**Shared Foundations and Conceptual Differentiation in Immunities from Jurisdiction**

**Professor J. Craig Barker**

**Dean of the School of Law and Social Sciences**

**London South Bank University**

**1. Introduction**

The issue of immunities from jurisdiction is one of the most controversial in contemporary international law. The reasons for this are many and varied. They include, for example, the increasing expansion of the extraterritorial reach of domestic civil and criminal jurisdiction,[[1]](#footnote-1) as well as advances in new and expanding areas of international law, such as human rights and international criminal law, in the context of which the law relating to immunities from jurisdiction is increasingly challenged.[[2]](#footnote-2) Unfortunately, much of the current controversy concerning immunities from jurisdiction derives from misunderstandings, accidental or deliberate, about the nature and purpose of immunities from jurisdiction.

There is a clear tendency, particularly in the academic literature and in some judicial dicta, to conflate the various forms of immunity into one single concept, and then, in some cases, to denigrate the notion of immunity as out-dated, State-centric and distorted. Some of this criticism of the concept of immunities is undoubtedly valid and worthy of further analysis and critique. The idea that immunities from jurisdiction, which are, by their very nature positivist constructs, are themselves somehow immune from challenge should be rejected. Nevertheless, if the challenge is merely an attempt to sweep aside all forms of immunity from jurisdiction in pursuit of a “greater” agenda of human rights and human dignity, then that process itself might have some very considerable and problematic unintended consequences.

The purpose of this Chapter is to seek to clarify and explain the conceptual and theoretical differences between the many different forms of immunity and to argue for a much more nuanced and specific understanding of immunities from jurisdiction in international law. It is suggested that part of the problem in distinguishing between the different types of immunity is the rather obtuse and unhelpful use of Latin maxims that serve simply to obfuscate the various concepts. Accordingly, this Chapter will eschew these maxims and seek to distinguish between various forms of immunity based on their history, necessity and importance. Ultimately, it will be argued that it is only through analysing the shared foundations and conceptual differentiation of immunities from jurisdiction that we can advance multifaceted solutions to what is the complex problem of understanding immunities from jurisdiction.

**2. The Personal Immunity of State Representatives Serving Abroad**

A. Diplomatic Agents

It is well-known and generally accepted that the first form of immunity from jurisdiction developed during ancient times in relation to the treatment of envoys or messengers. There is considerable evidence, particularly during the time of the Ancient Greeks and Ancient Romans,[[3]](#footnote-3) that representatives from “others” when travelling to or arriving in a foreign territory, were accorded a form of inviolability insofar as they were not subject to interference to their person or to their mission.[[4]](#footnote-4) Whether or not this inviolability amounted to diplomatic immunity is moot, and depends essentially upon the level of development of the jurisdiction from which the envoy or messenger could have been said to be immune. The original justification for the granting of such inviolability was simple necessity, backed up by a form of religious sanctity.[[5]](#footnote-5)

As diplomatic relations developed, so too did the sophistication of diplomatic law. Through the relative professionalism of Byzantine diplomatic method,[[6]](#footnote-6) to the austerity of the “international” relations of the Pope,[[7]](#footnote-7) diplomatic inviolability came to be more and more firmly established. By the time of the establishment of permanent diplomatic relations in the middle of the fifteenth century, the necessity of providing more developed rules of diplomatic law, including rules concerning the immunity from local jurisdiction of ambassadors and their retinue was gradually addressed, primarily by writers and theorists. Initially, the writers of the period drew on Roman Law doctrines and practices, these doctrines and practices having themselves been influenced by notions of Natural Law. [[8]](#footnote-8) However, by the time Grotius published his *De Jure Belli Ac Pacis* in 1625, the so-called classical writers had begun to study contemporary state practice as the basis of diplomatic law, instead of relying on an extension of Roman Law doctrines which provided insufficient explanation of the diplomatic relations between different states.[[9]](#footnote-9)

Three apparently competing theoretical explanations emerged during this period as the juridical explanation for the granting of immunity to ambassadors.[[10]](#footnote-10) The earliest, and arguably most important of these was the so-called “representative character” theory. In fact, this theory consisted of a range of theories that “ultimately traces immunity to the sovereignty of the State [or sovereign] which sends the agent”.[[11]](#footnote-11) A second theory of diplomatic immunity that emerged in the early period of permanent diplomatic relations was the “exterritoriality” theory. This theory considered ambassadors to be outside not only the jurisdiction of the receiving state but actually physically resident outside its territory. Ambassadors pursued their daily activities as if in a bubble of their own State’s territory and jurisdiction. The genesis of the theory is disputed and is often ascribed to a mistranslation of the words of Grotius by later writers.[[12]](#footnote-12) Additionally, the theory has always been described as a fiction,[[13]](#footnote-13) and gave rise to some absurd situations.[[14]](#footnote-14) The theory was gradually discredited to the extent that it was abandoned as a basis of diplomatic immunity around the turn of the twentieth century,[[15]](#footnote-15) and was not considered during the negotiation of the Vienna Convention on Diplomatic Relations 1961. In spite of this, the theory remains popular as a descriptive explanation for diplomatic law, particularly in the popular media. A third theory of “functional necessity” updated and formalised the reliance on the necessity of diplomatic intercourse that had characterised the early according of diplomatic inviolability. Although not initially considered as the primary justification for the granting of diplomatic immunity, all of the classical writers referred, to a greater or lesser extent, to the protection of the diplomatic function. Arguably the greatest emphasis on the necessity of the diplomatic function was placed by Vattel who argued that: “ambassadors and other public ministers are necessary instruments in the maintenance of that general society of nations and of that mutual intercourse between them.”[[16]](#footnote-16)

