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THE LAW OF STATE IMMUNITY

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Hazel Fox, QC
August 2002

Preface to Paperback Edition

This book is about the immunities afforded to a foreign State before national courts of other States. Its aim was to establish the current international law relating to State immunity from adjudication and execution but, in view of the shortage of direct international authority, it was necessary to engage in a comparative exercise examining the practice of national courts, particularly of English and US federal courts, in abstaining or exercising jurisdiction over foreign States. That absence of direct authority is increasingly being remedied. Even as the book was in proof, both the International Court of Justice (ICJ) and the European Court of Human Rights (ECHR) gave rulings relating to the international immunities of States, and the principle 'no immunity where no impunity' has received growing recognition with the entry into force of the Statute of the International Criminal Court (ICC), at least in respect to the exercise of criminal jurisdiction over genocide, war crimes, and crimes against humanity. If, as discussed below, the International Law Commission's (ILC) 1991 Draft Articles on Jurisdictional Immunities of States and their Property becomes adopted as an international convention, international source material will increasingly become the first stage of any enquiry into the contemporary law of international immunities. The niceties and contradictions in the application of that law, however, would seem likely to continue first to arise before national courts; and State practice as evidenced by national law is likely to continue as an important source in determining the scope of international immunities.

The spate of developments in the law of State immunity has not slackened since the publication of this book in November 2002 and while it is not possible in this paperback edition to effect a complete revision the publishers have permitted me to amend, page by page, obvious errors, typographical and otherwise, and also within the constraints of the existing layout to add new references. (The Table of Cases has also been updated to include additional entries—identified by an asterisk—and a supplementary bibliography appears on page xxxv below.)

Nonetheless this preface remains the prime source of information about changes in the law since the text of the hardback went to press. New developments include:

(i) the approval by the United Nations General Assembly (UNGA) Sixth Committee of a convention to incorporate the revised ILC 1991 Draft on Jurisdictional Immunities of States and their Property, subject to drafting of the preamble and final clauses;

(ii) national courts' adjudication of claims arising out of war damage, formerly accepted solely as a matter for diplomatic settlement;
(iii) national jurisdictions' constraints on the exercise of universal jurisdiction, exhaustion of local remedies, and respect for international immunities of serving heads of State and government;
(iv) State immunity as a restraint on the exercise of jurisdiction by international tribunals;
(v) a number of decisions elucidating further a State's immunity from execution;
(vi) decisions relating to the UK State Immunity Act 1978 (SIA) on:
- immunity of registration of foreign judgments;
- procedure;
- the exception for patents, trade marks etc., and visiting armed forces.

(vii) US Foreign Sovereign Inmmunities Act 1976 (FSIA) on:
- amendment of the FSIA;
- nexus;
- execution of judgments obtained against States designated as State sponsors of terrorism;
- Alien Tort Claims Act 1789 (ATCA).

I will deal with them in order.

(1) The proposed UN Convention based on the 2003 revised text of the ILC's Draft Articles on Jurisdictional Immunities of States and their Property

One of the most outstanding developments since 2002 is the decision of the UNGA Sixth Committee on 4 November 2003 to support the conclusion of a convention in the terms of a finalized text of the ILC 1991 Draft Articles on Jurisdictional Immunities of States and their Property.[1] Discussions over some ten years in the United Nations relating to the 1991 ILC Draft revealed deep divisions among States; in particular five major problems (as discussed in Chapter 5, pp. 219 *et seq.* below) were identified. In February 2003 it seems a compromise of views was achieved in a finalized text adopted under the chairmanship of Gerhard Hafner by the Ad Hoc Committee set up by the UNGA Sixth Committee, accompanied by a set of annexed understandings, and it is this text together with the annexed understandings which the UNGA Sixth Committee hopes to adopt as a convention.

[1] A/C.6/58/L.20, a decision which received the support of Australia, Austria, Belgium, China, Denmark, Finland, France, Germany, Greece, Hungary, India, Italy, Iran, Japan, Mexico, the Philippines, the Republic of Korea, Slovakia, South Africa, Spain, Sweden, UK, who were also joined by Norway, Poland, and Portugal.

