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The Issue of Immunity of Private Actors Exercising Public Authority and the New Paradigm of International Law

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Abstract:

1. The changing image and structure of international law – 2. The exercise of public authority through delegation – 3. The question of state immunity in the context of hybridisation between public and private – 4. The content of the activity as a paradigm to guide the extension of state immunity – 5. The issue of limiting the immunity of delegated non state actors – 6. Conclusions

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1 The changing image and structure of international law

The aim of this contribution is to investigate the way immunity is affected by the evolution of international law. Given the diversification of actors operating in the international arena, the investigation focuses on the extension of immunity to private actors exercising public authority. In particular, the investigation will introduce the concept of delegation of public authority, in the context of hybridisation between public and private. It will focus then on the content of the activity as a paradigm to guide the extension of state immunity, through a presumption of non applicability.

Years ago, the former President of the International Court of Justice (ICJ), Judge Higgins, affirmed that “international law has to be identified by reference to what the actors (most often states) [...] believe normative in their relations with each other”.¹ Understanding the evolution of contemporary international law necessarily requires us to consider the role played by various actors with reference to the structure and the contents of international law.

In this regard, the traditional picture of international law describes *states* as the “normal types” of legal persons and the primary subjects of the international community.² However, the beginning of the twentieth century witnessed a gradual reshaping of this idea together with that of international society.³

The first sign of this evolution was the development of intergovernmental organisations that, at an early stage, were essentially instruments of states’ collective action, lacking international legal personality.⁴ Later, after the Second World War, with the birth of the United Nations and the creation of new intergovernmental organisations, the new institutions became more autonomous and acquired their own obligations and rights.⁵ The post-war period witnessed as well the phenomena of “fragmentation” and “informalization” of the newly formed international governmental organisations (IGOs). As Benvenisti pointed out these phenomena have been a by-product of the tendency of states to “ensure that IGOs remain subservient to their interests, but also to avoid broad, integrative agreements whenever possible and opt for a large number of narrow agreements that are functionally defined [...] and circumscribe [IGOs] authority whenever its creation is unavoidable”.⁶

Then, in the last decades, technological and commercial developments have changed the way in which international affairs are managed. Such a change has taken place in order to face what Dominicé defined one of the major challenges of our time; *i. e.* the necessity of advancing global coordinated responses to global problems that cannot find solutions at the national level.⁷

In this regard, due to the emergence and growing influence of new entities at the international level, including private international corporations performing cross-borders activities, the original structure of international law has started to be challenged by what is generally referred to as *global governance* or *transnational law*. This latter term, for instance, first coined by Philip Jessup in 1956, has been used in order to describe the law that transcends or crosses borders and that it is not necessarily created and enacted by states.⁸

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The new phenomena described by global governance have paved the way for the appearance of new entities known as ‘non-state actors’ in international legal scholarship.⁹ This notion includes all those actors in international relations that are not states: international organisations, individuals, international corporations, non-governmental organizations (NGO) and even transnational criminal organisations.¹⁰ From a legal perspective, the evolution of international relations in a more transnational dimension and the emergence of new actors have certainly questioned the traditional legal framework based on state-made sources like treaties and custom. The presence of new entities and their impact in the regulation of cross-border affairs have led to the softening of international law instruments previously conceived only in formalistic terms. This is mainly due to the rise of new fields of global activities such as international trade, food, health and environment regulation.¹¹

In this regard, some scholars have expressed the necessity of a complete rethinking of the doctrine of sources of international law, as the traditional version is now considered outdated and inadequate.¹² One proposition intends to highlight the so-called “effect- (or impact-) based” conception of international law ascertainment, according to which “in today’s globalised world what matters is whether and how the subjects of norms, rules, and standards come to accept those norms”.¹³ In other words, these normative systems can be considered *law* based on their authoritative value. In this sense, especially in the context of regulatory bodies that are not considered lawmakers in the traditional sense, certain rules become law since they permit the exercise of authority by the actors involved in that particular regulation.¹⁴

As a consequence, the new articulations of international relations have led legal scholarship to reconsider the historically narrow scope of international law – conceiving *law* as a synonym of *government* – as increasingly expanding its space of action and turned their attention to the relationship between law and globalisation.¹⁵ On this subject, it has been suggested that the shift from government to governance in the production of law – caused by processes of globalisation and the consequent vertical extension of international law as to include multiple actors other than states – has led to the emergence of informal international law-making processes as an alternative to more traditional normative schemes.¹⁶

Such vertical extension of international law, along with the ever-increasing recourse to informal and soft-law-making processes, brought about reflections on the nature of international law and, in particular, on the boundaries between its public and private domains. Indeed, as already argued by Kelsen, the idea that some matters ought to be attributed to private ordering while others would need to be the object of public law is deeply political.¹⁷ The issue of the public/private divide has been addressed, from different perspectives, by the American critical legal studies and part of the feminist scholarship who maintained that such a divide enables and perpetuates relationships of dominance by relegating them to the private realm.¹⁸ This debate has led some of these authors to question the significance and the role of the public/private divide.

The “publicness” of public international law has been understood for a long time as a feature proper of the subjects of international law, *i. e.* the states, which are deemed as the public institution *par excellence*. Hence, the publicness of public international law was not necessarily associated to the exercise of authority. The absence of this latter has in many cases been identified as a defining feature of the international system in which sovereign states co-exist and interact on the base of consent: a dimension closer to the private law paradigm.¹⁹

However, as pointed out by some authors, the development of international legal order has also been influenced by the emergence of common, supranational and even global challenges. Sophisticated institutional structures, aimed at the fulfilment of common and global interests, have appeared with shapes and functioning that are quite far from the image of an international order based on horizontal relations informed by state consent.²⁰ Moreover, some authors stressed the importance of the identification of general interests that are proper of the international community.²¹ Thus, if on the one hand international law has witnessed an increasing emergence of non-state and private subjects, on the other hand the international legal order has acquired – at least with regard to some aspects – a “publicness” related no longer to the subjective element, but to the nature of the processes informed to common interests and confronted with the issue of legitimacy.²²

At the same time, the nature and the role of private international law has profoundly mutated as well. While its traditional space used to be at the outskirts of the national legal orders with the purpose of delineating their reciprocal boundaries, private international law acquired a more central role. As pointed out by Basedow, private international law still embodies the function of delineating domestic borders, but it has also become the “key to the private law of global home affairs in a multi-jurisdictional world”.²³

The public/private divide is hardly identifiable with clearcut distinctions between domains or activities. The criticisms mentioned before apply to the replication of the divide within the international domain. Indeed, notwithstanding the mutating actors and their dynamics of interaction at the international level, international law still reflects a very traditional view of the role of the state. As Chinkin points out, its claim “to universal applicability assumes a commonly accepted rationale for distinguishing between the conduct of state organs and that of other entities, which in fact depends upon philosophical convictions about the proper role of government and government intervention”.²⁴ The demarcation of the public and private spheres is in many instances

culturally specific, rendering the adoption of western analytical tools to understand the international regime questionable.²⁵

Such concerns were already raised by some national governments in the occasion of the revision of the Draft Articles on State Responsibility of the International Law Commission conducted by the Special Rapporteur James Crawford.²⁶ For instance, Germany questioned whether the fact that states increasingly entrust persons outside the apparatus of state organs with tasks normally attributable to a state was sufficiently taken into account, and suggested that the assumption of governmental functions is rooted in the past rather than in present conditions. On the same matter, the United Kingdom raised the doubt on the possibility of effectively defining what constitutes governmental functions within the Draft Articles given that there is no shared understanding of the concept.²⁷

Thus, the character of the public/private dichotomy and the “publicness” of public international law are challenged by the undergoing mutations of the international legal order. Nonetheless, they cannot be wiped out of the conceptual framework of international law as they still constitute a paradigm loaded of important consequences. They need to be analysed in the light of the current international system because, as Jouannet pointed out, even the more “liberal” international law – the contemporary international law of co-ordination structured on the private law paradigm – is not based on sovereign equality alone, but on democracy and human rights as well.²⁸ Hence, it appears that the characters of international law and of public international law might be multifarious and are to be searched not just in the nature of the actors but also in operations that they undertake.