The juridical basis of diplomatic law today is quite clearly based on functional necessity. Thus, the preamble to the Vienna Convention on Diplomatic Relations 1961 notes that “the purpose of [diplomatic] privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions …”[[17]](#footnote-17) Functional necessity is not an absolute concept and depends on “degrees of necessity”. On the other hand, the immunity of a diplomat cannot be limited strictly to the performance of diplomatic function. Rather, as Ogdon puts it, functional immunity “demands the immunity necessary to permit the agent to perform the *bona fide* diplomatic functions in complete freedom, independence and security”.[[18]](#footnote-18)

In particular, it must be remembered that ambassadors, and other diplomatic agents, and their families are not occasional visitors to the jurisdiction of other States. Their primary function is to live in the territory of the receiving State, to represent the sending State, protecting its interests and those of its nationals, to negotiate on behalf of the sending State, interacting on a daily basis with officials, but also with the ordinary population of the receiving State with the view to the promotion of friendly relations.[[19]](#footnote-19) The importance of the “representative character” of diplomatic agents is acknowledged in the Preamble to the Vienna Convention which describes diplomatic agents “as representing States”. This is not simply a throwaway phrase but is, rather, a reminder of the important role that diplomatic agents play in the conduct of international relations. The immersion of diplomatic personnel within the jurisdiction of the receiving State is complete and their immunity is part of a broader, self-contained regime of privileges and immunities that serve not only to facilitate diplomatic relations but also to provide protection for these individuals from the activities of the receiving State and from its populace who will often not share the same legal, political or religious interests and beliefs.[[20]](#footnote-20) Accordingly, attempts to reduce or limit diplomatic immunity should be considered only with serious forethought and due and careful consideration of the possible consequences not only for international relations but also for the individuals whose lives may be adversely affected.

B. Consular Officials

The origins of consular relations can be traced back almost as far as those of diplomatic agents, if not further. It has been pointed out, for example, that the Ancient Roman office of *preator peregrinus* can be considered as the forerunner of modern consulates.[[21]](#footnote-21) It is unlikely, however, that holders of these offices were entitled to any form of immunity or even inviolability.[[22]](#footnote-22) Nevertheless, as trading relations developed over the ensuing centuries, the practice of granting capitulations emerged.[[23]](#footnote-23) Capitulations were agreements between nations conferring rights and privileges on foreign subjects trading in one another’s territories. In some cases, these capitulations effectively rendered the recipients outside the jurisdiction of the local territory. As a result, certain trading posts acquired a degree of autonomy and the right to appoint special magistrates or judges known as “consuls”, whose competence came to comprise “all civil and criminal jurisdiction over, and protection of, the privileges, rights and property of their countrymen.”[[24]](#footnote-24)

As international trade continued to grow, sovereigns increasingly took control of appointing consuls and increasingly relied on them to undertake the business of the State, particularly in far-flung territories. However, as Zourek makes clear, “to do so, they had to be vested with sufficient authority, hence the need for the consul judge to become a real public minister. So the State took over the right to send consuls, who ceased to represent the traders, and became official State representatives performing certain diplomatic functions and enjoying corresponding privileges and immunities.”[[25]](#footnote-25) This period of development was rather short-lived. Numerous factors contributed to what became a significant diminution of the powers of consuls. The extraterritoriality of foreign citizens was increasingly recognised as incompatible with the sovereignty of the host State and many of the judicial powers previously enjoyed by consuls were ‘returned’ to the host State. In addition, the growth and spread of permanent diplomatic missions in the sixteenth and seventeenth centuries resulted in the removal from consuls of diplomatic powers, although the ‘representative character’ of consuls remained disputed until at least the nineteenth century.[[26]](#footnote-26) The functions of consuls were therefore, somewhat radically reduced to those functions, fulfilment of which might well have been the original rationale for the emergence of the institution, that is, ‘the task of looking after the interest of the State and its citizens, *particularly in trade, industry and shipping*’.[[27]](#footnote-27)

There was some dispute among the classical writers about the extent of the privileges and immunities of consuls. Wicquefort and Bynkershoek, for example, were unwilling to accord any privileges and immunities. However, Vattel took a more balanced approach. Writing in *Les Droits Des Gens* in 1751, Vattel identified consuls as “persons sent by a Nation to the chief commercial towns, and especially the ports, of foreign countries, with a commission to watch over the rights and privileges of their Nation, and to settle differences that may arise between its merchants”. Crucially, for Vattel, the exchange of consuls was a sovereign or governmental matter. Thus, he noted that “a Nation which wishes to send [a consul] must obtain the right to do so in its treaty of commerce”. Furthermore, the consul, “being entrusted with the affairs of his sovereign and receiving orders from him, remains subject to him and accountable to him for what he does”.