Accordingly at the present date two major issues have to be addressed: (a) the acceptability, particularly by reference to customary international law and enacted national legislation on State immunity, of the provisions contained in the finalized text of 2003; and (b) the manner by which the Draft Articles and annexed understandings may be incorporated into a treaty form.

Acceptability as law of the 2003 text of the ILC Draft Articles

As to the first issue, the acceptability of the 2003 finalized text as a statement of the law must turn more on it being the best achievable product of more than thirty years of work by the ILC and the UNGA Sixth Committee rather than its internal clarity and certainty. But, nonetheless, in making an assessment, the extensive amendments made in the course of the UN discussions should not be overlooked; these amendments affect in particular the Articles relating to the exceptions to commercial transactions (Article 10), employment contracts (Article 11), and ships (Article 16), and to Part IV relating to measures of constraint (execution). These amendments have helped to achieve some degree of agreement on the five major problem issues, namely, definition of the State and 'commercial transactions', and the treatment of State enterprises, employment contracts, and measures of constraint against the State.

Definition of the State[2]

So far as the definition of the State is concerned, the choice of a qualifier for political divisions and agencies and instrumentalities has been solved by a requirement that to enjoy immunity such an entity must satisfy both the structural and functional criterion (see pp. 231 and 350 below), that is, to enjoy immunity, it must both be 'entitled to perform and be actually performing acts in exercise of sovereign authority of the State'. This solution may have the not wholly undesirable effect of increasing the burden of proof on a State agency when claiming immunity.

State enterprise

Article 10.3 defines a State enterprise,[3] and states negatively that involvement in a commercial transaction by such a State enterprise shall not affect the immunity of

[2] Art. 2.1.(b)(iv) includes individuals acting as 'representatives of the State acting in that capacity' within the definition of the State but confusingly the Draft Articles are 'without prejudice' to the privileges and immunities enjoyed by persons connected with diplomatic missions, consular posts etc. and heads of State *ratione personae* (Art. 3.1(b) and 2).

[3] The relationship of a State enterprise referred to in Art. 10.3 to the political divisions and State agencies and instrumentalities defined in Art. 2.1(b)(ii) and (iii) remains unresolved. The understanding with respect to Art. 18 explains that the term 'entity' includes these other types of agency, but why is there no similar understanding with respect to Art. 10 to clarify the position of a State enterprise? Unfortunately it may not be merely a matter of terminology but a difference in national conceptions as to substantive law.

the State which establishes it. The fears that the Article would provide a defence to undercapitalization or even misrepresentation are met by an accompanying understanding adopted in 2003, stating that paragraph 3 of Article 10 does 'not prejudge the question of "piercing of the veil", questions relating to a situation where a State entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim, or other related issues'.[4]

Employment contracts

The difference of view over the employment-contract exception has been resolved by restricting broadly the immune class of employees to diplomatic agents and consular officers, and limiting the exercise of jurisdiction over other categories of employees (not being nationals of the employing State) solely to proceedings relating to dismissal or termination, and even then not where such proceedings would interfere with the security interests of the State (Article 11.2(c)). An understanding aims to limit the term 'security interests' primarily to 'matters of national security and the security of diplomatic missions and consular posts'.

The piecemeal amendment of the employment exception, however, has undermined the overall coherence of the Article, and it is hoped some further clarification can be achieved.[5]

Part 4: Measures of constraint against the State

In the course of discussions in the UNGA Ad Hoc Committee, Part 4, relating to immunity from execution, has been much improved, in particular by the addition of a new Article, presently numbered XY, in respect of pre-judgment measures of constraint. The connection requirement on post-judgment enforcement against State property has been seen by the UK and other countries as a major difficulty, but is now so watered down as probably generally to permit enforcement of judgments obtained against State agencies in respect of all their

[4] In *Norsk Hydro* v. *State Property of Ukraine* [2002] EWHC 2120 (Comm.) where an arbitration award had been given against the State of Ukraine alone, the English Court of Appeal struck down an order for enforcement of the award against a State entity as well as the State itself. 'The task of the enforcing court [under the New York Convention] should be as "mechanistic" as possible . . . No doubt, true "slips" and changes of name can be accommodated; suffice to say, that is not this case. Here it is sought to enforce an award made against a single party, against two separate and distinct parties.'

