Jurisdictional Immunities and *Certain Iranian Assets*: Missed Opportunities for Defining Sovereign Immunity at the International Court of Justice

Ylli Dautaj† & William F. Fox‡

The International Court of Justice (ICJ) is one of the most powerful and influential actors in international law. Its decisions are scrutinized closely not just by the parties that appear before the court but also by domestic courts, legislatures, state executives, and legal scholars.

The traditional doctrine of sovereign immunity was absolute and totally state-centric. Historically, a private party could not sue a state and seek execution of a state's assets. But the traditional doctrine is, generally speaking, no longer justifiable when states engage in commercial activities. These days, it is generally accepted that when a state acts like a commercial entity, it should be liable for its actions in much the same manner that a private company is held liable for its transgressions.

Recently, in the case of *Certain Iranian Assets*, the ICJ was presented with a magnificent opportunity to rework, clarify, and enhance the troubled doctrine of sovereign immunity, especially with regard to immunity from execution. The authors believe that the ICJ had a singular opportunity—just as it did in the *Jurisdictional Immunities* case in 2012—to broaden and articulate a modern doctrine of sovereign immunity. Instead of seizing this opportunity, however, the court hid behind outmoded and difficult-to-rationalize concepts of judicial restraint and tradition. As a result, the court has now missed two great opportunities to discuss and clarify a pragmatic and liberal rule of immunity from jurisdiction and execution, which has bedeviled courts and practitioners for many years.

In 2012, the court first missed the opportunity to elaborate a more human rights-oriented doctrine with respect to jurisdictional immunity for non-commercial acts and enforcement. In 2019, the court again missed the opportunity but solely with respect to jurisdiction from enforcement. Formulating a new doctrine that merges these two distinct immunity

† Ylli Dautaj is the Managin Partner at DER Legal; Visiting Lecturer, Uppsala University; PhD Candidate, University of Edinburgh; Senior Research Associate, O.P. Jindal Global University, Jindal Global Law School, India. Many thanks to Dr. Filippo Fontanelli and Dr. Ana Vargas for their guidance at the inception of this research project and overall great supervision and mentoring. Can be contacted at Ylli.Dautaj @derjuridik.se.

‡ William F. Fox is a Distinguished Visiting Professor at the School of Transnational Law, Peking University, Shenzhen Graduate Campus.

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regimes and rejects a state-centric approach would have launched the court on a journey toward a much more liberal, pragmatic, and human rights-centric regime and placed the court at the forefront of a proper, contemporary view of sovereign immunity. That the court did not do so is a singular regret and tragedy—one that the court can perhaps remedy in future actions. With the emerging impact of state capitalism, it is important that the court manifests human rights considerations and firmly entrenches justice and fairness as the polestar of transnational adjudication.

The authors make the point that there are still several crucial and unresolved issues pertaining to sovereign immunity; in particular with respect to (1) sovereign immunity from execution, and (2) immunity from non-commercial acts. These issues are, simultaneously, of a theoretical, doctrinal, and practical nature.

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Introduction

Questions involving the law of sovereign immunity arise frequently before both municipal and international courts. Because sovereign immunity is such a fundamental concept, issues regarding the doctrine are of immense importance to legal scholars and, more importantly, the doctrine has a substantial impact on the practice of international law. The basic

issues have been addressed by scholars and practitioners on many occasions.[1]

In this Article, we analyze the International Court of Justice's (ICJ) role in consolidating and interpreting the law of sovereign immunity. We do so by looking at Iran's recent attempt to invoke sovereign immunity in legal actions involving Iranian central bank assets held in the United States (U.S) and, in the recent past, Germany's success in circumventing the attempted assertion of jurisdiction and enforcement by Italian courts vis-á-vis war-related crimes.[2] This rather technical *de lege lata* (the "law as it exists") discussion underscores a much greater *de lege ferenda* ("future law" or "what the law should be") debate.[3] But these issues demand fresh discussion, beyond the confines of the traditional case note, because recent cases implicate a number of nuanced and unresolved issues with respect to the law of sovereign immunity.

This Article focuses primarily on two unresolved issues: (1) the distinction between immunity from jurisdiction and execution; and (2) the debate on the general rule of immunity for certain human rights-infringing, non-commercial activities. We devote most of our inquiry and analysis to whether a third, more liberal concept of immunity, which moves beyond the restrictive immunity currently perceived to be "in force," needs to be developed.[4] Given the relative recency of the ICJ's case law on the topic, some of our conclusions must remain tentative and, at times, speculative.

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1. *See* KAJ HOBÉR, SELECTED WRITINGS ON INVESTMENT TREATY ARBITRATION 497 (2013); *see also* Int'l Law Comm'n, Rep. on the Work of Its Thirty-Eighth Session, U.N. Doc. A/41/10, at 17 (1986) (explaining that "[i]mmunity from execution may be viewed . . . as the last fortress, the last bastion of State immunity"). For more general commentary on sovereign immunity in an international context, see generally Tom Ruys et al., *Introduction* to THE CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 1 (Tom Ruys et al. eds., 2019); Winston P. Nagan & Joshua L. Root, *The Emerging Restrictions on Sovereign Immunity: Peremptory Norms of International Law, the U.N. Charter, and the Application of Modern Communications Theory*, 38 N.C. J. INT'L L. & COM. REGUL. 375 (2013); Christian Tomuschat, *The International Law of State Immunity and Its Development by National Institutions*, 44 VAND. J. TRANSNAT'L L. 1105 (2011); Jasper Finke, *Sovereign Immunity: Rule, Comity or Something Else?*, 21 EUR. J. INT'L L. 853 (2010).

2. *See* Certain Iranian Assets (Iran v. U.S.), Application Instituting Proceedings, 2016 I.C.J. 2, ¶ 6 (June 14) [hereinafter Certain Iranian Assets]; Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. 99, ¶ 139 (1) (Feb. 3) [hereinafter Jurisdictional Immunities]. In analyzing these cases, one must be aware of the fact that when "a plaintiff sues a foreign state defendant in a particular court, and the foreign state is immune from suit, then the court will dismiss the plaintiff's claim, denying . . . court access." Christopher A. Whytock, *Foreign State Immunity and the Right to Court Access*, 93 B.U. L. REV. 2033, 2035 (2013).

3. Whytock, *supra* note 2, at 2089.

4. There is significant scholarship and commentary on human rights law and international humanitarian law. *See generally, e.g.*, Anna Spain Bradley, *Human Rights Racism*, 32 HARV. HUM. RTS. J. 1 (2019); Camila Teixeira, *Priority, Agency and Cooperation: How International Human Rights Law Helps Fulfil the Economic and Social Rights of the Most Vulnerable*, 24 INT'L J. HUM. RTS. 1031 (2019). However, the practice on laws ancillary or incidental to terrorism is scarcer and more difficult to parse. Thus, the "war on terror" sheds light on unorthodox challenges in law, philosophy, politics, and economics. *See generally, e.g.*, Judith Tinnes, *Bibliography: Legal Aspects of Terrorism*, PERSPS. ON TERRORISM, Aug. 2016, at 67.

But we are adamant that such an analysis must be performed even if we cannot form hard, fast, permanent conclusions.[5]

In *Bank Markazi v. Peterson*,[6] the United States Supreme Court addressed whether the United States Congress had the power under the U.S. Constitution to make certain Iranian assets held by Bank Markazi available to satisfy judgments in cases brought against the government of Iran for acts of international terrorism. The effect of this decision was to declare as "constitutional" a novel approach for attaching and executing sovereign assets. In this Article, we analyze the subsequent chain of events, beginning in the United States and winding up before the ICJ in the *Certain Iranian Assets* case.[7] We approach these issues through the prism of the law on sovereign immunity as it has evolved under customary international law. We believe that the ICJ was presented with a significant opportunity to play a much more active role in consolidating and interpreting the law on sovereign immunity but, unfortunately, came up short.[8] In particular, the ICJ could have done two things: (1) it could have unequivocally clarified the procedural and substantive distinction, or even better, rejected it; and (2) it could have clarified the law on immunity from execution, with particular reference to *seizing* central bank assets and establishing a *nexus* requirement.

Certain Iranian Assets came seven years after the *Jurisdictional Immunities* case. In *Jurisdictional Immunities*, the dispute originated in decisions out of municipal courts in Italy and Greece.[9] Arguably, the court was more proactive in that case, but it is our opinion that the court committed a fundamental error in not rejecting a state-centric approach to the law of sovereign immunity in favor of a human rights-oriented approach.[10]

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5. *See* Roger O'Keefe, *Jurisdictional Immunities*, *in* THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE 107, 108 (Christian J. Tams & James Sloan eds., 2013). "The relative freshness of this jurisprudence makes any assessment of the Court's role in the development of international law in this area necessarily tentative and, as regards the last case, largely speculative." *Id.* This statement was true in 2013 and holds true today.

6. *See generally* Bank Markazi v. Peterson, 136 S. Ct. 1310 (2016).

7. *See generally* Certain Iranian Assets, *supra* note 2.

8. It is very unlikely that the ICJ will return to the sovereign immunity issue in the merits phase of *Certain Iranian Assets*, especially considering that it has been previously treated as a procedural plea. Furthermore, we use the phrase "significant opportunity" deliberately because some of the more important and unresolved issues under public international law, in general, and the law of sovereign immunity, in particular, do not reach the court all that often. When such controversial matters are litigated, the judges should seize these rare opportunities to clarify the matter before them and any incidental and ancillary controversies that remain unresolved. In such cases, we believe that restraint is not the proper path for the court to take.

9. *See* Certain Iranian Assets, *supra* note 2, ¶¶ 27–36.

10. *See id.* ¶¶ 21–22 (Yusuf, J., dissenting).

> It is true that State immunity is a rule of customary international law, and not merely a matter of comity, although some legal scholars consider it only as an exception to the principle of territorial sovereignty and jurisdiction of States. Its coverage has, however, been contracting over the past century in light of the evolution of international law from a State-centered legal system to one which also protects the rights of human being's vis-à-vis the State. . . . It was indeed for

There is no question that the ICJ is well-positioned to consolidate the doctrinal framework and to create uniformity that transcends most barriers. However, the ICJ will need to flex its jurisdictional muscles to strengthen liberal and pragmatic municipal decisional law, and its 2004 United Nations Convention on State Immunity (UNCSI), which codifies customary international law. This would allow the ICJ to bolster its unique dominance while building a modern and principled transnational legal order. Moreover, the court should elaborate on the content of public international law by emphatically endorsing a liberal and pragmatic doctrine on sovereign immunity. The normative outcome must reflect not only Western values but also a broader framework that includes a diverse set of historical, economic, philosophical, political, and legal perspectives; that is, the court will have to take non-Western voices into account. But at the same time, this does not mean that the ICJ, as the chief architect of a transnational legal order, should bow down to political pressure.[11]

Finally, the modern relaxation of absolute immunity, we believe, springs from practical roots rather than from scholarly inquiry and analysis. At least at this point in time, capitalism and liberal democracies appear to have prevailed over the historical alternatives. Ideology has played a large—probably the main—role in the transition from absolute to restrictive immunity. This transition now raises new questions and may require several additional exceptions vis-á-vis immunity from jurisdiction and a more lenient approach with respect to immunity from execution.[12]

> the purpose of protecting the rights of individuals or juridical persons vis-à-vis States that a restrictive doctrine of immunities was introduced by national courts as early as the nineteenth century. Similarly, the tort exception to immunity has been conceived for the protection of individual rights against States.

Id.

11. This was the case in *Jurisdictional Immunities*, where the ICJ was not sufficiently decisive vis-á-vis Germany. *See generally* Jurisdictional Immunities, *supra* note 2.

12. There are disagreements on this point, however. *See, e.g.*, XIAODONG YANG, STATE IMMUNITY IN INTERNATIONAL LAW 23 (2012) ("It is doubtful whether ideological differences played any significant part in the evolution of State immunity rules."). Yang titled a sub-section of his book *The Irrelevance of Ideologies*. However, in his concluding remarks, he perplexingly wrote:

> The true cause for the passing of absolute immunity is that international economic life, and with it the very conceptualization of the State itself, had undergone so phenomenal a change that the law inevitably and inexorably became out of step with the reality, and thus had to be discarded as a thing of the past. It is only for this reason—and not because of any philosophical breakthrough, that the doctrine of absolute immunity finally appeared so anachronistic and untenable: *cessante ratione legis cessat ipsa lex*.

Id. at 31–32. We agree on the statement made but not on the proffered reasoning. The evolution of liberal democracies and their embrace of free and open markets is by definition a philosophical breakthrough. This philosophical breakthrough has paved the way from command economies international trade, investment, and commerce. As these market practices became more sophisticated, a shift in concepts of the sovereign and the sovereign's prerogatives followed. The State could now be made the subject of a lawsuit, and the state's assets were no longer outside the scope of permissible remedies. Capitalism prevailed; thus, now the discussions focus on issues of nuance, degree, and scope. The greatest philosophical battle of our time saw one ideology defeated and another prevailing superior for organizing a twenty-first-century citizenry.

The liberal movement now seeks to elevate individual rights and liberties above a state-centric approach. As such, this liberal and pragmatic trend echoes the post-World War II widening scope of public international law to include more subjects and to consider more than merely the interests of the state. As we pursue our analysis, we believe that the better approach may be to reject the distinction between immunity from jurisdiction and immunity from execution, and instead treat the two separate concepts as one.[13]

A. Some Additional Background for a Nuanced and Inclusive Discussion

For many years, the courts of politically influential and economically strong Western jurisdictions have been the driving force in the de facto creation of the law on sovereign immunity. This development is primarily due to two things: (1) a failed attempt to establish a multilateral framework on sovereign immunities,[14] and (2) ICJ silence with regard to creating a robust doctrine on sovereign immunity. The ICJ should take the lead in these matters because—unlike states' case law—it is the leading and most powerful voice in consolidating, crystalizing, and interpreting public international law. The court's decision should naturally be given great weight and influence. But at the same time, municipal courts should continue to work in tandem with the ICJ to generate a pragmatic and workable body of law on these crucial sovereign immunity issues. State practice (legislative and judicial) is the foundation for customary international law.

On these points, Western scholars, legislators, and judges appear to be in favor of a liberal and pragmatic doctrine vis-á-vis international economic law. The few disagreements go to the question of whether to endorse a further liberalization of the general rule on immunity.[15] What is the logical scope, degree, and extent of a further liberalization of the doctrine? In this Article, we affirmatively reject a state-centric approach to the law. But at the same time, we strongly believe that the legitimacy of a uniform, well-received transnational legal order is under threat if superpowers such as China, Russia, and India are to have no voice in the debate. We have the same view with regard to the scholarship of the Third World Approaches to International Law movement, and the voices of the Global South. But because one ideology has prevailed so emphatically (until recently at least), the rest of the world has been idle, mainly watching from a distance while the debate unfolds, having little incentive or power to shape it. For

13. *See* Hazel Fox, *When Can Property of a State Be Attached to Enforce a Foreign Judgment Given Against It in Another Country? Some Guidance in the ICJ Judgment in the* Jurisdictional Immunities *Case*, *in* CONTEMPORARY DEVELOPMENTS IN INTERNATIONAL LAW 46, 55 (Rüdiger Wolfrum et al. eds., 2016).

14. On December 2, 2004, the U.N. General Assembly adopted the United Nations Convention on Jurisdictional Immunities of States and Their Property. This treaty has not yet entered into force. It will enter into force once thirty states sign and ratify it. *See generally* G.A. Res. 59/38, United Nations Convention on Jurisdictional Immunities of States and Their Property (Dec. 2, 2004) [hereinafter UNCSI].

15. *See generally* HAZEL FOX & PHILIPPA WEBB, THE LAW OF STATE IMMUNITY (3d ed. 2013).

good and obvious reasons, there has been a great measure of cynicism directed towards exclusively Western practices in shaping public international law.

Accordingly, we must address the question of whether the creation of customary international law is a form of hegemonical practice; namely, by whom is the practice ascertained and for whom does it apply?[16] And, if these Western-dominant practices continue unhindered, whether we will forever be stuck in a scenario where—as the cynics have often asserted—the United Nation's (U.N.) and similar Western-led projects remain a "catch-22" by which the developing world can only break free from poverty by intensifying its dependence on the West. There is a similar question, of somewhat milder import (a proverbial dog that caught the car scenario), as to what happens once these projects reach the intended goals of relative interdependence. If the ICJ can get it right, we may be able—finally—to reject Western hegemony as a thing of the past. If the court gets it wrong, and does so repeatedly, global cooperation in these matters will soon perish.

