

7. STATE IMMUNITY Foreign States Immunities Act 1985 (Cth) (FSIA) UN Convention 2004 Germany v Italy [2012]	
FRAMEWORK	Step 1: Is the defendant a state, agency, or official (FSIA s 3(3))? Step 2: Apply restrictive immunity : classify act as jure imperii (sovereign: immune) or jure gestionis (commercial: not immune). Nature test, not purpose test. Step 3: Does a FSIA statutory exception apply? Step 4: For officials: personal (ratione personae) vs functional (ratione materiae) immunity. Step 5: Immunity from execution (separate analysis).
ABSOLUTE vs RESTRICTIVE IMMUNITY	
Absolute immunity (classical)	<i>The Schooner Exchange v McFaddon</i> (US SC, 1812): no state can be subjected to another's jurisdiction without consent. Few states follow absolute immunity today (China adopted restrictive approach 2024).
Restrictive immunity (modern dominant)	Sovereign/governmental acts (acta jure imperii): immune. Commercial/private acts (acta jure gestionis): not immune. Codified in FSIA 1985 (Cth); UN Convention 2004; UK SIA 1978; US FSIA 1976. CIL confirmed: <i>Germany v Italy</i> [2012] ICJ Rep 99.
Nature test	<i>I Congreso del Partido</i> [1983] 1 AC 244: look to nature of the act , not its purpose or motive. Would a private person be able to perform the act? <i>Kuwait Airways Corp v Iraqi Airways</i> [1995]: governmental act = one that by its own character could only be done by a state.
FSIA 1985 (Cth) FRAMEWORK	
FSIA s 9	General presumption of immunity from jurisdiction of Australian courts.
FSIA s 3(3)	'Foreign state' includes: (b) head of state in public capacity; (c) executive government and its officers and agencies acting in that capacity.
FSIA s 36	Serving head of state entitled to privileges and immunities of head of a diplomatic mission (equivalent to full personal immunity in civil and criminal proceedings).
EXCEPTIONS TO IMMUNITY (FSIA)	
s 10: Waiver	Express or implied waiver (submission to jurisdiction). Waiver of adjudicative immunity does NOT extend to execution; separate waiver required (FSIA s 31; UN Convention Art 20).
s 11: Commercial transaction	No immunity where proceedings concern a commercial transaction . <i>ACCC v PT Garuda</i> [2012] HCA 33: airline cartel conduct = commercial transaction; no immunity even though claim not in private-law form.
s 12: Employment	No immunity for certain contracts of employment, subject to carve-outs for official or governmental functions.
s 13: Local torts	No immunity for personal injury, death, or damage to tangible property occurring in Australia ('territorial tort exception'). UN Convention Art 12: same rule.
Other exceptions	s 14 : immovable property in Australia. s 15 : IP. s 16 : membership of bodies corporate. s 17 : arbitration agreements. s 18 : commercial ships. s 20 : taxation.
AGENCIES AND INSTRUMENTALITIES	
FSIA s 22 / Separate entity	Test : agency or instrumentality has immunity only to the extent it performs sovereign acts . <i>Trendtex v Central Bank of Nigeria</i> [1977] QB 529: bank had separate personality, engaged in ordinary banking, no immunity. <i>ACCC v PT Garuda</i> : airline's cartel conduct commercial.
PERSONAL AND FUNCTIONAL IMMUNITY OF OFFICIALS	
Ratione personae (incumbent)	Incumbent Heads of State, Heads of Government, and Foreign Ministers (the Troika) enjoy full personal immunity from foreign criminal and civil jurisdiction: <i>Arrest Warrant</i> [2002]. Covers all acts , official and private. Ceases when official leaves office.
Ratione materiae (functional)	All state officials (including former Troika) retain functional immunity for official acts performed while in office. Attaches to the act; endures after leaving office. To sue the official is effectively to sue the state.
Torture exception (Pinochet)	<i>Pinochet (No 3)</i> [2000]: where all relevant states are parties to CAT, state torture committed while in office is NOT an 'official function'; no functional immunity in criminal proceedings . Scope uncertain: may be limited to torture under CAT; possibly confined to CAT parties.
Australia (Zhang v Zemin)	<i>Zhang v Zemin</i> (2010) 243 FLR 299 (NSWCA): FSIA s 3(3)(c) extends immunity to former officials for acts done in official capacity. Former officials have no immunity for acts performed in a personal capacity. Tracks CIL distinction.
JUS COGENS AND STATE IMMUNITY	
No jus cogens exception	<i>Germany v Italy (Greece intervening)</i> [2012] ICJ Rep 99: no jus cogens exception to state immunity in civil proceedings, including for gross IHL violations. Immunity