[5] The revised text does not make plain whether the subparagraphs in para. 2 introduce separate or cumulative exemptions to paragraph 1; in consequence it appears that para. 2(a) and 2(a bis) introduce separate exemptions, whereas it was the intention of the ILC who originally proposed para. 2(a bis) in 1999 that it should merely particularize para. 2(a). In the words of the UK's 1988 comments, para. 2(a) as it stands is 'dangerously vague and likely to cover an excessively wide range of employees'. (The 1999 ILC Report A/CN.4/L 57, paras. 88–93, 103–5, sets out the history of the drafting changes to para. 2 (a).)

commercial property. The 2003 version of the ILC Draft[6] relating to post-judgment measures of constraint omits the requirement found in earlier drafts of 'a connection with the claim that is the object of the proceedings' (cf. Article 18(c) in the 2002 Draft A/57/22). Read with the annexed understanding in respect of Article 18 that 'property that has a connection with an entity' is broader than ownership or possession, and Article 10(iii)(b) which defines property of a State enterprise or other entity as including property which that State has authorized it to operate or manage, the ILC Draft would seem to permit enforcement against general funds, premises, and equipment used by a State enterprise, whether or not they have any connection with the transaction on which there has been default.

Definition of 'commercial transaction'

The most compelling reason for codification of the law of State immunity is to put on record the exception to State immunity for commercial transactions. It will be remembered that the 1991 ILC Draft followed the UK's list approach, declaring sale of goods, supply of services, and loans or contracts for other transactions of a financial nature to come within the definition of a commercial transaction; and in Article 2.1(c)(iii) it expanded the definition to include 'any other contract or transaction of a commercial . . . nature', thereby making necessary and giving rise to the much debated general definition of the term 'commercial transaction' in the following subsection. In its latest form in the 2003 text, Article 2.2 reads as follows:

> In determining whether a contract or transaction is a 'commercial transaction' under paragraph 1(c), reference should be made 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.

This is a complex piece of drafting and on the face of it highly unsatisfactory since it requires a national court to engage in a four-stage exercise in determining whether it has jurisdiction in a commercial transaction under Article 2.1(c)(iii).[7]

[6] 'Article 18—*State immunity from post-judgement measures of constraint*—No post-judgment measures of constraint, such as attachment, arrest or execution against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that . . . (c) It has been established that the property is specifically in use or intended use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.'

[7] First, in the absence of evidence of purpose, it may refer to the nature of the transaction, but, second, where there is evidence of purpose, it must still give prime attention to the nature of the transaction; at the third stage the court may omit the first two stages and in determining the commerciality of the transaction take account of its purpose where there is proof of an agreement by the parties so to take purpose into account. (Some form of reverse waiver would seem to be envisaged here by which the parties agree that the purpose and all acts in performance of the transaction shall

Rather surprisingly there is no accompanying understanding[8] and, as expressed at present, it constitutes an open invitation for reservation or interpretative declaration by a State when ratifying the proposed convention in which it is to appear. However it should not be forgotten that the Working Group of the ILC itself in 1999, after an exhaustive review of the whole subject, stated 'in view of the different facts of each case as well as the different legal traditions, the members of the Group . . . felt that the distinction between the so-called nature and purpose tests might be less significant in practice than the long debate about it might imply'.[9]

The ILC Draft as a Convention

Dealing with the second issue, treaty form (as discussed at pp. 250–2 below), the decision to adopt the ILC Draft Articles as a convention raises a number of problems specific to the treaty form. Presumably an attempt to resolve these problems will be addressed in a further meeting to be held in February 2004 of the Ad Hoc Committee under Gerhard Hafner's Chairmanship, which has been mandated to formulate a preamble and final clauses for the conclusion of a complete convention by the UNGA Sixth Committee in the 59th 2004 Session.[10]

