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STATE IMMUNITY AND THIRD-PARTY LIMITS ON THE JURISDICTION OF DOMESTIC COURTS

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Abstract: Recent case law has evidenced doctrinal ambiguity concerning whether state immunity precludes domestic courts' jurisdiction when rights and interests of third-party states may be affected. This article posits that such confusion arises from a failure to recognize state immunity as a rule predicated on the sovereign status of the defendant. Through an analysis of state practice, the article contends that the concept of indirect impleading incorporated in the UN Convention on State Immunity does not challenge the status-based nature of this rule. Construing state immunity as a subject-matter rule erroneously conflates it with distinct doctrines, such as *Monetary Gold* and the act of state doctrine.

Keywords: State immunity, Indirect impleading, *Monetary Gold*, Domestic courts, Act of state, Foreign affairs, Jurisdiction, Functional immunity, Non-justiciability

I. INTRODUCTION

In recent years, courts in Canada,[1] the United Kingdom (UK),[2] South Africa,[3] and the United States (US)[4] have been confronted with immunity claims by entities that would not ordinarily be entitled to state immunity – private individuals, companies, and state officials of the forum state – on the grounds that a decision by the court might 'affect' states not parties to the proceedings. In the UK, this issue came to the fore in *Belhaj v Straw*, where British government officials argued that English courts were precluded from reviewing allegations of their involvement in the unlawful detention and mistreatment of foreign nationals by US and other states officials on the grounds that such an enquiry would 'implead the foreign states'.[5]

Although courts have consistently rejected these immunity claims, the topic remains shrouded in confusion. To varying degrees, all courts seem to have accepted the defendants' premise that there may be an obligation to grant immunity in cases where the

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1 *United Mexican States v British Columbia* (2014) BCSC 54, 169 ILR 639.

2 *Belhaj v Straw* [2017] UKSC 3; [2017] AC 964.

3 *Saharawi Arab Democratic Republic and Another v Owner and Charterers of the MV 'NM Cherry Blossom' and Others* [2017] ZAECPEHC 31.

4 *WhatsApp v NSO Group Technologies* (District Court of the Northern District of California, 16 July 2020) Case No 19-cv-07123-PJH.

5 *Belhaj* (n 2) para 7.

defendant is not the state. Similarly, some scholars maintain that the principle of sovereign equality of states, which underpins immunity (*par in parem non habet imperium*[6]), precludes domestic courts from reviewing the legality of foreign states' sovereign acts, irrespective of the defendant's status.[7] The debate is rife with uncertainty, further complicated by recurring references to legal doctrines of uncertain scope such as 'indirect impleading' and 'act of state',[8] or doctrines typically associated with the competence of international courts like the *Monetary Gold* doctrine.[9]

This confusion may have significant consequences, potentially depriving claimants of judicial remedies in proceedings where determining the activities of third-party states is necessary, or making domestic prosecution of crimes such as aggression – which requires a judicial determination of a third-party state's wrongful act[10] – impossible.[11] These concerns become even more pressing in the context of ongoing discussions on establishing a special court to prosecute Russia's aggression against Ukraine.[12]

In these scenarios, it is crucial to avoid the 'Midas effect', where – much like the mythical Greek king who transformed everything he touched into gold – mere allegations of contact with foreign sovereigns would allow individuals and entities not ordinarily entitled to immunity to evade domestic court jurisdiction. As this contribution demonstrates, this prospect is the result of a misapprehension of the nature and content of state immunity as evidenced by the practice of domestic courts, and of the relationship between state immunity and other doctrines that must be kept separate from immunity.

The article is structured as follows. Section II examines competing state immunity theories, revealing that despite some support for subject-matter immunity, the preferable

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6 See Y Dinstein, '*Par in Parem Non Habet Imperium*' (1966) 1 *Israel Law Review* 407.

7 See, eg, HF Van Panhuys, 'In the Borderland Between the Act of State Doctrine and Questions of Jurisdictional Immunities' (1964) 13 ICLQ 1193, 1200; B Van Schaack, '*Par in Parem Imperium Non Habet*: Complementarity and the Crime of Aggression' (2012) 10 JICJ 133, 149; D Akande, 'Prosecuting Aggression: The Consent Problem and the Role of the Security Council' (2011) Oxford Legal Studies Research Paper No 10/2011, 33.

8 See, eg, T Grant, 'Article 6' in R O'Keefe, C Tams and A Tzanakopoulos (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property* (OUP 2013) 109; H Fox and P Webb, *The Law of State Immunity* (Rev 3rd ed, OUP 2015) 368; N Angelet, 'Immunity and the Exercise of Jurisdiction – Indirect Impleading and Exequatur' in T Ruys, N Angelet and L Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (CUP 2019) 82; Lord Lloyd-Jones, 'Forty Years On: State Immunity and the State Immunity Act 1978' (2019) 68 ICLQ 247, 265; T Ruys, 'The Role of State Immunity and Act of State in the NM Cherry Blossom Case and the Western Sahara Dispute' (2019) 68 ICLQ 67, 72.

9 See, eg, Akande (n 7) 13; Angelet (n 8) 88; Ruys (n 8) 75.

10 See D Akande and A Tzanakopoulos, 'The International Court of Justice and the Concept of Aggression', in C Kreß and S Barriga (eds), *The Crime of Aggression: A Commentary* (CUP 2016) 214.

11 The only exception would be prosecution by the victim state as a form of self-help; see Akande (n 7) 33.

12 See T Dannenbaum, 'Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine' (*Just Security*, 10 March 2022) <https://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine>; KJ Heller, 'The Best Option: An Extraordinary Ukrainian Chamber for Aggression' (*Opinio Juris*, 16 March 2022) <https://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression>.

view is based on the defendant's status. It further demonstrates that cases involving 'indirect impleading' do not undermine the status-based nature of state immunity. Section III argues that characterizing state immunity as a subject-matter rule blurs the distinction between immunity and other doctrines that are either inapplicable to domestic courts or not grounded in international law. Section IV concludes by emphasizing the importance of preserving state immunity within established boundaries to maintain a balance among competing interests. By doing so, the article fosters a more sophisticated and informed discussion, ensuring that justice is not jeopardized by baseless immunity claims.