We believe international law needs to take the next major step in human and legal civilization by intensifying ties among nations and embracing the concept of interdependence. This cannot be achieved without inviting new voices to discuss the role of the sovereign in the twenty-first century; but it does not mean that the West must jettison its firmly entrenched and elaborated values. The debate is ongoing, and the floor is open. Let the voices be heard. Our opinion is set out below.

I. The Law on Sovereign Immunity, the Dismantling of the State-Centric Approach, and the Last Bastion of Immunity from Execution

The law on immunity is one of the classic branches of public international law.[17] Sovereign immunity has been described as "a rule of interna-

16. For a solid discussion and great insight on the law of sovereign immunity and the issue of ascertaining customary international law, see Jurisdictional Immunities, *supra* note 2, ¶ 23 (Yusuf, J., dissenting).

> Thus, although State immunity is important to the conduct of harmonious and friendly relations between States, it is not a rule of law whose coverage is well defined for all circumstances or whose consistency and stability is unimpaired. There is indeed considerable divergence in the manner in which the scope and extent of such immunity is interpreted and applied in the practice of States, and particularly in the judicial decisions of their courts. It is not therefore very persuasive to characterize some of the exceptions to immunity as part of customary international law, despite the continued existence of conflicting domestic judicial decisions on their application, while interpreting other exceptions, similarly based on divergent domestic courts' decisions, as supporting the nonexistence of customary norms. This may give the impression of cherry-picking, particularly where the number of cases invoked is rather limited on both sides of the equation.

Id.

17. *See* JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 139 (2d ed. 2009).

tional law that facilitates the performance of public functions by the state and its representatives by preventing them from being sued or prosecuted in foreign courts."[18] Put somewhat differently, "[i]ts rationale is to promote the functioning of all governments by protecting states from the burden of defending litigation abroad."[19] Therefore, it has been described as a protection that enables states "to carry out their functions effectively."[20]

The law on sovereign immunity has been developed primarily through decisions by various nations' municipal courts and, to a certain extent, by municipal codification. But the law has also developed internationally, mainly through the codification of the 2004 UNCSI, the 2012 *Jurisdictional Immunities* case, other case law from international courts and tribunals, and renowned international scholarly work.[21]

Nevertheless, to this day, the law on sovereign immunity lacks a consolidated multilateral framework. Moreover, the ICJ has been relatively silent on the subject matter.[22] The closest multilateral attempt to uniformity has been, as mentioned above, the UNCSI, which was adopted in 2004 and ratified by several states.[23] But the Convention will not take effect and

18. JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 1, 470 (9th ed. 2019). Notably, analyses about (1) whether the plea of immunity is applicable to the agencies, political instruments, and instrumentalities of a State; (2) the extent to which it is applicable for individuals; (3) the extent of criminal jurisdiction; or (4) the issue of immunity from measures of constraint, are beyond the scope of this Article.

19. JULIAN D.M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION LAW 744 (2003).

20. FOX & WEBB, *supra* note 15, at 317. Fox and Webb argue that sovereign immunity works in three ways:

> (i) as a method to ensure a "stand-off" between States where private parties seek to enlist the assistance of the courts of one State to determine their claims made against another State; (ii) as a method of distinguishing between matters relating to public administration of a State and private law claims; (iii) as a method of allocating jurisdiction between States in disputes brought in national courts relating to State activities in the absence of any international agreement by which to resolve conflicting claims to the exercise of such jurisdiction.

Id. at 1.

21. *See* CRAWFORD, *supra* note 18, at 934.

22. With the exception of *Jurisdictional Immunities*, where the court ruled, among other things, that sovereign immunity was of a procedural nature. *See* Jurisdictional Immunities, *supra* note 2, ¶ 23. This seems to be echoed in *Certain Iranian Assets*. *See generally* Certain Iranian Assets, *supra* note 2. Until 2002 the ICJ had never taken up immunity issues. *See generally* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgement, 2002 I.C.J. 3 (Feb. 14) [hereinafter Arrest Warrant Judgement]; Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 422 (July 20).

23. In 1978, the International Law Commission (ILC) was tasked with reconciling territorial jurisdiction with sovereign authority. The ILC presented a report in 1991, which was initially rejected, and which was, finally, clarified in bits and pieces on request of the United Nations General Assembly before being de facto adopted into what is now the UNCSI.

The UNCSI closely follows the ILC draft and codifies a presumptive rule of jurisdictional and enforcement (attachment and execution) immunity but elaborates specific, case-by-case exceptions. Immunity from jurisdiction and execution is treated differently, as is the case on domestic case law and legislation where applicable. *See generally* UNCSI, *supra* note 14. Europe had made a similar attempt some thirty years prior, but it did not bring any uniformity, nor was it adequate to meet the shifts in sovereign participation in the global market.

enter into force until it is ratified by at least thirty states,[24] which is not likely to happen anytime soon. As a result, the law has been—and probably will continue to be—developed primarily through municipal decisional law and legislation. Another view is that the UNCSI represents a codification of customary international law and therefore the role for municipal courts will now be to interpret the content of the Convention. Either way, municipal law and procedural intricacies of the forum state will remain the driving force behind elaborating a liberal and progressive doctrine, or the opposite, a regressive one. In the view of one prominent scholar, "[i]mmunity exists as a rule of international law, but its application depends substantially on the law and procedural rules of the forum."[25] For these reasons it is evidently the case that the ICJ is well placed to interpret the law and consolidate it in light of state practice. Whether this means that the law of sovereign immunity is one of customary international law is another matter altogether. But because the law on sovereign immunity is not consolidated, and because we continue to encounter major disagreements on the historic, legal, political, economic, and philosophical normative values underpinning the doctrine, it is difficult to predict its application going forward. In reality, the principles we have were issued piece-meal and on an ad hoc basis, but many of these same principles are nevertheless accepted as representing a de facto consensus in both jurisprudence and doctrine.[26]

A. Immunity from Jurisdiction: The Push to Reject a State-Centric Approach in Favor of a Human Rights-Oriented Approach

The theory of sovereign immunity is said to have swung from an absolute to a restrictive immunity.[27] Some would advocate that this transition

24. As of 2019, fourteen states had signed—but had not ratified—the UNCSI, including Belgium, China, India, Russia, and the U.K. And twenty-two states had ratified it, including Austria, France, Iran, Italy, Japan, Saudi Arabia, Sweden, and Switzerland. The United States has neither signed nor ratified the Convention. *See United Nations Convention on Jurisdictional Immunities of States and Their Property*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-13&chapter=3&clang=_en [https://perma.cc/RAE5-3KA4] (last visited Feb. 19, 2020) [hereinafter U.N. TREATY COLLECTION]. Some of these states (e.g., China, India, and Russia) have been traditionally opposed to restrictive immunity.

25. CRAWFORD, *supra* note 18, at 471; *see also* FOX & WEBB, *supra* note 15, at 318–19, 760–75.

26. This consensus submits, among other things, that states enjoy immunity as a principle of customary international law, that the immunity can be qualified where the state acts in a private or non-governmental fashion, and that the law of immunity from jurisdiction is distinct from that of execution. *See* YANG, *supra* note 12, at 34.

27. The law on sovereign immunity is not static. The theory on sovereign immunity has changed incrementally and continues to do so. The theory on absolute immunity has been reformulated to respond to globalization and capitalism, in general, and reflects the dominance of capitalist systems in the areas of global commerce, trade, and investment. Doctrinal developments continue to reflect changes in philosophical, economic, political, and legal policies. To facilitate the move towards restrictive immunity, sovereign immunity doctrine has increasingly become the subject of codification. But the codification movement has slowed in recent years and the doctrine remains largely uncodified world-wide. The UNCSI, while still not in force, has, nevertheless, been

needs even further "liberalization" because further exceptions are instrumental and need to be carved out incrementally as a result of the increased standing of mandatory public international law (*jus cogens*), and the increased emphasis on international human rights law and victims' rights to reparation.[28] However, since the 2012 *Jurisdictional Immunities* case, doctrinal evolution seems to have gone in the other, more regressive direction.[29] The ICJ treated the plea of immunity "as a procedural exclusionary plea," where a procedural or substantive distinction is used to restrict the scope of immunity and its impact on questions of substantive law.[30]

The central idea behind absolute immunity posited that the world was conceived of competing sovereign states that enjoyed bilateral relations with each other and possessed exclusive internal competence and external equality and independence.[31] The restrictive theory on immunity, on the other hand, rests on the distinction between *acta jure imperii* (public acts) and *acta jure gestionis* (commercial acts).[32] This distinction underscores a carve out of immunity from both adjudication (jurisdictional immunity) and enforcement (immunity from execution).[33] As we will see below, however, sovereign immunity operates slightly different vis-á-vis jurisdiction as opposed to execution.[34] In other words, a state is not immune from jurisdiction when engaging in a commercial or private-law *activity*, and its property is not immune from execution when used for commercial *purposes*.[35]

The gradual evolution towards a restrictive theory on immunity is to be applauded. This transition began gradually but has really taken off since the 1970s.[36] Despite this, a more regressive, *third* theory of immunity seems to have arisen by treating sovereign immunity merely as "as a proce-

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accepted in both international legal scholarship and a number of court decisions as a codification of certain principles of customary international law. At the national level, the United States enacted the Foreign Sovereign Immunities Act (FSIA), which includes a restrictive doctrine on immunity and certain elaborated exceptions. Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified in scattered sections of 28 U.S.C.). The FSIA's exceptions include, among other things, the waiver and commercial activity exceptions. The United Kingdom adopted a similar codification in 1978 through the adoption of the State Immunity Act. *See generally* State Immunity Act of 1978 c. 33 (Eng.).

28. See Italy's arguments in Jurisdictional Immunities, *supra* note 2, ¶ 92; *see also* Whytock, *supra* note 2, at 2078.

29. *See* Whytock, *supra* note 2, at 2036.

30. FOX & WEBB, *supra* note 15, at 26. This, however, is not to be understood as granting impunity for substantive violations. Arrest Warrant Judgement, *supra* note 22, ¶ 60; *see also* Jurisdictional Immunities, *supra* note 2, ¶ 100 ("Moreover, as the Court has said, albeit in the different context of the immunity of State officials from criminal proceedings, the fact that immunity may bar the exercise of jurisdiction in a particular case does not alter the applicability of the substantive rules of international law.").

31. FOX & WEBB, *supra* note 15, at 32.

32. *See id.* at 34.

33. *See id.* at 29, 32.

34. *See id.* at 31.

35. *See id.* at 35–36 (emphasis added).

36. *See id.* at 33.

dural plea."[37] Due to today's global merchant practices and the emphasis on individual rights and liberties, a state should no longer benefit from the privilege of immunity for private commercial acts, and perhaps no longer for certain so-called sovereign acts either. Notwithstanding this, the "adoption of the restrictive theory does not avoid the problem of determining its precise boundaries."[38] As a result, the contours of sovereign immunity have been reflected—and created—mainly in domestic legislation, decisional law, and by certain multilateral efforts such as the European Convention on State Immunity and the UNCSI.[39] Notwithstanding this, some observers claim that a broad consensus does exist as to the type of exceptions applicable.[40] While that may be true, the law is still undefined in crucial aspects such as with respect to execution and human rights violations.

Thus, the move toward a restrictive theory is primarily a result of nation states' active participation in the market. This active participation as legal persons, in private law dealings, and with private law rights and obligations, is a result of ages-long philosophical, political, and economic battles on how to conduct state affairs. The relaxation of immunity is not a result of changes in the thinking of academics but rather because it has worked in practice. Capitalism and liberal democracies have prevailed over the alternatives.[41] It is argued that the capitalist ideology has played a large—probably the main—role in the transition from absolute to restrictive immunity. And that this transition now creates new questions and advocates for several additional exceptions to the immunity from jurisdiction, and a more sensible approach with respect to immunity from execution.[42]

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37. *Id.* at 45. However, there is one caveat: "These three models do not strictly describe a historical progression—indeed they overlap and infiltrate each other." *Id.* Thus, we may have entered into an alternate phase, which invites forum courts to exercise jurisdiction by denying sovereign immunity on grounds other than commerciality. Two arguments have been made to widen the basis of jurisdiction for immunity removal:

> First, the mandatory nature of international law's prohibition on international crimes and its effect on the responsibility of the State as well as the individual for such violations. Second, the right of access to a civil court for an individual that is the victim for a reparation, such as a violation of human rights.

Lady Hazel Fox, *Lady Hazel Fox on State Immunity*, U.N. AUDIOVISUAL LIBRARY (Oct. 10, 2011), http://webtv.un.org/watch/lady-hazel-fox-on-state-immunity/2622888935001/?term= [https://perma.cc/VGP5-GDAU].

Moreover, the decision in *Jurisdictional Immunities* was a step back from the movement to qualify immunity on the basis of peremptory rules of public international law, human rights, and access to courts (alternatively restoration by access to justice). *See* Jurisdictional Immunities, *supra* note 2, ¶¶ 77, 93. Referencing paragraphs 97 and 101 of the opinion, Fox and Webb wrote: "In consequence, the pleas of violation of *jus cogens* rules and of no effective alternative means of securing redress raised by Italy had no application . . . ." FOX & WEBB, *supra* note 15, at 995. For a contrary view, see generally the dissenting opinions in Jurisdictional Immunities, *supra* note 2.

38. CRAWFORD, *supra* note 18, at 473.

39. *See* FOX & WEBB, *supra* note 15, at 465.

40. *See* CRAWFORD, *supra* note 18, at 473.

41. *See* YANG, *supra* note 12, at 23.

42. *See id.*

As seen, the first two theories of immunity rest on the dichotomy between private law acts and the sovereign's role in state-to-state relations. The shift from absolute to restrictive immunity is significant, but it should be appropriately based on the recognition that states now engage in private sector actions and need to be held accountable as such. The number of acts qualifying as commercial acts, in turn, reflect modern reality when they include a larger number of non-sovereign functions. As states engage in more and more business activities that had been, traditionally, the province of private entities, these concepts of private, free, and open markets extended to state activities have pushed the concept of sovereign immunity toward a fiscally sound application. Questions remain, however, as to whether the presumption of immunity should be reconceptualized to reflect a stronger emphasis on the individual and the individual's rights and liberties. For example, in the United States, the Foreign Sovereign Immunities Act (FSIA) sets out a terrorism exception to sovereign immunity involving jurisdiction and perhaps also with respect to immunity from execution for otherwise immune sovereign assets.[43] Others have pushed for the law on sovereign immunity to take into account concepts such as *jus cogens*, serious human rights violations, and reparations for victims.[44] Additionally, further liberalization of the general rule on sovereign immunity is the only way to accommodate and address new issues that go above and beyond the commercial and sovereign dichotomy.[45] Such liberalization would not be an abandonment of the restrictive theory, but rather an expansion of its central ethos. The absolute theory has been discredited as outdated and unrealistic.[46] The new momentum takes us in a different direction; namely,

> a shift from the bilateralism of rights to a vertical hierarchy. The obligations of the State have extended to include those owed to the international community as a whole; and obligations owed to individuals have broadened through a network of human rights treaties. The desire to end impunity and to provide redress to victims has been expressed in the establishment of

43. The exception was codified in 28 U.S.C.A § 1605A (West). The United State Supreme Court's decision in *Bank Markazi* seems to approve the FSIA and its terrorism exception. "Enacting the FSIA in 1976, Congress transferred from the Executive to the courts the principal responsibility for determining a foreign state's amenability to suit." Bank Markazi v. Peterson, 136 S. Ct. 1310, 1329 (citations omitted).

44. *See* Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), Counter-Memorial of Italy, 2009 I.C.J. 127, ¶ 4.117 (Dec. 22) [hereinafter Counter-Memorial of Italy] (outlining elaboratively the access to justice for individuals' human rights, and arguing that sovereign immunity cannot lend itself towards de facto impunity); FOX & WEBB, *supra* note 15, at 429–33. Moreover, one scholar described a contemporary issue with sovereign immunity law as that "between the foreign state immunity doctrine and the right to court access." Whytock, *supra* note 2, at 2034; *see also* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966).

45. *See generally* Wenhua Shan & Peng Wang, *Divergent Views on State Immunity in the International Community*, *in* THE CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW, *supra* note 1, at 61.

46. *See, e.g.*, John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT'L L. 782, 797 (2003).

