



State Immunity: Recent Developments and Prospects

Joanne Foakes

International Law | December 2013 | IL BP 2013/02

Summary points

- Nearly nine years have elapsed since the adoption of the 2004 UN Convention on State Immunity. This paper considers whether the convention has increased legal certainty in this area or whether practice is as unpredictable and divergent as ever.
- So far the convention has had little impact on countries which traditionally accord absolute immunity to other states in their courts. It is therefore too early to say whether it can succeed in its objective of enhancing legal certainty and harmonizing practice.
- There is evidence, however, that many national and international courts such as the European Court of Human Rights are looking to the convention as a reflection of customary international law. In these circumstances there is some force in the argument that states that want to influence the way in which courts interpret the convention should become parties to it.
- Uncertainties about the scope of the convention remain, although to some extent these have diminished in recent years. A concern remains that it could 'freeze' international law so as to stop the development of an exception for serious human rights violations.
- For the United Kingdom and other Western states with existing legislation on state immunity, the benefits and potential disadvantages of becoming party to the convention remain finely balanced.

Introduction

In 2004 the Convention on the Jurisdictional Immunities of States and Their Property (the convention) was adopted after a long period of negotiation at the United Nations. It was hoped that this would put an end to arguments between, on the one hand, those countries (such as China) that considered there was absolute immunity for foreign states before other national courts and, on the other hand, those (such as the United Kingdom) arguing that international law allowed a number of exceptions to immunity. The period following the adoption of the convention has proved to be an eventful time for the international law of state immunity. There have been many national court cases involving litigation against states and their officials. Significantly, international courts have also begun to get involved. There have been recent decisions on the subject from the International Court of Justice (ICJ)¹ and the International Tribunal of the Law of the Sea (ITLOS).² In addition, there has been a string of cases before the European Court of Human Rights (ECtHR) in which the court has had to consider whether a particular grant of immunity by a national court is in conformity with a rule of international law so as to constitute a proportionate restriction on the right of access to a court as enshrined in Article 6(1) of the European Convention on Human Rights (ECHR).

On 6 May 2013 Italy became the latest state to accede to the convention, bringing the number of its parties to 14.³ However, of those, nine are European and, for whatever reason, states elsewhere have generally proved reluctant to participate. This, together with the fact that the convention is not yet in force, has been a disappointment to some. At the time of its adoption, following many decades of study and negotiation, hopes were expressed that it would be an instrument that would ‘harmonize the practice of states and facilitate commercial relations between states

and private actors’.⁴ The preamble to the UN convention itself declares that it should ‘enhance the rule of law and legal certainty, particularly in dealings between states and natural and juridical persons, and would contribute to the codification and development of international law and the harmonization of practice in this area’. Does the fact that the majority of states have not yet become party to the convention mean that these hopes have been largely unfulfilled, or can it be said that such harmonization and development are occurring anyway? This paper considers this question and also looks at what effect, if any, the lack of formal participation by the majority of states may have on such development. In doing so it focuses on certain aspects of the international law of state immunity where there has been particular uncertainty or diversity in state practice.

What is state immunity?

State immunity is a well-established principle of customary international law that has its roots in the sovereign equality of all states and the ensuing doctrine that no state can be subject to the jurisdiction of another. The ICJ recently described the sovereign equality of states as ‘one of the fundamental principles of the international legal order’ and emphasized the fact that ‘the rule of state immunity occupies an important place in international law and international relations.’⁵ In its early days the principle was often applied as a rule of absolute immunity, effectively barring all legal claims against a state in the courts of another state. Gradually, however, the scope of such immunity began to be qualified by a few ‘exceptions’, most notably with regard to the commercial activities of states. The theory is founded upon a distinction between state activity of a public or governmental nature (acts often described by lawyers as *iure imperii*), for which immunity applied, and those of a commercial or private

¹ *Jurisdictional Immunities of the State (Germany v Italy, Greece intervening)* 2012 ICJ 143 (3 February).

² ‘ARA Libertad’ Case (*Argentina v Ghana*), ITLOS Order of 15 December 2012.

³ The convention, which requires 30 states parties in order for it to enter into force, has 28 signatories and 14 states parties: Austria, France, Iran, Italy, Japan, Kazakhstan, Lebanon, Norway, Portugal, Romania, Saudi Arabia, Spain, Sweden and Switzerland. The United Kingdom has signed but not ratified.

⁴ See statement by Gerhard Hafner, Chairman of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property.

