TOPIC 7: Foreign State Immunity (PROBLEM QUESTIONS)

PRINCIPLE OF IMMUNITY

GENERALLY

- Even when there is valid exercise of jurisdiction, int'l law may accord immunity to the defendant over whom civil or criminal jurisdiction is exercised. Immunity is a *procedural* bar to exercise of jurisdiction (i.e. doesn't mean there's no jurisdiction but relevant defendant is immune from its exercise)
    - Immunity usually arises when a domestic court is asked to refrain from exercising jurisdiction in a particular case, as one party is a foreign state or government schooner exchange

Rationale

- Rationale for doctrine: derives from principle that states are legal equals and independent from one another, *par in parem non habet jurisdictionem* jurisdictional immunities of the state
- Under absolute approach to sovereign immunity, a foreign state can never be subject to the jurisdiction of national courts of another state Parlement Belge (commercial cargo but Belgian King case)

DRAFT RESPONSE STRUCTURE FOR TOPIC 7

1) Note: Must establish jurisdiction before dealing with immunity
2) CIVIL OR CRIMINAL?
    - Civil: FSIA applies
    - Criminal: *see below*
3) OFFICIAL OR PRIVATE ACT?
4) CURRENT/FORMER ROLE? WHEN WAS ACT CARRIED OUT?
5) EXCEPTIONS?

THE STATE

Traditionally, immunity for the state was complete, state had immunity from proceedings in a foreign state and no exceptions applied. Now most states follow restrictive immunity. According to principle of restrictive immunity, states are entitled to immunity in foreign courts if the acts or property in question were committed for purely public of governmental purposes (*acta jure imperii) (*FSIA s9) but not if they related to matters of a commercial nature (*acta jure gestionis)* as per s11 of the FSIA . Thus only governmental acts would be immune (Holland v lampen-wolfe)

DETERMINING WHETHER STATE ACT IS OFFICIAL (PUBLIC) OR PRIVATE (COMMERCIAL)

Commercial transactions

- UN Convention on Jurisdictional Immunities of States and their Property 2004 (not yet enforced) Art 2(1)(c): **defines commercial transaction**
    - 'any contract or transaction for sale of goods or supply of services'
    - Loan/transaction 'financial nature..including any obgliation of guarantee or of indemnity'
    - 'commercial, industrial, trading or professional nature' but not including employment contracts
- 'government functions'
    - **Trendtex:** key questions in case were whether Central Nank of Nigeria under 'governmental control' and exercised 'governmental functions'
    - determinations made under UK law, but with regard to law were body was incorporated (Nigeria) subject to UK statute
    - Intrinsic nature of act: UK adopted 'nature' test, act was of commercial nature, was a commercial transaction being of a private character, bank therefore had no immunity
- Debate about whether test is nature of act or purpose, caselaw trend seems to be nature of act
- **Test: Nature of transaction** Empire of Iran
    - Determining distinction between acts jure imperri (public acts) and jure gestionis (i.e. commercial acts of the state), distinction cannot merely be drawn 'according to the purpose of the state transaction'
    - [80]In determining distinction, court looked to "nature of the state transaction or the resulting legal relationships, and not to the motive or purpose of the state activity"
    - [81]: "whether a state is entitled to immunity does not depend on purpose of function which foreign State is thereby pursuing…"

CIVIL (i.e. brought by individual)	
A) REPRESENTATIVE/PUBLIC CAPACITY	**Both current + former HoS** - enjoy ordinary principles of foreign state immunity (FISA, s9) provided no s10-21 exceptions apply - While in office, HoS entitlted to same immunity as diplomat VCDR Art 36, immunity for both civil + criminal liability, Includes immunity from arrest (Art 29) -
B) IN PERSONAL/PRIVATE CAPACITY	**Current HoS** - Even if not acting in official capacity, current HoS conferred same immunity as head of a diplomatic mission, and (subject to s10-21 exceptions) is completely immune from Australian civil jurisdiction VCDR Art 31, FSIA s36, Includes immunity fom arrest (Art 29) - Thor Shipping v Al Dulhail 2008: Amir, even though acting in a private (as distinct from public) capacity, was entitled to same jurisdictional immunity as head of a diplomatic mission, and no VCDR Art 31 exceptions applied **Former HoS** - After official functions end, personal immunity ceases. So only entitled to functional immunity with respect to acts performed in the exercise of official functions during their role VCDR Art 39(2), FSIA S36 - So former head of state/diplomatic agent retains immunity *ratione materiae* in respect of acts performed in exercise of official functions (i.e. ONLY official acts performed during role) Arrest Warrant (i.e. is liable for civil acts committed in personal capacity)

