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ARTICLE

Why Canada's Terrorism Exception Does Not Violate International Law

Pourquoi l'exception relative au terrorisme prévue par le Canada ne viole pas le droit international

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Abstract

On 27 June 2023, Iran sued Canada in the International Court of Justice, alleging that the exception for state supporters of terrorism in Canada's *State Immunity Act* violates customary international law. This article argues that Canada's terrorism exception is consistent with customary international law. Although it is commonly assumed that state-supported terrorism is *acta jure imperii* and that a general and consistent practice of states accompanied by *opinio juris* is required to create an exception to state immunity, in fact, neither assumption is correct.

Keywords: Foreign state immunity

Résumé

Le 27 juin 2023, l'Iran a déposé la requête introductive d'instance contre le Canada devant la Cour internationale de Justice, faisant valoir que l'exception prévue par la Loi canadienne sur l'immunité des États pour les États qui soutiennent le terrorisme viole le droit international coutumier. Cet article soutient que l'exception relative au terrorisme, prévue par le Canada, est conforme au droit international coutumier. Bien qu'il soit communément admis que le terrorisme soutenu par un État relève de l'*acta jure imperii* et qu'une pratique générale et constante des États, accompagnée d'une *opinio juris*, soit nécessaire pour créer une exception à l'immunité des États, en réalité, aucune de ces deux hypothèses n'est correcte.

Mots-clés: Immunité des États étrangers

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On 27 June 2023, Iran sued Canada in the International Court of Justice (ICJ), alleging that the exception for state supporters of terrorism in Canada's *State Immunity Act* (*SIA*) violates customary international law.[1] This article argues that Canada's terrorism exception is consistent with customary international law. Although it is commonly assumed that state-supported terrorism is *acta jure imperii* and that a general and consistent practice of states accompanied by *opinio juris* is required to create an exception to state immunity, neither assumption is in fact correct. Under the restrictive theory of immunity, foreign states are generally immune from suit based on their sovereign activities (*acta jure imperii*) but are not immune from suit based on their non-sovereign activities (*acta jure gestionis*).[2] In *Jurisdictional Immunities of the State (Germany v Italy)*, the ICJ was careful not to limit *acta jure gestionis* to commercial activities, referring instead to the "non-sovereign activities of the State."[3] This article will argue that terrorism and support for terrorism are non-sovereign activities because they are activities in which persons other than states engage.

Even if terrorism and support for terrorism were considered *acta jure imperii*, it does not necessarily follow that foreign states are immune from suit based on such acts. In *Jurisdictional Immunities*, it was conceded that the conduct of armed forces during armed conflict is a sovereign activity.[4] But the ICJ did not conclude that such activities were entitled to immunity on that basis alone. Instead, the court conducted a detailed review of state practice and *opinio juris*.[5] In performing such a review for terrorism, a critical question is where to start — specifically, whether to begin from a baseline of immunity or jurisdiction.[6] A baseline of immunity presumes that foreign

[1] Application, *Alleged Violations of State Immunities (Iran v Canada)*, online: <www.icj-cij.org/sites/default/files/case-related/189/189-20230628-app-01-00-en.pdf>; *State Immunity Act*, RSC 1985, c S-18 [*SIA*].

[2] See e.g. James Crawford, *Brownlie's Principles of Public International Law*, 9th ed (Oxford: Oxford University Press, 2019) at 471 (stating that the "restrictive theory of immunity … holds that immunity is only required with respect to transactions involving the exercise of governmental authority (*acta jure imperii*) as distinct from commercial or other transactions which are not unique to the state (*acta jure gestionis*)"); Hazel Fox & Philippa Webb, *The Law of State Immunity*, 3rd ed (Oxford: Oxford University Press, 2013) at 34 (noting that, under the restrictive theory, "the nature of the act was adopted as the criterion to determine the application of foreign State immunity, with immunity continuing for acts in exercise of sovereign authority, *jure imperii* but being withdrawn from acts of a private law or commercial nature, *jure gestionis*"); Robert Jennings & Arthur Watts, *Oppenheim's International Law*, vol 1, 9th ed (Oxford: Oxford University Press, 1992) at 357 (noting the distinction under the restrictive theory "between the acts of a state in its sovereign capacity (*acta jure imperii*) and those of a private law or commercial character (*acta jure gestionis*), immunity not being granted to the latter"). See also *Jurisdictional Immunities of the State (Germany v Italy; Gr. intervening)*, [2012] ICJ 99 at 59 [*Jurisdictional Immunities*] (noting "that many States … now distinguish between *acta jure gestionis*, in respect of which they have limited the immunity which they claim for themselves and which they accord to others, and *acta jure imperii*").

[3] *Jurisdictional Immunities*, *supra* note 2 at para 60.

[4] *Ibid.*

[5] *Ibid* at paras 66–78. For further discussion of *Jurisdictional Immunities*, see section 2 of this article.

[6] See Rosalyn Higgins, "Certain Unresolved Aspects of the Law of State Immunity" (1982) 29 Neth Intl L Rev 265 at 270 ("[i]s sovereign immunity still the basic rule, with the exercise of jurisdiction an (expanding) exception? Or is it really the other way around?"). See also Christoph H Schreuer, *State Immunity: Some Recent Developments* (Cambridge: Grotius Publications, 1988) at 5 ("[t]he outcome might be determined simply by what one sets up as the basic principle, to which one is prepared to allow exceptions only if they are supported by uniform practice").

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states are immune from suit, and it requires a general and consistent practice of states to create exceptions. A baseline of jurisdiction, by contrast, presumes that foreign states may be sued and requires a general and consistent practice of states to create immunity. In other work, I have argued that the proper baseline for a particular area of customary international law depends on state practice — do states act as though international law requires a permissive rule or a prohibitive one?[7] This article argues that state practice with respect to state immunity shows that the proper baseline is jurisdiction and that a general and consistent practice of states is required to establish immunity prohibiting the exercise of jurisdiction.

The most relevant state practice on this baseline question is found in the transition from the absolute to the restrictive theory of immunity during the twentieth century.[8] When countries adopted the restrictive theory — the United States in 1952,[9] the United Kingdom in 1978,[10] and Canada in 1985[11] — they did not see themselves (and were not seen by others) to be violating customary international law, even though at each point in time the restrictive theory remained a distinctly minority position.[12] This practice is inconsistent with a baseline of immunity, which would require a general and consistent practice of states to create an exception. At each of these points in time — 1952, 1978, and 1985 — there was no general and consistent practice of denying immunity for non-sovereign activities. State practice during the transition to the restrictive theory is, however, consistent with a baseline of jurisdiction. By the time the United States adopted the restrictive theory in 1952, enough states had stopped following the absolute theory that one could plausibly say that the absolute theory was no longer supported by a general and consistent practice of states and, therefore, was no longer required by customary international law.