This leads to the issue of immunity, a traditional domain of substantive international law where nature of the actors and nature of the activity are of the utmost relevance. The main aim of this contribution is to investigate the way immunity is affected by this evolution of international law and how immunity should be framed with reference to private actors exercising public authority. The investigation will introduce the concept of delegation of public authority, in the context of hybridisation between public and private, focusing then on the content of the activity as a paradigm to guide the extension of state immunity, through a presumption of non applicability. The analysis of some relevant national case-law, and of a pending case in front of the ECJ will serve as support of the analysis for testing its contentions.

2 The exercise of public authority through delegation

The notion of public authority can be analysed from the different perspective of delegation. Indeed, the focus here is the concept of *governmental* authority, namely the authority exercised by states as an expression of their authoritative powers. In this context, the hybridisation between public and private occurs when a state chooses to delegate to a private actor an activity that the state was originally entitled to perform. From an international law perspective, the relevance of this practice resides in the fact that the delegated activity is generally considered as a prerogative of states.

This is a general principle shared by most national legal systems. For instance, in the United States the rule against delegation provides that authorities with governmental power are to exercise such power themselves without delegating it to other entities. However, as Lanham explains in his article on the delegation of governmental power to private parties, “the rule is by no means absolute, but it is likely to be applied with greater vigour where power is delegated to private parties than where the delegation is to an official party.”²⁹ The transfer of formerly governmental responsibilities to the private sector has become increasingly popular in the last decades. The rationale behind delegation is the promise of greater efficiency, lower costs along with the avoidance of legal entanglements characterising government.

As Lawrence points out, the debate over delegation of governmental power to private entities has mostly been political in nature. “Indeed, when privatization involves governmental functions, the legal issues are largely secondary, involving only details. But if [it] involves governmental powers, the legal problems become considerably more formidable.”³⁰

The exercise of governmental power, in general, and the delegation of such power to private entities, in particular, inevitably raises the issue of determining which powers are governmental and which are not. Most powers and functions exercised by a government could be undertaken by private actors.³¹ Nonetheless, some powers have been identified as essentially governmental: rulemaking, adjudication of rights, seizure of person or property, licensing and taxation.³² Common to these powers is the element of coercion that is uniquely based on the public authority. Whereas such powers, when exercised by private actors, are generally based on consent (contract) or ownership of property.³³

The term *delegation* has been defined as a “transfer of authority, whereby the exercise of power is conveyed from a governmental actor to a private entity in such a way as to confer the private delegate a degree of legiti-

macy of action".³⁴ This means that the external private actor that exercises authority is authorized to do so by an act issued by a delegating public body that is originally entitled to exercise that authority. Abbott, Snidal, Slaughter and others offer a definition that looks at the consequences of the transfer, according to which delegation consists in a grant of authority to implement, interpret and apply the rules and, interestingly, "possibly make further rules".³⁵

A good example that illustrates the process of delegating governmental authority is represented by the outsourcing of security activities to private military contractors. These private corporations are often used by states in armed conflict, prolonged military occupation, peacekeeping, and territorial administration in post-conflict institutional building and intelligence gathering.³⁶ Other examples of delegation of governmental power are that of airline companies, which exercise functions of immigration control, or private companies running detention facilities.

The increasing number and diversity of private actors empowered to exercise elements of governmental authority through delegation is raising the level of difficulty in the elaboration of a criterion to identify them. They operate in many different areas, and different are also the legal systems by which they are regulated. As pointed out by Momtaz, "if it is true that the common characteristic of these entities is that they enjoy a legal personality separate from that of the State, this does not mean that their other characteristics are not highly diverse".³⁷ According to the International Law Commission (ILC), there are some factors that may be considered as reliable indicators for the attribution of the behaviour of such private entities to the state, but they are not alone sufficient. These may be: the participation of the State in the capital of private entities, or the level of control exercised by the State over their activities. The ILC maintained that "the most appropriate solution is to refer to the real common feature which these entities have: namely that they are empowered, if only exceptionally and to a limited extent, to exercise specified functions which are akin to those normally exercised by organs of the State".³⁸

Moreover, as pointed out by Abbott, Snidal, Slaughter and others, delegation opens the exercise of governmental power to new actors and new forms of politics in international relations. In particular, private actors with delegated governmental authority are likely to have their own interests, which are constrained more or less successfully by conditions imposed on the grant of authority and surveillance.³⁹ All these aspects raise the problem of understanding the link between the delegated private actor and the State. This is particularly relevant from an international law perspective as it raises many concerns also with reference to the scope of application of immunity, as it will now be investigated.

3 The question of state immunity in the context of hybridisation between public and private

The hybridisation between public and private has relevant impact on the application of public international law norms. Indeed, the uncertainty in discerning public and private often brings confusion when the application of traditional international law norms comes into play. Focusing on the norm on the jurisdictional immunity of states, such a norm is intended as an essential part of the recognition of state sovereignty, as well as an aspect of the (formal) legal equality of states and their duty of non-interference.⁴⁰ The recognition of foreign states' sovereign powers operates as a protection for the exclusivity of those activities that are considered to be an exercise of public authority. In this sense, since the regulation of the social life of the state, namely the exercise of public authority, corresponds to the emanation of public acts, the state has the right to have those acts recognised by other states, on the ground that they express a prerogative contemplated by international law.⁴¹ Therefore, international law facilitates the performance of public functions by states and their representatives by providing immunity should they be sued or prosecuted in foreign courts. The law on state immunity in fact precludes the courts of the forum state from exercising adjudicative and enforcement jurisdiction in certain cases in which a foreign state is a party. It is therefore clear that the central question here is the possibility of extending the application of the norm on state immunity to actors that although separate from the state, are authorised or delegated to exercise elements of public authority.

As maintained by Peters, "immunities are a messy affair".⁴² The complexity of this matter can be sensed throughout its history that see immunities been treated as a matter of "mere grace, comity, or usage".⁴³ The judgement of the US Supreme Court, *Schooner Exchange v. McFaddon*, is treated as the first judicial decision on the issue of immunity globally. In the case, the Court granted immunity to a French public/national military vessel as "a matter of grace and comity".⁴⁴

This view of immunity can still be found in countries that paradoxically undertook a greater effort of codification of the matter in domestic statutes. Notably, countries of the common law tradition, whereby domestic statute law often constitutes the primary or even the sole legal basis for judgements concerning immunity. An example is represented by the judgement *Samantar v. Yousuf* in which there was no mention whatsoever to

international law. The only legal basis referenced were the American Foreign Policy Act and the policy of the State Department.⁴⁵

The legal nature of immunity was confirmed in 2012 by the judgement of the ICJ, which affirmed that the application of immunity is a requirement of international law, and that “whether in claiming immunity for themselves or according it to others, states generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other states to respect and give effect to that immunity”.⁴⁶

Immunities appear a particularly interesting and important institution to observe the mutations of international law. In particular, state immunity constitutes a reflection of the structure of the international legal order. As affirmed Lady Hazel Fox, any “study of state immunity directs attention to the central issues of the international legal system. [...] Ultimately the extent to which international law requires, and municipal legislations and courts afford, immunity to a foreign state depends on the underlying structure of the international community”.⁴⁷ For these reasons, this contribution focuses on the extension of state immunity to private actors, whose role in the international arena is gaining momentum.