One set of these problems concerns the status of the convention when ratified; is it when in force to be regarded as an authoritative statement of customary international law or merely an agreement between the ratifying States? The ratifying States will clearly be under an obligation to bring their national laws into conformity with its provisions, and Article 4 providing for non-retroactivity ensures that the convention has no application to 'any proceeding instituted against a State before a court of another State prior to the entry into force of the convention for the States concerned'. But will the 'without prejudice' clause in that Article, or perhaps an additional clause in the preamble, on the lines of that in the 1982 UN Law of the Sea, affirming that the rules of customary international law continue to govern matters not expressly regulated by the convention, operate to deprive the convention of the force of international law? One view may be that the inclusion of the understandings evidences a diplomatic compromise rendering the Articles in the convention to be merely an agreement between ratifying States as to one set of rules to be applied by national courts

be treated as in exercise of the sovereign authority of the State.) Finally (and it is not entirely clear whether stages one and two also have no relevance here), as a fourth stage, the national court may have regard to purpose if it is relevant in the practice of the forum State to determining the non-commercial character of the transaction. Reference to practice is wider than to the law of the forum State and would seem to permit administrative practice or even the fiat of some official to determine the immune nature of the transaction.

[8] But see the understanding to Art. 17, the exception relating to arbitration agreements, which states 'the expression "commercial transaction" includes investment matters'.

[9] A/CN.4/L.576, para. 60.

[10] It is likely that, prior to this meeting, the UK along with other member States of the Council of Europe will endeavour to achieve a common position as to the text of a complete convention.

with regard to State immunity. But such a restricted role for the convention contradicts the whole purpose of the ILC's work to codify international law on the basis of State practice. It also contradicts the current support of a majority of States for adopting the ILC Draft in convention form. Such support undoubtedly derives from a decision, at a time of increasing erosion of immunities, to establish a firm statement in treaty form of the current international law relating to State immunity.

The number of ratifications will determine the interpretation of the convention as constituting such a statement. Were the convention to come into force with a sizeable proportion of States ratifying it, it might prove difficult for a State to rely before an international tribunal, such as the ICJ or the Strasbourg court, on its national law for a more or less restrictive rule of immunity than that to be found in the convention. Factors in establishing the authority of the convention as a source of international law will be the number of States required for ratification, the matters excluded in the savings clauses, the method of incorporation of the Understandings, the permissibility and scope of reservations[11] or interpretative declarations,[12] and the terms of any dispute-settlement clause.

Savings clauses

The ILC in its 1991 commentary to Article 2 states that the term 'proceeding' should not be understood to include criminal proceedings and this interpretation was confirmed in 2003 by a general understanding 'that the draft Articles do not cover criminal proceedings'. The exclusion of criminal proceedings surely preserves the customary law of absolute immunity of States in respect of such proceedings; but some States seem to be of the view that it is better at the present juncture to have immunity of States from criminal proceedings included within the proposed convention. Proceedings relating to visiting forces, international organizations, and liability for nuclear or environmental accidents can probably be satisfactorily excluded by a general clause on the lines of the 1972 European Convention on State Immunity (ECSI) that 'nothing in the Convention shall affect existing or future international agreements in special fields which relate to matters dealt with in the present Convention'.

[11] No reservation was permitted to the European Convention on State Immunity, Art. 39.

[12] Could the UK when ratifying file an interpretative declaration that it understands the provisions of the convention to be given effect in English law by the SIA? Art. 2.3 of the 2003 text contains a 'without prejudice' clause providing that the use of terms in Art. 2 is without prejudice to 'the use of terms in the internal law of any State'; if this is capable of interpretation as not only not affecting the meaning of terms used in national law but also as permitting those meanings to govern the application of the convention in national law, it may go some way for allowing some degree of flexibility in the incorporation of the Draft into English law.

