
Book review:
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***Reece Thomas, Katherine*: The Commercial Activity Exception to State Immunity.** Cheltenham, UK: Edward Elgar Publishing 2024. ISBN 978-1-80392-345-1, x, 200 pp. £81.00

It is trite to say that most states nowadays recognise a rule of 'restrictive immunity' under international law, according to which foreign states are exempted from the jurisdiction of domestic courts with respect to acts performed in a 'public' or 'sovereign' capacity (*acta jure imperii*) but not with respect to acts performed in a 'private' or 'non-sovereign' capacity (*acta jure gestionis*).[1] There is however precious little consensus on where the line between these two categories of acts is to be drawn, despite decades of domestic court practice and scholarly debate on the issue.[2] Katherine Reece Thomas's *The Commercial Activity Exception to State Immunity* is the latest addition to this rich scholarship, zooming in on the most widely accepted yet persistently contested exception to state immunity.

Curiously, Reece Thomas does not fully explain the rationale for focusing specifically on the commercial activity exception or clarify how this exception should be understood. The book's stated focus is 'on the move from absolute immunity to the restrictive doctrine' (p. 1), with its goals including an exploration of 'how sovereign and non-sovereign acts are distinguished', the 'history and scope of the commercial activity exception', and an 'analysis of the meaning of "commercial" as applied to immunity from suit and enforcement' (p. 2). It also mentions 'significant gaps in the restrictive doctrine that need addressing, notably in the context of claims involving accusations of gross violations of human rights' (p. 2). However, these 'gaps' are not explicitly defined. References to human rights and, later, to 'rule of law and access to justice' suggest that the book aims to engage – and indeed does engage in later chapters – with ongoing debates about a potential exception to state immunity for human rights claims.[3]

At this point, one might reasonably question the connection between these issues and the 'commercial activity exception' referenced in the title. The book suggests that 'the commercial use/activity test may assist with the human rights arguments' (p. 2). However, the confusion that arises from the introduction appears to stem from a terminological ambiguity that remains

1 China, one of the last states to explicitly adhere to a rule of absolute immunity, recently shifted to the restrictive approach adopted by most other countries with the enactment of its 2023 Foreign State Immunity Law; see William S. Dodge, 'The Foreign State Immunity Law of the People's Republic of China', ILM 63 (2024), 312-319 (312).

2 See Hazel Fox and Philippa Webb, *The Law of State Immunity* (Rev and Up 3rd edn, Oxford University Press 2015), 399.

3 See Roger O'Keefe, 'State Immunity and Human Rights: Heads and Walls, Hearts and Minds', Vand. J. Transnat'l L. 44 (2011), 999-1045 (999); Lorna McGregor, 'State Immunity and Human Rights: Is There a Future after Germany v. Italy?', JICJ 11 (2013), 125-145 (125).

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unresolved throughout the book, at times creating uncertainty regarding the scope of the analysis and the conclusions reached.

As Yang pointed out, there are two ways to understand 'commercial activity' in the context of state immunity.[4] In a narrow – and more precise – sense, it refers to specific situations, such as those outlined in Article 10 of the 2004 United Nations Convention on State Immunity (UNCSI), where a state cannot claim immunity from the jurisdiction of a foreign court if it engages in trading or other commercial transactions with a foreign party. In this sense, commercial activity constitutes a significant, though by no means the only, exception to state immunity.[5]

In a broader sense, 'commercial activity' is sometimes used to describe all acts that are not immune under the restrictive doctrine by virtue of not being 'sovereign' or 'governmental'.[6] However, this broader use of the terms is less than felicitous, as noted by Crawford:

> '[T]here are many difficulties with the notion of 'commercial activity' as the central or distinguishing concept in a regime of restrictive immunity […] [a]s such a classification it is both simplistic and incomplete. Not all State activities can be described either as 'governmental' or 'commercial': indeed, very many cannot.'[7]

To her credit, Reece Thomas does not claim that commercial activities are the only acts for which immunity should be denied and acknowledges that most jurisdictions with codified immunity laws provide exceptions for a broader range of activities (p. 16). However, the book does not settle on a clear definition of 'commerciality', and this ambiguity affects both the selection and analysis of relevant issues. This is not to suggest that commercial activity is unworthy of discrete analysis – in fact, it is arguably the most coherent exception to state immunity due to the relative autonomy of the concepts of trade and commerce.[8] However, it is not always clear that the book confines its understanding of commerciality to these narrower parameters.

Following a chapter summarising the emergence of the restrictive doctrine more broadly, Chapters 3 and 4 focus on the commercial activity exception

4 Xiaodong Yang, *State Immunity in International Law* (Cambridge University Press 2012), 75.

5 Some widely accepted exceptions to immunity are not related to the commercial character of the acts, such as the exceptions for so-called 'territorial torts'.