⁵ *Jurisdictional Immunities of the State* (see note 1 above), at para 57. See also *Al-Adsani v UK* (Application No 35763/97, Merits 21 November 2001, 123 ILR 24, (2002) 34 EHRR 11 para 54) where the Grand Chamber of the ECHR concluded that the grant of state immunity pursues ‘the legitimate aim of complying with international law to promote comity and good relations between states through the respect of another state’s sovereignty’.

nature (so-called acts *iure gestionis*), for which it did not. This restrictive approach was confirmed in the case law of many states and, in some, by the enactment of specific legislation.⁶ However, practice was not consistent: some states, for example China and Brazil, adhered to a rule of absolute immunity⁷ while others, although adopting the restrictive approach, differed as to the precise scope of the exceptions admitted. Eventually the restrictive theory became the main feature of the 2004 UN convention, which maintains a general rule of immunity but provides for a certain number of restrictions.⁸

Exceptions to immunity: some recent case law

Commercial transactions

One of the most important and widely accepted exceptions in the convention is the one relating to commercial transactions. A state cannot claim immunity from the jurisdiction of another in legal proceedings which arise from a commercial transaction. The convention test for determining whether a transaction should be regarded as ‘commercial’ has been criticized as unclear. It provides that reference should be made primarily to the *nature* of the transaction but that its *purpose* may also be taken into account if the parties have so agreed or if, in the practice of the state where legal proceedings are brought, purpose is relevant in determining the non-commercial character of the transaction. The test is clearly the result of a hard-fought compromise, and although it allows some room for divergence between national courts, supporters of the convention have argued that it does nevertheless provide a firmer basis on which practice can move forward, particularly in those states where adherence to the absolute

doctrine had still lingered or in those that had not enacted legislation on the subject.

There are some indications that the convention’s restrictive approach with regard to commercial transactions has begun to influence the decisions of some national and international courts.⁹ In *Oleynikov v Russia*,¹⁰ the ECtHR confirmed that the grant of immunity in excess of the requirements of international law violates the right of access to court enshrined in Article 6(1) of the ECHR. The case concerned a dispute over a debt owed to the applicant by North Korea. The applicant sued before the Russian courts but, on appeal, his claim was dismissed without examination on the ground that any claim against a foreign state could be allowed only with the consent of that state unless otherwise provided by treaty or Russian federal law. The ECtHR held that such cursory dismissal without proper consideration as to whether the claim related to a commercial transaction had ‘impaired the very essence of the applicant’s right of access to court’.¹¹ In doing so, the court referred to the 2004 convention and the court’s view that its provisions reflected customary international law. It also noted that Russia, although not a party, had not objected to its adoption and had signed the convention in 2006.

Even in countries with a developed law based upon the restrictive theory, the convention has been cited. In *Svenska Petroleum Exploration AB v Lithuania*¹² the Court of Appeal described it as ‘reflecting current international thinking on the subject’.¹³ The case concerned proceedings to enforce an arbitration award in the United Kingdom arising from a contract between a private company and a Lithuanian state-owned entity. The Court of Appeal, while admitting that the contract bore many of the hallmarks of a commercial transaction, noted:

⁶ See, for example, the UK State Immunity Act 1978, which is intended, primarily, to implement the European Convention on State Immunity 1972, and has attracted only 8 states parties: Austria, Belgium, Cyprus, Germany, Luxembourg, the Netherlands, Switzerland and the United Kingdom.

⁷ See, for example, *Democratic Republic of the Congo v FG Hemisphere Associates LLC (No 1)* 147 ILR 376 (PRC (CFA HKSAR) 2011).

⁸ For a broad overview of the convention and its provisions see Joanne Foakes and Elizabeth Wilmshurst, *The UN Convention and its Effect*, Chatham House Briefing Paper (2005).

⁹ See Wittich, *The United Nations Convention on Jurisdictional Immunities of States and Their Property: a Commentary* (eds O’Keefe and Tams) (Oxford, 2013), at p. 72, stating: ‘Flaws notwithstanding, the convention’s definition of “commercial transaction” is a step towards greater consistency in international practice.’

¹⁰ ECHR, 14 March 2013.

¹¹ At para 72.

¹² [2007] QB 886.

¹³ 929 at para 132.

We do not find the characterisation of the present transaction an easy matter [...] the fact that it relates to the exploitation of oil reserves within the territory of the state suggests that it involved an exercise by the state of its sovereign authority in relation to its natural resources and so falls outside the realm of activities which a private person may enter into.

In the event it was not necessary to determine this question and the case was decided on a different issue.

The recent international debt crisis and consequent defaults by a number of states have prompted litigation around the world, particularly within the context of so-called vulture funds. These are funds that purchase sovereign bonds at a discounted price in the expectation of default and then seek to gain a profit by suing the debtor state for the full amount owed. Questions have been raised as to whether default by a state on bonds issued as part of an emergency scheme to stabilize its currency and safeguard its population can be properly characterized as a commercial transaction.¹⁴ A New York court has held that a bond issued by Argentina in such circumstances is a commercial transaction and therefore not immune.¹⁵ In proceedings before the UK courts to enforce that judgment, the UK Supreme Court made it clear that proceedings based on a foreign judgment were in an entirely different category from those based on a direct cause of action. It had to consider whether such proceedings could be regarded as ‘proceedings relating to [...] a commercial transaction’ within the meaning of the State Immunity Act 1978 (SIA).¹⁶ It concluded that they

could not be so regarded as there was no explicit exception for foreign judgments and, as such, they fell within the general immunity set out in the SIA. However, the court also found that subsequent legislation had effectively ‘amended’ the SIA so as to allow enforcement of judgments against foreign states in certain circumstances¹⁷ and that, in any event, Argentina had provided, in the terms of its bond, an express submission to the jurisdiction in this regard.