In short, the way in which states behaved during this transition establishes that, with respect to state immunity, states view jurisdiction as the baseline and require a general and consistent practice of states accompanied by *opinio juris* to create a rule of immunity. Applying these observations to immunity for terrorism, this article notes that there is no general and consistent practice of states affording immunity from suit based on acts of terrorism and support for terrorism. The article therefore concludes that terrorism exceptions such as Canada's are not prohibited by customary international law.

The article proceeds in four sections. The first section describes Iran's claims against Canada before the ICJ. The second section discusses the ICJ's judgment in *Jurisdictional Immunities*, explaining which of Canada's potential arguments appear to be foreclosed by that decision and which appear not to be. The next two sections analyze two separate arguments that are not foreclosed and that Canada might make in defence of its terrorism exception. The third section argues that terrorism and support for terrorism are non-sovereign acts (*acta jure gestionis*), to which state

[7]William S Dodge, "A Modest Approach to the Customary International Law of Jurisdiction" (2022) 32 Eur J Intl L 1471 at 1477 (discussing baselines for prescriptive and adjudicative jurisdiction).

[8]For accounts, see Gamal Moursi Badr, *State Immunity: An Analytical and Prognostic View* (The Hague: Martinus Nijhoff, 1984) at 21–62; Fox & Webb, *supra* note 2 at 131–64.

[9]See Letter from Jack B Tate, Acting Legal Adviser, Department of State, to Philip B Perlman, Acting Attorney General, 19 May1952, reprinted in *Department of State Bulletin*, vol 26 (1952) at 984 [Tate Letter].

[10]*State Immunity Act 1978* (UK), c 33 [*SIA* UK].

[11]*SIA*, *supra* note 1, s 5.

[12]See section 4 in this article.

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immunity does not attach, because they are acts in which persons other than states can and do engage. The fourth section then explains that state immunity may not attach to acts of terrorism even if they were considered sovereign acts (*acta jure imperii*). The critical question is whether the baseline for evaluating state practice is one of immunity or jurisdiction. Drawing on evidence from the transition from the absolute to the restrictive theory, the fourth section argues that the baseline in this area of customary international law is one of jurisdiction and that a general and consistent practice of granting immunity from suits based on terrorism and support for terrorism is required to establish a rule of immunity from such suits. The fifth section briefly concludes.

1. Iran's case against Canada

Iran's application to the ICJ claims that Canada has violated customary international law by allowing claims against Iran for its alleged support of terrorism, by recognizing foreign judgments against Iran for its alleged support of terrorism, and by adopting measures of constraint against Iran's property in Canada in connection with such actions.[13] In 2012, Canada amended its *SIA* to add exceptions to state immunity for support of terrorism. Section 6.1 of the *SIA* provides that a foreign state designated by the governor in council as a state supporter of terrorism "is not immune from the jurisdiction of a court in proceedings against it for its support of terrorism on or after January 1, 1985."[14] Section 12(1)(d) further provides that the property of a state supporter of terrorism is not immune from attachment and execution that "relates to a judgment rendered in an action brought against it for its support of terrorism or its terrorist activity" unless the property "has cultural or historical value."[15] Later that year, the governor in council listed Iran and Syria as supporters of terrorism.[16]

Another section of the same 2012 law, known as the *Justice for Victims of Terrorism Act* (*JVTA*), provides a cause of action against state supporters of terrorism for "[a]ny person that has suffered loss or damage in or outside Canada on or after January 1, 1985 as a result of an act or omission that is, or had it been committed in Canada would be, punishable under Part II.1 of the Criminal Code," which codifies terrorism-related offences.[17] The *JVTA* further provides for enforcement of foreign court judgments in favor of victims of terrorism against countries listed by Canada as supporters of terrorism.[18] Canadian courts have exercised jurisdiction over Iran pursuant to section 6.1 of the *SIA* for shooting down a Ukraine International Airlines flight in 2020.[19] Canadian courts have also enforced US terrorism judgments against real property owned by Iran and against two bank accounts in the name of the Iranian

[13]Application, *Alleged Violations of State Immunities (Iran v Can.)* at para 26, online: <www.icj-cij.org/sites/default/files/case-related/189/189-20230628-app-01-00-en.pdf>. This article does not address the customary international law concerning measures of constraint.

[14]*SIA*, *supra* note 1 at para 6.1(1).

[15]*Ibid* at para 12(1)(d).

[16]*Order Establishing a List of Foreign State Supporters of Terrorism*, SOR/2012-170, online: <laws-lois.justice.gc.ca/PDF/SOR-2012-170.pdf>.

[17]*Justice for Victims of Terrorism Act*, SC 2012, c 1, s 2, para 4(1) [*JVTA*].

[18]*Ibid* at para 4(5).

[19]See *Smith v Islamic Republic of Iran*, 2023 ONSC 4420 [*Smith*]; *Zarei v Iran*, 2021 ONSC 3377 [*Zarei*].

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embassy in Canada[20] and have recognized US terrorism judgments in a number of other cases.

Maryam Jamshidi has suggested that an additional target of Iran's case against Canada may be the United States, whose courts have issued terrorism judgments for billions of dollars against Iran.[21] In a 2019 decision,[22] the ICJ concluded that it lacked jurisdiction to consider whether the US exception for state sponsors of terrorism[23] violates customary international law. Unlike the United States, Canada has consented to the Article 36(2) compulsory jurisdiction of the ICJ. On 26 June 2023, Iran consented to such compulsory jurisdiction, specifically for disputes concerning jurisdictional immunities[24] and filed its claim against Canada the next day. Canada subsequently modified its consent to compulsory jurisdiction to prevent such surprise filings in the future.[25] But this modification does not affect Iran's pending claim.

2. The *Jurisdictional Immunities* decision

It seems best to begin with a brief account of the ICJ's 2012 decision in *Jurisdictional Immunities of the State*, which is the court's leading decision on state immunity.[26] Italian courts had permitted civil claims against Germany based on violations of international humanitarian law by Germany's armed forces on Italian territory during the Second World War. While admitting the violations of international humanitarian law by its armed forces, Germany argued that it was immune from suit for such violations in Italian courts. Because there was no treaty between the parties governing state immunity, the ICJ looked to customary international law. The court applied the same rules for identifying customary international law that it has applied in other cases, "requir[ing] that there be 'a settled practice' together with *opinio juris*."[27] State practice showed "that, whether in claiming immunity for themselves or according it to others, States generally proceed on the basis that there is a right to immunity under international law."[28] One might read this statement to say that the analysis of state immunity begins by assuming immunity and requires a general and consistent practice of states to create exceptions. But, as discussed further

[20]See *Tracy v The Iranian Ministry of Information and Security*, 2016 ONSC 3759.

[21]Maryam Jamshidi, "Iran's ICJ Case against Canada Tests the Terrorism Exception to Sovereign Immunity," *Just Security* (24 July 2023), online: <www.justsecurity.org/87357/irans-icj-case-against-canada-tests-the-terrorism-exception-to-sovereign-immunity/>.