The modern juridical basis for the granting of consular privileges and immunities is clearly stated in Paragraph 5 of the Preamble to the 1963 Vienna Convention on Consular Relations as being “to ensure the efficient performance of functions by consular posts”. However, once again, reference back to representative character is apparent from the final phrase of that paragraph which notes that those functions are fulfilled “on behalf of their respective States”. Crucially, it should be remembered that consular officials, like their diplomatic cousins, are not itinerant visitors to foreign States but, rather live and work there acting on behalf of their sending States. It is this final element, as much as any other, that requires the granting of a significant degree of privileges and immunities.

3. The Personal Immunity of State Representatives Not Serving Abroad

A. Heads of State and High-Ranking State Officials

While the immunity of diplomats and, to a lesser extent, that of consular officials can be traced back at least to the time of the ancients, the same cannot be said of the immunity of foreign sovereigns or, indeed, to the immunity of foreign States,[[28]](#footnote-28) which are of much more recent origin. This is partly due to the fact that the use of envoys limited the need for leaders personally to undertake missions abroad. In cases where leaders chose personally to negotiate with their counterparts, considerations of treatment and safety would have been foremost in their deliberations and negotiations when deciding to travel. Moreover, at least until the latter Middle Ages, the lack of equality between sovereigns meant that there was no need to consider questions sovereign immunity. It is certainly the case that during the period when Christendom was considered to be a Commonwealth, individual leaders would be subject to the overriding authority of the Pope. Most importantly, however, the notion of sovereignty was yet to fully emerge.

The Peace of Westphalia 1648, which brought an end to the Thirty Years War, resulted in a new legal and political order, the cornerstone of which was territorial sovereignty. Writing in 1651, Thomas Hobbes laid the foundations of this new order in his acclaimed work *Leviathan*. Insofar as Hobbes’s sovereign was not subject to external interference the possibilities for international law were limited. On the other hand, the work of earlier writers remained influential. With regard to sovereignty, writers such as Gentili argued that human society was united. Drawing on the work of Plato and Baldus he argued that the restraints on private citizens should apply equally to sovereigns. Specifically, according to Gentili, ‘as a private citizen conducts himself with reference to another private citizen, so ought it to be between one sovereign and another’.[[29]](#footnote-29) Similarly, Grotius believed in the society of States and argued that the sovereignty of kings did not permit them to ignore the law of nature, divine law, nor, indeed the law of nations.[[30]](#footnote-30) In relation to the specific question of the position of foreign sovereigns vis-à-vis one another both Gentili and Grotius undertook an extensive discussion of their roles both at home and abroad. However, nowhere did they consider directly the question of their immunity, nor even their inviolability. However, other contemporary writers, including, most notably, Richard Zouche, did consider the question and concluded that sovereigns who were found in the territory of another were subject to the jurisdiction of the territorial courts in the same way that private citizens would be.[[31]](#footnote-31) This opinion would seem to fit with the idea that sovereigns had exclusive control over the territory of their state and would not seem to contradict any of the views put forward by Gentili or Grotius. On the other hand, another of the classical writers, Cornelius van Bynkershoek, “could not see at all why a prince in the dominions of another cannot exercise the rights of sovereignty”.[[32]](#footnote-32) Bynkershoek linked his argument in favour of the immunity of sovereigns directly to the immunity of ambassadors. According to Bynkershoek:

[I]f ambassadors, who represent the prince, are not subject either in the matter of contracts or of crimes to the jurisdiction of him in whose country they are serving as ambassadors … are we to come to the opposite conclusion in the case of the prince? Shall we decline to accept in the case of the prince, who is himself present and happens to be transacting his business in person, a situation which reason and the consent of all nations has accepted in the case of ambassadors solely because they represent the prince and are the interpreters of his message? Is not his inviolability greater than that of his ambassadors?[[33]](#footnote-33)

In fact, as *Oppenheim* points out, there are many reasons for the granting of immunity to foreign sovereigns, or, as *Oppenheim* refers to them, Heads of State:

The basis for the special treatment accorded to Heads of State is variously ascribed, inter alia to the dignity which is a recognised quality of States as international persons ...; the respect due to them as representatives of sovereign States; their personal character as sovereigns (in the case of monarchs); the equality and independence of sovereigns and sovereign States and the principle *par in parem non habet imperium*; the incompetence of municipal law in an essentially international relationship; the practical need to ensure the free exercise by him of his functions as the highest organ of the State; the requirements of satisfactory international intercourse; the implied licence of the State being visited; and the dictates of international comity and courtesy. At one time or another each of these considerations has to a greater or lesser degree played its part, in conjunction in particular countries with purely domestic considerations, such as the English doctrine that the Crown could not be sued in its own courts.[[34]](#footnote-34)

Given that the origins and juridical foundations of the immunity of Heads of State is so contested, it is perhaps not surprising that there is no international treaty dealing with the issue. However, it appears that customary international law now provides for the immunity of both Heads of State and other senior State officials.[[35]](#footnote-35) This immunity is commensurate with that of diplomatic agents.[[36]](#footnote-36) The essence of the modern conception of such immunity, as with diplomatic and consular immunity, embraces concepts of functional necessity and representative character. As was made clear by the Institute of International Law in 2001, in its non-binding resolution on the immunities of Heads of State and of Governments, “immunities are granted to a Head of State or a Head of Government, as a representative of that State and not in his or her personal interest, because this is necessary for the exercise of his or her functions and the fulfilment of his or her responsibilities in an independent and efficient manner …”[[37]](#footnote-37) Crucially, and perhaps somewhat confusingly given what has been said above about diplomats and consular officials living in the territory of the receiving State, the immunity of Heads of State and senior officials applies while they remain in post *erga omnes* at all times, wherever they may be located.[[38]](#footnote-38) The position of former Heads of State and senior officials was addressed in the *Pinochet* litigation and relates more directly to State immunity and will be addressed as such in the following sections.