Immunity is, “after all, an outgrowth of the Westphalian interstate system based on coordination and cooperation among equal sovereigns”.⁴⁸ From the international law perspective, immunities (be them of states, state officials, or international organizations) are meant to protect the legal order, the stability of international relations, inter-state cooperation, and secure the discharge of public functions of the relevant actors.⁴⁹ However, the function of immunities, and in particular of state immunity, would be frustrated if applied beyond its rationale. Indeed, as El Sawah argues, immunity should not be granted “*au-delà de sa véritable justification*”⁵⁰ in order to prevent its degeneration into forms of privileges, unjustifiable in the contemporary international legal order. Thus, provided that private actors are assuming increasing importance in the international scene, often undertaking functions formerly exercised by states, how should immunity relate to these emerging situations?

The American doctrine and jurisprudence have started to conceive a new form of immunity called *derivative immunity*, enjoyed by private actors when acting in concert with sovereign states.⁵¹ This extension of immunity is intended to be applied to private corporations and contractors effectively operating “in the shoes of the sovereign”.⁵² It is therefore essential to investigate to what extent state immunity can operate beyond its traditional scope.

State practice is not uniform when considering if “other entities”, namely entities distinct from the state, can enjoy immunity by default. UK law, for instance, adopts a presumption of non-immunity in these cases.⁵³ This is the approach adopted in the *Trendtex* case in which it was observed that a court before which the issue of immunity arises has the responsibility of examining “all the relevant circumstances”.⁵⁴ In the decision, the tribunal held that the bank at stake had a status outside the government and separate from it, and was a mere agent not entrusted with any executive powers.⁵⁵ The presumption of non-immunity is clear when reading the State Immunity Act which, in defining a foreign state, does not include separate entities.⁵⁶ In the *Tsavliris* case, the tribunal had to establish if the Grain Board of Iraq, an entity with independent legal personality, was a department of the Iraqi Ministry of Trade. The entity was involved in a dispute on the ownership of a cargo of wheat on a ship. The tribunal concluded that the body was a “separate entity” having its own legal personality, along with financial and administrative independence, and thus not eligible to invoke state immunity.⁵⁷ The court then turned to analyse the activity performed by the entity and reached the same conclusion.

Interesting indications can be drawn by looking at the practice of states without immunity legislation. The German position is that separate legal entities of foreign states “enjoy no immunity”.⁵⁸ Thus German courts operate a preliminary assessment on the structure, status and activities the entity normally performs, insofar as its separateness from the state is considered the central question.⁵⁹ In *Central Bank of Nigeria*, the Frankfurt *Landgericht* goes even further by saying that, if the entity possesses independent legal personality, can sue and be sued in its own name and can acquire property, there is no need to look at whether the entity has been designed to exercise governmental functions.⁶⁰ Only when it constitutes an “integral instrumentality” of the state, the court has to investigate if the entity actually performs *acta jure imperii*.⁶¹ This extreme position seems to be mitigated in *NIOC Pipeline Contracts* when the court, in relation to the exercise of *acta jure imperii*, held that if the respondent was a legal person acting on a sovereign basis, it could have in principle enjoyed state immunity.⁶²

A different position seems to be held by French jurisprudence, affirmed by the *National Iranian Gas Corporation* case, which holds that foreign states, as well as bodies acting under their instructions or on their behalf, enjoyed jurisdictional immunity for acts of sovereign power (*puissance publique*) and for acts performed in the interests of a public service.⁶³ However, the separateness of the entity was assessed in *Kuwait News Agency*, a press organisation with its own legal personality and independent budget. The Court observed that the protected interests of the state of Kuwait justifying jurisdictional immunity could not have been infringed by the *acte de gestion* of a press agency, even if it was an “emanation of the state”.⁶⁴

As for Swiss jurisprudence, the *Banco de la Nacion Lima* concerned a dispute between a state-owned Peruvian bank and an Italian bank over attachments of funds held in Swiss banking institutions. The Court held that foreign state-owned corporations endowed with their own independent legal personality could not in principle invoke state immunity, unless they were performing an activity *jure imperii*.⁶⁵ Interestingly, the court expressed its position on an hypothetical situation: “it would hardly be equitable to authorise a bank which had close financial links with a foreign state to enter into competition at will with private banking undertakings and to conclude international financial transactions, thereby at the same time allowing that entity to invoke immunity”, and thus, in doing so, escaping the consequences of those transactions. In this case, therefore, the evaluation hinged on both the status of the entity and the activities performed.

The same position was held by the Italian courts in *Consorzio Agrario*, but concentrated more on the actions involved.⁶⁶ Belgian judges also considered both the legal personality and the contractual activity in *Vaessen*, when an American employer claimed jurisdictional immunity by virtue of an agreement between Belgium and the US concerning American military cemeteries managed by the claimant corporation.⁶⁷

Therefore, the case law illustrated here suggests that courts tend to reason on both the status of an entity and the activity performed. In other words, the possibility of granting immunity to entities separated from the state hinges on a double test. First, the court has to look at the constitution, structure, composition and financial independence of the entity; second, if the activity involves commercial operations, immunity shall be excluded, according to the restrictive doctrine. However, it seems that in certain circumstances, the status of the entity is indicative of the activity performed. Hence a corporation usually acts as a private body and puts in place contracts as any other private individual. Only specific factual circumstances may lead to an exercise of public functions and thus open the possibility of granting immunity. Therefore, in order to take into account all the relevant circumstances, the analysis of the status or personality of the entity seems to be necessary and, in any event, to be assessed on an *ad hoc* basis.

4 The content of the activity as a paradigm to guide the extension of state immunity

Even assuming the possibility of extending state immunity to private parties, it is important to establish which activities can be considered an exercise of governmental authority. International law deals with the identification of governmental authority for the ascertainment of state responsibility for internationally wrongful acts, and in particular for the question of the attribution of conduct. Indeed, if conduct can be attributed to a state – including their organs and other entities acting on their behalf – that conduct is, in principle, suitable to be covered by immunity. This section analyses the relevant case law concerned with the extension of immunity to non-state actors in order to identify the conditions enabling such extension.

For this purpose, the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) constitute a useful tool. In particular, what is of interest here is when the state entrusts an external *entity* to perform public functions, as addressed by Article 5 of the ARSIWA.⁶⁸ The term “entity” is intended to reflect a wide variety of bodies that, though not organs, are empowered by the law of a state to exercise elements of governmental authority.⁶⁹ The ARSIWA Commentary specifies that the intention of the provision is to give account to the increasing privatisation of public functions, such as in the case of private security firms contracted as prison guards and exercising powers of detention and discipline; or the case of private airlines to which states delegate certain powers in relation to immigration control or quarantine.⁷⁰

With regard to the notion of governmental authority in particular, it has been noted that there is no consensus on what it constitutes, as the concept tends to depend on a state’s “particular society, its history and traditions”.⁷¹ However, the ARSIWA Commentary tries to identify a set of criteria in order to determine the elements of governmental authority.⁷² These are: (a) the content of the powers, (b) the manner in which they are conferred to the entity, (c) the purposes for which the powers are to be exercised, and (d) the extent to which the entity is publicly accountable for their exercise.