[22]*Certain Iranian Assets (Iran v United States)*, [2019] ICJ 7.

[23]*Foreign Sovereign Immunities Act*, 28 USC § 1605A [*FSIA*].

[24]Declaration of Iran, online: <www.icj-cij.org/declarations/ir>.

[25]Declaration of Canada, online: <www.icj-cij.org/declarations/ca>.

[26]Under Article 59 of the *ICJ Statute*, the court's decisions do not have precedential effect. *Statute of the International Court of Justice*, 26 June 1945, Can TS 1945 No 7 (entered into force 24 October 1945). Nevertheless, the court has stated that "it will not depart from its settled jurisprudence unless if finds very particular reasons to do so." *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, [2008] ICJ 412 at para 53.

[27]*Jurisdictional Immunities*, *supra* note 2 at para 55 (quoting *North Sea Continental Shelf (Germany v Denmark; Germany v Netherlands)*, [1969] ICJ 3 at para 77 [*North Sea Continental Shelf*].

[28]*Jurisdictional Immunities*, *supra* note 2 para 56. Later in the opinion, the court refers to Italy's "obligation to respect the jurisdictional immunity of Germany." *Ibid* at para 133. But this is simply a reference back to the court's analysis earlier in the opinion, discussed later in this article.

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below, that is not how the court itself proceeded in *Jurisdictional Immunities.* One might alternatively read this statement to say simply that there are rights to state immunity under customary international law — that is, immunity is not simply a matter of comity — without addressing the baseline from which such rights are to be established.

In the next paragraph, the ICJ identified two possible baselines for state immunity. On the one hand, the court said that state immunity "derives from the principle of sovereign equality of States."[29] However, "[t]his principle has to be viewed together with the principle that each State possesses sovereignty over its own territory."[30] "Exceptions to the immunity of the State," the court continued, "represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it."[31] Because of the way in which the court structured its analysis in *Jurisdictional Immunities*, it did not have to choose between these baselines.

The court noted that many states "now distinguish between *acta jure gestionis*, in respect of which they have limited the immunity which they claim for themselves and which they accord to others, and *acta jure imperii.*"[32] *Acta jure imperii* are acts "to be assessed by the law governing the exercise of sovereign power," whereas *acta jure gestionis* are acts to be assessed by "the law concerning non-sovereign activities of a State, especially private and commercial activities."[33] The court considered (and Italy conceded) that "[t]he acts of the German armed forces … constituted *acta jure imperii*"[34] and that "States are generally entitled to immunity in respect of *acta jure imperii.*"[35]

But, significantly, states may not always be entitled to immunity for *acta jure imperii.* The ICJ noted that none of the national legislation that "provides for a 'territorial tort exception' to immunity expressly distinguishes between *acta jure gestionis* and *acta jure imperii.*"[36] The court considered, however, that it did not have to answer whether a territorial tort exception applied to sovereign acts generally.[37] The question in *Jurisdictional Immunities* was whether such an exception applied to the acts of armed forces during armed conflict. And so the court focused specifically on state practice and *opinio juris* with respect to such acts. After an exhaustive survey of state practice and *opinio juris* with respect to immunity for the activities of armed forces during armed conflict,[38] the court concluded on that basis that customary international law required immunity from jurisdiction.[39]

The ICJ went on to reject Italy's arguments that it should recognize an exception to such immunity based on the gravity of the violations, the *jus cogens* status of the rules that were violated, the lack of alternative means for securing redress, or the

[29] *Ibid* at para 57.
[30] *Ibid.*
[31] *Ibid.*
[32] *Ibid* at para 59.
[33] *Ibid* at para 60.
[34] *Ibid.*
[35] *Ibid* at para 61.
[36] *Ibid* at para 64.
[37] *Ibid* at para 65.
[38] *Ibid* at paras 66–77. Section 4.D in this article discusses the court's analysis in more detail.
[39] *Jurisdictional Immunities*, *supra* note 2 at para 78.

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combination of all these circumstances together.[40] The court found that state practice did not support recognizing such exceptions with respect to immunity that had already attached. During the course of this analysis, the court briefly mentioned the exception for state sponsors of terrorism in the US *Foreign Sovereign Immunities Act*,[41] on which Italy had relied, noting that "this amendment has no counterpart in the legislation of other States."[42] But the ICJ made this observation in the course of considering Italy's argument for an exception to immunity based on the gravity of the violation. The court had no occasion to address whether terrorism and support for terrorism are acts with respect to which states are immune from suit.[43]

The ICJ's decision in *Jurisdictional Immunities* is likely to frame the arguments that the parties will make in Iran's case against Canada. The decision would seem to rule out an argument on Canada's part that there should be an exception to immunity for terrorism based on the gravity of the offence. But the decision does not rule out arguments that terrorism and support for terrorism are, unlike the acts of armed forces during armed conflict, acts to which immunity does not attach in the first place. Such arguments could take at least two forms. First, Canada may argue that acts of terrorism are not *acta jure imperii*, like the acts of armed forces but, rather, *acta jure gestionis.* The third section of this article explores this possibility. Second, Canada may argue that, even if acts of terrorism are *acta jure imperii*, they are not entitled to immunity because there is no general and consistent practice of granting such immunity for such acts, as there was with respect to the acts of armed forces during armed conflict. The fourth section explores this possibility.

The argument in the fourth section depends on whether the proper baseline in this area of customary international law is immunity or jurisdiction. It is hard to draw firm conclusions from *Jurisdictional Immunities.* On the one hand, in deciding that Germany was immune from suit, the ICJ did not simply rest immunity on its characterization of the acts in question as sovereign acts, which would have been evidence for a baseline of immunity. Instead, the court looked for state practice and *opinio juris* to support immunity specifically for those acts. This method of analysis is consistent with a baseline of jurisdiction that requires a general and consistent practice to establish rules of immunity. On the other hand, the reason that the court

[40]*Ibid* at paras 80–106. The International Court of Justice (ICJ) reached a similar conclusion in an earlier case involving foreign official immunity. See *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*, [2002] ICJ 3 at para 58.

[41]*FSIA*, *supra* note 23 § 1605A.

[42]*Jurisdictional Immunities*, *supra* note 2 at para 88. Canada enacted its terrorism exception later the same year.

[43]The ICJ further addressed Germany's immunity from the jurisdiction of Italian courts in actions to declare enforceable judgments against Germany rendered by Greek courts and Germany's immunity from measures of constraint to enforce such judgments against property owned by Germany. See *Jurisdictional Immunities*, *supra* note 2 at para 109–33. The court held that state immunity from jurisdiction to declare enforceable a foreign judgment is governed by the same rules as an action on the merits against a foreign state. See *ibid* at para 130. The court held that the rules governing state immunity from jurisdiction to enforce are "distinct" (*ibid* at para 113) and that, at a minimum, the property must not be in use for "government non-commercial purposes" or that the foreign state has consented or allocated the property for satisfaction of the claim (*ibid* at para 118). Iran has raised these issues in its case against Canada. With respect to immunity from jurisdiction to recognize foreign terrorism judgments, the same rules apply as for actions on the merits, and so I will not address such jurisdiction separately. Iran's immunity from jurisdiction to enforce lies beyond the scope of this article.