**3. The Immunity of the State**

Historically there was no comparable juridical foundation for the immunity of the State as was apparent in relation to diplomatic and consular agents, nor even to the more limited and controversial justification for the immunity of the sovereign. The case of *The Schooner Exchange v McFaddon* which is often held up as the starting points for the development of the concept of sovereign (or State) immunity evidences this lack of juridical foundation rather well.

The circumstances of *The Schooner Exchange* are well known and will not be further rehearsed here. Suffice to say that the vessel in question had belonged to two private citizens of the US and was seized on the high seas by French forces and later refitted as a French warship. When the vessel was forced to put into an American port during a storm, the vessel was seized, arrested and detained in pursuance of an action raised by the libellants, including Mr McFaddon. On 4October 1811, a District judge dismissed the libel, with costs, on the ground that ‘a public armed vessel of a foreign sovereign, in amity with our government, is not subject to the ordinary judicial tribunals of the country, so far as regards the question of title, by which such sovereign claims to hold the vessel’. The Circuit Court reversed this decision on 28 October 1811, although the basis of this reversal is not clear. The matter was appealed by the District Attorney to the Supreme Court of the United States.

Before the Supreme Court, Mr Dallas noted that the vessel had arrived in the United States in distress and that no agreement to submit to the jurisdiction of the United States could be presumed. Furthermore, there was, according to Dallas, ‘no implied waiver of the peculiar immunities of a public vessel’.[[39]](#footnote-39) Dallas was also concerned that to allow one individual to raise a claim against a sovereign state would cause considerable difficulty in the future: ‘The peace of our ports and harbours would be at the mercy of the individuals. It would be impossible to carry it into practice. The sentence of the Court could not be executed. It is beautiful in theory to exclaim “*fiat justicia – ruat coelum*” but justice is to be administered with a due regard to the law of nations and to the rights of other sovereigns’.[[40]](#footnote-40) Dallas accepted that the private acts of a sovereign in a foreign state fell within the jurisdiction of the courts of that state and noted specifically that ‘if a sovereign descend from the throne and becomes a merchant, he submits to the laws of the country. If he contracts private debts, his private funds are liable … the distinction is between his private acts, and his acts as sovereign, and between his private and public property’. Ultimately, Dallas accepted that the vessel had been seized by France but that this had been done by virtue of the sovereign prerogative. According to Dallas, ‘whenever the act is done by a sovereign in his sovereign character, it becomes a matter of negotiation, or of reprisals, or of war, according to its importance’.[[41]](#footnote-41) In other words, the exercise of the sovereign prerogative caused the matter to become a dispute between sovereign states and no longer a dispute between individual citizens of the United States and the government of France. As a result, Dallas argued, the seizure of the vessel and its subsequent operation by a French naval officer, could not come within the jurisdiction of the United States.[[42]](#footnote-42):

On behalf of the libellants it was argued that the possibility of a flood of claims against states was ‘remote and improbable’ given that they would have to be supported by sufficient evidence. More importantly, the libellants saw significant dangers in not allowing their claim to proceed. In words that have echoed down the two centuries since they were uttered, the libellants called upon the Supreme Court to ‘consider the inconveniences on the other side. Your own citizens plundered. Your national rights violated. Your courts deaf to the complaints of the injured. Your government not redressing their wrongs but giving sanction to their spoliators’.[[43]](#footnote-43) Ultimately, the libellants argued forcibly for the territorial operation of the law. Citing Vattel, the libellants argued that anything within a country was exclusively within the authority of the territorial sovereign and his courts. While acknowledging some limited exceptions to this principle in the case of the person of the sovereign as well as ambassadorial immunity and the immunity of armed forces, they failed to see an established exception in the case of sovereign property. Thus, they asserted that: ‘The exemption of the sovereign himself, his ambassador and his armies, depends upon particular reasons which do not apply to his property, nor to his ships of war’.

The judgment of the court was delivered by Chief Justice Marshall. Marshall’s starting point was that ‘the jurisdiction of a nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself … all exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself’.[[44]](#footnote-44) On the other hand, according to Marshall, with respect to the relations between sovereign states, the world was ‘composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation, in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers’. Marshall continued:

This full and absolute territorial jurisdiction being alike the attribute of every sovereign and being incapable o conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation by placing himself, or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express licence, or in the confidence that the immunities belonging to his independent sovereign station, thought not expressly stipulated, are reserved by implication, and will be extended to him.[[45]](#footnote-45)

For Marshall, the existence of these exceptions to jurisdiction were caused by the implied waiver by the territorial sovereign of his complete and exclusive territorial jurisdiction and applied in three specific cases. The first of these is ‘the exemption of the person of the sovereign from arrest or detention within a foreign territory’.[[46]](#footnote-46) In explaining the reason for the exemption, Marshall referred directly to the fact that ‘a foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation’. As well as suggesting complete immunity from jurisdiction, this passage asserts the essence of the immunity of the sovereign as being the concept of dignity.