Although reference to such criteria can be indicative, case law in this context is far from coherent. This is probably due to the fact that the theoretical exercise of attribution of conduct is based on a *posteriori* reasoning, with the consequent difficulty of establishing a *priori* requirements. This is particularly testified by two cases decided by the Iran-United States Claims Tribunal that, with reference to the period of the Iranian Revolution of 1979, was frequently requested to decide if the conduct of private individuals were attributable to the government of Iran. The case *Hyatt International Corporation v. Iran* dealt with the expropriation of goods belonging to foreigners by a non-state charitable foundation, the “Foundation for the Oppressed”. The tribunal held Iran responsible for the conduct and affirmed that the entity was “instrumentally controlled by the Government”.⁷³ By contrast, in *Schering Corporation v. Iran* the Tribunal did not consider the activities of a “worker’s council” towards the applicant company as attributable to Iran, since the functions of the entity were confined to represent the interests of workers before private corporations.⁷⁴

In the same vein, it is worth mentioning a recent case decided in the ambit of investor-state arbitration. In *EDF (Services) Limited v. Romania* the arbitral tribunal had to decide upon the attribution of the conduct of two state-controlled companies and concluded that the activities were not performed as part of delegated governmental authority by virtue of Article 5 ARSIWA, since the activities were “performed in pursuit of the corporate object of a commercial company with the view to making profits”.⁷⁵

Therefore, case law demonstrates that it is not possible to single out specific criteria in order to clearly identify a common notion of governmental authority under international law. Moreover, we know that the relationship between states and separate entities is treated differently among jurisdictions. As a result, the evaluation is left to the courts on a case-by-case basis. Indeed, in the absence of a defined rule and specified requirements, it is the interpreter that has to look at the merits and take into account “all the relevant circumstances”.⁷⁶

Another method to identify the content of the activity performed is to look into the *nature* and *purpose* of such activity. State practice shows that this test is often used in order to distinguish *acta jure imperii* from *acta jure gestionis*, a fundamental prerequisite for the establishment of state immunity.⁷⁷ In the same vein, in the very recent case *Naku v. Sweden and Lithuania*, the European Court of Human Rights (ECtHR) noted, *inter alia*, that in order to ascertain the content of the activity, it is essential to look into the substance of it and thus the duties of an employee at the Swedish embassy in Vilnius were considered only technical and based on a private contract regulated by Lithuanian law and not a manifestation of Swedish sovereign powers.⁷⁸ This approach is also reflected in the UN Convention on Jurisdictional Immunities that refers to both nature and purpose in order to determine if an activity carried out by the state is commercial or not.⁷⁹

However, the choice to privilege the nature of the activity or its purpose, or *vice versa*, may lead to opposite conclusions. In the *Argentine Bonds* case, the Italian courts, when evaluating the conduct of the Argentinian government, concluded in favour of state immunity. The decision was based on the fact that the moratorium measures adopted by Argentina corresponded to an exercise of its sovereign powers, in relation to the pursued scope.⁸⁰ This conclusion has been criticised by the Italian doctrine, insofar as it did not take into consideration the relevant state practice in this ambit, which, instead, seems to suggest a preference for the nature of the activity rather than for its purpose.⁸¹ The same Italian jurisprudence indicates prevalence for the application of the “nature test”.⁸² This is also the position taken in the UN Convention that opted for the primacy of the nature test and the subsidiarity of the purpose.⁸³

For the scope of this contribution, it is of particular interest to scrutinise how state practice tends to prefer the “nature test”, since only when the public nature of a conduct is proven is it possible to establish the immunity of the state that put in place that conduct.

The “nature test” becomes particularly difficult with regards to “mixed activities”, namely conducts that present *prima facie* both public and private features. Here again the famous *Trendtex* case can be a good starting point. In that case, the Nigerian government ordered (public action) the Central Bank to suspend the payment of a supply of cement to private companies (based on a commercial transaction). Although the court did not explicitly consider the question of mixed activities, it rejected the defence on the basis of immunity without giving relevance to the fact that the contractual breach derived from a sovereign act.⁸⁴ The *Czarnikov* case concerned a supply of sugar that the Polish state-controlled company Rolimpex promised to deliver to the English corporation *Czarnikov*. Before *Rolimpex* had delivered all the sugar, the Polish government imposed a ban on the exports after predicting a shortage of sugar due to bad weather. During the appeal, the court did not concede state immunity because the company was not an organ of the state and Lord Denning affirmed that even if *Rolimpex* was considered a department of the Polish government, the state would have not been granted immunity for jurisdiction simply because of its governmental intervention in a commercial transaction.⁸⁵ In other words, in such mixed activity, the governmental intervention, a purely public act, would not be relevant for acknowledging the nature of the conduct.

In the similar case of *Congreso del Partido*, Cuba unilaterally suspended the supply of sugar to a Chilean company due to the deteriorated diplomatic relations with the then new president of Chile, Augusto Pinochet. The central question for the court was: “what is one to make of a case where a state has, and in the relevant circumstances, clearly displayed, both a commercial interest and a sovereign and governmental interest? To which is the critical action to be attributed?”⁸⁶ In other words, how is it possible to identify an exercise of sovereign powers when the conduct presents both public and private activity? The Court concluded that although the decision to order the ship carrying the sugar not to deliver the rest of the cargo to Chile had been taken for political non-commercial reasons (public conduct), in this case Cuba acted as the owner of the ship (private conduct) and therefore was not entitled to immunity.⁸⁷

The question of mixed activities was also considered by Swiss courts in *Banque Central de la République de Turquie* in which the Central Bank of Turkey was acting as an intermediary between an English bank and a Turkish bank for the repayment of a loan. The court did not grant immunity to the central bank insofar as the “the difficult distinction between *acta jure imperii* and *acta jure gestionis* was to be made not accordingly to their purpose but accordingly to the nature of the legal relationship”.⁸⁸ In other words, it is the nature of the link

between the state and the individual that is indicative of the essence of the activity and therefore decisive in the evaluation of state immunity.

The nature of the legal relationship, between the state and the private individual to whom the activity is delegated, appears of critical importance *vis-à-vis* immunity. The focus on such relationship excludes any form of automatic extension of the applicability of the institution. Indeed, the delegation of an activity by the state does not constitute a reason in itself for vesting the delegated individual with the immunity proper of the state. The nature of the subject, parameter emerged along with the old conceptualization of the absolute immunity of sovereign states, is ill-suited to govern the cases explored here as it extends the application of immunity either too much or not enough. The same is true for the evaluation of the scope, especially in the evaluation of the “mixed activities”. Thus, the judgement should focus on the nature of the act delegating the activity and on the nature of the relation between the state and the individual. This judgement cannot be made in a generalized fashion, but requires a factual and punctual assessment on a case by case basis.

5 The issue of limiting the immunity of delegated non state actors

As shown in this analysis, the emergence of non-state actors at the international level poses issues of coordination between the activities performed by these entities and public international law norms. In particular, the central question is whether or not a norm of classic international law, as in the case of state immunity, can or should be automatically extended to non-state actors when they are authorised to perform public functions.

A peculiar aspect proper of the law of immunity, that is important to take into account in the analysis of this matter, is that the discipline of immunity is driven by courts.⁸⁹ Unlike other aspects of international law, in the determination of the law of immunity a crucial role is played not much by the governments of states, their executive branches, or NGOs as much as it is done by the judiciary. In many cases, NGOs plays an important part in motivating victims to bring their claims to court as well as in providing them legal counsel, but the issues at stake are ultimately dealt by courts.

Provided that immunity is one of the most classic legal institutions proper of international law, it is surprising to observe the limited role played by international courts or tribunals on the matter. It is only recently that the ECtHR and the ICJ began to address a number of cases concerning immunity. The ECtHR developed a limited case-law on the issue of immunity. Particularly relevant is the case-law developed on employment disputes raising the question of immunity of international organizations, which has been heavily relied upon by national courts of both members to the ECHR and other European countries.⁹⁰ Besides this fortunate case-law, a couple of judgements of the ECtHR have been the object of a horizontal interaction with the ICJ,⁹¹ which was respectively cited “as authoritative” by the ECtHR.⁹²

However, besides this limited and only recently developed role assumed by the two aforementioned international courts, the discipline of state immunity is primarily a matter of domestic courts. Given the customary nature of the law of state immunity,⁹³ national courts considerably rely on foreign cases for the decision of the issue at hand.⁹⁴ This pattern appears quite unusual in international law, and this is arguably due to the fact that immunity becomes a question when a controversy is brought before a national court. Thus, as pointed out by some scholars,⁹⁵ domestic case-law becomes relevant in the development of international law of immunities under at least three aspects. First, domestic judgements may develop state practices and/or be pronouncements of *opinio iuris*, therefore constituting the basis of an international customary law.⁹⁶ Second, domestic court decisions may amount to “subsequent practice” for the interpretation of treaty law – in the sense of Art. 31(1)(b) of the Vienna Convention on the Law of Treaties – as well as for the “interpretation” of international customary rules. Third, pursuant to Art. 38(1)(d) of the ICJ Statute, domestic “judicial decisions” constitute a “subsidiary means for the determination of rules of law”.

