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State Immunity in International Law: The Trial of the State of Palestine Before the Israeli Judiciary

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Thesis Approval

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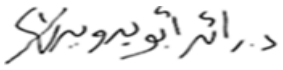
1. Dr. Raed Abubadawia : Supervisor	
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Declaration

I declare that, except where explicit reference is made to the contribution of others, this thesis is substantially my own work and has not been submitted for any other degree at the Arab American University or any other institution.

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Dedication

I dedicate this achievement

To my dearest parents: Your love, sacrifices, and endless encouragement have given me the strength to pursue my dreams. This achievement is as much yours as it is mine. I dedicate this work to you with all my love and gratitude.

To my beloved husband, Nidal: Your steadfast belief in me never wavered, even during the most challenging times. Your love, patience, and constant encouragement gave me the strength to continue when I felt I could not. Thank you for being my greatest source of support. I dedicate this work to you, my love.

To my precious daughters, Laya and Maryam: You are my greatest source of joy and inspiration. May this thesis serve as a reminder that with determination and perseverance, anything is possible. I dedicate this work to you with all my heart.

To my wonderful brothers and sisters: Your presence in my life has been a constant reminder of the power of family. I dedicate this work to you with deep appreciation and love.

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Abstract

This thesis examines the principle of state immunity within the framework of international law , with a focus on its significance and impact in the context of the Israeli-Palestinian conflict. The study aims to assess whether Palestine can successfully invoke state immunity in Israeli courts, particularly in civil cases involving accusations of human rights violations such as illegal detention and torture.

The research follows a doctrinal legal methodology, which includes an in-depth analysis of primary and secondary sources such as international treaties, case law, and customary international law. The study also employs comparative analysis by evaluating how state immunity is applied in other jurisdictions like the United States, United Kingdom, and Germany. Additionally, the thesis incorporates a case study focusing on Palestine’s legal status in relation to state immunity claims in Israeli courts.

The results indicate that Palestine’s ability to claim state immunity in Israeli courts is heavily influenced by political considerations, particularly in the context of the Israeli-Palestinian conflict. Israeli courts have frequently denied Palestine's immunity claims due to its disputed statehood, and the courts often prioritize security concerns over the principles of international law. This creates a complex and challenging environment for the consistent application of the doctrine of state immunity.

The thesis concludes by recommending that Palestine pursue further involvement in international legal frameworks, such as acceding to the United Nations Convention on Jurisdictional Immunities of States and Their Property, to strengthen its claims to sovereign immunity. It also suggests that Palestine seek an advisory opinion from the International Court of Justice (ICJ) to clarify its legal standing in relation to state immunity. Finally, the study advocates for a reassessment of the Oslo Accords, particularly their economic provisions, to allow Palestine more control over its own resources and enhance its international legal status.

Keywords: State Immunity, International Law, Israeli Judiciary, Palestinian Statehood, Human Rights Violations.

Table of Contents

Chapter 1: Introduction

1.1 Background

One of the most important principles in international law is the sovereign immunity of states. The essence of this principle is that sovereign states are generally not subject to the jurisdiction of foreign courts. This concept has evolved over history to become one of the basic pillars of international relations, ensuring that states and their representatives are able to perform their public duties without external interference, which enhances respect for the sovereignty of each state in the international legal system. This principle was initially absolute, but with the development of the international system and the increase in interactions between states in various fields—especially commercial and economic—international law has shifted towards what is known as "restrictive immunity," which allows states to be sued before the courts of other states in some cases, especially when the activities in question are of a commercial or non-governmental nature.

International law, through its various sources, regulates the rules governing state immunity. The most important of these sources is case law, which has been the basis for the understanding, codification, and development of state immunity rules. Case law played a fundamental role in helping the International Law Commission draft the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property. Although this agreement has not yet entered into force, it has become one of the most

important references that countries rely on when preparing their domestic laws for state immunity and when their courts adjudicate related cases.

However, the principle of state immunity faces many challenges. The lack of a fixed and clear standard for what constitutes a commercial act creates a loose space for national courts to decide this and thus grant or deny immunity. The increasing intersection between state immunity and international human rights law poses significant challenges, especially in cases involving serious allegations such as torture. Finally, the application of international law regarding state immunity in politically complex disputes poses another challenge. The case of Palestine's claim for state immunity before Israeli national courts embodies this tension. The complexity of the legal and political situation of Palestine affects the extent to which the principle of sovereign immunity is applied in cases where lawsuits are brought before Israeli courts against the Palestinian National Authority.

1.2 Research Problem

The research problem revolves around Israeli courts prosecuting the Palestinian National Authority in civil lawsuits filed by Palestinians who collaborated with Israeli security agencies, accusing the Authority of unlawful detention and torture. Israeli courts have awarded compensation in these cases, and the compensation amounts are being deducted from Palestinian "clearance" funds.

Therefore, this thesis focuses on the application of sovereign immunity in the context of the Israeli-Palestinian conflict. It specifically examines whether the State of Palestine can successfully invoke state immunity in Israeli courts, particularly in civil cases involving human rights violations, such as unlawful detention and torture. The study highlights the complexities arising from the political situation, the contested recognition of Palestine as a sovereign state, and how this affects its ability to claim state immunity in Israeli courts. This issue is further complicated by the ongoing Israeli occupation and the political sensitivities influencing judicial decisions in Israel.

1.3 Research Questions

The research should answer the following key questions:

Main Question:

1. Does the State of Palestine enjoy sovereign immunity before Israeli national courts, particularly in civil cases involving allegations of unlawful detention and torture?

Sub-questions:

2. What are the rules governing state immunity in international law, and the recognized exceptions to state immunity as applied in contemporary legal practices?

3. How do international human rights obligations interact with the principle of state immunity in cases involving serious allegations such as torture and unlawful detention?
4. Why does Israel prosecute the Palestinian National Authority in its courts, and what legal arguments underpin these proceedings?
5. How does the political context and the ongoing conflict between Israel and Palestine influence the application of the principle of state immunity in Israeli courts in cases involving the Palestinian National Authority?

1.4 Objectives of the study

The objectives of this research are as follows:

1. To examine the legal principles governing state immunity in international law and their application to the unique case of Palestine.

2. To evaluate recognized exceptions to sovereign immunity and examine how these exceptions are applied in contemporary legal contexts.

3. To assess Israel's judiciary prosecutes the Palestinian National Authority and the legal arguments that underlie such proceedings.

4. To explore the intersection between international human rights norms and state immunity, particularly in cases involving serious allegations such as unlawful detention and torture.

5. To provide a comprehensive case study analysis of Palestine's legal status and its implications for state immunity before Israeli courts.

1.6 Significance of the Study

This research holds significant importance in both academic and practical terms. It has strong academic importance because it addresses a relatively new and underexplored topic in international law, specifically the application of state immunity in the Palestinian context. By focusing on this unique situation, the study helps to bridge a gap in scholarly research, providing fresh perspectives that have not been adequately covered in existing literature. The research does not merely contribute to the field but plays a crucial role in expanding the understanding of how state immunity is interpreted and applied in real-world legal and political conflicts, which adds value to the ongoing academic discourse.

On a practical level, the study is equally important as it offers political decision-makers actionable insights based on its findings. Understanding how state immunity applies in the case of Palestine could inform future legal strategies, judicial decisions, and diplomatic negotiations and equips decision-makers with the knowledge they need to employ legal or political tools effectively in similar situations. This practical relevance makes the research not only a contribution to academic knowledge but also a valuable guide for shaping policy and legal strategies in politically charged contexts.

1.7 Literature Review

In The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts, Bankas (2022) provides an in-depth examination

of the ongoing debates surrounding the doctrine of state immunity, particularly in relation to private suits brought against sovereign states in domestic courts. He discusses the challenges of differentiating between acts of state and commercial activities and explores how state immunity often shields governments from accountability in human rights violations. Bankas critically addresses the tension between traditional principles of state immunity and the evolving landscape of human rights law, emphasizing the potential need for reform through multilateral treaties and international arbitration.

Yang, Xiaodong, in State Immunity in International Law (2012), provides a thorough examination of the historical evolution of the state immunity doctrine and its associated practices. He critically assesses the reasoning behind restrictive immunity and carefully analyzes significant exceptions to immunity, including commercial transactions, employment agreements, tort liability, separate entities, enforcement of judgments, and waiver of immunity.

Sebis (2016), in his paper "Can Serious Human Rights Violations Justify a Breach of State Immunity?", explores the limitations of bringing serious human rights violations to domestic courts due to state immunity, referencing the 2012 ICJ case of Germany vs. Italy. The author argues that the current legal framework, which broadly prohibits individual claims, could be more effective if it differentiated between two categories: forbidden claims arising from violations during systematic conflicts and

permissible claims by victims in peaceful times. This approach would allow for a more nuanced legal response to human rights violations.

Harms and Ferry (2017), in their book The Palestine-Israel Conflict: A Basic Introduction, provide a comprehensive overview of the Palestinian-Israeli conflict, offering readers a clear understanding of its historical development. The authors trace the origins of the conflict from biblical times through to the present day, analyzing key political events that have shaped the region. Their work serves as a foundational resource for understanding the complex history and enduring nature of one of the most well-known conflicts of the 20th century, which continues to impact the region today.

In his article Palestine Statehood and International Law, Quigley (2013) argues that Palestine's status as a state is well-established in international law. He asserts that Palestine meets the criteria for statehood under international law and has been recognized as a state by numerous countries. He emphasizes that the 2012 United Nations General Assembly resolution, which designated Palestine as a non-member observer state, reflects this long-standing recognition of Palestinian statehood. Quigley further discusses the implications of this recognition for Palestine's participation in international organizations, including the International Criminal Court.

Despite the extensive literature on state immunity, much of it has concentrated on Western legal frameworks and major international issues. There remains a notable gap in research addressing its application in politically sensitive contexts, such as the Israeli-Palestinian conflict. This thesis aims to fill that gap by

conducting a case study on Palestine's legal status and its effects on state immunity within Israeli courts.

1.8 Study limitations

Legal Limitations: The legal limitations of the thesis are defined within the scope of international law and its application within the Israeli legal system:

- **Sources of International Law:** The thesis relies on primary sources of international law, such as international treaties and customary international law. It also includes secondary sources, such as judicial decisions, international resolutions, academic literature, and legal commentaries.

- **Israeli Legal System:** The thesis examines state immunity within the framework of Israeli national law and judicial precedents. It explores how the Israeli judiciary applies international legal principles of state immunity.

Subject Matter Limitations: The dissertation examines state immunity in international law, covering both civil and criminal lawsuits, as well as immunity from execution. The case study focuses on the legal status of Palestine and its ability to claim state immunity in Israeli courts. Specifically, it analyzes civil cases brought by Palestinians against the Palestinian Authority in Israeli courts between 2003 and 2009, involving charges of unlawful detention and torture.

1.9 Methodology

The research follows a **doctrinal legal methodology** , focusing on the analysis of primary and secondary sources of international law. The study interprets and evaluates various international treaties, customary international law, judicial decisions, and the writings of leading scholars. Primary sources include key treaties like the United Nations Convention on State Immunity, relevant case law from national and international courts, and historical legal precedents that have shaped the doctrine of state immunity. Secondary sources involve academic literature on state immunity and human rights violations.

A significant component of the methodology involves **comparative analysis**, particularly in evaluating different national and international judicial practices. For instance, the thesis compares how various countries, such as the United States, the United Kingdom, and Germany, have treated the issue of state immunity, especially concerning commercial activities versus sovereign acts.

The study also utilizes **case study analysis**, particularly examining the status of Palestine before the Israeli courts. This case study serves to explore the practical application of state immunity principles, especially in politically sensitive and legally complex situations.

Finally, the thesis includes **historical legal analysis**, tracing the evolution of sovereign immunity from its origins to its current restrictive application in international

law. This historical analysis aids in understanding the development of legal doctrines and their current interpretations

1.10 Study plan

To achieve the objectives outlined above, this thesis is structured as follows:

Chapter 1: Introduction

Provides an overview of the topic, the research problem, its importance, research questions, objectives, and methodology, along with a review of relevant literature and the study's scope.

Chapter 2: Sovereign Immunity in International Law

This section examines the historical evolution and principles of sovereign immunity, differentiating between absolute and restrictive immunity. It provides a comprehensive review of the rules governing sovereign immunity in international law and discusses the challenges states face in applying sovereign immunity.

Chapter 3: State Immunity and Human Rights Violations

Explores the tension between state immunity and human rights accountability, particularly in cases involving jus cogens norms like the prohibition of torture. It includes an analysis of key international cases and treaties relevant to this issue.

Chapter 4: The Status of Palestine in International Law

examines the legal status of Palestine in international law, from its transformation from a liberation movement to its recognition as a non-member observer state in the United Nations.

Chapter 5: Case Study - The Trial of Palestine Before the Israeli Courts

The study examines the trial of the Palestinian Authority in Israeli courts, focusing on lawsuits related to allegations of unlawful detention and torture. It analyzes the jurisdiction of Israeli courts in these cases and explores the application of international law, particularly in relation to the Palestinian Authority's claim of sovereign immunity.

Chapter 2 : Sovereign Immunity of States in International Law

2.1 Evolution and Concept of Sovereign Immunity in International Law

Drawing from the historical context, the concept of immunity has been practiced since ancient times in civilizations such as ancient Egypt, Rome, and Greece.[1] Initially, personal immunity was granted to kings and princes. For instance, in the 14th century, King Edward I of England enacted a law for himself known as "princepslegibus solutus," which means "the prince is not bound by laws," thus exempting himself from appearing before the English courts of that time.[2] By the 16th century, immunity was extended to ambassadors and embassies.[3] However, as noted by historian Christopher A. Whytock, the principle of sovereign state immunity, recognizing the immunity of states as distinct entities, did not emerge until the 19th century. This development occurred after the rise of the modern nation-state, where the equality of sovereignty became one of the key principles governing international relations, leading to the application of sovereign state immunity.[4] This reflects the evolution of immunity from personal privileges of rulers to a formalized legal principle that protects states and their sovereign functions in the international system.

State immunity, a fundamental principle in international law means that a sovereign state is not subject to the jurisdiction of the national courts of another state. This principle is

[1] Bederman, David J. International law in antiquity. Vol. 16. Cambridge University Press, 2001, pp 173- 177.
[2] Barry, Herbert. "The King Can Do No Wrong." Virginia Law Review, (1925), p 352.

[3] Whytock, Christopher A. "Foreign state immunity and the right to court access." Boston University Law Review, vol.93, 2013, p.2038.
[4] Bankas, Ernest K. The state immunity controversy in international law: private suits against sovereign states in domestic courts. Second edition. Springer Berlin, Heidelberg, 2022 , p36.

based on a general principle in international law, the principle of equality of sovereignty among states, dating back to Roman times with the Latin phrase "*par in parem non habet imperium*", which means that "an equal does not have authority over an equal ", and thus one sovereign state cannot exert authority over another sovereign state.[5]

To understand this principle, one must refer back to the classical concept of sovereignty. The Romans were the first to delve into the concept of sovereignty. A group of concepts and terms formulated by Roman jurists in the thirteenth and fourteenth centuries, relating to the "sovereign," formed a fundamental axis in reaching the concept of sovereign immunity. The prevailing approach in ancient times considered the state as a moral entity embodied in the person of the ruler. Sovereignty meant "the authority of the prince," and the prince could not err (*princeps legibus solutus*). The prince was not subject to the courts he established to protect his subjects, and he was not bound by the law (princeps legalibus solutus es); rather, he enacted the laws. "*Rex in regno suo imperator est*" is one of the most prominent concepts that formed the principle of sovereignty, meaning "the king is emperor in his own kingdom," and no one has authority over him, from which the principle "*par in parem non habet imperium*" gained its strength.[6]

These Roman concepts of sovereignty provided the fertile ground for the concept of state immunity and the equality of sovereignty among states, which began to crystallize

[5] Dinstein, Yoram. "Par in Parem Non Habet Imperium." *Israel Law Review* 1.3 (1966): 407-420.
[6] The state immunity controversy in international law: private suits against sovereign states in domestic courts, p36.

clearly after the ratification of the Treaty of Westphalia in 1648 and the emergence of modern nation-states.[7]

The first case where the concept of sovereign immunity for a state was raised against foreign judicial jurisdiction occurred in 1812 in the case known as "The Schooner Exchange v. McFaddon." This case later played a significant role in establishing legal principles related to the immunity of foreign sovereign ships. The case involved a lawsuit filed in a Philadelphia county court in the United States against a French warship accused of violations while sailing in American territorial waters. Initially, the lower court ruled that the ship was subject to American jurisdiction. However, the United States Supreme Court later issued a decision overturning the lower court's ruling. Chief Justice John Marshall delivered the majority opinion, establishing the principle of "sovereign immunity of foreign ships." The court found that the ship (Schooner Exchange) was a warship belonging to a sovereign foreign state with peaceful relations with the United States government. Therefore, it should be exempt from the jurisdiction of the American national judiciary.[8]

Sovereign immunity extends beyond states to encompass their leaders, representatives, and agents. Courts of one state cannot legally sue a foreign ruler using their own legal procedures, as the ruler acts on behalf of his state. This immunity, granted out of respect for the state's sovereignty and independence, also applies to state officials and

[7] Ibid.
[8] Schooner Exchange, Schooner Exchange and Bonaparte (on the application of United States) v McFaddon and Greetham, Decision of the Supreme Court, 11 US (7 Cranch) 116 (1812), 3 L.Ed. 287 (1812), ILDC 1378 (US 1812), 24th February 1812, United States; Supreme Court [US]. https://supreme.justia.com/cases/federal/us/11/116/

representatives. However, it's important to note that state immunity doesn't equate to impunity, nor does it prevent litigation altogether. International judicial institutions like the International Court of Justice or the International Criminal Court can be utilized in cases involving violations of international law.[9]

So as Ernest K. Bankas said state sovereign immunity can be defined as : " a meta juridical procedural shield, which protects sovereign states, organs of government, heads of state, heads of government and other high ranking officials of states from being impleaded before foreign judicial authorities, or to be forced to defend themselves before foreign courts. " [10]

Sovereign immunity encompasses two elements : judicial immunity and immunity from execution. Under the first element , a court of a particular state is not permitted to hear or take any judicial actions in lawsuits filed against another state. As for immunity from execution, if a judgment is issued against a state by the national courts of another state under any circumstances, this judgment cannot be enforced. Consequently, this safeguard the assets and properties of the state, situated within the territory of another state, from

[9] Arrest Warrant (11 April 2000) Democratic Republic of Congo v. Belgium, Preliminary Objection and Merits, Judgment, ICJ Reports 2002, p. 53: Where the court was unequivocal in that “the immunity from jurisdiction enjoyed by incumbent Ministers of Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed.”

[10] The state immunity controversy in international law: private suits against sovereign states in domestic courts, p33.

being subjected to execution.[11] We will discuss the two aspects of immunity in some detail in the third section of this chapter (Rules governing state immunity in international law).

2.2 Types of States Sovereign Immunity

Two primary approaches to state immunity, absolute and restrictive immunity, will be outlined based on state practices.

2.2.1 Absolute Immunity[12]

Absolute immunity means that a state has complete immunity against any legal proceedings taken against it in foreign national courts without its consent, Irrespective of the nature of the legal dispute being adjudicated.[13] The Schooner Exchange v. McFaddon case, previously mentioned, was indeed the inaugural instance of adopting the absolute concept of sovereign immunity. In this case, judges primarily based their reasoning on the classical concept of sovereignty, where the sovereign was seen as a divine entity, and his actions were beyond any legal accountability. He could not be prosecuted and was granted absolute immunity regardless of the case's subject. This extended to the state itself, leading to absolute immunity in foreign courts.[14]

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[11] Fox, Hazel, and Philippa Webb. The law of state immunity. Oxford International Law Libra, 2013, chapter 9.

[12] Some criticize the term "absolute immunity" on the grounds that it is not truly absolute, as the state can waive it.

[13] Yang, Xiaodong. State immunity in international law. Vol. 89. Cambridge University Press, 2012. p 8.

[14] Schooner Exchange, Schooner Exchange and Bonaparte (on the application of United States) v McFaddon and Greetham, Decision of the Supreme Court, 11 US (7 Cranch) 116 (1812), 3 L.Ed. 287 (1812), ILDC 1378 (US 1812), 24th February 1812, United States; Supreme Court [US].

Another judicial precedent in the English legal system regarding the sovereign immunity of state assets and its high-ranking officials was established in 1880. An English court heard a case against a commercial vessel owned by the Belgian royal family, accused of violating laws while passing through the Thames River in England. At first, the court decided that it did not possess jurisdictional immunity. However, in its final judgment, the court reversed this decision and granted immunity to the vessel because it was owned by the government of the Kingdom of Belgium, even though it was engaged in private commercial activities.[15] The approaches adopted by these courts in the United States and England, followed by many similar cases, embraced the absolute concept of state immunity. This approach, prioritizing state sovereignty in foreign jurisdictions to stabilize relations between them, was the prevailing stance of states until the 20th century.

2.2.2 Restrictive Immunity

Due to the expansion and diversification of state activities, especially in international commerce, another approach to state immunity emerged, based on distinguishing between sovereign acts (*acta de jure imperii*) and administrative or managerial acts (*acta de jure gestionis*). This distinction is crucial as it delineates when a state can claim immunity from the jurisdiction and enforcement actions of foreign courts.

[15] The case of *The Parliament Belge* (1880) 5 P.C. 197. M. McMenamin, "State Immunity Before the International Court of Justice: Jurisdictional Immunities of the State (Germany v Italy)", *VUWLR*, vol. 44, no. 1, May 2013, p.191.

Based on this distinction, the commercial or private activities of a state are excluded from immunity, while immunity is maintained for sovereign or public actions.[16]

Acta Jure Imperii and *Acta Jure Gestionis* are Latin terms. Acta Jure Imperii means "acts of sovereign authority" and refers to actions undertaken by a state that are inherently governmental and exercise elements of its sovereignty. Examples include, policy-making , legislation, military operations, foreign affairs, and security policies, law enforcement, and other activities that are beyond the capabilities of private entities. Such activities typically enjoy immunity from the jurisdiction and enforcement actions of foreign courts as they directly relate to the sovereign functions of the state. *Acta Jure Gestionis* means "acts of private management" include actions that are commercial or civil in nature and do not involve the core sovereign functions of the state, such as entering into contracts, commercial transactions, operating businesses, or other activities that can be undertaken by both private and public entities.[17]

Belgium and Italy were among the pioneering nations to embrace the restrictive stance on state immunity. An early legal precedent supporting this approach can be traced back to 1879 in the case of Raw v. Duroti. In this instance, the Belgian Court of Appeal ruled that the sale and shipment of guano by the Peruvian government to a Belgian port constituted commercial transactions, hence falling under the jurisdiction of Belgian

[16] The United Nations, General Assembly, Report of the International Law Committee on the work of its fifty -third session, Report of the Sixth Committee, Document / 589/569, on November 62, 611.
[17] The law of state immunity, Chapter 12, The Concept of Commerciality.

courts.[18] Since the latter half of the 20th century, this approach has been widely embraced by nations.[19]

The International Court of Justice (ICJ), the primary judicial organ of the United Nations, has played a significant role in shaping the discourse on state immunity, particularly through landmark cases like "Jurisdictional Immunities of the State" (Germany v. Italy). In this pivotal case, the issue of state immunity concerning sovereign actions was addressed. The dispute originated when Italian courts permitted civil lawsuits against Germany for war crimes committed during World War II. In response, Germany brought the matter before the ICJ to assert its claim of immunity. The ICJ ruled that the actions in question, which pertained to wartime activities, were indeed of a sovereign nature and thus protected by state immunity under international law. This decision reinforced the principle that actions undertaken by a state in its sovereign capacity are shielded from the jurisdiction of foreign courts, unlike commercial or private actions, which are subject to legal accountability similar to that of private entities.[20]

However, a significant obstacle to this approach is the absence of a definitive rule or objective criteria for differentiating between sovereign and non-sovereign actions of a state, with no consensus even among scholars or national court rulings on this matter. The practical difficulties of consistently applying these distinctions is due to the evolving nature

[18] Rau v. Duruty, Belgium, 1879, 26 AJIL Supplement (1932) 612, 613.

[19] L. M. Caplan, 'State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory', AJIL 97 (2003), 741 et seq. (745)

[20] The international court of Justice, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, para 60.. https://www.icj-cij.org/case/143

of state activities, which often blur the lines between sovereign and non-sovereign functions. Some argue that the nature of the act itself is sufficient for distinction, regardless of its purpose. This is known as the 'Nature Approach,' which examines the outward form of the action to determine whether it resembles those typically undertaken by a private entity. For example, if an act can only be performed by a state, such as declaring war, it is considered a sovereign act; while acts like entering into commercial contracts, such as purchasing military equipment, are considered administrative or private acts, regardless of their purpose.[21] Various courts across different jurisdictions have adopted the "nature" approach. For example, The Swiss Federal Tribunal consistently holds that the decisive factor is the nature of the action, while according less significance to the purpose, which is directed towards the public interest.[22] This is aligned with practices in other countries like The United States[23], Netherlands[24], Greek[25] and Kenya[26], where sovereign immunity is determined based on the nature of the action.

[21] A, Weiss,Compétence ou Incompétence, des Tribunaux Í é des Estats Entragers. Hague Recueil 1.1923, 545–546. Weiss, a former senior judge of the Permanent Court of International Justice in The Hague, was appointed its Vice-President in 1922.

[22] Italian v. Beta, Switzerland, (1966) 65 ILR 394, 401, Ground 7a. See also R´epublique Y v. X, Switzerland, 2000, 11 RSDIE (2001) 589, 590; R´epublique de Y v. Office, Switzerland, 2001, 12 RSDIE (2002) 607, 608.

[23] US Foreign Sovereign Immunities Act (FSIA) emphasizes the nature of the act. According to Section 1603(d) of the FSIA, the commercial character of an activity is determined by reference to the nature of the course of conduct or transaction, not by its purpose. The Foreign Sovereign Immunities Act of 1976 (FSIA), https://usun.usmission.gov/wp-content/uploads/sites/296/225005.pdf

[24] Portugal v. De Sousa, Netherlands, (1981) 94 ILR 314, 315; Soci´et´e Europ´eenne v. Yugoslavia, Netherlands, (1973) 65 ILR 356, 361.

[25] Distomo Massacre Case, Greece, (2000) 129 ILR 513, 516.

[26] UK v. Joel, Kenya, (1983) 103 ILR 235, 239.

Others believe that while the nature of the act is important, it is not sufficient to distinguish between sovereign and non-sovereign acts. They argue that the purpose of the act should also be considered. This is known as the 'Purpose Approach,' which takes into account the intent behind the action, whether it was meant to serve a public service or a governmental objective. For instance, a state entering a contract to purchase weapons or warships for its military needs would constitute a sovereign act, even if the act itself is commercial. This was also the view of the United Nations International Law Commission in the United Nations Convention on the Immunity of States and Their Property.[27] The convention reflect a nuanced approach, primarily advocating for the "nature" test but allowing room for the "purpose" test under specific conditions, especially if the parties to a transaction have agreed that purpose should be considered, or if the forum state's practice consider the purpose relevant in discerning the non-commercial aspect of the action.[28] Ultimately, in the absence of a universally binding international agreement, the issue is primarily governed by the domestic legislation of the court's jurisdiction where the legal proceedings are initiated.[29]

The prevailing trend among countries, whether through their national legislation or national court decisions, is the restrictive approach. Leading this trend are the United States, most European countries, Australia, and Malaysia. Nevertheless, several countries

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[27] Yang, Xiaodong. *State immunity in international law*. Vol. 89. Cambridge University Press, 2012.p 75-107.
[28] United nation treaty collection, United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004, article 2\2 . Accessed on Feb 28th 2014 . https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=_en
[29] Milisavljević, Bojan. "„Imunitet države u međunarodnom pravu–osvrt na rad Komisije za međunarodno pravo “." Nauka, bezbednost, policija (2014): p26 .

still adhere to the absolute immunity approach regarding state actions especially third world countries.[30]

2.3 Rules Governing State Immunity in International Law

Article 38 of the International Court of Justice's statute outlines the main sources from which the rules of international law are drawn. These sources, listed in sequence, include "international treaties, customary international law, general principles of international law, along with judicial decisions of courts and the writings of the most highly qualified publicists as subsidiary sources of international law".[31] So it's important to resort to them in detailing the rules relating to state immunity.