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proceeded in this way may have been because Italy invoked the territorial tort principle. If the proper baseline were generally one of immunity, the territorial tort principle might have shifted that baseline to one of jurisdiction on the facts of this case, requiring the court to proceed as it did if it wished to avoid addressing the territorial tort question. In the end, one can say that the court in the *Jurisdictional Immunities* decision did not begin with a baseline of immunity. But it is hard to say more than that.

3. Terrorism as a non-sovereign act

As discussed above, the restrictive theory of foreign state immunity distinguishes between sovereign acts (*acta jure imperii*) and non-sovereign acts (*acta jure gestionis*).[44] States are not necessarily immune from all suits based on *acta jure imperii.*[45] But states are not immune from suit based on *acta jure gestionis.*[46] *Acta jure gestionis* are not limited to commercial acts. In *Jurisdictional Immunities*, the ICJ said that "the terms '*jure imperii*' and '*jure gestionis*' … refer … to whether the acts in question fall to be assessed by reference to the law governing the exercise of sovereign power (*jus imperii*) or the law concerning non-sovereign activities of a State, especially private and commercial activities (*jus gestionis*)."[47] Commercial activities are an important example of non-sovereign activities, but they are not the only activities belonging to this category.[48]

How can one determine whether an act is sovereign or non-sovereign? For the purpose of determining immunity under customary international law, the categorization must depend on customary international law rather than domestic law.[49] A number of leading authorities have written that an act may be considered non-sovereign for the purposes of immunity if it is one in which a private person can engage. The proper test, Robert Jennings suggested, is to "look at the legal nature of the act and ask whether it could have been done by a private person."[50] Rosalyn Higgins similarly phrased the test as "whether an act is one that may be performed by anyone, or only by a sovereign."[51] And James Crawford pithily asked whether the act is "not unique to the state."[52]

[44]See *ibid* at para 59 (noting "that many States … now distinguish between *acta jure gestionis*, in respect of which they have limited the immunity which they claim for themselves and which they accord to others, and *acta jure imperii*").

[45]See *ibid* at para 64 (discussing state practice declining to recognize immunity for *acta jure imperii* that are torts within the territory of the forum state).

[46]See Crawford, *supra* note 2 at 471; Fox & Webb, *supra* note 2 at 34; Jennings & Watts, *supra* note 2 at 357.

[47]*Jurisdictional Immunities*, *supra* note 2 at para 60.

[48]See also James Crawford, "International Law and Foreign Sovereigns: Distinguishing Immune Transactions" (1983) 54 Brit YB Intl L 75 at 91 ("[n]ot all State activities can be described either as 'governmental' or 'commercial'").

[49]*Ibid* at 77–78. However, states are generally free, as a matter of their own domestic laws, to grant more immunity than international law requires.

[50]Robert Jennings, "The Place of the Jurisdictional Immunity of States in International and Municipal Law" in Wilhelm G Grewe, *Vortrag vor dem Europa-Institut der Universitat des Saarlandes* (1988) 3 at 16; see also at 8 (suggesting that the solution "is to interpret 'in the exercise of sovereign authority' as excluding the doing of something which an ordinary private person might also do").

[51]Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1994) at 84.

[52]Crawford, *supra* note 2 at 471.

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To say that one must consider the nature of an act is not to say that its purpose must always be ignored. In defining "commercial activity," for example, some states have chosen to refer to both nature and purpose.[53] Other states refer only to the nature of the activity,[54] and still others expressly prohibit consideration of purpose.[55] The *United Nations Convention on the Jurisdictional Immunities of States and Their Properties* (*UN Convention*), which is not in force, refers primarily to the nature of an activity but says that purpose may be considered too.[56] It seems clear that states are permitted to consider both nature and purpose in determining whether state immunity attaches to an activity. But it seems equally clear that states are not required to do so. It is therefore permissible under customary international law for Canada to adopt the test for non-sovereign acts that Jennings, Higgins, and Crawford have articulated and to deny immunity for acts in which a private person can engage on the ground that such acts are *acta jure gestionis*.

Generally, terrorism and support of terrorism are acts that can be performed by private persons.[57] Indeed, many of the judgments against Iran under the US state sponsor of terrorism exception for which plaintiffs have sought recognition in Canada are based on Iran's support of Hezbollah and other non-state actors.[58] For present purposes, it is not necessary to agree upon a definition of "terrorism." Whether an act is one to which state immunity attaches depends not on whether the act constitutes "terrorism" but, rather, on whether the act is one in which a private person can engage. If a private party can engage in an act, it may be considered *acta jure gestionis* and, therefore, not immune from suit under customary international law.[59] A few courts have reasoned that "state-sponsored" terrorism is, by definition, a

[53]*Foreign State Immunity Law of the People's Republic of China*, Zhonghua Renmin Gongheguo Waiguo Guojia Huomian Fa (中华人民共和国外国国家豁免法) (promulgated by the Standing Comm. National People's Congress, 1 September 2023, effective 1 January 2024), art 7 [*China FSIL*] ("[t]he courts of the People's Republic of China, in determining whether an act is a commercial activity, shall consider all factors relating to the nature and purpose of the act").

[54]*SIA*, *supra* note 1 at para 2 ("commercial activity means any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character").

[55]*FSIA*, *supra* note 23 § 1603(d) ("[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose").

[56]*United Nations Convention on the Jurisdictional Immunities of States and Their Property*, UN Doc A/59/508 (2 December 2004), art 2(2) [*UN Convention*] ("reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction").

[57]See Thomas Weatherall, *Is Terrorism Sovereign? Evaluating the Jurisdictional Immunity of the State for Acts of International Terrorism* (2025) at 13 [manuscript on file with author] ("terrorism is traditionally understood to be the domain of non-State actors and, as such, generally does not entail the exercise of sovereign power or constitute a public act"). In this respect, terrorism is distinct from torture and other human rights violations that require state action. *Cf Kazemi Estate v Iran*, [2014] 3 SCR 176 at 180 ("[b]y definition, torture is necessarily an official act of the state. It is the state-sanctioned or official nature of torture that makes it such a despicable crime").

[58]See e.g. *Reed v Islamic Republic of Iran*, 845 F Supp (2d) 204 (DDC 2012); *Bennett v Islamic Republic of Iran*, 507 F Supp (2d) 117 (DDC 2007); *Higgins v Islamic Republic of Iran*, No 1:99CV00377, 2000 WL 33674311 (DDC 21 September 2000).