is **procedural**; jus cogens is **substantive**; they operate on different planes and do not conflict. Italy must remedy the situation. Confirmed: *Jones et al v UK* (ECtHR, 2014): compatible with ECHR Art 6.

IMMUNITY FROM EXECUTION

UN Convention Art 19 / FSIA Part IV No post-judgment enforcement unless: (1) state expressly consented; (2) state earmarked property; (3) property is specifically in non-governmental use, in the forum state, and connected to the claim. Protected categories: military property; central bank assets; diplomatic mission property; cultural heritage.

NOTE: The most common error is arguing jus cogens displaces immunity. *Germany v Italy* says it does NOT for civil proceedings. The narrow exception is Pinochet (No 3) for criminal proceedings under CAT. Flag both arguments, then apply *Germany v Italy* for civil, *Pinochet* for criminal torture only.

KEY CASES

Case	Result	Key Principle
<i>Jurisdictional Immunities (Germany v Italy)</i> [2012] ICJ Rep 99	Italy wrong; immunity applies	No jus cogens exception to state immunity in civil cases; immunity procedural; not displaced by substantive prohibition; even for IHL violations.
<i>Arrest Warrant (DRC v Belgium)</i> [2002] ICJ Rep 3	Belgium violated immunity	Incumbent Foreign Minister has full personal immunity (ratione personae); 'immunity is not impunity'; four ways immunity may be overcome (own state; third state after leaving office; sending state waiver; international tribunal).
<i>Pinochet (No 3)</i> [2000] 1 AC 147	No functional immunity	Former head of state: ratione personae lost on leaving office; state torture under CAT not 'official function'; no functional immunity for torture in criminal proceedings where all states parties to CAT.
<i>ACCC v PT Garuda Indonesia</i> [2012] 247 CLR 240	No immunity	Cartel conduct is commercial transaction; FSIA s 11 exception applies; commercial character not affected by state ownership of airline.
<i>I Congreso del Partido</i> [1983] 1 AC 244	No immunity	Nature-of-act test controls; whole context of claim assessed; commercially-motivated political act does not restore immunity.
<i>Trendtex Trading v Central Bank of Nigeria</i> [1977] QB 529	No immunity	Separate entity test: bank had separate personality; ordinary commercial banking not sovereign authority.
<i>Zhang v Zemin</i> (2010) 243 FLR 299 (NSWCA)	Immunity granted	FSIA extends to former officials for acts in official capacity; no immunity for personal-capacity acts; ratione materiae tracked.