2.3.1 International Agreements

whether they are general (multilateral) or specific (bilateral), are fundamental sources of international law whose provisions are binding for the contracting parties. One of the earliest international agreements on state immunity was the Brussels Convention of 1926. Under this convention, commercial ships owned by a foreign state were subjected to the local judicial jurisdiction. This convention was ratified by 10 countries (Belgium, Brazil, Chile, Estonia, Hungary, Poland, Germany, the Netherlands, Italy, Romania)[32], but

[30] Ibid , State immunity in international law ,p 13.
[31] Statute of the International Court of Justice, 1945. Art. 38(1) sources of international law. https://www.icj-cij.org/statute
[32] United nation treaty collection , International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, signed at Brussels, April 10th 1926, and Additional Protocol, signed at Brussels, May 24, 1934. https://treaties.un.org/doc/Publication/UNTS/LON/Volume%20176/v176.pdf

its importance in the field of state immunity is limited. Its scope is confined to rules related to the immunity and responsibility of state ships used in commercial activities. In 1972, the Council of Europe adopted the European Convention on State Immunity (ECSI). The aim of this convention was to establish more comprehensive and common rules governing matters related to the sovereign immunity of states, thereby unifying international practices in this regard. It also aims to protect the rights of individuals in their dealings with states, which fall under private law.[33]

The (ECSI) adopted a restrictive approach to immunity from jurisdiction. Articles 1 to 14 detail the cases in which the contracting states are not granted immunity before the national courts of another contracting state. These cases mostly hinge on distinguishing commercial activities from other sovereign acts of the state. In cases not listed in Articles 1-14, states retain immunity from jurisdiction.[34] Meanwhile, the Convention grants contracting states absolute immunity from coercive enforcement against state property. Article 23 of the European Convention states, "No enforcement or precautionary measures may be taken against the property of a contracting state in the territory of another contracting state, except in cases and to the extent expressly consented to in writing by the state in each specific case." To mitigate the rigidity of these provisions, Article 24 of the Convention introduces an optional regime allowing a state to declare a waiver of immunity

[33] Helmut, Damian. "European convention on state immunity." null (1987).:151-155.
[34] United nation treaty collection, European Convention on State Immunity, 1972. Accessed on January 7th 2024. https://treaties.un.org/pages/showDetails.aspx?objid=08000002800c8eb2

in specific cases. If a state issues such a declaration under Article 24, it waives its immunity accordingly.[35]

In June 1976, The European Convention on State Immunity (ECSI) entered into force. However, it did not achieve widespread acceptance among nations, with only 8 countries (Germany, United Kingdom, Austria, Belgium, Switzerland, Cyprus, Luxembourg, and the Netherlands)[36] as members. This limits its scope of application. Nevertheless, the European Convention represented an important experience that influenced the subsequent United Nations Convention on State Immunity and Their Property (UNCSI) of 2004.

UNCSI, undoubtedly the most significant legal document in this field, has not yet entered into force as it requires ratification by 30 countries (as per Article 30 of the Convention) and has so far been ratified by only 23 countries.[37] Its importance lies firstly in the fact that while the ECSI is a regional instrument, drafted under the auspices of the Council of Europe in 1972 with its scope limited to European member states and primarily reflecting the legal understandings and practices of these countries regarding state immunity, UNCSI aims to codify and clarify the rules related to state immunity in

[35] Ibid, articles 23 and 24 .
[36]European Convention on State Immunity, 1972.
[37] United nation treaty collection, United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004 . Accessed on Feb 28th 2014 . https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=_en

international law and unify state practices in this field on a global scale.[38] The International Law Commission of the United Nations undertook this initiative, preparing a draft of the articles on state immunity and their property from jurisdiction in 1991. After numerous amendments and evaluations by the United Nations, the draft was eventually adopted by the General Assembly as UNCSI in 2004.

Although the Convention is not binding on non-member states, it was developed by an international committee composed of 34 members, all renowned for their competence in this area of international law.[39] Therefore, it holds significance comparable to the teachings of the most esteemed legal experts, which are recognized as a source of international law. Additionally, The Convention was adopted by the UN General Assembly, representing all countries worldwide, reflecting a broad consensus among member states at that time regarding the principles governing the jurisdictional immunities of states. The adoption itself signifies a collective endorsement of the restrictive approach to state immunity.[40] Secondly, the United Nations Convention establishes a comprehensive framework for state immunity, encompassing both judicial immunities and immunities from execution. In contrast, the European Convention primarily focused on judicial immunities. Thirdly , International conventions, even those un ratified or not yet in effect, are frequently utilized as influential sources in courts and legal systems. Consequently, the provisions set forth in

[38] Cristina, Elena, Popa, Tache. "State Immunity, Between Past and Future." Access to justice in Eastern Europe, 6 (2023).:97-110. doi: 10.33327/ajee-18-6.1-a000121

[39] Statute of the International Law Commission, 1947, article 1 "The Commission shall consist of thirty-four members who shall be persons of recognized competence in international law".

[40] Hazel, Fox. "In Defence of State Immunity: Why the UN: Convention on State Immunity is Important." International and Comparative Law Quarterly, 55 (2006).

the UNCSI have the potential to influence judicial rulings and shape the evaluation of both international and domestic laws regarding state immunity.[41] In this regard, both Sweden and Japan have enacted laws to integrate the provisions of the Convention into their respective national legal frameworks. Countries might choose to implement only certain sections of the Convention, as demonstrated by France's 2016 legislation, which is influenced by Part IV of the Convention focusing on enforcement measures.[42]

Furthermore, during the 2012 case at the International Court of Justice (ICJ) , the court made reference to the UNCSI Convention. Although the Convention had not entered into force for the parties involved, the International Court of Justice found it pertinent to the extent that its provisions represented customary international law. The ICJ went on to fully quote Articles 12, 19 and 6(2) of the Convention in paragraphs 69, 116, and 129 respectively, to support its provisions.[43] Likewise, in a 2013 decision, the European Court of Human Rights (ECTHR) ruled that the provisions of the UNCSI are applicable under customary international law even if a state has not ratified the convention, as long as the state has not explicitly objected to it.[44] In national jurisdictions, UNCSI's influence is also evident. In the case of Jones v Saudi Arabia, the English House of Lords applied state immunity in a claim against officials for torture committed abroad. Lord Bingham cited the UNCSI, highlighting its significance as a reflection of international consensus, despite its

[41]The law of state immunity, chapter 9, p 291.

[42] Audiovisual Library of International law, United Nations Convention on Jurisdictional Immunities of States and Their Property, historic archives, by Philippa Webb, October 2017. https://legal.un.org/avl/ha/cjistp/cjistp.html

[43] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012. https://www.icj-cij.org/case/143

[44] *Oleykinov v Russia*, App no 36703/04, 14 March 2013, para 66.

then-embryonic status. He also recognized the Convention as the most definitive expression of the current international consensus on the limitations of state immunity in civil cases.[45] Given all the points mentioned, it is crucial that we thoroughly discuss the provisions of this agreement in detail.

State Immunity Within the Framework of the United Nations Convention on State Immunity (UNCSI)

1- Immunity from Jurisdiction

It refers to the protection given to a state from being suited in the courts of another state. The concept covers the entire judicial process, starting from the commencement of legal actions, through the serving of legal notices, conducting investigations, and carrying out examinations, to the trial itself. It also includes issuing temporary or preliminary orders, leading up to the delivery of different types of judgments, the implementation of these judgments, their potential suspension, and any additional exemptions that might apply. In this context, a 'court' includes any state organ authorized to carry out judicial functions, regardless of its specific title or level within the government. Regarding the concept of "judicial functions,"[46] it's important to recognize that these functions can differ across various constitutional and legal frameworks. Consequently, the Commission chose not to define this term strictly within the article. Nonetheless, judicial functions generally

[45] Jones v Minister of Interior of Kingdom of Saudi Arabia [2006] UKHL 26; [2006] 2 WLR 70, para 8, citing Aikens J in AIG Capital Partners Inc v Republic of Kazakhstan [2005] EWHC 2239 (Comm); [2006] 1 All ER 284, 310, para 80; 129 ILR 589.

[46] See Articles 1 and 2 of the Convention.

encompass activities undertaken by both courts and administrative bodies at various phases of a legal process. This can include activities before the start of, during, or at the conclusion of legal proceedings. Judicial functions typically involve the resolution of legal disputes, making decisions on legal and factual issues, and issuing temporary or enforcement orders throughout the stages of legal processes. Additionally, they include various administrative and executive tasks typically conducted by or under a state's judicial authorities in relation to legal proceedings. It's important to note, however, that the internal organizational structures of individual states determine the specific nature of these functions, and in this context, the term does not extend to encompass all aspects of justice administration, which in some legal systems, may also involve activities like the appointment of judges.[47]

This type of immunity encompasses not only the state acting in its own capacity but also extends to its diverse governmental entities and officials who perform sovereign functions. This includes the head of state, government leaders, the central administration, all ministries and governmental departments, as well as various subordinate agencies and divisions. Additionally, it covers entities representing the state abroad, such as diplomatic and consular missions, permanent delegations, and other similar bodies. The term "various organs of government" is

[47] International Law Commission. "Draft Articles on Jurisdictional Immunities of States and their Property, with commentaries." Yearbook of the International Law Commission . (1991). Para 1-19.

used to refer to all parts of the government's structure, not just the executive branch.[48]

The convention imposes an obligation to refrain from exercising jurisdiction in cases involving or affecting another state that is entitled to immunity and unwilling to submit to the jurisdiction of the former state. This limitation on jurisdiction is obligated by international law. The convention highlights the independence and sovereignty of the state granting immunity, rather than the sovereignty of the state seeking immunity. Thus, the primary condition for jurisdictional immunity is the presence of a valid jurisdiction according to the internal laws of the state, provided these laws do not contravene the basic principles of public international law. The applicability of state immunity becomes relevant only when there's proof of valid jurisdiction. Typically, courts have the authority to assess the presence, scope, and boundaries of their jurisdiction.[49]

Various circumstances can lead to a state being involved in litigation or legal proceedings in another state's court. Proceedings are considered instituted against another state if " it's named as a party or if the proceeding seeks to affect its

[48] Ibid.The concept of state immunity continues to be effective even after a representative's role or assignment concludes. This ongoing protection is attributed to its origin in the state's sovereignty and the official capacity of the tasks, categorized as immunity 'ratione materiae.' However, any activities undertaken by sovereigns or ambassadors that are unrelated to their official duties fall under the jurisdiction of local courts once these officials have left their positions.

[49] Ibid, article 6, para 3 & 4 .Unlike UNCSI, the ECSI does not specifically require a judge in a contracting state to proprio motu (on their own initiative) acknowledge and give effect to state immunity in the absence of an appearance by the defendant state. The UNCSI explicitly imposes this obligation on its contracting states, reflecting a more proactive approach towards recognizing and enforcing state immunity.

property, rights, interests, or activities"[50]. This includes actions against state-owned vessels and other measures of attachment or execution.[51]

1.1 Exceptions to Immunity from Jurisdiction

The articles of the United Nations Convention on State Immunity (UNCSI) lay out a comprehensive framework concerning the exceptions to a state's immunity from the jurisdiction of another state's courts. These exceptions detail the circumstances under which a state cannot claim immunity when facing legal proceedings in the courts of another state. Key exceptions include:

1- State Waiver: A state may waive its immunity either explicitly or implicitly. The Convention mainly focuses on explicit waiver, which is typically articulated in international treaties, within the terms of a documented contract, by making a formal statement in court or through a written correspondence related to a particular legal case.[52] Implied consent, on the other hand, is deduced from a state's actions or conduct. For instance, if a state voluntarily engages in legal proceedings, such as by submitting to or intervening in a lawsuit, or by taking any action pertaining to the merits of the case, it may be regarded as implicitly consenting to the court's jurisdiction. The

[50] UNCSI , article 6.
[51] Ibid, commentaries on article 6 " Modalities for giving effect to State immunity", p 23-25.
[52] Article 7(1) of the convention.

agreement also makes clear that some actions do not constitute implied consent. For instance, if a state gets involved in legal proceedings or acts solely to assert its immunity or to claim rights over property involved in the case, this cannot be taken as agreeing to the court's jurisdiction. Similarly, when a representative of a state appears as a witness in court, it should not be seen as the state agreeing to the court's jurisdiction. Additionally, a state's absence in a lawsuit in another country's court should not be construed as approval to the jurisdiction of that court.[53]

Arbitration agreements are a clear example of a state waiving its immunity. When a state agrees to participate in arbitration through a contractual commitment, it intentionally relinquishes its immunity. Such an agreement might either be embedded within a part of a broader contract or exist as a separate, standalone arbitration pact.[54] in a case before The London Commercial Court between Orascom Telecom Holding LLC v. Republic of Chad (2008). Orascom, an Egyptian multinational telecommunications company, sought to enforce an arbitration award against Chad in the UK courts. The London Commercial Court ruled that the Republic of Chad could not claim state immunity in this

[53] Article 8 of the UNCSI convention.
[54] Article 17 of the UNCSI convention.

particular instance. The court ruled on the basis that Chad, by agreeing to an arbitration clause, had essentially relinquished its right to assert immunity.[55]

2- "Commercial Transactions": defined as " any commercial contract or transaction for the sale of goods or supply of services, any contract for a loan or other transaction of a financial nature, and any other contract or transaction of a commercial, industrial, trading, or professional nature, but not including a contract of employment of persons ." [56] Under this exception if a state is involved in a commercial deal with a foreign individual or legal entity, it is not allowed to invoke jurisdictional immunity in another state's courts. However, if those involved in the transaction have specifically agreed upon different conditions regarding immunity, then those agreed terms will hold precedence. This rule of non-immunity does not extend to commercial transactions conducted between states themselves, and this includes state entities that are involved in proceedings related to a commercial transaction. The crucial aspect here is whether the issues or conflicts stemming from the

[55] Judgment of the High Court of Justice of England and Wales, EWHC 1841 , 28 July 2008. https://jusmundi.com/fr/document/decision/en-orascom-telecom-holding-sae-v-the-republic-of-chad-and-societe-des-telecommunications-du-tchad-judgment-of-the-high-court-of-justice-of-england-and-wales-2008-ewhc-1841-monday-28th-july-2008.

[56] Article 2\1(c) of the UNCSI convention .

commercial transaction are subject to the jurisdiction of another state's court, as defined by the relevant rules of private international law.[57]

The articles propose two sequential tests to determine if an activity qualifies as a commercial transaction. The first is the "nature" test, which assesses the inherent character of the transaction or contract. If deemed non-commercial or governmental, the analysis stops there. If it seems commercial, the "purpose" test comes into play, examining the transaction's intent, which is particularly pertinent for developing nations' economic activities. We have already explained this in the previous section (see restrictive immunity).[58]

3- "Personal Injuries" : This exemption is intended to allow legal action by individuals who have incurred physical injuries or property damage resulting from an act or omission by a foreign state. This encompasses instances of death, physical harm, or loss or damage to property, predominantly in cases like traffic accidents. This exception is particularly relevant when the injury or damage is caused by an act or omission by the foreign state or its agents operating within the territory of the forum state. The exception

[57] Article 10 , UNCSI convention .
[58] Article 2\2 of the UNCSI convention.

applies when the harmful act or omission, at least in part, occurs in the territory of the state where the legal action is brought , and where the state would be liable under the local law. also the person responsible for the act or omission must have been present in the state at the time it occurred.

The article clarifies that compensation refers to monetary forms and that responsibility for the harmful act is attributed to state agents or officials performing official functions, rather than to the state as a legal entity. The article excludes cases involving transboundary or trans-frontier injuries and damages, like the export of dangerous materials or actions resulting from armed conflict. The exception does not differentiate between acts performed as sovereign functions (jure imperii) and those performed as part of a state's commercial or private activities (jure gestionis).The specific application and recognition of this exception can vary based on national laws of individual countries, as well as relevant international treaties and conventions.[59]

In a case before the European Court of Human Rights - Al-Adsani v. United Kingdom (2001), the applicant, a dual Kuwaiti-

[59] International Law Commission. "Draft Articles on Jurisdictional Immunities of States and their Property, with commentaries. Article 12, P 44-46.

British citizen, claimed that he had been tortured by Kuwaiti authorities. He sought to bring a civil lawsuit against Kuwait in the United Kingdom for compensation resulting from the alleged torture. The European Court of Human Rights held that while the right of access to a court is an important right, it is not absolute and can be subject to limitations. The court found that the immunity granted to Kuwait was in line with the principles of international law which recognize the state's immunity from civil jurisdiction in foreign national courts concerning acts of torture and that the alleged torture was committed outside the forum state.[60]

4- "Ownership, Possession, and Use of Property" : this exception is designed to allow foreign courts to exercise jurisdiction when a legal proceeding does not directly target a foreign state but seeks to impact the state's property rights or interests. It addresses circumstances under which a state cannot invoke immunity in foreign courts regarding disputes over property located within the jurisdiction of the court.[61] Article 13 of the Convention identifies three types of

[60] The case of Al-Adsani v. United Kingdom, European Court of Human Rights, Application no. 35763/97,21 November 2001. https://www.refworld.org/jurisprudence/caselaw/echr/2001/en/33721

[61] The provision of article 13 is, however, without prejudice to the privileges and immunities enjoyed by a State under international law in relation to property of diplomatic missions and other representative offices of a government.

property-related cases where a state cannot claim immunity from legal proceedings in the courts of another state:

a) Cases Involving Immovable Property: This includes any legal matters concerning the rights or interests of a state in immovable property (like land or buildings) located in the country where the court is situated (the forum state). It covers cases involving ownership, use, or obligations related to such property.

b) Property Acquired Through Succession, Gifts, or as Ownerless: This category covers cases where a state has rights or interests in property, movable or immovable, that it has acquired through inheritance, as a gift, or as property without a known owner (bona vacantia).

c) Managing Property: This involves cases where a state has a role in administering certain types of property. Examples include trust property, the estate of a bankrupt individual, or assets of a company that is being wound up or dissolved.[62]

The jurisdictional basis for previous exceptions is grounded in the principle of territoriality and the local laws of the forum state. territoriality is a principle in international law asserts that a country has the right to to enact laws concerning actions within its own borders and to exercise jurisdiction over individuals and incidents that take place in its

[62] Article 13 of the UNCI Convention.

territory. The Territorial Principle highlights that a state's authority to govern and apply its laws within its own borders is a key aspect of its sovereignty. This principle is essential as it forms the foundation of the various legal rights inherent to a state.[63]

In the context of state immunity, exceptions often arise when a foreign state's activities bear a significant link to the territory of the state where legal action is sought. In the 2012 Jurisdictional Immunities ruling the International Court of Justice (ICJ) explored state immunity within the context of two key principles: sovereign equality and sovereign territoriality. The Court examined how applying one of these principles might necessitate exceptions or deviations from the other. The ICJ pointed out that state immunity stems from the principle of sovereign equality among states, a fundamental aspect of the international legal framework as affirmed in the United Nations Charter, Article 2, paragraph 1.[64] this principle needs to be considered alongside the concept that each state maintains sovereignty over its territory, thereby establishing its jurisdiction over occurrences and individuals within its borders. Thus, when exceptions to state immunity occur, they signify a deviation from the principle of sovereign equality. Similarly, the application of state immunity can sometimes diverge from the principle of territorial sovereignty and its associated jurisdictional authority.[65]

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[63] Shaw, Malcolm N. *International law*. Cambridge university press, 8th edition ,2017, chapter 11, p489.

[64] United Nations, The Charter of the United Nations, 24 October 1945, Chapter I , article 2(1) "The Organization is based on the principle of the sovereign equality of all its Members". https://www.un.org/en/about-us/un-charter/chapter-1

[65] The ICJ, *Jurisdictional Immunities of the State* ,2012, para 57.

Territoriality is an essential element in many exceptions to state immunity, in particular the three aforementioned exceptions (commercial transactions conducted within the forum state's territory, torts committed there[66], or disputes over property located there). These exceptions are recognized internationally, as they provide a middle ground between maintaining state sovereignty and recognizing the legal powers of the forum state over actions occurring within its territory. [67]

5- "Intellectual Property, Industrial Property, and Similar Rights"[68]: This exception intersects with both the "commercial transactions" exception in Article 10 and the "ownership, possession, and use of property" exception in Article 13. Intellectual and industrial property rights, including patents, trademarks, copyright...etc, are globally recognized as carrying significant economic and strategic value. Unlike traditional property rights, these rights are intangible yet recognized in various legal systems as rights that can be owned, possessed, or utilized. States, like any other legal entities, can own and exploit these rights, and thus, their activities related to these rights can sometimes fall under the judicial scrutiny of foreign

[66] International law commission, Draft Articles on Jurisdictional Immunities of States and their Property, article 12,para8.

[67] The law of state immunity, 2013, chapters 13-15.

[68] The language in Article 14's title "Intellectual and industrial property " is deliberately wide-ranging and all-encompassing, designed to include all current and potential varieties of intellectual or industrial property. Primarily, it considers three major categories: patents and industrial designs, classified as industrial property; trademarks and trade names, which are more associated with business and international commerce, including issues of restrictive business practices and unfair competition; and copyrights, along with various other types of intellectual property.

courts. The infringement of a patent, industrial design, or any literary or artistic copyright might not always be driven by profit motives, but it often negatively affects the commercial interests of those legally entitled to manufacture and distribute the related products. States provide protection for intellectual and industrial property rights both on a national and international level. When a state actively engages with the legal system of the forum state, such as by applying for or registering a copyright, it essentially consents to the jurisdiction of that forum state. This voluntary engagement, along with the legal safeguards provided by the forum state, forms a robust basis for jurisdiction. Generally, the protection of these rights is dependent on their registration or the submission of a registration application. The article is not limited to actions against a state or for rights owned by a state but includes third-party rights, where state rights may become relevant. In this case, for jurisdiction to be established, two conditions must be met: the infringement must occur in the territory of the forum state, and the infringed right must be legally protected in the forum state. [69]

This exception aligns with the practices observed in state behaviors and is reflected across various domestic legal systems. For

[69] International Law Commission,1991, article 14, Para1-10.

example In 1988 Atari Games Corp sued the Government of Oman in the United States for copyright infringement, alleging that Oman had illegally copied and distributed Atari video games. The court found that the actions attributed to the Omani government were sufficiently commercial in nature and directly affected Atari in the U.S., thus allowing the lawsuit to proceed under the commercial activity exception.[70]

6- " Participation in Companies or Legal Persons": Article 15 pertains to scenarios where a state's involvement in companies or legal entities is considered. This article becomes relevant when a state participates in an entity that also includes non-state actors, such as private sector companies, and this entity is based or mainly operates within the jurisdiction of the forum state. Those are the two main criteria.[71]

This provision is focused on the legal interactions and corporate dynamics within these entities, specifically how a state's rights and responsibilities are defined in relation to both the entity itself and its other members. State involvement in these entities may

[70] Atari Games Corp. v. Oman, 693 F. Supp. 1062 (N.D. Cal. 1988). https://law.justia.com/cases/federal/district-courts/FSupp/693/1204/2357614/

[71] UNCSI Convention, article 15 (1).

aim for commercial gain (as in businesses or corporations) or non-commercial goals (such as in non-profits or charities). The crucial concept is that a state, by choosing to partake in these entities under another state's jurisdiction, agrees to adhere to that state's laws and judicial authority.[72] Nonetheless, there are circumstances under which states may still assert their immunity, especially if there is a bilateral agreement or if the entity's founding documents explicitly provide for such immunity. The exception contained in Article 15 is also clear in state practice[73]and legislation. [74]

A relevant example is Yukos Universal Limited v. Russian Federation case. Yukos, once Russia's largest oil company, was effectively dismantled by the Russian government, and its assets were expropriated. The shareholders of Yukos sought compensation through international arbitration. The Permanent Court of Arbitration in The Hague ruled in favor of the Yukos shareholders. The case highlighted the issues of state participation in a commercial entity

[72] International Law Commission,1991, article 15, Para 1-9.

[73] Recent national legislation on jurisdictional immunities of States may be cited in support of this exception. See, for example, section 8 of the United Kingdom State Immunity Act of 1978; section 10 of the Singapore State Immunity Act of 1979; section 9 of the Pakistan State Immunity Ordinance of 1981; section 9 of the South Africa Foreign States Immunities Act of 1981; and section 16 of the Australia Foreign States Immunities Act of 1985. This exception appears to have been included in the broader exception of trade or commercial activities conducted or undertaken in the State of the forum provided in the United States of America Foreign Sovereign Immunities Act of 1976, in the European Convention, and in the Inter-American Draft Convention on Jurisdictional Immunity of States .

[74] UNCSI Convention, article 15 (2).

and the limits of state immunity in international investment disputes.[75]

7- " Ships owned or operated by a State" : A state is not entitled to immunity in the courts of another state in cases related to a ship it owns or operates[76], if the ship was engaged in commercial activities that are not governmental in nature when the legal issue originated. This exemption from immunity does not extend to warships or other naval vessels, or to any ship that is solely used for non-commercial government functions. In the "ARA Libertad" case (Argentina vs. Ghana, 2013) before the International Tribunal for the Law of the Sea (ITLOS), Argentina initiated proceedings against Ghana due to the detention of one of its naval training ships. The International Tribunal for the Law of the Sea ordered the immediate release of the ship, affirming that warships are entitled to immunity under international law, which includes immunity from arrest or detention by other states, except with the consent of the flag state.[77]

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[75] Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. 2005-04/AA227. https://www.italaw.com/cases/1175

[76] commentaries of this article explains "ship operation", such as those involving collision, navigation accidents, assistance salvage, general average, and contracts relating to the ship. This includes proceedings involving the determination of a claim in respect of the consequences of pollution of the marine environment.

[77] Case concerning the detention of the vessel 'ARA Libertad' (Argentina v. Ghana)," Judgment of 15 December 2012, International Tribunal for the Law of the Sea (ITLOS), Case No. 20. https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/published/C20_Order_151212.pdf

In situations where there's uncertainty about whether a ship or its cargo is being used for governmental and non-commercial purposes, official documentation from a state's diplomatic representative or a relevant authority can act as proof.[78] The legal authority of the forum state over these matters is grounded in the territorial principle, acknowledging the state's sovereignty within its maritime territory.