(II) National courts' adjudication of claims arising out of war damage, formerly accepted solely as a matter for diplomatic settlement

Until recently claims brought by individuals relating to damage to the person or property suffered in time of war had been generally assumed to be non-justiciable before national courts, alternatively to be barred by a plea of State immunity as activity *jure imperii*, in exercise of sovereign authority, and in consequence solely subject to diplomatic settlement of the States engaged in the war. But the development of international humanitarian law and a shift in the treatment of armed conflict from interstate reciprocity to protection of individuals by international humanitarian law and human rights[13] has resulted in a re-examination of claims of individuals both for personal mistreatment and misappropriation of property occurring in time of war, and particularly during the Second World War. Consequently, despite payments made pursuant to the peace treaties and bilateral agreements between victim State and the State charged with commission of offences, a further review of claims of Jewish victims for compensation for loss of life and property suffered as a result of the Holocaust has taken place, and in the last decade a further processing of claims has taken place on behalf of non-Jewish persons for injury and loss in countries in consequence of armed conflict, in the course of occupation during the Second World War by Germany[14] and Japan,[15] and during the Korean War by armed forces of the United States.[16]

In some of these claims the issue of State immunity has been avoided by presenting the claim directly against the industrial concern or national bank that was involved in the commission of the offence. But recently the question whether diplomatic settlement is the sole method of satisfaction of claims for war damage has been debated in proceedings before the Greek and German courts and before the ECHR.

As reported at page 412 below, the Greek Supreme Court by a majority decision held that State immunity did not bar claims of Greek nationals for personal injuries and loss of property suffered at Distomo by reason of acts of the German occupying forces in 1944 and awarded some $30 million.[17] The applicants also pursued their claims in the German courts and the courts of the two countries have reached conflicting decisions on the nature of the immune character of the massacre carried out in Distomo by German forces. The Greek court cited Article

[13] See Meron, 'The Humanization of Humanitarian Law' *AJIL* 94 (2000) 239.

[14] Germany recently agreed to establish a $5.1 billion fund to compensate survivors, non-Jewish and of many nationalities, of slave and forced labour camps during the Nazi era.

[15] *Joo* v. *Japan* 332 F 3d 679 (DC Cir. 2003).

[16] US Department of Army, Inspector General, *No Gun Ri Review* (January 2001).

[17] *Prefecture of Voiotia* v. *Federal Republic of Germany*, Case 11/2000, Areios Pagos Hellenic Supreme Court, 4 May 2000, noted by Gouvaneli and Bantekas in *AJIL* 95 (2001) 198; Supreme Court 131/2001 reported 54 *Revue Hellenique DI* (2001) 592–3.

43 of the 1907 Hague Regulations respecting the Laws and Customs of War on Land (which applied as customary international law, Greece not being a party to the Hague Convention) as supporting the view that military occupation pursuant to an armed conflict does not bring about a change in sovereignty or preclude the application of the law of the occupied State. The German court did not deny that the occupying force was required to respect the laws in force in the occupied country but relied on Article 3 of the 1907 Hague Convention as restricting to aggrieved States, not their individual nationals, any demand for reparation for violations of the Convention, and on Article 2 as restricting such demands to States who were parties to the Convention. The German court held that it was unable to recognize the Greek judgment because Greece lacked jurisdiction over Germany in respect of acts *jure imperii* and declared that the conduct of German troops in violation of the laws of war constituted such acts *jure imperii*.[18]

In contradiction to this approach, the Greek court applied a restrictive doctrine of State immunity and accepted as customary law the exception for personal injuries and damage to property set out in Article 11 of the ECSI, as approved by the ILC, the Institut de droit international and enacted in the US FSIA. In the Greek court's view, that exception extended to the acts of revenge committed by the German SS troops in the village of Distomo, such acts being performed within the territory of the occupied State and with the person who committed the act or omission present in the territory at the time of the act or omission. Further, factually, the majority in the Greek court, contrary to the minority, concluded that the massacre was not in the course of armed conflict or resistance activity but were 'hideous murders that objectively were not necessary in order to maintain the military occupation of the area or subdue the underground action'; as such they were an abuse of sovereign power, in breach of peremptory international norms and not *jure imperii*.