By contrast, the Court of Final Appeal of the Hong Kong Special Administrative Region has upheld the absolute immunity of the Democratic Republic of the Congo (DRC) in proceedings to enforce two International Chamber of Commerce (ICC) arbitral awards that had held the DRC liable for defaulting in its payments on two credit agreements.¹⁸ There were letters before the court from the Chinese Ministry of Foreign Affairs to the effect that absolute immunity applied. The court took the view that state immunity was a matter falling within the sphere of foreign relations on which they were constitutionally required to refer to the Chinese government. The letters requiring the application of absolute immunity were therefore conclusive.¹⁹ No reference was made to the UN convention.

Enforcement of judgments

As illustrated by the cases referred to above, many issues within the commercial sphere arise within the sensitive area of a state’s immunity from enforcement. Traditionally such immunity from enforcement or execution has been treated as a separate matter from that of a state’s immunity

14 Contrast *Republic of Argentina v Weltover* 504 (US S.Ct) 607;119 L ed 2d 394 (1992) with *Borri v Argentina* (Italy (CofC) No. 11225 ILDC 296 (It 2005). In response to the debt crisis the United Kingdom was one of the first jurisdictions to enact legislation – the Debt Relief (Developing Countries) Act 2010 – which applies to states covered by the Heavily Indebted Poor Countries Initiative (HIPC) and prohibits private creditors from pursuing their claims against HIPC countries in the United Kingdom above a limited amount set by the HIPC Initiative.

15 More controversially a US court (*NML Capital Ltd v Argentina*, 12-00105, US Ct of Appeals (2nd Circ NY)) has granted an injunction to a number of bondholders to prevent Argentina from making payments on its restructured debt without making comparable payments on the defaulted debt at the original value prompting Argentina to petition the Supreme Court seeking to overturn the ruling on the ground that it ‘represents an unprecedented intrusion into the activities of a foreign state within its own territory that raises significant foreign relations concerns for the United States’.

16 *NML Capital Ltd v Republic of Argentina* [2011] UKSC 31.

17 See s.31 Civil Jurisdiction and Judgments Act 1982 which provides that a judgment given by an overseas court against another state can be recognized and enforced in the United Kingdom if ‘(a) it would be so recognized and enforced if it had not been given against a state; and (b) that court would have had jurisdiction in the matter if it had applied rules corresponding to those applicable to such matters in the United Kingdom in accordance with ss 2-11 of the SIA 1978’.

18 *DRC v FG Hemisphere Associates LLC (No 1)* 147 ILR 376 (PRC (CFA HKSAR) 2011).

19 The problems raised by the trading in debts of impoverished countries was specifically raised by China. See para 211 of judgment.

from suit. This is reflected in Article 19 of the UN convention, which provides that no post-judgment measures of constraint such as attachment, arrest or execution may be taken against the property of a state unless the state has expressly consented to the taking of such measures or has allocated or earmarked property for the satisfaction of the claim that is the object of that proceeding, or it has been established that the property is specifically in use or intended for use for other than government non-commercial purposes and has a connection with the entity against which the proceeding is directed. As regards the latter exception, Article 21 specifically provides that certain categories of property, including embassy bank accounts, property of a central bank or other monetary authority, military property and property ‘forming part of the cultural heritage of the state’, shall not be considered as ‘property specifically in use or intended for use by the state for other than government non-commercial purposes’. This more cautious approach is generally reflected in the case law of most countries, where the intrusive character of enforcement measures (as opposed to the mere exercise of adjudicatory powers) has meant that, even in states that have adopted the restrictive doctrine, immunity from enforcement has remained far more extensive than the jurisdictional immunity enjoyed by foreign states.

Enforcement – national courts

In this context, particular problems can arise when national courts are required to interpret the meaning of arbitration clauses accepted by states. The language of the UN convention suggests that a mere arbitration clause would not imply a waiver of enforcement immunity but would require separate additional consent. This approach has been generally followed although, at one stage, the French Court of Cassation appeared to accept that language found in the ICC Arbitration Rules could be interpreted to imply waiver from execution.²⁰ More recently, however, NML Capital’s efforts to enforce awards made in its favour has prompted a more cautious judgment from the French Court of Cassation on this issue.²¹ NML tried to attach

moneys held in bank accounts in France owed by various French companies to Argentina (largely by way of tax and social security claims). The court held that the disputed attachments concerned public assets necessarily used by Argentina in the exercise of sovereign powers and that, as the waiver given by Argentina²² did not specifically refer to such revenues, it could not apply to them. In reaching this conclusion, it indicated that such rules could be derived from the relevant provisions of the UN convention. The decision would appear to rest upon a very broad view as to the kind of funds that must be regarded as not in use or intended for use ‘for other than government non-commercial purposes’. Perhaps anticipating a possible challenge, the court noted that the ECtHR has, in a series of cases, held that a state’s application of state immunity will not contravene ECHR provisions so long as they accurately reflect the relevant rules of international law.