The second exception to complete and absolute territorial jurisdiction ‘standing on the same principles as the first’ is, according to Marshall, ‘the immunity, which all civilized nations allow to foreign ministers’. Here the assertion is of immunity from jurisdiction as well as inviolability. Marshall is unclear as to the rationale for the immunity of foreign ministers which derive either from his representative character or from the fiction of extra-territoriality, although he asserts that it is something to which sovereigns have consented. This consent is again closely linked to the dignity of the sending sovereign: ‘The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad’.[[47]](#footnote-47)

A third exception applied in the case of the troops of a foreign prince whom a sovereign will allow to pass through his dominions. In such cases, according to Marshall, the free passage of an army would be defeated if the sending sovereign did not retain its exclusive command: ‘The grant of a free passage therefore implies a waiver of all jurisdiction over the foreign troops during their passage and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require’.[[48]](#footnote-48) According to Marshall, this exemption would apply equally to public warships insofar as it ‘constitutes a part of the military force of her nation’.[[49]](#footnote-49) Marshall continued: ’[The sovereign] has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity. The implied license therefore under which such vessel enters a friendly port, may reasonably be construed, and it seems to the Court ought to be construed, as containing an exemption from the jurisdiction of the sovereign within whose territory she claims the rites of hospitality’.[[50]](#footnote-50) Marshall did not seek to draw a clear distinction between the private and public acts of a sovereign, although he did accept that ‘a prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individuals’. More important for Marshall, was the character of the vessel in question as a public warship and it was that character which, by analogy with the immunity of foreign armed forces, secured the exemption of the vessel from the jurisdiction of the United States in the case in question.

A careful analysis of *The Schooner Exchange* highlights the limitations of the case as a precedent for anything other than the immunity of a public warship from the jurisdiction of a foreign court. Nevertheless, Marshall’s dictum has come to be regarded by many as the starting point for state immunity generally. It is certainly the case that the decision was cited with approval in many subsequent cases, particularly in common law jurisdictions, leading to the establishment of the so-called absolute theory of State immunity.[[51]](#footnote-51) In the US case of *Berizzi Brothers Co. v. Steamship Pesaro*,[[52]](#footnote-52) the US Supreme Court argued that: “When, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans and operates ships in the carrying on of trade, they are public ships in the same sense that warships are. We know of no international usage which requires the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force” The effect of such a statement is effectively to ensure that any act by a government can be considered as public and so entitled to attract immunity. This was not a foundation on which the theory of absolute State immunity could easily rest and the development of the restrictive doctrine of state immunity depended not on an abandonment of this distinction but, rather, a gradual reassessment of the all-encompassing notion that any act carried out by a government constituted a public act.

The false juridical foundations of State immunity were identified and deconstructed by Sir Hersch Lauterpacht, in a seminal article published in 1951. Drawing to some extent on the dictum of Chief Justice Marshall in *The Schooner Exchange,* Lauterpacht noted that the doctrine of State immunity was apparently built upon the concepts of independence, equality, sovereignty and dignity. However, he convincingly argued that these concepts do not provide an adequate basis, individually or together, for the maintenance of state immunity. In relation to independence and equality, he argued that:

It is not easy to see why the principles of independence and equality should preclude the courts of a state from exercising jurisdiction over another state and its property so long as the state exercising jurisdiction merely applies its ordinary law, including its rules of private international law, and so long as it applies it in an unobjectionable manner not open to the reproach of denial of justice or of the disregard of the legislative and administrative sovereignty of the foreign state.

In relation to the concept of sovereignty, he noted that:

No legitimate claim of sovereignty is violated if the courts of a state assume jurisdiction over a foreign state with regard to contracts concluded or torts committed in the territory if the state assuming jurisdiction. On the contrary, the sovereignty, the independence and the equality of the latter are denied if the foreign state claims as a matter of right- as a matter of international law – to be above the law of the state within the territory of which it has engaged in legal transactions or committed acts entailing legal consequences according to the law of that state.

Lauterpacht reserved his greatest criticism for the concept of dignity, which he described as an anarchic survival that would not be derogated from by subjecting it to the normal operations of the law with regard to contracts it has concluded or torts it has committed. He considered that “the dignity of foreign states is no more impaired by their being subjected to the law, impartially applied, of a foreign country than it is by submission to their own law.”

It is worth noting further that Lauterpacht did not see any benefit in the development of the distinction between acts *jure gestionis* and acts *jure imperii*, declaring that “it is doubtful whether that distinction can accurately or profitably be accepted as the basis of future law”. Nevertheless, he did accept that it was possible and desirable to salvage from it that element which appears to be sound and practical. As a result of his analysis, Lauterpacht proposed the abandonment of the doctrine of state immunity, subject to specified safeguards and exceptions. One of these, it should be noted, was that immunity should remain “in respect of executive and administrative acts of the foreign state within its territory. He continued: “no action should lie with regard to torts committed by foreign states and their organs in their own territory. This must be left either to judicial remedies within that foreign state or to appropriate diplomatic action in accordance with the accepted practice of diplomatic protection of citizens abroad.”