> international criminal courts and tribunals and the exercise of universal jurisdiction by national courts.[47]

This would have been a good development, but instead the ICJ elaborated a new theory of sovereign immunity in the *Jurisdictional Immunities* case.[48] That model of sovereign immunity focuses on the "exclusionary phase with its application confined to a Procedural Plea in the presentation of a claim against a foreign State in a national court."[49] Thus, since *Jurisdictional Immunities*, the law on sovereign immunity may be considered "a procedural exclusionary plea," where a procedural or substantive distinction is used to restrict the scope of immunity and its impact on questions of substantive law.[50]

In *Jurisdictional Immunities*, Italy proposed an alternative that was very much in line with the liberal expansion of the law on sovereign immunity.[51] Italy supported its claim with three basic arguments;[52] that is, there can be no sovereign immunity where (1) a state has committed serious violations of international humanitarian law;[53] (2) a state is in violation of norms of a *jus cogens* character;[54] and (3) a state has failed to provide for victims' reparations.[55] This is clearly a call for a more human rights-oriented or individual-liberty-oriented, rather than state-centric, approach.[56] Notwithstanding this marvelous opportunity, the ICJ declined to move the law of sovereign immunity to a third, more *liberal* phase. Quite the opposite, the court decided against Italy and dismissed each argument (as well as the cumulative effect of each argument).[57] The court did so by presenting its own alternative: a third, but more *regressive*, phase of sovereign immunity that defined pleas as solely procedural in nature. The court held:

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47. Fox & Webb, *supra* note 15, at 424–25.

48. *See id.*

49. *Id.* at 425.

50. *Id.* at 467. However, the procedural exclusionary plea model does not grant impunity for substantive violations. It has been said elsewhere, and is applicable in this context, that "the immunity from jurisdiction [enjoyed by ministers of foreign affairs] does not mean [the ministers have] impunity [for] any crimes they might have committed." Arrest Warrant Judgement, *supra* note 22, ¶ 60; *see also* Jurisdictional Immunities, *supra* note 2, ¶ 100.

51. *See e.g.*, Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Brit. Y.B. Int'l L., 1961, at 1, 15.

52. This Article does not deal with the argument of re-classifying some of a state's alleged crimes as falling under the "territorial tort exception."

53. The primary grounds are crimes that amount to war crimes or crimes against humanity. *See* Jurisdictional Immunities, *supra* note 2, ¶ 80.

54. One example is the prohibition on torture.

55. This argument primarily focuses on court access. Whytock, *supra* note 2, at 2035 ("Even if its precise contours are not entirely settled, the right to court access is increasingly recognized in both international and domestic law."). But what does "court access" actually entail? Does it include the broader realm of "access to justice," and therefore a right to provide judgment, or does it give creditors power and influence in the execution of a judgment or award?

56. *See* Ruys et al., *supra* note 1, at 5.

57. *See* Jurisdictional Immunities, *supra* note 2, ¶¶ 62–109.

> The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.[58]

Scholars have described the ruling as having a "broader reach than the Court's decision to dismiss Italy's claim to war damage," and that it "reflects in some respects a general retreat from the expansive tendency of the Second Model."[59] Indeed, this pronouncement went from treating rights on a "bilateral basis," toward treating rights on the basis of a vertical hierarchy. As we have already discussed, many authorities support reading the law of sovereign immunity in light of the "obligations owed to the international community as a whole."[60] Such reading is further supported by several concepts—such as, *jus cogens* norms (i.e., as conflicting with "peremptory norms");[61] *erga omnes* ("towards everyone") obligations; universal jurisdiction; and vctims' reparations.[62] However, "these four concepts have largely failed to obtain support in State practice and have not in fact operated to restrict the scope of State immunity."[63] Moreover, the court could have approached the question in a non-binary way by promoting the "principle of proportionality"—namely, that sovereign immunity "should not be granted if its impact on the claimant's ability to obtain court access would be disproportionate to the benefits of immunity for relations between the

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58. *Id.* ¶ 93.

59. Fox & Webb, *supra* note 15, at 428.

60. Nagan & Root, *supra* note 1, at 400.

61. See the joint dissent in Al-Adsani v. U.K., 34 Eur. Ct. H.R. 11, ¶¶ 1–3 (2002).

> By accepting that the rule on prohibition of torture is a rule of *jus cogens*, the majority recognises that it is hierarchically higher than any other rule of international law, be it general or particular, customary or conventional, with the exception, of course, of other *jus cogens* norms. For the basic characteristic of a *jus cogens* rule is that, as a source of law in the now vertical international legal system, it overrides any other rule which does not have the same status. In the event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails. The consequence of such prevalence is that the conflicting rule is null and void, or, in any event, does not produce legal effects which are in contradiction with the content of the peremptory rule. . . . [and] due to the interplay of the *jus cogens* rule on prohibition of torture and the rules on State immunity, the procedural bar of State immunity is automatically lifted, because those rules, as they conflict with a hierarchically higher rule, do not produce any legal effect. In the same vein, national law which is designed to give domestic effect to the international rules on State immunity cannot be invoked as creating a jurisdictional bar, but must be interpreted in accordance with and in the light of the imperative precepts of *jus cogens*.

Id.; *see also* Fox & Webb, *supra* note 15, at 433 ("This view has not, however, attracted the support of the ICJ nor of the majority of the [European Court of Human Rights] in later cases. The ICJ in the Congo v[.] Rwanda judgment on preliminary objections did not accept that the rules on jurisdiction and the *jus cogens* norms in issue (the prohibition on genocide) interplayed with each other.") (citations omitted); Jones v. Ministry of Interior of the Kingdom of Saudi Arabia [2007] UKHL 26, ¶ 49 (Eng.) (applying the more restrictive approach and rejecting the peremptory character of *jus cogens*).

62. Fox & Webb, *supra* note 15, at 429–30.

63. *Id.* at 430.

forum state and the foreign state."[64]

The main criticism of treating sovereign immunity on the basis of a procedural or substantive distinction is that it cannot be usefully applied in all cases where issues related to immunity arise.[65] The ICJ (and the European Court of Human Rights)[66] has prioritized sovereign immunity over victims' reparations through access to courts and access to justice, and has "thus [failed] to shed light on how the two doctrines might be reconciled," confirming that sovereign immunity "is indeed a serious barrier to court access."[67] Further shoring up all of our previous discussion, two leading scholars of sovereign immunity made the following comment:

> The "diversification of international actors" and response to obligations "owed to the international community as a whole" may provide grounds for some expansion of the matters permitted to come within such an investigation. But the setting aside by a court of the immunity of a foreign State summoned before it on the ground that a plea to immunity from jurisdiction is wholly procedural and exclusionary of all substantive issues, as the ICJ stated in the *Jurisdictional Immunities* judgment, raises issues of fundamental importance that cannot be solved solely by the distinction between procedure and substance.
>
> . . . .
>
> This review of State practice may lead one to describe the Third Model as both regressive and exclusionary, a recognition that the time is not ripe for unilateral decisions of national courts to provide solutions to highly political claims. The better view, however, is to treat the Second and Third Models as swings of a pendulum. Given the changing political makeup of the international community and the considerable economic and environmental problems to be faced, change in the shape of international law, as the ICJ itself indicated, is also not to be ruled out. The ICJ 2012 Judgment has left a number of doors open.[68]

At this point, we need to ask a provocative question: Is it a form of Western hegemony to relentlessly weaken the general rule on immunity vis-á-vis (1) aspects of international economic law; and (2) the setting aside of immunity for state officials (primarily those from third-world countries); but not for, inter alia, (3) reparations for victims; or (4) human rights violations? Moreover, if immunity is retained on the basis of a procedural or substantive distinction, will reparations for grievances stemming from imperialism, war-related crimes, interventionist wars, or their equivalents, be out-of-reach for directly, indirectly, or vicariously aggrieved victims as a consequence? Is this potential "slippery-slope" the underlying reason for suddenly breaking away from the natural trajectory of a liberal

64. Whytock, *supra* note 2, at 2038.

65. *See, e.g.*, Alexander Orakhelashvili, *State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong*, 18 EUR. J. INT'L L. 954, 968 (2007).

66. *See generally* Al-Adsani v. U.K., 34 Eur. Ct. H.R. 11 (2002); McElhinney v. Ir., 34 Eur. Ct. H.R. 13 (2002).

67. Whytock, *supra* note 2, at 2036.

68. FOX & WEBB, *supra* note 15, at 453, 460.

doctrine on sovereign immunity? Any practitioner outside the field of international economic law will be stuck between a rock and a hard place when a state invokes immunity pursuant to an alleged human rights violation or its equivalent.

The United States is rightly subject to criticism for various miscalculations in both its international policy objectives and its often-misconceived political concerns; but on the broad issue of foreign sovereign immunity, both U.S. courts and the U.S. Congress have heeded the need for an approach to sovereign immunity that is far more sensitive to human rights. The U.S. Congress has codified a liberalized version of immunity from jurisdiction in the terror-related exceptions of its FSIA, and has provided a process for obtaining the *execution* of such judgments against states designated as sponsors of terrorism.[69] In *Bank Markazi v. United States*, the U.S. Supreme Court's analysis was arguably deficient in both logic and traditional legal analysis, but it was not deficient with regard to the underlying justification, which rested on policy objectives and political concerns.[70] The Court did considerable justice to a comparative legal methodology and wrote an opinion that is pragmatic and workable. By contrast, the ICJ, in *Jurisdictional Immunities*, failed to properly account for this vertical, hierarchical structure of law, which has, at its center, a strong regard and sensitivity for the rights of victims.[71] Moreover, the ICJ compounded its error in the *Certain Iranian Assets* case by focusing on a technical discussion and completely side-stepping the potential to consolidate, crystalize, and further develop this area of law.[72]

In sum, these two ICJ decisions can be explained as follows: if a state is entitled to sovereign immunity under public international law, there will be no access to justice, notwithstanding the gravity of the violation. In large part because of the ICJ's derelictions, sovereign immunity doctrine remains in an unfortunate and wholly avoidable "state of flux." And even worse, current political trends appear to be pulling the law in different, sometimes opposite and often irreconcilable, directions.[73] But at the same time, the doctrine's evolution, however haphazard and inconsistent, can help us understand its past political, economic, philosophical, and legal virtues and also help us anticipate the changes to come. Fundamentally, we can recognize that sovereign immunity largely reflects "the accommodation of private claims for redress with the maintenance of due respect for authority."[74] Put a bit differently, the theory of sovereign immunity is

69. 28 U.S.C.A. § 1605A(a) (West).

70. *See* Bank Markazi v. Peterson, 136 S. Ct. 1310, 1329 (2016).

71. *See generally* Jurisdictional Immunities, *supra* note 2.

72. *See generally* Certain Iranian Assets, *supra* note 7.

73. *See* Ruys et al., *supra* note 1, at 4.

74. Fox & Webb, *supra* note 15, at 468; *see also* Ruys et al., *supra* note 1, at 5 ("And so immunity regimes continue to be forged by competing forces, including, on the one hand, the deference to state sovereignty, the desire for stability in international relations or the need to protect the independent functioning of [international organizations], and, on the other hand, the advance of human rights and the fight against impunity, as well as the principle comprehensive nature of states' territorial jurisdiction."); Jurisdictional

largely granted, withheld, or modified on policy objectives and political concerns.[75]

B. Immunity from Execution: Same, Same but Different

A growing concern for private rights, individual liberties, and public morality, coupled with increasing entry of governments into what had previously been regarded as private pursuits, has led many courts to review the plea on immunity.[76] Accordingly, due to globalization and global trade, the areas in which states can seek immunity has shrunk considerably. The initial distinction was based almost entirely on the concept of "commerciality,"[77] but these days, non-commercial exceptions are being carved out incrementally from the general rule of immunity (e.g., for non-commercial torts and funding terrorist activities).[78]

As the restrictive sovereign immunity doctrine was first being debated, a crucial question emerged: whether "commerciality" should be determined on the basis of the "nature of the act" (i.e., the nature approach) or on the basis of the "purpose of the act" (i.e., the purpose approach).[79] More recently, the nature approach has gained the most traction and is now the dominant position taken vis-á-vis immunity from jurisdiction.[80] In other words, if the act is commercial in nature (or an act under the private law sphere), the state's immunity is limited because these activities are lacking in a true "public purpose." The less-utilized purpose approach classifies an act as "sovereign" if it has any kind of arguable sovereign purpose.[81] However, despite being largely discredited, the purpose approach

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Immunities, *supra* note 2, ¶ 24 (Yusuf, J., dissenting) ("Would it not have been more appropriate to recognize, in light of conflicting judicial decisions and other practices of states, that customary international law in this area remains fragmentary and unsettled?").

75. To reemphasize this point, see RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES (REVISED) ch. 5, intro. note (1987). The Restatement treats the normative basis of the doctrine of sovereign immunity as "necessary for the effective conduct of international intercourse and the maintenance of friendly relations." *Id.*

76. *See* Fox, *supra* note 37.

77. There is no easily discernable, bright line between what is and what is not a commercial activity. The court must draw a distinction on a case-by-case basis unless the activity or transaction falls in a "straight-jacket," such as a sale of goods. *See* YANG, *supra* note 12, at 77 ("[A]ll that the current instruments on State immunity say is, in essence, that 'a commercial activity is a commercial activity.' This is pure tautology. In most cases, therefore, the courts are left to their own devices; and an examination of the relevant case law reveals a picture of great variety and complexity."). It is equally difficult to define what is a governmental, non-commercial activity.

78. For a very good analysis, see generally David P. Stewart, *Immunity and Terrorism*, *in* THE CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW, *supra* note 1, at 651.

79. One might also add a "context approach." *See* YANG, *supra* note 12, at 85. Some judges have found difficulty in favoring a distinction and have instead searched for an answer in the totality of the circumstances.

80. *Id.* at 86.

81. *Id.* at 98 ("[The purpose test] naturally lost much of its validity when States, in particular the Soviet-type States in the twentieth century, increasingly engaged in all manner of activities formerly conducted only by private individuals or companies. In fact, the whole doctrine of restrictive immunity, throughout its history of evolution, has

is sometimes unfortunately applied as the main test for imposing a limitation on sovereign immunity from execution.[82] Additionally, some states add a nexus requirement; that is, whether a connection exists between the territory and the commercial act, transaction, or assets located in the forum-state.[83] Other states give their executive branch the authority to decide whether to enforce a judgment against a foreign state.[84] Conclusively, the evolution of restrictive immunity is significant but on the related issue of immunity from execution, there has not been as much development.[85] At least one viewpoint has been expressed in this fashion: "The fact that a state cannot claim immunity from jurisdiction does not necessarily mean that the state is not immune from the actual execution of the award. In most laws the exceptions to immunity from execution are narrower than the exceptions to immunity from jurisdiction."[86]

The dichotomy and difference of approach with regard to immunity from execution, which also establishes a number of qualifications, has developed somewhat differently from the doctrine governing immunity from jurisdiction. Some areas where uncertainty persists include (1) whether immunity for execution is subject to rules other than those governing immunity from jurisdiction; and (2) whether state property should be subject to execution when it is used for non-sovereign purposes only, or whether a perceived commercial activity is sufficient.[87]

In sum, (1) there are significant distinctions between immunity from jurisdiction and immunity from execution,[88] (2) the purpose test is the dominant test for ascertaining whether assets are non-commercial, (3) the

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been predicated on the abandonment or rejection of the 'public purpose' argument in favour of a 'private nature' test.").

82. In particular, the unresolved issue with respect to immunity from execution is receiving increased attention because there is no "international procedure for an orderly resolution of the situation arising from state insolvency or a state's general inability to meet its financial commitments; rescheduling of state debts remains largely a political process." Fox, *supra* note 13, at 46.

83. *See, e.g.*, Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, § 1605A(a)(2), 90 Stat. 2891 (codified in scattered sections of 28 U.S.C.). To enable the restrictive theory to be effectively applied in a practical setting required the development of a crucial doctrine that we refer to as the waiver (or implied consent) doctrine.

84. *See, e.g.*, Kodikas Politikes Dikonomias [KPol.D.] [Code of Civil Procedure] art. 923 (Greece).

85. *See* James Crawford, *The Place of the International Court in International Dispute Settlement*, *in* THE INTERNATIONAL LEGAL ORDER: CURRENT NEEDS AND POSSIBLE RESPONSES 95, 95 (2017); *see also* YANG, *supra* note 12, at 343 ("'Measures of constraint' is a generic term covering both interlocutory, interim or pre-trial measures prior to final judgments and the execution or enforcement of judgments. In the context of State immunity, these are coercive or enforcement measures taken by the court either to restrain the foreign State in the disposition of its property, normally in the form of interlocutory injunctions, or otherwise to attach, arrest or seize the property of the foreign State.").

86. LEW ET AL., *supra* note 19, at 750.

87. *See* Fox, *supra* note 13, at 48.