6 E. g., Section 1602 of the Foreign Sovereign Immunities Act 1976 (USFSIA) asserts that '[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned'.

7 James Crawford, 'International Law and Foreign Sovereigns: Distinguishing Immune Transactions', BYIL 54 (1983), 75-118 (91).

8 Crawford (n. 7), 90.

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stricto sensu. Chapter 3 examines the development of this exception in the United Kingdom (UK) and the USA, with some comparative insights from other legal systems. The analysis reveals that, despite variations in the wording of relevant statutes, the key questions typically revolve around how broadly the activity underlying the claim is defined. This leads Reece Thomas to revisit the longstanding debate between nature and purpose, noting that, while statutes like the UK State Immunity Act (UKSIA) establish 'a very clear "nature" test' (p. 25), courts often reintroduce a purpose element by considering the 'context' of the transaction (p. 23). This outcome should not come as a surprise, given that the nature/purpose dichotomy has long been recognised as untenable.[9] The grant of immunity often appears to hinge more on the proximity between the activity at the basis of the claim and the public purpose that ultimately underpins all state activities.[10] Reece Thomas does not articulate the issue in these terms, but she is undoubtedly correct in concluding that the hybrid 'nature in context'[11] test represents the approach on which most courts seem to converge (p. 53).

Here Reece Thomas also ventures into a proposal for law reform, rhetorically asking whether it is 'not time to […] draw up a list of immune transactions and property' (p. 32). While not a new suggestion – it was included in a 1991 Resolution adopted by the *Institut de Droit international* following a proposal by its Rapporteur, Ian Brownlie[12] – it remains a thought-provoking idea that has found support in the literature.[13] However, questions of commerciality are unlikely to be fully resolved by such a list,[14] particularly given that 'non-sovereign' does not necessarily equate to 'commercial'.

Chapter 4 sets out to explore 'international law developments' relating to the commercial activity exception, though its focus is primarily on relevant provisions of the European Convention on State Immunity of 1972 (ECSI) and of the UNCSI. The chapter offers some points of comparison between the UNCSI, UKSIA, and United States Foreign Sovereign Immunities Act

9 Crawford (n. 7), 95.

10 In a sense, this can be viewed as the flipside of the question courts consider when determining whether a claim 'relates to' (p. 32) or is 'based upon' (p. 41) a commercial activity.

11 Lord Wilberforce in *I Congreso* established the test by assessing the nature of an act in its context, which allows courts to consider its purpose despite this being absent from the UKSIA's relevant provisions; see House of Lords, *Owners of Cargo Lately Laden on Board The Marble Islands v. Owners of The I Congreso del Partido,* judgement of 16 July 1981, [1983] 1 AC 244, 267.

12 Institut de Droit International, Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement (Session of Basel, 1991).

13 Rosanne Van Alebeek, The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law (Oxford University Press 2008), 61.

14 See Yang (n. 4), 81: 'Realities are far more complex than can be reflected by any list, however exhaustive.'

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(USFSIA), while also questioning the extent to which the UNCSI can be considered reflective of customary international law (p. 62). However, Reece Thomas stops short of conducting a detailed analysis of state practice and *opinio juris*, leaving the conclusion on this point unresolved (p. 63).

The remainder of the book is ostensibly not about the commercial activity exception, at least not in the narrow sense. That said, the concept of commerciality remains relevant to other rules of immunity, as illustrated in Chapter 5, which examines immunity from enforcement against state assets. These rules, often referred to as the 'last bastion' of sovereignty, are distinct from and narrower than the rules governing immunity from jurisdiction.[15] Notably, as Reece Thomas observes, the only exception that enjoys some degree of acceptance among states is for property 'in use for a commercial purpose'. This exception is significant not only because it is restricted to commercial use – as opposed to merely 'non-governmental' use[16] – but also because it explicitly adopts a test of purpose rather than nature (p. 65).

Still, true to the book's overall approach, Reece Thomas does not delve into the principles underpinning this legal framework but instead focuses on the practical challenges of identifying assets that fall within this exception. To navigate the complex and often inconsistent case law, Reece Thomas explains that English courts have adopted a 'purpose in context' test (p. 70), whereby they examine the broader context to determine whether immunity applies to state assets such as embassy bank accounts.[17] Reece Thomas seems to approve this approach and suggests that the broader context should inform the treatment of a wider range of assets (p. 72). While this is intuitively persuasive, I find the explanatory power of the test less compelling. Property can serve multiple purposes, not all of which are readily apparent from its use, and all purposes are ultimately part of the broader context. How, then, should courts decide which purpose prevails? Reece Thomas herself acknowledges that some difficult questions remain unresolved in judicial practice, such as whether it is appropriate to distinguish between current use and origin in cases where definitive evidence of current use is lacking (p. 73).