8- "Employment Contracts": This exception suggests that if a foreign state engages in an employment contract, particularly with a local employee in another country, the state may not be able to invoke immunity from legal actions pertaining to that employment agreement. This is because employment disagreements are generally considered matters of private law, and permitting a state to claim immunity in such situations could potentially result in unfair treatment or injustice to the employees.[79] As a result, in numerous legal systems, foreign states can be subject to the jurisdiction of local courts in disputes stemming from employment agreements with local staff. In the case of Mahamdia v. People's Democratic Republic of Algeria (2012), which involves a dispute between an employee and the Algerian Embassy in Germany regarding his employment

[78] UNCSI Convention, article 16.
[79] International Law Commission,1991, article 16.

contract, the court ruled that the Algerian Embassy could not claim immunity in a dispute over an employment contract with a local employee. The court determined that activities involving the employment of local staff were not sovereign acts.[80]However, this exception typically doesn't cover employees engaged in fundamentally governmental roles, like diplomatic or consular officials.[81]

2- Immunity from execution

Immunity from execution is one aspect of state immunity refers to the protection granted to a foreign state's property located in a foreign territory, preventing it from being seized or attached by the courts of that foreign territory. This implies that even if a court holds jurisdiction over a sovereign state and issues a judgment or arbitration award against it, immunity from execution can prevent the actual enforcement of that judgment or award against the state's assets.[82] Although judicial immunity and execution immunity serve similar purposes, safeguarding a state's sovereignty and independence, immunity against enforcement

[80] Ahmed Mahamdia v People's Democratic Republic of Algeria Judgment of the Court (Grand Chamber), 19 July 2012. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62011CJ0154.
[81] UNCSI, article 11.
[82] Leo, J., Bouchez. "The Nature and Scope of State Immunity from Jurisdiction and Execution." Netherlands Yearbook of International Law, 10 (1979).:3-33.

procedures is independent of judicial immunity. A state can maintain its immunity against enforcement procedures despite waiving its judicial immunity.[83]

Immunity from execution can also extend to certain individuals, such as heads of state, diplomats, and government officials, who may be granted immunity to protect them from legal actions or enforcement measures while performing their official duties. This immunity is provided to protect these individuals from potential interference or harassment that could hinder their ability to carry out their responsibilities effectively. Rooted in the principles of sovereign equality among states and the need to preserve diplomatic relations and state independence, this immunity remains essential. Nonetheless, it's important to recognize that such immunity is not absolute and can be relinquished or restricted under certain conditions, such as in instances of grave crimes or breaches of international law.[84]

As is the case with judicial immunity, immunity from execution is not absolute, but there are some exceptions, which are as follows:

[83] The ICJ, *Jurisdictional Immunities of the State* ,2012, Para 57,113.

[84] Sami, Ur, Rahman., Nasir, Zaman. "Critical overview of principle of territorial integrity under international law." Pakistan journal of social research, 05 (2023).:943-954.(More details in Chapter 3)

2.1 Exceptions to Immunity from execution

1- **Waiver of Immunity:** A state can explicitly agree to allow enforcement actions against its property. This is typically done through an international agreement, a contract, or directly in court.[85]

2- **Earmarked Property:** Property that a state has specifically allocated or earmarked for the satisfaction of a particular claim is not protected by immunity from execution. This means if a state designates certain assets to settle a claim, those assets can be subject to enforcement measures. This is relevant to both measures of constraint applied before a judgment is made and those imposed after a judgment is issued.[86]

3- **Commercial Use of Property:** Property that is utilized or designated for commercial purposes rather than non-commercial governmental activities, situated within the jurisdiction of the court and directly linked to the legal claim in question or associated with the specific state agency or instrument involved in the legal proceedings,can be subject to execution. Specific categories of state property, such as military assets, assets used for diplomatic missions, cultural objects, and central bank funds, are generally protected from execution, recognizing the

[85] Article 18 and 19
[86] Ibid .

importance of these assets to state sovereignty and international relations.[87]

For example in the SerVaas Incorporated v. Rafidain Bank and others case (2012, UK).This case dealt with the issue of immunity in relation to the enforcement of a debt judgment against Iraqi state assets in the United Kingdom. The court had to decide whether the assets held by Rafidain Bank, which was state-controlled, could be targeted to satisfy a commercial judgment. The UK Supreme Court ultimately held that the assets were protected under state immunity laws, emphasizing that for assets to be subject to enforcement measures, they must be specifically used or intended for use by the state in commercial activities.[88]

While the UN Convention provides a comprehensive framework for understanding state immunity, a state's actual practice in applying these principles can be inconsistent. This will be explained in the following sections.

[87] Article 21.

[88] SerVaas Incorporated v. Rafidain Bank and Republic of Iraq case, UK Supreme Court, [2012] UKSC 40. https://www.supremecourt.uk/cases/uksc-2011-0247.html

2.3.2 Customary International Law

Customary international law is a fundamental source of international law. Unlike written conventions and agreements, customary international law consist of unwritten norms that emerge from the uniform and continual practices of states, combined with their belief that these practices are required by law. so customary law has two crucial elements:

1. Consistent Practice: To qualify as customary international law, a practice must be broadly and regularly followed by a substantial number of states. This includes both actions and refraining from actions, which are consistently performed under similar conditions over an extended period. Practice is evidenced in various forms such as national legislation, decisions and actions of the executive branch, rulings from domestic courts, acts and protests in the diplomatic sphere, and directives issued to state officials.[89]

2. Opinio Juris (Legal Obligation): In addition to consistent practice, it is crucial that states carry out these practices under the belief that they are legally obligated to do so. This sense of legal obligation, known as opinio juris, is what sets customary law apart from mere habits or routines that might be followed for reasons such as diplomatic convenience.[90]

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[89] International Law Association, Statement of Principles Applicable to the Formation of General Customary International Law. In Report of the Sixty-Ninth Conference, edited by A.H.A. Soons, and Christopher Ward, (2000) , pp712–777.

[90] Klabbers, Jan. *International law*. Cambridge University Press, 2020, part 1.

Also unlike international agreements, the rules of customary international law are legally binding on all states, even those that have not explicitly consented to them.[91]The principle of state immunity is firmly established and recognized internationally as a principle of customary international law. It has been affirmed by various authoritative bodies such as judicial authorities in different countries[92], international conventions, international tribunals and institutions, national legislatures, and academic opinion.[93] The 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property articulates in its preamble that the "jurisdictional immunities of states and their property are generally accepted as a principle of customary international law."[94] Additionally, the ICJ referencing a comprehensive survey of state practice by the International Law Commission, confirmed that "state immunity has been adopted as a general rule of customary international law deeply rooted in current state practice" [95].

As a rule of customary international law, state immunity means that a state is protected from the jurisdiction of the courts of another state under international law, not

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[91] Bradley, Curtis A., and G. Mitu Gulati. Withdrawing From International Custom. *Yale Law Journal*, 2010. P 202–275.

[92] *French Consular Employee Case*, Austria, (1989) 86 ILR 583, 585; *Case against the Foreign Minister*, Austria, 2001, 6 *Austrian RIEL* (2001) 288, 294; *Brasseur* v. *Greece*, Belgium, (1933) 6 AD 164, 167; *Iraq* v. *Vinci*, Belgium, (2002) 127 ILR 101, 109; *Jaffe* v. *Miller*, Canada, (1993) 103 DLR (4th) 315; 13 OR (3d) 745, 752; 95 ILR 446, 452; *Schreiber* v. *Germany*, Canada, (2002) 216 DLR (4th) 513, 518; *Bouzari* v. *Iran*, Canada, (2002) 124 ILR 427, 433; affirmed, *Bouzari* v. *Iran*, Canada, (2004) 243 DLR (4th) 406, 418; 128 ILR 586, 596; *Roxford* v. *Cuba*, Canada, [2003] 236 FTR 1, [2003] 2003 FCT 763; [2003] 4 FC 1182, para. 28. For more examples see footnote number 8 , State immunity in international law, 2012.

[93] Ian Brownlie, Principles of Public International Law ,7th ed., 2008. Rosalyn Higgins, Problems and Process: International Law and How We Use It, 1994. Malanczuk, Peter. Akehurst's modern introduction to international law. Routledge, 2002.

[94] UNCSI convention , preamble.

[95] The ICJ, Jurisdictional Immunities of the State ,2012, Para 56.

just national law. The lack of national legislation concerning immunity does not fundamentally alter the immune status of the defendant state. In fact, in the absence of national laws, courts are required to define the scope of immunity by consulting a variety of international resources, including foreign court decisions, treaties, other international legal instruments, and academic commentary.[96]

Historically, states enjoyed absolute immunity under customary international law, which was widely accepted and applied globally as reflected in various judicial decisions and state practices. In the 20th century, many states began shifting towards a restrictive theory of state immunity. The prevailing view in contemporary international law is that the restrictive approach has become a part of customary international law. This is evident through widespread adoption in national legislation, judicial decisions, and international treaties like the aforementioned UN Convention. The Convention reflects the general acceptance of restrictive immunity in international relations. [97] The European Convention on State Immunity (1972), the United States Foreign Sovereign Immunities Act (FSIA) in 1976The UK's State Immunities Act 1978, Canada's State Immunities Act 1982 Australia's Foreign State Immunities Act 1985 all these countries and others adopted the restrictive approach in their national laws [98].

Even countries such as China, Russia and some developing countries that until recently adhered to absolute immunity have recently demonstrated a willingness to apply

[96] State immunity in international law, 2012, p 36.
[97] In Defence of State Immunity: Why the UN: Convention on State Immunity is Important, 2006.
[98] Some countries have not enacted legislation on sovereign immunity, but their courts have recently followed restrictive immunity, such as courts in Kenya, Nigeria, Zimbabwe, Ireland, and New Zealand.

the principles of restrictive immunity, particularly in the context of commercial activities. Both Russia and China, although they have not yet ratified, have signed the United Nations Convention on State Immunity. Russia adopted a law in 2015 that is consistent with the Convention's restrictive approach regarding state immunity.[99] Also on September 1, 2023, China adopted its first law on foreign state immunity that entered into force on January 1, 2024 and was also consistent with the Convention's restrictive approach. This is a major shift in China's policy on state immunity, as its position has remained relatively conservative and consistent for decades.[100] It is crucial to understand that the non-practice of restrictive immunity by all countries does not impact the formation of custom. Because the standard for establishing rule as customary international law is not unanimity among all states but general consensus, which allows for the rule to develop and be recognized quickly.[101]

The International Court of Justice also has reinforced this transition, especially in the "Jurisdictional Immunities of the State" (Germany vs. Italy) case, where the court adopted the restrictive approach by ruling that while states enjoy immunity from suits related to sovereign acts, this does not extend to commercial activities.

Therefore, the principle of state immunity in customary international law has transitioned from absolute to restrictive immunity, reflecting how customary international

[99] Audiovisual Library of International law, United Nations Convention on Jurisdictional Immunities of States and Their Property, October 2017.

[100] David Gu, Xiaoche Jiang and Ben Liu, China Shifts Its Position on State Immunity: A Brief Commentary on China's Foreign State Immunity Law, September 27, 2023 . https://www.linkedin.com/pulse/china-shifts-its-position-state-immunity-brief-commentary/

[101] Cheng B ,International law: teaching and practice. Stevens and Sons, London, 1982, p 277.

law can adapt to changing state practices and global legal standards.[102] Despite the general acceptance of the restrictive theory, debates continue over its scope and application. For example, defining precisely what constitutes a "commercial activity" can lead to different interpretations. This is what we will discuss in some detail in the next section.

2.3.3 Judicial Decisions

National and international judicial decisions serve as a secondary source of international law rules referred to in the absence of a treaty or customary rule on a matter in international law.[103] Judicial decisions serve as evidence of state practices, which are one of the two fundamental components needed to establish customary international law. These decisions also serve as primary interpretative tools that help shape the understanding and application of principles of international law.[104]

When discussing state immunity, it can be said that national courts were the first to address the issue of sovereign immunity and have contributed to the establishment and development of current rules for state immunity through a large number of precedential decisions regarding legal proceedings taken against foreign states.[105] We have previously referred to many of these national and international judicial decisions, including the famous

[102] Verdier, Pierre-Hugues, and Erik Voeten. "How does customary international law change? The case of state immunity." International Studies Quarterly 59.2 (2015): 209-222

[103] Statute of the International Court of Justice, Art. 38(1).

[104] Vladyslav, Lanovoy. "Customary International Law in the Reasoning of International Courts and Tribunals." null (2022).:231-255.

[105] Yasir, Gökçe. "The Restrictive Immunity Doctrine and Employment Claims: Recent Trends in the Face of Competing Interests." Journal of East Asia and international law, 9 (2016).

International Court of Justice ruling in the case of Jurisdictional Immunities of the State (Germany v. Italy).

Although national courts have been instrumental in advancing the understanding of state immunity, especially through their handling of the restrictive theory, there are still challenges. One of the main issues is defining what constitutes a "commercial activity" for the purposes of applying the restrictive theory of immunity. The conflicting interpretations of the concept of "commercial activities" can be clarified through court decisions from different jurisdictions. These cases often reflect different approaches to determining exactly what constitutes a commercial act by a state, thereby influencing whether immunity is granted or denied.

For example, the issuance of bonds by sovereign states is a complex activity that courts have had to classify as either commercial or sovereign, affecting the application of state immunity. Different jurisdictions have dealt with this issue with varying interpretations, leading to inconsistent legal outcomes. Here are some examples where courts have differed on whether the issuance of bonds by a state constitutes a commercial activity:

- United States : Weltover, Inc. v. Republic of Argentina (1992)

  Argentina restructured its external debt through bond issuance. When Argentina defaulted on these bonds, bondholders including Weltover, Inc in the United States filed a lawsuit. The U.S. Supreme Court ruled that Argentina's bond issuance was a commercial activity because it was the kind of transactions that

private parties could engage in. Thus, Argentina could not claim sovereign immunity against legal proceedings related to financial restructuring.[106]

- United Kingdom: NML Capital Ltd v. Republic of Argentina,2010.

  After Argentina's default, NML Capital sought to enforce American judgments related to Argentine bonds in the United Kingdom. English courts recognized the commercial nature of bond issuance and allowed enforcement against Argentine assets in the United Kingdom.[107]

Conversely, other courts have taken a different approach, including:

- Germany: Federal Constitutional Court, 2007

  In a case involving Argentine bonds, German creditors argued that Argentina's debt restructuring should not fall under state immunity protections as it constituted a commercial activity. The Federal Constitutional Court of Germany disagreed, emphasizing the sovereign nature of debt restructuring.[108]

- Belgium : NML Capital Ltd v. Republic of Argentina ,2012

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[106] Republic of Argentina v. Weltover, Inc, 504 U.S. 607 (1992). https://supreme.justia.com/cases/federal/us/504/607/

[107] NML Capital Ltd v Republic of Argentina , EWCA Civ 41 [2010 . https://vlex.co.uk/vid/nml-capital-ltd-v-793246145

[108] The Federal Constitutional Court (Bundesverfassungsgericht), 2 BvM 1/03, May 8, 2007. https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2007/05/ms20070508_2bvm000103en.html . See Federal Court of Justice (BGH) on Greek sovereign bonds (2016). https://www.disputeresolutiongermany.com/2016/03/federal-supreme-court-no-jurisdiction-over-greek-bond-litigation/

> Similar to the UK case, NML Capital attempted to enforce U.S. court judgments in Belgium. Initially, Belgian courts treated the restructuring of Argentine debt as a commercial activity, but the Belgian Supreme Court later emphasized the sovereign nature of the bond issuance and reversed earlier decisions. [109]

As these examples show, even similar cases can lead to different outcomes depending on the jurisdiction, showcasing the intricate relationship between national legal interpretations and international law principles and highlighting the challenges in achieving uniformity in the application of international law concerning state immunity.

[109] Burress, Joshua. "Sovereign Disobedience: the role of US courts in curtailing the proliferation of sovereign default." Ind. Int'l & Comp. L. Rev. 25 (2015): 281.

Chapter 3 : State Immunity and Human Rights Violations

The principle of state immunity, which protects sovereign states from legal proceedings in foreign courts, is a cornerstone of international law. However, with the increasing global awareness and advocacy for human rights, the blanket application of state immunity is under scrutiny. This discussion becomes particularly poignant in cases where states or their officials are accused of committing serious human rights violations, such as torture, genocide, and crimes against humanity. The friction between protecting states from foreign jurisdiction and ensuring accountability for human rights violations presents a complex legal and ethical challenge that has sparked intense debate in recent legal discussions. Should international law continue to support state immunity at the expense of justice for victims of severe human rights violations?

In this section, we will discuss a set of issues: does the United Nations Convention address the issue of state immunity in the presence of human rights violations? what are peremptory norms? challenges facing state immunity (universal jurisdiction and the International Criminal Court), In light of gross human rights violations, how do courts deal with state immunity?

3.1 **UNCSI and Human Rights Violations: The Need for Expanded Protections**

According to Article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCSI), a foreign state's human rights breaches

do not give rise to state immunity in situations involving bodily harm or property damage. This permits legal actions to take place in the national court of the state in which the harm or damages were sustained, also involving the responsible foreign state official.[110] Moreover, concerning harmful actions arising from commercial transactions, the exception outlined in Article 10 of UNCSI may apply. Both U.S. and UK laws consider the possibility of bringing a tort liability suit within the commercial exception, potentially enabling compensation claims for economic losses resulting from harmful behavior.[111]

Regarding tortious acts that constitute non-commercial human rights violations committed by a state outside the territory of the court's state, UNCSI maintains the foreign state's immunity. The Convention does not provide specific provisions that target or address broader human rights abuses like torture, genocide, or crimes against humanity. The exceptions to immunity it outlines are generally not designed to cover criminal activities or grave abuses of human rights unless they result in direct physical injury or property damage under specific circumstances. so victims of these abuses may not be able to obtain civil compensation in national courts against states or their current officials or agents. This maintenance of immunity has been heavily criticized, as ratifying UNCSI could create an additional barrier to obtaining compensation for victims of such violations.

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[110] UNCSI, article 12.

[111] The law of state immunity, chapter15 " violations of human rights".

Therefore, adopting a protocol that explicitly guarantees victims' and their families' entitlement to compensation in such circumstances is necessary.[112]

The judiciary is one of the primary areas of development in this subject. Both domestic and international courts have struggled to apply sovereign immunity, particularly when serious human rights breaches occur—violations that are regarded by international law as peremptory norms. This research will concentrate on the crime of torture.

3.2 Peremptory Rules (Jus Cogens), and the Crime of Torture

Us cogens, also known as a peremptory norm or compelling law is "a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[113] Jus cogens rise over all other acknowledged sources of international law as it is considered a higher customary law.[114]

The International Criminal Court (ICC) held in the Prosecutor v. Furundzija case that "norms designated as jus cogens cannot be violated by states through international agreements, regional or local customs, or even through general customary laws that do not

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[112] Hall, Christopher Keith. "UN Convention on State Immunity: The need for a human rights protocol." International & Comparative Law Quarterly 55.2 (2006): 411-412.

[113] United Nations. “Vienna Convention on the Law of Treaties.” Treaty Series, vol. 1155, May 1969, article 53. https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

[114] International Law Commission. *Chapter V Peremptory norms of general international law (jus cogens)*. A/74/10, 2019.para 9 and 10. https://legal.un.org/ilc/reports/2019/english/chp5.pdf

have the same normative weight".[115] Peremptory norms were covered in the report from the 71st Session of the International Law Commission. An example list of norms acknowledged as jus cogens is provided in the report, and it includes "prohibitions against racial discrimination, torture, genocide, and the right to self-determination". The report offers enough legal evidence to conclude that each of these offenses falls under jus cogens.[116] It can be contended that jus cogens norms inherently create obligations that are "*erga omnes*" in nature. This means that such obligations are responsibilities that sovereign states owe to the international community as a whole, primarily to uphold and enforce fundamental values and preserve global security and stability.[117]

According to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), torture is defined as " Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the

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[115] **Prosecutor v. Furundzija**, Case No. IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), Trial Chamber, Judgment, 10 December 1998

[116] Ibid, International Law Commission. Some academics cite the Rome Statute of the International Criminal Court (ICC) and identify infractions of the offenses documented there as grave violations of human rights. This rationale is compelling, given that the Rome Statute specifically addresses human rights falling within the realm of ius cogens, including genocide, crimes against humanity (and by extension, torture as well) and various war crimes.

[117] Tams, Christian J. Enforcing obligations erga omnes in international law. Vol. 44. Cambridge University Press, 2005.

instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[118]

The International Court of Justice (ICJ) recognized the prohibition of torture as "part of customary international law" that "has become a peremptory norm (jus cogens)" [119] , meaning it is a fundamental principle that all states must adhere to, regardless of their specific treaty obligations. States are required to take decisive action to prevent torture and punish its perpetrators. This includes the duty to investigate allegations of torture, prosecute offenders, and provide redress and compensation to victims.[120]

3.3 Combating Severe Human Rights Abuses: Universal Jurisdiction and the International Criminal Court

1- Universal jurisdiction [121]

A principle of international law permits the courts of a state to try people for some serious crimes, regardless of the victim's nationality, the location of the crime, or the country of the perpetrator. This concept, is rooted in the notion that some crimes—like crimes against humanity, war crimes, genocide, and torture—are so serious that they constitute transgressions against the entire international

[118] UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations, Treaty Series, vol. 1465, 10 December 1984, article 1. https://treaties.un.org/doc/publication/unts/volume%201465/volume-1465-i-24841-english.pdf

[119] Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, p. 422, at p. 457, para. 99.

[120] APT, APF and OHCHR. "Preventing Torture-An operational guide for National Human Rights Institutions." (2013).

[121] What is Universal Jurisdiction, https://seoul.ohchr.org/sites/default/files/2022-10/09_What%20is%20Universal%20Jurisdiction_formatting_FIN_ENG.pdf

community.[122] so Universal jurisdiction serves as a key mechanism for enforcing jus cogens norms.

The notion of universal jurisdiction gained prominence after World War II with the Nuremberg and Tokyo tribunals, which prosecuted high-ranking officials for serious violations committed during the war. These trials are seen as early applications of universal jurisdiction. Following the war, the Geneva Conventions (1949) and other international treaties, such as the 1984 Convention Against Torture, further solidified the obligation of states to prosecute or extradite perpetrators of war crimes and torture found within their territories.[123]

In practice, many countries have national laws that allow for the prosecution of international crimes . For example, in 2022, a German court utilized universal jurisdiction to convict a Syrian national for crimes against humanity committed in Syria.[124] However, although the principle of universal jurisdiction is widely accepted among states, there are great difficulties in terms of implementation due to different legal systems and political considerations that impact the enforcement of international criminal justice uniformly.[125]

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[122] Cassel, Douglass. "Universal Criminal Jurisdiction." Hum. Rts. 31 (2004), p 22.
[123] Ibid .
[124] The Washingtion Post, Germany convicted a Syrian man of war crimes in Syria. Can national courts prosecute injustices everywhere?, Analysis by Leslie Johns, Maximo Langer and Margaret E. Peters January 14, 2022. Accessed at May 1st , 2024. https://www.washingtonpost.com/politics/2022/01/14/germany-convicted-syrian-man-war-crimes-syria-can-national-courts-prosecute-injustices-everywhere/.
[125] Philippe, Xavier. "The principles of universal jurisdiction and complementarity: how do the two principles intermesh?." International review of the Red Cross 88.862 (2006): 375-398.

Universal jurisdiction challenges state immunity because it permits the prosecution of serious human rights violations that may involve senior state officials or heads of state, traditionally protected by state immunity.

2- International Criminal Court (ICC)

The ICC further challenges state immunity by having the mandate to prosecute individuals for international crimes, including genocide, war crimes, crimes against humanity, and the crime of aggression. According to Article 27 of the Rome Statute (which established the ICC), "official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence".[126] This directly confronts (challenge) the concept of immunity ratione personae, which has always protected state leaders from being sued by foreign courts.

The question that arises here: When a state violates peremptory rules in international law, such as the prohibition of torture, does state immunity remain?

[126] UN General Assembly, Rome Statute of the International Criminal Court ,17 July 1998, article 27. https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf

3.4 Balancing State Immunity with Peremptory Norms (Jus Cogens)

The interplay between state immunity and jus cogens, particularly in cases involving allegations of torture, presents a legal dilemma. Here's how the courts deal with this issue:

1- The International Court of Justice

In the Jurisdictional Immunities case (Germany vs. Italy), the International Court of Justice held that "under customary international law as it currently stands, a state is not deprived of immunity by reason of the fact that it is accused of committing serious violations of international human rights law or the international law of armed conflict." It also denied the existence of a collision between state immunity and human rights. This ruling highlighted the primacy of state immunity even in the context of serious international crimes.[127]

The differentiation between human rights infringements in times of peace and those occurring during conflicts could have been made by the International Court of Justice (ICJ). During wartime, permitting individual lawsuits against states for human rights abuses is deemed impractical and potentially detrimental. Such matters should be addressed through reparations and peace accords to prevent overwhelming local courts and complicating global relations. Conversely, human rights violations by individuals in peacetime, like breaches of freedom of speech or

[127] Jurisdictional Immunities of the State, para 91.

protection against torture, merit a different approach. Nevertheless, the International Court of Justice has disregarded this distinction, and its ruling has influenced numerous subsequent judicial rulings, impeding the resolution of individual complaints.[128]

2- National courts :

- The case of Jones v. United Kingdom

The case involved four plaintiffs (Jones and others) who claimed they had been subjected to torture by Saudi officials while detained in Saudi Arabia. After returning to the United Kingdom, they attempted to initiate a civil lawsuit against the Kingdom of Saudi Arabia and the individuals allegedly responsible for their torture.They claimed that torture should not be covered by state immunity because it is a serious crime that is recognized by international law. However, the UK courts, including the House of Lords (now the Supreme Court), ruled that Saudi Arabia and its officials were entitled to state immunity from civil actions in UK courts. The case was subsequently taken to the European Court of Human Rights (ECHR), which affirmed the UK courts' decision, stating that the application of state immunity in this scenario was in line with international law. The ECHR noted that there is not yet a widely recognized exception to state immunity

[128] Sebis, Giacomo. "Can serious Human Rights Violations justify a Breach of State Immunity? The current legal provisions of international law on why serious human rights violations cannot be brought to domestic courts." Politikon: The IAPSS Journal of Political Science 29 (2016): 166-188.

in civil cases involving allegations of torture, especially when the incidents occur outside of the jurisdiction where the case is brought.[129]

- Kazemi Estate v. Islamic Republic of Iran

The instance pertains to Zahra Kazemi, an Iranian-Canadian photojournalist who passed away while under confinement in Iran. Allegedly, she endured acts of torture and sexual assault during her period of detainment. Stephan Hashemi, her son, initiated legal proceedings in Canada against the Islamic Republic of Iran and its representatives, in pursuit of compensatory damages for the suffering and demise of his mother. The highest judicial body in Canada ruled that Iran is entitled to sovereign immunity as per the Canadian State Immunity Act. This adjudication determined that, in accordance with current legislation in Canada, there exists no provision within sovereign immunity laws permitting the litigation against a foreign state for instances of torture conducted beyond Canadian borders.[130]

This decision emphasized the limitations imposed by domestic law in dealing with international crimes and highlighted the tension between

[129] Jones and Others v. United Kingdom, European Court of Human Rights, Application no. 34356/06 and 40528/06, Judgment of 14 January 2014. https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-9248%22]}

[130] Kazemi (Estate of) v. Islamic Republic of Iran, 2014 SCC 62, [2014] 3 S.C.R. 176. https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/14384/index.do . The Ontario Superior Court of Justice in Boozari v. Islamic Republic of Iran in 2002 adopted the same finding.

national laws and the need for accountability in cases of severe human rights infractions.

3- The European Court of Human Rights

The (ECHR) has also addressed this issue in several cases, including the Jones case and the Al-Adsani case mentioned earlier. It generally supported state immunity in cases involving serious crimes, citing the absence of a unified European position on breaching state immunity under these circumstances.[131] This position mirrors that of the International Court of Justice.

Despite the binding nature of jus cogens norms, the enforcement of these norms through civil suits especially against sovereign states, encounters significant legal hurdles due to the principle of state immunity. As we have seen courts in jurisdictions like the UK and those operating under the European Convention on Human Rights (ECHR) have consistently upheld the doctrine of state immunity, even when the civil claims involve allegations of serious violations of jus cogens norms, such as torture. Criminal jurisdiction over state officials for serious violations of human rights is even more contentious.

Under international law, state officials are granted two types of immunities: personal immunity, also known as "immunity ratione personae", and functional immunity, referred to as "immunity ratione materiae" .

[131] Orakhelashvili, Alexander. "State Immunity in National and International Law: Three Recent Cases Before the European Court of Human Rights." Leiden Journal of International Law 15.3 (2002): 703-714..