The only issue on which the two courts appear to have found some common ground was to rule that the London Debt Agreement of 1952, the 'Two-plus-Four' Agreement of 12 September 1990, and the bilateral agreement of 1960 in favour of Greek citizens who endured Nazi persecution, did not preclude the making of claims against Germany by individual citizens for damage suffered during the occupation.

Despite obtaining a judgment in Greece, there has been no legal or diplomatic settlement of the claims. There has been no enforcement of the Greek judgment in Greece because, as required by Article 923 of the Greek Civil Procedure Code, the Minister of Justice refused authorization for enforcement against a foreign State, a refusal upheld by the Greek Supreme Court as in conformity with Greek law.[19] By way of challenge the claimants brought an application before the ECHR against both Greece and Germany alleging violation of the right of access to court

[18] *Distomo Massacre Case*, German Supreme Court, June 2003, BGH-1112R 248/98.

[19] Vournas, 'Sovereign Immunity and the Exception for *jus cogens* Violations' *NYL Sch J Intl & Comp L* (2002) 629–53, who notes a Special Constitutional Court was convened in September 2002 to reverse the Greek Supreme Court's decision in the *Viotia* case.

under Article 6.1 of the Convention and expropriation of property under the First Protocol.[20] A Chamber of the Court rejected the application as inadmissible against both Greece and Germany.

So far as Greece was concerned, the ECHR applied its earlier ruling in *Al-Adsani* to give effect to immunity from execution under international law of a foreign State's property and to hold that Greece in refusing to authorize enforcement of the judgment was under no obligation to guarantee the recoverability of the reparation awarded; Greece, in refusing to authorize enforcement, enjoyed a wide margin of appreciation, particularly in matters of foreign relations, and had acted in accordance with international law, and 'in the public interest', '*à éviter des troubles dans les relations entre la Grèce et l'Allemagne*'.

As regards the application against Germany, the ECHR, applying *McElhinney* v. *UK*, held that a State party's responsibility for violations of Convention rights was primarily based on territorial control and that presence as a defendant in proceedings initiated by others in the national courts of another country in no way engaged the responsibility of Germany for lack of enforcement of the judgment.

This round of litigation leaves the law of immunity in respect of war damage in a state of uncertainty. The ECHR has followed *Adsani* by upholding State immunity with regard to civil proceedings for reparation sought by victims of war damage and applied it as well to immunity from execution. With no reduction in armed conflict worldwide, States would face an overwhelming financial burden were they to permit all war damage to be recoverable through national courts (at least without any time lag as has been the case with the financial consequences of the Holocaust). Yet to allow such recovery against foreign States might bring home more acutely the devastation which such conflicts cause. The ECHR stated that its application of current international law did not exclude development in customary international law in the future.

Recovery of war damage against foreign States in US courts

So far as US courts are concerned their jurisdiction to adjudicate claims relating to war damage has been treated as a question either of implied waiver or of retroactive effect of the FSIA. US courts have generally refused to hold the commission of acts in time of armed conflict, which are now characterized as international crimes in violation of peremptory international norms, as coming within the commercial exception of the FSIA[21] and equally refused to treat a

[20] *Kalogeropoulos* v. *Greece and Germany*, ECHR, No. 0059021/00, Judgment on Admissibility, 12 December 2002.

[21] *Sampson* v. *Federal Republic of Germany* 250 F 3d 1145 (7th Cir. 2001): 'We need not decide whether the pre-1952 law or the less stringent theory of sovereign immunity codified in the FSIA applies because . . . Sampson's suit against Germany is barred even under the lower standards of FSIA' (1149, n. 3). See to the same effect *Abrams* v. *Societe nationale des chemins de fer francais* 175 F Supp. 2d 428 (EDNY 2001) (deportation of Jews by rail by a railway which was a State agency of France where the claim was argued on sovereign immunity as it existed prior to FSIA).