As the book progresses, the emphasis on commerciality ebbs and flows. Chapter 6, which addresses the definition of a 'state' for the purposes of state immunity, illustrates this shift. The primary challenge here lies in determining when separate state entities, such as agencies and instrumentalities, should be granted immunity and whether their assets can be targeted in

15 ILC, 'Draft Articles on Jurisdictional Immunities of States and Their Property, with commentaries', (1991) ILCYB, Vol. II, Part Two, 56.

16 Note that UNCSI, Art. 19 adopts both terms.

17 See House of Lords, *Alcom Ltd. V. The Republic of Colombia,* judgment of 12. April 1984, [1984] AC 580, 603 (*per* Lord Diplock).

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claims against the state. Reece Thomas observes that the UKSIA emphasises separateness, as these entities do not enjoy immunity under Section 14(1) unless the proceedings relate to actions undertaken in the 'exercise of sovereign authority' where the state itself would have been immune. However, establishing a test for what qualifies as an 'exercise of sovereign authority' is a significantly more demanding task than defining 'commercial activity', and the UKSIA offers no guidance on this point (p. 111). It might therefore be interesting to assess the extent to which courts revert to a test of commerciality to determine whether an activity falls outside the boundaries of sovereign authority. However, this is not a line of reasoning that Reece Thomas chooses to pursue. Instead, her focus shifts to demonstrating that domestic courts – even when operating under different statutory frameworks, such as the USFSIA – employ a multi-factor assessment to decide whether a separate entity is immune. This leads her to the conclusion that 'maybe context is all' (p. 114).

Chapter 7 is where the unifying thread of the book begins to fray. The chapter ostensibly focuses on the immunity of central bank assets, a topic that has gained prominence in light of recent sanctions against Afghanistan and Russia. These assets fall into a specific category of property in use for 'government non-commercial purposes' and, except in extraordinary circumstances, are recognised as immune by the UNCSI and most states.[18] Reece Thomas acknowledges this and notes that no reasonable interpretation of the commercial use exception could encompass sanctions against central banks (p. 141). Rather than concluding the analysis at this point, however, Reece Thomas delves into whether recent sanctions involving the freezing and seizing of central bank assets can be reconciled with the rules of immunity. While this topic is undoubtedly interesting, given that commerciality plays no role in the discussion, one might question whether its inclusion is motivated more by its current prominence in academic discourse than by a substantive connection to the book's central theme.

Finally, Chapter 8 explores how the commercial activity exception can have non-commercial applications, particularly in the context of human rights claims. This is a promising avenue for examining the pressure that recent litigation is placing on the commercial activity exception. The limited number of accepted exceptions to state immunity, coupled with the growing involvement of states in activities that blur the line between public and private spheres, and the International Court of Justice's finding that no

18 See UNCSI, Art. 21(c); Ingrid (Wuerth) Brunk, 'Immunity from Execution of Central Bank Assets' in: Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019), 266-284 (280 f.).

customary exception exists for human rights violations,[19] has created fertile ground for creative attempts to fit human rights claims into established exceptions, such as that for commercial activities. To what extent can this exception be stretched to accommodate such claims? At what point does the exception risk swallowing the rule? Having sidestepped foundational questions about the meaning of commerciality, the book is not ideally positioned to provide a definitive answer to these questions.

After summarising the debate on a human rights exception to state immunity, the chapter examines recent case law from the United States (US) and UK concerning the use of employment contracts to ground jurisdiction in cases involving modern slavery and human trafficking. Reece Thomas cites approvingly Philippa Webb's view according to which framing human rights violations as employment claims may offer a new pathway for holding states, diplomats, and international organisations accountable.[20] Yet, critical issues leading up to this conclusion are only touched upon. For instance, Reece Thomas notes that employment contracts are treated as a distinct exception under the UKSIA (p. 162),[21] whereas under the USFSIA, they fall within the commercial activity exception (p. 167). This discrepancy raises questions about the extent to which these exceptions overlap and the appropriate test to be applied in employment cases: is profit the key factor? Should the focus be on whether a private person could enter into such contracts? Or does it hinge on whether the work performed is governmental in nature?[22] Reece Thomas highlights these issues (p. 168) but does not provide definitive answers.[23]

Instead, the book turns to cases involving individual foreign diplomats, where courts are increasingly more open to exercise jurisdiction in employment disputes (p. 164). Strictly speaking, however, these cases involve a different type of immunity, namely diplomatic immunity.[24] To be sure, commerciality also plays a role here, as the 1961 Vienna Convention on Diplomatic Relations (VCDR) deprives a diplomatic agent of immunity in civil proceedings for 'any professional or commercial activity exercised […] outside his official functions'.[25] Still, the extent to which conclusions drawn

19 ICJ, *Jurisdictional Immunities of the State* (Germany v. Italy), judgment of 3 February 2012, ICJ Reports 2012, 99 (139).

