹ Charter of the United Nations (signed 26 June 1945, entered into force 31 August 1965) 1 UNTS XVI (UN Charter) art 2 (1).

² Malcolm N Shaw, *International Law* (8th edn, Cambridge University Press 2017) 195. See also Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th ed, Routledge 1997).

³ Gamal Moursi Badr, *State Immunity: An Analytical and Prognostic View (Developments in International Law)* (Springer Science & Business Media 2013) 89.

⁴ Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th ed, Routledge 1997) 11.

⁵ See, for example, *Ukraine v The Law Debenture Trust Corporation plc* [2018] EWCA Civ 2026. Note however, that in that particular case, the state of Ukraine waived immunity and as a result, no question of jurisdiction arose.

with public international law provides an appropriate lens from which the larger question of the English Courts' engagement with international law can be examined.

This article seeks to examine this engagement in greater detail. The author shall consider first the three doctrinal models of state immunity and their treatment in English law; second, the key principles of state immunity within the framework of the State Immunity Act 1978; and third, discuss the dominant trends that have emerged in the realm of state immunity in recent jurisprudence.⁶ The author argues that these trends are indicative of a greater willingness of English courts to adopt and adhere to international law principles even when they are not strictly bound by them. It is also argued that the developments in state immunity jurisprudence are representative of the larger paradigm shift in international law from a state-centric model to one that sees greater involvement of non-state actors.

1. Doctrinal Models of State Immunity

1.1 The Absolute Model

The absolute model of state immunity provides the widest bracket of immunities for state action. In accordance with this doctrine, a state may never be subject to the jurisdiction of a foreign court.⁷ By corollary, foreign courts must necessarily refrain from exercising jurisdiction over another state regardless of the circumstances. Fox and Webb, who have authored one of the leading texts on the law of state immunity, see this absolutist doctrine as one that is predicated on a Westphalian understanding of state sovereignty.⁸ Such an understanding places foremost emphasis on of the sovereign authority of the state and in the exclusivity of a state's internal as well as external competence.⁹ It was therefore, considered inappropriate for domestic courts to assert any form of jurisdiction over a foreign nation state.

In English jurisprudence, the absolute model of state immunity manifested as early as the nineteenth century. In 1880, the Court of Appeal in the case of *The Parlement Belge* stipulated that:

[A]s a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though

⁶ Although the focus of this article is English Courts, it should be noted that the State Immunity Act 1978 applies to the entirety of the United Kingdom.

⁷ Khawar Qureshi, *Public International Law Before the English Courts* (Wildy, Simmonds & Hill Publishing 2016) 57.

⁸ Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd edn, Oxford University Press 2015) 25.

⁹ *ibid*; See also Bardo Fassbender and others, *Oxford Handbook of The History Of International Law* (New York 2012) 100; John Martin Gillroy, *An Evolutionary Paradigm For International Law: Philosophical Method, David Hume, and The Essence Of Sovereignty* (Springer 2013).

such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction.¹⁰

This absolutist approach was further cemented through judicial decisions in the early twentieth century. In *The Porto Alexandre*, the Court of Appeal, relying on the ruling in *Parlement Belge*, set aside the writ in rem against a commercial trading ship on the basis that it was a foreign state owned vessel requisitioned by the Portuguese Government.¹¹ Further affirmation came from the dictum of the House of Lords in *Compania Naviera Vascongada v S S Cristina* where Lord Atkin, for instance, noted that immunity for foreign sovereigns was a proposition of international law which had been ‘engrafted’ into English domestic law.¹² In that case, immunity was accorded to a vessel requisitioned by the Spanish government.¹³

The absolute immunity approach continued to be the prevailing view for several decades. It attracted little criticism until a paradigm shift came about in the 1970s, when a more restrictive model began to emerge through the combination of judicial decisions in the UK and the development of a multilateral state immunity framework in Europe.¹⁴ These developments are discussed below.

1.2 The Restrictive Model

Unlike the absolute model of state immunity which focuses on the *actor* (the sovereign state), the restrictive model is focused on the specific *acts* carried out by states.¹⁵ More specifically, the restrictive model makes a conceptual distinction between acts of a public or governmental character or ‘*jure imperii*’ and acts of a private character or ‘*jure gestionis*’.¹⁶ Whilst states are free to carry out both these categories of acts, if the act in question is of a purely private or commercial nature, it shall not have the benefit of state immunity.¹⁷ On the other hand, those state actions which are for public interest or have some governmental character to them are protected by state immunity and foreign courts will be unable to exercise jurisdiction where such acts form the subject matter of the dispute.¹⁸ The rationale for making such a distinction, which was clarified by Lord Wilberforce in the case of the *Playa Larga*, is that this model enables access to justice for individuals who have entered into commercial transactions with the state in question.¹⁹ Given that the state has willingly entered into such commercial

¹⁰ (1880) 5 PD 197 (CA) 214.

¹¹ *The Porto Alexandre* [1918-19] All ER Rep 615 (CA).

¹² *Compania Naviera Vascongada v Cristina* [1938] AC 485, 490 (HL).