Hence, given the paramount role that national judicial decisions play in the determination and development of the international law of state immunity, it appears that domestic courts are, indeed, the principal arenas where the issue of the extension of immunity has to be addressed

The relevance of this point can be illustrated through a case decided by the Tribunal of Genoa, Italy in 2012.⁹⁷ The case concerned the activity of naval classification societies, namely private corporations to which flag states delegate the technical surveys required to assess the seaworthiness of ships. In February 2006, after a technical failure, a Panama-registered vessel sank in the Red Sea, causing the death of more than 1,000 people. After the incident, the victims’ relatives initiated a legal action against the classification society – based in Italy – responsible for the technical checks and entrusted by the Panamanian maritime administration to carry out the relative surveys. The Italian judges concluded in favour of the classification society, declaring that the company had the right to be granted immunity from the Italian jurisdiction on the ground that, for the activities considered, it acted on behalf of a foreign state, Panama, being delegated by it.

Although it is not possible here to discuss the numerous legal questions that led to that decision, this case shows how the tribunal extended the application of a norm of public international law, originally meant for states as primary addressees, – to a private actor. This approach has three main direct consequences: (1) the risk of substantially jeopardising the legal protection of the subjects suffering the wrongful conduct; (2) an increased difficulty in exercising an effective judicial control on the activities performed by non-state actors; and (3) more generally, the risk of generating incoherence in the application and interpretation of public international law norms.

The controversy was raised again before the Tribunal of Genoa, which in September 2018 lodged a request for a preliminary ruling of the European Court of Justice (ECJ) in order to assess whether the activities of the naval certification societies are to be qualified as administrative matters or as civil and commercial.⁹⁸ The qualification of the matter at hand requested by the Italian Tribunal has a double implication. On the one hand, if the activities of the certification societies are deemed as civil or commercial matters, the Regulation (EC) No 44/2001 would find application to the case establishing the jurisdiction of the Italian judge.⁹⁹ On the other hand, if the matter is qualified as administrative, the abovementioned Regulation would not find application and the jurisdiction of the Italian judge will be waived by granting jurisdictional immunity to the classification societies.

Hence, the grant of immunity to the non-state actors is dependent on the qualification of their activities delegated by the Panamanian state as “administrative”, *i. e.* expression of governmental authority, or as “civil and commercial matters” falling in the category of *acta iure gestionis*. The notion of “civil and commercial matters” of the Regulation has been understood by the Court as autonomous, and to be interpreted in the light of the general principles common to the national legal systems and of the Regulation itself.¹⁰⁰ The extension of such notion to a specific case is determined by the elements characterizing the type of legal relations between the actors involved.¹⁰¹ In the case at hand, the nature of the relation between the Panamanian state and the classification societies might be considered differently depending on whether the societies were performing classification or a certification activities.¹⁰²

In order to avoid the automatic application of a norm of public international law to a subject that is not directly considered as part of this normative system, a solution may consist in the establishment of a presumption of non-applicability, that should be applied by national courts.

In other words, it is possible to suggest that when legal practitioners face the question of whether or not applying a norm of public international law to non-state actors, they should start with the assumption that these entities are *per se* not entitled to enjoy public international law norms. This is not to say that the ultimate result would exclude the application of the norm in every case. Rather, a careful consideration of all the relevant factual circumstances may deny or confirm the suitability of such application.¹⁰³

In civil procedure, the concept of *presumption* has a definite meaning. In particular, it is a rule according to which given a certain fact – known as primary fact – then another fact – the presumed fact – will also be taken as proved, unless evidence is provided by the opponent to rebut the presumption or contradict the presumed fact.¹⁰⁴ For instance, it is considered as a general presumption that all documents, whether ancient or modern, whether formal or informal, were drafted on the date written on the document.¹⁰⁵ According to another common law rule, a person who has disappeared and no one has heard from for seven years by those most likely to have heard from him is presumed dead.¹⁰⁶ In the same vein, the Italian Civil Code provides, for instance, that if the current owner has owned the same object in the past, it is presumed that he has also been the owner in the intermediate period.¹⁰⁷ These are all examples of a particular form of presumption, namely the presumption *juris tantum*, according to which the primary fact shifts the burden of proof of the presumed fact to the respondent who must provide evidence to disprove it.¹⁰⁸ The three main characteristics of this presumptions are: (1) they derive from law, (2) they apply to a class a set of conditions which are fixed and uniform, (3) they are drawn by court, and in the absence of opposing evidence they are conclusive for the party in whose favour they operate.¹⁰⁹

Indeed, it is necessary to establish which facts can be referred to when a court has to decide whether or not a non-state actor can be considered to be acting as a state and therefore entitled to enjoy public international law immunity. According to this reasoning, for the purpose of the application of international law, a private entity shall be presumed *not* to be an integral part of the state – or a state organ – even when it exercises elements of public authority. As a result, the responding private actor must provide evidence that it is in fact acting as an organ of the state, exercising elements of the governmental power delegated by the latter. This method would guarantee that only when precise factual circumstances are proved, the court should operate the extension of a public international law norm to a non-state actor. This approach seems to be confirmed by the abovementioned UK State Immunity Act that, for the purpose of the application of state immunity, does not include separate entities in the notion of a state, even if they exercise public authority.¹¹⁰ Also the case law analysed in the previous paragraphs shows how courts tend to primarily reason on the status of the entity and only when the entity is considered to be an integral part of the state do they turn to evaluate the features of the

activity involved. In this sense, it may be recalled that in the *Central Bank of Nigeria*, German courts affirmed that independent separate entities in principle enjoy “no immunity”.¹¹¹

This restrictive approach to the extension of immunity appears to be adopted by the EU as well. With regard to the protection of the activities conducted by naval classification societies delegated by states, Recital 16 of Directive 2009/15/EC adopts a restrictive approach in the extension of immunity to the delegated non-state actors. It explicitly excludes the possibility of extension of immunity, “which is a prerogative that can only be invoked by Member States as an inseparable right of sovereignty and therefore that cannot be delegated”.¹¹²

Doubts on the validity of Recital 16 might be raised in the case concerning the responsibility of the naval classification societies on the ground that it has not been transposed in the relevant national legislation, *i. e.* the Italian legal system. However, the role of recitals is not to set forth a normative precept, but to state the act’s validity and to provide for the principles essential for interpreting the normative content of the act.¹¹³ The ECJ has repeatedly expressed itself on the matter stating that the recital may resolve the ambiguity where the operative provision is not clear,¹¹⁴ and that it can help to explain the purpose and intent behind the legal instrument, determining the scope of the act.¹¹⁵ Hence, the function of a recital is not to provide for a normative provision itself but to explicit the purposes and the scope of the entire act.¹¹⁶ It follows that the material and punctual transposition of the single recital in a national provision is irrelevant for its applicability, and that the Directive 2009/15/EC – in its transposition in the Italian legal system – is to be read in the light of the restrictive approach to the extension of immunity stated in its Recital 16.¹¹⁷

Thus, immunity is a prerogative proper of sovereign states that in order to be extended to a non-state actor would require to prove its exercise of governmental power as delegated by the state. In other words, the main focus is on the nature of the link between the state and the entity. In fact, it would be too burdensome for any party other than the private actor to prove this link; therefore, it is the party that seeks to resort to international law that has to prove such relationship.