II. STATE IMMUNITY AS A STATUS-BASED RULE AND THE NOTION OF 'INDIRECT IMPLEADING'

State immunity, a corollary of the principle of sovereign equality of states,[13] is often deemed to prevent one sovereign state from ruling or exercising power over another.[14] In fact, it is more accurate to say that the application of state immunity requires balancing the conflicting sovereignties of the forum state and the foreign state.[15] Historically, states have adopted at least two models of state immunity to address this need.[16]

The absolute model generally prohibits domestic courts from exercising jurisdiction over foreign states without their consent. In contrast, the restrictive model – now prevalent – exempts foreign states from domestic court jurisdiction only for sovereign acts, not for private or commercial activities. This shift has been justified on the grounds of justice and accountability, especially when states engage in transactions similar to those of private individuals.[17] However, this explanation falls short of a comprehensive theoretical foundation,[18] leading to difficulties in identifying the beneficiaries of state immunity. A critical question is whether immunity pertains primarily to the 'person' of the state or extends in general to its sovereign activities.

Advocates of a subject-matter approach to state immunity argue that the key element is the exercise of jurisdiction over foreign sovereign activities rather than over foreign sovereign defendants.[19] Yet, if taken to the extreme, this view would lead to paradoxical results: the restrictive model would have narrowed the scope of immunity to

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13 *Jurisdictional Immunities of the State* (*Germany v Italy*) (Judgment) [2012] ICJ Rep 99, 123, para 57. See also Fox and Webb (n 8) 25; J Crawford, *Brownlie's Principles of Public International Law* (9th ed, OUP 2019) 471.

14 P Gaeta, JE Viñuales, and S Zappalà, *Cassese's International Law* (3rd ed, OUP 2020) 122.

15 *Schooner Exchange v McFaddon*, 11 US 116 (1812); *Jurisdictional Immunities* (n 13) para 57. See also Dinstein (n 6) 418–9; Fox and Webb (n 8) 35; Z Douglas, 'State Immunity for the Acts of State Officials' (2012) 82 BYIL 281, 316.

16 Fox and Webb have identified a third model; see (n 8) 38.

17 See R Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (OUP 2008) 48.

18 ibid 59.

19 See Van Panhuys (n 7) 1208; MG Kohen, 'Definition of "State"', in G Hafner, M Kohen, and S Breau (eds), *State Practice Regarding State Immunities/La Pratique des États concernant les Immunités des Etats* (Brill, 2006) 5.

private law acts while expanding the number of potential beneficiaries due to the irrelevance of the defendant's status.

Hence, most authorities agree that the restrictive model, while incorporating elements of subject-matter immunity, remains based on the defendant's status.[20] To ascertain whether this aligns with the structure of state immunity under customary international law, one must consider state practice and *opinio juris*,[21] particularly focusing on national court judgments addressing immunity questions.[22]

The UN Convention on Jurisdictional Immunities of States and Their Property (UNCSI), though not in force,[23] is a useful starting point for this enquiry.[24] At first glance, UNCSI supports the status-based approach. Article 6(1) requires that a state respect state immunity by not exercising jurisdiction 'in a proceeding before its courts against another State'. When read alongside Article 2(1)(b) – which clarifies that the term 'state' includes its central organs and, to an extent, constitutive units, agencies, instrumentalities, and representatives – this aligns with the idea that state immunity depends on the sovereign status of the defendant. However, Article 6(2) introduces a significant caveat, particularly in subsection (b), which decouples immunity from the defendant's status and focuses on the subject matter of the proceedings:

> A proceeding before a court of a State shall be considered to have been instituted against another State if that other State … is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State.

The vagueness of the provision has drawn criticism.[25] Generally, it is unclear why state immunity should apply in cases without a named state party. Grant suggests that the provision captures situations of indirect impleading',[26] an English law concept with limited recognition in other common law jurisdictions and virtually absent in civil law systems. This fact alone, however, suggests that indirect impleading may relate more to specific common law peculiarities than to a customary international law rule.[27] Moreover, it is

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20 See, eg, J Crawford, 'International Law and Foreign Sovereigns: Distinguishing Immune Transactions' (1983) 54 BYIL 75, 79; PT Stoll, 'State Immunity', in *Max Planck Encyclopedia of Public International Law* (2011) para 13; Fox and Webb (n 8) 339; Van Alebeek (n 17) 83; *Belhaj* (n 2) para 14 (Lord Mance).

21 *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* (Judgment) [1969] ICJ Rep 44 at [77]; ILC, Draft conclusions on identification of customary international law, with commentaries (2018) UN Doc A/73/10, 124.

22 *Jurisdictional Immunities* (n 13) para 55.

23 On 7 July 2022, Benin became the twenty-third state party. Thirty ratifications are required for the entry into force of the Convention.

24 Not only has the ILC attempted to codify custom, but national and international courts also use UNCSI as a useful, albeit not always definitive, guidance to identify the rules of immunity; see P Webb, 'International Law and Restraints on the Exercise of Jurisdiction by National Courts of States' in M Evans (ed), *International Law* (OUP, 5th ed, 2018) 323; O'Keefe, Tams, and Tzanakopoulos (n 8) xli.

25 See Douglas (n 15) 313; Grant (n 8) 110.

26 Grant (n 8) 109.

27 State practice must be 'sufficiently widespread and representative, as well as consistent'; see ILC, Draft conclusions on identification of customary international law, with commentaries (2018) UN Doc A/73/10, 135:

debatable whether the broad text of Article 6(2)(b) accurately reflects the narrow situations associated with the English law concept of indirect impleading.