Personal immunity is grounded on the position or status of the individual rather than the action itself. It grants full immunity from the jurisdiction of foreign courts to heads of state, heads of government, and foreign ministers during their term in office. This immunity is extensive and shields even actions that are not directly linked to the official's responsibilities. Nevertheless, this immunity ceases once the official steps down, although actions carried out in an official capacity may still benefit from functional immunity. This form of immunity is universally acknowledged to uphold the efficacy of international relations by preventing the harassment or prosecution of officials for actions taken in their official capacity.[132] In contrast, functional immunity pertains to actions taken in an official capacity and continues to protect state officials even post their term in office. This immunity ensures that actions taken as part of a state's function are not subject to foreign jurisdiction, thus preserving a state's sovereignty and operational integrity. Immunity ratione materiae protects State officials only for acts directly related to their official duties and excludes protection for private acts. This category of immunity is not limited to high-ranking officials but can extend to any state employee acting in an official capacity. [133] Both personal immunity and functional immunity are argued to not apply in instances of severe human rights abuses. Several key issues will be examined within this framework:

[132] Dapo, Akande, and Shah Sangeeta. "Immunities of state officials, international crimes, and foreign domestic courts." Challenges in International Human Rights Law. Routledge, 2017. 249-286.
[133] "Immunity of State officials from foreign criminal jurisdiction." Yearbook of the International Law Commission, United Nations, null (2022), 205-218.

- Pinochet case

The case of Pinochet stands out as one of the most prominent instances concerning the immunity of governmental officials. In 1998, the former Chilean dictator Augusto Pinochet faced an arrest in London while on a medical trip to the United Kingdom, following a Spanish warrant issued by Judge Baltasar Garzón. The warrant aimed at extraditing Pinochet to Spain to confront allegations of genocide, terrorism, and torture. The arrest was grounded in the doctrine of universal jurisdiction. Pinochet's legal advisors contended that his status as a former head of state shielded him from prosecution. Nonetheless, the House of Lords, serving as the ultimate appellate court in the United Kingdom at that time, determined that Pinochet's immunity did not extend to acts of torture and participation in torture conspiracies. These actions were deemed as beyond the official duties of a head of state and contrary to peremptory norms of international law. This landmark ruling led to Pinochet being stripped of the immunity he enjoyed regarding many of the charges against him. This case set a precedent in recognizing that international crimes can strip the protection typically provided by state immunity.[134]

[134] R.V. Bow Street Metropolitan Stipendiary, Ex-Parte Pinochet, (1999) 2 All ER 97. https://vlex.co.uk/vid/r-v-bow-street-792642061

- Hissène Habré case

Habré governed Chad from 1982 until his removal in 1990, after which he sought refuge in Senegal. Throughout his tenure, he was allegedly responsible for extensive human rights abuses, including killings, torture, and systematic oppression, particularly targeting certain ethnic groups. After years of living in exile, Habré's case gained significant international attention, leading to calls for his prosecution. Despite the initial reluctance of Senegal to take legal action, international pressure, particularly from Belgium and human rights organizations, intensified. Belgium even sought Habré's extradition under the principle of universal jurisdiction. The situation was elevated to the International Court of Justice (ICJ), which rendered a decision in 2012 stating that Senegal had not met its responsibilities as outlined in the United Nations Convention against Torture. Senegal was instructed by the ICJ to take legal action against Habré promptly if they chose not to hand him over to Belgium.[135] Consequently, Senegal and the African Union established the Extraordinary African Chambers within the Senegalese judicial framework specifically for this particular lawsuit. Habré was convicted in 2016 for perpetrating offenses

[135] The international court of justice , Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment of 20 July 2012. https://www.icj-cij.org/case/144

including crimes against humanity, war crimes, torture, and sexual violence. Subsequently, he received a life sentence.[136]

- Arrest Warrant case (Congo v. Belgium)

The case involved a significant dispute over an international arrest warrant issued in 2000 by a Belgian judge against the then-serving Foreign Minister of the Democratic Republic of the Congo, Abdulaye Yerodia Ndombasi, accusing him of committing crimes against humanity allegedly committed during conflicts in the Democratic Republic of the Congo. The Democratic Republic of the Congo initiated legal proceedings against Belgium at the International Court of Justice, alleging that the issuance of the arrest warrant breached international law, specifically the regulations safeguarding the immunity of incumbent foreign ministers. Belgium argued that the arrest warrant was legitimate under international law due to the concept of universal jurisdiction concerning grave international offenses like genocide, war crimes, and crimes against humanity. In February 2002, the International Court of Justice rendered a judgment in favor of the Democratic Republic of the Congo. The Court determined that Belgium had transgressed international law by issuing an arrest warrant against a sitting foreign minister. It underscored that Yerodia, in his capacity as a foreign

[136] The Case of Hissène Habré before the Extraordinary African Chambers in Senegal, 2013. https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal

minister, benefitted from absolute immunity from prosecution under international law while holding office.[137]

- Omar Al-Bashir case

One of the significant cases illustrating the intricate interplay between international criminal justice and state immunity is the Omar Al-Bashir case. In 2009, the International Criminal Court (ICC) indicted Al-Bashir, Sudan's President, for war crimes, crimes against humanity, torture, and genocide linked to the Darfur conflict starting in 2003. This marked the ICC's first issuance of an arrest warrant against a sitting head of state.[138] Despite the warrant, Al-Bashir freely traveled to numerous countries, including those signatory to the Rome Statute, which established the ICC. Several African countries, including Malawi, declined to arrest him, citing his immunity as a head of state under customary international law.

This refusal prompted the ICC to refer the matter to the Security Council due to the non-compliance of Malawi and other African nations with their obligations under the Rome Statute, specifically Article 27. The Security Council issued a resolution referring the case to the ICC under Chapter VII, without explicitly committing to extradite or arrest President

[137] The international court of justis, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) Judgment of 14 February 2002. https://www.icj-cij.org/case/121

[138] Ch 3. Prosecutor v Omar Al Bashir (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09, P-T Ch I (4 March 2009), paras 41-5. https://www.icc-cpi.int/darfur/albashir

> Al-Bashir. Instead, the resolution urged Sudan and the parties involved in the Darfur conflict to fully cooperate with the ICC.[139] Al-Bashir continued to govern Sudan and remained unrested during his international travels despite the ICC's warrants, likely influenced by diplomatic considerations, concerns regarding state immunity, and potential political repercussions.[140]

The interaction between state immunity and the enforcement of peremptory norms presents a critical challenge in the international legal framework, especially when addressing serious human rights violations such as torture, genocide, and war crimes. The cases of Pinochet, Habré, Yerodia, and Al-Bashir illustrate diverse judicial responses to this challenge.

These cases highlight a significant tension: the need to adhere to international standards that protect human rights and the traditional principle of state immunity, which protects current and sometimes former state officials from prosecution. While the Pinochet case marked a pivotal moment, demonstrating that former heads of state could be stripped of immunity for acts that violate international standards, the rulings of the International Court of Justice, as seen in the Yerodia case, affirm a strong commitment to the immunity of current officials, even when faced with serious international crimes. Furthermore, the Al-

[139] Resolution 1593 (2005) / adopted by the Security Council at its 5158th meeting, on 31 March 2005. https://digitallibrary.un.org/record/544817?ln=en&v=pdf

[140]The State Immunity Controversy in International Law, chapter 18, p 615-623. The case sparked broader political and diplomatic tensions, particularly allegations of bias against African countries by the International Criminal Court. Especially since Al-Bashir had visited other non-African countries such as China and Iran, this influenced the stance of African countries towards cooperation with the International Criminal Court.

Bashir case sheds light on the practical limitations of international justice systems, such as the International Criminal Court, when member states do not comply with arrest orders due to the cited immunity and political considerations.

The inclination towards limiting state immunity in instances of human rights abuses lacks sufficient backing in the global community as a whole. The international community remains divided, and progress is uneven. Although there is an increasing tendency to restrict state immunity concerning international crimes, there is significant resistance from various states. The opposition arises from various factors, such as the absence of a clear international legal framework that explicitly allows for exceptions to state immunity for breaches of peremptory norms and the aim to uphold the integrity of the international legal system and the principles of non-interference, which are regarded as pivotal to state sovereignty and dignity. Ongoing discussions and judicial decisions continue to shape the complex relationship between state sovereignty, international law, and human rights, reflecting a field that is often dynamic and controversial. This ongoing evolution underscores the need for a balanced legal approach that respects state sovereignty while ensuring accountability for egregious human rights violations.

Recently, the Israeli courts issued several rulings against the Palestinian Authority and its agencies in lawsuits filed by Palestinians against the Palestinian Authority before the Israeli courts, claiming that they were arrested and tortured on charges of collaborating with Israel. Israeli courts have granted themselves jurisdiction over these cases. The Israeli courts awarded compensation to many of them, and implemented the rulings by deducting

the compensation amounts from the Palestinian tax “clearance” funds. Through , the next chapter we will examine to what extent the rules of international law relating to the immunity of states apply to this issue ?

Chapter 4 : The Status of Palestine in International Law (from A Liberation Movement to a State)

The status of Palestine in international law has evolved significantly, transitioning from a liberation movement to being recognized as a state by many countries and international organizations.[141] This shift can be understood through several key developments :

1. Pre-1948 to 1967 Period

Palestine was under Ottoman rule until the end of World War I, after which it became a British mandate under the League of Nations. The 1917 Balfour Declaration expressed British support for a "national home for the Jewish people" in Palestine, leading to increased Jewish immigration and tensions with the Arab population. Due to escalating violence, Britain referred the Palestine issue to the UN General Assembly. On November 29, 1947, the UN passed Resolution 181, partitioning Palestine into a Jewish state (56%), an Arab state (43%), and internationalizing Jerusalem (1%).[142]

[141] Harms, Gregory, and Todd M. Ferry. The Palestine-Israel conflict: a basic introduction. Pluto Press, 2017.
[142] UN General Assembly. Resolution 181 (II). Future Government of Palestine. A/RES/181(II), 1947. Available at: https://documents.un.org/doc/resolution/gen/nr0/038/88/pdf/nr003888.pdf (Accessed: 9 August 2024).

The Jewish community accepted the plan, but the Arab states and Palestinians rejected it. On May 14, 1948, the same day the British mandate ended, Israel was unilaterally declared an independent state. Following this declaration, a war broke out involving the Arab states neighboring Palestine, resulting in the defeat of the Arab armies, the displacement of hundreds of thousands of Palestinians (known as the Nakba), and Israel's seizure of 77% of Palestine, including most of Jerusalem, exceeding the UN partition plan. In the 1967 war, Israel occupied additional territories including Gaza, the West Bank, East Jerusalem, and the Golan Heights. UN Security Council Resolution 242 called for Israeli withdrawal from occupied territories and recognition of each state's right to live in peace,[143] but Israel did not comply. Consequently, over half of the Palestinian population ended up in refugee camps in the West Bank, Gaza, or neighboring Arab countries.[144]

2. The Palestine Liberation Organization (PLO)

On May 24, 1964, the first Palestinian National Council convened in Jerusalem, declaring the establishment of the Palestine Liberation Organization (PLO) as the representative of the Palestinian people, leading their struggle for liberation. Initially, the PLO engaged primarily in armed struggle and diplomatic efforts. The October War of the early 1970s and subsequent political changes led

[143] UN Security Council. Resolution 242 (1967). S/RES/242(1967). Available at: https://documents.un.org/doc/resolution/gen/nr0/240/94/pdf/nr024094.pdf (Accessed: 9 August 2024).
[144] Khalidi, R. The Iron Cage: The Story of the Palestinian Struggle for Statehood. Oxford: Oneworld Publications, 2006, p1-40.

the PLO to adopt a new foreign policy emphasizing diplomacy for international recognition.[145]

This shift culminated in the UN General Assembly including the Palestine issue as a separate agenda item for the first time since 1952. In October 1974, the PLO, representing the Palestinian people, was invited to participate in General Assembly deliberations on Palestine. The Assembly passed two resolutions: Resolution 3236 recognized the inalienable rights of Palestinians, including self-determination, sovereignty, and national independence.[146] Resolution 3237 granted the PLO observer status at the UN General Assembly, significantly expanding international recognition of the PLO as the legitimate representative of the Palestinian people.[147]

In 1988, the Palestinian National Council declared the establishment of the State of Palestine, recognizing the 1967 borders with East Jerusalem as its capital.[148] By the end of 1988, the Palestinian state was recognized by 78 countries.[149]

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[145] Sayigh, Y., Armed Struggle and the Search for State: The Palestinian National Movement, 1949-1993 (Oxford University Press, 1999).
[146] UN General Assembly Resolution 3236 (XXIX). Available at: https://www.un.org/unispal/document/auto-insert-178825/ [Accessed 9 August 2024].
[147] UN General Assembly Resolution 3237 (XXIX). Available at: https://www.un.org/unispal/document/auto-insert-178826/ [Accessed 9 August 2024].
[148] Interactive encyclopedia of the Palestine question, Palestinian Declaration of Independence, 15 November 1988. Available at: https://www.palquest.org/en/overallchronology?synopses%5B0%5D=170&nid=170 [Accessed 9 August 2024].
[149] Tessler, Mark (1994). A History of the Israeli–Palestinian conflict (2nd, illustrated ed.). Indiana University Press. p. 722.

However, this recognition did not lead to significant changes on the ground, as Israel maintained occupation over the territories in question.

3. Oslo Accords (1993-1995)

In January 1993, secret meetings between Israeli negotiators and Palestinian Liberation Organization (PLO) negotiators ultimately led to the signing of the Oslo Accords. The agreement included the PLO's recognition of Israel's right to exist and its renunciation of terrorism in exchange for Israel's commitment to a peaceful resolution of the Israeli-Palestinian conflict and its recognition of the PLO as the representative of the Palestinian people.[150]

The most significant outcome of the agreement was the establishment of the Palestinian National Authority (PNA), which was granted transitional self-rule in the West Bank and Gaza Strip for a period not exceeding five years. During this period, and no later than the beginning of the third year, negotiations on final status issues were to take place, including Jerusalem, refugees, settlements, security arrangements, borders, relations, and cooperation with neighboring countries, and other issues of mutual interest, based on United Nations Security Council

[150] Interactive encyclopedia of the Palestine question, the Oslo process and the establishment of the Palestinian authority ,1993, https://www.palquest.org/en/overallchronology?sideid=4674 [Accessed 9 August 2024].

Resolutions 242 and 338.[151] However, despite numerous negotiations and efforts, these core issues remain unresolved.

The Oslo Accords were followed by a series of other agreements, including Oslo II on September 28, 1995. In addition to the main text of the agreement, it included seven protocols aimed at regulating various aspects of Israeli-Palestinian relations during the peace process. The most notable was the protocol on redeployment and security arrangements, which divided Palestinian territories into Areas A, B, and C: Area A (Full Palestinian civil and security control). Area B (Palestinian civil control and joint Israeli-Palestinian security control). Area C (Full Israeli control, including security and land administration). The remaining protocols covered civil affairs, legal matters, economic relations, cultural and educational issues, health, and the environment. These protocols formed the executive framework and details of the agreement.[152]

4. Palestinian division

In 2006, the first Palestinian legislative elections took place, leading to a win for Hamas, which supports armed resistance for liberation. Fatah and other factions

[151] Declaration of Principles on Interim Self-Government Arrangements (DOP). signed on September 13, 1993 https://documents.un.org/doc/undoc/gen/n93/548/38/pdf/n9354838.pdf?OpenElement [Accessed 9 August 2024]

[152] Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip". signed on September 28, 1995. https://www.un.org/unispal/document/auto-insert-185434/ [Accessed 9 August 2024]

declined to join the new government because of differences in political agendas. As tensions escalated between the factions, Hamas seized control of the Gaza Strip, while Fatah consolidated its power in the West Bank. This situation resulted in the establishment of two separate Palestinian administrations. Despite multiple efforts to create a unity government, none have succeeded so far.[153]

5. Palestine as a State

On November 29, 2012, the United Nations General Assembly adopted Resolution 67/19, with a majority of 138 countries, granting Palestine the status of a non-member observer state at the United Nations.[154] This marked a significant diplomatic victory that allowed Palestine to join numerous international organizations and treaties. As a result, Palestine was able to accede to the International Criminal Court on April 1, 2015.[155] In the same year, the United Nations permitted the Palestinian flag to be raised at its headquarters.

The question that arises here is: after Palestine obtained state status under the United Nations resolution, does this mean that Palestine enjoys, like other states, sovereign rights, particularly state immunity? This will be addressed in the next chapter.

[153] International Crisis Group. (2006). "Enter Hamas: The Challenges of Political Integration." Middle East Report No. 49.
[154] United Nations General Assembly, Resolution 67/19: Status of Palestine in the United Nations, 29 November 2012, available at: https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/67/19 [accessed 13 August 2024].
[155] International Criminal Court, Palestine: Acceptance of the jurisdiction of the International Criminal Court, 1 April 2015, available at: https://www.icc-cpi.int/palestine [accessed 13 August 2024].

Chapter 5: The Trial of Palestine before The Israeli Courts as a Case Study

5.1 Facts Of The Case

The Jerusalem District Court received five lawsuits in the years 2003, 2004, 2005, 2008, and 2009. These lawsuits were brought against the Palestinian Authority by 60 Palestinian plaintiffs who claimed that they were abducted, imprisoned and tortured by the Palestinian Authority on suspicion of spying for the State of Israel. The five lawsuits were consolidated, and after approximately 90 sessions in which many witnesses, including the plaintiffs and experts on behalf of the plaintiffs, were heard, a decision was made on 24 April 2017 by (Judge M. Drori). The conclusion was that the Palestinian Authority was found responsible for 52 of the 60 plaintiffs on the basis that their arrest by the Palestinian Authority was illegal. On 28 June 2018, the court ordered the Palestinian Authority to pay a total of 12 million shekels in compensation for the illegal detention and torture.[156]

The Palestinian Authority appealed to the Israeli Supreme Court, which upheld the Jerusalem District Court's decision and dismissed the Palestinian Authority's arguments.[157] Subsequently, to enforce these judgments, Israeli authorities deducted the compensation

[156] Israel Hayom, Court Orders PA to Compensate Collaborators It Imprisoned, Tortured, 29 June 2018, available at: https://www-israelhayom-com.translate.goog/2018/06/29/court-orders-pa-to-compensate-collaborators-it-imprisoned-tortured/?_x_tr_sl=en&_x_tr_tl=ar&_x_tr_hl=ar&_x_tr_pto=sc [accessed 13 August 2024].

[157] The Israeli Supreme Court as a Civil Court of Appeal, Appeal No. 6840/18. On May 11, 2021. see Hadarat for Political & Strategic Studies (HPSS) , July 2nd 2021. https://hadarat.net/

amount from the Palestinian Authority's clearance funds. The Palestinian Authority condemned these deductions, describing them as acts of piracy and collective punishment. They emphasized that such actions violate international agreements and undermine the financial stability of the Palestinian Authority.[158]

5.2 Applying the Rules of International Law of State Immunity to The Case.

As noted in chapter 2 , The first step in dealing with an issue related to state immunity is to determine whether the court has jurisdiction to hear the case. a court must first make sure it has the legal right to hear a case (jurisdiction) according to its own country's laws and international law principles. Only after confirming its jurisdiction should the court consider if state immunity applies. This is what we will discuss in the next section.

5.2.1 The Jurisdiction of the Israeli Court

When the Jerusalem District Court allowed Palestinians to sue the Palestinian Authority for illegal detention, it based its jurisdiction on several key arguments:

[158] Asharq Al-Awsat, Israel Seizes 13 Million from Palestinian Authority Funds for 'Collaborators', 15 August 2019, available at: https://aawsat.com/home/article/1858651/%D8%A5%D8%B3%D8%B1%D8%A7%D8%A6%D9%8A%D9%84-%D8%AA%D8%AD%D8%AC%D8%B2-13-%D9%85%D9%84%D9%8A%D9%88%D9%86%D8%A7%D9%8B-%D9%85%D9%86-%D8%A3%D9%85%D9%88%D8%A7%D9%84-%D8%A7%D9%84%D8%B3%D9%84%D8%B7%D8%A9-%D9%84%D8%B5%D8%A7%D9%84%D8%AD-%C2%AB%D8%A7%D9%84%D9%85%D8%AA%D8%B9%D8%A7%D9%88%D9%86%D9%8A%D9%86%C2%BB?page=7 [accessed 13 August 2024].

The court noted that several detainees were arrested in areas under Israeli sovereignty (East Jerusalem and Area C). The court also found that in some cases, the Palestinian Authority had detained Palestinians residing in Israel or holding Israeli citizenship, and under the Oslo Accords, the Palestinian Authority does not have jurisdiction over Israeli citizens and residents. As for the detainees who were, at the time of their arrest and imprisonment, residents of the Palestinian Authority in Area A or B, the court referred to the provisions of the Interim Agreement and its internal laws. In particular, the court relied on the declaration regarding the implementation of the Interim Agreement (Judea and Samaria) (No. 7, 1995). Section 6(a)(4) of the declaration states that the military commander shall continue to exercise powers and responsibilities "in all matters relating to the external security of the area, and the security and public order of the settlements, military sites, and Israelis." Section 6(b) of the declaration states that "the decision of the IDF commander in the area that the powers and responsibilities remain in his hands shall be decisive in this matter."[159]

The court of first instance concluded that based on the language of the Interim Agreement and according to the internal laws of the State of Israel, the Palestinian Authority is granted jurisdiction and detention powers only concerning "ordinary" criminal offenses within its areas of control (Areas A and B, where the Palestinian Authority in Area B has joint and parallel authority with the security responsibility granted to Israel). This contrasts with "security detention," which does not fall under the Palestinian Authority's

[159] HaMoked: Center for the Defence of the Individual, 'List regarding the implementation of the Interim Agreement (Judea and Samaria) (No. 7), 1995-56' (2017) https://hamoked.org/files/2017/1133_eng.pdf accessed [25 July 2024].

jurisdiction but remains under the exclusive authority of the State of Israel. The court considered that the State of Israel, through the military commander, remains the actual sovereign and holds powers and responsibilities in Judea and Samaria (the West Bank), except for those powers and areas of responsibility that were explicitly transferred to the Palestinian Authority. As long as the primary act attributed to the plaintiffs involves a national security element, it constitutes a "security offense," as anyone who harms or prevents harm to the region's security is engaged in an action relevant to security.[160]

Israel retained security responsibility in the interim agreements, and this responsibility should be interpreted broadly, including in the intelligence domain, which also covers the operation of agents, aides, and collaborators. The Palestinian Authority does not have the authority to undertake actions that harm state security, including investigative and detention actions aimed at apprehending state aides and collaborators. Moreover, the Oslo Accords include provisions obligating the Palestinian Authority to cooperate with Israel on security matters. The court stated that the Palestinian Authority's actions of detaining and torturing individuals for their collaboration with Israeli authorities constitute a direct violation of these agreements. Based on the above, the court determined that jurisdiction is granted to the State of Israel .[161]

The Palestinian Authority denied the allegations of torture and asserted its right to detain individuals who endanger the security of the Palestinian Authority and its vital

[160] Israeli Supreme Court, 'Judgment in Civil Appeal Case No. 5105/17, 6840/18, 6966/18' (11 May 2021) https://hamoked.org/files/2017/1133_eng.pdf accessed [20 July 2024], Para 11.
[161] Ibid

interests through espionage or collaboration with Israel, based on the Jordanian Penal Code that prohibits treason. The PA argued that Israel does not have jurisdiction over Palestinians, and claimed immunity from the court's ruling. However, the court dismissed these defenses, stating that Palestine does not meet the criteria of a sovereign state under international law as it lacks essential attributes of statehood, such as full territorial control and sovereign powers. Therefore does not qualify for state immunity. [162]

Comments on the court decision:

The court claims jurisdiction because some of the detainees were arrested in areas under Israeli sovereignty (East Jerusalem and Area C) or were Israeli citizens/residents. However, the court's classification of East Jerusalem and Area C as being under Israeli sovereignty contradicts international law and United Nations Security Council resolutions, particularly Resolution 242 (1967), which calls for the withdrawal of Israeli forces from territories occupied in the 1967 conflict, including East Jerusalem.[163] Additionally, Resolution 478 (1980) declares Israel's Basic Law proclaiming Jerusalem as the "complete and united" capital as "null and void". [164]Resolution 2334 (2016) reaffirms that Israel's establishment of settlements in the Palestinian territories occupied since 1967, including

[162] Ibid, para 10,12.
[163] UN Security Council, 'Resolution 242 (1967) of 22 November 1967' (S/RES/242) https://unispal.un.org/DPA/DPR/unispal.nsf/0/7D35E1F729DF491C85256EE700686136 accessed [30 June 2024].
[164] UN Security Council, 'Resolution 478 (1980) of 20 August 1980' (S/RES/478) https://unispal.un.org/DPA/DPR/unispal.nsf/0/6DE6DA8C895B5F04852560DF0065F578 accessed [30 June 2024].

East Jerusalem, has no legal validity and constitutes a flagrant violation under international law.[165]

Furthermore, the advisory opinion of the International Court of Justice (2004) states that the construction of the wall in the occupied Palestinian territories, including inside and around East Jerusalem, is contrary to international law and reaffirms that East Jerusalem is occupied territory.[166] More recently, the 2024 advisory opinion reiterates the illegality of Israel's occupation of Palestinian territories and emphasizes Israel's obligations under international law to withdraw and respect the rights of the occupied population.[167] Thus, Israel's legal claims and sovereignty allege over these territories are illegitimate.

The Israeli court's claim that the Palestinian Authority lacks authority over "security detention" and that Israel's security responsibilities under the agreement should be interpreted broadly is inconsistent with the clear provisions of the Oslo II Accords and the general principles of treaty interpretation under the Vienna Convention on the Law of Treaties. According to the Vienna Convention, treaty provisions must be interpreted in good faith, in accordance with the ordinary meaning of the terms in their context and in light of the treaty's object and purpose.[168] The broad interpretation provided by the Israeli

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[165] UN Security Council, 'Resolution 2334 (2016) of 23 December 2016' (S/RES/2334) https://www.un.org/webcast/pdfs/SRES2334-2016.pdf accessed [30 June 2024].

[166] International Court of Justice, 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory' (Advisory Opinion) [2004] ICJ Rep 136 https://www.icj-cij.org/en/case/131/advisory-opinions accessed [30 June 2024].

[167] International Court of Justice, 'Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem' (Advisory Opinion) [2024. https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-00-en.pdf accessed [30 July 2024].

[168] Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, articles 31&32, available at: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf [accessed 13 August 2024].

court of "security responsibility" to justify extensive Israeli control over areas explicitly designated for Palestinian Authority jurisdiction appears to conflict with these principles. The Oslo Accords explicitly define the jurisdiction and responsibilities of the Palestinian Authority, including internal security, public order, and law enforcement within Areas A and B. It also provided for the establishment of a strong police force to ensure this.[169]

The agreements establish mechanisms for security cooperation, but they do not grant Israeli court's jurisdiction over actions taken by the Palestinian Authority within its areas of control. The Palestinian Authority's obligation to cooperate with Israel on security matters does not negate its right to enforce its laws within its jurisdiction. The Palestinian Authority operates under its legal system, which includes laws against espionage and treason. These laws provide the legal basis for detaining and interrogating individuals suspected of committing such crimes.[170]

The actions of the Palestinian Authority against individuals suspected of collaborating with a foreign entity (Israel) fall within its security mandate to maintain public order and internal security. The court's decision to extend Israel's security powers beyond the clear and ordinary meaning of the treaty's provisions undoubtedly disregarded the intent of the parties and the specific scope of authority established in the accords, thereby deviating from the interpretive standards set forth by the Vienna Convention. Finally, any issues related to non-compliance with the agreements between the two sides

[169] Israel-Palestine Liberation Organization (PLO), Interim Agreement on the West Bank and the Gaza Strip (Oslo II Accord), 28 September 1995, articles 10- 13 . available at: https://peacemaker.un.org/israelopt-osloii95 [accessed 13 August 2024]. The second Oslo Accord states in Article (17/4/A) "The territorial jurisdiction of the Council [the Authority] shall extend to all persons, except Israelis."
[170] Penal Code No. 16 of 1960 (applicable in the West Bank), articles 110 - 115.

should be addressed through the mechanisms outlined in the agreements, such as joint committees and arbitration[171], rather than through unilateral judicial actions by Israeli courts.