[59]Although the test is typically phrased as whether the act is one in which a private person could have engaged (see notes 50–52 above), one might alternatively ask whether the act is one in which private persons

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sovereign activity because only sovereigns can engage in it.[60] This is tautological. One could as easily say that government contracting is a sovereign activity because, by definition, only sovereigns can engage in it. No one today would accept such an argument with respect to the commercial activities of states, and it makes no more sense to do so with respect to other state activities.

Asking whether a private person could engage in an activity provides an apparently simple test for distinguishing non-sovereign activities from sovereign ones, but there may still be hard cases. In January 2020, for example, two missiles fired by Iran's Islamic Revolutionary Guard Corps destroyed a Ukraine International Airlines flight shortly after its departure from Tehran. All 176 people on board died, including eighty-five Canadian citizens and permanent residents.[61] In *Zarei v Iran*,[62] the Ontario Superior Court of Justice held that Iran was not immune from suit under the *SIA*'s terrorism exception because the destruction of the plane met Canada's statutory definition of terrorism.[63] Certainly, firing a missle at an airplane is something that a private person could do. Iran, however, claimed that its soldiers mistook the plane for a US cruise missile and thus were engaged in military defence.[64] Even without considering Iran's purpose in firing the missiles,[65] it is plain that one might characterize this act in different ways — either as a non-sovereign act of terrorism or as a sovereign act of military defence. In other words, even under the "private person" test, there may still be questions of characterization.

The argument advanced in this section is different from the one that the ICJ rejected in *Jurisdictional Immunities* — that international law recognizes an exception to state immunity based on the gravity of the international law violations.[66] The argument here does not turn at all on the fact that terrorism is broadly condemned by

typically engage or, conversely, whether the act is one in which only sovereigns typically engage. *Cf* Frédéric Mégret, "Are There 'Inherently Sovereign Functions' in International Law" (2021) 115 Am J Intl L 452. Terrorism is not an act in which sovereigns typically engage.

[60]See e.g. *Hashwah v Qatar National Bank QPSC and Others*, [2022] EWHC 2242 at para 28 [*Hashwah*] ("[t]he key point is that by definition a private citizen cannot provide support for terrorist activity that is '*state sponsored*'. By definition such support can be provided only by a state").

[61]This incident is the subject of a separate application to the ICJ. See Joint Application, *Aerial Incident of 8 January 2020 (Canada, Sweden, Ukraine, United Kingdom v Iran)*, online: <www.icj-cij.org/sites/default/files/case-related/190/190-20230704-app-01-00-en.pdf>.

[62]2021 ONSC 3377.

[63]*Ibid* at paras 25–31. See also *Smith*, *supra* note 19 (following *Zarei*, *supra* note 19). For criticism of the reasoning in *Zarei*, see Leah West & Michael Nesbitt, "Noble Cause, Terrible Reasoning: Zarei v Iran, 2021 ONSC 3377," *Intrepid* (25 May 2021), online: <www.intrepidpodcast.com/blog/2021/5/25/noble-cause-terrible-reasoning-zarei-v-iran-2021-onsc-3377>.

[64]"Iran Plane Crash: Ukrainian Jet Was 'Unintentionally' Shot Down," *BBC News* (11 January 2020), online: <www.bbc.com/news/world-middle-east-51073621>. See also Kelly Adams, "Governmental and Non-Governmental Acts in Terrorism Exceptions to Sovereign Immunity," *Transnational Litigation Blog* (10 October 2023), online: <tlblog.org/governmental-and-non-governmental-acts-in-terrorism-exceptions-to-sovereign-immunity/> ("Iran has a strong argument that the direct actions taken its military constitute acta jure imperii; not only were they taken by an official organ of the Iranian government, but the act itself was of a military nature, and therefore governmental").

[65]See notes 53–56 above and accompanying text (discussing the use of nature and purpose to define sovereign acts).

[66]See *Jurisdictional Immunities*, *supra* note 2 at para 81–91. See also notes 40–43 above and accompanying text.

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the international community.[67] Rather, the argument turns entirely on the fact that (nearly all) acts of terrorism and support for terrorism are acts in which a private party could engage. As such, terrorism and support for terrorism are *acta jure gestionis* to which no immunity attaches under customary international law. In other words, this argument turns not on the lawfulness of the acts but, rather, on their non-sovereign character.

In *Jurisdictional Immunities*, the ICJ's analysis of immunity from suit had two basic stages. First, the court considered whether customary international law requires immunity from suit with respect to the acts of armed forces during armed conflict, concluding that it does based on state practice and *opinio juris*.[68] Second, the court considered whether customary international law recognizes an exception to state immunity based on the gravity of the international law violations, concluding that it does not based on state practice and *opinio juris*.[69] The argument in this section addresses the first stage of the analysis, not the second. Because acts of terrorism and support for terrorism are *acta jure gestionis*, for which customary international law does not require immunity in the first place, it becomes unnecessary to consider whether to recognize an exception for terrorism based on its universal condemnation.

4. Baselines in the law of state immunity

This section considers a separate and independent argument in defence of Canada's terrorism exception. Canada may argue that, even if acts of terrorism are *acta jure imperii*, they are not entitled to immunity because there is no general and consistent practice of granting such immunity for such acts as there was with respect to the acts of armed forces during armed conflict. This argument depends on the baseline for analysis.

It is well established that "the existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio juris*."[70] But, in applying this rule, where should one start? Should one assume that states may act as they please unless their action violates a prohibitive rule established by state practice and *opinio*

[67]It is, of course. See e.g. UNSC Resolution 1373 (2001) ("[d]eclar[ing] that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations"); UNSC Resolution 1269 (1999) ("[u]nequivocally condemn[ing] all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed, in particular those which could threaten international peace and security"); *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Resolution 2625 (XXV) (1970) ("[e]very State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force").

[68]See notes 38–39 above and accompanying text.

[69]See notes 40–43 above and accompanying text.

[70]*Jurisdictional Immunities*, *supra* note 2 at para 55 (quoting *North Sea Continental Shelf*, *supra* note 27 at para 77). See also International Law Commission, *Draft Conclusions on Identification of Customary International Law, with Commentaries*, UN Doc A/73/10 (2018), Conclusion 2 [*ILC Draft Conclusions*] ("[t]o determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)").