The International Law Commission's (ILC) commentary and *travaux préparatoires* indicate that Article 6(2)(b) was primarily intended to cover specific cases involving seizure or attachment of properties belonging to a foreign state or under its possession or control.[28] This aligns with the 'classic example' of indirect impleading: actions *in rem* against a ship owned or operated by a state.[29] Originally, this concept was introduced by the House of Lords to account for a precedent according to which actions *in rem* were distinct from actions *in personam* against property owners.[30] In proceedings against state-owned ships – where the state/owner was not considered a party – it was deemed that 'the owner [was] at least *indirectly impleaded* to answer to, that is to say, to be affected by, the judgment of the Court.'[31] However, this approach was almost unique to English law. In civil law systems, where actions *in rem* do not exist, state immunity arises because the state/owner is the defendant in proceedings concerning its property.[32] Even common law courts have inconsistently applied indirect impleading for actions *in rem* and gradually moved away from it.[33] The House of Lords eventually recognized that ship owners are necessary parties to proceedings *in rem*,[34] rendering the logic of indirect impleading obsolete.[35]

According to Grant, another case falling under Article 6(2)(b) UNCSI is that of proceedings involving parties disputing rights or interests in property, where a third-party State asserts a right or interest in the same property.[36] However, it is unclear whether state immunity applies to all such proceedings. Support for this proposition comes from a handful of English cases whose reasoning has been much criticized.[37] While proceedings

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28 ILC, 'Draft Articles on Jurisdictional Immunities of States and Their Property, With Commentaries' [1991] 2(2) YBILC 13, 24–25. See also S Sucharitkul, 'Third Report on Jurisdictional Immunities of States and Their Property' [1981] 2(1) YBILC 126, 141.

29 Grant (n 8) 109. Almost all the examples cited by the ILC refer to such cases; see 'Draft articles with commentaries' (n 28) 25.

30 See *The Bold Buccleugh* (1851) 7 Moo PC 267, 13 ER 884.

31 *The Parlement Belge* (1880) 5 PD 197, 217-18 (emphasis added).

32 eg, *The Public Prosecutor for the Treasury v The United States Shipping Board, Owner of the Ship 'Cathelamet'* (1929) 3 ADIL 184 (Portugal). See C Pejovic, 'Civil Law and Common Law: Two Different Paths Leading to the Same Goal' (2001) 32 *Victoria University of Wellington Law Review* 817, 836–7.

33 Notably, the US Supreme Court expressly distanced itself from the House of Lords' reasoning in *Berizzi Bros Co v The Pesaro*, 271 US 562, 575 (1926). See also *The Navemar*, 303 US 68, 74 (1938); *Republic of Mexico v Hoffman*, 324 US 30, 34–35 (1945).

34 *India v India Steamship Co Ltd (The 'Indian Grace') (No 2)* [1998] AC 878, 913 (Lord Steyn).

35 Moreover, since *in rem* actions involve both adjudication and enforcement against the owner's property, immunity questions are usually resolved based on the rules governing immunity from execution for state property; see art 3, Brussels Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels (10 April 1926) 176 LNTS 199; State Immunity Act of 1978 (SIA), section 10; *Alcom v Colombia* [1984] AC 580, 600 (Lord Diplock). See also Fox and Webb (n 8) 175.

36 Grant (n 8) 110.

37 *Dollfus Mieg et Compagnie SA v Bank of England* [1952] AC 582; *Rahimtoola v Nizam of Hyderabad* [1958] AC 379. For a critique, see FA Mann, 'The State Immunity Act 1978' (1979) 50 BYIL 43, 56.

involving state-owned or controlled property may be considered equivalent to proceedings against the state, there are situations where domestic courts have exercised jurisdiction despite third-party state claims to property disputed between private parties.[38]

In any event, there is virtually no practice supporting the extension of indirect impleading to situations beyond those involving third-party state property. Only a few rare *dicta* can be found in proceedings against former state representatives concerning their official acts.[39] According to these, foreign states would be indirectly impleaded in proceedings against their officials given that they would be expected to satisfy any award of damages.[40] However, this is an unorthodox view on the so-called 'functional' immunity of state officials, given the absence of a state obligation to indemnify its officials under international law.[41] The basis for this type of immunity is typically found in the fact that under international law official acts of state representatives are imputable to the state.[42] In this sense, functional immunity operates as 'a mechanism for diverting responsibility to the state',[43] which is the actual defendant in the proceedings.[44]

There has never been a suggestion in domestic court practice that immunity should be granted due to proceedings affecting 'interests' or 'activities' of third-party states. Article 6(2)(b) UNCSI is overinclusive in using these terms, which do not reflect customary international law and would exacerbate confusion if UNCSI were to enter into force.[45] The main issue with this provision is that it overlooks the fundamental logic governing state immunity.

The equality and independence of states prevent courts from exercising jurisdiction in a manner that compels a foreign state to exercise its sovereign authority or requires

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38 Particularly in the case of trust funds; see *Lariviere v Morgan* (1871-72) LR 7 Ch App. 550, 560 (UK); *Lamont v Travelers Insurance Company* (1942) 9 ADIL 207, 211 (US); *Republic of the Philippines v Maler Foundation* (2012) 150 ILR 741 (Singapore).

39 See *R v Bow Street Metropolitan Stipendiary Magistrate Ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147, 286 (Lord Philips); *Jones v Saudi Arabia* [2007] 1 AC 270, 290 (Lord Bingham); *Al Attiya v Bin-Jassim Bin-Jaber Al Thani*, [2016] EWHC 212 (QB), para 13 (Blake J). See also Grant 110.

40 See *Jaffe v Miller*, 1993 CarswellOnt 1185, para 32. In a similar vein, see also *Twycross v Dreyfus* (1877) 5 Ch D 605, 618–9 (James LJ).

41 See Douglas (n 15) 308. On functional immunity, see Immunity of State Officials from Foreign Criminal Jurisdiction, Memorandum by the Secretariat, UN Doc A/CN.4/596 (2008) paras 88–9; D Akande and S Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21 EJIL 815, 817; Crawford, *Brownlie's* (n 13) 477.

42 See Akande and Shah (n 41) 826; Douglas (n 15) 322–3; *Prosecutor v Blaškić* (Judgment on the Request for Review of the Decision of 18 July 1997) IT-95-14 (29 October 1997), para 38; *Re Rissmann* (1973) 71 ILR 577, 581 (Italy). It is possible that the conduct may also be attributable to the individual state official; see Roman Kolodkin, Preliminary report on immunity of State officials from foreign criminal jurisdiction, UN doc A/CN.4/601 (29 May 2008) 179-180.