¹³ *ibid.*

¹⁴ However, some limited form of opposition was seen for instance, in *Johore (Sultan of) v Abubakar Tunku Aris Bendahar* [1952] AC 318 (Privy Council).

¹⁵ Fox and Webb (n 8) 4.

¹⁶ Qureshi (n 7) 57; *Owners of the Philippine Admiral v Wallem Shipping (Hong Kong) Ltd (The Philippine Admiral)* [1977] AC 373 (Privy Council).

¹⁷ *ibid.*

¹⁸ *ibid.*

¹⁹ *Playa Larga (Owners of Cargo Lately Laden on Board) v I Congreso del Partido* [1983] 1 AC 244 (HL).

transactions, it is considered inappropriate that the state then be protected by the principle of state immunity after a dispute has arisen.²⁰

The first substantial effort to codify the restrictive doctrine came with the European Convention on State Immunity (ECSI)²¹, which was adopted by 8 states in 1972, including the United Kingdom,²² and provided that States enjoyed immunity from the civil jurisdiction of other states except for those acts that were commercial, industrial, or non-sovereign in nature.²³

Following the codification of the restrictive model in the ECSI, English Courts also began to adopt the restrictive doctrine when deciding questions of immunity accorded to state action. The 1977 decision of the Privy Council in *The Philippine Admiral*, was a landmark decision involving a claim brought against a commercial trading ship owned by the Philippines for breach of contract.²⁴ In this case, the Council did not grant immunity notwithstanding the fact the vessel in dispute was owned by a foreign state on the basis that the activities that it was carrying out were purely commercial in nature.²⁵ It was reasoned that the decision in *The Parlement Belge* had been misinterpreted and incorrectly relied on by subsequent decisions such as *The Porto Alexandre*.²⁶ According to Lord Cross, the correct interpretation of *The Parlement Belge* was not a rule of absolute immunity - rather, while foreign sovereigns had immunity in respect of in personam actions.²⁷ Furthermore, immunity for in rem actions only extended to conduct that was substantially public in nature.²⁸ Commercial trading activities were not considered to not fall under the bracket of this type of conduct.²⁹

The restrictive model was subsequently affirmed in *Trendtex Trading Corporation v Central Bank of Nigeria*, which concerned an irrevocable letter of credit issued for the purchase of cement by the Central Bank of Nigeria.³⁰ Here it was held by the Court of Appeal that because the letter of credit was issued in London through a London based bank and in the 'ordinary course of commercial dealings', it constituted an act of private character.³¹ It is this model that has now been incorporated into the UK statutory framework on state immunity. This framework is discussed in detail in Section 2.

²⁰ *ibid.*

²¹ European Convention on State Immunity (adopted 16 May 1972, entered into force 11 June 1976) 1495 UNTS 181 (ECSI).

²² Alexander Orakhelashvili, *Research Handbook On Jurisdiction And Immunities In International Law* (Edward Elgar Publishing 2015) 274;

²³ Qureshi (n 7) 59.

²⁴ [1977] AC 373 (Privy Council) 400.

²⁵ *ibid* [403].

²⁶ *ibid* [223-225].

²⁷ *ibid.*

²⁸ *ibid.*

²⁹ *ibid.*

³⁰ *Trendtex Trading Corp v Central Bank of Nigeria* [1977] 2 WLR 356 (CA).

³¹ *ibid.*

1.3 State Immunity as a Procedural Plea

In addition to the two models listed above, there also appears to be a third model emerging in international law. Fox and Webb discuss this model in light of International Court of Justice decisions such as in the *Jurisdictional Immunities of States (Germany v Italy, Greece intervening)*.³² In accordance with this model, state immunity is entirely a plea of procedural character and consequently, the lawfulness of the actions of a state cannot be questioned in a foreign court.³³ Through this strict and pragmatic approach, state immunity is seen as a technical consideration independent of the substantive issues raised in the claim.³⁴ In English jurisprudence this approach has yet to crystallise. An example of the problems in the application of this model is tortious claims where the classification of a foreign state's conduct as procedural or substantive may prove difficult particularly in light of pre-existing questions in this area such as determining which damages relate to substance or type of loss and which procedure or quantification.³⁵ Further, the development of this model by the ICJ in an inter-state context, which primarily concerns the examination of principles of international law, may pose difficulties when transposing it to domestic state immunity frameworks.

2. The State Immunity Framework in the UK

The efforts to codify the law of state immunity in a domestic Statute began in the early 1950s with the setting up of an Interdepartmental Committee on State Immunities under the chairmanship of Lord Somervell.³⁶ However, the findings of that committee were ultimately inconclusive.³⁷ Real momentum was gained only when the United Kingdom signed the ECSI. In order to ratify the ECSI as well as the International Convention of Unification of Certain Rules concerning the Immunity of State-owned Ships (1934)³⁸ and bring English law in tandem with international law, the State Immunity Bill was introduced.³⁹ These efforts then crystallised into the State Immunity Act (SIA) which came into force on 22nd November 1978.⁴⁰

The Act follows the restrictive model⁴¹ and its purpose is primarily threefold – to make legal provisions relating to a) proceedings against or by foreign states in the United Kingdom, b)

³² *Jurisdictional Immunities of the State (Germany v Italy)*, ICJ 99, 124 (3 February 3 2012).