Despite the appeal, the Israeli Supreme Court upheld the lower court's decision, affirming that Israeli courts have the right to hear cases brought by collaborators with "Israel," even if they are not Israeli citizens. In any case, even if the Jerusalem District Court granted itself jurisdiction to hear the case according to its internal laws, this does not negate the application of the rules of foreign state immunity. Jurisdiction is a threshold issue, and having valid jurisdiction is a prerequisite for moving forward with applying the rules of judicial immunity for a foreign state. [172]

The researcher believes that, for the reasons previously mentioned, the court should dismiss the case concerning the Palestinian plaintiffs due to lack of jurisdiction, while the rules of state immunity should apply to those plaintiffs who hold Israeli citizenship. The Israeli court rejected the Palestinian Authority's claim of state immunity, considering that the Palestinian Authority does not qualify as a sovereign state. This issue will be addressed in more detail in the following section.

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[171] The Oslo Accords provide structured mechanisms for addressing issues of non compliance and disputes through joint committees, negotiation, mediation, and arbitration. see Oslo I Accord (1993),Article 13 (Liaison and Coordination) https://info.wafa.ps/ar_page.aspx?id=4888 . and Oslo II Accord (1995), article 21 (Settlement of Differences and Disputes). https://info.wafa.ps/ar_page.aspx?id=4891

[172] If the court lacks jurisdiction, it dismisses the case without proceeding to address other substantive or procedural issues, including immunity claims.

5.2.2 Assessing the Status of Palestine as a State in International Law

The status of the Palestinian state is a complex and controversial issue. To determine whether Palestine is a state within the international community, reference will be made to the rules of international law. The International Law Commission, in its deliberations, and the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004, in Article 2 on the use of terms or Article 6 on methods of implementing state immunity, did not address the issue of defining a sovereign state for the purpose of claiming immunity. in international law, there is no universally agreed-upon definition of a "state." However, two main theories have been developed to explain statehood: the declaratory theory and the constitutive theory.[173]

The declaratory theory, states that an entity is a state if it meets the four criteria outlined in Article 1 of the Montevideo Convention: a permanent population; a defined territory; a government; and the capacity to enter into relations with other states. Recognition by other states is seen as a political act and not a necessary condition for statehood.[174]

The constitutive theory, posits that the act of recognition is what creates a state. Therefore, formal recognition by existing states establishes the new entity as a state. This theory does not specify clear criteria for statehood, such as the exact number of states

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[173] Crawford, James. "The Creation of States in International Law." Oxford University Press, 2nd edition, 2006, p4-9.

[174] The Montevideo Convention on the Rights and Duties of States, Uruguay, Seventh International Conference of American States, 26 December 1933. available at: https://treaties.un.org/pages/showDetails.aspx?objid=0800000280166aef

required to grant legal recognition or the level of international recognition a new entity must receive.[175] So, does Palestine meet the criteria for statehood based on either the declaratory or constitutive theory?

When assessing these criteria in the context of the Palestinian situation through the lens of the declaratory theory, it becomes evident that Palestine satisfies the initial criterion (a permanent population). Approximately 5 million Palestinians inhabit the regions of the West Bank, Gaza Strip, and East Jerusalem. This demographic collectively embodies a shared culture, identity, and traditions, thereby conforming to the stipulations set forth by the Montevideo Convention.[176]

For the second criterion, which pertains to a defined territory, a contentious discourse has emerged among scholars who contend that fragmentation, ambiguity in border delineation, and ongoing disputes with Israel render Palestine's "defined territory" nebulous. Nevertheless, one could assert that Palestine fulfills this criterion for several reasons: firstly, in accordance with international law, the territory of a state is not mandated to possess continuity, nor is a state compelled to officially declare its borders. The situation concerning Israel exemplifies that the absence of fixed and explicitly defined borders does not constitute an impediment to statehood.[177] Secondly, Palestine has established its

[175] Encyclopædia Britannica, States in International Law, available at: https://www.britannica.com/topic/international-law/States-in-international-law#ref794948 [accessed 14 August 2024].
[176] Palestinian Central Bureau of Statistics (PCBS), Population Projections for the State of Palestine 2021-2025, available at: http://www.pcbs.gov.ps/site/512/default.aspx?lang=en&ItemID=4051 [accessed 14 August 2024].
[177] Francis A. Boyle, "The Creation of the State of Palestine", European Journal of International Law 1, no. 1 (January 1990): 301.

borders, and a significant majority of the international community, including the United Nations and the European Union, acknowledges the "Green Lines"[178] as the legitimate demarcation between Palestinian and Israeli territories, which encompass the West Bank, Gaza Strip, and East Jerusalem—territories deemed occupied under international law. Since the Oslo Accords and continuing to the present, the international community has concurred that, regarding border matters, Palestine and Israel should utilize the pre-1967 borders as a foundational reference for subsequent negotiations, as reiterated by the Palestinian Liberation Organization in its 1988 Declaration of Independence[179]. Thirdly, the presence of border disputes with Israel does not negate Palestine's status as a state, a circumstance that is similarly observed in many other nations[180]. Consequently, even in instances where Israel persists in deploying forces at the borders and erecting settlements that impede Palestinians' effective territorial governance, Palestine nonetheless retains a defined territory within the parameters of the Montevideo Convention.

The governmental criterion presents significant challenges, primarily attributable to the intricate nature of the Palestinian context. The Palestinian Authority does not possess exclusive authority over the aforementioned Palestinian territories; certain regions are co-administered with Israel (notably, segments of the West Bank), while others are governed

[178] The term "Green Line" refers to the armistice demarcation lines established between Israel and its neighbors (Egypt, Jordan, Lebanon and Syria) after the 1948 Arab-Israeli War. Areas beyond the Green Line, which were occupied by Israel in 1967, including the West Bank, East Jerusalem, the Gaza Strip and the Golan Heights, are considered occupied territory under international law. These lines are drawn on the map in green ink, hence the name "Green Line".

[179] Palestinian Liberation Organization (PLO), Declaration of Independence, 15 November 1988, available at: https://www.un.org/unispal/document/auto-insert-196196/ [accessed 14 August 2024]. The political statement announced the PLO's approval of Security Council Resolutions 242 and 338.

[180] For example, India and Pakistan dispute the Kashmir region, the East China Sea claimed by China and Japan, or the Western Sahara in northwest Africa, where Morocco expelled the indigenous Sahrawi people from the area.

by Hamas (the Gaza Strip), thus precluding Palestine from identifying a singular entity that wields effective control over the territory. Moreover, other substantial arguments contend that vital aspects of governmental authority, such as external security and border management, were never delegated to the Palestinian Authority, remaining firmly under Israel's jurisdiction.[181]

Nonetheless, in spite of the political strife that has emerged between the Palestinian Authority and Hamas, which has somewhat restricted the Palestinians' capacity to execute effective governmental operations, it can be posited that the powers conferred upon the Palestinian Authority in accordance with the Interim Agreement serve as evidence of Palestine possessing a governmental structure. The Palestinian Authority is responsible nearly for all of the essential governmental services, including the judiciary, law enforcement, legislative and executive functions, education, tourism, culture, social welfare, , among others.[182]

Furthermore, the constriction of its responsibilities due to occupation does not fundamentally undermine the requirement for efficient governance, as international law does not stipulate that an entity must possess the entirety of these powers and authorities to fulfill the governmental criterion. Numerous diminutive states, such as Liechtenstein, Monaco, and San Marino, are acknowledged as sovereign entities yet lack the capability to

[181] William T. Worster, "The exercise of jurisdiction by the ICC over Palestine", American University International Law Review 26, no. 5 (February 2012): 1167.
[182] Ibid.

effectively exercise competences and powers in relation to external security matters.[183] Additionally, the occupation of Palestinian territories restricts the Palestinians' capacity to exert effective authority; however, this limitation does not undermine their status as a state. Under international law, states under occupation retain their rights and obligations, and occupation is perceived as a transient condition that does not alter the legal status of the state. Resolutions from the UN General Assembly and Security Council have consistently reaffirmed the sovereignty and territorial integrity of states under occupation, including Palestine[184]. Although the occupying power may exert control over the territory, it does not acquire sovereignty. The occupied state maintains its legal identity, sovereignty, and rights, even in circumstances where its ability to exercise control over its territory is curtailed.[185] This is adequate to conclude that Palestine satisfies the governmental criterion as delineated in the Montevideo Convention.

Regarding the final criterion, which involves the ability to establish relations with other states, although the Palestinian Authority, as per the Oslo accord , lacks authority over foreign relations, it is the Palestine Liberation Organization (PLO) that has been recognized for signing international agreements and forming diplomatic ties with other

[183] Joe DelGrande, An Examination of Palestine's Statehood Status through the Lens of the ICC Pre-Trial Chamber's Decision and Beyond, NYU Journal of International Law and Politics (JILP), 20 October 2021, available at: https://nyujilp.org/an-examination-of-palestines-statehood-status-through-the-lens-of-the-icc-pre-trial-chambers-decision-and-beyond/#FN26 [accessed 14 August 2024].
[184] United Nations General Assembly Resolution 66/225, The sovereignty of Palestine over the Occupied Palestinian Territory, including East Jerusalem, and of the Arab population in the occupied Syrian Golan over their natural resources, 22 December 2011, available at: https://documents.un.org/doc/undoc/gen/n11/472/32/pdf/n1147232.pdf [accessed 14 August 2024].
[185] Quigley, John. "Palestine statehood and international law." Global Policy Essay 1 (2013).

nations.[186] Palestine has become a party to 98 international agreements[187] and has established a network of diplomatic missions in countries that recognize the State of Palestine, along with several delegations and representative offices in countries that either do not recognize or only partially recognize Palestine.[188] Therefore, Palestine satisfies this criterion. Based on this analysis, the researcher concludes that Palestine qualifies as a state under the declarative theory, as it meets all the requirements of the Montevideo Convention.

To assess whether Palestine qualifies as a state under the constitutive theory, which bases statehood on international recognition, we observe that, on a bilateral level, Palestinian authorities have been successful in securing recognition from a large number of countries. Since the Declaration of Independence in 1988 until now, 149 countries have officially recognized the State of Palestine, accounting for over 70% of the world's nations.[189] Although only a small number of European and Western countries have extended such recognition, this is largely due to geopolitical interests related to the Israeli conflict rather than a rejection of Palestine's legitimacy. Even countries that do not formally recognize Palestine as a state still often treat it as such; Germany is a prime example of this.

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[186] State of Palestine, "Diplomatic Relations", Permanent Observer Mission of the State of Palestine to the United Nations. http://palestineun.org/about-palestine/diplomatic-relations/

[187] Palestinian Ministry of Foreign Affairs , List of international agreements to which the State of Palestine has acceded (as of September 2020). https://www.mofa.pna.ps/ar-jo/%D9%81%D9%84%D8%B3%D8%B7%D9%8A%D9%86/%D9%81%D9%84%D8%B3%D8%B7%D9%8A%D9%86%D9%81%D9%8A%D8%A7%D9%84%D9%85%D9%86%D8%B8%D9%88%D9%85%D8%A9%D8%A7%D9%84%D8%AF%D9%88%D9%84%D9%8A%D8%A9/%d9%82%d8%a7%d9%8a%d9%85%d8%a9-%d8%a8%d8%a7%d9%84%d8%aa%d9%81%d8%a7%d9%82%d9%8a%d8%a7%d8%aa-%d8%a7%d9%84%d8%af%d9%88%d9%84%d9%8a%d8%a9-%d8%a7%d9%84%d8%aa%d9%8a-%d8%a7%d9%86%d8%b6%d9%85%d8%aa-%d8%a7%d9%84%d9%8a%d9%87%d8%a7-%d8%af%d9%88%d9%84%d8%a9-%d9%81%d9%84%d8%b3%d8%b7%d9%8a%d9%86-%d8%ad%d8%aa%d9%89-%d8%a7%d9%8a%d9%88%d9%84%d9%88%d8%b3%d8%a8%d8%aa%d9%85%d8%a8%d8%b1-2020

[188] Palestinian News & Info Agency (WAFA), Palestinian diplomatic missions abroad https://info.wafa.ps/ar_page.aspx?id=2339

[189] Palestinian Ministry of Foreign Affairs https://www.mofa.pna.ps/ar-jo/%D9%81%D9%84%D8%B3%D8%B7%D9%8A%D9%86/%D9%81%D9%84%D8%B3%D8%B7%D9%8A%D9%86%D9%81%D9%8A%D8%A7%D9%84%D9%85%D9%86%D8%B8%D9%88%D9%85%D8%A9%D8%A7%D9%84%D8%AF%D9%88%D9%84%D9%8A%D8%A9/%d8%a7%d9%84%d8%af%d9%88%d9%84-%d8%a7%d9%84%d8%aa%d9%8a-%d8%a7%d8%b9%d8%aa%d8%b1%d9%81%d8%aa-%d8%a8%d8%af%d9%88%d9%84%d8%a9-%d9%81%d9%84%d8%b3%d8%b7%d9%8a%d9%86

In August 2022, Abbas, President of the Palestinian National Authority, had compared Israeli actions in Palestinian villages to the Holocaust, leading to two criminal charges based on Section 130 para. 3 of the German Criminal Code (StGB).On December 11, 2023, the Berlin Public Prosecutor's Office discontinued investigations against Mahmoud Abbas, , citing his immunity under Section 20 para. 1 of the German Courts Constitution Act (GVG). This immunity was recognized despite Germany not formally recognizing Palestine as a state .[190]

As mentioned in chapter 2 , State immunity in international law stems from the principles of equality, independence, and dignity of states. A head of state's immunity, both ratione materiae (for official acts) and ratione personae (personal immunity), derives directly from the state itself. This concept underscores that official acts of the head of state are acts of the state, thus warranting immunity. [191]Unlike private international law, which is based on functional jurisdiction, public international law bases immunity on the existence and sovereignty of the state. It distinguishes between states and non-states regarding immunity, indicating that immunity is not generally extended to non-states. In summary, while Germany has not recognized Palestine as a state, Granted Abbas immunity similar to that of recognized states. demonstrating a complex interplay between recognition and the practical application of international law principles.

[190]Lea Köhne, *(State) Immunity for Palestine*?, Verfassungsblog , 18 December 2023 , https://verfassungsblog.de/state-immunity-for-palestine/ (Accessed 6 July 2024).
[191] Pedretti, Immunity of Heads of State and State Officials for International Crimes, 2015, p. 7.

However, international consensus on recognizing the state of Palestine is not required. In 1936 a resolution for the Institute of International Law[192] states that " the existence of new states with all connected legal effects is not affected by the refusal of one or more States to recognize."[193] This language speaks in favor of recognizing Palestine as a state even in the face of non-consensual acceptance by the international community.

On the international front, Palestine's efforts have seen significant success. It has gained membership in key regional organizations, including the Arab League, the Organization of Islamic Cooperation, and the Non-Aligned Movement.[194] Progress has also been made within the United Nations. In October 2011, Palestine secured full membership in UNESCO, and shortly after, its status within the UN was elevated to that of a non-member observer state.[195] In May 2024, the UN General Assembly overwhelmingly passed a resolution urging the Security Council to reconsider Palestine's bid for full UN membership. This resolution, which was supported by 143 countries, with 9 opposing and 25 abstaining, provided Palestine with additional rights and privileges but fell short of granting full membership. The aim was to enhance Palestine's participation in the UN in line with its observer status.[196] Earlier, in April 2024, the Security Council had voted on the

[192] The Institut de Droit International is an independent organization founded in 1873, composed of the world's leading experts in international law. Its primary purpose is to promote the development of international law, both public and private, and to encourage the peaceful resolution of international disputes. https://www.idi-iil.org/en/about-the-institute/

[193] Institut De Droit International: Resolutions Concerning the Recognition of New States and New Governments, 30 Am. J. Int'l L. (Supplement: Official Documents) 163, 185 (Oct. 1936).

[194] According to the website of the Palestinian Ministry of Foreign Affairs and Emigrants, Palestine is a member of 21 international organizations as of May 25, 2018.

[195] United nations, Status of Palestine in the United Nations, report of the Secretary- General, https://www.un.org/unispal/document/auto-insert-182149/ . accessed 6 July 2024.

[196] 131. United Nations, Resolution adopted by the General Assembly on 10 May 2024, A/RES/77/299, 10 May 2024. https://documents.un.org/doc/undoc/ltd/n24/129/97/pdf/n2412997.pdf

matter, with 12 out of 15 members in favor. However, the United States exercised its veto power, blocking the resolution and arguing that Palestinian statehood should be achieved through direct negotiations with Israel rather than unilateral measures through the UN.[197] This highlights that the only barrier to Palestine's full UN membership is the U.S. veto in the Security Council. Additionally, Palestine's recourse to international courts, particularly the International Court of Justice[198] and the International Criminal Court,[199] further support the arguments presented in this discussion.

In summary, even if Palestine does not fully meet the criteria for statehood under the declarative theory, the researcher argues that it satisfies the conditions of the constitutive theory. Palestine qualifies as a state due to its extensive bilateral and multilateral recognition, particularly within the United Nations, and its successes in acting as a state within the international framework. International bodies like the United Nations and, more specifically, the International Criminal Court (ICC) have made decisions in recent years that reinforce this constitutive perspective on statehood. Following the 2012 UN General Assembly resolution, which granted Palestine non-member observer status, the ICC was able to assert its jurisdiction over Palestine. The ICC's Pre-Trial Chamber used this opportunity to address a gap in the Rome Statute by recognizing Palestine as a state for the purposes of its jurisdiction. Instead of strictly adhering to the formal requirements of the

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[197] United Nations, UN News , US vetoes Palestine's request for full UN membership, 18 April 2024. https://news.un.org/en/story/2024/04/1148731.

[198] International court of justice, "legal consequences of the construction of a wall in the occupied Palestinian territory", advisory opinion of 9 July 2004. https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf

[199] ICC, State of Palestine, https://www.icc-cpi.int/palestine . (accessed 6 July 2024).

Montevideo Convention,[200] the most effective way to protect Palestinians is to affirm their right to establish a state.

Based on this understanding, with clear evidence that Palestine is a state according to international law, it holds the right to immunity. From this perspective, refute the Israeli claim that Palestine is not a state and proceed to apply the principles of international law regarding state immunity to the case at hand. Initially, it is important to examine the laws of the court's state concerning state immunity and their application, except where there is a conflict with customary international law or an obligatory international agreement. The following section will thus focus on state immunity in Israeli law.

5.2.3 State Immunity in Israeli law

First : Israeli Foreign State Immunity Law

Israel did not sign the United Nations Convention on Jurisdictional Immunities of States and Their Property. However, in 2008, the Israeli Knesset passed the Israeli Foreign States Immunity Law No. 5769, in which Israel acknowledges that the law embodies many of the principles of the United Nations Convention and is based, in principle, on international law and prevailing practice.[201]

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[200] Certain exceptional instances are regarded as States despite their deficiency in meeting one or more of the recognized criteria of Statehood. The Vatican City attains the designation of a State through acknowledgment and approval, allowing it to engage in numerous treaties and maintain diplomatic ties with various States. Crawford, The Creation of States in International Law (2nd edn , Oxford University Press, 2006), 221–33

[201] Council of Europe , Committee of Legal Advisers on Public International Law, Questionnaire on "Service of process on a foreign State", Israel. https://www.coe.int/en/web/cahdi/service-of-process-on-a-foreign-state

The Israeli law adopts a restrictive approach to immunity, stating that foreign states generally enjoy immunity from the jurisdiction of Israeli courts unless an exception to this general rule applies. The exceptions under Israeli law include: commercial transactions, employment contracts[202], personal injury or property damage, property rights (both real estate and intellectual property), issues related to ships and commercial cargo, and when a foreign state waives its immunity.[203] These exceptions generally align with those in the United Nations Convention.

Notably, Article 2 of Israeli law excludes criminal matters from the judicial immunity of foreign states, thereby allowing individuals to be prosecuted for crimes such as war crimes and crimes against humanity.[204] However, in its commentary on the International Law Commission's 2022 draft articles regarding the immunity of state officials from foreign criminal jurisdiction, Israel objected to Article 7. This article stipulates that state officials do not enjoy immunity for certain crimes, including genocide, crimes against humanity, war crimes, apartheid, torture, and enforced disappearance.[205] Israel even recommended the deletion of this article,

[202] In this exception to immunity, Israeli law requires that the employee be an Israeli citizen or resident when the cause of action arises. While the UN Convention excludes immunity in employment contracts when the work is performed wholly or partly in the forum state, it does not include the specific residency or citizenship requirements set forth in Israeli law.

[203] Israel Foreign States Immunity Law 5769-2008, articles 3-12. https://www.coe.int/t/dlapil/cahdi/Source/state_immunities/Israel%20Immunities%20January%202009.pdf [accessed 16 August 2024.[

[204] Ibid, article 2 " A foreign state shall have immunity from the jurisdiction of the courts in Israel, excluding jurisdiction in criminal matters (hereafter referred to as immunity from jurisdiction), subject to the provisions of this statute".

[205] United Nations, Report of the International Law Commission, Chapter 6: Immunity of State Officials from Foreign Criminal Jurisdiction (2022) https://legal.un.org/ilc/reports/2022/english/chp6.pdf accessed 17 August 2024.

arguing that it does not align with customary international law or state practice.[206] It seems contradictory that Israel expects its own officials to enjoy criminal immunity while its law does not extend such immunity to officials of other states. Despite the exclusion of criminal matters from immunity, the Israeli law provides no further details on this issue.

Regarding immunity from enforcement, foreign states enjoy immunity from the enforcement of judgments or other judicial decisions within Israeli territory. This immunity extends to the foreign state's assets, generally protecting them from seizure or enforcement actions. However, there are specific conditions and exceptions where this immunity does not apply. For example, immunity does not cover judgments or decisions in criminal matters, and the following assets are excluded from immunity:

a. Commercial assets.
b. Assets located in Israel that a foreign state acquired through inheritance, gifts, or as ownerless property.
c. Real estate located in Israel is also excluded from immunity.
d. Assets belonging to entities separate from the foreign state (such as state-owned companies) do not benefit from immunity from enforcement, except for central banks.

[206] International Law Commission, 'Israel: Comments and Observations by the Israeli Government', Seventy-Fifth Session of the International Law Commission, 2023. https://legal.un.org/ilc/sessions/75/pdfs/english/iso_israel.pdf accessed 17 August 2024.

e. Immunity from enforcement can be waived.[207]

Israeli law defines commercial assets as: "Any asset, excluding a diplomatic or consular asset, a military asset, or an asset of a central bank, which is held in Israel by a foreign state for a commercial purpose; in this matter, an asset held in Israel by a foreign state and not intended for a particular purpose shall be regarded as being held by that state for a commercial purpose, unless it is proved otherwise."[208] Thus, it provides a broad definition, allowing a wide range of assets to be classified as commercial unless proven otherwise. This presumption places the burden of proof on the state claiming immunity to demonstrate that the asset is not for commercial use. Commercial activity is defined as: "any transaction or activity within the sphere of private law which is of a commercial nature, including an agreement for the sale of goods or services, a loan or other transaction for finance, guarantee, or indemnity, and which by its nature does not involve the exercise of governmental power."[209] This is somewhat consistent with the definition of commercial activity found in the United Nations Convention.

Article 20 allows the Israeli government to grant immunity to political entities not recognized as states, under specific conditions and for limited periods.[210] This clearly contradicts international law and prevailing practices, from which Israel

[207] Israel Foreign States Immunity Law, articles 15-18.
[208] Ibid, article 1.
[209] Israel Foreign States Immunity Law, article 1.
[210] Ibid, article 20.

claims its law is derived, as immunity is granted exclusively to states. If Israel argues that Palestine does not enjoy immunity because it is not a "state", why then does its law allow for the granting of immunity to non-state entities?

Second : Israeli judicial precedents on state immunity

- **Her Majesty the Queen in Right of Canada v. Edelson (1997)**

In this case, the Israeli courts dealt with the issue of state immunity concerning a lease dispute involving the Canadian government. The case arose when the Canadian ambassador did not vacate a leased property after the lease term ended. The landlord, Reinhold, filed a suit seeking rent payment for the extended period. The Canadian government claimed sovereign immunity, arguing that the lease was part of its sovereign activities, thus falling under the protections of state immunity. The Israeli magistrate court initially accepted this argument. However, upon appeal, the district court distinguished between acts performed jure imperii (sovereign acts) and jure gestionis (commercial acts), ruling that renting property for an ambassador's residence was a commercial act rather than a sovereign one. This interpretation aligns with the modern trend towards restrictive sovereign immunity, where states are not immune from commercial transactions.[211]

[211] Her Majesty the Queen in Right of Canada v. Edelson, Israel Supreme Court, Case No. PLA 7092/94, [1997] IsrLR 403; 131 ILR 279, available at: https://versa.cardozo.yu.edu/topics/foreign-immunity

- **Yusipov and Others v. Arab Republic of Egypt (2011)**

The plaintiffs, numbering 24, filed a tort claim seeking NIS 260,000,000 for deaths and personal injuries caused by Kassam rockets fired from the Gaza Strip into Israel. They alleged that Egypt supported and encouraged the smuggling and supply of weapons, money, and experts in terrorism, facilitating these activities through systematic policy. Egypt argued that the actions ascribed to Egypt pertain to governmental public policy, security, and international relations, and are therefore protected by sovereign immunity.

The Israeli court upheld Egypt's claim to immunity under both the Immunity Law and international customary law, determining that the acts in question were governmental and public policy actions, not private-commercial ones.The court concluded that the tort exception did not apply because the alleged acts were committed within Egypt's sovereign territory and pertained to governmental functions. The court recognized the principle of non-justiciability for acts of state and acts of war, further supporting Egypt's immunity. The court dismissed the case, citing the need to respect

the immunity of foreign sovereigns to avoid undesirable political and judicial outcomes .[212]

- **The Attorney general v. Alan steen and others (2011)**

The case involves Alan B. Steen and others seeking enforcement of three U.S. court judgments against the Islamic Republic of Iran, the Iranian Revolutionary Guards, and the Ministry of Public Security and Intelligence of Iran, awarding them monetary compensation for acts of terrorism. The central issue was whether the Israeli Ministry of Foreign Affairs could be bypassed to serve legal documents to Iran, given the absence of diplomatic relations between Israel and Iran. Whether Israel can enforce U.S. judgments against Iran when diplomatic relations do not exist.

The Supreme Court noted that the delivery of proceedings to a foreign country must only be done through the Foreign Ministry through diplomatic channels, as stipulated in Section 13(a) of Israel's Immunity Law 2008, and is only possible with countries that have diplomatic relations with Israel. The court ruled that legal documents could not be served from Israel to Iran due to the "procedural disconnection" resulting from the "diplomatic rupture" between the two countries. The court's decision was based on the

[212] Yusipov and Others v. Arab Republic of Egypt, Israel Supreme Court, Case No. 1104/09, 2011, Council of Europe, CAHDI Database, available at: http://www.cahdidatabases.coe.int/contribution/details/338

principle of reciprocity, noting that since Israel only accepts service of process documents through diplomatic channels, it should adhere to the same procedure when sending documents. [213]

This case shows how the procedural rules of the forum state's law can prevent the enforcement of judgments even though the judgment itself does not have immunity from enforcement.

- **Agudat Moreh v. The Palestinian Authority (2006)**

The Plaintiff Agudat Moreh purchased land in (Area A) of the Palestinian Occupied Territories, but the transactions were not completed. The Plaintiff sued the head of the village in an Israeli court, winning a judgment in 2000.The PA was responsible for enforcing this judgment but failed to do so. Consequently, the Plaintiff sought compensation from the PA in an Israeli court. The PA claimed sovereign immunity to dismiss the suit. Judge Okon of the Jerusalem District Court ruled on April 23, 2006, dismissing the suit on both substantive grounds and sovereign immunity.[214]

[213] The Attorney General v. Alan Steen and others (2011) H.C.J. 1104/09 (Isr. Sup. Ct.). Available at: https://rm.coe.int/0900001680afa96f (Accessed: 7 August 2024).
[214] Harpaz, Guy. "The Palestinian Authority and Sovereign Immunity in Israeli Courts: CA (Jer) 4049/02 Agudat Moreshet Elon Moreh v. the State of Israel." Israel Law Review 40.1 (2007): 198-212.