43 Akande and Shah (n 41) 826.

44 See Douglas (n 15) 287.

45 See Douglas (n 15) 315; *Belhaj v Straw* [2015] 2 WLR 1105, 1126; *Benkharbouche v Embassy of Sudan* [2015] EWCA Civ 33, para 36. When the provision was drafted several states expressed 'concern[] about [its] potential breadth': Report of the Secretary-General (1992) UN Doc A-47-326, 29–30 (US), 4 (Australia), 25 (UK). Some states objected earlier in the drafting process; see Comments and observations received from Governments, UN Doc A/CN.4/410 and Add.1-5, 68 (East Germany), 52 (Australia).

compensation for damages caused by sovereign powers.[46] However, precluding domestic courts from exercising jurisdiction in cases involving sovereign activities in general would excessively restrict the forum state's sovereignty. Often, domestic courts must make judicial determinations on the sovereign acts of foreign states to fulfil their judicial function with respect to individuals or entities within their jurisdiction.

Cases involving allegations of complicity between a non-state defendant and a third-party state serve as prominent examples. Domestic courts have frequently exercised jurisdiction over the non-state defendant, even when it required determining the responsibility of the third-party state. For instance, in the *Van Anraat* case, the District Court of The Hague established jurisdiction over a businessman accused of war crimes and genocide by supplying chemicals to Iraq, despite having to first establish the responsibility of principal Iraqi state officials.[47] In *KPMG Peat Marwick v Davison*,[48] a commission of inquiry requested documents related to transactions between New Zealand companies and a Cook Islands Government agency. The Court of Appeal of New Zealand dismissed an immunity objection based on the Cook Islands' involvement, as they were not the focus of the inquiry and not subject to potential judgment execution.[49] In *United Mexican States v British Columbia*,[50] a Canadian union accused an agricultural employer of conspiring with Mexico to improperly interfere with a representation vote. The British Columbia Supreme Court rejected Mexico's immunity plea, as the legal consequences of establishing 'improper interference' would affect only the employer, employees, and union, leaving Mexico 'exposed to no legal consequence'.[51] In *WhatsApp v NSO*,[52] an Israeli tech company objected to US court jurisdiction, claiming its spyware technology was used by foreign governments for law enforcement activities that would be covered by immunity. The District Court for the Northern District of California rejected this plea, stating that no foreign sovereign customers would be forced to pay a judgment if WhatsApp prevailed.[53]

This line of reasoning aligns with the UK Supreme Court's decision in *Belhaj* to reject the argument that an inquiry into the UK government's involvement in unlawful detention and mistreatment by foreign officials would 'implead' those foreign states.[54] Both Lord Mance and Lord Sumption agreed that state immunity did not apply because the foreign states were not parties to the case, their property was not at risk, and the relief sought would not impact their legal rights or constrain their exercise of those rights.[55]

In cases of complicity between a foreign state and an individual or entity within the forum, there is a compelling policy argument for the exercise of jurisdiction when relief is

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46 See Van Alebeek (n 17) 67; Angelet (n 8) 81.

47 *Van Anraat*, No 09/751003-04 (23 December 2005) para 4.2, official translation at Rechtspraak.nl.

48 *KPMG Peat Marwick v Davison* (1997) 104 ILR 526.

49 ibid 531.

50 *United Mexican States* (n 1).

51 ibid para 68 (Warren J).

52 *WhatsApp* (n 4). See R Buchan and D Franchini, 'WhatsApp v NSO Group: State Immunity and Cyber Spying' (*Just Security*, 16 April 2020) <https://www.justsecurity.org/69684/whatsapp-v-nso-group-state-immunity-and-cyber-spying>.

53 *WhatsApp* (n 4) 12. The decision was upheld on appeal; see *WhatsApp v NSO Group Technologies*, opinion of 8 November 2021, No 20-16408, 19.

54 *Belhaj* (n 2) para 7.

55 ibid para 29 (Lord Mance); para 197 (Lord Sumption).

sought solely from the latter. This is often the only way to ensure that the party that is not entitled to immunity does not evade responsibility. For instance, in *Belhaj* the grant of immunity would have led to a complete absence of accountability for the British government defendants, as they would have enjoyed state immunity in other states' courts, effectively precluding any legal action against them worldwide.[56]

In sum, the idea that state immunity requires abstaining from exercising jurisdiction because deciding the claims may affect the interests and activities of third-party states is incorrect as a matter of customary international law and may lead to a lack of accountability for entities not entitled to immunity. This finding is further supported by another line of cases dealing with the activities of third-party states: those in which the legal relationship between two private parties is determined by the acts of states that are not parties to the proceedings. These cases are analysed in the following section.

III. THE PERILS OF SUBJECT-MATTER REASONING: ANCILLARY QUESTIONS AND AVOIDANCE TECHNIQUES

The doctrinal confusion surrounding the nature of state immunity risks conflating it with other doctrines focused on the subject matter of the proceedings. This risk was evident in *Belhaj*, where defendants argued that alongside immunity *ratione personae*, the principle of sovereign equality of states also includes immunity *ratione materiae*:

> State immunity requires that the domestic courts of one state must not exercise jurisdiction over proceedings which require a ruling on the sovereign rights, interests or activities of a foreign state without its consent[.][57]

To bolster the argument that domestic courts must not sit in judgment where they must rule on the validity of foreign states' sovereign acts, the defendants further cited two ICJ cases (*Monetary Gold*[58] and *East Timor*[59]) and the foreign act of state doctrine.[60]

This echoes the ILC's stance in the 1996 Code of Crimes Against the Peace and Security of Mankind, according to which domestic courts lack the competence to prosecute the crime of aggression because determining individual criminal responsibility requires a preliminary finding of a state's aggression. In the ILC's view, such a determination by a national court 'would be contrary to the fundamental principle of international law *par in parem imperium non habet*'.[61]

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56 See *Belhaj* (n 2) para 30 (Lord Mance). See also *United Mexican States* (n 1) para 135 (Warren J).