20 Philippa Webb, 'The Immunity of States, Diplomats and International Organizations in Employment Disputes: the New Human Rights Dilemma?', EJIL 27 (2016), 745-767 (747).

21 The same distinction can be found in UNCSI, Art. 11.

22 See Yang (n. 4), 93.

23 Compare and contrast the multi-factor framework in Webb (n. 20), 749.

24 See Eileen Denza, 'Interaction Between State and Diplomatic Immunity', Proceedings of the ASIL Annual Meeting 102 (2008), 111-114 (111).

25 Vienna Convention on Diplomatic Relations of 18 April 1961, 500 UNTS 95, Art. 31.

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from this case law can and should be transferred to state immunity is not fully articulated.

The remainder of the chapter explores the applicability of the commercial activity exception in criminal cases, such as those involving terrorist financing. The commercial link in these contexts appears tenuous, and Reece Thomas acknowledges that such claims have largely failed. This includes UK cases on the recognition of US judgments against state sponsors of terrorism and a US case against a Turkish bank, where the Supreme Court avoided addressing the commercial activity exception altogether. The book concludes with an Appendix summarising recent developments on state immunity and human rights in Italian courts, although the commercial activity exception played no role in this context.

The picture the book presents is ultimately one of complexity and heterogeneity across different legal systems. The book does a good job in describing this complexity, providing a detailed account of the various areas where commerciality has influenced the application of immunity rules. However, it does not attempt to make sense of this complexity or reconcile the divergent approaches. From the outset, the book explicitly states that it 'is not going to examine the theoretical bases for [state] immunity' (p. 1). Consequently, it does not seek to develop a comprehensive theory of commerciality or critically evaluate the role this concept should play in the contemporary state immunity regime. Instead, the aim is to offer 'an introduction only' to 'state immunity in a commercial context' (p. 8), primarily through the mapping of domestic court practice and scholarly debates in this area.

On these terms, the book undoubtedly succeeds. Its broad scope allows Reece Thomas to tackle some of the most complex and topical issues of state immunity while occasionally critiquing existing inconsistencies and accountability gaps. It is easy to see this book becoming a valuable resource for scholars and practitioners addressing specific state immunity issues, particularly in the UK and US. Where the book is less effective, however, is in its limited efforts to synthesise and develop its findings. One is left wondering whether, despite nominal differences in their approaches, domestic courts in different jurisdictions might, in practice, often reach similar conclusions on comparable facts. Unfortunately, the book also lacks meaningful attempts to identify customary international law or critically assess domestic court practice in light of it.

In conclusion, it is worth considering whether an in-depth assessment of the commercial activity exception to state immunity can truly avoid engaging with the fundamental principles underpinning the rules that govern it. As many have observed, the difficulties and uncertainties in the application of state immunity largely stem from the fact that its foundations remain, to this

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day, 'poorly articulated'.[26] While dispensing with theory has undoubtedly facilitated the development and codification of state immunity rules, it is widely recognised that the exceptions listed in immunity codifications are a matter of legislative convenience.[27] In hard cases, these statutory provisions offer limited guidance, and the absence of a deeper understanding of the principles at play is a recipe for inconsistency and confusion.

Put simply, the danger of analysing state immunity on a granular level without an overarching framework is missing the forest for the trees. While it may be true that differing domestic court approaches cannot always be reconciled, this raises a broader question: to what extent does international law permit a margin of appreciation at the boundaries of the restrictive doctrine?[28] This is not merely a doctrinal issue. As Reece Thomas emphasises (p. 151), the right of access to justice, which serves as a counterbalance to state immunity, raises significant concerns about whether granting immunity in cases not warranted by international law could expose the forum state to liability for breaching its human rights obligations. This is a complex question that, in some respects, lies beyond the scope of Reece Thomas's book. However, given the increasing pressure on state immunity in domestic court practice,[29] it is an issue that cannot be easily set aside.

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26 See Crawford (n. 7), 77; Van Alebeek (n. 13), 47.

27 Christoph H. Schreuer, *State Immunity: Some Recent Developments* (Grotius 1988), 7.

28 For example, activities traditionally regarded as governmental, such as the state's issuance of bonds to private individuals, have recently been recognised as commercial; see Fox and Webb (n. 2), 404. This raises the question of whether courts recognising immunity in such circumstances would exceed what is required by international law.

29 See Régis Bismuth, Vera Rusinova, Vladislav Starzhenetskiy and Geir Ulfstein, *Sovereign Immunity Under Pressure* (Springer 2022).

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