“ The intrusive character of enforcement measures as opposed to the mere exercise of adjudicatory powers has meant that, even in states that have adopted the restrictive doctrine, immunity from enforcement has remained far more extensive than the jurisdictional immunity enjoyed by foreign states ”

In addition to the requirement that property must be ‘specifically in use or intended for use by the state for other than government non-commercial purposes’, Article 19(c) of the convention contains the proviso that post-judgment measures of constraint can only be taken against ‘property that has a connection with the entity against which the proceeding was directed’. The main purpose of this

²⁰ *Société Creighton v Ministre des Finances de l'Etat du Qatar*, CoC (1st Civil Chamber) 6 July 2000, Bulletin Civil 1 no 207 [2001] *Revue de l'arbitrage*.

²¹ *NML Capital Ltd v Argentina (France (CoC))*, 28 March 2013.

²² The waiver expressly referred to post-judgment measures of enforcement.

proviso was to prevent such measures being taken against the property of a foreign state where the judgment debtor was in fact a state enterprise. However, a recent decision of the Privy Council suggests that such a requirement can cut both ways. The difficulty in enforcing arbitration awards against the property of a state has prompted many judgment creditors to look to the assets of state-owned entities. However, the decision in the *Gecamines* case made it clear that where a separate juridical entity is formed by a state for commercial purposes with its own management and budget, the strong presumption is that its separate corporate status should be respected for the purpose of enforcement. On this basis the separate entity should not have to bear the state's liabilities and only in 'quite extreme circumstances' would this presumption be displaced.²³

Enforcement – international courts

In October 2012, NML, as part of its campaign to enforce a US judgment in its favour applied to a Ghanaian High Court for the seizure of an Argentinian naval training vessel, the *ARA Libertad*, which was in the Ghanaian port of Tema. The court took the view that the waiver contained in the bond document was effective to remove the vessel's immunity from execution and granted the application.²⁴ Following this judgment, Argentina instituted arbitration proceedings against Ghana under the UN Convention on the Law of the Sea (UNCLOS) and applied to the International Tribunal (ITLOS) for provisional measures. ITLOS ordered release of the vessel and, in doing so, appeared to accept that the vessel was a warship and, as such, potentially immune from attachment or other measures of constraint under customary international law.²⁵ The tribunal did not refer to the 2004 UN convention,

focusing instead on Article 32 of UNCLOS, which states that 'nothing in this convention affects the immunity of warships and other government ships operated for non-commercial purposes'.²⁶

In another inter-state case, *Jurisdictional Immunities of the State (Germany v Italy)*,²⁷ the ICJ was not only required to rule on Germany's immunity from jurisdiction but also on its immunity from enforcement in regard to property situated in Italy. The case did not arise from a commercial suit but followed a decision by the Italian Court of Cassation that Germany did not enjoy immunity in respect of a claim by an Italian forced labourer who had been captured and deported by German occupying forces during the Second World War.²⁸ Inspired by this, plaintiffs who had been awarded damages in a separate claim against Germany in the Greek courts²⁹ had sought to enforce those awards in Italy. The Italian court ruled that the Greek judgment was enforceable, although execution of the judgment against the Villa Vignoni, a German state property in Northern Italy, was stayed pending the decision of the ICJ. In its judgment, the ICJ confirmed that immunity from suit and immunity from execution are two very separate matters.³⁰ It was noted that this important distinction had been maintained in the UN convention, and the ICJ drew upon its provisions in determining that Italy had violated Germany's immunity in two respects in regard to enforcement of the Greek award: first, in its recognition of the award and authorization of its enforcement; and, second, by way of its imposition of a legal charge on the German-owned villa that was used for state non-commercial purposes.

The judgment considered the extent to which the recognizing court is required to re-examine the originating

²³ *La Générale des Carrières et des Mines v FG Hemisphere Associates LLC* [2002]UKPC 27 para 3 (UK (PC Jersey) 2012).

²⁴ This was in spite of the fact that the Ghanaian government had supported the general position of the Argentinian government that the vessel enjoyed immunity from enforcement.

²⁵ Argentina had argued that any waiver, in order to be effective, would have had to be specific as to warships.

²⁶ Article 21 of the 2004 UN Convention contains a list of specific categories of property which shall not be considered as property in use or intended for use for 'other than government non-commercial purposes', which includes 'property of a military character or used or intended for use in the performance of military functions.'

²⁷ See note 1 above.

²⁸ *Ferrini v Germany* (2004) 87 RDI 539 (Corte di Cassazione, 2004).

²⁹ *Voiotia v Germany (Distomo Massacre Case)* 129 ILR 513 (Greece (CoC) 2002). The plaintiffs had also, unsuccessfully, tried to enforce the judgment in Greece and Germany.

³⁰ At para 113.

court's judgment and the criteria that should be applied in doing so. The ICJ made it clear that it was not the role of the recognizing court to 're-examine in all its aspects the substance of the case which has been decided' but ruled that it must ask itself whether

in the event that it had itself been seized of the merits of a dispute identical to that which was the subject of the foreign judgment, it would have been obliged under international law to accord immunity to the foreign state.