57 *Belhaj* (n 2) 1039.

58 *Case of the Monetary Gold Removed from Rome in 1943 (Italy v France, UK and USA)* [1954] ICJ Rep 19.

59 *East Timor (Portugal v Australia)* [1995] ICJ Rep 90.

60 *Belhaj* (n 2) 1039.

61 ILC, 'Commentary to the Draft Code of Crimes against the Peace and Security of Mankind' [1996] 2(2) YBILC 15, 30.

The following sections demonstrate that this reasoning should be rejected as it distorts the law of state immunity, blurring the line with other doctrines that are either inapplicable to domestic courts or not mandated by international law.

A. The inapplicability of the **Monetary Gold** *doctrine to domestic courts*

The principle of consent is fundamental to international adjudication.[62] As a corollary, in the *Monetary Gold* case, the ICJ found that it could not adjudicate a dispute when the interests of a state not party to the proceedings formed the 'very subject matter' of the dispute.[63] In *East Timor*, the ICJ further clarified this doctrine, stating that it 'could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case.'[64]

Based on this case law, it has been suggested that the *Monetary Gold* doctrine should guide the application of state immunity in cases involving the rights and interests of third-party states. Alongside *Belhaj*, this argument was presented before the High Court of South Africa. In *Cherry Blossom*,[65] the Saharawi Arab Democratic Republic and the Polisario Front sought to attach a ship's cargo exporting phosphate from Moroccan-controlled part of Western Sahara, claiming that sovereignty over its natural resources belonged to the people of Western Sahara. The defendants – the owner of the ship and the private company to which the cargo had been sold – objected to the South African courts' jurisdiction, arguing that Morocco's rights and interests were 'indirectly impleaded', and relied on an 'analogous approach' with the abovementioned ICJ cases.[66]

Both the UK Supreme Court and the High Court of South Africa rejected the analogy between state immunity and the *Monetary Gold* doctrine.[67] The analogy has however found some support in the academic literature.[68] Ruys, in particular, argued that the *Cherry Blossom* case bears a striking resemblance to the *East Timor* case, in that 'the "very subject-matter" of the case related to the legality under international law of the conduct of a State that was not directly named as a party to the proceedings and that had not consented to those proceedings'.[69]

The problem with this argument is that it ignores the essential differences between international and domestic adjudication. A test developed by an international court to deal with matters of admissibility serves a different purpose to the rules concerning the jurisdiction of domestic courts and such a test cannot be readily transposed to the domestic plane.[70] To begin with, it is unclear how this analogy should work from the standpoint of the sources of international law. Advocates of the analogy are not aided by the fact that the

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62 See *Status of Eastern Carelia* (advisory opinion) [1923] PCIJ Rep Series B No 5, 27; JG Merrills and E de Brabandere, *Merrills' International Dispute Settlement* (7th ed, CUP, 2022) 5.

63 *Monetary Gold* (n 58) 32.

64 *East Timor* (n 59) 103.

65 *Belhaj* (n 2) para 27; *Cherry Blossom* (n 3) para 69.

66 *Cherry Blossom* (n 3) paras 68–9.

67 *Belhaj* (n 2) para 27 (Lord Mance); *Cherry Blossom* (n 3) para 71.

68 See Akande (n 7) 13; Ruys (n 8) 75–6; Angelet (n 8) 88.

69 Ruys (n 8) 76.

70 See *Belhaj* (n 2) para 193 (Lord Sumption); *Cherry Blossom* (n 3) para 71.

status of the *Monetary Gold* doctrine is itself contested.[71] If the doctrine embodies a customary rule resulting from the practice of states before international courts and tribunals,[72] it is of little aid in establishing the competence of domestic courts. If the doctrine is the corollary of general principles of international adjudication[73] – about which some doubts remain[74] – one must be satisfied that the same considerations that determine the application of the doctrine before international courts and tribunals exist with respect to the exercise of jurisdiction by domestic courts.

In this regard, proponents of the analogy point to the similarities between state immunity and the principle of consent as the basis of the jurisdiction of the ICJ, given that both are premised on the overarching principle of sovereign equality.[75] According to Crawford, the international dispute settlement rule is 'the nearest direct analogue in international law to the rule of State immunity'.[76] Occasionally, the allocation of competences between national and international courts – particularly the need to ensure that international disputes are resolved by judicial bodies better suited to handle inter-state claims – is also cited as a reason for the existence of state immunity.[77] Nevertheless, while these parallels suggest a connection between the considerations informing state immunity and the *Monetary Gold* doctrine, they do not justify the wholesale importation of the latter's test to answer questions raised by the former.

A significant distinction exists between international and domestic courts that warrants caution when comparing the procedural rules adopted in these fora. The purpose of an international court such as the ICJ is to settle international disputes.[78] The principle of consent is the sole source of its authority and provides the outer limits of its powers. Although an ICJ decision is binding exclusively 'between the parties and in respect of that particular case',[79] it may have further effects that pre-judge the legal position of absent

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71 See Z Mollengarden and N Zamir, 'The Monetary Gold Principle: Back to Basics' (2021) 115 AJIL 41.

72 O Pomson, 'Does the Monetary Gold Principle Apply to International Courts and Tribunals Generally?' (2019) 10 JIDS 88, 117.

73 See D Akande, 'Introduction to the Symposium on Zachary Mollengarden & Noam Zamir "The Monetary Gold Principle: Back to Basics"' (2021) 115 *AJIL Unbound* 140, 141.

74 For example, a Pre-Trial Chamber held that the doctrine does not apply to the International Criminal Court: *Decision on the 'Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine'* (5 February 2021) ICC-01/18, paras 58–60. According to the EU Advocate General's opinion in *R (on the application of Western Sahara Campaign UK) v Revenue and Customs Commissioners (C-266/16)*, the doctrine 'does not exist in the Statute of the Court of Justice of the EU and, in any event, could not exist in EU law': [2018] 3 CMLR 15, 489. For a critique of arguments supporting *Monetary Gold* based on general principles, see Pomson (n 72) 109–110.