State's commission of such acts as constituting an implied waiver of immunity for such acts. 'Implied waiver depends upon the foreign governments having at some point indicated its amenability to suit.'[22]

Until the Tate letter was sent in 1952, US federal courts followed a doctrine of absolute immunity and deferred to the political branch, the State Department, the decision whether to take jurisdiction over a foreign State; prior to 1952 accordingly the US courts ruled that the expectations of States in respect of claims arising from war damage were that they would be treated solely as a matter for diplomatic settlement. After the Tate letter and the enactment of the FSIA in 1976, a restrictive doctrine of immunity was applied and the application of the commercial-activity exception to events that occurred prior to 1952 was, as a number of federal appeals courts have held, regarded as to 'impose new obligations upon, come without fair notice to and upset the settled expectations of foreign sovereigns'. Although the Supreme Court had ruled that a statute had retroactive effect only where it took away substantive rights,[23] its recent ruling that a statute has retroactive effect which 'creates a new jurisdiction where none previously existed',[24] has been used to support a like construction of the FSIA; the 1976 statute created a new jurisdiction over foreign States where none existed before. In *Princz* the District of Columbia Appeals Court left open whether FSIA applied retrospectively to claims of Holocaust victims, but in *Joo* v. *Japan* the same Appeals Court, relying on this clarification by the Supreme Court, dismissed claims by 'comfort women' who were alleged to have been victims of sexual slavery and torture by the Japanese military.[25] Whether or not the 'comfort stations' were a 'commercial activity' within the meaning of the FSIA, the commercial-activity exception did not apply retroactively to events prior to the Tate letter. The court stated 'the 1951 Treaty of Peace between Japan and the Allied Powers created a settled expectation on the part of Japan that it would not be sued in the courts of the United States for actions it took during the prosecution of World War II, and the Congress has done nothing that leads us to believe it intended to upset that expectation'.[26]

A different approach has, however been taken by the Ninth Circuit which recently held that the expropriation exception to section 1605(a)(3) of the FSIA may be applied retroactively to activities of the German and Austrian governments in the 1930s and 1940s. The Ninth Circuit reasoned 'that the Austrians could not have had any expectation, much less a settled expectation, that the State Department would have recommended immunity as a matter of "grace

[22] *Princz* v. *Federal Republic of Germany* 26 F 3d 1166 at 1174 (DC Cir 1994); 33 ILM 1483 (1994), confirmed in *Joo* v. *Japan*, n. 25 below.

[23] *Landgraf* v. *USI Film Products* 511 US 244, 274 (1994).

[24] *Hughes Aircraft Co.* v. *United States, ex rel. Schumer* 520 US 939, 946 (1997).

[25] *Joo* v. *Japan* 172 F Supp. 2d 52 (DDC 2001). In both cases the court held the claims did not come within any of the FSIA exceptions.

[26] *Joo* v. *Japan* 332 F 3d 679 (DC Cir. 2003).

and comity" for the wrongful appropriation of Jewish property'.[27] Following this decision, to determine the issue of retroactivity of a particular claim and to resolve the confusion as to which cases the claimants 'could have legitimately expected to have their claims adjudicated in the United States prior to the FSIA', the Second Circuit in a number of cases has remanded for a factual enquiry into the State Department's position prior to the FSIA on sovereign immunity enjoyed by the particular defendant State.[28]

(iii) National jurisdictions' constraints on the exercise of universal jurisdiction, exhaustion of local remedies, and respect for international immunities of serving heads of State and government

As noted at page 57 below, the ICJ in the *Arrest Warrant* case confined its judgment to the immunity of a serving minister for foreign affairs and did not pronounce on the legality of Belgium's purported exercise, pursuant to a law enacted in 1993, of universal jurisdiction *in absentia*. In proceedings brought against France (which consented to the Court's jurisdiction), the Congo is now seeking to obtain a ruling from the ICJ that the initiation of criminal proceedings for the official acts performed by the head and high-ranking officials of another State constitutes a unilateral exercise of universal jurisdiction which is contrary to international law.[29]A number of national supreme courts have endorsed the ICJ's ruling and applied it so as to accord immunity from jurisdiction to heads of State and heads of government for acts performed while in office, even where constituting genocide, war crimes, or crimes against humanity; these courts have further adopted a cautious approach to universal jurisdiction, declaring that, save where pursuant to an obligation under an international convention, its exercise should be restricted to situations where there is a jurisdictional connection with the territory of the forum State and local remedies have been exhausted.[30] Thus in the *Guatemalan Genocide* case the Spanish Supreme Court held jurisdiction might properly be exercised by the Spanish court in respect of arson of the Spanish Embassy in Guatemala