11. USE OF FORCE UN Charter Arts 2(4), 39-42, 51 UNGA Res 2625 (1970), 3314 (1974) Nicaragua v US Armed Activities	
FRAMEWORK	Step 1: Prima facie breach of Art 2(4) . Step 2: Self-defence (Art 51) : (a) armed attack; (b) necessity; (c) proportionality; (d) reporting to SC. Step 3: SC Chapter VII authorisation . Step 4: Anticipatory/pre-emptive self-defence; self-defence against non-state actors; collective self-defence. Step 5: Humanitarian intervention (unlawful absent SC); R2P (SC-channelled only). Step 6: Link to state responsibility if unlawful.
STEP 1: PRIMA FACIE BREACH OF Art 2(4)	
Art 2(4) prohibition	UN Charter Art 2(4) : refrain from the threat or use of force against territorial integrity or political independence of any state, or in any other manner inconsistent with UN purposes. Also a rule of CIL (<i>Nicaragua</i> [188]; <i>Armed Activities</i> [148]: 'cornerstone of the UN Charter').
Related CIL instruments	UNGA Res 2625 (XXV) (1970) : prohibits organising/encouraging irregular forces for incursion into another state. UNGA Res 3314 (XXIX) (1974) : Definition of Aggression; enumerates acts (invasion, bombardment, blockade, sending armed bands). UNGA Res 42/22 (1987) : Non-Use of Force.
Indirect force	<i>Nicaragua</i> [195]: financing, training and arming contras = prohibited use of force (though not itself an armed attack). <i>Armed Activities</i> [161]-[165]: active military, logistic, economic or financial support to armed groups = use of force; mere supply of funds alone may be insufficient (<i>Nicaragua</i> [228]).
Threats	<i>Nuclear Weapons AO</i> [47]: threat is unlawful if the threatened act, carried out, would itself be unlawful. Military manoeuvres near border alone are not threats without a signalled intent (<i>Nicaragua</i> [227]).
Scope of 'force'	Armed force: clearly prohibited. Economic/political coercion: generally NOT force. Cyber operations: force if causing physical damage comparable to kinetic attack ('kinetic equivalence'); lesser interference may raise non-intervention issues. Exam trap: not all coercion = use of force under Art 2(4).
STEP 2: SELF-DEFENCE (Art 51)	
Art 51 text	UN Charter Art 51 : 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.' 'Inherent right' imports CIL rules (<i>Nicaragua</i> [94]).
(a) Armed attack	<i>Nicaragua</i> [191]-[195]: armed attack is most grave form of use of force; distinguished from 'mere frontier incidents.' Scale and effects test. Examples: invasion, bombardment, missile attacks, mining, sending armed bands of gravity comparable to regular-forces attacks. <i>Armed Activities</i> [110]: territorial incursions taking towns = armed attack. <i>Oil Platforms</i> [64]: individual incidents may accumulate to constitute armed attack; attacks must be aimed specifically at claiming state.
(b) Necessity	No peaceful alternative available. <i>Oil Platforms</i> [76]: US failed necessity; diplomatic alternatives not exhausted. Caroline (1841): necessity 'instant, overwhelming, leaving no choice of means, no moment for deliberation.'
(c) Proportionality	Response must be proportional to the armed attack and to the purpose of repelling it. <i>Armed Activities</i> [147]-[304]: Uganda's attacks on airports and towns far from border were disproportionate. Not punitive or retaliatory; self-defence is forward-looking.
(d) Reporting to SC	Art 51 : immediate reporting required. Failure is evidentiary: <i>Nicaragua</i> [200]-[237]: US failure to report treated as evidence it did not in fact rely on self-defence.
STEP 3: ANTICIPATORY AND PRE-EMPTIVE SELF-DEFENCE	
Anticipatory	Narrow view : Art 51 requires armed attack to have 'occurred'; anticipatory SD unlawful. Broad view : 'inherent right' imports pre-Charter CIL allowing response to imminent attack (Caroline). ICJ expressly reserved opinion (<i>Nicaragua</i> [194]; <i>Armed Activities</i> [143]). Emerging consensus: anticipatory accepted if imminence is genuine.
Pre-emptive (preventive)	Response to non-imminent future attack. Widely rejected . Israeli Osirak raid (1981) condemned by SC Res 487. US 2002 National Security Strategy: pre-emption (controversially). Not recognised as CIL.
Australia's position	AG 2017: anticipatory SD available 'when the attacker is clearly committed to launching an armed attack, in circumstances where the victim will lose its last opportunity to effectively defend itself.'
STEP 4: SELF-DEFENCE AGAINST NON-STATE ACTORS	
ICJ controversy	<i>Israeli Wall AO</i> [139]: Art 51 requires armed attack 'by one State against another State' (controversial; separate opinions of Higgins, Kooijmans, Buergenthal questioned this). <i>Armed Activities</i> [147]: ICJ expressly reserved position on self-defence against non-state actors.
Post-9/11 practice	SC Res 1368 and 1373 (2001) : affirmed 'inherent right of self-defence' without attributing 9/11 attacks to a state; acknowledged US action in Afghanistan. 'Unwilling or unable' doctrine : victim state may use force against non-state actors if host state is unwilling or unable to suppress them. Supported by US, UK, Australian

practice; controversial; not judicially settled.