75 See Akande (n 7) 13; Ruys (n 8) 77.

76 Crawford, 'Distinguishing' (n 20) 80.

77 R Jennings, *The Place of the Jurisdictional Immunity of States in International and Municipal Law* (Saarbrücken: Europa-Institüt, 1988) 3–4; S Sucharitkul, 'Fifth Report on Jurisdictional Immunities of States and Their Property' [1983] 2(1) YBILC 25, 57–8; Van Alebeek (n 17) 74–5.

78 See A Pellet, 'Judicial Settlement of International Disputes', in *Max Planck Encyclopedia of Public International Law* (2013) para 25.

79 ICJ Statute, art 59.

third states.[80] In contrast, while domestic courts may sometimes interpret and apply international law, they cannot – without additional qualifications – settle international disputes.[81] As state organs, their powers and authority stem from their own state's sovereignty, not the consent of other states. Consequently, domestic courts have a much more limited capacity to alter the legal rights and obligations of states compared to the ICJ.

A domestic court's finding on an ancillary question concerning a third-party state, when necessary to resolve a dispute between two private parties, does not inherently implicate that state's rights and interests. As the High Court of South Africa convincingly concluded:

> A finding on these issues by a South African court applying South African law, which includes customary international law …, cannot in any legal sense affect the rights of Morocco at international law.[82]

In a similar vein, several scholars argue that despite the ILC's suggestion to the contrary, domestic courts remain competent to prosecute the crime of aggression.[83] While a finding that a state has committed an act of aggression indicates a violation of international law, the finding itself has no immediate legal consequences for the alleged aggressor state. [84] The increasing number of states criminalising aggression in national laws further supports this view.[85]

In general, the analogy with the *Monetary Gold* doctrine is deceiving because it conflates state immunity, an international law doctrine based on the status of the defendant, with the domestic law doctrine of act of state, which is linked to subject-matter considerations.[86] The following section will clarify the significance of this distinction.

B. The act of state doctrine as distinguished from state immunity

Domestic courts in several jurisdictions have developed a number of 'avoidance techniques' to abstain from reviewing the legality of foreign states' activities.[87] Broadly speaking, these can be divided into two categories. First, common law courts generally

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80 For instance, as pointed out by Lord Sumption, 'each of the parties would have been bound to deal with the non-party in accordance with it'; see *Belhaj* (n 2) para 193. See also A Tzanakopoulos 'Resolving Disputes Over the South China Sea Under the Compulsory Dispute Settlement System of the UNCLOS' (2017) 14 *Soochow LJ* 119, 133.

81 See A Tzanakopoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts' (2011) 34 *Loy LA Int'l & Comp LJ* 133, 165–7.

82 *Cherry Blossom* (n 3) para 84. See also *Belhaj* (n 2) para 31 (Lord Mance), para 193 (Lord Sumption).

83 P Wrange, "The Crime of Aggression, Domestic Prosecutions and Complementarity" in C Kreß and S Barriga (eds), *The Crime of Aggression: A Commentary* (CUP 2016) 713. See also Dannenbaum (n 12); Heller (n 12).

84 Wrange (n 83) 713.

85 See T Dannenbaum, *The Crime of Aggression, Humanity, and the Soldier* (CUP 2018) 18–19.

86 See Van Alebeek (n 17) 83; *Belhaj* (n 2) para 196 (Lord Sumption).

87 The term refers to techniques for bypassing applicable international legal provisions; see ILA Study Group on Principles on the Engagement of Domestic Courts with International Law, *Final Report* (2016) para 19. In a substantive sense, state immunity can also be considered one of these techniques; see Webb (n 24) 316.

avoid examining the validity of foreign states' sovereign acts within their territory under the '(foreign) act of state' doctrine.[88] Second, both common law and civil law courts recognize a principle of 'non-justiciability' – sometimes encompassed within the act of state doctrine[89] or known as the 'political question' doctrine[90] – where certain politically sensitive questions are deemed inappropriate for judicial resolution.[91]

The act of state and non-justiciability doctrines share some connections with the law of state immunity. Historically, all these concepts originated from similar considerations concerning the protection of the 'sovereign'.[92] However, their development has taken markedly different paths. State immunity has crystallized into a customary international law rule premised on the principle of sovereign equality of states and based on the status of the defendant. Conversely, act of state and non-justiciability are substantive defences[93] based on domestic and foreign policy considerations, such as the separation of powers,[94] the propriety of judicial intervention in foreign policy matters,[95] or 'comity and expediency'.[96] Similar considerations may equally justify judicial abstention with respect to politically sensitive decisions of the government of the forum.[97]

These doctrines are thus fundamentally different from state immunity. While some courts have questioned whether these doctrines may have an international law foothold,[98] it is widely accepted that they are 'at best permitted by international law … not based upon it'.[99] This distinction has two significant implications. First, unlike state immunity, there are considerable variations in how act of state and non-justiciability are applied by domestic courts, reflecting the ethos of each national judiciary.[100] Second, since act of state and non-justiciability are discretionary doctrines not subject to international legal

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88 See *Underhill* v *Hernandez*, 168 US 250 (1897); *Buttes Gas and Oil Co v Hammer (No 3)* [1982] AC 888, 932–3 (Lord Wilberforce); *Belhaj* (n 2) para 118 (Lord Neuberger); Crawford, *Brownlie's* (n 13) 70; Webb (n 24) 340.

89 See *Belhaj* (n 2) para 40 (Lord Mance); para 123 (Lord Neuberger); Webb (n 24) 343–4.

90 See *Baker v Carr*, 369 US 186, 217 (1962).

91 See *Buttes Gas* (n 88) 938; Lord Mance, 'Justiciability' (2018) 67 ICLQ 739; M Teo, 'Narrowing Foreign Affairs Non-Justiciability' (2021) 70 ICLQ 505. Non-justiciability includes doctrines such as the French '*acte de gouvernement*', or the Italian '*atto di governo*'; see *UK and Governor of Hong Kong* (1993) 106 ILR 233 (France); *President of the Council v Marković* (2002) 128 ILR 652 (Italy); Crawford, *Brownlie's* (n 13) 94–8.