6 Conclusions

As seen, state courts are looking for a proper guidance in order to avoid the dangers of an automatic extension of immunity to non-state actors.

In the context of the new picture of international law that has been canvassed there are good reasons for applying a presumption of non-applicability of state immunity to non state-actors delegated to the exercise of public authority.

The first reason has to do with the effectiveness of the “rule of law”. Indeed, from the perspective of classical international law states are understood as a unitary entity with a uniform legal opinion. This conviction is a by-product of the principle of the rule of law that requires states to be organized pursuant to the principle of separation of powers, with the judiciary branch completely separated from the executive. However, this separation is sometimes not as neat as it is supposed to be. This separation might become particularly blurred in cases concerning state immunity, where there is a “tendency of some courts to defer to the assessment of the executive branch when deciding whether to grant immunity or not”.¹¹⁸ In these cases there is an actual risk that the assessment made by the executive is based more on foreign policy considerations rather than considerations derived from the rule of law principle, with the risk of provoking an effect of judicial self-restraint. The introduction of the presumption of non-applicability would limit the effects of such self-restraint to the extent that, regardless of the relevance of the private actors involved, immunity will not operate unless proven in court.

From a second perspective, the presumption of non-applicability is coherent with the idea that the publicness of international law should be preserved: indeed the element of “publicness” that might be present in the facts of a hypothetical case would need to be identified and proven in the proceeding. Moreover, considering that we are dealing with cases where state immunity might be extended to private actors, the presumption appears essential to enable a pondered adaptation of an institution of classic public international law to the mutating international legal order. As said, in the evolution from absolute to relative immunity, with the distinction between acts *iure imperii* and *iure gestionis*, the legal institution remains strongly anchored to the state as the subject of the act. Hence, an automatic application of immunity to non-state actors would be alien to the logic underpinning the institution. In fact, it would denature its function, with the risk to produce effects that go beyond, or are even incompatible, with its rationale. Instead of granting stability of international relations and inter-state cooperation, this extension of immunity carries along the potential effect of granting privileges to private entities that are unjustified in the international legal order.¹¹⁹ Furthermore, the presumption of non-applicability is coherent with the changing image of international law characterized by the emergence of phenomena of private governance. The increasing heterogeneity of actors along with the new structure that international law is

assuming requires a careful adaptation of the classical institutions developed within the Westphalian paradigm of international law, preventing any automatic application of the classic institutions to the new context and to new subjects therein.

A third reason has to do with the *nature* element. If the automatic application of immunity to an exercise of public authority by the state is justified by the nature of the state, it follows that whenever the public authority is delegated to a non-state actor it is no longer automatically covered by the nature-derived immunity. On the contrary, it would require an evaluation of the imperative character of the act that will need to be proven genuinely governmental. Such character cannot be assumed when the actor is not a state and imposes a factual and punctual analysis of the case in order to evaluate the possibility to extend the immunity to the delegated subject.

A fourth and last aspect is worth of consideration. An automatic extension of immunity to private subjects appears highly incoherent with the development that international public law has undergone in the recent decades. Indeed, the efforts of constitutionalization and democratization of the international legal system,¹²⁰ with the objective of enhancing legitimacy and the effective application of human rights, seems to go in the opposite direction. As argued by Trindade Cançado, the expansion of international law came along with the abandonment of Hegelian and neo-Hegelian conceptions of the state, as the final repository of individual freedoms and responsibilities, towards a more humanized dimension of public international law.¹²¹ Such an easy extension of immunity to private actors would frustrate not only the work undertaken so far in the direction to render accountability effective when it comes to human rights violation, but also the very legitimacy of the institutions of immunity itself. Indeed the extension of this traditional elements of international law should be carefully limited to its Westphalian assumptions and dimension, without any broad interpretation or automatic extension beyond the inter-state dynamic.

In the light of the abovementioned reasons, it is crucial to find a rule that state courts can apply when deciding upon the possibility of extension of immunity to non-state actors. The relevant case law on the matter refers to various tests¹²² in order to determine such an extension. However, they appear to extend too much or not enough the application of immunity. Looking at the nature and the function of this legal institution, as well as at the recent jurisprudential developments, this contribution proposes the application of the presumption of non-applicability of immunity to non-state actors. Presumption that can be confuted upon the proof of the exercise of governmental authority the private delegated actor.

Article Note: Though the contribution is an overall joint effort of the authors, par. 1, 5 and 6 are authored by Alberto Oddenino and par. 2,3,4 and 6 are authored by Diego Bonetto.

Notes

- 1 R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1998), 18.
- 2 J. Crawford, *Brownlie's Principles of International Law* (Oxford University Press, 2008), 116; A. Cassese, *International Law* (Oxford University Press, 2005), 72; W. Friedmann, *The Changing Structure of International Law* (Columbia University Press, 1964), 67, quoting P. Jessup, *A Modern Law of Nations*, 1948.
- 3 See generally, A. Cassese, *supra* (2), 22–45; the processes of mutation taking place at the international level are characterised by different patterns – like the absence of a unitary sovereign – that make such processes happening at a slower pace if compared to the ones happening within national borders, on this point see A. Pellet, “L’adaptation du droit international aux besoins changeants de la société internationale,” *Collected Courses of the Hague Academy of International Law*, 329 (2007): 18.
- 4 See e. g. The International Institute for Agriculture set up in 1905 or the various River Commissions (for the Rhine and Danube); see also *Jurisdiction of the European Commission of the Danube Between Galatz and Braila, France, and others v Romania*, Advisory Opinion, 1927, PCIJ, (Series B) No 14, ICGJ 281.
- 5 A. Cassese, “States: Rise and Decline of the Primary Subjects of the International Community,” in *The Oxford Handbook of The History of International Law*, eds. B. Fassbender, A. Peters (Oxford University Press, 2012), 66; *Reparation for injuries suffered in the service of the Nations*, Advisory Opinion, 1949, ICJ Rep 174.
- 6 E. Benvenisti, “The Law of Global Governance,” *Collected Courses of the Hague Academy of International Law* 368 (2013): 74.
- 7 C. Dominicé, “La société internationale à la recherche de son équilibre,” *Collected Courses of the Hague Academy of International Law* 370 (2013): 32.
- 8 See generally C. Menkel-Meadow, “Why and How to study Transnational Law,” *UC Irvine Law Review* 1, no.1 (2001): 97–129.
- 9 H. Thirlway, *The Sources of International Law* (Oxford University Press, 2014), 17.
- 10 M. Wagner, “Non-State Actors,” in *Max Planck Encyclopedia of Public International Law*, ed. R. Wolfrum (Oxford University Press, 2009), 1.
- 11 On the softening of international law see P. M. Dupuy, “Soft Law and the International Law of the Environment,” *Michigan Journal of International Law* 12 (1991): 420–435. For a social science-oriented perspective to soft law see A. T. Guzman and T. Meyer, *Soft Law*, in *Economic Analysis of International Law*, E. Kontorovich and F. Parisi (eds.), Elgar Publishing, 2016.
- H. THIRLWAY, *supra* (7), p. 199. A more cautious position can be found in J. d’ASPREMONT and, “Softness in International Law: A Self-Serving Quest for New Legal Materials,” *The European Journal of International Law*, Vol. 19, no. 5, 2008.
- 12 H. Thirlway, *supra* (7), 199, 5, 2008.
- 13 J. Klabbers, “Law-Making and Constitutionalism,” in *The Constitutionalization of Interantional Law*, eds. J. Klabbers, A. Peters, and G. Ulfstein (Oxford University Press, 2009), 98.