Lauterpacht’s analysis foreshadowed and likely influenced the development of the restrictive theory of State immunity, at least in the UK. In the US, the so-called Tate Letter of 19 May 1952,[[53]](#footnote-53) signalled a shift in US policy away from absolute State immunity to the restrictive theory which disallowed State immunity for commercial acts. In the United Kingdom, it took until the mid-1970s for the restrictive theory finally to crystallise, primarily as the result of a judicial onslaught against absolute State immunity, led primarily by Lord Denning.[[54]](#footnote-54) Finally through a series of cases, beginning in 1976, the UK finally adopted the restrictive theory of State immunity. The importance of these developments for the purposes of this Chapter is not to rehearse again the development of the restrictive theory per se, but, rather, to emphasise that there is no inherent conceptual reason why State immunity should not be challenged and, where appropriate set aside. This should be contrasted, it is submitted, with the position regarding diplomatic and other forms of personal immunity explored above which, while sharing common foundations with State immunity, are conceptually very different.

The academics and practitioners who sought, successfully, to challenge the absolute theory of State immunity in the middle of the twentieth century did so, at both an international and domestic level, by arguing that the customary international law of State immunity had changed to reflect a more restrictive approach.[[55]](#footnote-55) This understanding of the state of customary international law on the question of State immunity was supported by the European Convention on State Immunity 1972, and the statutory reform, particularly in Anglo-American jurisdictions, where adherence to the absolute rule had been most strict.[[56]](#footnote-56) The effect of this process of solidifying customary international law around the restrictive theory, however, was to freeze the restrictive theory at a particular stage in time and in relation to an understanding of the restrictive theory that was enmeshed in the vagaries of Cold War politics. This was made particularly problematic by the methodology of the relevant instruments, which was to crystallise the concept of State immunity, subject to a very limited number of exceptions, most of which related to commercial matters, reflecting the contemporary understanding of the restrictive theory of State immunity.

That same limited analysis of the restrictive theory of State immunity has now itself been codified in the 2004 United Nations Convention on the Jurisdictional Immunities of States and Their Property. The convention adopts the methodology of confirming State immunity subject to a few specific exceptions. During the negotiation of the Convention, some States and a number of human rights organisations pressed for the inclusion in the Convention of an exception for serious human rights abuses, or at the very least, the addition of an Optional Protocol permitting the removal of State immunity in relation to such activities. Not only was this rejected but certain States argued for a restriction on the restrictive theory advocating a return to absolute immunity. It is not because of the concern for the granting of immunity in the case of human rights abuses that adherence to the Convention is low. It is rather because, in the view of many States, the Convention allows for the removal of immunity in too many cases.

So it is left to individuals and organisations to continue to challenge the law of State immunity both in domestic, regional and international courts. Some such challenges have had limited success. General Augusto Pinochet, for example, was found not to have immunity from the criminal jurisdiction for acts of torture committed in Chile during his dictatorship, but this was a case of Head of State immunity as opposed to State immunity, and was dependent on his being a former Head of State and on the fact that torture committed abroad had been specifically criminalised in English law as an “official” crime thereby removing any co-existent immunity.

For the most part, such challenges have, ultimately, been unsuccessful. What can be gleaned from the jurisprudence is that State immunity in many States is limited only by the specific exceptions developed in the 1970s and codified in the relevant legislation. Furthermore, State immunity pursues a legitimate international purpose and is not a breach of the right to a fair trial in the context of Article 6 of the European Convention on Human Rights, although it may breach European Union law. State immunity is not trumped in the situation of an alleged breach of a *jus cogens* norm, primarily on the grounds that State immunity is a procedural question that must be addressed before consideration can be given to the substantive issues. Finally, State immunity is a principle that is closely guarded by States and State officials. The impact of the development of the restrictive theory of States immunity, the codification of the concept in the 2004 Convention and the effect of recent high-level decisions of international courts has been to solidify the principle in both domestic and international law.

That having been said and bearing in mind this author’s earlier assertion that there is no juridical foundation to State immunity and no inherent reason why State immunity cannot be further restricted, if not entirely done away with, the question is raised as to how this might be done. Conceptual challenges will continue, for example along the lines of the challenging dissenting opinion of Judge Cinçado Trindade in *The Jurisdictional Immunities of the State* case before the ICJ. Challenges to State immunity will also continue to occur in domestic courts. However, it is asserted here that what is required is a significant policy change by governments and work should be undertaken to facilitate direct changes in the law, both domestic and international.

**4. Shared Foundations and Conceptual Differentiation – Conclusions**

The purpose of the chapter has been, in part, to provide an overview of the historical development of, and conceptual framework for, immunities from jurisdiction as a general category of public international law. The aim has been to facilitate better understanding of the application and importance of the different types of immunity from jurisdiction.