The judge based his ruling on several grounds. First, the Palestinian Authority was granted, under the Israeli-Palestinian Interim Agreement (the Oslo Accords), a quasi-sovereign status, particularly with regard to Area A. This status gave the Palestinian Authority some of the competencies and characteristics that sovereign states typically enjoy. Second, Judge Okun used a functionalist perspective, focusing on the practical features and functions of the Palestinian Authority rather than strict adherence to formal definitions of statehood. This approach considered the Palestinian Authority's exercise of authority over the police, judiciary, and electoral processes as an indicator of sovereign competencies. The court recognized that while the Palestinian Authority is not a fully recognized state within the Israeli legal system, it does possess international legal personality. Judge Okun argued that depriving the Palestinian Authority of this immunity would place it in a "twilight zone," where it would bear responsibilities without corresponding rights.[215]

This case represents a unique and contentious decision in Israeli law, granting sovereign immunity to the Palestinian National Authority (PA). Judge Okon's ruling acknowledges the quasi-sovereign status of the PA under the Oslo Accords, emphasizing a functionalist perspective that considers the PA's practical governance capabilities, such as policing,

[215] Ibid.

judiciary, and electoral processes. It should be noted that the case was filed a decade before the case in question, during which time Palestine has acquired a different international status.

5.2.4 Does Palestine Have Immunity ?

First: Judicial Immunity

Israeli law adheres to the restrictive doctrine of state immunity, which requires classifying the activity at the center of the lawsuit as either a sovereign or commercial act. The activity in question—(the arrest and torture of Palestinians collaborating with Israel)—is clearly not commercial but a sovereign act of the state, regardless of any associated violations. The actions of the Palestinian security forces in arresting Palestinians for espionage and treason are unquestionably acts of law enforcement, which fall under sovereign state functions, thereby granting the state immunity from the jurisdiction of foreign courts.

In the Saudi Arabia v. Nelson case, Scott Nelson, an American citizen working at a hospital in Saudi Arabia, brought a lawsuit in the United States, alleging unlawful detention and torture by Saudi officials. The U.S. Supreme Court ruled that Saudi Arabia was immune from the suit under the Foreign Sovereign

Immunities Act (FSIA), as the actions involved (arrest, detention, and torture) were sovereign acts, not commercial activities.[216]

Once the nature of the activity in question is determined, the key issue becomes whether severe human rights violations, such as torture, negate the application of state immunity.

Despite the fact that torture is prohibited by numerous international treaties—including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the United Nations Convention Against Torture—and even though it constitutes a violation of a jus cogens norm of international law, state immunity still takes precedence over human rights, particularly in civil cases. This principle has been reinforced through international practice and numerous judicial precedents, which were discussed in Chapter 3. Most notably, the International Court of Justice in the Jurisdictional Immunities (Germany v. Italy) case confirmed that sovereign immunity applies to state acts, irrespective of their legality

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While there are instances where human rights have been prioritized over the immunity of state officials, such cases have predominantly involved criminal lawsuits. To date, no judicial precedent exists in which a court has rejected a state's

[216] US Supreme Court, Saudi Arabia v. Nelson, 507 U.S. 349 (1993). https://supreme.justia.com/cases/federal/us/507/349/

immunity in a civil lawsuit solely on the grounds of allegations of torture. The principle of sovereign immunity remains robust, as courts often uphold it to avoid infringing on state sovereignty and respecting the principle of non-interference in the domestic affairs of other states.

Lastly, there is no indication—either explicit or implicit—that the State of Palestine has waived its immunity, be it judicial or enforcement immunity. On the contrary, in its response to the jurisdiction of the Jerusalem District Court, the State of Palestine firmly asserted its immunity. Therefore, based on all the points outlined above, the State of Palestine clearly enjoys judicial immunity in this case

Second : Immunity from Execution – Execution on Palestinian Clearance Funds

To determine whether Palestinian clearance funds are immune from execution, several key factors must be addressed: first, the rules governing immunity from execution under Israeli law, the nature of the funds subject to execution, and whether there has been any waiver of immunity from execution.

International law generally distinguishes between immunity from jurisdiction and immunity from execution. Even if a state is not immune from jurisdiction, it may still enjoy immunity from execution unless specific exceptions apply. As previously mentioned, Article 15(a) of the Israeli Foreign States Immunities Law

provides that foreign state assets are immune from execution procedures following a judgment or other court order in Israel. However, Article 16 outlines exceptions, including commercial assets, assets obtained through inheritance or gifts, and immovable property located in Israel.[217] Therefore, Palestinian clearance funds are immune from execution unless one of these exceptions applies. So, what exactly are clearance funds, and what is their nature?

As mentioned earlier, the Oslo II Accords include protocols governing relations between Israel and the Palestinian National Authority in various matters. One of the most important protocols is the one regulating economic relations between the two parties, known as the Paris Protocol on Economic Relations. The Paris Protocol is an agreement between Israel and the Palestine Liberation Organization, signed on April 29, 1994, and integrated into the Oslo II Accords in September 1995. The protocol establishes a framework for economic cooperation and outlines various economic arrangements between Israel and the Palestinian Authority. Notably, it created a customs union, meaning there are no economic borders between Israel and the Palestinian territories. Both parties apply the same import policies, customs duties, and standards, effectively creating a single economic area.[218]

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[217] Israel Foreign States Immunity Law, articles 15 &16.

[218] Protocol on Economic Relations between the Government of the State of Israel and the PLO representing the Palestinian People (Paris Protocol, 29 April 1994) https://www.mne.gov.ps/ckfinder/userfiles/files/agreements/Paris%20Economic%20Protocol.pdf accessed 17 August 2024.

Under the protocol, Israel collects value-added tax (VAT), customs duties, and other taxes on behalf of the Palestinian Authority for goods and services imported by Palestinian importers into the Palestinian territories via Israeli-controlled ports and crossings, or purchased by Palestinians in Israel. These taxes and duties are then transferred to the Palestinian Authority regularly, usually on a monthly basis, in a process known as "clearance" after deducting agreed-upon administrative fees.[219] This control gives Israel the ability to delay or threaten to withhold the transfer of taxes it collects for the Palestinian Authority as a means of pressure or punishment. Israel has employed this tactic multiple times since the agreement's signing, causing severe harm to the ability of public institutions in the occupied territories to carry out their functions.[220]

Under Israeli immunity law, clearance funds do not fall under the second or third exceptions. As for the first exception to immunity from execution—commercial assets—Israeli law defines commercial assets as those held by a foreign state in Israel for commercial purposes. In this context, any asset held by a foreign state in Israel that is not assigned a specific purpose is presumed to be held for commercial purposes unless proven otherwise.

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[219] Ibid, article 12.

[220] In 2018, Israel enacted a law mandating deductions from these funds equivalent to amounts paid by the PA as stipends to prisoners and families of deceased attackers. This law reflects Israel's policy to penalize the PA's financial support system. https://www.jns.org/israeli-supreme-court-ruling-gives-terror-victims-recourse-over-palestinian-authority-payments-to-terrorists/

Clearance funds are funds collected by Israel on behalf of the Palestinian Authority and held temporarily before being transferred to the Palestinian Authority. Therefore, these funds are considered assets held in Israel. According to the definition, if the funds are held for commercial purposes, they could be considered "commercial assets." However, the Palestinian Authority's budget reports detail the allocation of its budget, including the use of clearance funds to pay public sector salaries, fund infrastructure projects, and support public services such as health and education.[221] The World Bank regularly publishes reports analyzing the economic situation in the Palestinian territories, highlighting the role of clearance funds in financing government operations. These reports emphasize how vital these funds are for maintaining public services and paying public sector employees.[222] Similarly, the International Monetary Fund (IMF) provides detailed analyses of the Palestinian economy, focusing on how clearance funds are used to support the budget and maintain economic stability.[223] Together, these documents provide substantial evidence that clearance funds are used for non-commercial purposes.

[221] Palestinian Ministry of Finance. Fiscal Data and Reports. Available at: https://www.pmof.ps/internal.php?var=11 (Accessed: 9 August 2024).

[222] World Bank. Palestinian Economic Update May 2024. Washington, D.C.: The World Bank Group, 2024. Available at: https://thedocs.worldbank.org/en/doc/ce9fed0d3bb295f0363d690224d1cd39-0280012024/original/Palestinian-Econ-Upd-May2024-FINAL-ENGLISH-Only.pdf (Accessed: 8 August

[223] International Monetary Fund (IMF). West Bank and Gaza: Report to the Ad Hoc Liaison Committee; September 8, 2023. Washington, D.C.: International Monetary Fund, 2023. Available at: https://www.imf.org/en/Publications/CR/Issues/2023/04/24/West-Bank-and-Gaza-Report-to-the-AD-HOC-Liaison-Committee-532738 (Accessed: 9 August 2024).

Finally, there is no indication that the Palestinian Authority has waived its immunity with respect to these funds. Any waiver must be explicit and in writing, or by notification to the court, according to Article 17 of the Israeli Foreign States Immunities Law.[224] Based on the above, Palestinian clearance funds are immune from execution, and deductions cannot be made from them to enforce Israeli judgments.

Although this case is the first of its kind, will not be the last. Several months ago, Israel enacted a law allowing Israelis injured or families of those killed in Palestinian attacks, labeled as "victims of terrorism and their families," to claim financial compensation from the Palestinian Authority. As part of the implementation of Israeli court rulings on this matter, the Israeli Minister of Finance ordered the seizure of 100 million shekels from Palestinian clearance funds. [225]

The core issue is that the forum state does not recognize Palestine as a state, despite its clear statehood, as previously demonstrated. This lack of recognition directly impacts the application of state immunity laws. Legal proceedings in Israeli courts are heavily influenced by the broader Israeli-Palestinian conflict. Israel, as an occupying power, consistently violates

[224] Israel Foreign States Immunity Law, article 17 stipulates that " Assets of a foreign state shall not benefit from immunity under section 15 if the foreign state has expressly waived such immunity in writing, or by written or oral notice to the court."

[225] Bezalel Smotrich, 'Smotrich orders confiscation of 100 million shekels from Palestinian Authority for terror victims' families' Ynet News (5 August 2024) https://www.ynetnews.com/article/r1rudipy0 accessed 21 August 2024.

international law and categorically refuses to acknowledge the Palestinian state or accept the two-state solution. This ongoing refusal, coupled with Israel's continued deductions from Palestinian funds, further complicates the legal and political landscape.

Conclusion And Recommendations

This thesis has critically examined the complex and evolving principle of state immunity, particularly focusing on its application within the politically sensitive and legally challenging context of the Israeli-Palestinian conflict. The principle of state immunity, traditionally serving as a shield protecting sovereign states from the jurisdiction of foreign courts, has undergone significant transformations, especially with the emergence of restrictive immunity. Under this restrictive approach, there are several recognized exceptions where a state does not enjoy immunity, including commercial transactions, employment contracts, personal injury, intellectual and industrial property, ships owned or operated by a state, participation in companies or legal persons, ownership and use of property, and finally, the waiver of immunity by the state. These exceptions have been widely recognized by states and have been adopted by the United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCIS).

Despite this, the UNCIS does not address state immunity in the context of gross human rights violations. International practices and the International Court of Justice (ICJ) tend to maintain state immunity, even in the presence of peremptory norm violations, particularly in civil cases. In criminal cases against state officials, immunity generally remains intact as long as the official is in office. However, there have been recent international efforts to deny immunity even when the official is in office if the case involves serious human rights violations. A notable example is the draft articles produced

by the International Law Commission in 2022 concerning the immunity of state officials from foreign criminal jurisdiction.

The thesis concludes that, despite the complex legal and political situation of Palestine, it is considered a state under international law, particularly according to the constitutive theory of statehood. This theory posits that a political entity becomes a state when it is recognized as such by the international community, especially by other sovereign states. Palestine has achieved significant recognition from 149 countries and numerous international organizations, affirming its status as a sovereign state. Consequently, Palestine enjoys the sovereign rights of states, including immunity. The primary obstacle to fully exercising its sovereignty over its territory is the illegal occupation of its lands, which does not negate its sovereignty but rather preserves it for the occupied state.

Upon examining Israeli law on state immunity and several Israeli precedents available to the researcher, the study finds that Israeli law adopts a restrictive approach to state immunity, largely aligning with the principles of international law, though with some unique national rules. The Israeli Foreign States Immunity Law excludes criminal matters from judicial immunity, which theoretically allows for the prosecution of individuals for crimes such as war crimes and crimes against humanity.

when applying the rules of Israeli law on state immunity on the case study , Palestine deserves both judicial and execution immunity. The case under study addresses a set of civil cases brought by Palestinians against the Palestinian National Authority in Israeli courts. Applying the relevant state immunity rules, the actions subject to the lawsuit, such

as "illegal detention," are sovereign acts of the state that enjoy state immunity. As for the "torture" allegation, as previously clarified, immunity takes precedence even over gross human rights violations, especially in civil cases. Despite this, Israeli courts have shown a tendency to reject Palestine's immunity claims based on its disputed statehood and the overarching political and security dynamics of the Israeli-Palestinian conflict. Israel's consistent non-recognition of Palestinian statehood and the ongoing conflict significantly shape judicial outcomes in cases involving Palestinian immunity. This approach reflects Israel's broader strategy of maintaining control over Palestinian territories and resources, as evidenced by its use of economic pressure tactics, such as withholding Palestinian clearance funds, to enforce Israeli court judgments.

The case study on Palestine further asserts that the Oslo Accords, signed in the 1990s, were intended as temporary agreements leading to a final status settlement. However, many of their provisions have persisted due to the lack of a final peace agreement. These accords have now created a complex and often contentious legal framework that no longer reflects Palestine’s status as a state. The agreements limit Palestine's authority over its own territory, while Israel continues to selectively breach these accords in ways that serve its interests, including using them as a tool to confiscate Palestinian funds through the clearance system established by the Oslo Accords.

In light of the study's findings and the comprehensive analysis of the legal and political challenges related to state immunity in the Palestinian context, the following

strategic recommendations are proposed to enhance Palestine's legal and political standing and bolster its claims to sovereign immunity at both the international and domestic levels:

The study advocates for the international community to take proactive steps toward establishing clearer guidelines regarding exceptions to state immunity, particularly in cases involving serious human rights violations.

One of the key recommendations is for the State of Palestine to accede to the United Nations Convention on Jurisdictional Immunities of States and Their Property. Joining this convention would bolster Palestine's recognition as a sovereign state within the international community, reinforcing its claim to sovereign statehood with the corresponding legal rights and obligations accorded to UN member states. Additionally, this move would provide Palestine with stronger legal protection for its assets and property abroad, particularly in countries that are signatories to the convention.

Palestine should intensify its diplomatic efforts to garner greater international recognition and support for its statehood, particularly from countries that have not yet recognized it, while also participating more actively in international forums to advocate for Palestinian sovereignty and rights

Seeking an advisory opinion from the International Court of Justice (ICJ) is also suggested as a strategic option for the Palestinian Authority. Although advisory opinions from the ICJ are not legally binding, they carry significant weight in the international legal landscape. Requesting such an opinion could serve to legitimize Palestine's position and

clarify the standing of international law concerning Palestine's ability to claim state immunity.

The study recommends a reassessment of the Oslo Accords, particularly the economic protocol. Palestine should consider either seeking amendments to these provisions or withdrawing from the accords entirely. To mitigate the economic impact, the Palestinian Authority could seek international support to pressure Israel into allowing an independent tax collection mechanism. This mechanism could be managed by a neutral international body that would collect taxes and then transfer them to the Palestinian Authority. Additionally, the Palestinian Authority might explore collaborations with third parties, such as the United Nations, the European Union, or neighboring countries like Jordan and Egypt, to facilitate the collection of taxes and customs duties on goods entering Palestinian territories. This process requires the formation of a team of legal experts and specialists in international affairs to conduct a comprehensive analysis of the legal, political, and economic advantages and disadvantages of each option, ensuring that an informed decision is made to strengthen Palestine's legal and political position on the international stage.

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Appendices

Israeli Supreme Court, 'Judgment in Civil Appeal Case No. 5105/17, 6840/18, 6966/18'

(11 May 2021)

<u>בבית המשפט העליון בשבתו כבית משפט לערעורים אזרחיים</u>

ע"א 5105/17

ע"א 6840/18

ע"א 6966/18

לפני: כבוד השופט י' עמית כבוד השופטת י' וילנר כבוד השופט א' שטיין

המערער בע"א 5105/17: פלוני

המערערת בע"א 6840/18: הרשות הפלסטינית המערערים בע"א 6966/18: פלונים

נ ג ד

המשיבים בע"א 5105/17: הרשות הפלסטינית ו19- פלונים המשיבים בע"א 6840/18: פלונים

המשיבה בע"א 6966/18: הרשות הפלסטינית מתייצב להלך: היועץ המשפטי לממשלה

ערעורים על פסק דינו, פסק דינו החלקי והחלטתו של בית המשפט המחוזי ירושלים בת"א 5074/03 שניתנו ביום 3.5.2017, 5.12.2017 ו- 28.6.2018 על ידי כבוד השופט מ' דרורי

עו"ד ברק קדם, עו"ד אריאל חיומי, עו"ד אריה ארבוס, עו"ד יהודה לוזון

בשם המערערים בע"א 5105/17 והמערערים בע"א :6966/18

בשם המערערת בע"א :6840/18 עו"ד נגה מושקוביץ-בן שבת בשם המתייצב להליך: עו"ד נעמי זמרת

פסק-דין

השופט י' עמית:

1. לבית המשפט המחוזי בירושלים הוגשו חמש תביעות במהלך השנים 2003, 2004, 2005, 2008 ו-2009. חמש התביעות הוגשו כנגד הרשות הפלסטינית)להלן: הרש"פ(על ידי 60 תובעים בטענה כי הם נחטפו, נכלאו ועונו על ידי הרש"פ עקב חשד

כי סייעו למדינת ישראל בסיכול פעולות טרור. חמש התביעות אוחדו והדיון בהן פוצל בין שאלת האחריות לשאלת הנזק.

2. לאחר כ90- ישיבות שבהן נשמעו עדים רבים, כולל התובעים ומומחים מטעם התובעים, ניתנה ביום 24.4.2017 החלטה בשאלת האחריות)כב' השופט מ' דרורי.(ההחלטה אוחזת 6039 פסקאות ומשתרעת על פני כ1800- עמודים, והשורה התחתונה שלה היא כי הרש"פ נמצאה אחראית ביחס ל52- מתוך 60

התובעים מן הטעם שמעצרם על ידי הרש"פ היה שלא כדין. בתמצית שבתמצית, אחריותה של הרש"פ התבססה על כך שמעצרם של התובעים היה בלתי חוקי, מאחר שלרש"פ לא הייתה סמכות לעצור ולשפוט את התובעים בגין "עילה ביטחונית" באשר זו מסורה לסמכות השיפוט של ישראל. כמה מהתובעים היו בעת מעצרם תושבי ישראל, או שנעצרו בשטחה הריבוני של ישראל)מזרח ירושלים(כך שגם בגין טעם זה, נקבע שמעצרם היה בלתי חוקי. על רקע מסקנה זו נקבע כי מעצרם של 52 תובעים היה בגדר "כליאת שווא" על פי פקודת הנזיקין, הן זו שחלה בישראל והן זו המנדטורית שחלה ביהודה ובשומרון)להלן: ההחלטה בשאלת האחריות.(

ביום 5.12.2017 ניתנה החלטה נוספת, במסגרתה פסק בית המשפט המחוזי שכר טרחת המומחים מטעם התובעים, שאותו העמיד על 900,000 .₪

ביום 28.6.2018 ניתן לבקשת התובעים פסק דין חלקי בעילה של כליאת שווא. נפסק שכל אחד מהתובעים זכאי לסכום של 422 ₪ בגין כל יום שבו היה כלוא, וזאת בהתאם לשיעור הפיצוי הקבוע בסעיף)8א(לתקנות סדר הדין הפלילי)פיצויים בשל מעצר או מאסר(, התשמ"ב1982- שעניינו בפיצויים לפי סעיף 80 לחוק העונשין, התשל"ז.1977- סכום זה הוכפל בימי הכליאה של כל אחד מהתובעים, ובהתאם לכך נפסק הפיצוי לכל אחד מהתובעים)בהמשך תוקן פסק הדין החלקי לאור תיקונים שונים הנוגעים למספר ימי המעצר של כמה מהתובעים.(סך הכל נפסק לזכות התובעים בפסק הדין החלקי סכום של כ12- מיליון .₪

בקשה של הרש"פ לעיכוב ביצוע פסק הדין החלקי נענתה במובן זה שנקבע כי סכום הפיצוי שנפסק יופקד ולא יחולק לתובעים עד למתן פסק דין בערעורים דכאן.

3. במאמר מוסגר נספר לקורא כי בעת כתיבת שורות אלה, נמשך בירור תביעתם של התובעים בבית המשפט המחוזי בירושלים באופן פרטני, ועניינם פוצל ל52- תיקים לבחינת ראשי הנזק הנוספים להם הם טוענים בעוולת התקיפה. התובעים תיקנו את כתבי

התביעה ובית המשפט מינה מספר מומחים מטעמו לבחינת הנכות הרפואית הנטענת על ידם. אציין כי בהחלטה בשאלת האחריות, קבע בית המשפט המחוזי כי הוכח, כבר בשלב זה, ב"ראשית ראיה" שאותם תובעים אכן עונו על ידי אנשי הרש"פ ולכן הם זכאים לתבוע את נזקיהם מכוח עילת התקיפה.

4. מכוח פסק הדין החלקי הוגשו שלושת הערעורים המאוחדים שלפנינו כלהלן: (-) ע"א 5105/17 – ערעור של אחד התובעים שתביעתו נדחתה על ידי בית משפט קמא.

(-) ע"א 6840/16 – ערעור הרש"פ כנגד ההחלטה בשאלת האחריות, כנגד פסיקת שכר הטרחה למומחים, וכנגד פסק הדין החלקי)להלן: ערעור הרש"פ או הערעור העיקרי.(

(-) ע"א 6966/18 – ערעור 52 התובעים)להלן: המשיבים או התובעים(על מיעוט הפיצוי שנפסק לזכותם בפסק הדין החלקי לכל יום של כליאת שווא.

שקלנו אם לדחות את הדיון בערעור הרש"פ ובערעורם של 52 המשיבים, עד אשר הדיון בעניינם של 52 המשיבים יסתיים בפסק דין סופי. ברם, בהינתן השנים הרבות שחלפו מאז הגשת התביעות; בהינתן השנים הנוספות שיחלפו מן הסתם עד אשר יינתן פסק דין סופי בכל אחד מ52- התיקים; בהינתן שאם יתקבל ערעור הרש"פ בשאלת האחריות יתייתרו כל ההליכים התלויים ועומדים – בהתחשב בכל אלה מצאנו לדון בשלושת הערעורים לגופם.

נתחיל בערעור העיקרי, הוא ערעור הרש"פ על ההחלטה בשאלת האחריות ועל פסק הדין החלקי. נקדים ונציין כי לנוכח השאלות העקרוניות שהתעוררו בתיק, ביקשנו את עמדת היועץ המשפטי לממשלה ויש להצר על כך שבית המשפט המחוזי לא מצא לנכון לעשות כן לאורך כל שנות ההתדיינות. מכל מקום, עמדת היועץ המשפטי תמכה בקביעות העקרוניות של בית המשפט המחוזי בנושאים הבאים: הרש"פ אינה מדינה או ריבון זר וכפועל יוצא מכך יש לדחות את טענותיה לחסינות, להיעדר שפיטות ול"מעשה מדינה;" סמכות השיפוט נתונה לבית המשפט בישראל; לרש"פ לא הייתה סמכות לעצור ולאסור את המשיבים.

ערעור הרש"פ – הערעור העיקרי)ע"א 6840/18 ההחלטה בשאלת האחריות

5. בית המשפט המחוזי האריך בדיון בשאלת האחריות, ומתוך כך, נקצר אנו בדברים ונביא אך את עיקרי הקביעות שהביאו אותו למסקנה כי יש להכיר באחריותה של הרש"פ לנזקי המשיבים. לצד קביעות אלה, אציג את טענת הרש"פ בערעור ואכריע במחלוקת.

כהערה מקדמית אציין כי ככלל, יש לעורר טענת חוסר סמכות בהזדמנות הראשונה, אם בכתב ההגנה ואם בבקשה לסילוק על הסף. טענותיה המקדמיות של הרש"פ בשאלת הסמכות הועלו בכתבי ההגנה, הועלו במהלך הדיונים, הועלו בבקשה לדחייה על הסף ובסיכומיה, כך שאין לקבל את טענת המשיבים כי הרש"פ זנחה טענות אלה.

אסלק אפוא מעל דרכנו את שלל הטענות המקדמיות שהעלתה הרש"פ.

6. סמכות השיפוט: ככלל, סמכות השיפוט נקנית על דרך המצאת כתב התביעה לנתבע, כאשר באמצעות האקט הפורמאלי של ההמצאה, מחילים על הנתבע את שיפוטו של בית המשפט)ע"א 9/89 Electric General נ' מגדל חברה לביטוח, פ"ד מב(4) 762, 768 .((1989) על המצאת מסמכים למי שנמצא בתחומי הרשות הפלסטינית חל ההסדר שנקבע בהוראות צו שעת חירום)יהודה והשומרון וחבל עזה – שיפוט בעבירות ועזרה משפטית( )שטחי המועצה הפלסטינית – עזרה משפטית בענינים אזרחיים,(התשנ"ט- .1999 צו זה נועד להקל על המצאת כתבי בי-דין, ומכוח צו זה אין צורך לקבל היתר המצאה על פי תקנה 500 לתקנות סדר הדין האזרחי, התשמ"ד1984-)וראו, לדוגמה, רע"א 9048/07 הרשות הפלסטינית נ' גולדמן ;(2.5.2010) רע"א 661/17 אלמשרק חברה לביטוח בע"מ נ' אלסנדוק)הקרן(אלפלסטיני לפיצוי נפגעי תאונות דרכים .((16.2.2017) כך נעשה במקרה דנן, ומכאן שבית המשפט בישראל קנה סמכות בין-לאומית לדון בתביעה. דומה כי גם הרש"פ אינה חולקת על כך והדיון התמקד בטענות המהותיות הנוגעות לסמכות.

7. לטענת הרש"פ, לנוכח מקום ביצוע העוולות הנטענות, ועל פי מירב הזיקות, בתי המשפט בישראל אינם הפורום הנאות לדון בתביעה. כן נטען כי יש להחיל על התביעות את הדין הירדני, וכי לרש"פ חסינות מפני שיפוט. אתייחס בקצרה לטענות אלה.