- 14 On the informal law-making role of private institutions (PIs) that, notwithstanding the “soft” nature of their acts, produce *de facto* binding norms, see BENVENISTI, *The Law of Global Governance*, p. 89: private institutions “actually possess means to set and enforce standards that are binding *de facto* due to the market share of the PI members. The PIs do not seek formally binding norms, because they do not need legal formality to make their standards widely effective.”
- 15 P. Berman, “From International Law to Law and Globalisation,” *Journal of Transnational Law* (2004–2005): 485–556; S. Cassese, “The Globalization of Law,” *International Law and Politics* 37 (2006): 973–993.
- 16 R. Wessel, J. Pauwelyn, J. Wouters, *Informal International Law-Making* (Oxford University Press, 2012), at 1.
- 17 H. Kelsen, *Pure Theory of Law*, (2nd edn., tr by Max Knight, 1967), 281–284.
- 18 D. Kennedy, “The Stages of the Decline of the Public/Private Distinction,” *University of Pennsylvania Law Review* 130 (1981–1982): 1352; and N. Fraser, *Unruly Practices: Power, Discourse, and Gender in Contemporary Social Theory* (University of Minnesota Press, 1989).
- 19 See amongst many L. Oppenheim, *International Law. A Treatise*, 1905; J. Westlake, *International Law*, 1904; more recently P. Weil, “Towards Relative Normativity in International Law?,” *American Journal of International Law* 77 (1983): 441; K. Doehring, “Democracy and International Law,” in *Multiculturalism and International Law*, eds. S. Yee and E. Mc Whinney Morin (2009), 199–205.
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- 22 Bogdandy, Goldmann, Wenzke, ‘From Public International Law to International Public Law’, p. 5.
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- 27 On the matter see also Chinkin, A Critique of the Public/Private Dimension, p. 389.
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- 31 Ellickson provides an analysis of the parallel between municipalities and homeowners’ associations (see R. Ellickson, “Cities and Homeowners associations,” *University of Pennsylvania Law Review* (1982): 1519).
- 32 On the matter of the governmental or private character of state activities see *Sonntag v. Waidmann and others*, April 21, 1993, C-172/91, par 21.
- 33 For a deeper analysis on this matter see Lawrence, “Private Exercise of Governmental Power,” p. 648.
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- 35 K. Abbott and others, “The Concept of Legalization,” *International Organization* 54, no. 3 (2000): 401–419.
- 36 See generally F. Francioni and N. Ronzitti, *War by Contract, Human Rights, Humanitarian Law and Private Contractors* (Oxford University Press, 2011).
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- 38 Commentary to draft art. 7, para 18: Report of the ILC, 26th Session, *ILC yearbook 1974*, Vol II(1), p. 282.
- 39 Abbott and others, “The Concept of Legalization,” p. 418: “Deciding disputes, adapting or developing new rules, implementing agreed norms, and responding to rule violations all engender their own type of politics, which helps to restructure traditional interstate politics”.
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- 42 A. Peters, “Immune Against Constitutionalisation?,” in *Immunities in the Age of Global Constitutionalism*, eds. A. Peters, E. Lagrange, S. Oeter, and C. Tomuschat (Martinus Nijhoff, 2014), 1.
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- 45 US Supreme Court., *Mohamed Ali Samantar v. Bashe Abdi Yousuf et al.*, June 1, 2010, 560.
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- 47 H. Fox and F. Webb, *The Law of State Immunity* (Oxford: Oxford University Press (3d ed.), 2013), 7.
- 48 Peters, “Immune Against Constitutionalisation?,” p. 2.
- 49 *Ibid.*, p. 17.
- 50 S. El Sawah, *Les immunités de l’Etat et des organisations internationales: immunités et procès équitable* (Bruxelles: Larcier, 2012), para. 22.
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- 52 *Al-Quraishi v. Nakhla*, US Maryland District Court, 2010, 728 F. Supp. 2d 702.
- 53 X. Yang, *State Immunity and International Law* (Cambridge University Press, 2012), 232.
- 54 *Trendtex Trading Corporation v. Central Bank of Nigeria*, England Court of Appeal, 1977, *International Law Reports*, Vol. 64, p. 147.
- 55 *Ibid.*
- 56 Section 14 UK *State Immunity Act*, reads as follows: “The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom; and references to a State include references to (a) the sovereign or other head of that State in his public capacity; (b) the government of that State; and (C) any department of that government, but not to any entity (hereafter referred to as a “separate entity”) which is distinct from the executive organs of the government of the State and capable of suing or being sued.
- 57 *Tsavliris Salvage (International) Limited v. The Grain Board of Iraq*, 2008, EWHC 612, 2 Lloyd’s Rep 90.
- 58 *Central Bank of Nigeria Case*, Landgericht of Frankfurt, 1976, *International Law Reports*, Vol. 65, p. 131 ff.
- 59 *NIOC Pipeline Contracts Case*, Germany, 1982, *International Law Reports*, Vol. 65, p. 212ff and *NIOC Legal Status Case*, Germany, 1980, *International Law Reports*, Vol. 65, p. 199 ff.