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juris?[71] Or should one assume that states may not act unless authorized by a permissive rule established by state practice and *opinio juris*? The question of baselines for determining customary international law has received relatively little scholarly attention.[72] The International Law Commission's Draft Conclusions on Identification of Customary International Law say nothing about it.[73]

A. Scholarly opinion

Scholars writing on state immunity have sometimes addressed the baseline question. In a 1988 book on state immunity, Christoph Schreuer identified the question in a passage worth quoting at length:

> If we were to acknowledge that … there is no uniform and general practice, much would depend on how we pose our questions. The outcome might be determined simply by what one sets up as the basic principle, to which one is prepared to allow exceptions only if they are supported by uniform practice. If immunity is the starting point, a requirement of a positive universal practice for any restriction is bound to lead to an assertion of absolute immunity. On the other hand, if we proceed from a general rule of jurisdiction, we will find it difficult, if not impossible, to find proof of a uniform practice supporting immunity.[74]

Writing in 1982, Higgins put the question more succinctly: "Is sovereign immunity still the basic rule, with the exercise of jurisdiction an (expanding) exception? Or is it really the other way around?"[75] Her answer was that the baseline for state immunity is jurisdiction: "It is sovereign immunity which is the exception to jurisdiction and not jurisdiction which is the exception to a basic rule of immunity. An exception to the normal rules of jurisdiction should only be granted when international law requires."[76] Ian Sinclair took the same view in his Hague Lectures, stating that "one does not start from an assumption that immunity is the norm, and that

[71]This approach is sometimes associated with the *Lotus* Case. See *S.S. Lotus (France v Turkey)*, (1927), PCIJ (Ser A) No 10 at 18 ("[r]estrictions upon the independence of States cannot … be presumed"); *ibid* at 19 ("[f]ar from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules").

[72]Chimène Keitner and I have addressed some aspects of the baseline question in earlier work. See William S Dodge & Chimène I Keitner, "A Roadmap for Foreign Official Immunity in U.S. Courts" (2021) 90 Fordham L Rev 677 at 702–04 (arguing that the baseline for foreign official immunity is jurisdiction rather than immunity); Chimène I Keitner, "Foreign Official Immunity and the 'Baseline' Problem" (2011) 80 Fordham L Rev 605 (arguing the same); Dodge, *supra* note 7 at 1476–79 (arguing that the baseline for prescriptive jurisdiction is that states may not act in the absence of permissive rule, whereas the baseline for adjudicative jurisdiction is that states may act in the absence of a prohibitive rule).

[73]*Cf ILC Draft Conclusions*, *supra* note 70, Conclusion (1), commentary (6) (noting that "the draft conclusions do not deal in general terms with the question of a possible burden of proof of customary international law").

[74]Schreuer, *supra* note 6 at 5.

[75]Higgins, *supra* note 6 at 270.

[76]*Ibid* at 271.

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exceptions to the rule of immunity have to be justified. One starts from an assumption of non-immunity."[77] And Jennings has agreed with Sinclair.[78]

B. Establishing the baseline

As discussed above, the ICJ's decision in *Jurisdictional Immunities* does not decide which baseline is appropriate for determining rules of state immunity.[79] In that case, the court did not treat the characterization of Germany's acts as *acta jure imperii* as establishing a baseline of immunity. Instead, the court based the rule of immunity for the acts of armed forces during armed conflict on state practice and *opinio juris* specifically with respect to such acts. This is the way in which the court would proceed if the baseline were one of jurisdiction. But the court may have proceeded in this way because Italy invoked the territorial tort principle, which would have shifted any baseline of immunity to one of non-immunity. If the court wanted to avoid addressing the scope of the territorial tort principle, it had to proceed as it did. In the end, one can say that the *Jurisdictional Immunities* decision did not start from a baseline of immunity, but it is hard to draw more general conclusions about the baselines from the decision.

It is also difficult to establish the proper baseline for state immunity based on the structure of the international system. In *Jurisdictional Immunities*, the ICJ stated that state immunity "derives from the principle of sovereign equality of States, which … is one of the fundamental principles of the international legal order."[80] But, in the next breath, the court acknowledged the competing "principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory."[81] These are two different baselines that appear to conflict.

There is an even more fundamental problem with deriving a baseline of immuntity from the principle of sovereign equality. Certainly, sovereign equality is a basic principle of the modern international legal order,[82] but this principle by itself does not tell us what the rights are that states enjoy equally. States might enjoy equal immunity from suit in the courts of other states. States might also enjoy equal authority to exercise jurisdiction. When rights of immunity conflict with rights to exercise jurisdiction, the principle of sovereign equality does not tell us which should prevail. As Crawford once observed, "[t]he simple assertion, *par in parem non habit jurisdictionem*, which is said to underlie the principle of jurisdictional immunity, is

[77]Ian Sinclair, "The Law of Sovereign Immunity: Recent Developments" (1980) 167 Rec des Cours 113 at 215.

[78]Jennings, *supra* note 50 at 12 (quoting Sinclair, *supra* note 77 at 215). See also Lee M Caplan, "State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory" (2003) 97 Am J Intl L 741 at 744 ("as a fundamental matter, state immunity operates as an exception to the principle of adjudicatory jurisdiction"); Lorna McGregor, "Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty" (2007) 18 Eur J Intl L 903 at 912 (characterizing immunity as "an exception to the jurisdiction of the forum state").

[79]See text following note 43 above.

[80]*Jurisdictional Immunities*, *supra* note 2 at para 57.

[81]*Ibid.*

[82]See *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 (entered into force 24 October 1945), art 2(1) ("[t]he Organization is based on the principle of the sovereign equality of all its Members").

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question begging" for it does not answer "with respect to which issues … are States to be regarded as *pares*, equals."[83]

If a baseline for state immunity cannot be derived from the structure of the international system, then it must be based on state practice and *opinio juris*.[84] In earlier work, I have argued that different areas of customary international law may have different baselines and that those baselines depend on how states behave — that is, on whether states act as though international law requires a permissive rule or a prohibitive one.[85] In the area of prescriptive jurisdiction, for example, state practice reveals a baseline of prohibition, which means that states may not exercise jurisdiction to prescribe unless authorized by a permissive rule.[86] In the area of adjudicative jurisdiction, by contrast, state practice reveals a baseline of permission, which means that states may exercise jurisdiction to adjudicate unless forbidden by a prohibitive rule such as state immunity.[87] One must therefore examine state practice with respect to state immunity to decide whether the baseline in this area of customary international law is permissive (jurisdiction) or prohibitive (immunity).

It is sometimes asserted that the practice followed in drafting international conventions and domestic statutes of stating a general rule of immunity followed by exceptions indicates a baseline of immunity.[88] Certainly, this is state practice. But it not clear that such practice is accompanied by the *opinio juris* required for customary international law.[89] The practice may reflect drafting convenience rather than a sense of legal obligation. From a drafting perspective, it is easier to identify instances in which a foreign state should not be granted immunity than to identify all the instances in which it should. The practice is safer too. States generally do not violate international obligations by granting more immunity from suit than international law requires, but they may do so by granting less. Stating a general rule of immunity followed by exceptions helps ensure that state immunity laws stay well within what international law requires. This drafting practice "is just a matter of legislative convenience," Schreuer notes, and "[n]o inferences should be drawn from this technique as to the existence of a general rule of international law requiring immunity."[90]

In determining the proper baseline for state immunity, it may be more productive to examine the practice of states adopting the restrictive theory. As described in the next section, countries adopting the restrictive theory during the twentieth century

[83]Crawford, *supra* note 48 at 77.

[84]See *ibid* at 85–86 (distinguishing between "structural" rules and "positive" rules).