³³ Fox and Webb (n 8) 4.

³⁴ *ibid* 396.

³⁵ *ibid*.

³⁶ Qureshi (n 7) 63. See also Michael Brandon, 'Report On Diplomatic Immunity By An Inter-Departmental Committee On State Immunities.' (1952) 1 *The International and Comparative Law Quarterly*.

³⁷ Qureshi (n 7) 64.

³⁸ International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (adopted 10 April 1926, entered into force 8 January 1936) 176 LNTS 199.

³⁹ Andrew Dickinson and others, *State Immunity (Selected Materials and Commentary)* (Oxford University Press 2004) 4.002.

⁴⁰ Georges R Delaume, 'The State Immunity Act of The United Kingdom' (1979) 73 *The American Journal of International Law*.

⁴¹ In addition to recognising jurisprudence restricting the scope of immunity, increased financial and commercial activity also provided motivation for adopting the restrictive model. Bankers and traders were increasingly engaging in commercial transactions with states and it was considered important

the immunities and privileges of heads of state, and c) to provide for the effect of judgments rendered against the United Kingdom in the courts of other member states of the ECSI.⁴² It is applicable in relation to proceedings commenced in 'courts of the UK', which is defined to mean 'any tribunal or body exercising judicial functions'.⁴³ Although the objective of the SIA was to codify the restrictive model of state immunity, the Act itself is not a codifying statute and therefore does not set out the entirety of the law on state immunity within it.⁴⁴ Rather, as was set out by Lord Hope in *Holland v Lampen-Wolfe*, there are two regimes on the law of state immunity that run alongside each other – the first is the State Immunity Act 1978 and the second is under common law which continues to apply to all cases falling outside the scope of the Act.⁴⁵ For example, criminal proceedings have been expressly excluded by the Act⁴⁶ and continue to be governed by the common law. It has also been pointed out that the SIA does not prescribe hard limits on the scope of state immunity, leaving much room for these limits to be shaped by the common law.⁴⁷

2.1 The General Rule of Immunity

Section 1 of the SIA lays down the default rule regarding immunity from jurisdiction and stipulates that a state generally has immunity from the jurisdiction of UK courts except for when its conduct falls within any of the exceptions contained in sections 2-17.⁴⁸ States are not required to appear in proceedings and claim this immunity; rather, it is an inherent immunity which courts are required to give effect to.⁴⁹ Case law has confirmed that section 1 must be construed in mandatory terms and does not entail a discretionary element.⁵⁰ In *Jones v Saudi Arabia*, relying on the practice of other states as well as scholarly work on the subject, the UK House of Lords noted that 'where applicable, state immunity is an absolute preliminary bar' and that accordingly, there was no scope for the exercise of discretion.⁵¹ This interpretation has subsequently been confirmed by the Court of Appeal.⁵² The consequence of this conception of state immunity is that where state immunity exists, courts may not then go into the question of merits.

Section 14 clarifies what constitutes a state for the purposes of the immunities under the SIA. More specifically, it notes that the immunities and privileges conferred by Part I extend to

that they have assurance that any potential disputes arising 'will be capable of litigation in the courts'. See HL Deb 16 March 1978 vol 389.

⁴² State Immunity Act 1978, Preamble.

⁴³ *ibid* s 22(1).

⁴⁴ Fox and Webb (n 8) 167.

⁴⁵ *Holland v Lampen-Wolfe* [2000] 1 WLR 1573 (HL) (*Holland v Lampen-Wolfe*).

⁴⁶ State Immunity Act 1978, s 16(4).

⁴⁷ *Playa Larga* (n 19) Lord Wilberforce.

⁴⁸ State Immunity Act 1978, s 1(1).

⁴⁹ *ibid* s 1(2). See also *Arab Republic of Egypt v Gamal Eldin and Another* [1996] 2 All ER 237 (EAT).

⁵⁰ *Qureshi* (n 7) 56.

⁵¹ *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another (Secretary of State for Constitutional Affairs and others intervening)* [2007] 1 AC 270 (HL) 33.

⁵² See *Koo Golden East Mongolia v Bank of Nova Scotia and others* [2007] EWCA Civ 1443, [2008] QB 717.

‘any foreign or commonwealth State other than the United Kingdom’ and that the term ‘state’ includes the following within it:

- (a) the sovereign or other head of that State in his public capacity;
- (b) the government of that State; and
- (c) any department of that government.⁵³

Section 14(1)(a) only relates to acts by heads of state in a public capacity; when such an entity is acting in a private capacity, the applicable provisions of the SIA are those under Part III.⁵⁴ As regards the term ‘government’ used in sections 14(1)(b) and (c), the application of this term had previously been determined on the basis of whether or not the entity exercised ‘sovereign authority’,⁵⁵ similar to the test under section 14(2)(a). However, more recently, since the adoption of the United Nations Convention on Jurisdictional Immunities of States and Their Property in 2004, the House of Lords has stipulated that the term ‘government’ must now be construed with reference to that Convention.⁵⁶