88. This is also underscored in Jurisdictional Immunities, *supra* note 2, ¶ 113 ("The rules of customary international law governing immunity from enforcement and those governing jurisdictional immunity (understood *stricto sensu* as the right of a State not to be the subject of judicial proceedings in the courts of another State) are distinct and must be applied separately.").

nexus requirement complicates things even further in this context, and (4) certain categories are absolutely immune.[89] Conversely, in order for a judgment or award creditor to successfully execute against state assets when the shield of sovereign immunity is invoked, she will likely have to: (1) prove either that an explicit waiver exists, that the property has been earmarked, or that assets are used for other non-sovereign, commercial purposes; (2) establish a territorial or entity connection; and (3) even if the first two requirements are met, she might still be unable to execute the judgment or award because the assets traced might fall under certain categories that are considered immune *ipso facto*.[90] Such immune assets can include, inter alia, diplomatic property (e.g., premises and bank accounts); central bank property; military property (e.g., ships and aircrafts); states' cultural heritage; and state property forming part of an exhibition.[91]

An illustration of the general rule on immunity from execution and accompanying exceptions can be found in the UNCSI.[92] Even though not yet in force, the Convention provides a comprehensive regime of rules covering immunity from execution for a state and its assets.[93] It contains three crucial articles bearing on our discussion: Article 19 (post-judgment); Article 20 (effect of consent to jurisdiction to measures of constraint); and Article 21 (specific categories of property that are considered immune).[94] This Section will focus primarily on execution. However, we must keep in mind that attachment is usually of equal importance in order to preserve the property identified for potential execution purposes (e.g., credit in a bank account).

Of particular importance are the three exceptions to immunity from execution found in Article 19(a)-(c): express consent, allocating or earmarking property, or used or intended for use for other than government non-commercial purposes. Nor can we discount the five categories listed as immune in Article 21(1), inter alia, property of the central bank or other monetary authority of the state. Although not yet in force, the UNCSI is skilfully drafted and is intended to be a respected, contemporary statement of both customary international law and a representation of the common ground that exists among diverse jurisdictions.[95] Indeed, the Convention has crystalized the move towards a restrictive theory on immunity for purposes of execution. At the same time, separate "exception regimes" can be found in codified, domestic sovereign immunity laws (e.g.,

89. *See* YANG, *supra* note 12, at 343.

90. *See* FOX & WEBB, *supra* note 15, at 463.

91. *See id.* at 518–19.

92. For a proper understanding of the UNCSI's content, it is necessary to read the legislative history in Int'l Law Comm'n, Rep. on the Work of Its Forty-Third Session, U.N. Doc. A/46/10, ¶ 28 (1991).

93. *See* Fox, *supra* note 13, at 47.

94. *See* UNCSI, *supra* note 14, at arts. 19–21.

95. *See, e.g.*, Jurisdictional Immunities, *supra* note 2 (stating that parts of the UNCSI codified customary international law); Sedelmayer v. The Russian Federation, Nytt Juridiskt Arkiv [NJA] [Supreme Court Reports] 2011 p. 475 Ö 170-10 (Swed.) (relying on the UNCSI for its codification of customary international law).

the FSIA and the United Kingdom's Sovereign Immunities Act); in customary international law (e.g., distinction between assets used for a public purpose as opposed to for commercial use); and in a large number of judicial decisions.

It is unequivocally the case that progress toward liberalizing the law on sovereign immunity has been slower in the context of execution, in part because execution of state assets is seen as being much more intrusive on the sovereignty of the state. For this reason, a number of scholars believe that "[t]he purpose test is a means of balancing respect for state sovereignty and the judgment debtor's right to be paid amounts judged due and owing."[96] Additionally, the exceptions are narrow in scope and courts "tend to respect the discretion of states in claiming that the property at issue is used for public purposes."[97] At this moment in time, it would seem that the law on immunity from execution is restrictive in theory but quasi-absolute in practice. Hazel Fox and Phillipa Webb eloquently highlight a conspicuous bottleneck involving the supposed restrictive theory on sovereign immunity from execution: "Even where attachment of foreign State assets located in the forum State is legally possible, the political consequences to the friendly relations of the forum State with the foreign State may discourage the forum State's support for such enforcement."[98]

They continue in that passage's footnote:

> There are also strong economic considerations in favour of a foreign State's immunity from enforcement; the secure placement of foreign reserves of China and other States with expanding economies lodged in the U[.S.] and western European States constitute a significant factor in the balance of payments and stabilization of currency rates.[99]

For all these reasons, we believe it is a serious mistake to call the transition from absolute immunity to restrictive immunity an outright "triumph."[100] We note that the discredited "purpose approach" vis-á-vis immunity from jurisdiction is the prevalent approach vis-á-vis immunity from execution. Some have asserted that the doctrine of absolute immunity is "now a thing of the past."[101] We are not quite ready to join this

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96. CRAWFORD, *supra* note 18, at 489.

97. *Id.*

98. FOX & WEBB, *supra* note 15, at 437.

99. *Id.* at 437 n.25.

100. YANG, *supra* note 12, at 6 (claiming that "[t]he history of the law of [sovereign] immunity is the history of the triumph of the doctrine of restrictive immunity over that of absolute immunity"); *see also* Letter from Jack B. Tate, Acting Legal Advisor, Dept. of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952) (on file with the Department of State Bulletin). We find it fascinating to observe that as early as 1882 there was some trace of appreciation for, and reception of, the restrictive theory. *See* Morellet v. Governo Danese, Cass., 1882, n. 35 Giur. It. 1883, I, 125, 125–31 (It.) (opining that the state exists as a "political entity" and as a "legal person").

101. YANG, *supra* note 12, at 3; *see also,* Ruys et al., *supra* note 1, at 5 ("Thus, while there is a clear move towards a restrictive approach to state immunity, a number of (important) states, such as China, occasionally continue to profess allegiance to the old absolute doctrine. In addition, some uncertainty persists with regard to the distinction between *acta jure imperii* and *acta jure gestionis*, or with regard to the scope of the non-

statement for several reasons. First, the general rule is still absolute immunity. Second, states still seem to enjoy quasi-absolute immunity from execution due to the narrow test for conditioning, qualifying, or withholding immunity in this context. Third, the law on sovereign immunity is not static, and history is cyclical; political, philosophical, and economic convictions and considerations make doctrines and legal concepts that invoke "sovereignty" swing like pendulums.[102] The current doctrine of sovereign immunity can shift radically and dramatically if Western influence decreases in global affairs. The "giants" who invoked an absolute doctrine of sovereign immunity were China and Russia.[103] These are two powerful nations, albeit with philosophical, political, economic, and legal roots and perspectives that are substantially different from those traditionally promulgated in the West. However, we note that both China and Russia have signed the UNCSI.[104] It will be interesting to see whether States that oppose the restrictive immunity theory will feel bound by the distinction between commercial and sovereign acts that is now generally considered part of customary international law.[105]

II. The ICJ and the Outstanding and Unresolved Issues of Sovereign Immunity Under Public International Law: *Italy v. Germany* and *Iran v. United States*

This Section deals with two ICJ cases that directly addressed the sovereign immunity issues covered in this Article. As we pursue this analysis, we believe it important to fully disclose our own views on the proper role of the judiciary and our analytical methodology.[106] We believe such disclosures are required given that ICJ decisions are frequently criticized from

commercial tort exception. This in turn raises questions [on] whether the restrictive rule has attained customary status.").

102. Adding to the precautionary tale as opposed to hearing out only a "restrictive theory transborder ballad" is also the fact that (1) "[t]he transition . . . has not been straightforward or unproblematic for States whose primary exposure is as defendants in foreign courts"; (2) China's confirmation on its practice of absolute immunity; and (3) "the fact that there is no multilateral framework yet in force." CRAWFORD, *supra* note 18, at 502–04.

103. Germany applied an absolute doctrine on sovereign immunity prior to 1945. This changed in *The Empire of Iran Case*, ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] [Federal Constitutional Court], 2 BVM 1/62, Apr. 30, 1963, https://www.servat.unibe.ch/dfr/bv016027.html [https://perma.cc/X3EN-JCVZ] (Ger.), *translated in* 45 I.L.R. 57. In this case the court went so far as to say that absolute immunity did not represent customary international law. In so holding, the court relied on foreign court practices and emphasized the distinction between public acts and commercial acts.

104. *See* U.N. TREATY COLLECTION, *supra* note 24.

105. *See* Dem. Rep. Congo v. FG Hemisphere Ass'n LLC, [2011] 14 H.K.C.F.A.R. 95, 246 (C.F.I.). China seems to have outright rejected restrictive immunity, confirming its practice of absolute immunity. The current posture of Russia is less clear.

106. For a good discussion on the sort of partisanship that we wish to avoid, see O'Keefe, *supra* note 5, at 137, 140. Professor Roger O'Keefe very perceptively discusses the issue of lawyers and scholars advocating for the consideration of *jus cogens*, human rights violations, and similar matters when determining whether to grant, condition, or withhold sovereign immunity. He writes:

both a substantive standpoint and an ideological standpoint.[107]

It is overly facile for a writer to comment that "the Court has had ample opportunity" when the author's true import goes much deeper into the nuances of the court's jurisdiction, power, and authority to make a statement.[108] By contrast, in this Article, we seek pragmatic and workable solutions. As part of our search, we want the reader to know that we are strongly in favor of a contextual and purpose-based method of interpretation. We see this entire area of law as something that is continuously developing.[109] We want to recognize and make allowances for the fact that the law is ever-evolving, as courts apply both policy objectives and political concerns when dealing with sovereign immunity or any legal application

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> Despite their popularity with partisans inside and outside the academy, these arguments had enjoyed little success in national or international judicial fora. . . . On top of this, a vocal school of *international legal thought* and *activism* continued to press for the recognition of some sort of exception to state immunity in the context of alleged violations of international rules for the protection of the human person or, more specifically, of *jus cogens*.

Id.

107. *See generally* Pieter Kooijmans, *The ICJ in the 21st Century: Judicial Restraint, Judicial Activism, or Proactive Judicial Policy*, 56 INT'L & COMPAR. L.Q. 741 (2007). ("We must continue to provide that core predictability that distinguishes law from politics, but we have to do so in a way that is responsive to the legitimate needs and aspirations of the international community.") (quoting Judge Rosalyn Higgins, then-President of the ICJ); Crawford, *supra* note 85, at 95 ("[The ICJ] lacks several of the features of a supreme court. Its jurisdiction (although general *ratione material*) is not compulsory; its decisions are not precedents binding on other courts and tribunals; it must compete with other forums of international dispute settlement.").

108. Kooijmans, *supra* note 107, at 752. This is especially so when considering that the jurisdiction of the court is dependent on consent; it is not compulsory. "This precondition for the Court's functioning is a serious set-back. It prevents the court from playing a role comparable to that of the European Court of Justice in Luxembourg or the European Court of Human Rights, whose jurisdiction flows automatically from their basic treaties." *Id.* at 743.

109. *See, e.g.*, Fitzmaurice, *supra* note 51, at 1.

> There are broadly two main possible approaches to the task of a judge, whether in the international field or elsewhere. There is the approach which conceives it to be the primary, if not the sole duty of the judge to decide the case in hand, with the minimum of verbiage necessary for this purpose, and to confine himself to that. The other approach conceives it to be the proper function of the judge, while duly deciding the case in hand, with the necessary supporting reasoning, and while not unduly straying outside the four comers of the case, to utilize those aspects of it which have a wider interest or connotation, in order to make general pronouncements of law and principle that may enrich and develop the law.

Id. at 14–15; *see also* Kooijmans, *supra* note 107, at 742 ("Of course, the Court has no choice but to act within these parameters but the way in which it carries out its function is dependent upon the conceptualization of its task; the Statute is not a straitjacket which leaves no room for an imaginative interpretation."). At the end of the day, the debate seems to be one on whether to endorse a "contractual theory"—that is, to interpret the law strictly as provided by the parties only, and render a judgment on the dispute before them only—or a "status-theory" by which the court operates as guardians of an international or transnational legal order, considering its duties owed to the international community at large.

that deals with the obdurate obstacle of "sovereignty."[110]

In his separate opinion in *Jurisdictional Immunities*, Judge Abdulqawi Yusuf opined that "[s]tate immunity from jurisdiction cannot be interpreted in an abstract manner or applied in a vacuum. The specific features and circumstances of each case, and the factors underlying it, have to be fully taken into account."[111] The proper debate ought to be focused on what political, economic, philosophical, and legal policies are given priority and whether, and how much, legal theory should be constrained by practical realities. We believe judges should consider a wide array of general principles of law, foreign case law, and distinguished scholarly work in rendering their decisions. This further suggests that a decisional framework based on transnational rules has considerable merit. A comparative method for identifying the proper application (i.e., scope, degree, and extent) of the doctrine on sovereign immunity makes much sense.

There is no doubt that the ICJ has had enormous impact on the development of the law of sovereign immunity. But a proper analysis must be much more nuanced and subtle. One learned scholar wrote:

> The results of the Court's forays into the law of interstate immunities have been, variously, to crystallize, to cataly[z]e the further formation of, to consolidate, and to set the seal on the customary rules at issue. Not all, however, of the Court's statements on jurisdictional immunities have touched on controversy. Many have represented no more than textbook expositions of doctrinal principle as to the nature and implementation of such immunities. Dicta of this sort have served usefully to affirm or clarify certain fundamentals of the law of jurisdictional immunities, and have been restated since in a range of fora.[112]

The prevailing view on the overall impact of the ICJ, one with which we agree, is captured in the following statement: "[O]ne can hardly today deny the impact of its judgments and advisory opinions and the role they have played in the development and consolidation of international law [including the court's] general pronouncements of law and principle that may enrich and develop the law."[113] Accordingly, it is also the role of the court to shape the law of sovereign immunity. Given that the ICJ is the principal judicial organ of the U.N.,[114] it should, whenever possible, provide guidance by being more proactive, particularly when the issues before the court in a given case are of "primordial importance in present-day international society but still are largely obscure from a legal point of view."[115] The judges can and should make pronouncements of law that

110. *See* THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 545 (7th ed. 2020).

111. Jurisdictional Immunities, *supra* note 2, ¶ 27 (Yusuf, J. dissenting).

112. O'Keefe, *supra* note 5, at 107.

113. Vera Gowland-Debbas, *The Role of the International Court of Justice in the Development of the Contemporary Law of Treaties*, *in* THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE, *supra* note 5, at 26.

114. *See Main Bodies*, U.N., https://www.un.org/en/sections/about-un/main-organs/#:~:text=the [https://perma.cc/7S2Y-NPP7] (last visited Sept. 12, 2020).

115. Kooijmans, *supra* note 107, at 753.

contribute to the development of public international law by addressing the issue before them or "relating to issues which are incidental to the case before it but are not strictly necessary for its ruling," such as *obiter dicta* statements, or statements "contained as part of the dictum[-]oriented reasoning."[116] On this point, Judge Yusuf wrote: "The Court should not deal with 'surprise and regret[,'] but rather with the 'appropriate settlement' pursuant to international law."[117] Unless the court takes on a more active role in crystalizing and consolidating a body of international law generally, and sovereign immunity law in particular, that is less state-centric, the international community will continue to be surprised by the court's decisions. It is vital that the court "consciously and conscientiously" further the development of international law and not just react to existing law, as well as alert the international community to the law's many shortcomings.[118]

With regard to sovereign immunity, the analysis shifts by virtue of the distinction between immunity from jurisdiction as compared to execution. In other words, in the jurisdictional phase, a court decides whether the act is of a commercial *nature*; and, in the executional phase, it decides whether the property is used for a commercial *purpose*. Echoing a number of other writers, we are willing to go even a bit further to assert that "[t]here is a general rule that, even if judgment against a State based on an act *jure gestionis* has been entered, measures of execution against that State's property may not be taken without the foreign State's consent if the asset in

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116. *Id.* at 750–51.

117. Jurisdictional Immunities, *supra* note 2, ¶ 10 (Yusuf, J., dissenting); *see* Gowlland-Debbas, *supra* note 113, at 52.

> Though increasingly called upon by states to address the hard questions that are of concern to the international community as a whole—be they related to armed conflicts or serious violations of human rights—the ICJ, an institution set up in a world where bilateral and subjective relations between states continue to prevail, has not always been able to respond to contemporary expectations. As an inter-state Court whose jurisdiction is based on consent, it is also not able to accommodate the voices of non-state actors, which are today important vehicles of the "dictates of the public conscience[,"] nor international organizations in contentious cases, despite the important place they occupy today. Yet the Court has also on several occasions been conscious that in interpreting or applying the law, it could not make an abstraction of the human objectives behind the rules nor of the values and finalities which impregnate the international legal system. In the realm of treaty-making it has been conscious of the impact of the substantive content of a treaty on its formal and procedural rules and it is particularly in relation to furthering the concept of treaties with a collective interest that it has been most responsive to current developments and the needs of the international community.