- 60 *Central Bank of Nigeria Case*, *supra* (36), p. 134.
- 61 *Ibid.*
- 62 *NIOC Pipeline Contracts Case*, *supra* (37), pp. 213–214.
- 63 *National Iranian Gas Corporation v. Pipeline Services and Another*, Cour de Cassation, 1990, *International Law Reports*, Vol. 113, p. 446 ff.
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- 65 *Banco de la Nacion Lima v. Banco Cattolico del Veneto*, Switzerland Federal Tribunal, 1984, *International Law Reports*, Vol. 82, p. 10 ff.
- 66 *Consorzio Agrario della Tripolitania v. Federazione Italiana Consorzi Agrari and Cassa di Risparmio della Libia*, Corte di Cassazione, 1966, *International Law Reports*, Vol. 65, p. 265 ff.
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- 70 *Ibid.*; see also J. Crawford, *State Responsibility, The General Part* (Cambridge University Press, 2013), 127.
- 71 ARSIWA Commentary, Article 5, para. (6).
- 72 *Ibid.*
- 73 *Ibid.*, at 94.
- 74 *Schering Corporation v. Iran*, US-Iran Claims Tribunal Reports 362, at 370.
- 75 *EDF (Services) Limited v. Romania*, International Centre for Settlement of Investment Dispute (ICSID) Case No. ARB/05/13, at 197–198.
- 76 *Trendtex*, *supra* (32), p. 147.
- 77 *Borri v. Repubblica Argentina*, Corte di Cassazione, 2005, in *Rivista di diritto internazionale privato e processuale*, 2005, p. 1091.
- 78 *Naku v. Lithuania and Sweden*, ECtHR, 2016, Application No. 26126/07, at 94–95.
- 79 Article 2(2) UN Convention on Jurisdictional Immunities of States and their Property, *supra* (5).
- 80 *Borri v. Repubblica Argentina*, *supra* (55), p. 1094.
- 81 See e. g. B. I. Bonafè, “State Immunity and the Protection of Private Investors: the *Argentine Bonds Case* Before Italian Courts,” *Italian Yearbook of International Law* XVI (2006): 165–185.
- 82 Reply received by Italy regarding the Convention on Jurisdictional Immunities of States and Their Property, 2001, UN Doc. A/56/291/Add. 1: “Italy considers the ‘nature test’ to be in principle the sole criterion for determining the commercial character of a contract or transaction”. See also I. Pingel, ‘Observations sur le convention du 17 janvier 2005 sur les immunités juridictionnelle des États et de leurs biens,’ *Journal de Droit International* 132, no. 4 (2005): 1048.
- 83 Article 2(2) UN Convention on Jurisdictional Immunities of States and Their property reads as follows: “In determining whether a contract or transaction is a “commercial transaction” under paragraph 1 (c), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction”.
- 84 *Trendtex*, *supra* (32), p. 111.
- 85 *C. Czarnikov Ltd v. Rolimpex*, England Court of Appeal, 1977 and House of Lords, 1978, *International Law Reports*, Vol. 64, p. 195.
- 86 *Congreso del Partido*, House of Lords, 1981, *International Law Reports*, Vol. 64, p. 316.
- 87 *Ibid.*
- 88 *Banque Central de la République de Turquie v. Weston Compagnie de Finance et d’Investissement SA and Another*, Switzerland Federal Tribunal, 1978, *International Law Reports*, Vol. 64, p. 417.
- 89 Peters, “Immune Against Constitutionalisation?,” p. 6.
- 90 ECtHR, *Waite and Kennedy*, Appl. No. 26083/94, judgment of February 18, 1999.
- 91 ECtHR, *Al-Adsani v. United Kingdom* (Grand Chamber), application No. 35763/97, judgment of November 21, 2001, ECHR Reports 2001-xi, p. 101, and *Kalogeropoulou and Others v. Greece and Germany*, Application No. 59021/00, decision of December 12, 2002, ECHR Reports 2002-x, p. 417, quoted in ICJ, *Jurisdictional Immunities* (n.3), para. 90.
- 92 ECtHR, *Jones and others v. uk*, appl. nos. 34356/06 and 40528/06, judgment of January 14, 2014, para. 197.
- 93 As emerged from a study conducted more than two decades ago, relative state immunity was a rule of international customary law formed through the convergence of state practice and opinio iuris since the late 1970s; see Y. I. Pingel-Lenuzza, *Les immunités des Etats en droit international* (Bruxelles: Bruylant, 1997), 4–11.
- 94 See Yang, *State Immunity*, p. 4, when explaining the practice of national courts to rely on foreign cases the author states that “such references constitute a persistent feature in cases of State immunity”.
- 95 See, among others, A. Roberts, “Comparative International Law? The Role of National Courts in Creating and Enforcing International law,” *International and Comparative Law Quarterly*, no. 60: 62–63.
- 96 See Yang E. Kadens and E. A. Young, “How Customary is Customary International Law?,” *William & Mary Law Review* 54, no. 3 (2013): 885.
- 97 *Abdel Naby Hussein Mabrouk Aly and others v. Rina s.p.a.*, sentenza Tribunale di Genova, March 12, 2012.
- 98 More precisely, the Italian Tribunal in the request for preliminary ruling (Case C-641/18) questions whether “articles 1(1) and 2(1) of Regulation (EC) No 44/2001 of December 22, 2000 [should] be interpreted – particularly in the light of Article 47 of the Charter of Fundamental Rights of the European Union, Article 6(1) of the European Convention on Human Rights and recital 16 of Directive 2009/15/EC – as preventing a court of a Member State from waiving its jurisdiction by granting jurisdictional immunity to private entities and legal persons carrying out classification and/or certification activities, established in that Member State, in respect of the performance of those classification and/or certification activities on behalf of a non-EU State, in a dispute concerning compensation for death and personal injury caused by the sinking of a passenger ferry and liability for negligent conduct.”
- 99 The Regulation (EC) No 44/2001 establishes the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. In particular, art. 1(1) and 2(1) provide respectively that:

This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters;

Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

- 100 See the ECJ judgement of November 15, 2018, C-308/17, *Kuhn*, EU:C:2018:91, § 32.
- 101 On the nature of this determination see the ECJ judgement of September 12, 2013, C-49/12, *Sunico*, EU:C:2013:545, § 33.
- 102 On the relevance of the distinction between classification and certification activities for the extension of immunity to delegated non state actors see V. Ulfbeck and A. Mollmann, and “Public Function Liability of Classification Societies,” in *Certification – Trust, Accountability, Liability*, Studies in European Economic Law and Regulation, ed. P. Rott (Springer, 2019).
- 103 This line of reasoning finds a confirmation in the recently delivered Opinion of the A.G. Maciej Szpunar to the Case C-641/18, in which the reflection on immunity has been linked to art. 47 of the EU Charter of Fundamental Rights, see Opinion of the Advocate General Szpunar to the Case C-641/18 delivered January 14, 2020.
- 104 P. Murphy, *Evidence* (Blackstone Press Limited, 1997), 94.
- 105 *Anderson v. Weston* (1840) 6 Bing. N.C. 296, 300–306, as reported in M. N. Howard and others, *Phipson on Evidence* (Sweet & Maxwell, 1990), 93.
- 106 *Bullock v. Bullock* (1960) 1 WLR 975.
- 107 Article 1142, Italian Civil Code reads as follows (Italian version): “Il possessore attuale che ha posseduto in tempo più remoto si presume che abbia posseduto anche nel tempo intermedio”.
- 108 F. P. Luiso, *Diritto Processuale Civile, Vol. II* (Giuffrè, 2015), 86.
- 109 M. N. Howard and others, *supra* (69), p. 84.
- 110 Section 14 UK *State Immunity Act, supra* (34).
- 111 *Central Bank of Nigeria Case*, Landgericht of Frankfurt, *supra* (36), p. 134.
- 112 In providing common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations, Recital 16 of Directive 2009/15/EC states that: “When a recognised organisation, its inspectors, or its technical staff issue the relevant certificates on behalf of the administration, Member States should consider enabling them, as regards these delegated activities, to be subject to proportionate legal safeguards and judicial protection, including the exercise of appropriate rights of defence, apart from immunity, which is a prerogative that can only be invoked by Member States as an inseparable right of sovereignty and therefore that cannot be delegated”.
- 113 On the function and role of recitals see M. den Heijer, T. van Os van den Abeelen, and A. Maslyka, “On the Use and Misuse of Recitals in European Union Law,” *Amsterdam Law School Legal Studies Research Paper* No. 2019–31, pp. 3 ss; and T. Klimas and J. Vaiciukaite, “The Law of Recitals in the European Community Legislation,” *ILSA Journal of International and Comparative Law* 15, no. 1: 75 ss.
- 114 See, for instance, Case C-244/95, *Moskof v Ethnikos Organismos Kapnou*, EU:C:1997:551, § 44; Case C-435/06, C, EU:C:2007:714, § 51–52.
- 115 See Case C-173/99, BECTU, EU:C:2001:356, § 37–39.
- 116 This point emerges also from the Joint Practical Guide for drafting EU legislation, O.J. 1999, C 73/1, Interinstitutional Agreement on common guidelines for the quality of drafting of Community legislation; see also van Os van den Abeelen et al., “On the Use and Misuse of Recitals,” p. 5.
- 117 On the specific relevance of the Recital 16 of Directive 2009/15/EC see L. Neyret, “L’affaire *Erika*: moteur d’évolution des responsabilités civile et pénale,” *Recueil Dalloz*, 2010, 2238; and A. Spagnolo, “Società private delegate di pubbliche funzioni e immunità statale: tendenze e problemi,” *Questione Giustizia* (2015).
- 118 Peters, “Immune Against Constitutionalisation?,” p. 8.
- 119 El Sawah, *Les immunités de l’Etat*, para. 22; see also J. Verhoeven, *i Le droit international des immunités: consolidation ou contestation?* (Paris: Librairie Générale de Droit et Jurisprudence (LGDJ), 2004), 5–8.
- 120 See among many Peters A. Wiener, A.F. Lang, J. Tully et al., “Global Constitutionalism: Human Rights, Democracy and the Rule of Law,” *Global constitutionalism*, no. 1 (2012), 1; and Peters et al., *Immunities in the Age of Global Constitutionalism*, pp. 18–19.
- 121 A. A. Trindade Cançado, “International Law for Humankind: Towards a new *ius gentium*,” *Collected Courses of the Hague Academy of International Law* 317 (2005): 269–270.
- 122 See § 4.