[85]See Dodge, *supra* note 7 at 1476–79.

[86]*Restatement (Fourth) of the Foreign Relations Law of the United States* § 407 (2018) [*Restatement (Fourth)*] (noting that "states typically justify and critique exercises of prescriptive jurisdiction based on whether an accepted basis for such jurisdiction exists").

[87]Dodge, *supra* note 7 at 1477–79.

[88]See e.g. Xiaodong Yang, *State Immunity in International Law* (Cambridge: Cambridge University Press, 2012) at 38 ("[s]uch a uniform pattern of general immunity qualified by particular exceptions can only mean one thing, namely, that the starting premise is always that a foreign State is presumed immune unless and until proven otherwise").

[89]*Jurisdictional Immunities*, *supra* note 2 at para 55 (noting that state practice "not accompanied by the requisite *opinio juris* … sheds no light upon" customary international law).

[90]Schreuer, *supra* note 6 at 7; see also Jennings, *supra* note 50 at 18 (noting that this "is a method appropriate to municipal legislation" which "is not concerned to lay down the international law rule of immunity").

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did not consider themselves to be violating customary international law — and were not seen by others to be doing so — even when the restrictive theory represented a distinctly minority position. This practice is consistent only with a baseline of jurisdiction.

C. Evidence from adoption of the restrictive theory

Pierre-Hugues Verdier and Erik Voeten have compiled a table listing adoptions of the restrictive theory from 1886 until 2010.[91] According to their compilation, the early adopters of the restrictive theory were Italy (1886), Belgium (1903), Switzerland (1918), Egypt (1920), and Greece (1928). The Netherlands joined the club in 1947, and the United States did so in 1952. In other words, when the United States adopted the restrictive theory in 1952, only six other countries had done the same, out of a total of seventy-seven countries around the world.[92] Six out of seventy-seven hardly seems like a general and consistent practice of states.

Acting Legal Adviser Jack Tate claimed greater support for the restrictive theory when he wrote the Justice Department to report the US State Department's change in practice.[93] Tate additionally counted France, Romania, Peru, "and possibly Denmark" in the restrictive camp, although he put the Netherlands in the absolute camp.[94] These adjustments bring the number of countries supposedly in the restrictive camp to nine. Against these, Tate listed sixteen countries adhering to the absolute theory: the British Commonwealth, Czechoslovakia, Estonia, Poland, Brazil, Chile, China, Hungary, Japan, Luxembourg, Norway, Portugal, the Netherlands, Sweden, Argentina, and Germany.[95] He also mentioned later in his letter that there was support "on the part of the Soviet Union and its satellites for continued full acceptance of the absolute theory of sovereign immunity."[96] Tate made no claim that there was, in 1952, a general and consistent practice of states adopting the restrictive theory. Rather, he noted "the existence of two conflicting concepts of sovereign immunity, each widely held and firmly established."[97] Tate treated the decision as a policy choice, announcing that "it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity."[98]

The United States did not consider that it was violating customary international law when it adopted the restrictive theory in 1952. Neither did the United Kingdom in 1978, or Canada in 1985, when each of them enacted their respective *State*

[91]Pierre-Hugues Verdier & Erik Voeten, "How Does Customary International Law Change? The Case of State Immunity" (2015) 59 Intl Studies Q 209 at 220.

[92]For the number of countries, I have used figures from the Correlates of War dataset available at <correlatesofwar.org/data-sets/state-system-membership/> because those are the figures on which Verdier and Voeten relied. The figures are accessible in graphic form at the *Our World in Data* website, online: <ourworldindata.org/grapher/number-of-countries>.

[93]Tate Letter, *supra* note 9.

[94]*Ibid.*

[95]The letter states that thirteen countries supported the absolute theory, but I count sixteen in this list.

[96]Tate Letter, *supra* note 9.

[97]*Ibid.*

[98]*Ibid.*

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Immunity Acts.[99] Nor does it appear that other countries protested that the United States, the United Kingdom, or Canada were violating customary international law by adopting the restrictive theory.[100] Yet, at each point in time, the restrictive theory seems to have been very much a minority position. The United States was the seventh country to adopt the restrictive theory in 1952 when there were seventy-seven countries in the world; the United Kingdom was the nineteenth in 1978 when there were 154 countries; and Canada was the thirty-first in 1985 when there were 161 countries.

For present purposes, it does not matter how broadly or narrowly one defines the restrictive theory that these states adopted. The critical point is that each state began to allow claims against foreign states in a way that was inconsistent with the prevailing absolute theory of state immunity, without a general and consistent practice of states supporting an exception to the absolute theory. And yet these states did not consider themselves to be violating customary international law, which they would necessarily have been doing if a general and consistent practice of states were required to establish exceptions to state immunity.

Evidence from the transition to the restrictive theory appears inconsistent with a baseline of immunity. With such a baseline, there would have to be a general and consistent practice of states to create exceptions allowing the exercise of jurisdiction with respect to non-sovereign acts. No such practice existed until the final decades of the twentieth century at the earliest. Even as of 2010, according to Verdier and Voeten, forty-five countries out of the 121 for which they could find data still adhered to the absolute theory.[101] Evidence from the transition to the restrictive theory is consistent, however, with a baseline of jurisdiction. With such a baseline, as soon as there was no longer a general and consistent practice of state supporting the absolute theory, customary international law no longer required it. At that point, the decision to adopt the restrictive theory or absolute theory became a policy choice, which is precisely how countries from the United States onward treated it.

D. Implications for Canada's terrorism exception

If, as argued above, the proper baseline is jurisdiction, then states are not entitled to immunity from jurisdiction with respect to acts of terrorism and support of terrorism unless such immunity is backed by a general and consistent practice of states granting such immunity, accompanied by *opinio juris*. Such state practice does not exist for

[99]Verdier and Voeten report dates for adoption of the restrictive theory of 1977 for the United Kingdom and 1982 for Canada. Verdier & Voeten, *supra* note 91 at 220. I have chosen to use the dates that these countries adopted their *State Immunity Acts* instead and have adjusted the numbers accordingly.

[100]Hersch Lauterpacht reported in 1951 that "[t]here were no persistent protests when Italian and Belgian courts and the Mixed Courts of Egypt paved the way in assuming jurisdiction over foreign states in matters *jure gestionis*; when the courts of many countries followed suit; or even when courts of some countries went to the length of assuming jurisdiction in the matter of execution." Hersch Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States" (1951) 28 Brit YB Intl L 220 at 227–28.

[101]Verdier & Voeten, *supra* note 91 at 220. Some important countries on this list have since changed their positions. Russia adopted the restrictive theory in 2016 when the *Federal Law on Jurisdictional Immunities of Foreign States and the Property of Foreign States in the Russian Federation* (Russ), No 297-FZ (2015), went into force. China adopted the restrictive theory in 2024 when the *China FSIL*, *supra* note 53, went into force. For analysis of the latter, see William S Dodge, "China's Foreign State Immunity Law: A View from the United States" (2024) 1 Chinese J Transnational L 137.