The criteria to be applied are the international law rules as applied by the recognizing court. Since the Italian courts would have been obliged to grant immunity to Germany if they had been seized of a case identical to the *Distomo Massacre* case, they could not recognize the Greek award and authorize its enforcement without violating Germany's immunity. The ICJ cited two national court decisions in support of this approach, including the UK case referred to above, *NML Capital Ltd v Argentina*.³¹

Employment contracts

Under the restrictive doctrine, exceptions to a state's immunity began to emerge in respect of some contracts of employment between a state and an employee that fell to be performed in the forum state. The UN convention reflects this development in a detailed and somewhat tortuous provision setting out the terms of the exception and the numerous exceptions to that exception. The general employment contracts exception will not apply, for example, where 'the employee has been recruited to perform particular functions in the exercise of governmental authority'.³² At the time the convention was adopted there was some concern that this provision could be open to an excessively broad interpretation. The underlying purpose was to ensure that a foreign state would retain immunity in relation to contracts for the

employment of persons who were required to perform acts *iure imperii*. It is not always easy, however, to distinguish between such acts and other acts of an ordinary *iure gestionis* nature and, in practice, courts in different jurisdictions have often taken widely differing views on the matter.

Two judgments of the Grand Chamber of the ECtHR have demonstrated a restrictive approach to the interpretation and application of this provision. In *Cudak v Lithuania*,³³ the ECtHR held that a Lithuanian switchboard operator employed by the Polish Embassy in Vilnius did not perform such functions and that, as a consequence, the Lithuanian court's action in dismissing her claim against Poland had failed to preserve the necessary relationship of proportionality between the requirements of international law and her right of access to a court under Article 6 of the ECHR. In doing so it noted that the rules formulated in the 2004 convention and the draft articles on which it had been based 'appeared to be consistent with the emerging trend in the legislative and treaty practice of a growing number of states'. It also stated that

it is a well-established principle of international law that, even if a state has not ratified a treaty, it may be bound by one of its provisions, in so far as that provision reflects customary international law.³⁴

The court adopted a similar approach in *Sabeh El Leil v France*,³⁵ which concerned the termination of employment of an accountant at the Kuwaiti Embassy in Paris. The French courts had held that Kuwait was entitled to rely on immunity in the ensuing claim. Again, the ECtHR took the view that international law did not require such an excessive grant of immunity, basing its view on a restrictive interpretation of the relevant provisions of the UN convention and in particular what constitutes 'a function in the exercise of governmental authority'. In doing

³¹ See note 16 above, although it is notable that the English Supreme Court had to follow a somewhat indirect route in order to reach the required result.

The other case was *Kuwait Airways Corp v Iraq* [2010] SCR, 2, 571 (Canada).

³² See Article 11 (2) (a). Para (2)(b) also contains a separate exception covering diplomatic agents and consular officers.

³³ Application no 15869/02 Judgment ECHR(GC) 23 March 2010 (2010) 51EHRR 15.

³⁴ See paras 66 and 67.

³⁵ Application no. 34869/05 Judgment (GC) 29 June 2011 (2011) 54 EHRR 14.

so, it noted that France had signed the convention and was, at that time, in the process of ratifying it. The court declared ‘it is possible to affirm that the provisions of the 2004 convention apply to the respondent state under customary international law’.³⁶

‘ Though the argument that the 1978 Act struck an appropriate balance might at one stage in recent history have provided a sufficient answer, it no longer does so in the light of the developing restrictions on state immunity ’

In the United Kingdom, section 16 (1) of the SIA of 1978 provides that the employment exception (as embodied in section 4 of the act) does not apply to ‘proceedings concerning the employment of the members of a mission’ within the meaning of the term as used in the Vienna Convention on Diplomatic Relations 1961.³⁷ This exclusion is broader than its equivalent in the 2004 convention, which refers specifically to diplomatic agents, consular officers, members of the diplomatic staff of a permanent mission to an international organization and ‘any other person enjoying diplomatic immunity’. The 1978 act also provides in section 4 (2)(b) that the exception will not apply if ‘at the time the contract was made the individual was neither a national of the UK nor habitually resident there’. The UN convention contains a rather different exclusion relating to whether ‘the employee is a national of the employer state at the time when the proceeding is instituted, unless this person has the permanent residence in the state of the forum’.³⁸

Recently in *Benkharbouche v Sudan* and *Janah v Libya*,³⁹ the UK Employment Appeal Tribunal (EAT) had the task of considering this provision in the context of claims for unfair dismissal, unpaid wages and other matters brought by a cook at the Sudanese Embassy and a member of the domestic staff of the Libyan Embassy. Two employment tribunals had upheld claims of immunity made by the states involved, albeit on slightly different grounds, and the applicants appealed to the EAT. In doing so they relied, in part, on the judgments of the ECtHR in *Cudak v Lithuania* and *Sabeh el Leil v France*, arguing that their right of access to a court had been denied contrary to Article 6 of the ECHR. The president of the EAT noted that on the factual findings made in respect of the employment duties of the two applicants, any exercise of jurisdiction could not interfere with any ‘public governmental function’ of the relevant states, concluding:

Though the argument that the 1978 Act struck an appropriate balance might at one stage in recent history have provided a sufficient answer, it no longer does so in the light of the developing restrictions on state immunity. The principles on which state immunity is based do not out balance the importance of access to court for employees with functions such as those of the claimants.