CRIMINAL(i.e. brought by state)	
C) REPRESENTATIVE/PUBLIC CAPACITY	**Current HoS** - enjoy ordinary principles of foreign state immunity (FISA, s9) provided no s10-21 exceptions apply - Additionally, while in office, HoS entitlted to same immunity as diplomat VCDR Art 36, immunity for both civil + criminal liability, Includes immunity fom arrest (Art 29) - i.e. complete personal immunity from criminal proceedings arrest warrant **Former HoS:** - Any person who, in performing act of state, commits a criminal offence, is immune from prosecution. - Immunity subsists as immunity *ratione materiae:* immunity in relation to his official acts done while he was an official - Eg: Pinochet (No 3), for murder and conspiracy to murder, ordinary rules of immunity apply - But is torture an official act? *See below 'jus cogens'*
D) IN PERSONAL/PRIVATE CAPACITY	**Current HoS** - enjoy ordinary principles of foreign state immunity (FISA, s9) provided no s10-21 exceptions apply - Additionally, while in office, HoS entitled to same immunity as diplomat VCDR Art 36, immunity for both civil + criminal liability regardless of whether act is within role - i.e. complete personal immunity from criminal proceedings arrest warrant

TOPIC 7: ESSAY QUESTIONS

Advantages of foreign state immunity

- "basic principle of int'l law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state…" Lord Browne-Wilkinson in **R v Bow Street**
- Immunity does not mean impunity **arrest warrant,** immunity before domestic courts doesn't mean that wrongful act will go unpunished
- Immunity is domestic not int'l, won't prevent victim states to take offending state before int'l body and argue state committed wrongful act

Disadvantages of foreign state immunity

- "exceptions to the immunity of the state 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." **Jurisdictional Immunities**
- Even in int'l context, if victim state takes offender state before int'l body such as ICJ, states must accept jurisdiction of ICJ, another procedural bar
- One of oldest principles of CIL, but extent and application still unclear

SHOULD FOREIGN STATE IMMUNITY BE ABOLISHED

The notion of foreign state immunity (FSI) is derived from idea that all sovereign states are equal. Often expressed by the maxim "par in parem non habet imperium', the doctrine of foreign state immunity bars domestic courts from adjudicating disputes involving another state. Its rationale is not to protect states from consequences of breaches of int'l law, but rather prevent courts of one state assessing legality of acts of a foreign state, acting as a procedural bar.

This essay endeavours to contend that while FSI was created to protect the dignity and sovereignty of foreign states, it has become a convoluted and fragmented doctrine. It not only infringes on the principle of territorial sovereignty, but in lacking consistency and clarity, is rendered almost redundant and should thus be abolished.