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terrorism. It may be instructive to compare the state practice that the ICJ in *Jurisdictional Immunities* found sufficient to establish immunity from suit with respect to the activities of armed forces to state practice with respect to terrorism.[102] In *Jurisdictional Immunities*, the court first examined the provisions of the *European Convention on State Immunity* and the *UN Convention*, while noting that they were "relevant only in so far as their provisions and the process of their adoption and implementation shed light on the content of customary international law."[103] Although neither of these conventions includes an exception for acts of terrorism, it is clear that their listing of certain exceptions to immunity does not preclude recognition of other exceptions under customary international law. The International Law Commission's commentary on the *Draft Articles Jurisdictional Immunities of States and Their Properties* that ultimately became the *UN Convention* "considered that any immunity or exception to immunity accorded under the present articles would have no effect on general international law and would not prejudice the future development of State practice."[104]

Turning to national legislation, in *Jurisdictional Immunities*, the ICJ found that two of the nine states that had adopted a territorial tort exception expressly excluded the acts of foreign armed forces from that exception.[105] By comparison, none of the fourteen states that have now adopted state immunity acts have expressly granted immunity for acts of terrorism, while two — Canada and the United States — have expressly denied immunity for such acts.[106] State practice in the form of court decisions also looks different. In *Jurisdictional Immunities*, the ICJ noted that courts in eight countries had held that the acts of armed forces in armed conflict were immune from suit, whereas only one country (Italy) maintained the opposite position.[107] In the terrorism context, there are many decisions from the United States holding that Iran and other states are not immune from suits based on acts of terrorism.[108] The Canadian courts have held the same.[109] Additionally, Italy's Court of Cassation has held that US terrorism judgments are enforceable in Italy, reasoning that the immunity of a foreign state does not extend to sovereign offences (*delicta*

[102]Recall that the ICJ started from a baseline of non-immunity in that case, although its reason for doing so may be debated. See text following note 43 above.

[103]*Jurisdictional Immunities*, *supra* note 2 at para 66; *European Convention on State Immunity*, 16 May 1972, ETS 74 (entered into force 11 June 1976); *UN Convention*, *supra* note 56.

[104]International Law Commission, "Draft Articles on Jurisdictional Immunities of States and Their Properties," UN Doc A/46/10 (1991) at 23, para 3. See also Rosanne van Alebeek, "Part III: Proceedings in Which State Immunity Cannot Be Invoked" in Roger O'Keefe & Christian J Tams, eds, *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford: Oxford University Press, 2013) 157 (noting that the convention's listing of certain exceptions "does not mean, obviously, that other such exceptions may not in principle exist as a matter of customary international law and be relied on in proceedings to which the Convention does not apply"). The *Restatement (Fourth)* observes that the *UN Convention*, *supra* note 56, "neither endorses nor precludes the removal of immunity for acts of state sponsored terrorism." *Restatement (Fourth)*, *supra* note 86.

[105]*Jurisdictional Immunities*, *supra* note 2 at para 71.

[106]*SIA*, *supra* note 1 at para 6.1; *FSIA*, *supra* note 23 § 1605A (state-sponsors of terrorism); § 1605B (international terrorism in the United States).

[107]*Jurisdictional Immunities*, *supra* note 2 at para 73.

[108]See e.g. *Leibovitch v Islamic Republic of Iran*, 697 F(3d) 561 (7th Cir 2012); *Rux v Republic of Sudan*, 461 F (3d) 461 (4th Cir 2006); *Kilburn v Socialist People's Libyan Arab Jamahiriya*, 376 F(3d) 1123 (DC Cir 2004).

[109]See *Smith*, *supra* note 19; *Zarei*, *supra* note 19.

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imperii).[110] On the other side of the ledger, France's Court of Cassation has held that US terrorism judgments are not enforceable in France because of state immunity.[111] A Luxembourg district court has similarly denied recognition of a US terrorism judgment,[112] although that decision has been appealed. And the UK courts have concluded that state sponsored terrorism is a governmental act in the course of applying the United Kingdom's *State Immunity Act*.[113]

For terrorism, in short, there is nothing like the consistent state practice and *opinio juris* that the ICJ in *Jurisdictional Immunities* found supporting the immunity of armed forced during armed conflict. Although some state practice supports immunity for terrorism, other state practice denies it. In the absence of general and consistent state practice granting immunity for terrorism accompanied by *opinio juris*, Canada's terrorism exception cannot be said to violate customary international law.

5. Conclusion

This article has outlined two arguments that Canada may make to defend the consistency of its terrorism exception with customary international law. The arguments are independent, and acceptance of either one would mean that Canada's terrorism exception is consistent with customary international law. The argument that terrorism and support for terrorism are not sovereign acts is the more straightforward and may, for that reason, be more appealing. But the argument about the proper baseline for analysis is fundamental to a proper understanding of customary international law in this area and to a proper understanding of customary international law more generally. Other authors have flagged the question in the past, and many of them have opined that the proper baseline for immunity is jurisdiction, including Higgins, Jennings, and Sinclair.[114] But such opinions have generally been given in passing and without sustained analysis. I hope that the analysis offered here may help explain why that opinion is correct.

[110]Cass Civile sez un (Italy), No 39391 (10 December 2021), online: <sentenze.laleggepertutti.it/sentenza/cassazione-civile-n-39391-del-10-12-2021>. See also Donato Greco, "Italy and the Enforcement of Foreign Judgments on Third States' Tort Liability for Sponsoring Terrorism" (2022) 2 Italian Rev Intl & Comparative L 123 (English translation and commentary).

[111]Cour de cassation 1e civ (France), No 21-19.766 (28 June 2023), online: <www.dalloz.fr/documentation/Document?id=CASS_LIEUVIDE_2023-06-28_2119766>.

[112]Tribunal d'arrondissement (Luxembourg), No 177266 (27 March 2019), online: <www.stradalex.lu/fr/slu_src_publ_jur_lux/document/tal_lu_20190327-talux1-177266a>.

[113]*SIA* UK, *supra* note 10; *Estate of Heiser v Islamic Republic of Iran*, [2019] EWHC 2074 at para 184 (denying enforcement of US terrorism judgments); *Hashwah*, *supra* note 60 at para 28 (dismissing claims based on state-sponsored terrorism). One should note that, in each case, the court reach its conclusion in the course of applying the *SIA* UK, which contains no terrorism exeption.

[114]See Higgins, *supra* note 6 at 270 ("[i]t is sovereign immunity which is the exception to jurisdiction and not jurisdiction which is the exception to a basic rule of immunity"); Sinclair, *supra* note 77 at 215 ("one does not start from and assumption that immunity is the norm, and that exceptions to the rule of immunity have to be justified. One starts from an assumption of non-immunity"); Jennings, *supra* note 50 at 12 (quoting Sinclair).

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