Id.

118. *See, e.g.*, Gowlland-Debbas, *supra* note 113, at 25–26. ("[The ICJ] should not create the impression of ethical indifference, nor act as an 'automatic slot machine' totally divorced from the social and political realities of the international community. The Court had to exercise in each case a creative activity, having in mind the necessities of the international community.") (citing HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE 75 (1958); and Shabtai Rosenne, *Sir Hersch Lauterpacht's Concept of the Task of the International Judge*, 55 AM. J. INT'L L. 825, 835, 854–55 (1961)).

question serves governmental purposes."[119]

Thus, at the heart of the discussion lies not *whether* there is a general presumption of immunity but rather *what* exceptions are available and *when* and *how* they apply in each context. For example, two exceptions generally applicable under liberal, progressive case law—perhaps even forming part of customary international law and identified in most codified versions on sovereign immunity—include the "waiver" exception and the "commercial activity exception."[120] Even when sovereign immunity is not codified per se, the restrictive doctrine has helped extend the waiver exception to include implied waivers in certain situations as a matter of law.[121] For example, a state that has agreed to a contract's arbitration clause is said to have waived its immunity from adjudication.[122] A legitimate question, not within the scope of this Article, is whether a waiver of jurisdiction should translate into a waiver from attachment and execution as well. The prevailing view is that it does not.[123] This logic is hard to conceptualize, hence the unresolved issues. Thus, despite the triumph of restrictive immunity over absolute immunity,[124] a number of issues remain open and unresolved; primarily, the extent to which immunity is or should be restricted when it comes to execution of court judgments or foreign arbitral awards against a state.

In the ICJ's *Jurisdictional Immunities* decision, the court partly consolidated customary international law—at least with respect to immunity from jurisdiction.[125] To be sure, much of this law grew out of municipal case law, legislative action, scholarly research and writing efforts, and the UNCSI.[126] In *Jurisdictional Immunities*, the court observed, among other things, that immunity from jurisdiction had been "adopted as a general rule of customary international law solidly rooted in the current practice of States."[127] It also observed a distinction between proceedings for the recognition and enforcement on the one hand, and the execution of a foreign judgment on the other.[128] Lastly, it found that parts of Article 19 of the UNCSI (on immunity from execution and its corollary exceptions)

119. ROY GOODE ET AL., TRANSNATIONAL COMMERCIAL LAW: TEXTS, CASES, AND MATERIALS 522 (2015).

120. *Sovereign Immunity from Jurisdiction in International Arbitration*, ACERIS L. (Feb. 18, 2020), https://www.acerislaw.com/sovereign-immunity-from-jurisdiction-in-international-arbitration/#_ftn1 [https://perma.cc/NUQ4-56W8].

121. *See, e.g.*, LEW ET AL., *supra* note 19, at 749 ("Furthermore, in countries which have not codified the issue of sovereign immunity, courts and commentators have consistently considered arbitration agreements to be a waiver of immunity for court proceedings in support of arbitration."); *see also* CRAWFORD, *supra* note 18, at 501.

122. *See State Immunity: An Overview*, ASHURST (June 18, 2019), https://www.ashurst.com/en/news-and-insights/legal-updates/state-immunity—an-overview/ [https://perma.cc/S8WM-4PJ9].

123. *See id.*

124. *See* YANG, *supra* note 12, at 6.

125. *See* O'Keefe, *supra* note 5, at 111–15.

126. *See* Jurisdictional Immunities, *supra* note 2, ¶ 79.

127. *Id.* ¶ 54.

128. *See id.* ¶¶ 122, 130.

represent customary international law.[129]

Unfortunately, the majority opinion in *Jurisdictional Immunities* did not liberalize sovereign immunity law. Nor did the court prove helpful with respect to the debate on immunity from execution. Indeed, the court squandered several opportunities in this case. Moreover, the decision falls short in that it did not provide the international community with sufficient ammunition to better-develop the law if the opportunity arises again.[130]

In 2019, the ICJ was again presented with a singular opportunity to clarify a great deal of sovereign immunity law, and perhaps to further crystalize or consolidate customary international law with respect to both immunity from jurisdiction and immunity from execution. Writing before the ICJ's decision in the *Certain Iranian Assets* case, two young scholars rightly commented that "a range of questions [would] arise that the 2012 *Jurisdictional Immunities* case . . . left unanswered," and that the court would be in a position to "shed light on matters such as the exact regime relating to the property of central banks," in particular between the stricter provisions of the UNCSI and those of more "liberal" state practice.[131] The court, however, turned down that opportunity.

It must, nevertheless, be mentioned that the court must often balance pragmatism with its overall standing as a legitimate, international judicial body; therefore, it must closely monitor the currency of its judgments. For the readers awareness, our criticism takes into account this consideration.

A. *Italy v. Germany*

In the dispute between Italy and Germany, Germany claimed that Italy violated public international law by denying sovereign immunity to Germany in proceedings regarding (1) jurisdictional immunities relating to war damage caused by German armed forces during World War II in disputes that were handled in Italian courts, (2) immunity from enforcement (execution) of German property, and (3) the Italian courts' failure to consider jurisdictional immunity when recognizing and enforcing foreign

129. The ICJ did not determine whether the entirety of Article 19 reflects current customary international law. *See id.* ¶¶ 117–18. But it made a serious mistake in closing off additional discussion on implied waiver from execution. The court essentially created a caveat by stating that this reflected only "current" customary international law, and therefore the discussion may remain open.

130. At this point, a few words on the role of separate and dissenting opinions is warranted. The separate or dissenting opinion contributes to scholarly discourse and promotes judicial accountability and transparency. A dissenting opinion (1) often leads to a better majority opinion and an overall better judgment; (2) encourages the majority to act more responsibly when deliberating and crafting their opinion; (3) enhances the stakeholders' confidence in the process; and, most importantly, (4) contributes to the future development of relevant doctrines. *See* Ylli Dautaj, *Dissenting Opinions in Investment Treaty Arbitration: The Investment Court System*, 17 U. COLL. DUBLIN L. REV. 37, 44 (2017).

131. *See* Philipp Janig & Sara Mansour Fallah, *Certain Iranian Assets: The Limits of Anti-Terrorism Measures in Light of State Immunity and Standards of Treatment*, 59 GER. Y.B. INT'L L. 355, 389 (2016).

judgments.[132] Germany's application included a request to grant jurisdictional immunity, to grant immunity from execution, and to declare that Italian courts were obliged to consider jurisdictional immunity when recognizing or enforcing foreign judgments.[133]

With respect to immunity from jurisdiction, Italy proposed an alternative[134]—clearly in accord with the liberal expansion of sovereign immunity law,—arguing that there can be no sovereign immunity (1) when a state has committed serious violations of international humanitarian law,[135] (2) when a state is in violations of *jus cogens* norms,[136] and (3) when the state has failed to provide for victims' reparations.[137] But the ICJ missed this opportunity to move sovereign immunity law into a third, more liberal phase, surprising the international community. Moving in the opposite direction, the court decided against Italy (and derivatively the Greek and Italian courts), by dismissing each argument including the cumulative effects of each argument.[138] The ICJ did this by presenting its own alternative view of the evolution of the doctrine of sovereign immunity. This alternative is, in our view, a much more regressive version of sovereign immunity by which a court condemns sovereign immunity pleas as procedural.[139]

In essence, the court determined whether customary international law on sovereign immunity took these considerations into account. They deduced the answer from "a substantial body of State practice from other countries," which allegedly demonstrates "that customary international law does not treat a State's entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated."[140]

The court went on to hold that the idea that "international law no longer required [sovereign] immunity in cases of allegations of serious vio-

132. *See* Jurisdictional Immunities, *supra* note 2, ¶¶ 15, 17.

133. *See id.*

134. *See, e.g.*, Fitzmaurice, *supra* note 51, at 14–15; Kooijmans, *supra* note 107, at 742.

135. Primarily, these are crimes that amount to war crimes or crimes against humanity. *See* Counter-Memorial of Italy, *supra* note 44, ¶ 1.10.

136. One example is the prohibition of torture. *See id.* ¶ 4.68.

137. *See id.* ¶ 5.34 (explaining that victims' reparations focus on court access).

138. Jurisdictional Immunities, *supra* note 2, ¶ 38.

139. *See* Jurisdictional Immunities, *supra* note 2, ¶ 82 ("Immunity from jurisdiction is an immunity not merely from being subjected to an adverse judgment but from being subjected to the trial process. It is, therefore, necessarily preliminary in nature. Consequently, a national court is required to determine whether or not a foreign State is entitled to immunity as a matter of international law before it can hear the merits of the case brought before it and before the facts have been established. If immunity were to be dependent upon the State actually having committed a serious violation of international human rights law or the law of armed conflict, then it would become necessary for the national court to hold an enquiry into the merits in order to determine whether it had jurisdiction. If, on the other hand, the mere allegation that the State had committed such wrongful acts were to be sufficient to deprive the State of its entitlement to immunity, immunity could, in effect be negated simply by skillful construction of the claim.").

140. *Id.* ¶ 84.

lations of international human rights law, war crimes or crimes against humanity have been rejected by the courts in [Canada, France, Slovenia, New Zealand, Poland, and the U.K]."[141] In passing, the court referred to the U.S. terror-exception and made the point that this "amendment has no 'counterpart in the legislation of other States.'"[142] And with respect to the *jus cogens* argument and reparations for victims, the court held:

> The application of rules of State immunity to determine whether or not the Italian courts have jurisdiction to hear claims arising out of those violations cannot involve any conflict with the rules which were violated. Nor is the argument strengthened by focusing upon the duty of the wrongdoing State to make reparation, rather than upon the original wrongful act. The duty to make reparation is a rule which exists independently of those rules which concern the means by which it is to be effected. The law of State immunity concerns only the latter; a decision that a foreign State is immune no more conflicts with the duty to make reparation than it does with the rule prohibiting the original wrongful act. Moreover, against the background of a century of practice in which almost every peace treaty or post-war settlement has involved either a decision not to require the payment of reparations or the use of lump sum settlements and set-offs, it is difficult to see that international law contains a rule requiring the payment of full compensation to each and every individual victim as a rule accepted by the international community of States as a whole as one from which no derogation is permitted.
>
> To the extent that it is argued that no rule which is not of the status of *jus cogens* may be applied if to do so would hinder the enforcement of a *jus cogens* rule, even in the absence of a direct conflict, the Court sees no basis for such a proposition. A *jus cogens* rule is one from which no derogation is permitted but the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess *jus cogens* status, nor is there anything inherent in the concept of *jus cogens* which would require their modification or would displace their application. The Court has taken that approach in two cases, notwithstanding that the effect was that a means by which a *jus cogens* rule might be enforced was rendered unavailable.[143]

Learned scholars have described the ruling as having a "broader reach than the Court's decision to dismiss Italy's claim for war damage[s]," and that it "reflects in some respects a general retreat from the expansive tendency" of the restrictive doctrine.[144] The court rejected the access-to-court argument on the basis that the plea of sovereign immunity is a procedural rule and concepts such as *jus cogens* are substantive in nature.[145] There-

141. *Id.* ¶ 85.
142. *Id.* ¶ 88.
143. *Id.* ¶¶ 94–95.
144. *See* FOX & WEBB, *supra* note 15, at 428.
145. The court looked at previous practice in international courts and tribunals:
> Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged. In particular, the Court observes that none of the primary international instruments referred to . . . relates to civil proceedings or to State immunity.

fore, the court could comfortably assert that the law on sovereign immunity contains no exception of that kind. Put a bit differently, the court concluded that under customary international law, a state is not stripped of immunity simply because it is accused of human rights violations, breaches of international humanitarian law, or their equivalent. Perplexingly, the court based this assertion on state practice and previous decisions from international courts and tribunals.

Looking closely at the opinion, two commenters properly observed that the court left open three issues: (1) "the distinction between acts in exercise of sovereign authority and acts of a commercial nature is likely to come under pressure," and "[t]he ICJ does not define *acta jure gestionis* and its scope remains flexible"; (2) the legitimate aim and proportionality test cited in the case could eventually "provide a route for breaking down the procedural [versus] substantive distinction"; and (3) the "procedural [versus] substantive distinction may prove less impenetrable than the ICJ['s] *Jurisdictional Immunities* judgment suggests," implying that it could "come under attack" someday.[146] Admittedly, however, other authors endorsed the outcome.[147]

The case also touched upon the unresolved issue regarding immunity from execution with respect to post-judgment proceedings. Even though not yet in force, the UNCSI "provides a comprehensive regime of rules covering immunity from adjudication and [execution] of a state."[148] As such, the court felt free to refer to Article 19 of the UNCSI, in general, and Article 19(c), in particular. Although the court was careful to not endorse Article 19 as a mandatory manifestation of customary international law, "the ICJ shaped, by reference to that article's exception (c), the standards to be applied by a third state's court in proceedings for recognition of a judgment given against a foreign state in the national court of another state."[149] Thus, in a kind of back-handed endorsement of the Convention, the court crystalized and consolidated the law as written in there, holding:

> It is true that in its Report on Jurisdictional Immunities of States and their Property . . . the working group of the International Law Commission noted, as a recent development in State practice and legislation on the subject of immunities of States, the argument increasingly put forward that immunity should be denied in the case of death or personal injury resulting from acts of a State in violation of human rights norms having the character of *jus cogens*, particularly the prohibition on torture. However, as the working group itself acknowledged, while national courts had in some cases shown some sympathy for the argument that States were not entitled to plead immunity where there had been a violation of human rights norms with the character of *jus cogens*, in most cases . . . the plea of sovereign immunity had succeeded.

Al-Adsani v. U.K., 34 Eur. Ct. H.R. 11, ¶¶ 61–62 (2002) (citations omitted).

146. Fox & Webb, *supra* note 15, at 461–65.

147. *See* O'Keefe, *supra* note 5, at 111 ("All of [the ICJ's contributions in the *Jurisdictional Immunities* case] should prove, to varying degrees, of significance to the consolidation of customary international law and, in one respect, to its correct implementation at the national level.").

148. Fox, *supra* note 13, at 47.

149. *Id.*

> When the United Nations Convention was being drafted, these provisions gave rise to long and difficult discussions. The Court considers that it is unnecessary for purposes of the present case for it to decide whether all aspects of Article 19 reflect current customary international law. Indeed, it suffices for the Court to find that there is at least one condition that has to be satisfied before any measure of constraint may be taken against property belonging to a foreign State: that the property in question must be in use for an activity not pursuing government non-commercial purposes, or that the State which owns the property has expressly consented to the taking of a measure of constraint, or that that State has allocated the property in question for the satisfaction of a judicial claim . . . .[150]

The court then held that the property in dispute was clearly in use for sovereign functions—namely, for cultural exchanges between Germany and Italy.[151] But in so holding, the court appears to have solidly acknowledged the "commercial purposes" exception as constituting customary international law. Of course, because it was not required to address the issue, the court remained silent on whether *all* aspects of Article 19 reflect current customary international law. For example, the court did not address the issue of whether the nexus requirement in Article 19(c) forms part of customary international law, leaving unanswered whether "post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed."[152]

With respect to immunity from execution, Germany alleged that Italy was in breach of international law because the Italian courts had granted execution with respect to a judgment delivered by a Greek court.[153] The Greek court had conditioned Germany's immunity prior to delivering its judgment on the merits.[154] The execution was ordered against German-owned property that was used for cultural purposes.[155]

On the topic of execution, the court held that "the rules of customary international law governing immunity from enforcement are distinct from and go further than those governing jurisdictional immunity, and must be separately applied."[156] Therefore, "the Court may rule on the issue of whether the charge on Villa Vigoni" violates Germany's immunity from enforcement "without needing to determine whether the decisions of the Greek courts awarding pecuniary damages against Germany . . . were themselves in breach of that State's jurisdictional immunity."[157] Borrow-

150. Jurisdictional Immunities, *supra* note 2, ¶¶ 117–118 (citations omitted).

151. *Id.* ¶ 119. Going even further, the ICJ may have indirectly recognized Article 21(1)(d) of the UNCSI in that the property forms part of the cultural heritage of the State and is "not placed or intended to be placed on sale." UNCSI, *supra* note 14, at art. 21(1)(d).