8. פורום לא נאות: בית משפט קמא קבע כי הפורום הנאות הוא מדינת ישראל, בהתאם למבחנים השונים הנוהגים בסוגיה זו, וכי "אין כלל מקום להשוות בין הפורום הישראלי לבין ה'אופציה' של ניהול התביעות נגד הרש"פ בבתי המשפט המקומיים הפלסטיניים ביהודה ושומרון")פסקה .(410

איני רואה להכביר מילים בנושא זה שנסקר באריכות על ידי בית משפט קמא, ואין לנו אלא לאמץ את קביעותיו ומסקנותיו בנושא זה. ככלל, בבואו לבחון את נאותות הפורום, על בית המשפט לקחת בחשבון את "מכלול הנסיבות, הציפיות והאינטרסים הרלוונטיים לעניין" לרבות האפשרות המעשית והחוקית של ניהול התביעה בפורום הזר)בג"ץ 8754/00 רון נ' בית הדין הגדול, פ"ד נו(2) 625, 655 ((2002)) והנטל הוא על הטוען טענת פורום לא נאות)ראו, לדוגמה, ע"א 45/90 עבאדה נ' עבאדה, פ"ד מח(2) 77, 82 .((1994)) מקום שבו מדובר בתובעים שלטענתם נכלאו ועונו בשל שיתוף פעולה וסיוע לישראל, הרי שהזיקה העניינית היא לישראל. מקום שבו מדובר בתובעים שעל חלקם נגזר גזר דין מוות על ידי הרש"פ, שעדיין תלוי ועומד, תובעים אשר שוחררו מכלאם על ידי צה"ל במבצע חומת מגן – הרי שבהיבט המעשי והחוקי קשה להלום כי היה מתאפשר להם לקבל את יומם בבתי המשפט בשטחי הרש"פ, שלא להזכיר כי חלק מהתובעים הם כיום אזרחי ותושבי ישראל שחל עליהם איסור כניסה לשטחי A.

9. ברירת הדין: בנושא ברירת הדין יפים לענייננו הדברים שנאמרו ברע"א 4060/03 הרשות הפלסטינית נ' דיין, פ"ד סב(3) 1 פס' 8 :(2007)

"התשובה לשאלת ברירת-הדין, ככל שהיא מותנית במקום ביצוע העוולה, אינה מובנת מאליה. בה-בעת, אף במקרים שבהם מקום ביצוע העוולה אינו ישראל, יש לבחון אם הנסיבות המיוחדות שבהן עסקינן אינן מחייבות החלה של החריג לכלל. כך, למשל, לא ניתן להתעלם בהקשר זה מן העובדה שבתביעות השונות מועלות בין היתר טענות בדבר עידוד ותמיכה של הרשות הפלסטינית במעשי איבה שכוונו כלפי אזרחים ותושבים ישראליים. נראה כי קיים קושי מובנה בבירור התביעות הללו לפי הדין הזר החל

ברשות הפלסטינית)דין שכלל לא הוכח עד כה.(ניתן לסבור כי הדין הישראלי הוא הדין בעל העניין האמיתי בהסדרת הנושא، וכי קיים קושי להכפיף בכגון דא את עילת התביעה לדין הזר."

וכך גם בע"א 1432/03 ינון יצור ושיווק מוצרי מזון בע"מ נ' קרעאן، פ"ד נט(1) 345، 357-358 (2004):

"אכן، ייתכן כי בסופה של בחינת הכללים של ברירת הדין יגיע בית-המשפט למסקנה כי על עוולה שבוצעה בגדה המערבית חל הדין הישראלי [...] אשר-על-כן יש לדחות את טענת המערערת כי כללי המשפט הבינלאומי הפומבי אינם מאפשרים כלל להכפיף מעשה עוולה שבוצע בגדה המערבית، ואשר התביעה בגינו נידונה בפני בית-משפט ישראלי، לכללי ברירת הדין המקובלים אצלנו."...

אין אפוא מניעה להחיל במקרה דנן את הדין הישראלי.

10. חסינות הרש"פ، אי שפיטות، "מעשה מדינה:" עמדתה של מדינת ישראל، כפי שהובעה על ידי היועץ המשפטי לממשלה، היא שהרש"פ אינה עונה על הקריטריונים המבססים קיומה של מדינה לפי המשפט הבין-לאומי. ההכרעה בשאלת חסינות הרש"פ נעשית בכל מקרה ומקרה בהתאם לעמדתה של ממשלת ישראל המובאת לפני בית המשפט באמצעות תעודת שר חוץ، ותעודה עדכנית הוגשה במצורף לעמדתו של היועץ המשפטי לממשלה.

יפים לענייננו הדברים שנאמרו בע"א 2144/13 עזבון המנוח עמית עמוס מנטין ז"ל נ' הרשות הפלסטינית (6.12.2017):

"אשר לשאלה האם נהנית הרש"פ ממעמד של מדינה לעניין החסינות, קבע בית משפט זה, גם על סמך עמדתו של היועץ המשפטי לממשלה, כי התשובה תינתן בכל מקרה ומקרה על-פי נסיבותיו, בהתאם לתעודת שר חוץ שתוגש, וזאת מתוך תפיסה כי מדובר בשאלה עובדתית העומדת לפתחה של הרשות המבצעת. זו שוקלת שיקולי מדיניות, בטחון, כלכלה ועוד [...] עמדה זו נסמכת בין היתר על הקריטריונים שנקבעו במשפט הבינלאומי להגדרת "מדינה" – חדשים גם ישנים – ובעיקרו של דבר זו כאמור שאלה מדינית.

[...] דרך המלך אפוא היא כי תעודת שר החוץ המוגשת לבית המשפט תבטא את עמדת מדינת ישראל ביחס למעמד המדיני של הרש"פ בקשר לעניין הנדון.

[...] מדובר בהחלטה מדינית מובהקת. נושאים אלה מצויים בסמכותה של הרשות המבצעת ובית המשפט לא ידרש אליהם – על דרך העיקרון – כל עוד עושה הרשות המבצעת בתחומי סמכותה, והחלטתה אינה נגועה בפגם

משפטי של ממש [...] ברי אפוא כי לא עומדת לה, לרש"פ, חסינות מפני שיפוט בתובענה דנן")שם, בפסקאות 51-53 לפסק דינו של השופט סולברג, ההדגשה במקור.(

והנשיאה נאור הוסיפה ואמרה)שם, פסקה :(3

"ההכרעה בשאלה אם קמה זכאות לחסינות המוקנית ל'מדינה זרה' נעשית בכל מקרה לגופו, בהתאם לתעודת שר חוץ [...] למען השלמת התמונה אוסיף, כי לפי סעיף 20 לחוק חסינות מדינות זרות, התשס"ט-2008 רשאי שר החוץ, בהתייעצות עם היועץ המשפטי לממשלה ובאישור הממשלה וועדת

החוקה, חוק ומשפט, לקבוע בצו כי לישות מדינית עומדת חסינות ריבון, וזאת גם אם מעמדה המשפטי הבין-לאומי אינו עולה כדי מעמדה של מדינה. לפי דברי ההסבר להצעת חוק חסינות מדינות זרות, התשס"ח-2008 ה"ח 357, הוראה זו מבוססת על פרקטיקה של בתי משפט מדינתיים אחרים, אשר החילו את חסינות הריבון גם על ישויות זרות שמעמדן אינו כשל מדינה ריבונית. עם זאת, כפי שצוין בדברי ההסבר, כבמדינות אחרות החליט המחוקק הישראלי 'להשאיר את העניין בתחום המדיני')שם, בעמוד 344(, בהתאם לצו של שר החוץ. לפי האמור בעמדה שהוגשה מטעם היועץ המשפטי לממשלה בהליך שלפנינו, לא ניתן צו מתאים בעניין הרשות הפלסטינית. משכך, גם בהיבט זה היא אינה זכאית לחסינות במקרה דנן."

בהעדר צו לפי סעיף 20 לחוק חסינות מדינות זרות, התשס"ו-2008 רשאי בית המשפט לדון בתביעות נגד הרש"פ. למעלה מן הצורך נציין כי עמדתו של היועץ המשפטי לממשלה ביחס למעמדה של הרשות הפלסטינית מבוססת על המשפט הבין-לאומי המינהגי שלפיו, על מנת שישות תהווה מדינה עליה לעמוד בארבעת התנאים המצטברים הבאים: אוכלוסייה קבועה, שטח מוגדר, ממשל אפקטיבי ויכולת לקיים יחסי חוץ עם מדינות אחרות)רובי סיבל ויעל רונן משפט בינלאומי 76-77)מהדורה שלישית, 2016((. לרש"פ אין שליטה אפקטיבית בשטח, והשליטה על המרחב האווירי כמו גם האחריות הכוללת על הביטחון נותרו בידי מדינת ישראל. לכך יש להוסיף סמכויות נוספות שאינן נתונות בידי הרש"פ כמו תחום התקשורת והשימוש בספקטרום האלקטרומגנטי, היבטים מוניטריים הקשורים, בין היתר, לגביית מיסים, סמכות פרסונלית בלבד בשטח, ועוד. ובכלל, כפי שנראה להלן, על פי הסכמי הביניים, לרש"פ מוקנות הסמכויות שהועברו לה במפורש, כאשר הסמכות השיורית נותרה בידי מדינת ישראל)וראו רות לפידות "לסוגיית הסמכויות השיוריות באוטונומיה" מחקרי משפט יד 383, 389-390)התשנ"ח((.

מכאן שגם הטענה להעדר שפיטות או לחסינות או ל"מעשה מדינה," דינה

להידחות.

וכעת, לאחר שסילקנו מעלינו טענות של סף, אבוא לעיצומם של דברים, ולדרך הילוכו של בית משפט קמא בהחלטה בשאלת האחריות.

11. סמכויות הרש"פ: בית משפט קמא בחן באריכות את הוראות הסכם הביניים הישראלי-פלסטיני בדבר הגדה המערבית ורצועת עזה)להלן: הסכם הביניים(שנחתם במסגרת שורת ההסכמים הידועים כהסכמי אוסלו. נקבע כי יש לסווג את הסכם הביניים בין ישראל לבין אש"ף כ"אמנה בינלאומית," שנקלטה במשפט הישראלי הפנימי במספר דברי חקיקה של הכנסת)חוק יישום ההסכם בדבר רצועת עזה ואזור יריחו)הסדרים כלכליים והוראות שונות( )תיקוני חקיקה,(התשנ"ה-1994; חוק יישום הסכם הביניים בדבר הגדה המערבית ורצועת עזה)סמכויות שיפוט והוראות אחרות( )תיקוני חקיקה,(התשנ"ו-1996; חוק יישום הסכם הביניים בדבר הגדה המערבית ורצועת עזה)הגבלת פעילות,(התשנ"ה-1994; חוק לתיקון ולהארכת תוקפן של תקנות שעת חירום)יהודה ושומרון – שיפוט בעבירות ועזרה משפטית,(התשס"ז-2007).

הסכם הביניים יושם גם במשפט הפנימי באזור יהודה ושומרון, על ידי מפקד האזור שהוציא צו מיוחד ליישום ההסכם: מנשר בדבר יישום הסכם הביניים)יהודה והשומרון( )מס' 7(התשנ"ו-1995)להלן: המנשר.(סעיף)6א(4)(למנשר קובע כי המפקד הצבאי יוסיף להחזיק בכוחות ובאחריות ב"כל ענין הנוגע לביטחון החוץ של האזור, לביטחון ולסדר הציבורי של הישובים, האתרים הצבאיים וישראלים" וסעיף)6ב(למנשר מורה כי "קביעת מפקד כוחות צה"ל באיזור כי כוחות ותחומי אחריות מוסיפים להיות בידו תהיה מכרעת לעניין זה." על חשיבות המנשר אנו למדים מהדברים הבאים:

"המנשר מיישם את הסכם הביניים ביהודה והשומרון. הוא מיישם אותו כשם שחוק יישום הסכם הביניים בדבר הגדה המערבית ורצועת עזה)סמכויות שיפוט והוראות אחרות( )תיקוני חקיקה(מיישם את ההסכם בישראל. אך המנשר הוא הדין. הוא הקובע מי בעל הסמכות ומהי הסמכות לעניין מסוים בשטח זה או אחר. הוא ולא הסכם הביניים. הסכם הביניים הוא מקור היסטורי של המנשר, אך אין הוא מקור התוקף של המנשר. לכן, גם אם קיים הבדל בין ההוראות של המנשר לבין ההוראות של הסכם הביניים, ואף אם קיימת סתירה ביניהן, ההוראות של המנשר גוברות. ההוראות של הסכם הביניים הן חלק מן הדין החל ביהודה והשומרון רק אם אומצו, ובמידה שאומצו, על-

ידי המנשר")בג"ץ 2727/96 וופא נ' שר הביטחון, פ"ד

נ(2) ,848 853 (1996))הדגשה הוספה – י"ע.((

הסכם הביניים כולל הסדרים בנושאים שונים ועולה ממנו כי הסמכויות השיוריות נותרו בידי ישראל, ובכל הקשור לביטחון חוץ ולביטחון ישראלים נקבע כי ישראל "תחזיק בכל הסמכויות כדי לנקוט צעדים הנחוצים לשם מילוי אחריות זו", כך שישראל רשאית לנקוט בצעדים בכל מקום)יואל זינגר "הסכם-הביניים הישראלי- פלשתינאי בדבר הסדרי ממשל עצמי בגדה המערבית וברצועת-עזה – כמה היבטים משפטיים" משפטים כז ,605 ,610 622)התשנ"ז( )להלן: זינגר.((בתמצית ניתן לומר כי מדינת ישראל, באמצעות מפקד האזור, ממשיכה להיות הריבון למעשה ובעל הסמכויות והאחריות ביהודה ושומרון, למעט אותן סמכויות ותחומי אחריות שהועברו במפורש לידי הרשות הפלסטינית. על פי הסכם הביניים, אין לרש"פ סמכויות שיפוט על אזרחים ותושבים ישראלים, וכך גם לפי סעיף)6א(למנשר הקובע כי המפקד הצבאי יוסיף להיות בעל כוחות ותחומי אחריות בין היתר על "ישראלים" ועל איזור .C בית המשפט הגיע למסקנה כי הסכם הביניים העניק לרש"פ סמכויות שיפוט ומעצר אך ורק בנוגע

לעבירות פליליות "רגילות," בהתאם לאזורי השליטה בתחומה)איזורי A+B, כאשר באיזור B לרשות יש סמכות משותפת ומקבילה לאחריות הביטחונית שהוקנתה לישראל.(זאת, להבדיל מ"מעצר ביטחוני" שאיננו בסמכותה של הרש"פ, אלא בסמכותה הייחודית של מדינת ישראל. נקבע כי מלשון הסכם הביניים, ועל פי דיניה הפנימיים של מדינת ישראל, סמכויות הביטחון נותרו בידי מדינת ישראל והנטל על הרש"פ לשכנע כי על פי הסכם הביניים היא הייתה מוסמכת לעצור את מי מהתובעים. בשורה התחתונה נקבע כי:

"בהתאם להגדרה זו, ככל שהמעשה העיקרי המיוחס למבצע, מערב בתוכו אלמנט לאומני ביטחוני – הרי שמדובר בעבירה ביטחונית. גם מעשים המתבצעים לשם סיכול פעולות של גורמי טרור הינם: 'עבירות ביטחוניות,' מפני שגם מי שפועל כדי לפגוע, וגם מי שפועל כדי למנוע פגיעה בביטחון האזור, משמעות מעשיו היא ביטחונית מובהקת")פסקה 335 לפסק הדין.(

"כל מעשה תקיפה או מעצר שעשתה הרשות כנגד מי מבין 'תושביה,' אשר שיתף פעולה עם מדינת ישראל, נעשה שלא בסמכות ושלא על פי דין.

מעשים אלו, אף הם נכנסים בגדרם של עבירות ביטחוניות, שסמכות השיפוט בגינם מסורה למדינת ישראל; ובכל מקרה, אין לרש"פ סמכות לדון את אותם אנשים, ואף לא לעצור אותם. מעצרם על ידי הרש"פ – הינו כליאת שווא. כלומר: התובענות שבפניי הוגשו בגין מעצרים שבחוסר סמכות")שם, פסקה .(373

מכאן קצרה הדרך למסקנתו של בית משפט קמא כי סמכות השיפוט בתובענה אזרחית בגין מעצר ביטחוני, שיש לה השפעה ביטחונית, דינה להתברר בבתי המשפט בישראל)שם, פסקה ,(375 להבדיל ממעצר

פלילי שבוצע בסמכות, שאז גם אם פעלה הרש"פ שלא כדין מחמת יחס בלתי הולם או עינויים, הרי שסמכות השיפוט לגביה נתונה לבתי המשפט ברש"פ.

12. בערעור שלפנינו טענה הרש"פ כי לה הסמכות לעצור את התובעים המחזיקים בתעודות זהות פלסטיניות, לפי החוק הפלסטיני שחל על תובעים אלו, שהם הרוב מבין התובעים. דרך הילוכה של הרשות היא כלהלן: המעשים המיוחסים לה הינם מעשי מדינה מובהקים והכלל הוא שמדינה לא תשפוט בערכאותיה הפנימיות מעשה מדינה של ישות ריבונית אחרת. התובעים הם צד שלישי להסכם הביניים והם אינם יכולים להישען על הוראותיו על מנת להקים עילת תביעה כנגד הרש"פ. החוקים שנחקקו בעקבות הסכמי אוסלו אינם מאמצים או מחילים במשפט הישראלי הפנימי חובות וסמכויות שיפוט הנוגעות לרש"פ ועניינם אך ורק בסמכויות שיפוט של בתי המשפט בישראל בלבד. כך גם לגבי הוראות המנשר שעניינו בסמכויות שנותרו בידי מפקד האזור. מבחינת הרש"פ, מקור הסמכות הוא הסכם הביניים שהקנה לרש"פ סמכויות חקיקה, ביצוע ושיפוט, הן פליליות הן אזרחיות, מבלי שאלה סויגו או הוגבלו בקשר לעניינים ביטחוניים. נטען כי מתן ממשל עצמי לרש"פ מחייב מתן סמכות אף בעניינים ביטחוניים, וכל פרשנות השוללת סמכות זו מרוקנת מתוכן את יכולתה של הרש"פ להגן על עצמה. למשטרה הפלסטינית – הכוללת גם את הביטחון המסכל והמודיעין – ניתן מעמד בנספח להסכם הביניים, כך שלמשטרת הרש"פ הסמכות לפעול בקשר למעשי המשיבים כמשתפי פעולה עם ישראל.

הרש"פ מסכימה כי הסכם הביניים מקנה למדינת ישראל אחריות לגבי כל הקשור לביטחון ישראלים ואיומי טרור, אך לשיטתה, מעשיהם של התובעים לא יצרו סיכון ביטחוני לישראלים ואיום טרור. את התובעים שהיו תושבי הרשות יש לראות כמי שביצעו מעשה בגידה וריגול, כמשמעו בחוק הפלילי הירדני, כנגד הרש"פ והעם הפלסטיני. הרש"פ נכנסת לנעליה של הממלכה הירדנית, ואת מדינת ישראל ניתן לראות כמדינה זרה, וכ"אויב" לצורך סעיף הבגידה. לגבי התובעים שהחזיקו בעת מעצרם בתעודות זהות

ישראליות, נטען כי גם בהנחה שיש לראותם כתושבים של מדינת ישראל, הרי שלא ניתן למנוע בעד הרש"פ מלעצור אותם, כמי שפגעו באינטרסים החיוניים שלה וגרמו נזק לאזרחיה ולמוסדותיה. לגישה זו, ריגול לטובת ישראל כנגד הרש"פ פוגע בסדר

הציבורי ועל כן הוא נתון לסמכות הרש"פ, אינו מהווה סיכון לישראלים ולכן אינו בסמכות ביטחונית ישראלית, וממילא אינו בסמכות שיפוט ישראלית. אשר למי שהיו תושבים או אזרחים ישראליים, הרי שהחובה שלא לעצור ישראלים חלה רק במישור המשפט הבין-לאומי, אך ההסכם אינו בגדר דין פנימי של המערערת.

13. איני רואה לקבל טענות אלה של הרש"פ.

אקדים ואומר כי בכל הנוגע למשיבים שהיו ישראלים בעת מעצרם או שנעצרו בשטח בריבונות ישראל)כמו מזרח ירושלים(או שנעצרו בשטח C, ברי כי אין לרש"פ סמכות כליאה ומעצר לגביהם)וראו הוראת סעיף 6)א(למנשר.(לכן, התמקד הדיון באותם משיבים אשר בעת מעצרם וכליאתם היו תושבי הרש"פ בשטח A או B.

במאמר מוסגר אציין כי הרש"פ חלקה על קביעות בית המשפט לגבי היותם של תובעים מסוימים תושבי ארעי או תושבים או אזרחי ישראל)כך, לגבי תובעים מס' 13 -14 בת"א 5074/03 שעניינם נדון בפרקים מ"ח-מ"ט לפסק הדין; תובעים 2-5 ו7- בת"א 7123/05 שעניינם נדון בפרקים נ"ו-נ"ט ו-ס"א לפסק הדין(אך המדובר בקביעות שבעובדה, שאיני רואה מקום להתערב בהן, באשר אין דרכה של ערכאת ערעור להתערב בממצאי עובדה ומהימנות.

14. קשה להלום כי החוק הפלילי הירדני הנוגע ל"בגידה" יופנה כנגד מדינת ישראל כמדינת אויב, כאשר המפקד הצבאי הוא הריבון שנכנס בנעלי הממלכה הירדנית, ולא הרש"פ)ואיני נדרש לשאלות הנוגעות למעמדה של ירדן בשטחי איו"ש.(יתירה מכך, עבירת הבגידה לפי הדין הירדני מתקיימת רק כאשר מדובר בבגידה במדינה, וכפי שכבר צוין, הרש"פ איננה בגדר "מדינה." מכל מקום, צווי המפקד הצבאי כריבון גוברים על החקיקה הירדנית ועל פי צווים אלה, ברי כי מדינת ישראל אינה בגדר אויב. נהפוך הוא, אויב הוא מי שמבצע עבירה המופנית כנגד מדינת ישראל, שמטרתה לפגוע בביטחון הציבור, בכוחות צה"ל או בסדר הציבורי בישראל או באזור. הכרה בכך ששיתוף פעולה עם המפקד הצבאי מאפשר לרש"פ לפעול בדרך של כליאה והעמדה לדין, משמעה כי הלכה למעשה אין למפקד הצבאי סמכות ביטחונית בשטח, וזאת בניגוד להסכמי הביניים. הטענה לפיה דין האזור מעניק לרש"פ סמכות לכלוא ולענות את המשיבים בשל שיתוף פעולה וסיוע ל"אויב הציוני," אינה מתיישבת עם תכליתם ולשונם של הסכמי הביניים, ולתכלית שעומדת בבסיסת התחייבותה של הרש"פ לעצור ולהעמיד לדין אנשים החשודים בביצוע מעשי אלימות וטרור)זינגר, בעמ' .(626

בהקשר זה, לא למותר להזכיר את סעיף XVI 2 להוראות הסכם הביניים הקובע כי "פלסטינים אשר קיימו מגע עם הרשויות הישראליות לא יהיו נתונים לפעולות של הטרדה, אלימות, נקמה או העמדה לדין. אמצעים מתמשכים נאותים יינקטו, בתיאום עם ישראל, על מנת להבטיח את הגנתם." סעיף זה נמצא בפרק שכותרתו "אמצעים בוני אמון" שנוסחו: "מתוך כוונה ליצור אווירה ציבורית חיובית ותומכת שתלווה את יישומו של הסכם זה, ובסיס יציב לאימון הדדי ולתום לב, ועל מנת להקל על שיתוף הפעולה הצפוי ואת היחסים החדשים בין שני העמים, מסכימים שני הצדדים להסכם לנקוט באמצעים בוני אימון כמפורט להלן :"[...] האמצעים המדוברים הם שחרור אסירים ועצורים פלסטינים; אי העמדה לדין או הטרדה של פלסטינים משתפי פעולה עם ישראל)כמצוטט לעיל;(ואי העמדה לדין בגין עבירות שביצעו פלסטינים מחוץ לישראל שכניסתם אושרה לגדה ולרצועת עזה בעקבות ההסכם, כמפורט שם. אכן, דומה

כי יש ממש בטענת הרש"פ כי סעיף זה מתייחס למשת"פים ולסייענים שפעלו לפני חתימת הסכם הביניים, על מנת לפתוח דף חלק עם חתימת ההסכם, אך תכליתו ורוחו של סעיף זה תומכים במסקנה שאליה הגיע בית משפט קמא, מה עוד שבהסכם הביניים נקבע כי הרש"פ וישראל ישתפו פעולה במישור הביטחוני על מנת להילחם בטרור.

אכן, גם לרש"פ אינטרסים ביטחוניים לגיטימיים, אך האינטרס הביטחוני הישראלי שאותו מייצג המפקד הצבאי הוא האינטרס שידו על העליונה לנוכח האמור במנשר, וכאמור, המנשר הוא הדין הקובע בשטחים, ולא הסכמי הביניים. הרש"פ טענה כי סמכות המפקד הצבאי היא כנגד תושבי הרש"פ שפגעו בביטחון ישראל, בעוד שמעשיהם של המשיבים לא פגעו בישראל ועל כן הסמכות לעצור ולכלוא אותם נתונה לרש"פ. אכן, המשיבים עצמם לא פעלו נגד ביטחון ישראל: נהפוך הוא, הם שירתו את ביטחון ישראל. דווקא בשל כך, פגיעה במשיבים על ידי מעצרם וכליאתם היא פגיעה באינטרס הביטחוני של ישראל, מה שאין הרש"פ רשאית לעשות על פי הסכמי הביניים והמנשר שהותירו את האחריות הביטחונית בידי ישראל.

מטבע הדברים, ניסיונות הרש"פ לאתר סייענים ומשתפי פעולה עם מדינת ישראל, עומדים בניגוד לאינטרסים הביטחוניים של המדינה. לא בכדי שמרה ישראל לעצמה בהסכמי הביניים ובמנשר את האחריות בתחום הביטחוני. אחריות זו יש לפרש במובן הרחב, לרבות בתחום המודיעיני, שכולל גם "יומינט," קרי, הפעלה של סוכנים, סייענים ומשתפי פעולה. לרש"פ אין סמכות לבצע פעולות שפוגעות בביטחון המדינה, ובכלל זה פעולות החקירה והמעצר שננקטו על ידה על מנת לאתר סייענים ומשתפי פעולה עם המדינה. כפי שציין היועץ המשפטי לממשלה, זו עמדתו של המפקד הצבאי בהתבסס על עמדת השב"כ; ולנוכח הוראות סעיף)6ב(למנשר, "קביעת מפקד כוחות

צה"ל באזור כי כוחות ותחומי אחריות מוסיפים להיות בידו, תהיה מכרעת לעניין זה")סעיף 36 לעמדת היועץ המשפטי לממשלה.(מכאן המסקנה שעל פי הדין החל באזור אין לרש"פ סמכות לעצור ולחקור מי שחשוד בשיתוף פעולה עם ישראל.

15. ומזווית נוספת: על דרך ההיקש, כפי שהחריג של תקנת הציבור מאפשר לבית המשפט בישראל לפסול תחולתו של דין זר בהקשרים שונים)ראו, לדוגמה, סעיף 3(3) לחוק אכיפת פסקי-חוץ, התשי"ח-(1958, כך יהא זה צורם שבית משפט בישראל יכיר בלגיטימיות של הליכי מעצר, מאסר ועינויים שבוצעו כלפי מי שסייע לישראל לסכל פעילות טרור המופנית כנגדה. בהיבט של תקנת הציבור, קשה להלום כי בית משפט בישראל יכיר בטענת הגנה לפיה שיתוף פעולה עם ישראל הוא מעשה בגידה לטובת האויב הישראלי, ויש להילחם בו. מה עוד שאותם מעשי "בגידה" נועדו למנוע פעולות טרור נגד ישראל ונגד ישראלים, שהרש"פ בהסכם הביניים התחייבה למנוע.

ברי כי הנרטיב הפלסטיני שונה מהנרטיב הישראלי. מחבלים שביצעו פעולות טרור שנתפסות בישראל כמזעזעות במיוחד, זוכים לעיתים לפעולות הנצחה וזוכים באופן שוטף לתמיכה כספית בהם ובמשפחותיהם, בעוד שפעולות שביצעה ישראל נתפסות על ידי הפלסטינים כמעשי טרור. אלא שבית משפט בישראל אינו אמור להדהד נרטיב פלסטיני שכל כולו מנוגד לתקנת הציבור בישראל, ולעניין זה אין נפקא מינה אם אותו נרטיב משמש כטענת הגנה או כטענת התקפה, אם כצינה או כחנית.