Immunity is not granted to those entities that are distinct from the executive organs of the government of the state – known as ‘separate entities’ – except under certain conditions.⁵⁷ The first of these is where the separate entity is acting in an exercise of ‘sovereign authority’.⁵⁸ In order to determine whether there has been an exercise of sovereign authority, courts must consider whether the act in question is a sovereign act or a private act in accordance with customary international law.⁵⁹ Various factors involved in making such a consideration include: to whom the critical action is attributable,⁶⁰ the context of the claim,⁶¹ and whether a private person has the capacity to act in that manner.⁶² The second exception applies where the circumstances are such that if the proceedings brought against the separate entity would ordinarily have been brought against a state, that state would have been immune.⁶³ Dickinson, Lindsay, and Loonam note that such a circumstance might arise, for example, where a

⁵³ State Immunity Act 1978, s 14(1).

⁵⁴ *ibid* s 20-21.

⁵⁵ *Propend Finance Pty Ltd & Ors v Sing & Anr* [1997] WL 1103759 (CA).

⁵⁶ Fox and Webb (n 8) 177. See Jones (n 51) [69] (Lord Hoffmann).

⁵⁷ State Immunity Act 1978, s 14(1), (2).

⁵⁸ *ibid* s 14(2)(a).

⁵⁹ Dickinson (n 39) 404; See also *Kuwait Airways Corporation v Iraqi Airways Co. and Another* [1995] 1 WLR 1147 (HL) (Lord Goff) 1161 (Kuwait Airways [No 1]).

⁶⁰ *Playa Larga* (n 19) at 264.

⁶¹ *ibid* 267.

⁶² *Kuwait Airways* (n 59) [1160].

⁶³ State Immunity Act 1978, s 14(2)(b).

proceeding is brought with respect to membership of a company against the separate entity, where all other members of the company are States.⁶⁴

Central banks and monetary authorities of a State can be classified as departments of the government under section 14(1)(c) or in some instances, be classed as separate entities.⁶⁵ However, regardless of their classification, this category of actors receives certain special privileges under the SIA; for example, the property of a central bank may not be regarded as 'in use or intended for use for commercial purposes' and thus is not subject to attachment.⁶⁶ The list of entities laid down in section 14 is not exhaustive, but Her Majesty has the power to extend or restrict the scope of immunities.⁶⁷

2.2 Waiver of Immunity

Although states are entitled to immunity under the SIA, such immunity may be waived by the state either explicitly or implicitly. A waiver of immunity is seen both as the state relinquishing its right to immunity and as it consenting to the jurisdiction of the court.⁶⁸ The relevant provision dealing with waiver or submission to the court's jurisdiction is section 2 according to which a state will have been deemed to have waived its immunity in four circumstances.

The first is where it has submitted to the jurisdiction of United Kingdom courts after the dispute has arisen⁶⁹ either in writing or by virtue of its conduct.⁷⁰ The second is where it has submitted to the jurisdiction by prior written agreement.⁷¹ In such cases, the whole of the agreement must be in writing.⁷² Such an agreement can however, include a treaty or any other international agreement.⁷³ The third circumstance where the state is deemed to have submitted to the court's jurisdiction is where the state itself has instituted the proceedings.⁷⁴ Finally, a state may waive immunity by intervening or 'taking any step in the proceedings'⁷⁵ aside from the claim to immunity itself or asserting an interest in property in certain circumstances.⁷⁶ The waiver of immunity is founded in the notions of sovereignty and consent. State behaviour which demonstrates a waiver of immunity is, in itself a sovereign act and therefore, where a state voluntarily acts in this manner, it may not then gain the benefit of immunity.

⁶⁴ Dickinson (n 39) 406.

⁶⁵ Fox and Webb (n 8) 181; State Immunity Act 1978, s 14(3), (4); See also, *Banca Carige SpA Cassa di Risparmio di Genova e Imperia v Banco Nacional de Cuba* [2001] 1 WLR 2039 (Ch).

⁶⁶ *ibid*.

⁶⁷ State Immunity Act 1978, s 15.

⁶⁸ Fox and Webb (n 8) 187.

⁶⁹ State Immunity Act 1978, s 2(2).

⁷⁰ Fox and Webb (n 8) 189.

⁷¹ State Immunity Act 1978, s 2(2).

⁷² See *Ahmed v Government of The Kingdom of Saudi Arabia* [1996] ICR 25 (CA).

⁷³ Dickinson (n 39) 350.

⁷⁴ State Immunity Act 1978, s 2(3)(a).

⁷⁵ *ibid* s 2(3)(b).

⁷⁶ *ibid* s 4.

2.3 Exceptions to Immunity

The SIA follows an exclusionary framework where the general principle is that a state will be have the benefit of immunity unless its conduct falls within any of the categories listed in sections 3-11. It is these categories of exceptions that have resulted in much contention in English jurisprudence. For the purposes of providing context to the decisions discussed later on in this article, a brief overview of these exceptions has been provided below.