On this basis he concluded there was a breach of Article 6 of the ECHR insofar as section 16 of the SIA of 1978 was applied. He was considerably more hesitant in reaching a similar conclusion in respect of section 4 (2)(b), noting that it had clearly been considered ‘as a matter of customary international law, that a rational distinction could properly be drawn between nationals of the host country and others with no connection by residence with the host country’.⁴⁰ For the sake of argument, however, he was prepared to assume that there had been a breach of Article 6 in this respect also. The

³⁶ At para 58. See also *Guadagnino v Italy and France* (ECHR), 18 January 2011.

³⁷ In Article 1 (b) the ‘members of the mission’ are the head of mission and the members of the staff of the mission.

³⁸ See Article 4(2) (e). Although note that the draft Articles on Jurisdictional Immunities of States and Their Property adopted by the International Law Commission (ILC) in 1991 did contain a provision equivalent to section 4 (2) (b) of the SIA 1978.

³⁹ UKEAT/0401/12/GE and UKEAT/0020/13/GE (4 October 2013).

⁴⁰ See note 38 above.

judge went on to reject the argument that section 3 of the Human Rights Act of 1998 would enable the 1978 act to be interpreted so as to permit the claims to proceed, on the basis that such an interpretation ‘would cross the critical line between interpretation and legislation’. However, the claimants’ argument that, insofar as the claims were employment claims within the material scope of European Union (EU) law, the principle of effectiveness would require the EAT to disapply provisions of legislation that conflict with fundamental rights guaranteed under EU law, in particular the Charter of Fundamental Rights of the European Union (of December 2000), proved more successful. On this basis, the tribunal held that the provisions of sections 16 and 4 (2) of the 1978 act should be disapplied as regards the claim in *Benkarbouche v Sudan* in respect of a breach of the Working Time Regulations and as regards the claims alleging racial discrimination, harassment and breach of the Working Time Regulations in *Janah v Libya*. All parties were granted permission to appeal.

Personal injuries and damage to property

In the practice of many states a foreign state will not be immune in proceedings for which pecuniary compensation is sought for death or personal injury or damage to property caused by an act committed or omission in the forum state. This exception, often referred to as the ‘territorial tort’ exception, developed in the context of accidental injury such as traffic accidents on the basis that the driving of a motor car or other vehicle, even for governmental purposes, was, by its nature, a private law act rather than one carried out by a state in the exercise of its sovereign authority. The courts in some countries have, however, held that the exception can extend to intentional harm carried out in the exercise of sovereign authority such as assassinations carried out in the forum state by agents of the foreign state.⁴¹ The territorial tort exception, as enshrined in the UN conven-

tion, is expressed in general terms and is not limited to the sort of unintentional insurable tort from which the exception developed. Only two territorial criteria must be met. The act or omission which caused the injury or damage must occur in whole or in part in the territory of the forum state and the author of the act or omission must be present in that territory at the time of the act or omission. It is clear that, although mainly concerned with accidental torts, the provision ‘is wide enough to cover also intentional physical harm such as assault and battery, malicious damage to property, arson or even homicide, including political assassination’.⁴²

In *Natoniewski v Federal Republic of Germany*,⁴³ the Polish Supreme Court took the view that the territorial tort exception existed as a matter of customary international law. Referring to the UN convention and other international legal materials, it concluded that

there is no international duty, on the part of states, to other states in matters of torts, if the actions leading to a tort occurred in the territory of the forum state, and if the author of the injury or damage was present in that territory at the time when those actions occurred.

The case involved a claim brought by a Polish national against Germany for compensation for injuries caused by the pacification of the Polish town of Szczecyn by German armed forces during the Second World War. The court therefore had to address the delicate question of whether the exception could extend to actions carried out during armed conflict. This and the more general question as to whether it could extend to official acts carried out by a state’s armed forces while in the territory of the forum state had prompted some concern with regard to the UN convention. The latter does not expressly exclude such matters from its scope,⁴⁴ although the ILC Commentary does assert that the relevant draft Article (on which the final provision embodying the exception was based) does

41 See *Letelier v Republic of Chile*, 63 ILR 378, 386–7 (US (DDC) 1980) and *Schreiber v Canada (Attorney General)*, 2002 SCC 62, paras 32 and 35–6 (Can (SC) 2002).

42 ILC Commentary, draft article 12, para 4.

43 (2010) Polish YIL 299 (Pol (SC) 2010).

44 Contrast with Article 31 of the European Convention on State Immunity (ECSI) and several national legislative provisions e.g. s.16(2) of the SIA 1978.

not apply to situations involving armed conflicts.⁴⁵ The Polish Supreme Court concluded that, as a matter of customary international law, the exception does not apply in such situations, observing that an armed conflict which necessarily involves suffering on a large scale could not be reduced to a relationship between an individual victim and the wrongdoing state. In such circumstances, it concluded that there are good practical reasons why states should be left to agree on a more comprehensive settlement of mutual claims.⁴⁶

In *Jurisdictional Immunities of the State*, the ICJ did not rule on the customary nature of the territorial tort exception but did observe that the exception had emerged in the context of insurable risks⁴⁷ and that state practice, in general, did not support its extension to acts committed on the territory of another state by a state's armed forces and other organs of state in the course of conducting an armed conflict. Accordingly it rejected Italy's argument that Italian courts had jurisdiction over a claim brought against Germany by a civilian forced labourer in regard to acts carried out by German occupying forces during the Second World War. In its judgment, the ICJ sounded a note of caution in regard to the identification of rules of customary international law. It observed that neither Germany nor Italy (at that time) was a party to the UN convention, which, in any event, was not yet in force, and that it must therefore determine the extent of any immunity by reference to 'international custom as evidence of any general practice accepted as law.' In this context it referred to criteria laid down in earlier cases to the effect that such rules were to 'be looked for primarily in the actual practice and *opinio iuris* of states, even though multilateral conventions may have an important role in recording and defining rules deriving from custom, or indeed in developing them'.