92 See *Underhill* (n 88) 254; Van Alebeek (n 17) 82; Stoll (n 20) para 5; G Hernández, *International Law* (2nd ed, OUP, 2022) 237–8.

93 See Crawford, *Brownlie's* (n 13) 70; Hernández (n 92) 238.

94 See Crawford, *Brownlie's* (n 13) 79.

95 See *Kadić v Karadžić*, 70 F3d 232, 249 (2d Cir, 1995); *Belhaj* (n 2) para 126 (Lord Neuberger).

96 *Oetjen v Cent Leather Co*, 246 US 297, 304 (1918); *R (on the application of Khan) v Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 872, 883.

97 See, eg, *Shergill v Khaira* [2015] AC 359, 378; *Greenham Women against Cruise Missiles v Reagan* 591 F Supp 1332 (1984); *Marković* (n 91). Unlike state immunity, non-justiciability is not defeasible with the defendant's consent; see Crawford, 'Distinguishing' (n 20) 81–2.

98 In 1951, the Court of Appeal of Amsterdam held that the act of state doctrine had international law status; see *South Moluccas v Royal Packet Shipping Company* (1956) 17 ILR 143, 152. This reasoning was abandoned in the more recent *Van Anraat* (n 47).

99 *Belhaj* (n 2) para 200 (Lord Sumption). See also Crawford, *Brownlie's* (n 13) 71; Stoll (n 20) para 14.

100 For example, varying degrees of deference to the executive can be observed between English and German courts; see Crawford, *Brownlie's* (n 13) 58 and 95.

obligations, they can often be balanced against competing public policy considerations of the forum. In particular, these doctrines are often set aside when the acts under scrutiny are manifestly contrary to established rules of international law.[101] This differs from state immunity, which cannot be disregarded even if the conduct in question involves violations of peremptory norms (*jus cogens*).[102]

Act of state and non-justiciability are indifferent to whether proceedings are brought against the state; it is the subject matter that determines their application. Conversely, the defendant's status is a crucial factor in determining whether the rule of state immunity is engaged. Disregarding this in favour of a purely subject-matter rule would turn state immunity into a supercharged act of state doctrine without any of the counterweights of the act of state doctrine. Domestic courts would be prevented from reviewing foreign sovereign acts even if they took place within the forum state's territory. Furthermore, since domestic policy considerations cannot justify non-compliance with a state's international obligations,[103] domestic courts would be unable to exercise jurisdiction when public policy reasons warranted it. Such consequences would be bizarre and are plainly not supported by state practice.

It is not uncommon for domestic courts to examine the legality of sovereign acts of foreign states when necessary to decide a dispute between private litigants. The point was made as early as in 1889 by Von Barn:

> the Courts are free to consider and pronounce an opinion upon the exercises of sovereign power by a foreign Government, if the consideration of those acts of a foreign Government only constitutes a preliminary to the decision of a question of private rights which in itself is subject to the competency of the Court of law.[104]

Proceedings connected with foreign expropriations and nationalizations are a case in point. Expropriation is a quintessentially sovereign activity and there is little doubt that, if proceedings challenging the legality of these acts are brought against the expropriating state before the courts of another state, the rule of state immunity would preclude the exercise of jurisdiction.[105] However, an act of expropriation may have legal consequences for the relationships of private parties outside the territory in which the expropriation takes place. When confronted with issues of recognition of foreign expropriations in litigation

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101 See *Kuwait Airways v Iraqi Airways* (Nos 4 and 5) [2002] 2 AC 883, 1081 (Lord Nicholls); *Belhaj* (n 2) para 262 (Lord Sumption).

102 *Jurisdictional Immunities* (n 13) para 93.

103 See ILC, 'Draft articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' [2001] 2(2) YBILC 31, 36.

104 L Von Bar, *The Theory and Practice of Private International Law* (2nd ed, Green & Sons, 1892) 1121.

105 See eg *Campione v Peti-Nitrogenmuvek* (1984) 65 ILR 287 (Italy); *Oder-Neisse Property Expropriation Case* (1984) 65 ILR 127 (Germany); *S v Socialist Republic of Romania* (1990) 82 ILR 45 (Switzerland). The US is an outlier, as section 1605(a)(3) FSIA provides an exception to state immunity for 'rights in property taken in violation of international law'; see D Franchini, 'State Immunity as a Tool of Foreign Policy: The Unanswered Question of Certain Iranian Assets' (2019) 60 *Virginia Journal of International Law* 433, 453.

among private parties, domestic courts rarely decline to exercise jurisdiction for the simple fact that the validity or legality of these acts is called into question.[106]

Almost all domestic courts differentiate between the effects of these acts within the expropriating state's territory and those outside it, often refusing to recognize and enforce the latter.[107] Additionally, some decisions explicitly examine the legality of foreign expropriations, regardless of their territorial scope.[108] When confiscated property is moved to another state where legal proceedings occur, some courts refuse to review the legality of foreign expropriations.[109] However, this abstention from jurisdiction is justified not so much by an international rule of immunity, but by considerations of judicial propriety typical of the act of state doctrine.[110] As a result, if essential interests of the forum demand it, domestic courts can reassert jurisdiction. Notably, several courts have held that certain violations of international law may justify refusing to recognize sovereign acts of foreign states based on the public policy of the forum.[111] This is particularly the case with respect to grave human rights infringements or other gross violations of international law.[112]

All these assessments concerning the legality of foreign expropriations under the public policy umbrella can only be premised on the assumption that there is no rule of international law preventing the exercise of jurisdiction.[113] The key distinction in this regard is between an exercise of jurisdiction against the state with respect to its sovereign acts and an exercise of jurisdiction over other entities with respect to their legal relationship

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106 For an overview of this practice, see PR Wood, *Conflict of Laws and International Finance* (2nd ed, Sweet & Maxwell 2019) chapter 58, paras 27–33.