Commercial Transactions and Contracts

As per section 3 of the SIA, a state loses its immunity in respect of any proceedings that have to do with commercial transactions⁷⁷ that the state has entered into⁷⁸ as well as any contracts to be performed wholly or partly in the United Kingdom regardless of whether it is commercial in nature.⁷⁹ However, section 3 also lists three instances where it is inapplicable: where the parties to the dispute are states, where the parties have agreed otherwise in writing, and if the contract was made in another state under its governing law.⁸⁰

There has been considerable debate regarding the scope and application of the term ‘commercial transactions’. For example, in *Holland v Lampen-Wolfe*, it was held that the writing and publication of an allegedly libellous memorandum had a tortious rather than contractual nature and thus fell outside the scope of section 3.⁸¹ In *Svenska Petroleum v Lithuania*, although the oil exploration agreement fell under the ambit of ‘commercial transactions’, section 3 was still held to be inapplicable as the proceedings in question related to an arbitral award and not to the commercial transaction itself.⁸² In *NML v Argentina*, a narrow construction of section 3 was favoured, in noting that the term ‘proceedings relating to’ in section 3 would not extend a judgment that in turn dealt with a commercial transaction.⁸³

Contracts of Employment

Employment contracts which are those contracts that set out the rights and obligations that arise between an employee and an employer, do not fall within the scope of section 3 and instead are governed by section 4 of the Act.⁸⁴ As per section 4 – as regards any proceedings

⁷⁷ The term ‘commercial transactions’ has been defined in Section 3(3) as encompassing:

(a) any contract for the supply of goods or services;
(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and
(c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority.

⁷⁸ *ibid* s 3(1)(a).

⁷⁹ *ibid* s 3(1)(b).

⁸⁰ *ibid* s 3(2).

⁸¹ *Holland* (n 45) [1587].

⁸² *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania and another* (No 2) [2007] 2 WLR 876 (CA) 14 (*Svenska v Lithuania*).

⁸³ *NML Capital Ltd v Republic of Argentina* (*NML v Argentina*) [2011] UKSC 31 (Lord Mance) 86. Lord Philips however, disagreed with the majority; See *NML v Argentina* (Lord Philips) 26.

⁸⁴ State Immunity Act, s 3(3)(c).

relating to a contract of employment that is both made and wholly or partially performed in the UK – a State loses immunity.⁸⁵ This rule does not apply where: the contract of employment is with a national of the State concerned,⁸⁶ a non-UK national, or an individual otherwise not habitually resident in the UK.⁸⁷ The exception also does not apply if it has been expressly excluded in writing.⁸⁸

Further, as per section 16(1), section 4 also does not apply to those contracts of employment that concern diplomatic or consular missions. The provision has been subject to controversy in cases such as *Benkharbouche* where it was argued that a state is entitled to absolute immunity where the employment of the embassy staff is concerned in light of principles of diplomatic law.⁸⁹ The Court rejected this argument holding that while article 7 of the Vienna Convention on Diplomatic Relations precludes states from ordering the employment of persons in embassies, it does not affect questions of state immunity where only damages are sought.⁹⁰

Other Exceptions

Aside from the above, other exceptions include subjects such as personal injury and property-related exceptions. Section 5, for example, excludes from immunity any proceedings relating to acts or omissions caused within the UK,⁹¹ leading to death or personal injury,⁹² or resulting in damage or loss to tangible property.⁹³ Section 6, on the other hand, retracts immunity from proceedings relating to a state's interest, possession, or use of immovable property in the UK⁹⁴ as well as any concomitant obligations.⁹⁵ Additionally, immunity is also extended to intellectual property claims such as those for: patents and trademarks (section 7),⁹⁶ membership of corporate bodies (section 8),⁹⁷ proceedings relating to arbitration (section 9), the commercial use of ships (section 10),⁹⁸ and VAT customs duties and agricultural levy (section 11).⁹⁹

⁸⁵ *ibid* s 4(1).

⁸⁶ *ibid* s 4(2)(a).

⁸⁷ *ibid* s 4(2)(b).

⁸⁸ *ibid* s 4(2)(c).

⁸⁹ *Benkharbouche v Embassy of the Republic of Sudan (Secretary of State for Foreign and Commonwealth Affairs and others intervening)* [2017] UKSC 62; See also *Military Affairs Office of the Embassy of the State of Kuwait v Mr L Caramba-Coker* [2003] WL 1610407 (EAT); *United Arab Emirates v Abdelghafar* [1995] 105 ILR 627 (EAT); *Federal Republic of Nigeria v Ogbonna* [2012] 1 WLR 139 (EAT) (*Nigeria v Ogbonna*).

⁹⁰ *ibid* [68].

⁹¹ See also *Jones* (n 51).

⁹² State Immunity Act, s 5(a).

⁹³ *ibid* s 5(b).

⁹⁴ *ibid* s 6(1)(a).

⁹⁵ *ibid* s 6(1)(b).

⁹⁶ See also *Planmount Ltd v Republic of Zaire* [1981] 1 All ER 1110 (QB).

⁹⁷ See also *R v Inland Revenue Commissioners Ex p. Camacq Corp* [1990] 1 WLR 191 (CA).

⁹⁸ See also *Holland* (n 45).

⁹⁹ *Fogarty v United Kingdom* ECHR 2001-XI, [2001] (*Fogarty*).