In addition the chapter has sought to highlight the conceptual differentiation between various different types of immunity, particularly the personal immunity of diplomats, consuls and high-ranking State officials, the restriction of which, it has been argued, ,should be approached carefully and cautiously. The justification of, and conceptual framework for State immunity, on the other hand, is more brittle, although, perhaps ironically, the legal doctrine supporting the concept is arguably stronger than in relation to personal immunity. It is possible robustly to challenge the concept of State immunity. It has been suggested that the best way to do that is to focus on challenging States to change their policy focus than directly to challenge the established legal doctrine that supports State immunity.

1. The importance of the link between immunity and jurisdiction is self-evident. As Judges Higgins, Kooijmans and Beurgenthal made clear in their Joint Separate Opinion in the *Arrest Warrant Case:* “’Immunity’ and ‘jurisdiction’ are inextricably linked”. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* 2002 ICJ Reports 63, at 64. [↑](#footnote-ref-1)
2. For a discussion of this controversy see Barker J.C. (2013) “Negotiating the complex interface between state immunity and human rights: an analysis of the international court of justice decision in *Germany v Italy*”. *International Community Law Review*, 15 (4), 415. [↑](#footnote-ref-2)
3. On Greek and Roman diplomacy see, generally, Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome* (London: MacMillan & Co. Ltd, 1911); Hill, *A History of Diplomacy in the International Development of Europe* (London: Longman, Green & Co., 1905); Nicolson, *Diplomacy* (Oxford: OUP, 2nd edn. 1949); Nicolson, *The Evolution of Diplomatic Method* (London: Constable Co. Ltd, 1949); Young, 'The Development of the Law of Diplomatic Relations', British Yearbook of International Law, Vol.40 (1964), p.14. [↑](#footnote-ref-3)
4. According to *Satow’s Guide to Diplomatic Practice* (6th Ed., 2009) Paras 8.11, 8.14 and 9.3, “Personal inviolability is of the privileges and immunities of missions and diplomats, the oldest established and most universally recognised.” The principle, which is now guaranteed under Article 29 of the Vienna Convention on Diplomatic Relations 1961 (500 UNTS 95), “has two distinct aspects in modern international law. The first is immunity from any legal process or action by the law enforcement officers of the receiving State. The second aspect ... is the duty of protection laid on the receiving State.” *Ibid*. [↑](#footnote-ref-4)
5. Barker J. Craig. (1995) “The Theory and Practice of Diplomatic Law in the Renaissance and Classical Periods” 6 *Diplomacy and Statecraft* 593 at 595. [↑](#footnote-ref-5)
6. See Nicolson, *Diplomacy, op cit* at 10 and Nicolson, *Evolution, op cit*, at 26. [↑](#footnote-ref-6)
7. See B. Behrens “Origins of the Office of English Resident Ambassador in Rome”, *Engilish Historical Review* Vol. 49 (1934) 640. [↑](#footnote-ref-7)
8. As this author has previously noted: “Most important among the early treatises on diplomatic law were