107 eg *Expropriation of Eastern Zone Company (Germany) Case* (1958) 22 ILR 14; *Expropriation of Sudeten-German Co-Operative Society Case* (1961) 24 ILR 35; *Hungarian Aircraft Company Case* (1987) 72 ILR 82; *SARL Des Établissements Sidney-Merlin v Directeur Des Domaines De La Seine* (1972) 45 ILR 47 (France); *Società Ornati v Archimedes Rechenmaschinenfabrik Reinhold Pothig* (1963) 28 ILR 39 (Italy). See also KM Meessen, *Economic Law in Globalizing Markets*, vol 20 (Kluwer Law International 2004) 184.

108 eg *Expropriation of Insurance Companies Case* (1957) 18 ILR 197.

109 eg *Expropriations in Czechoslovakia (Austria) Case* (1978) 51 ILR 22; *Société Algérienne De Commerce Algo v Sempac* (1984) 65 ILR 73 (France). *Texaco Overseas Petroleum Company v Montedison* (1978) 101 *Il Foro* 1064; (1988) 77 ILR 584.

110 For example, the Austrian Supreme Court cited potential interference with ongoing negotiations between the relevant states; see *Expropriations in Czechoslovakia* (n 109).

111 See, eg, *Senembah Maatschappij v Republiek Indonesie Bank Indonesia*, reported in M Domke, 'Indonesian Nationalization Measures Before Foreign Courts' (1960) 54 AJIL 305, 308 (Netherlands); *Expropriation of Eastern Zone Company (Germany) Case* (1958) 22 ILR 14; *Expropriation of Sudeten-German Co-Operative Society Case* (1961) 24 ILR 35; *Stephen v Zivnostenska Banka* (1967) 33 ILR 184 (US); *Hungarian Aircraft Company Case* (1987) 72 ILR 82 (Belgium); *Sociedad Minera El Teniente v Norddeutsche Affinerie* (1987) 73 ILR 230 (Germany); *BP Exploration Company (Libya) v Astro Protector Compania Naviera* (1988) 77 ILR 543 (Italy).

112 *Oppenheimer v Cattermole (Inspector of Taxes)* [1976] AC 249, 278 (Lord Cross); *Re Helbert Wagg & Co Ltd* [1956] Ch 323, 349; *Kuwait Airways* (n 101) 1081 (Lord Nicholls), 1101 (Lord Steyn).

113 See *Buttes Gas* (n 88) 926 (Lord Wilberforce): 'The doctrine of sovereign immunity has no application'.

as determined by the sovereign acts.[114] The rule of state immunity prohibits the former but not the latter.

In such cases, a strong policy argument favours the exercise of jurisdiction. When proceedings are brought against a foreign state regarding its sovereign activities, the territorial sovereignty of the forum state may be limited to avoid infringing the sovereignty of the defendant state. However, when the foreign state is not the defendant, no such infringement occurs. On the contrary, if the forum state were prevented from reviewing the legality of acts of foreign states, it would have to determine the legal relationship between non-state parties within its jurisdiction assuming that the acts of the foreign state were lawful. This would effectively impose the sovereignty of the third-party state over that of the forum state.[115] If state immunity is a matter of balancing competing sovereignties, it cannot be the case that one of these prevails over the other under all circumstances.

IV. CONCLUSION

The limits to the competence of domestic courts tasked with reviewing the conduct of foreign states bear upon the balance of interests that underpins the rules of state immunity; when drawing these boundaries, one must be mindful of the risks that lie at both ends. Complete disregard for the potential interference with sovereign equality and independence resulting from the exercise of jurisdiction over sovereign acts of foreign states would undermine the very *raison d'être* of the rules of state immunity and disrupt international intercourse. Yet, domestic courts should not relinquish their judicial function too easily when confronted with claims that their proceedings may affect foreign sovereigns, lest creating unjustifiable accountability gaps with respect to entities that are not entitled to immunity.[116]

This article has demonstrated that the notion that an entity or individual not entitled to immunity may object to the jurisdiction of domestic courts by asserting that the proceedings may affect interests or activities of foreign states is based on a misapprehension of the nature of state immunity. State immunity is not a subject-matter rule that prevents courts from generally reviewing foreign sovereign acts. It is a status-based rule which exempts foreign states from judicial pronouncements that can alter their legal rights and obligations and are enforceable against them.

Attempts to dissociate state immunity from the defendant's status using 'indirect impleading' originate from an overly expansive interpretation of a concept created by English courts to address specific state property cases. In contrast, domestic courts in both civil and common law jurisdictions have frequently exercised jurisdiction, even when dealing with third-party states' rights and interests. Examples include cases involving state

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114 See *Kuwait Airways v Iraqi Airways (No 1)* [1995] 1 WLR 1147, 1163 (Lord Goff).

115 See Webb (n 24) 344: 'By accepting a plea of act of State the English court goes some way to endorsing the validity of the foreign State's act, whereas in immunity the court remains neutral'. See also Angelet (n 8) 95.

116 Such an outcome would be inconsistent with the trend to restrict immunity in favour of closing accountability gaps; see generally R Bismuth et al (eds), *Sovereign Immunity Under Pressure* (Springer 2022).

interests in property held by private parties, cases of complicity between a private individual or entity and a foreign state, and cases where the legal relationship between private parties is determined by foreign sovereign acts, such as expropriations. Transforming state immunity into a subject-matter rule risks dangerously conflating it with unrelated doctrines, such as the *Monetary Gold* doctrine and the act of state doctrine. For the reasons discussed above, similar suggestions should be rejected.

In the debate concerning the competence of domestic courts with respect to rights and interests of foreign states, it is unhelpful to refer to formulas such as *par in parem non habet imperium* as trump cards while glossing over the complexities and contested nature of the principles governing state immunity. One must agree with Lord Mance's observation that '[t]he modern focus on individual rights and freedoms … makes it increasingly difficult for domestic courts simply to withdraw from adjudication upon issues arising out of State activity on the international plane'.[117] A deeper understanding of the relevant international obligations can only aid domestic courts in fulfilling their responsibilities.

[117] Lord Mance, 'Justiciability' (n 91) 757.