Serious breaches of human rights

The UN convention contains no exception from immunity that would allow a claim to be brought against a foreign state solely on the ground that a grave violation of human rights had occurred.⁴⁸ From time to time attempts have been made in various national courts to assert such an exception but all failed until the Italian Court of Cassation decided in the *Ferrini* case⁴⁹ that a foreign state did not enjoy immunity in respect of *ius cogens* violations. A similar approach was taken by the Greek courts in the *Distomo Massacre* case. However, the latter was overruled in Greece by a subsequent judgment of the Special Constitutional Court,⁵⁰ and the *Ferrini* case was itself the subject of proceedings brought by Germany against Italy before the ICJ.⁵¹ In those proceedings, the court held that Italy had violated the jurisdictional immunity which Germany enjoys under international law by allowing the claims in the *Ferrini* case to proceed. In doing so it referred to substantial state practice which demonstrates that

customary international law does not treat a state's entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated.

It noted, in particular, that there is no limitation of immunity by reference to the gravity of the violation in the UN convention and that such absence is significant given that the point was specifically considered while the text was being negotiated. It noted further that there is no conflict between the *ius cogens* rules forming part of the law of armed conflict and the rules on state immunity because:

⁴⁵ See also statement of Gerhard Hafner, Chairman of the Ad Hoc Committee who, when presenting the draft convention to the Sixth Committee, stated that there had been a general understanding that military activities were not covered by the convention at 6, para 36. This statement was referred to in General Assembly resolution 59/38 which adopted the convention. The point has also been reiterated subsequently in declarations made by Norway and Sweden on ratifying the convention.

⁴⁶ See also CA(TA)2134/07 *Irit Tzema v Germany* (2009)(Israel) and *Arraci Barreto v Germany*, 9.7.2008 (Brazil).

⁴⁷ See para 64.

⁴⁸ The deliberations of a working group set up to consider the issue were inconclusive and the matter was eventually dropped on the ground that the matter 'did not seem to be ripe enough for the Working group to engage in a codification exercise over it'. See ILC Rep 43rd Session Supp. No 10 (1991).

⁴⁹ See note 28 above.

⁵⁰ *Germany v Margellos* [A.E.D.] Special Supreme Court 6/2002 129 ILR 526 (2002).

⁵¹ See note 1 above.

The two sets of rules address different matters. The rules of state immunity are procedural in character and are confined to determining whether or not the courts of one state may exercise jurisdiction in respect of another state. They do not bear upon the question whether or not the conduct in respect of which proceedings are brought was lawful or unlawful.

The ICJ concluded that ‘under customary international law as it presently stands, a state is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict’.

‘The convention clearly endorses the principle that state officials acting in a public capacity should be immune from suit to the same extent as the state itself’

But what about the situation where a plaintiff sues the state official or officials responsible rather than the state itself? In *Samantar v Yousef* the plaintiffs sued a former prime minister and defence minister of Somalia, seeking compensation for acts of torture, rape and extrajudicial killing committed in Somalia and allegedly authorized by the defendant during his term of office. The defendant claimed immunity from suit under the US legislation on state immunity,⁵² but the US Supreme Court decided that such legislation does not apply to claims lodged against individual foreign government officials.⁵³ This approach is in contrast to that adopted by the convention, which assimilates the position of a state’s representatives, acting in an official capacity,

to that of the state itself. Article 2 (1) defines the term ‘state’ very broadly and expressly includes ‘representatives of the state acting in that capacity’.⁵⁴ By doing so the convention clearly endorses the principle that state officials acting in a public capacity should be immune from suit to the same extent as the state itself.⁵⁵ This fact was noted by the House of Lords in *Jones v Saudi Arabia*⁵⁶ in dismissing a civil claim brought against a number of Saudi government officials in respect of allegations of torture. Lord Bingham referred specifically to the doctrine of foreign official immunity, stating unequivocally that a ‘foreign state’s right to immunity cannot be circumvented by suing its servants or agents’. Lord Hoffmann made the same point, declaring that the convention makes it clear that, as a matter of international law,

the same immunity against suit in a foreign domestic court which protects the state itself also protects the individuals for whom the state is responsible ... the traditional way of expressing this principle in international law is to say that the acts of state officials acting in that capacity are not attributable to them personally but only to the state.