   Ayrault's impressively titled *L’ordre, formalite et instruction judiciaire dont les anciens Grecs et Romains ont usee et accusations publiques (sinon qu'ils ayent commence a {'execution) conferSs au stil et usage de nostre France* (1576), Gentilis' *De Legationibus Libri Tres* (1585), and Hotman's *LAmbassadeur* (1603). [↑](#footnote-ref-8)
9. Of the many excellent treatises on the subject of diplomacy written after this point, the most notable include Wicquefort's *LAmbassadeur et ses fonctions* (1681), Cornelius Van Bynkershoek's *De Foro Legatorum* (1721) and Vattel's *Le Droit Des Gens* (1750). See Barker, *op cit*, note 5 at 598. [↑](#footnote-ref-9)
10. During this early period of the establishment of diplomatic relations, the classical writers generally referred only to the position of ambassadors and their households. [↑](#footnote-ref-10)
11. Ogdon, *Juridical Bases of Diplomatic Immunity* (John Byrne & Co, 1936) at 105. [↑](#footnote-ref-11)
12. See Barker J. Craig, *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil* (Ashgate, 1996), at 36-40. [↑](#footnote-ref-12)
13. See Grotius, *De Jure Belli ac Pacis*, 1625, Vol II, Bk II, Ch XVIII, at 443. [↑](#footnote-ref-13)
14. The understanding that ambassadors were considered as resident in their home State gave rise to the so-called *franchise du quartier,* as a result of which whole areas of the world’s major capital cities were considered to be outside local jurisdiction and, as a consequence became dens for outlaws and criminals. According to Anderson, for example, “By the eighteenth century, the position in Rome had become so impossible … that the papal police had to be equipped with special maps to show them which streets they were permitted to pass through.” Anderson, *The Rise of Modern Diplomacy* (Longman, 1993) at 56. [↑](#footnote-ref-14)
15. See the Report of the Special Rapporteur to the Sub-Committee on Diplomatic Immunities to the Committee of Experts for the Progressive Codification of International Law, League of Nations Document C.45.M.22.1926, 20 *ILM* 153 (Supp. 1926) which noted that “It is perfectly clear that exterritoriality is a fiction which has no foundation in either law or in fact”. [↑](#footnote-ref-15)
16. Vattel, *op cit*, note 9, Bk IV, Ch VII at 376. [↑](#footnote-ref-16)
17. Preamble to the Vienna Convention on Diplomatic Relations, 1961, paragraph 4. [↑](#footnote-ref-17)
18. Ogdon, *op cit*, at 177. [↑](#footnote-ref-18)
19. On the functions of the diplomatic mission see VCDR 1961, Article 3. See also Denza, E, *Diplomatic Law* *Commentary on the Vienna Convention on Diplomatic Relations* (3rd Ed, OUP, 2008), Chapter 3. [↑](#footnote-ref-19)
20. On the importance of diplomatic law as the basis for the protection of diplomatic personnel, See Barker J. Craig *The Protection of Diplomatic Personnel* (Ashgate, 2006). See also the decision of the International Court of Justice in *United States Diplomatic and Consular Staff in Tehran* 1980 ICJ Reports 3. [↑](#footnote-ref-20)
21. UN Doc A/CN.4/108. Report on consular intercourse and immunities by Mr J Zourek, Special Rapporteur to the International Law Commission, *Yearbook of the International Law Commission* 1957 Vol II, 73. [↑](#footnote-ref-21)
22. *Ibid*. [↑](#footnote-ref-22)
23. **Something about the controversies regarding the capitulations system.** [↑](#footnote-ref-23)
24. Jennings & Watt, *Oppenheim’s International Law* (9th ed., 1996), Vol I, at 1132. It should be noted that capitulations did not exist between European States and ultimately came to be linked with colonialism and discrimination between Western and other States who were required to grant capitulations in order to secure trading rights and privileges. [↑](#footnote-ref-24)
25. Zourek, *op cit*, at p. 74. [↑](#footnote-ref-25)
26. Zourek (1957), at 75. [↑](#footnote-ref-26)
27. *Infra*. Emphasis in original. [↑](#footnote-ref-27)
28. On State, or sovereign, immunity, see further below. [↑](#footnote-ref-28)
29. Gentilis, *De Jure Belli Libri Tres* Book I Chapter XV at 68. [↑](#footnote-ref-29)
30. Grotius, *De Jure Belli ac Pacis* at 121. [↑](#footnote-ref-30)
31. Zouche, *De jure Feciali Inter Gentes*, Part II, section 2, question 6. [↑](#footnote-ref-31)
32. *Ibid*. [↑](#footnote-ref-32)
33. *Ibid*, at 18. [↑](#footnote-ref-33)
34. Jennings & Watts, *op cit*, p. 1034. [↑](#footnote-ref-34)
35. See the opinion of the ICJ in *Arrest Warrant of 11 April 2000* (DRC v Belgium) 2002 ICJ Rep 3, at para. 51 [↑](#footnote-ref-35)
36. *Ibid*. See also Watts, “The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers” (1994) 247 *Hague Recueil* 9 at 52-53. [↑](#footnote-ref-36)
37. *Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law* Institute of International Law, YB (vol. 69 2000-01) 743, Preamble, paragraph 3. [↑](#footnote-ref-37)
38. Watts, *op cit* at 53. [↑](#footnote-ref-38)
39. *Ibid*. [↑](#footnote-ref-39)
40. *Ibid*. [↑](#footnote-ref-40)
41. At p. 122. [↑](#footnote-ref-41)
42. “There is … no municipal law, nor any practical construction by the executive, the legislative or the judicial department of our government, which authorizes the jurisdiction now claimed; we can only have recourse to the law of nations to try the validity of that claim. The law requires the consent of the sovereign, wither express or implied, before it can be subject to foreign jurisdiction. There is no express assent of a foreign sovereign to the jurisdiction over his prerogative. “ [↑](#footnote-ref-42)
43. At 128. [↑](#footnote-ref-43)
44. At 136. [↑](#footnote-ref-44)
45. At 137. [↑](#footnote-ref-45)
46. At 137. [↑](#footnote-ref-46)
47. At 138-9. [↑](#footnote-ref-47)
48. At 140. [↑](#footnote-ref-48)
49. At 144. [↑](#footnote-ref-49)
50. At 144. [↑](#footnote-ref-50)
51. IN the UK see, for example, *The Parlement Belge* [1880] 5 P.D. 197; *The Porto Alexandre* [1920] P/ 30.; and *Cheung (Chung Chi) v The King* [1939] A.C. 160. [↑](#footnote-ref-51)
52. 271 U.S. 562 (1926) [↑](#footnote-ref-52)
53. 26 *State Dept. Bull, 984 (1952) 47 A.J.I.L. 93 (1953).* [↑](#footnote-ref-53)
54. See, for example, *Rahimtoola v. Nizam of Hyderabad* [1958] A.C. 379; *Thai-Europe Tapioca Service Ltd. v. Government of Pakistan, Directorate of Agricultural Supplies* [1975] 1 W.L.R. 1485; The Philippine Admiral [1977] A.C. 373; *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] Q.B. 529 [↑](#footnote-ref-54)
55. This was perhaps most apparent in the dictum of Lord Denning in *Trendtex* in which he opined that: “If this court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to that change - and apply the change in our English law - without waiting for the House of Lords to do it.” *Ibid*, at 554. [↑](#footnote-ref-55)
56. Reference can be made specifically to the Foreign Sovereign Immunities Act 1976 in the US and to the State Immunity Act 1978 in the UK. [↑](#footnote-ref-56)