16. תמיכה לגישה זו אנו מוצאים בפסק הדין הקצר שניתן בבג"ץ 3418/05 נודל נ' ראש ממשלת ישראל (26.5.2005), שם התבקש בית המשפט להורות לראש הממשלה לנקוט בכל האמצעים העומדים לרשותו כדי למנוע הוצאתם להורג של מי שהוגדרו על ידי הפלסטינים כמשתפי פעולה עם ישראל, ואשר בית דין צבאי ברשות הפלסטינית דן אותם למוות. וכך נכתב על ידי השופט)כתוארו אז(א' רובינשטיין:

"מתגובת המדינה עולה כי בראשית חודש מארס ,2005 נעשו פניות שונות בהקשר זה מטעם שרת המשפטים ומטעם היועץ המיוחד לראש הממשלה לגורמים בכירים ברשות הפלסטינית. בפניות אלו הובהר כי מדינת ישראל לא תשלים עם הוצאות להורג על רקע של שיתוף פעולה עם ישראל, וזאת בלא קשר לשאלה אם הנידונים למוות אכן שיתפו פעולה עם ישראל. כן הובהר כי תהליך שחרור האסירים נסמך על כך שלא ייעשו הוצאות להורג על רקע שיתוף פעולה עם ישראל. עמדת ישראל הובהרה לרשות הפלסטינית פעם נוספת בישיבתה האחרונה של הוועדה המשותפת לשחרור אסירים שהתקיימה ב 8.5.05. כעולה

מתשובת המדינה השיבו נציגי הרשות הפלסטינית, כי יושב ראש הרשות הפלסטינית ביקש מהם להודיע, שאין בכוונת הרשות לממש את פסקי הדין בדבר הוצאתם להורג של משתפי פעולה עם ישראל. פניה נוספת נעשתה לרשות הפלסטינית מטעם שגריר ארצות הברית בישראל, ומבדיקת המשיב עמו עולה כי אף היא נענתה, שאין בכוונת הפלסטינים לממש את פסקי הדין.

ג. נוכח המתואר, נראה כי ננקטו מספר צעדים שמטרתם למנוע את הוצאתם להורג של משתפי פעולה עם ישראל, ובעקבותיהם הודיעו נציגי הרשות הפלסטינית כי אין בכוונת הרשות לממש את פסקי הדין.

ד. גם אם החשש קיים, ואף אם – מבלי לקבוע מסמרות – דומה כי נסיון העבר אינו מרגיע, נראה כי הדרך הראויה לטיפול היא ברוח מה שנקטו נציגי המשיב, קרי, פעולה מתמדת מסוגים שונים כלפי הרשות הפלסטינית כדי להבטיח ככל הניתן את מניעתן של ההוצאות להורג. חזקה על המשיב כי לא ירפה מכך."

17. בית משפט קמא עמד על כך שהעד מטעם הרש"פ התחמק בחקירתו שוב ושוב מהשאלה כיצד ואם המודיעין הכללי מטפל במידע שלפיו פלוני הוא סוכן או משתף פעולה עם השב"כ. הדברים צוטטו

באריכות בפסק דינו של בית משפט קמא)פסקה (365 ונוכח התחמקויותיו של העד، הגיע בית המשפט למסקנה כי "הרשות מודעת להעדר הסמכויות שלה בתחום זה، על אף שלמעשה היא נוהגת ליטול אותן، בכוח הזרוע")פסקה

366).

ודוק: רשאית הרש"פ להגן על ביטחונה-שלה ולפעול כנגד מרגלים וסייענים، כל עוד אין בכך כדי לפגוע באינטרסים הביטחוניים של המדינה، שהותירה כאמור את האחריות הביטחונית בידיה. כך، לדוגמה، רשאית הרש"פ לפעול כנגד מי שנחשד בריגול לטובת מדינה או ארגון אחר، כמו החמאס، דעאש، איראן וכיו"ב، ככל שאין בכך כדי לפגוע באינטרס הביטחוני של ישראל אשר מעוגן בהסכם מתאים בין שתי הישויות. אף ייתכן כי התוצאה תהא שונה בתקופות ובמצבים שבהם מתקיים שיתוף פעולה בטחוני הדוק בין הרש"פ לבין ישראל. המדובר בנושא רגיש، ומכאן החשיבות של קבלת עמדת המפקד הצבאי באזור ככל שדברים דומים יתרחשו גם בעתיד. לנוכח רגישות העניין، ומאחר שנטען על ידי הרש"פ כי הגיעו דברים כדי כך שכל מי שנעצר על ידי הרשות בחשד לשת"פ עם ישראל מגיש תביעה לאחר שחרורו، דומה כי לגבי כל תביעה، ראוי לקבל עמדת היועץ המשפטי לממשלה ועמדת המפקד הצבאי באזור، שהיא לכאורה העמדה המכרעת.

18. בית משפט קמא בחן באריכות ובאופן פרטני את עניינו של כל אחד מהמשיבים، ומצא כי במרבית המקרים، המדובר במי שסייע להפסקת פעילותם של גורמי טרור، בדרך של העברת מידע לגורמי הביטחון הישראלים، או באמצעות פעולות אקטיביות כאלו ואחרות، בהדרכה של גורמים ישראלים.

הרש"פ טענה כי בין המשיבים יש כאלה שלא פעלו לסיכול ולמניעת מעשי טרור נגד ישראל. ברם، כפי שציין בית משפט קמא، הנטל הוא על הרש"פ להוכיח מה הייתה עילת המעצר. והנה، מתברר כי לא עלה

בידי הרש"פ להמציא צווי מעצר, בקשה להארכת מעצר, תיעוד או רישום כלשהו של החקירות, מזכר או מכתב או תרשומת של קצין משטרה, פרוטוקולים של בית משפט, תיעוד רפואי – ובקיצור, לא הוצג תיעוד של ממש כפי שניתן היה לצפות אילו היה מדובר בהליך תקין אשר התקיים באצטלה של דין. הרש"פ טענה כי בתי המשפט ובתי הכלא נהרסו בהפגזות ובהפצצות שביצעה ישראל במהלך מבצע חומת מגן, ולכן הארכיונים אבדו, כפי שעולה מעדויות עדים מטעמה. אך כפי שנקבע על ידי בית משפט קמא, לא הובאה בפניו כל ראיה קונקרטית לכך שהושמדו ארכיונים במהלך מבצע חומת מגן. בית משפט קמא עמד על כך שלא ייתכן שלא נמצא אפילו פרוטוקול דיון אחד ברשותו של עורך דין אחד שייצג מי מ60- התובעים שתביעותיהם נדונו, וכי חלק מהמסמכים היו אמורים להימצא במקומות שונים כמו מנגנון הביטחון המסכל, בתי המעצר, בתי המשפט ובתי החולים. לא הובא לעדות ולו עורך דין אחד שייצג בשעתו מי מהתובעים)ולא נעלמה מעיני טענת הרש"פ כי ב"כ התובעים הוא שנמנע מלזמן מי מעורכי הדין,(אף לא אדם אחד שחתם על כתב אישום של מי מתוך 60 התובעים. המסקנה היא פשוטה – מרבית התובעים נעצרו ונכלאו למשך ימים, חודשים ושנים, ללא כל אסמכתא חוקית, מבלי שהובאו כלל לבתי משפט ומבלי שהוצאו לגביהם צווי מעצר. ובקיצור, ניתן היה לצפות לאלפי מסמכים אך בפועל – מעט תיעוד שמוכיח כי התקיימה פרוצדורה של מעצר כדין. הוצגו מסמכים בודדים)פסקאות 586 ו590- לפסק הדין,(כגון צו מעצר בעילה של שיתוף פעולה עם ישראל לגבי תובע אחד, או חיקוק ספציפי שבו הואשם אחד התובעים שלא כחלק מצו מעצר)פסקה 593 לפסק הדין,(וראו התייחסות למסמכים נוספים שהוצגו בפסקאות ،3035 ،3050 .4001 כן הוגשו אישורי הצלב האדום על תקופות הכליאה של התובעים ועל התאריכים שבהם נציגי הצלב האדום ביקרו אותם בבתי הכלא. אישורים אלה, שהוגשו בהסכמה, שימשו את בית המשפט לצורך קביעת הפיצוי בפסק הדין החלקי.

19. העינויים: בהחלטה בשאלת האחריות, קבע בית משפט קמא כי קיימת, כבר בשלב זה, "ראשית ראיה" שהתובעים עברו מסכת עינויים; כי התובעים זכאים לתבוע

את נזקיהם מכוח עילת התקיפה; וכי לרש"פ יש אחריות שילוחית על מעשי העינויים שבוצעו כלפי התובעים על ידי מנגנוני הביטחון שלה.

ערעור הרש"פ מופנה גם כלפי קביעות אלה, אך כפי שציין בית משפט קמא "כדי לפסוק פיצוי קונקרטי של סכומי כסף, יש להוכיח את הפרטים של כל עינוי ועינוי, ומה היו תוצאותיו הבריאותיות, מבחינת אחוזי נכות, אובדן תפקוד, ועוד. בשלב זה של קביעת אחריות לעצם העינוי, די בראשית ראייה על העינויים, כאשר עיקר הראיות יובאו בשלב הבא של הדיון על גובה הנזק")שם, פסקה .(656

קביעותיו של בית משפט קמא בדבר "ראשית ראיה" לגבי הפגיעות הנפשיות והפיזיות שנגרמו לכל אחד ואחד מהתובעים עקב המעצר והעינויים, הן קביעות מובהקות שבעניני עובדה ומהימנות שאין דרכה של ערכאת הערעור להתערב בהן. לכן, איני רואה לקבל את הטענות הכלליות שהעלתה הרש"פ לגבי מהימנות העדויות ומשקלן של חוות הדעת עליהן נסמכו התובעים. מכל מקום, ההחלטה בשאלת האחריות היא עקרונית, ונושא הנזק כפוף להוכחה מלאה וקונקרטית של מעשי העינויים ולראיות הפרטניות אשר תוגשנה על ידי כל אחד מהתובעים ב52- התיקים הפרטניים התלויים ועומדים בפני בית המשפט המחוזי.

20. הערעור הנוגע לחלק מהמשיבים: לצד הנושאים העקרוניים הנוגעים לכל המשיבים, נסב ערעור הרש"פ גם על כמה מקרים פרטניים מבין המשיבים ואתייחס לכך להלן ובקצרה:

(-) התובעת מס' 19 בת"א 6120/04 בשם עזבונו של בנה המנוח)סעיף 125 לסיכומי הרש"פ, פסקה 706 לפסק דינו של בית משפט קמא(– ככל שהתביעה אכן אינה מכוח עזבונו של המנוח אלא כהפסדי תמיכה,

הרי שעניין זה הוא להמשך ההתדיינות בשאלת הנזק. כך גם לגבי התובעת הנזכרת בפסקה 5831 לפסק הדין, שלגביה נטען כי לא תבעה מכוח היותה יורשת של בתה.

(-) התובע מס' 14 בת"א 5074/03)סעיף 148 לסיכומי הרש"פ, פרק מט של פסק הדין(– אין באמור בפסקה 3081 לפסק הדין כדי לגרוע מקביעתו העובדתית של בית המשפט שמצא כי קיימת ראשית ראיה לכך שהוא עונה במהלך מעצרו. לכן, דין טענת המערערת בעניין זה להידחות.

(-) התובע מס' 8 בת"א 7123/05)סעיף 150 לסיכומי הרש"פ, פרק סב של פסק הדין(– התובע שלל בתצהירו קיומם של עינויים בחקירה, ומכאן טענת הרש"פ כי בית המשפט שגה בקביעתו בפסקה 4597 כי קיימת ראשית ראיה לעינויים.

אלא שהטענה לא נעלמה מעיני בית משפט קמא, שהבחין בין שני המעצרים של התובע, וקיבל את עדותו כי העינויים שעבר היו במהלך מעצרו הראשון)פסקה .(4591 גם כאן מדובר בקביעת ממצאי עובדה ומהימנות שאין דרכה של ערכאת ערעור להתערב בהם.

התובע מס' 18 בת"א 6120/04)סעיף 153 לסיכומי הרש"פ, פרק סב של פסק הדין(– טענת הרש"פ היא כי דין התביעה להידחות מחמת היעדר הוכחה, בהינתן שהתובע התאבד מבלי שנחקר על תצהירו כך שהתצהיר אינו קביל, ולא ניתן לקבוע ממצאים על בסיס עדויות אחי המשיב. אלא שבניגוד לטענת הרש"פ, אחיו של התובע היה עד למעצר והעיד עליו מידיעה אישית, ונמצאה תמיכה לעדותו במסמכי האשפוז מבית החולים ובדברי אח אחר)פסקאות 1700 ו1703- לפסק הדין.(לא למותר לציין כי לנוכח התנגדות הרש"פ למתן עדות מוקדמת, בית המשפט קבע כי "ספק רב הוא אם מחדל אי חקירתו בחקירה נגדית, אינו מוטל לפתחה של הנתבעת")פסקה .(1697

ההחלטה בדבר הוצאות המומחים

21. בהחלטתו מיום 5.12.2017 חייב בית המשפט את הרש"פ לשאת בשכר טרחת המומחים בסך של כ900,000- .₪ נטען כי לא היה מקום לחייב את הרש"פ לשלם הוצאות למומחים טרם הסתיים שלב בירור הנזק, וכי המשיבים נמנעו מלהציג הסכמי שכר טרחה עם המומחים.

אף לטעמי לא היה מקום בשלב זה לפסיקת שכר טרחה בסכום העומד בממוצע על כ17,000- ₪ בגין חוות דעת שניתנו בכל אחד מהתיקים)על פי חישוב של 900,000 ₪ ל52- תובעים, (ועל כן אפחית מחצית מתוך הסכום שנפסק, וסכום זה ישא הפרשי הצמדה וריבית כדין מיום מתן פסק הדין החלקי)להבדיל מריבית הפיגורים שנקבעה בפסקאות 74-75 לפסק הדין.(

פסק הדין החלקי

22. הרש"פ העלתה בערעור מספר טענות הנוגעות לפסק הדין החלקי. לנושא זה אתייחס כעת, במסגרת הדיון בערעורם של המשיבים על מיעוט הסכום שנפסק לזכותם מכוח העוולה של כליאת שווא.

ערעור המשיבים)ע"א 6966/18) וערעור הרש"פ על פסק הדין החלקי

23. המשיבים טענו כי בית המשפט שגה בכך שפסק לכל אחד מהם סכום של 422 ₪ לכל יום שבו היה כלוא. סכום זה נפסק בהתאם לשיעור הפיצוי הקבוע בתקנה)8א(לתקנות סדר הדין הפלילי)פיצויים

בשל מעצר או מאסר,(התשמ"ב1982- שעניינה בפיצויים לפי סעיף 80 לחוק העונשין, התשל"ז1977-)להלן: חוק העונשין.(לטענת המשיבים, בכך סטה בית המשפט מההלכה לפיה אין להשתמש בתקנות העונשין לקביעת פיצוי בעוולה אזרחית, ומכל מקום, הפיצוי שנפסק הוא תו מחיר נמוך לחירותו של אדם, ומנוגד לפסיקת בתי המשפט שפסקו סכומים גבוהים בהרבה בגין כליאת שווא. לגישתם של המשיבים, היה על בית המשפט לפסוק לכל הפחות הסך של 3,000 ₪ בגין כל יום כליאה, בהתאם לדעת הרוב בע"א)מחוזי חיפה(4323/07 מדינת ישראל שירות בתי הסוהר נ' שירי ,(2.6.2008) שבקשת רשות לערער עליו נדחתה על ידי בית משפט זה ברע"א 5932/08)להלן: עניין שירי.(המשיבים טענו כי הפיצוי בגין שלילת החירות צריך לכלול גם את הצער, הבושה וחוסר האונים הנלווה למאסר או למעצר ולא רק את אבדן ההשתכרות, דהיינו החלק ה25- של השכר הממוצע במשק. לכך יש להוסיף את מידת האשם הגבוהה של הרש"פ, שאף בגינה היה מקום לפסוק סכום גבוה יותר.

במהלך הדיון שלפנינו, הבהרנו למשיבים כי הסכום שנפסק הוא בבחינת חישוב מתמטי של הנזק שנגרם להם בראש הנזק של אובדן חירות בלבד, לצורך פסק הדין החלקי, וכי בשלב השני של קביעת הנזק יעמדו להם טענותיהם כי יש להגדיל את הפיצוי בגין נזק לא ממוני שנגרם להם בעקבות כליאתם, שהרי, כאמור בעניין שירי, מסכום הפיצוי על פי הוראת תקנה 8 לתקנות הפיצויים נעדר "המימד של הצער, הבושה וחוסר האונים הנלווים למאסר או מעצר." בעקבות הבהרה זאת, חזרו בהם המשיבים מערעורם.

24. מנגד, הרש"פ הלינה בערעורה על כך שבית המשפט לא שמע ראיות בשאלת ראש הנזק של כליאת שווא; על שלא נשמעו ראיות בנוגע לעניינו הפרטני של כל אחד מהתובעים; כי על פי הדין המקומי וממוצע השכר בשטחים – הוא מקום מושבם של

המשיבים בעת המעצר והמאסר – הפיצוי היה צריך להיות נמוך בהרבה; כי אין מדובר בפעולה חשבונאית גרידא של מכפלת מספר ימי המעצר והכפלתו בתעריף היומי; כי הפיצוי בגין כליאת שווא הוא פיצוי על נזק לא ממוני אשר חופף לראש הנזק של כאב וסבל, אובדן הנאות חיים ופיצויים מוגברים, כך שלא היה מקום לפסוק את הסכומים שנפסקו טרם נשמעו ראיות לעניין הנזק; כי לא היה מקום לפסיקת פיצוי אחיד לכל אחד מהתובעים; כי הפיצוי בראש נזק זה גם מכמת פיצוי בגין כאב וסבל והפסד השתכרות; כי משניתן פסק דין לפיצוי ללא הוכחת נזק אין מקום להמשיך בהליך ולאפשר שמיעת ראיות לשם הענקת פיצוי נוסף; כי לא היה מקום לפסוק פיצוי למשיבים שנפטרו לפני ובעת בירור התביעה ואינם בחיים)חמישה מהתובעים;(וכי לא היה מקום להוסיף ריבית פיגורים לסכום שנפסק.

איני רואה לקבל טענת הרש"פ כי ההסדר בסעיף 80 לחוק העונשין ותקנה)8א(הם בבחינת הסדר ממצה)וראו והשוו לעמדת השופט ג'ובראן בעניין שירי.(עם זאת, לא ניתן להתעלם מכך שהסכום שנקבע על פי התקנות, משקף התחשבות בשכר הממוצע במשק, כך שבהמשך הדרך, בעת בירור התביעות הפרטניות, ובחישוב אבדן ההשתכרות והפיצוי בגין כאב וסבל, יהיה על בית המשפט המחוזי להתחשב בסכומים שנפסקו לזכות כל אחד מהמערערים – וזאת, במיוחד אם הדבר ייעשה בדרך אומדנא. הסכומים שנפסקו בפסק הדין החלקי ישאו הפרשי הצמדה וריבית כדין מיום מתן פסק הדין החלקי)להבדיל מריבית הפיגורים שנקבעה בפסקה .(351

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25. המערער היה עצור במשך 30 חודשים בכלא של הרש"פ, שם עבר לטענתו עינויים קשים כאשר משך כל תקופת מאסרו לא הובא בפני שופט. המערער היה תושב האזור ולאחר מעצרו ברח לישראל בה הוא שוהה החל משנת .2002 המערער אישר בעדותו כי ביצע פיגועים בתחום מדינת ישראל, אך לדבריו לא

נפגעו אנשים בפיגועים אלה והמערער סיכל את תכניות שולחיו בכך שהניח מטענים במקומות שבהם לא סביר שיפגעו אנשים.

בית משפט קמא קבע כי המערער הודה כי הניח מטען נפץ בכפר סבא; כי בהתאם לתצהירו, המערער לא מחזיק באזרחות ישראלית ונשא בעבר תעודת זהות פלסטינית, ואזרחותו לא מנעה מהרש"פ לעצרו; כי המערער נעצר בשטח A; וכי עילת מעצרו הייתה סחר בנשק ללא קשר כלשהו למדינת ישראל. בית המשפט דחה את טענת המערער כי נעצר בגין סיכול פיגועים שהיה בכוונתה של הרשות להוציא לפועל, ובשורה התחתונה

נקבע כי המערער לא הרים את הנטל להראות כי מעצרו נעשה בגין עילה ביטחונית. משכך, מחק בית המשפט את תביעתו.

26. במסגרת הערעור טען המערער, בין היתר, כי בעת הגשת התביעה היה רשום במרשם האוכלוסין של ישראל ונשא תעודת זהות ישראלית. אי לכך, מעמדו הוא כשל ישראלי ומועד הגשת התביעה הוא הקובע לצורך סמכותו של בית משפט קמא לדון בתביעה, במנותק משאלת חוקיות המעצר. עוד נטען כי בניגוד לקביעת בית המשפט, עילת מעצרו היתה ביטחונית ולא פלילית, וגם מטעם זה היה מקום לדון בתביעתו.

27. הקביעה כי עילת המעצר של המערער היא פלילית ולא ביטחונית, היא בבחינת קביעה עובדתית שאין דרכה של ערכאת הערעור להתערב בה. בית משפט קמא ביסס את קביעתו זו, בין היתר, על כך שבניגוד לתובעים האחרים, הרש"פ לא טענה כי המערער נעצר בגין שיתוף פעולה עם ישראל אלא טענה שעילת מעצרו היתה עבירה של סחר בנשק; על הסכמת ב"כ המערער לגרסת הרש"פ ביחס לעילת המעצר; ועל עדותו של המערער בפני בית המשפט במסגרתה הודה כי החזיק ברובה מסוג M16 ומסר אותו בזמן אמת

לידי הרש"פ – כך שיש ממש באישום של סחר בנשק. לא נעלמו מעיני טענת המערער לשינוי גרסה מצד הרש"פ ביחס לעילת המעצר או הטענה כי דברי ב"כ המערער בבית משפט קמא הוצאו מהקשרם. ועדיין, על פי עדות המערער עצמו יש ביסוס לאישום של סחר בנשק, כך שהרש"פ הצביעה על טעם שהתיר לה לעצור את המערער בדל"ת אמות סמכויותיה. לא למותר לציין כי לטענת הרש"פ וכעולה מהחלטת בית המשפט מיום 5.7.2012، ב"כ המערער התנגד לקו חקירה ולהצגת מסמכים מצד ב"כ הרש"פ הקשורים למעצר המערער בשל כך שעשה פיגועי דמה שגרמו לפרובוקציה נגד הרש"פ، וזאת מן הטעם שעילת מעצר זו והמסמכים הקשורים לכך לא גולו קודם לכן. בנסיבות אלה، אין להתערב בקביעה העובדתית של בית משפט קמא כי המערער לא נעצר בגין עילה ביטחונית.

שאלת מעמדו של המערער בעת הגשת התביעה، אף היא שנויה במחלוקת בין הצדדים. לטענת הרש"פ، המערער לא היה אזרח או תושב ישראל בעת המעצר, ולא הוכיח את היותו ישראלי במועד הגשת התביעה، ובכלל טענותיו בעניין זה נטענו לראשונה בערעור، ומבלי שהוצגו ראיות בעניין בפני בית משפט קמא. בנסיבות אלה، איני סבור כי בית משפט זה בשבתו כערכאת ערעור צריך להידרש לטענה שבסיסה שאלה עובדתית. מכאן שגם בהיבט זה، דין הערעור להידחות.

סוף דבר

28. לנוכח כל האמור، מצאנו לדחות את שלושת הערעורים כלהלן:

(-) ערעור הרש"פ)ע"א 6840/18 נדחה בכפוף להבהרות וההערות המפורטות לעיל. זאת، למעט בעניין שכר טרחת המומחים וריבית הפיגורים כמפורט בפסק הדין.

(-) ערעור המשיבים)ע"א (6966/18 נדחה בהסכמתם, ומובהר כי הסכום שנפסק לזכותם הוא בבחינת חישוב של הנזק שנגרם להם בראש הנזק של אובדן חירות בלבד, וכי בשלב השני של קביעת הנזק תעמודנה להם טענותיהם כי יש להגדיל את הפיצוי בגין נזק לא ממוני שנגרם להם בעקבות כליאתם.

(-) הערעור הפרטני)ע"א (5105/17 נדחה גם הוא בהעדר עילה להתערבות. 29. הרש"פ תישא בהוצאות המשיבים בע"א 6840/18 בסכום כולל של 25,000 .₪

בע"א 6966/18 לא יעשה צו להוצאות, והמערער בע"א 5105/17 יישא בהוצאות הרש"פ בסך של 5,000 .₪

ש ו פ ט

ש ו פ ט ת

ש ו פ ט

השופטת י' וילנר:

אני מסכימה.

השופט א' שטיין:

אני מסכים.

הוחלט כאמור בפסק דינו של השופט י' עמית. ניתן היום, כ"ט באייר התשפ"א (11.5.2021).

ש ו פ ט ש ו פ ט ת ש ו פ ט

ملخص

تتناول هذه الأطروحة مبدأ حصانة الدول في إطار القانون الدولي، مع التركيز على أهميته وتأثيره في سياق الصراع الإسرائيلي الفلسطيني. وتهدف الدراسة إلى تقييم ما إذا كان يمكن لفلسطين أن تنجح في التذرع بحصانة الدول أمام المحاكم الإسرائيلية، خصوصاً في القضايا المدنية التي تتضمن اتهامات بانتهاكات حقوق الإنسان مثل الاحتجاز غير القانوني والتعذيب.

تتبع الدراسة منهجية قانونية عقائدية تشمل تحليلًا متعمقًا للمصادر الأولية والثانوية مثل المعاهدات الدولية والقوانين القضائية والقانون الدولي العرفي. كما تتبنى الدراسة تحليلًا مقارنًا من خلال تقييم كيفية تطبيق حصانة الدول في ولايات قضائية أخرى مثل الولايات المتحدة والمملكة المتحدة وألمانيا. بالإضافة إلى ذلك، تتضمن الأطروحة دراسة حالة تركز على الوضع القانوني لفلسطين فيما يتعلق بمطالبات حصانة الدولة في المحاكم الإسرائيلية.

تشير النتائج إلى أن قدرة فلسطين على المطالبة بحصانة الدولة أمام المحاكم الإسرائيلية تتأثر بشكل كبير بالاعتبارات السياسية، خاصة في سياق الصراع الإسرائيلي الفلسطيني. فقد رفضت المحاكم الإسرائيلية في كثير من الأحيان مطالبات الحصانة من قبل فلسطين بسبب وضعها كدولة متنازع عليها، وغالباً ما تعطي هذه المحاكم الأولوية للاعتبارات الأمنية على حساب مبادئ القانون الدولي. وهذا يخلق بيئة معقدة وتحديات كبيرة أمام التطبيق المتسق لمبدأ حصانة الدول.

وتختتم الأطروحة بتوصية بأن تسعى فلسطين إلى مزيد من الانخراط في الأطر القانونية الدولية، مثل الانضمام إلى اتفاقية الأمم المتحدة بشأن حصانات الدول وممتلكاتها، لتعزيز مطالباتها بالحصانة السيادية. كما تقترح الأطروحة أن تسعى فلسطين للحصول على رأي استشاري من محكمة العدل الدولية لتوضيح موقفها القانوني فيما يتعلق بحصانة الدول. وأخيرا ، تدعو الدراسة إلى إعادة تقييم اتفاقيات أوسلو، وخاصة البنود الاقتصادية، لتمكين فلسطين من السيطرة بشكل أكبر على مواردها وتعزيز وضعها القانوني الدولي.

الكلمات المفتاحية: حصانة الدولة، القانون الدولي، القضاء الإسرائيلي، الدولة الفلسطينية، انتهاكات حقوق الإنسان.