4. Recent Jurisprudence and Engagement with Public International law

In the last decade or so, there have been a number of landmark decisions by English courts which have had substantive impacts on the doctrine of state immunity. Notably, questions have arisen with respect to the scope and application of the SIA vis-à-vis the preservation of human rights. The application of state immunity in arbitral proceedings is yet another area that presents much debate. Further, the adoption of the United Nations Convention on Jurisdictional Immunities of States and Their Property 2004, which is a multilateral treaty framework enshrining the principle of state immunity has also played a significant role in influencing the practice of English courts. Key jurisprudential developments as well as the trends that emerge from these developments shall be discussed thematically, below.

State Immunity and Conflict with Human Rights

The very nature of state immunity, in that it precludes proceedings against states and similar entities, raises ostensible conflicts in terms of questions of access to justice. It is unsurprising, therefore, that there has been much deliberation regarding conflicts between the SIA and various international instruments that seek to protect the right to judicial remedy and fair trial.

The application of the general rule of immunity under section 1 of the SIA itself was challenged before the European Court of Human Rights as conflicting with the Right to Fair Trial under article 6 of the European Convention on Human Rights (ECHR) on two separate occasions – *Fogarty v United Kingdom*¹⁰⁰ and *Al-Adsani v United Kingdom*.¹⁰¹ In both instances, the Court observed that the doctrine of state immunity, which arises out of principles of international law itself, is in pursuance of a legitimate aim of ‘complying with international law to promote comity and good relations between states through respect of another state’s sovereignty’ and consequently, that its adoption is not disproportionate and does not go beyond the margin of appreciation accorded to the United Kingdom.¹⁰² A similar view was taken by the Employment Appeals Tribunal in 2013 decision of *Al-Malki v Reyes*.¹⁰³ It is also noteworthy that the context in which *Al-Adsani* arose was a *civil* proceeding in respect of acts of torture. In contrast, where criminal proceedings for acts of torture are involved, the *jus cogens* status of the prohibition against torture and the concomitant grant of universal criminal jurisdiction are important applicable considerations. This distinction appears to indicate that state sovereignty is given primacy subject to the applicability of peremptory and non-derogable norms of international law.¹⁰⁴

More recently, in the landmark decision of *Benkharbouche*¹⁰⁵, the UK Supreme Court made significant pronouncements on the article 6 question. This case concerned two Moroccan

¹⁰⁰ *ibid.*

¹⁰¹ *Al-Adsani v United Kingdom* ECHR 2001-XI, [2001] (*Al-Adsani*).

¹⁰² *ibid* 58; *Fogarty* at 35; See also Matthias Kloth, *Immunities and The Right Of Access To Court Under Article 6 Of The European Convention On Human Rights* (Martinus Nijhoff Publishers 2010) 30.

¹⁰³ *Al-Malki and another v Reyes and another* [2014] ICR 135 (EAT).

¹⁰⁴ See Shaw (n 2) 944 on *jus cogens* norms.

¹⁰⁵ *Benkharbouche* (n 89).

nationals, Ms Janah and Ms Benkharbouche, who worked for the Libyan and Sudanese embassies in London respectively. Upon being fired from their roles in these embassies, both claimants brought a variety of claims under EU Law as well as UK Law against Libya and Sudan. Although the Employment Tribunal initially dismissed these claims on the basis of state immunity,¹⁰⁶ the validity of provisions of the SIA relating to contracts of employment in a diplomatic/consular mission – namely sections 4(2) and 16(1)(a) itself was challenged on the basis of conflict with article 47 of the EU Charter of Fundamental Rights – ‘right to effective remedy and fair trial’ – and article 6 of the ECHR.¹⁰⁷ As regards section 4(2), according to which the proceedings would be barred by immunity as the claimants were neither UK nationals nor habitually resident in the UK, the Court held that not only did this provision contravene article 6 – read in conjunction with the article 14 prohibition on discrimination – but also that there was no evidence of customary international law justifying its requirement.¹⁰⁸

As far as section 16(1) was concerned, the Court held that the blanket immunity that this provision offered to diplomatic and consular missions, without distinguishing between acts of a sovereign nature and those of a private nature, also fell afoul of the customary international law standard of restrictive immunity and constituted a disproportionate interference of article 6 rights.¹⁰⁹ The Court rejected the Secretary of State’s contention that state practice evidenced the existence of an absolute rule of state immunity.¹¹⁰ It also held that since these provisions contravened Article 6 of the ECHR, they were also incompatible with article 47 of the EU Charter.¹¹¹ The dictum in *Benkharbouche* has been regarded as a welcome change in jurisprudence, in particular by critics of the SIA as it further restricts the scope of the principle.¹¹² It has also been viewed as significant in terms of its interpretation of international conventions such as the ECSI and the 2004 UN Convention.¹¹³

Arbitration and the SIA

In tandem with the growth of arbitration as a dispute resolution mechanism, a number of state immunity questions relating to this area have also arisen in recent years.¹¹⁴ In accordance with section 9, an exception from state immunity applies to proceedings relating to arbitration,¹¹⁵

¹⁰⁶ *ibid*, 2-8.

¹⁰⁷ *ibid* [13].