Yes should be abolished

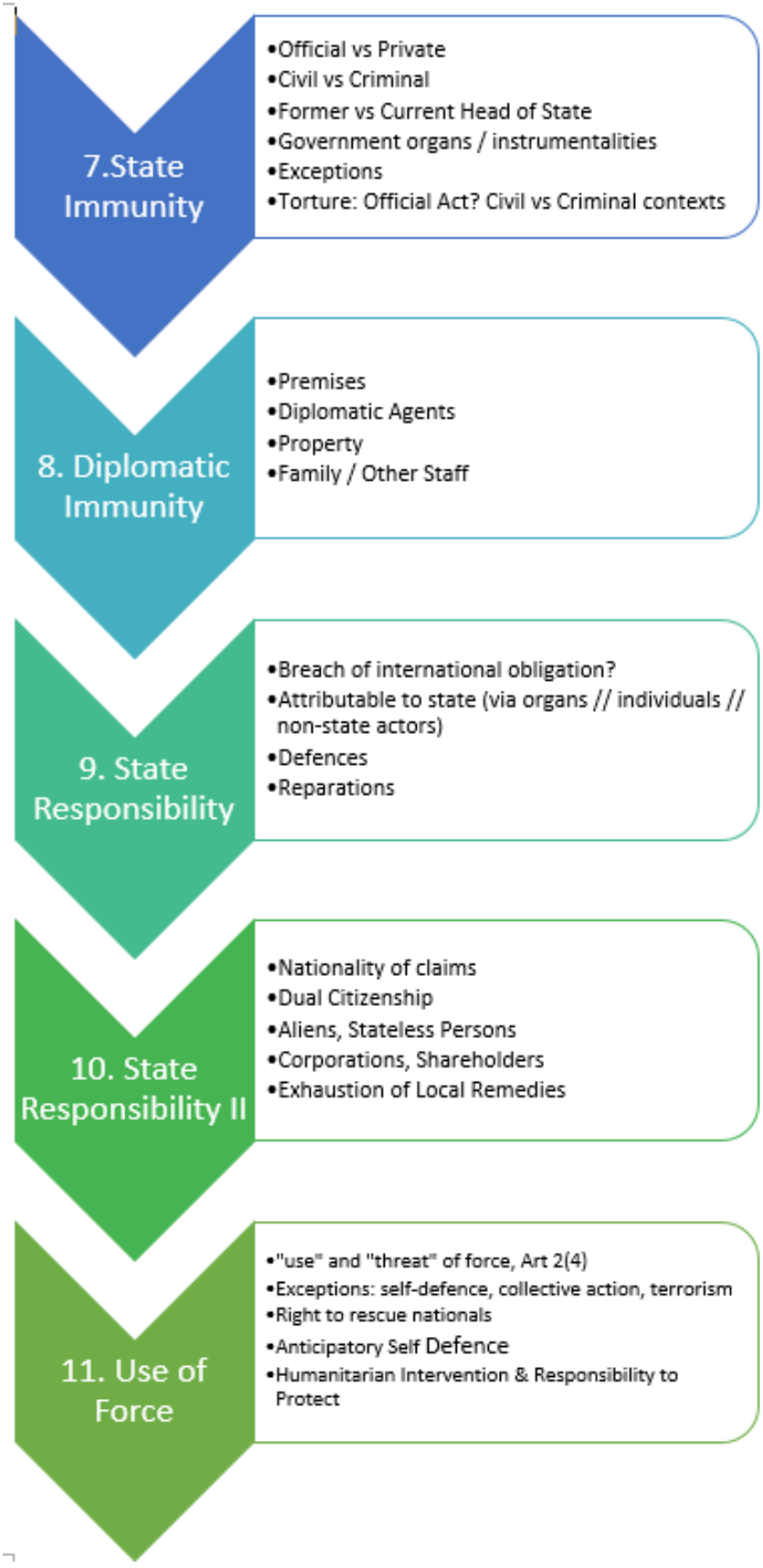
1. 'fragmented position' in int'l law

- "basic principle of int'l law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state…" Lord Browne-Wilkinson in **R v Bow Street**
- While principle of sovereign equality of states has always been core of int'l law, this principle doesn't necessarily warrant that a state can never exercise jurisdiction over the activities of another state
- Always been dispute as to whether to utilise absolute approach or whether FSI is restrictive
- Timing in which adoption of restrictive immunity also differs: European states applied it early 1900s, whereas US and UK 1950s
- Even in more modern context: DRC v FG: PRC never recognised commercial exception or distinction to absolute immunity. Opinion of HK court after handover was, as matter of domestic constitutional law, absolute immunity upheld without commercial exception
- Some argue that the principle is an "essentially insignificant problem which has tended to infuse an element of artificiality into int'l law" (Hersch Lauterpacht, The Problem of Jurisdictional Immunities of Foreign States, 1951, 28 British Yearbook of Int'l Law 220)

2. No consistency,

- Immunity exists for state officials carrying out acts of torture for criminal proceedings, but not civil
    - dissenting opinion of Judge Kalaydjieva in jones v UK: endorsing parallel systems of state immunity for state officials: no immunity in relation to criminal proceedings for acts of torture Pinochet (No 3), but immunity in relation to civil proceedings against hem for same acts (which are analysed as acts of the state) jones v Saudi arabia

REVIEW DIAGRAMS: OVERVIEW OF TOPICS (FOR FINAL EXAM)



PRACTICE PROBLEM QUESTION 1

QUESTION

- refer to 'jurisdiction' problem question in unit outline

SCAFFOLD ANSWER

- Jurisdiction can be exercised over individuals + other entities
- Concurrent jurisdiction can be exercised
  - Would then be dependent on negotiating countries (dixon)
- Extradition
  - No CIL basis to assert right to extradition
  - Thus has to be treaty based
- Piracy
  - Traditionally: original basis for assertion of universality, historically evolved due to concern
  - Definition can be altered: both passengers on vessel + from outside
  - Piracy is jus cogens norm
- Double nationality
- Nationality or residency
  - (*on facts of prob Q)* If residency is also regarded as a basis of nationality, it can be relied upon

ANTIC

- **Territory basis**: yes. effects clearly felt (Objective territory basis **ward v r)**
  - *Define the terms in problem question*
  - Subjective territory is _____
  - Objective territory is when act is completed in relevant jurisdiction
- Legislative basis: Internet Act mentioned
- Nationality:
  - Charlie: not Antican national (but if residency was included, could be (known as domicile))
  - Alice: not national.
  - Rollo: yes national.
- **Passive personality**: looks at victims/survivor's nationality

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