[27] See *Altmann* v. *Republic of Austria* 317 F 3d 954 (9th Cir. 2002) at 965. The court in *Joo* distinguished the legislative history of the peace treaty with Japan from the policy of the executive relevant to the claim in *Altmann*; in a letter in 1949 the State Department stated that 'the policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials'.

[28] *Abrams* v. *Societe nationale des chemins de fer francais* (2001) 332 F 3d 173 (2nd Cir. 2003).

[29] *Certain Criminal Proceedings in France (Republic of the Congo* v. *France)*; a request for indication of provisional measures was refused, 17 June 2003.

[30] *Bouterse*, Netherlands Supreme Court, 18 September 2001; *Public Prosecutor* v. *Jorgic*, German Federal Supreme Court, 30 April 1999; German Constitutional Court, 12 December 2001. See generally Reydams, *Universal Jurisdiction* (2003), 141, 165.

committed in 1981 in which four Spanish priests were killed,[31] because Spanish nationals were victims, but denied jurisdiction in the *Peruvian Genocide* case, where acts of genocide, etc. against Peruvian nationals were alleged to have been committed by Peruvian ex-Presidents Alan García, Alberto Fujimori, and other government and military officials in Peru.[32] In February 2003 the Belgian Court of Cassation held that the prosecution under the 1993 law of Ariel Sharon *in absentia* for alleged war crimes committed in Israeli occupied territories while he was in office as Israel's Prime Minister was not legally justified; it confirmed the lower court's ruling that a suspect's presence is a condition precedent for universal jurisdiction under domestic law, and ruled that, whilst section 5 of the 1993 Act provided that a person's official status did not prevent the application of law, that statute contravened the principle of customary international law on jurisdictional immunity if it was interpreted as setting aside such an immunity.[33] Following this decision and the ICJ ruling in the *Arrest Warrant* case, and to implement the ICC Statute, the Belgian legislature made a number of amendments to its law relating to universal jurisdiction; the final amendment published in August 2003 allows Belgian courts to exercise jurisdiction over cases where the victim is a national of Belgium or has resided in Belgium for at least three years but makes the initiation of proceedings subject to the court's approval. The amendment also provides that under international law, the following prosecutions are excluded: those against heads of State, heads of government and ministers of foreign affairs, during the period in which they exercise their function, as well as against other persons whose immunity is recognized by international law, and persons who obtain immunity based on a treaty to which Belgium is a party.[34] The amendment also provides that, in accordance with international law, no act in furtherance of initiating a criminal action may take place during the period of stay of anyone who has been officially invited by Belgian authorities or by an international organization based in Belgium with whom Belgium has entered into a location arrangement.[35]

[31] Spanish Supreme Court, Judgment No. 327/2003 (25 February 2003).

[32] Spanish Supreme Court, Judgment No. 712/2003 (20 May 2003).

[33] *HAS* v. *Ariel Sharon*, Belgian Court of Cassation, 12 February 2003, 42 ILM 596 (2003).

[34] Belgium's Amendment to the Law of 15 June 1993 (as amended by the Law of 10 February 1999 and 23 April 2003) (Moniteur belge, 7 May 2003) Concerning the Punishment of Grave Breaches of Humanitarian Law, 5 August 2003 (Moniteur belge, 7 August 2003).

[35] Donald Rumsfeld, the US Secretary of Defence, threatened to remove the headquarters of NATO from Belgium if its courts continued to prosecute serving government officials.