¹⁰⁸ *ibid* [76].

¹⁰⁹ *ibid* [73].

¹¹⁰ *ibid* [69].

¹¹¹ *ibid* [78].

¹¹² Katja S Ziegler, 'Immunity Versus Human Rights: The Right to A Remedy After Benkharbouche' [2017] Human Rights Law Review 33 (Ziegler); See also Andrew Sanger, 'State Immunity and The Right of Access to A Court Under The EU Charter Of Fundamental Rights' (2016) 65 International and Comparative Law Quarterly.

¹¹³ *ibid* 34.

¹¹⁴ Rupert Coldwell, 'A Procedural Bar to Award Enforcement? State Immunity in England & Wales' (*Kluwer Arbitration Blog*, 18 Nov 2016) <<http://arbitrationblog.kluwerarbitration.com/2016/11/18/a-procedural-bar-to-award-enforcement-state-immunity-in-england-wales>> accessed 19 March 2020.

¹¹⁵ State Immunity Act, s 9(1).

on the condition that the arbitration agreement in question is not between two states.¹¹⁶ Further, as per section 9(1) the arbitration agreement must be in writing. However, the Court of Appeal in *London Steam Ship Owners Mutual Insurance Association v Spain* (2015) interpreted this provision widely.¹¹⁷ In this case, the claimants brought proceedings against Spain and France in relation to an arbitral dispute between the parties arising out of an insurance contract. Although the contract was not formally signed by the defendants, the court held that the pursuit of claims under the contract by itself amounted to an adoption of the arbitration agreement and that, accordingly, the requirement under section 9 had been fulfilled.¹¹⁸

In the area of commercial disputes in particular, with arbitration gaining widespread popularity, the question of a possible overlap in the application of sections 3 and 9 of the SIA is one worth examination. This question was considered in *NML v Argentina*, a case dealing with a debt moratorium over Argentinian-issued bonds, where the court considered the overlap and noted that although there was a high likelihood of an overlap, that possibility by itself did not justify a narrow construction of section 3; rather, that conclusion was based on a number of other factors.¹¹⁹ The Court also recognised that section 9 had a wide scope of application, covering not only arbitral award enforcement but any other proceeding relating to arbitration.¹²⁰ Aside from further restricting the scope of state immunity, this development may also have been conditioned by the fact that England is increasingly becoming the forum of choice for large scale international commercial arbitrations.

The UN Convention on State Immunity and its impact

The United Nations Convention on Jurisdictional Immunities of States and Their Property was adopted in 2004¹²¹ with the objective of creating a comprehensive international legal framework on the question of state immunity.¹²² Although several countries, including the United Kingdom, have signed it, the requisite number of ratifications have not been fulfilled and the Convention is yet to come into force.¹²³ The most conspicuous difference between the SIA and the UN Convention is that in respect of proceedings relating to state property in use or intended for use commercially,¹²⁴ the UN Convention makes a slightly different characterisation and widens the ambit to any state property that has a connection to the state entity.¹²⁵

¹¹⁶ *ibid* s 9(2).

¹¹⁷ *London Steam Ship Owners Mutual Insurance Association Ltd v Spain* [2015] EWCA Civ 333 (CA) 70.

¹¹⁸ *ibid*.

¹¹⁹ *NML v Argentina* (n 83) [112-150].

¹²⁰ *ibid* [30].

¹²¹ United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004, not yet in force) UN GA Res A/59/38 (UN Convention).

¹²² Roger O'Keefe, Christian J Tams and Antonios Tzanakopoulos, *The United Nations Convention On Jurisdictional Immunities Of States And Their Property* (Oxford University Press 2013) 14.

¹²³ *Orakhelashvili* 274.

¹²⁴ State Immunity Act, s 6.

¹²⁵ UN Convention at Article 18(c).

Although the UN Convention has not yet come into force and the UK is not strictly bound by the Convention in its treaty form, it is interesting to note that English Courts have frequently relied on the Convention to interpret provisions of the SIA.¹²⁶ Notable examples of recent jurisprudence include the Supreme Court's reliance on the Convention in the context of detention and torture related proceedings in *Belhaj v Straw*,¹²⁷ *Rahmatullah*,¹²⁸ and with respect to an arbitral award concerning an oil exploration agreement in *Svenska v Lithuania*¹²⁹ among numerous others.¹³⁰

Emerging Trends and engagement with Public International Law

Over the past few years, the question of state immunity has been at the heart of a number of landmark English decisions. The treatment of state immunity in recent jurisprudence has received mixed reactions. Whilst it has garnered praise from some,¹³¹ it has also been criticised by authors like Aniche who has called this jurisprudence 'consistently inconsistent'.¹³² However, this is not entirely true. Although these decisions engage the principle in various different contexts, upon closer reflection, two dominant trends can be culled out from the corpus of caselaw. The first, is that there appears to an increasing level of engagement by English Courts with public international law and public international law principles. The second, is that the scope of state immunity is becoming more and more limited. This increase in limits is in tandem with, and perhaps reflective of, a more ubiquitous change in international law from a state-centric to a more individual-centric model. This change is reflected in greater focus on individuals as subjects holding rights and duties across various regimes such as international human rights law, international criminal law and international investment law.¹³³

Although international legal principles have historically played an important role in the evolution of the state immunity doctrine, the influence of international law seemingly decreased in the years following the entry into force of the State Immunity Act 1978.¹³⁴ However, this appears to have changed once again in recent jurisprudence. Despite the presence of a domestic legislation, courts at all levels have not only looked to international

¹²⁶ Fox and Webb (n 8) 171; See also *Jones v Saudi Arabia*; *AIG Capital Partners Inc v Republic of Kazakhstan* [2006] 1 WLR 1420 (Comm).