152. UNCSI, *supra* note 14, at art. 19(c). As we discuss later in this Article, this comment is of great significance in the 2019 ICJ case *Certain Iranian Assets*.

153. *See* Jurisdictional Immunities, *supra* note 2, ¶ 121.

154. The case concerned the Distomo massacre. *See generally Prefecture of Voiotia v. Federal Republic of Germany*, Areios Pagos [A.P.] [Supreme Court] 11/2000 (Greece), *translated in* 129 I.L.R. 513.

155. *See* Jurisdictional Immunities, *supra* note 2, ¶ 119.

156. *Id.* ¶ 113.

157. *Id.* ¶ 124.

ing the spirit, if not necessarily the express language of, Article 19 of the UNCSI, the court had no trouble determining that the property was used for a governmental, non-commercial purpose and thus, the execution of the property was in violation of the grant of immunity that Germany should enjoy.[158] Put differently, the property enjoyed immunity because it was used for governmental, non-commercial *purposes* "regardless of the validity of the judgment on which it was based."[159]

The enforcement of a foreign judgment directly raised another issue: whether Germany's immunity, which barred the Greek court's judgment, should also bar the Italian court's jurisdiction. In other words,

> whether the task of the court in the recognizing state was merely to "rubber-stamp" the original judgment and recognize it without any further examination, or did that court enjoy an independent jurisdiction to determine any or all of these matters by reference to the recognizing court's national law or to that law's understanding of the relevant international law?[160]

The court rightly underscored the difference between a court tasked first with adjudication and then with enforcement, and a court tasked only with the latter. It stated that "it was not the role of the [enforcing court] to [re]examine in all its aspects the substance of the case which had been decided."[161] Moreover, the court held:

> Where a court is sei[z]ed, as in the present case, of an application for *exequatur* of a foreign judgment against a third State, it is itself being called upon to exercise its jurisdiction in respect of the third State in question. It is true that the purpose of *exequatur* proceedings is not to decide on the merits of a dispute, but simply to render an existing judgment enforceable on the territory of a State other than that of the court which ruled on the merits. It is thus not the role of the *exequatur* court to [re]examine in all its aspects the substance of the case which has been decided. The fact nonetheless remains that, in granting or refusing *exequatur*, the court exercises a jurisdictional power which results in the foreign judgment being given effects corresponding to those of a judgment rendered on the merits in the requested State. The proceedings brought before that court must therefore be regarded as being conducted against the third State which was the subject of the foreign judgment.
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> . . . .
>
> It follows from the foregoing that the court sei[z]ed of an application for *exequatur* of a foreign judgment rendered against a third State has to ask itself whether the respondent State enjoys immunity from jurisdiction—having regard to the nature of the case in which that judgment was given—before the courts of the State in which *exequatur* proceedings have been instituted. In other words, it has to ask itself whether, in the event that it had

158. *See id.* ¶¶ 119, 120 ("In these circumstances, the Court finds that the registration of a legal charge on Villa Vigoni constitutes a violation by Italy of its obligation to respect the immunity owed to Germany.").

159. Fox, *supra* note 13, at 51.

160. *Id.*

161. Jurisdictional Immunities, *supra* note 2, ¶ 128.

> itself been sei[z]ed of the merits of a dispute identical to that which was the subject of the foreign judgment, it would have been obliged under international law to accord immunity to the respondent State.[162]

The court thereby rejected the direct—and more traditional—recognition of the foreign judgment in favor of determining only whether the court would have granted immunity. Additionally, the court elaborated a theory by which the enforcing court must "ask itself whether, in the event that it had itself been sei[z]ed of the merits of a dispute identical to that which was the subject of the foreign judgment, it would have been obliged under international law to accord immunity to the respondent state."[163] Thus, "[s]ince in the earlier sections of the judgment[,] the ICJ had upheld the immunity of Germany and dismissed the three lines of attack mounted by the Italian defense, the answer to this question was clear."[164] Germany was deemed to enjoy immunity and enforcement was denied. Growing out of all of this, it would appear that the court fashioned a rule of customary international law: a judge tasked with determining immunity must "look to the underlying transaction on which the claim to immunity is based."[165]

The court contributed to the law of sovereign immunity by articulating four points; some adversely affecting the evolution of the law, others consolidating uncontested positions. Notably, the court (1) "observed that state immunity from civil proceedings in the courts of another state had been 'adopted as a general rule of customary international law solidly rooted in the current practice of States'";[166] (2) held that proceedings for recognition and enforcement are separate procedures and that, therefore, immunity from jurisdiction must be separately decided in the enforcing court; (3) elaborated on a distinction between immunity from jurisdiction and immunity from execution, and appeared to agree that parts of the UNCSI (with respect to post-judgment measures of constraint) represent a codification of customary international law; and (4) accepted that the law has transitioned from absolute to restrictive immunity.[167] But then it went on to essentially create a third concept of immunity by creating a procedural versus substantive distinction that treats sovereign immunity pleas as procedural.[168]

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162. *Id.* ¶¶ 128, 130 (citations omitted); *see also* O'Keefe, *supra* note 5, at 112–13 (describing this portion of the *Jurisdictional Immunities* case as *locus classicus* on this point).

163. Jurisdictional Immunities, *supra* note 2, ¶ 130.

164. Fox, *supra* note 13, at 53; *see also* Jurisdictional Immunities, *supra* note 2, ¶ 131 ("For the reasons set out in Section III above of the present Judgment, the Italian courts would have been obliged to grant immunity to Germany if they had been sei[z]ed of the merits of a case identical to that which was the subject of the decisions of the Greek courts which it was sought to declare enforceable (namely, the case of the Distomo massacre). Accordingly, they could not grant *exequatur* without thereby violating Germany's jurisdictional immunity.").

165. Fox, *supra* note 13, at 54.

166. O'Keefe, *supra* note 5, at 111.

167. *See id.* at 111–12, 114–15.

168. *See id.* at 109.

Jurisdictional Immunities is suspect because of several different possible justifications for sovereign immunity, such as the doctrine of international comity, and formal justifications based on grounds of independence, dignity, or equality.[169] The "doctrinal truth" of sovereign immunity seems to rest on a justification based on "equality," which was fully embraced by the court.[170] Perplexingly, it led to favoring the procedural plea of Germany over the substantive legal product of another country: Greece. The justification for this outcome rests on even more unsteady grounds; namely, that the procedural plea trumps the product of another equal court.[171] The better approach for a court tasked with a situation like this would be to, first, reject jurisdictional immunity and go through traditional rules of procedure for recognition and enforcement of foreign judgments or foreign arbitral awards, and second, entertain the law of sovereign immunity from execution as applicable.

Essentially, the court wasted an opportunity to elaborate a liberal and pragmatic phase of sovereign immunity that is more human rights-centered as opposed to strictly state-centric. The court conveniently, and somewhat artificially, decided to hide behind customary international law "as it presently stands."[172] In contrast, we believe the preferable principle ought to be that so-called "formal logic" should be displaced in transnational litigation when the duty that the adjudicator owes is towards the international community at large.[173]

Importantly, the central problem is not an isolated ICJ opinion with which we disagree, but rather what appears to be a structural deficiency that prevents the law from evolving in a more liberal direction. The application of customary international law as a stand-alone source of sovereign

169. A better outcome would have been to justify the grant of immunity on the basis of international comity, as elaborated indirectly by Judge Kenneth Keith in his separate opinion. *See* Jurisdictional Immunities, *supra* note 2, ¶ 19 (separate opinion by Keith, J.) ("That very long-established practice, recognizing harsh post-war realities and the need for former enemy States to establish new relationships, strongly supports the conclusion that a former belligerent State may not be subject, without its consent, to the jurisdiction of a foreign court in cases such as those which are the subject of the present proceedings.").

170. O'Keefe, *supra* note 5, at 112.

171. *See* Jurisdictional Immunities, *supra* note 2, ¶ 94 (Yusuf, J., dissenting) ("It may, for example, be asked whether the judicial decisions of a handful of domestic courts . . . could serve to substantiate the existence of customary international law based on State practice . . . . It could equally be asked why more weight should be attached, in terms of the existence of customary law norms, to those decisions as opposed to the Italian and Greek Supreme Courts' decisions . . . . Is customary international law a question of relative numbers?").

172. Jurisdictional Immunities, *supra* note 2, ¶ 91.

173. *See, e.g.*, O'Keefe, *supra* note 5, at 144 ("But arguments such as those put to the Court by Italy have nonetheless continued to be advanced in a seemingly endless procession of speculative claims across a host of jurisdictions, the hope apparently being that a court somewhere sometime would, like the Italian Court of Cassation, place dogmatic naturalism before state practice and *opinio juris* and, for that matter, formal logic. After the ICJ's Judgment, it is hard to see even the most optimistic victims' organization or loss-leading law firm, let alone legal aid fund, backing the sort of case so roundly ruled out by the Court.").

immunity law is outdated. The same is true for the standard justification for the doctrine of sovereign equality, which is based on bilateralism. Instead, a formal justification for sovereign equality that aligns with "the view of international law as a vertical hierarchical structure of law with obligations 'owed to the international community as a whole'" should be preferred.[174]

Judge Yusuf wrote a powerful dissenting opinion in *Jurisdictional Immunities*. He opined that the court's analysis on states' obligations to make reparations for violations of war-related crimes was lacking, and that such obligations are intimately linked to the denial of state immunity and the approach to identify the evolution of customary international law from state practice.[175] Among other things, he emphasized the standing of human rights and humanitarian law literature in relevant scholarly work and in judicial decisions.[176]

B. *Iran v. United States*[177]

The United States has taken several direct and indirect measures against Iran for its alleged support of groups labelled as "terrorist organizations"[178] and for other, related violations of human rights. To effectuate this position, the United States created an exception to the jurisdictional immunity for states that sponsor terrorism.[179] Deeming Iran to be one such state, the United States blocked Iranian assets and property, and made these assets available for attachment and execution.[180] By way of legislative and executive action, the United States provided victims of terrorism with a judicial forum to remedy their grievances. In most cases, those actions led to restoration or reparation claims. Many of the U.S.-based court judgments resulted in default judgments in favor of the claim-

174. FOX & WEBB, *supra* note 15, at 429.

175. *See* Jurisdictional Immunities, *supra* note 2, ¶ 3 (Yusuf, J., dissenting).

176. Judge Yusuf was understandably frustrated with the majority's approach to the issues. He wrote:

> [I]nstead of assessing the impact that this failure to make reparations—and the absence of alternative means of redress—could have on the granting or denial of State immunity to Germany in the courts of the forum State under international law, the Court limits itself to state that "the Court considers that it is a matter of surprise—and regret—that Germany decided to deny compensation . . . ." It bears to be recalled in this connection that disputes between States are not submitted to an international adjudicatory body, and particularly to the principal judicial organ of the United Nations, for expressions of surprise and regret, but for their appropriate settlement on the basis of international law.

Id. ¶ 10 (citations omitted).

177. The entirety of the cases in U.S. courts and the case before the ICJ underscore another fundamental development with respect to the law of sovereign immunity—namely, to what extent the newly created exception for terrorist activities may prevail over a plea of state immunity. For a recent and good discussion on this topic, see generally Janig & Fallah, *supra* note 131.

178. The measures against Iran are based on its classification as a "state sponsor of terrorism" under the U.S. State Department. *See id.* at 356.

179. *See id.* at 357.

180. *See id.* at 372; *see also* 28 U.S.C.A § 1605A (West).

ants because Iran refused to participate in the proceedings.[181] As expected, these measures were challenged by Iran in U.S. courts and before the ICJ.

As a matter of sovereign immunity doctrine, the United States liberalized the law of sovereign immunity through a series of actions, some of which are sensible and understandable, and some of which are highly questionable. First, the United States Congress amended the FSIA to include an exception for terrorist activities.[182] Second, the president, as head of the executive branch, issued an executive order[183] to freeze Iran's property and financial institutions. Third, in order to make Iran's blocked assets available for execution, the United States enacted the Iran Threat Reduction and Syria Human Rights Act of 2012 (Threat Reduction Act).[184] Subsequently, assets of the Central Bank of Iran (Bank Markazi) were blocked and made available for execution. In *Bank Markazi v. Peterson*, the Supreme Court of the United States declared the Iran Threat Reduction Act to be valid and constitutional.[185] Iran then took the dispute to the ICJ, arguing that the United States' actions against Iranian assets violated the 1955 Treaty of Amity, Economic Relations, and Consular Rights between the U.S. and Iran (Treaty of Amity).[186]

As previously discussed, the *Jurisdictional Immunities* case and the UNCSI provide a general rule of immunity and its respective exceptions. Five categories are listed as immune in Article 21(1) of the UNCSI, including "property of the central bank or other monetary authority of the State."[187] Whether this exception is properly a part of customary international law is debatable.[188] If it is, the assets in dispute enjoy virtually absolute immunity. Thus, the discussion would turn on the question of to what extent the United States can create its own exceptions to sovereign immunity without breaching public international law. Another debatable issue is whether Article 19(c) makes the nexus requirement an obligation pursuant to customary international law. In such a case, the execution would only apply against the parties in the court proceedings. The ICJ remained silent on this point in the *Jurisdictional Immunities* case and in *Certain Ira-*

181. *See* Michael A. Rosenhouse, *State-Sponsored Terrorism Exception to Immunity of Foreign States and Their Property Under Foreign Sovereign Immunities Act of 1976, 28 U.S.C.A. 1605(a)(7)*, 176 AM. L. REPS. FED. 1, 66 (2002).

182. *See* 28 U.S.C.A. § 1605A (West).

183. *See* Exec. Order No.13,599, 77 Fed. Reg. 6659, 6660 (Feb. 8, 2012).

184. 22 U.S.C. § 8701 (2018).

185. Bank Markazi v. Peterson, 136 S. Ct. 1310, 1311 (2016).

186. At least two authors raise an interesting point on these issues. *See* Janig & Fallah, *supra* note 131, at 369 ("Overall, Iran's line of argumentation appears somewhat oxymoronic, as it seeks to incorporate a right exclusively enjoyed by States—i.e.[,] State immunity—into provisions intended to protect individuals' rights.").

187. UNCSI, *supra* note 14, at art. 21.

188. *See* Janig & Fallah, *supra* note 131, at 375–76 ("Yet, again, judicial as well as legislative State practice so far have been reluctant to award special protection to property of a central bank. Only a limited number of States enacted legislation as to that effect. Thus, the customary nature of this provision is 'contentious[,'] and courts usually apply the general rules to property of the central bank as well.").

nian Assets (at least at the jurisdictional phase).[189]

1. *A Short Note on Immunity from Execution of Central Bank Assets in Public International Law*

Central banks and other monetary authorities keep accounts with foreign banks for various activities and purposes. Whether a judgment or award creditor may attach and execute against central bank assets is treated as a very sensitive topic because "attachment of such funds will cause serious financial problems and lead to significant harm to [the] friendly relations between states."[190] For these reasons, Article 21(1)(c) of the UNCSI makes the property of central banks absolutely immune. The express language is striking and unambiguous: "property of a State *shall not* be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under [A]rticle 19, subparagraph (c) . . . [when it is the] property of the central bank or other monetary authority of the State."[191]

The difference in state practice, however, is significant. States are divided among (1) those that provide for "near-absolute immunity" from execution; (2) those that adopt a "middle-approach"; and (3) those that offer "no special protection" (i.e., conditioning immunity on a commercial activity exception). This lack of uniformity renders the proper level of protection under customary international law uncertain and unresolved.[192] Put a bit differently, should the immunity be virtually absolute, as is the case under the UNCSI; should the immunity be near-absolute for state property but with qualified exceptions (e.g., a terrorism-related exception); or should the immunity be assessed on the activity of the assets in use, rather than on their purposes? Current state practice is not uniform and does not reflect the language of the UNCSI.

Moreover, a separate issue vis-á-vis immunity for central bank assets arises when the activities or purposes are mixed (used for both commercial and sovereign activities or purposes). Earlier decisions allowed for attachment of mixed accounts in certain circumstances, but current practice seems to consider such accounts to be immune unless the use clearly tilts towards the commercial side of a transaction.[193]

2. Bank Markazi v. Peterson

The *Peterson* case underscores three highly contested issues with regard to the law of sovereign immunity: (1) immunity from execution of

189. *See generally* Jurisdictional Immunities, *supra* note 2; Certain Iranian Asserts, *supra* note 7.