STEP 5: COLLECTIVE SELF-DEFENCE

Requirements (CIL) *Nicaragua* [195]-[199]: additional CIL requirements: (1) victim state must **declare itself victim** of an armed attack; (2) victim must **request assistance**; (3) reporting to SC. US failed all three requirements for collective SD on behalf of El Salvador.

STEP 6: SC CHAPTER VII AUTHORISATION

Arts 39-42 **Art 39:** SC determines existence of threat to the peace, breach of the peace, or act of aggression. 'Threat to the peace' most flexible: terrorism, WMD, gross HR violations, chemical weapons use. **Art 40:** provisional measures. **Art 41:** non-forcible measures (sanctions, arms embargoes, travel bans, asset freezes). **Art 42:** forcible measures. SC authorises member states in practice.

Art 103 and compliance **Charter Art 25:** binding on all members. **Charter Art 103:** Charter obligations prevail over obligations under any other agreement. *Lockerbie*: SC Chapter VII decisions prevailed over Libya's asserted treaty rights before the ICJ.

STEP 7: HUMANITARIAN INTERVENTION AND R2P

Humanitarian intervention Orthodox view: **unlawful absent SC authorisation**. No treaty basis; no widespread opinio juris. NATO/Kosovo 1999: described as 'illegal but legitimate.' UK 2018 Syria position reasserted narrow doctrine. Not recognised CIL.

R2P **UNGA Res 60/1 (World Summit 2005), paras 138-139:** (1) each state has responsibility to protect its population from genocide, war crimes, ethnic cleansing, crimes against humanity; (2) international community has responsibility to assist; (3) collective action through SC under Chapter VII if state manifestly fails and peaceful means inadequate. **R2P does NOT authorise unilateral intervention**; channels response through SC. Libya 2011 (SC Res 1973) is the leading example.

NOTE: Students often conflate anticipatory self-defence (response to imminent attack: generally accepted) with pre-emptive self-defence (response to non-imminent future attack: generally rejected). Distinguish carefully using the facts. Also note that Art 51's 'inherent right' language is the hook for importing CIL into the Charter's self-defence framework.

KEY CASES

Case	Result	Key Principle
<i>Nicaragua v US (Merits)</i> [1986] ICJ Rep 14	US violated PIL	Art 2(4) CIL; arming contras = use of force; armed attack threshold (scale and effects); four self-defence requirements; collective SD additional requirements; parallelism.
<i>Armed Activities (DRC v Uganda)</i> [2005] ICJ Rep 168	Uganda violated PIL	Art 2(4) is 'cornerstone'; territorial incursions = armed attack; response was disproportionate; effective control test; support to armed groups may be force.
<i>Oil Platforms (Iran v US)</i> [2003] ICJ Rep 161	US failed self-defence	Necessity and proportionality strictly applied; accumulation of events approach; individual incidents insufficient; diplomatic alternatives must be exhausted.
<i>Nuclear Weapons AO</i> [1996] ICJ Rep 226	Advisory	Threats assessed by lawfulness of underlying conduct; ICJ could not conclude on legality of nuclear weapons in extreme self-defence circumstances of survival.
<i>Legal Consequences of the Construction of a Wall (Israeli Wall AO)</i> [2004] ICJ Rep 136	Advisory	Art 51 state-to-state requirement (controversial); erga omnes consequences of self-determination breach; all states: duty of non-recognition.