¹²⁷ *Belhaj v Straw* [2017] UKSC 3 194.

¹²⁸ *R on the application of Yunus Rahmatullah, Amanatullah Ali v Secretary of State for Defence, Secretary of State for Foreign and Commonwealth Affairs* [2014] EWHC 3846 (QB) 67.

¹²⁹ *Svenska* (n 82) [14].

¹³⁰ See, for example, *Al Attiya v Bin-Jassim Bin-Jaber Al Thani* [2016] EWHC 212 (QB); See also *Al-Malki v Reyes*; *United States v Nolan* [2009] IRLR 923 (EAT).

¹³¹ See Ziegler (n 112).

¹³² Ernest Tooichi Aniche, 'A Critical Examination Of The British Municipal Court Rulings On Cases Of International Immunity: Revisiting The Imperatives Of Politics Of International Law' (2016) 2 Cogent Social Sciences 7.

¹³³ For a comprehensive examination of the status of individuals in international law see Kate Parlett, *'The Individual in the International Legal System: Continuity and Change in International Law'* (Cambridge University Press 2010).

¹³⁴ *Trendtex* (n 30) [534].

law in determining the scope of immunity, but have engaged substantively with principles and concepts of public international law. Noteworthy examples include the comprehensive survey conducted in cases such as *Benkharbouche*¹³⁵ and *Belhaj*.¹³⁶ This level of engagement with international law is in stark contrast with earlier English decisions such as the case of *Cheney*, in which fundamental principles of international law – such as the Geneva Conventions concerning international humanitarian law which were binding under international law – were entirely rejected.¹³⁷ Further, it is also interesting that courts have relied extensively on the 2004 UN Convention on State Immunity as well as its preparatory works by the International Law Commission despite the Convention not having come into force yet.¹³⁸

The second dominant trend that emerges is an increasing restriction on the scope of state immunity. Whether this is in the context of conflict with human rights, arbitrations, or commercial transactions, either provisions of the SIA are being outrightly rejected, as in *Benkharbouche*, or they are being interpreted so as to limit the scope of immunity as in *NML v Argentina*. This increase in limits on state privilege is in line with two major paradigm shifts that have occurred in international law over the past decades. The first is the change in the understanding of sovereignty from an absolute power granted to states to it becoming functional sovereignty, one that must be limited in order for increased harmonisation in the international legal order.¹³⁹ The second significant paradigm shift is the change in international law from a state-centric to an individual centric model.¹⁴⁰ States are no longer the primary subjects of international law.¹⁴¹ Rather, individuals are being given greater importance in recent times in recognising countervailing movements to state power, solidifying individual rights in international instruments and even allowing them to bring claims before international tribunals.¹⁴² The approach that English Courts have taken in limiting state immunity in favour of human rights and protection of individual interests is consistent with these shifts.

Conclusion

As has been outlined above, there are two significant inferences that may be derived from the jurisprudence surrounding the law on state immunity before the English Courts – the first being greater engagement with public international law and the second being that the doctrine is being interpreted more and more restrictively. Both of these inferences are indicative of a larger shift in attitude relating to the way in which public international law has been treated.

The thorough examination of international law sources in cases such as *Belhaj*, *Benkharbouche*, and *Rahmatullah* demonstrate a sea change from the days of *Cheney*, where international law

¹³⁵ *Benkharbouche* (n 89) [36]-[62].

¹³⁶ *Belhaj* (n 127) [12]-[30].

¹³⁷ See *Cheney v Conn (Inspector of Taxes)* [1968] 1 WLR 242 (Ch).

¹³⁸ *Benkharbouche* (n 89) [62].

¹³⁹ Ando Nisuke, 'Some Critical Observations on The International Law Commission's Articles On State Responsibility' (1995) 5 Asian Yearbook of International Law 125.

¹⁴⁰ Shaw (n 2) 198.

¹⁴¹ *ibid.*

¹⁴² *ibid.*

was seen as a set of merely indicative guidelines. The current trend indicates that there is greater willingness in English jurisprudence to rely on international law principles, even when they are not strictly applicable. This approach is likely to have considerable impact on future evaluations of the scope and limits of state immunity as well, as a strong case has been made for interpreting state immunity principles in line with international law and particularly the 2004 UN Convention.

The increasing restrictions placed on state immunity are also telling as they have developed contemporaneously and in tandem with the shift in international law to a model that is no longer purely state-centric. Further this restrictive approach not only appears to be more in line with developing international law principles, but it may be argued that it is also symptomatic of the larger shift in international law of the power dynamics between state and non-state actors.