190. YANG, *supra* note 12, at 410 ("Therefore it is little wonder that, in the practice of some states, special considerations apply to the immunity of foreign central banks. In these states the property of foreign central banks is accorded absolute or near absolute immunity from execution.").

191. UNCSI, *supra* note 14, at art. 21(1) (emphasis added).

192. *See* Ingrid Wuerth, *Immunity from Execution of Central Bank Assets*, *in* THE CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW, *supra* note 1, at 266.

193. *See* Janig & Fallah, *supra* note 131, at 373 n.108.

state assets and property, (2) the scope and degree of the terror exception, and (3) the unresolved and infrequently discussed concern of future "executive unilateralism."[194] These issues highlight the distinctions between immunity from jurisdiction and execution, the prospective liberalization of the law of sovereign immunity, and the policy and political impact of the doctrine's application and evolution. As others have commented, "the [U.S.] Supreme Court approved Congress's efforts to make certain Iranian assets available to satisfy the judgments in cases brought against Iran for its role in specific instances of international terrorism."[195] Nevertheless, discussion on the issues of separation of powers and the Necessary and Proper Clause in that case are beyond the scope of this Article. The FSIA permits a victim to sue a state that is considered a "sponsor of terrorism" in U.S. courts pursuant to Section 1605A.[196] It is an exception to the presumption of jurisdictional immunity. The article provides, in pertinent part:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.[197]

Notwithstanding this express and unambiguous language, victims of state-sponsored terrorism who may have prevailed on the merits of the controversy have encountered enormous problems when it comes to seizing assets in the context of immunity from execution.[198] The traditional understanding was that property located in the United States (the nexus requirement) would normally be considered available for execution when, for example, the property was used for a commercial activity.[199] But under the express language of the statute, certain property may be shielded from execution when it is the property "of a foreign central bank or monetary authority held for its own account."[200]

In *Bank Markazi*, the victims had obtained a default judgment against Iran for attacks by terrorist organizations that were allegedly funded by Iran in the 1980s.[201] The claimants commenced enforcement procedures

194. Bank Markazi v. Peterson, 136 S. Ct. 1310, 1328 (2016).
195. *Leading Cases: Constitutional Law: Bank Markazi v. Peterson*, 130 HARV. L. REV. 307, 307 (2016).
196. 28 U.S.C.A § 1605A (West).
197. *Id.* § 1605A(a)(1).
198. *Bank Markazi*, 136 S. Ct. at 1317–18 ("After gaining a judgment, however, plaintiffs proceeding under the terrorism exception 'have often faced practical and legal difficulties' at the enforcement stage. . . . Subject to state exceptions, the FSIA shields foreign-state property from execution.").
199. *See* 28 U.S.C. § 1610(a).
200. *Id.* § 1611(b)(1).
201. *Bank Markazi*, 136 S. Ct. at 1317.

and obtained billions of dollars in judgments against Iran. But those judgments remained unpaid. Bank Markazi was not willing to pay and the traditional distinction between immunity from jurisdiction and immunity from execution made execution by way of reparations nearly impossible. The writs for execution were intended to consolidate the various requests for judgment in a unified enforcement proceeding.[202] To remedy some of the enforcement difficulties, Congress enacted the Terrorism Risk Insurance Act of 2002 (TRIA), which authorizes execution of judgments obtained under the FSIA's terrorism exception against "the blocked assets of [a] terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party)."[203] In 2012, President Barack Obama used his executive authority to block "[a]ll property and interests in property of any Iranian financial institution, including the Central Bank of Iran, that are in the United States."[204] However, "[t]he availability of these assets for execution . . . was [highly controversial and] contested."[205]

To "place beyond dispute the availability of some of the . . . blocked assets for satisfaction of judgments rendered in terrorism cases," and while the *Bank Markazi* case was still pending, Congress enacted the Threat Reduction Act.[206] While this act did not amend neither the FSIA nor the TRIA, it effectively rendered any defense on sovereign immunity pursuant to Sections 1610 and 1611 of the FSIA outdated, mundane, and virtually without consequence. Effectually, the Threat Reduction Act "ma[de] available for post[-]judgment execution a set of assets held . . . for Bank Markazi."[207] Section 8772(a)(1) expressly provides that certain assets, "notwithstanding any other provision of law, *including any provision of law relating to sovereign immunity*, and preempting any inconsistent provision of State law . . . shall be subject to execution or attachment in aid of execution, . . . in order to satisfy any judgment" involving compensatory damages.[208] Section 8772(b) goes on to specify as available for execution certain assets held in the U.S. for a foreign securities intermediary.[209] The Threat Reduction Act requires a court to determine who owns, or "holds equitable title to," various assets and that "no other person possesses a constitutionally protected interest in the assets . . . ."[210]

During litigation, Bank Markazi argued that the law dictated the outcome of a pending case (i.e., the judgment enforcement procedure) and

202. *Id.* at 1320.

203. *Id.* at 1318 (alteration in original) (citations omitted) ("A 'blocked asset' is any asset seized by the Executive Branch pursuant to either the Trading with the Enemy Act . . . or the International Emergency Economic Powers Act . . . .").

204. *Id.*

205. *Id.*

206. *Id.*; *see also* 22 U.S.C. § 94 (2012).

207. *Bank Markazi*, 136 S. Ct. at 1316 (quoting 22 U.S.C. § 8772).

208. 22 U.S.C. § 8772(a)(1) (emphasis added).

209. *See id.* (exempting "a financial asset that is . . . held by or for a foreign securities intermediary doing business in the United States"; . . . a blocked asset; and [an asset] . . . equal in value to a financial asset of Iran, including an asset of the central bank . . . .").

210. 22 U.S.C. § 8772(a)(2).

thus usurped the powers of the judiciary.[211] The District Court rejected this argument, the Second Circuit affirmed, and the Supreme Court granted certiorari and ultimately agreed.[212] Thus, the matter before the Supreme Court was actually a constitutional separation-of-powers issue rather than an issue of the scope and effect of sovereign immunity. In other words, the Supreme Court held constitutional Congress' efforts to make Iran's assets available for execution subsequent to awards rendered against Iran under FSIA § 1605A.[213] The Court justified its holding as an exception to immunity from execution on the basis of policy objectives and political concerns.[214]

The *Bank Markazi* opinion is open to both praise and criticism. For example, Justice Ruth Bader Ginsburg, delivering the opinion of the Court, emphasized that "Congress and the President have, time and again, as exigencies arose, exercised control over claims against foreign states and the disposition of foreign-state property in the United States."[215] She went on to comment that "the Executive, prior to the enactment of the FSIA, regularly made case-specific determinations whether sovereign immunity should be recognized, and courts accepted those determinations as binding."[216] On this point we wish to underscore Justice Ginsberg's use of the term "prior to the enactment."[217] Historically, the doctrine of sovereign immunity grew out of common law and was a matter of grace and comity.[218] At that time, U.S. courts typically looked to the State Department for a recommendation on whether a foreign government should enjoy immunity.[219] The courts normally deferred to State Department's determination and incorporated that determination in the court's decision.[220] But clearly, the FSIA was enacted in part to rectify some of these shortcomings.[221] The purposes of the FSIA are the following:

> [(1)] to codify the restrictive principle of immunity whereby the immunity of a foreign State is restricted to suits involving its public acts (*jure imperii*) and is not extended to suits based on its commercial or private acts (*jure gestionis*); [(2)] to ensure the application of this restrictive principle in the courts and not by the State Department; [(3)] to provide a statutory proce-

211. *Bank Markazi*, 136 S. Ct. at 1322.
212. *Id.*
213. *Id.* at 1329 ("By altering the law governing attachment of particular property belonging to Iran, Congress acted comfortably within the political branches' authority over foreign sovereign immunity and foreign assets. For the reasons stated, we are satisfied that § 8772—a statute designed to aid in the enforcement of federal-court judgments—does not offend 'separation of powers principles . . . protecting the role of the independent judiciary within the constitutional design.'").
214. *Id.* at 1328 ("In pursuit of foreign policy objectives, the political branches have regulated specific foreign-state assets by, inter alia, blocking them or governing their availability for attachment.").
215. *Id.* (citing Dames & Moore v. Reagan, 453 U.S. 654, 673–74, 679–81 (1981)).
216. *Id.* (citing *Dames & Moore*, 453 U.S. at 669–74).
217. *Id.*
218. *See, e.g.*, Samantar v. Yousuf, 560 U.S. 305, 311–12 (2010).
219. *See id.*
220. *See id.*
221. *See id.* at 313.

> dure to make service upon and establish personal jurisdiction over a foreign State; and [(4)] to remedy in part the private litigant's inability to obtain execution of a judgment obtained against a foreign State.[222]

The FSIA also transferred the "primary responsibility for immunity determinations from the Executive to the Judicial Branch."[223] While the *Bank Markzai* decision did not discount this evolution, the Supreme Court nevertheless held that "it remains Congress' prerogative to alter a foreign state's immunity and to render the alteration dispositive of judicial proceedings in progress."[224] The heart of the matter is whether the legislative branch "commandeer[ed]" the judicial branch.[225] In his dissent, Chief Justice John Roberts believed that to be the case. He opined that "no comparable history sustains Congress's action here, which seeks to provide relief to respondents not by transferring their claims in a manner only the political branches could do, but by commandeering the courts to make a political judgment look like a judicial one."[226]

The *Bank Markazi* opinion is fascinating. Two interesting issues of constitutional dimension arose and will likely be debated heavily in the years to come: whether the legislative branch can tailor legislation to accommodate cases pending in court, and whether Congress violated the separation of powers.[227] Further issues left open by the opinion are whether the legislative branch set a dangerous precedent, and whether *Bank Markazi* shores up recent claims of "executive unilateralism."[228] It is certainly true that the Court's ad hoc approach to the immunity from execution issue was completely novel. This issue may well become controversial in many settings that go well beyond the terrorism debate and issues of access to justice and reparations for victims of terrorism. One question we find fascinating is whether, under the *Bank Markazi* rationale, powerful investors can make assets of a state available for execution when a state is "insolvent" and is subject to having a stream of investment-arbitration awards rendered against the state. From an investor standpoint this evolution merits close attention because well-connected and politically powerful individuals are closely monitoring the effects of *Bank Markazi* and looking at the holding as a valuable weapon in the global game of "asset hunting" by judgment creditors and other similarly situated persons.[229]

For those who would criticize *Bank Markazi*, we ask: What is the alternative? Might it lead to a re-politicization of transnational litigation or the appreciation of the duties owed to the international community at large?

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222. FOX & WEBB, *supra* note 15, at 238–39.
223. Republic of Austria v. Altmann, 541 U.S. 677, 691 (2004).
224. Bank Markazi v. Peterson, 136 S. Ct. 1310, 1329 (2016) (citations omitted).
225. *Id.* at 1337 (Roberts, C.J., dissenting).
226. *Id.*
227. *Id.*
228. *Id.* at 1338 n.28.
229. Susan Kostal, *Iran Terror Victims Receive First Payments; Will This Affect Foreign Immunity?*, AM. BAR ASS'N J. (Mar. 1, 2017, 4:05 AM), https://www.abajournal.com/magazine/article/iran_terror_victims_receive_first_payments [https://perma.cc/4TX9-Q3C2].

Could *Bank Markazi* signal a rejection of universal human rights? Bank Markazi, the Petitioner in that case, argued:

> If Congress wanted to compensate these plaintiffs, there were any number of alternatives. Congress could have paid the claims out of public funds, as it has done in the past. Or the political branches could have sought to negotiate compensation through diplomatic discussions.[230]

Bank Markazi's argument would firmly entrench a state-centric approach to sovereign immunity and human rights, while at the same time completely rejecting a more liberal, human rights approach.

On the other hand, transnational cooperation is bottomed on the virtues of uniformity, harmonization, and predictability. How predictable is a regime that decides on an ad hoc basis whether to condition and withdraw immunity by unilateral action and is subject either directly or indirectly to pressure from private sector lobbyists?[231] Carving out a general immunity exception on a piece-meal basis is probably not the best way to develop sound policy. This approach calls into question its own legitimacy and sustainability as we try to develop a well-articulated and well-thought-out regime for functional transnational litigation.

We strongly believe that the better approach is to amend the FSIA to reflect a liberal doctrine. In so doing the FSIA would reject the distinction between immunity from jurisdiction and execution by treating the two as one. In *Bank Markazi*, the better approach would have been for the justices to elaborate a liberal doctrine of immunity from execution or provide greater assistance in the asset-hunt (e.g., by approving general-asset discovery requests in these situations and shifting the burden-of-proof for purposes of the assets or property to the state).

3. Certain Iranian Assets: *The International Court of Justice*[232]

Th decision of the *Certain Iranian Assets* case grew out of a series of cases brought against Iran pursuant to the terror exception in the FSIA § 1605A.[233] The heart of the dispute before the ICJ was the alleged violation by the United States of the Treaty of Amity.[234] The ICJ's decision on whether the court had jurisdiction was handed down on February 13, 2019.[235] The case has now moved to the merits phase. To fully understand the current posture of the case, we need to reiterate the distinction

230. Brief for Petitioner at 53–54, Bank Markazi v. Peterson, 136 S. Ct. 1310 (2016) (No. 14-770) (citations omitted).

231. *See* Alain Deneult, *Corporations as Private Sovereign Powers: The Case of Total*, RESILIENCE (Mar. 16, 2020), https://www.resilience.org/stories/2020-03-16/corporations-as-private-sovereign-powers-the-case-of-total/ [https://perma.cc/3UG4-4WET].

232. This Section focuses entirely on the law of sovereign immunity; therefore, we exclude the issues of admissibility on the "compromissory clause"; the separate judicial status of Bank Markazi and Iran (i.e., whether the central bank is to be treated as a "company," an "agent," or an "instrumentality" of Iran); and the substantive protection for investors pursuant to international investment law.

233. *See, e.g.*, *Bank Markazi*, 136 S.Ct. at 1316.

234. *See generally* Certain Iranian Assets, *supra* note 2.

235. *Id.* ¶ 1.

between immunity from jurisdiction and immunity from execution. Again, the jurisdictional issues appear to carve out an exception to the general rule of immunity. Similarly, the execution phase highlights the extremely difficult hurdle of actually reaching and seizing the assets on behalf of a judgment or award creditor.

a. The Jurisdictional Phase

The United States presented several jurisdictional objections in the form of requests made to the court, requesting the dismissal of: (1) Iran's claims in their entirety as *inadmissible*; (2) all claims that the United States measures that block or freeze assets of Iran or its financial institutions violate any provision of the Treaty of Amity; (3) all claims that are predicated on a purported failure by the United States to accord sovereign immunity from jurisdiction or enforcement to Iran, Bank Markazi, or Iranian state-owned entities; and (4) all claims of purported violations of Article III, IV, or V of the Treaty of Amity.[236]

We focus primarily on the third and fourth objections to jurisdiction. Essentially, Iran claimed that the measures imposed by the United States fell within the scope of the Treaty of Amity, and the United States "consider[ed] that the question of immunities [was] outside the court's jurisdiction *ratione materia*, since the rule on the central bank immunities is a rule of customary international law and is not covered by the 1955 Treaty [of Amity]."[237] We also pay brief attention to whether Bank Markazi is a "company" within the meaning of the Treaty of Amity and is thereby justified in claiming the rights and protections afforded to companies.

As a preliminary matter, we note that the court could have discussed what customary international law is with respect to immunity from execution for central bank assets and whether there is a customary international law nexus requirement. Further, the court could have determined if such customary international law would be applicable in this case pursuant to treaty interpretation. We acknowledge that, as to this second objection, the court assumed that Bank Markazi is a "company" as defined by the Treaty of Amity.[238]

i. The Third Jurisdictional Objection

Article IV(2) of the Treaty of Amity provides protection for property of nationals and companies with the most constant protection and security under public international law.[239] Applying this language, the court held that the article must be read in its proper context and that, therefore, the provisions guarantee certain rights and minimum protections for natural

236. *See id.* ¶ 15.
237. *Id.* ¶ 3 (separate opinion by Gevorgian, J.).
238. *Id.* ¶ 56.
239. *See* Treaty of Amity, Economic Relations, and Consular Rights, Iran-U.S., at art. IV(2), Aug. 15, 1955, 8 U.S.T. 3853 [hereinafter Treaty of Amity].

persons and legal entities engaged in activities of *a commercial nature*.[240] This seems to undercut any further argument that states enjoy absolute protection under the traditional doctrine of sovereign immunity as delineated under customary international law.

Article XI(4) of the Treaty of Amity provides:

> *No* enterprise of either High Contracting Party, including . . . government agencies and instrumentalities . . . [that are] publicly owned or controlled shall, if it engages in *commercial . . . or other business activities* within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, or execution of judgment . . . to which privately owned and controlled enterprises are subject therein.[241]

Here, the court held that this language does not implicitly transform an obligation to treat state entities that engage in activities *jure imperii* with sovereign immunity under customary international law.[242] The court reasoned that the paragraph indeed conditions from all possible "immunity" the publicly-owned enterprises that are engaging in commercial or industrial activities.[243] Conversely, this language does not affect the immunities enjoyed under customary international law by state entities that engage in activities *jure imperii*, but that does not imply an obligation to uphold those immunities under the Treaty of Amity.[244] That is, Article XI does leave intact the immunities enjoyed under customary international law for activities *jure imperii*, but it does not transform such compliance to a treaty obligation.[245] The argument that this provision incorporates sovereign immunities into the Treaty of Amity, therefore, cannot be sustained.[246]

Iran further argued that Article XI recognized immunity as a *procedural* defense for entities controlled by Iran but acting *jure imperii*.[247] The court did not give this assertion much credence. In a separate opinion, Judge Djamchid Momtaz commented that the matter should have been settled at the merits stage "in light of rules of international law on the interpretation of treaties."[248] Further, Judge Momtaz opined that Article XI should be "interpreted in light of general international law on immunities of States and their banks, as codified in . . . the United Nations Convention on Jurisdictional Immunities of States and Their Property . . . and as set

240. *See* Certain Iranian Assets, *supra* note 2, ¶ 57 ("The 'international law' in question in this provision is that which defines the minimum standard of protection for property belonging to the 'nationals' and 'companies' of one Party engaging in economic activities within the territory of the other, and not that governing the protections enjoyed by State entities by virtue of the principle of sovereign equality of states.").

241. Treaty of Amity, *supra* note 239, at art. XI(4).

242. *See* Certain Iranian Assets, *supra* note 2, ¶ 65.

243. *See id.*

244. *See id.* ¶¶ 62–65.

245. *See id.* ¶ 65.

246. *See id.*; *see also id.* ¶ 3 (separate opinion by Robinson, J.) ("[Article XI(4) does] "compellingly imply that State enterprises carrying out acts *jure imperii* enjoy sovereign immunity by virtue of the Treaty [of Amity].").

247. *See id.* ¶ 60.

248. *Id.* ¶ 7 (separate opinion by Momtaz, J.).

out in . . . the 1976 FSIA . . . ."[249] In a separate opinion, Judge Patrick Robinson suggested that the *a contrario* inference is justified on the object and purpose of the treaty.[250]

Article III, paragraph 2 of the Treaty of Amity provides: "Nationals and companies of either High Contracting Party shall have freedom of access to the courts of justice . . . within the territories of the other High Contracting Party, in all degrees of jurisdiction, both in defense and pursuit of their rights . . . ."[251] On this issue, the court was "not convinced that a link of the nature alleged by Iran exist[ed] between the question of sovereign immunities and the right guaranteed by Article III[(2)]."[252] The court had to determine whether, assuming the bank enjoyed immunity under customary international law, that the breach of such immunity constitutes a violation of the right to freedom of access to the courts as guaranteed by that provision. The court ultimately held that there is nothing in Article III to suggest that "the obligation to grant Iranian 'companies' freedom of access to [U.S.] courts entails an obligation to uphold the immunities that customary international law is said to accord—if that were so—to some of these entities."[253]

On the issue of fair and equitable treatment under Article IV(1) of the Treaty of Amity, the court held that this paragraph does not include an obligation to respect the sovereign immunities of the state and its entities under customary international law.[254]

As to the matter of "freedom of commerce" under Article X(1) of the Treaty of Amity, the court, by reference to its previous decision, held that commerce includes commercial activities in the wider sense—namely, ancillary activities related to commerce.[255] Therefore, the court was "not convinced that the violation of the sovereign immunities to which certain State entities are said to be entitled under international law in the exercise of their activities *jure imperii* is capable of impeding freedom of commerce, which by definition concerns activities of a different kind . . . ."[256] Consequently, the violations of sovereign immunities alleged by Iran "d[id] not fall within the scope of" Article X.[257]

Iran claimed that the U.S. had failed to respect the immunity from jurisdiction and execution for its state-controlled entities. The United States countered that the Treaty of Amity offered no such immunity. The court aligned with the United States[258] and accordingly shut the door for ruling on the content of sovereign immunity under customary interna-

249. *Id.* ¶ 23.
250. *See id.* ¶ 9 (separate opinion by Robinson, J.).
251. *See* Treaty of Amity, *supra* note 239, at art. III (2).
252. Certain Iranian Assets, *supra* note 2, ¶ 70.
253. *Id.*
254. *See id.* ¶¶ 72–74.
255. *Id.* ¶ 78.
256. *Id.* ¶ 79.
257. *See id.*
258. *See id.* ¶ 11 (separate opinion by Momtaz, J.) ("In my opinion, the violation of the sovereign immunities of Bank Markazi in relation to its activities *jure imperii* is capa-

tional law in any of the contested articles, such as the terrorist exception or immunity for central bank assets.

ii. The Fourth Jurisdictional Objection

The question before the court was solely whether Bank Markazi is a "company" within the meaning of the Treaty of Amity and is thereby justified in claiming the rights and protections afforded to such pursuant to Articles III, IV, and V.[259] The court saw it this way:

> First, an entity may only be characterized as a 'company' within the meaning of the Treaty [of Amity] if it has its own legal personality, conferred on it by the law of the State where it was created, which establishes its legal status. . . . Secondly, an entity which is wholly or partly owned by a State may constitute a 'company' within the meaning of [said t]reaty.[260]

Part of this analysis required a close examination of the activities of Bank Markazi.[261] Iran argued that whether an entity carries out functions of a sovereign nature, whether it engages in other activities, or a combination of both, is of no consequence when it comes to characterizing it as a "company."[262] The court acknowledged that a single entity could engage in both commercial as well as sovereign activities; thus, it decided that it had to address the question about the nature of Bank Markazi's activities before it could decide whether the U.S.' measures violated the Treaty of Amity. However, the court was of "the view that it d[id] not have before it all the facts necessary to determine whether Bank Markazi was carrying out, at the relevant time, activities of the nature of those which permit characterization as a 'company' within the meaning of the Treaty of Amity."[263] Consequently, the court "conclude[d] that the [fourth] objection to jurisdiction does not possess, in the circumstances of the case, an exclusively preliminary character."[264]

b. The Merits Phase

The court has yet to deliver its judgment on the merits. Whether the bank is to be treated as a company or governmental entity is still in dispute. First, the court will have to determine its legal status. Second, it will be crucial for the court to examine the functions and activities of Bank Markazi.[265] If the Bank's functions are sovereign in nature, and the legal status is that of a company, the question of whether the United States is in breach of customary international law could be profitably discussed although this discussion will likely be by academics and not by the court

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ble of impeding freedom of commerce between Iran and the United States and thus depriving the Treaty [of Amity] of its object and purpose.").

259. *See id.* ¶ 10.
260. *Id.*
261. *See id.* ¶ 89.
262. *See id.* ¶ 90.
263. *Id.* ¶ 97.
264. *Id.*
265. *See id.* ¶ 7 (separate opinion by Robinson, J.).

itself, given the court's strong tilt toward traditional solutions to modern problems. But even if the bank's functions are purely commercial or a mixture of both commercial and governmental, the better question with respect to the seizure of its assets is whether those particular assets were used for a non-commercial purpose.

A Concluding Assessment and Appraisal

We discern a substantial number of flaws and weaknesses in the ICJ's *Jurisdictional Immunities* and *Certain Iranian Assets* opinions. For example, in *Certain Iranian Assets*, the court restricted itself by holding the United States accountable for its potential violations of customary international law. That is, the question of whether central bank assets can be executed pursuant to customary international law or whether the nexus requirement puts the separate assets of Bank Markazi out of reach for judgments against Iran is beyond the proper reach of the court given its traditional approach to sovereign immunity. Nevertheless, the court could use the merits phase of *Certain Iranian Assets* as an opportunity to elaborate on the applicability of UNCSI Article 21(1)(c) and the nexus requirement.

According to Judge Robinson's separate opinion, if the court had instead incorporated the customary international law of state immunity into the Treaty of Amity, it would have been forced to discuss the crucial issue of immunity from execution of the central bank assets.[266] The United States would then have sought to justify its departure from customary international law on the basis of a number of grounds, such as the terror exception, *jus cogens*, human rights violations, or victims' reparations. This string of arguments would have resembled those presented by Italy in the *Jurisdictional Immunities* case. Again, the court would have had to decide whether to elaborate a more human rights-centered approach with regard to sovereign immunity, and given its decision in *Jurisdictional Immunities*, it is not at all clear that the court is prepared to do so. Merely examining state practice would not, in and of itself, justify a more liberal and pragmatic evolution of the doctrine. Therefore, it is unclear whether the United States would have prevailed if forced to use this argument, but there is logic to this approach. Nevertheless, it is likely that the approach would have been interpreted to present "a major obstacle to the implementation of the Treaty [of Amity] and to the smooth and uninterrupted flow of commerce between the territories of the two parties."[267]

Notwithstanding, the nexus requirement in the UNCSI may still come before the ICJ for resolution. In which case, the question remains: Can assets of a separate entity be made available for a judgment against the state? The court could elaborate further on the doctrine of piercing the corporate veil with respect to states and their agencies, instrumentalities,

266. *Id.* ¶ 3 (separate opinion by Robinson, J.).

267. *Id.* ¶ 12 (separate opinion by Momtaz, J.). For a dramatically contrasting view on the issue of proper interpretation of treaty language, see *id.* ¶¶ 15–17 (separate opinion by Brower, J.).

and entities. But the only substantive remark on the customary international law content of sovereign immunity law came from Judge Momtaz's separate opinion:

> At the same time, it is true that "[r]eliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law." However, the withdrawal of immunities for certain specified acts, as results from the United States' legislation, has not been adopted by other States. On the contrary, as noted by the Court in the case concerning *Jurisdictional Immunities* . . . , "this amendment has no counterpart in the legislation of other States. None of the States which has enacted legislation on the subject of State immunity has made provision for the limitation of immunity on the grounds of the gravity of the acts alleged". The Court concluded that "under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict."[268]

Alternatively, the court might have pursued an inquiry with regard to "whether there is a 'reasonable connection' between the Treaty [of Amity] and the claim of sovereign immunity" in order to justify treaty protection of sovereign immunity for state enterprises carrying out acts *jure imperii*.[269] We find glimmerings of these views in, for example, the separate opinion of Judge Kirill Gevorgian who discussed access to courts and the procedural versus substantive distinction.[270]

Finally, we believe the court was too quick to debunk the sovereign immunity argument. Judge Momtaz highlighted a very important point that merits further attention if not by the court, at least in academic discussion and subsequently before other courts and tribunals. As he sees it, treaties of a specific nature should take account of the law of sovereign immunity to the extent possible.[271] This would again underscore the important debate between access to court, on the one hand, and sovereign immunity, on the other.

It is difficult to know where the evolution of the sovereign immunity doctrine stands. On the one hand, it could be argued that because "[w]e are now in an era of legal accountability of states, [that] such accountability is inconsistent with immunity."[272] On the other hand, we might contend that non-commercial acts should remain absolutely immune and that execution "against state property constitutes a greater interference with a State's freedom to manage its own affairs and to pursue its public purposes than does the pronouncement of a judgment or order by a national court of

268. *Id.* ¶ 25 (separate opinion by Momtaz, J.) (alteration in original) (citations omitted) (quoting Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 207 (June 27); and Jurisdictional Immunities, *supra* note 2, ¶¶ 88, 91).

269. *Id.* ¶ 4 (separate opinion by Robinson, J.).

270. *See id.* ¶¶ 6–9 (separate opinion by Gevorgian, J.).

271. *See id.* ¶ 15 (separate opinion by Momtaz, J.) (citations omitted).

272. Whytock, *supra* note 2, at 2088.

another State."[273] There is a third position: the plea of sovereign immunity is purely procedural and must be treated independently from the substantive dispute before the court. Importantly, we cannot yet assert that judges should categorically and unconditionally endorse a human rights-centered approach. At this point in time, this would probably be too drastic a request, even though we do seek a sovereign immunity doctrine that embraces many of the virtues in human rights-centered approaches, and that transcends parochialism and idiosyncrasy. What is certainly time for, however, is the correction of wrongly reasoned doctrines that fail to regard the proper balancing of legitimate competing interests. Therefore, a viable approach might be for the ICJ, or any other court, to consider the plea of sovereign immunity and the plea of access to court or access to justice as competing, procedural pleas; then, decide which one trumps the other on the basis of a proportionality analysis.

As the *Bank Markazi*[274] dispute moved through the United States. Judicial system, the United States Congress by ad hoc legislative action altered the course of a then-pending case. The final outcome makes sense on its particular facts, but the congressional action opened a can of doctrinal worms. That is, the executive branch in the future might seek to grant, condition, or withhold immunity through unilateral action, applying concepts that grow out of "executive unilateralism."[275] As salutary as these actions might seem on a one-off basis, there can be no uniformity, clarity, or predictability under public international law if legislative and executive branches in politically and economically powerful states decide to act ad hoc and piecemeal so as to accommodate, inter alia, individual cases and the power of lobbyists.

In the authors' opinion, the ICJ is far better placed than national courts to interpret and apply public international law. The impact of the ICJ would be enhanced if the judges took advantage "of the case[s] in hand which have a wider interest or connotation in order to make general pronouncements of law and principle that may enrich and develop the law,"[276] rather than exercising judicial restraint. As the principle judicial organ of the world community, the ICJ is best placed to cope with a multitude of legal problems through a proactive judicial policy. It is true that the disputes may at times have a political or even philosophical component making the task difficult, but the judges are well aware of that. The court is increasingly dealing with cases concerning "cutting-edge" issues and this "allows the Court to play [a more] preponderant role in delineating the law than it was able to do in the past."[277] Therefore, the court should have followed dissenting Judge Yusuf's approach:

> The assertion of jurisdiction by domestic courts for a failure to make reparations for serious breaches of the law of armed conflict admitted by the

273. Fox & Webb, *supra* note 15, at 3180.
274. *See generally* Bank Markazi v. Peterson, 136 S. Ct. 1310 (2016).
275. *Id.* at 1317.
276. Kooijmans, *supra* note 107, at 750.
277. *Id.* at 753.

> responsible State, particularly where no other means of redress is available, could not, in my view, harm the independence or the sovereignty of another State. It simply contributes to the crystallization of an emerging exception to State immunity, which is based on the principles underlying human rights and humanitarian law and on the widely[ ]held *opinio juris* of ensuring the realization of those rights, including the right to an effective remedy, in those circumstances where the victims would have no other means of redress.[278]

It has rightly been said that "the right to court access . . . is widely accepted and increasingly legalized."[279] We believe that access to courts should include the broader and more ambiguous term "access to justice."[280] Therefore, the concept of access to court should apply with equal force in the enforcement stage. This would render any distinction between the two regimes outdated. Access to courts should be available where sovereign immunity conflicts with violations of human rights law, terror-related activity, or war-related crimes. The procedural versus substantive distinction was a fatally dangerous doctrinal evolution that completely neglects liberal values in favor of a more state-centric approach.

Dealing with the law of sovereign immunity as a subject under public international law, the ICJ should have exercised its considerable power and influence to address and resolve a number of issues in this area. Instead, the court moved toward a more regressive approach as enunciated in the *Jurisdictional Immunities* case and not denounced in the *Certain Iranian Assets* case. Thus, critics claim that there are now two "last fortress[es]" or "last bastion[s]" of sovereign immunity.[281] One is the always-present distinction between immunity from jurisdiction and immunity from execution, and the other is the near-absolute immunity for certain human rights-infringing, non-commercial acts. To better resolve this conflict, the ICJ should reject the distinction between immunity from jurisdiction and execution, and reject the state-centric approach of sovereign immunity in favor of a human rights-oriented approach.[282]

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278. Jurisdictional Immunities, *supra* note 2, ¶ 51 (Yusuf, J., dissenting).

279. Whytock, *supra* note 2, at 2037.

280. *Id.* at 2058.

281. Ylli Dautaj, *Sovereign Immunity from Execution: Caveat Emptor*, KLUWER ARB. BLOG (June 4, 2018), http://arbitrationblog.kluwerarbitration.com/2018/06/04/sovereign-immunity-from-execution-caveat-emptor/ [https://perma.cc/VM34-VB6R].

282. *See* Fox, *supra* note 13, at 55.