In *Samantar*, the decision by the US Supreme Court did not, in itself, determine the question as to whether or not the former prime minister was entitled to immunity. In practice, the lower court then had to resolve the matter with reference to customary international law. The Supreme Court had noted in this connection that there was no ‘doubt that in some circumstances the immunity of the foreign state extends to an individual for acts taken in his official capacity’ under the common law ‘if the effect of exercising jurisdiction would be to enforce a rule of law against the state.’ The lower court determined that immunity did not apply, but in doing so placed considerable weight on the statement of Interest submitted by the Executive to that effect.⁵⁷ Two main factors appear

⁵² The Foreign Sovereign Immunities Act (FSIA).

⁵³ 130 S.Ct 2278 (2010).

⁵⁴ Article 2(1)(b)(iv).

⁵⁵ See ILC Commentary on draft articles which stated that proceedings ‘against such representatives or agents of a foreign government in respect of their official acts are essentially proceedings against the state they represent.’ [1991]2 YBILC 14 UN Doc.A/CN.4/SER.A/1991/Add.1.

⁵⁶ [2007]1 AC 270 (HL).

⁵⁷ *Yousef v Samantar*, US District Court for Eastern District of Virginia, Civil Action No 1:04 CV 1360 (LMB), statement of Interest of the US State Department, 14 February 2011.

to have influenced the State Department to submit that immunity did not apply: first, the fact that the defendant was resident in the US and that such residents should be subject to the jurisdiction of the US courts, particularly when sued by other US residents; and, second, the fact that Mohamed Ali Samantar was a former official with no recognized government to claim immunity on his behalf or confirm that the alleged acts were committed in an official capacity.⁵⁸ Other recent interventions by the US State Department in civil claims against former government officials, namely a former president of Mexico⁵⁹ and two former directors-general of Pakistan's Intelligence Service,⁶⁰ have been quick to assert immunity on the basis that, in determining whether certain acts were taken in an official capacity, 'the Department of State generally presumes that allegations relating to the official's exercise of the powers of his or her office fall into that category'.⁶¹

The full implications of the Supreme Court judgment in *Samantar* are not yet clear. While the interventions of the State Department suggest that, in practice, there will be a strong presumption that immunity will apply to acts carried out by a foreign official while exercising the powers of his or her office, it is clear that such a presumption could in certain circumstances be displaced. The particular facts in the *Samantar* case provide one example of this but there may be others. The Supreme Court judgment, although it did not determine the question of immunity and acknowledged that the immunity of a foreign state could, in certain circumstances, extend to an individual for acts carried out in an official capacity, did suggest that the immunity of a state and its officials in regard to civil claims may not always be co-extensive. Such an approach is in contrast to

the one adopted by the House of Lords in *Jones v Saudi Arabia*,⁶² which rested on the view that any suit against an individual acting in an official capacity must implead the state and, if the state is immune, that immunity must extend to the official concerned to prevent that immunity from being circumvented. This issue and others is now the subject of *Jones v UK* and *Mitchell v UK*⁶³ judgments currently pending before the ECtHR. Both applications arose from the earlier case of *Jones v Saudi Arabia* in which the claimants attempted to sue a foreign state and some of its officials allegedly responsible for their torture abroad. The applications assert that Article 6 (1) of the ECHR is directly engaged by the UK court's denial of access and that an assessment is, therefore, required as to whether that denial, on the ground of immunity, pursued a legitimate aim and was proportionate. The applications focus, in particular, on the immunity accorded to the individual officials. It is likely that, in considering this matter, the court will look closely at the relevant provisions of the UN convention, in particular Article 2 which, as we have seen, expressly includes within the definition of 'state' 'representatives of the state acting in that capacity', and, possibly, Article 6 which provides that, even where a state has not been named as a party, court proceedings shall be considered to have been instituted against that state if the proceeding 'in effect seeks to affect the property, rights, interests or activities of that other state'. It is worth noting in this context that, in earlier cases before the court where the original suit had been brought against the foreign state only,⁶⁴ the ECtHR found no violation of Article 6, considering that 'the grant of immunity to a state in civil proceedings pursues the legitimate aim of complying

58 In January 2013, the US formally recognized a new government in Somalia which has now formally requested immunity for the former prime minister Samantar. His lawyers are reportedly currently preparing an appeal.

59 *Doe v Zedillo*, US District Court of Connecticut, Civil Action No 3:11 CV 01433 (AWT) Suggestion of Immunity of the US, 7 September 2012.

60 *Scherr, Rosenberg et al v Lashkar e Taiba et al* US District Court of Eastern District of New York, Civil Case 1:10 CV 05381 (DLI-CLP) Statement of Interest and Suggestion of Immunity, 17 December 2012.

61 It was noted in this respect that such 'a preliminary assessment is particularly apt for former heads of state, who typically have wide-ranging responsibilities'. See also *Claudia Balcerio et al v Drummond Company et al* (US District Court for DC Civil Case No. 1:10-mc-00764 (JDB) 8 September 2011), where court held that a former President of Colombia could not be compelled to testify in civil proceedings against a US company in respect of its involvement in war crimes and crimes against humanity allegedly carried out by government forces.

62 129 ILR 629 (UK(HL)2006).

63 Application Nos 34356/06 and 40528/06.

64 *Kalogeropolou v Greece and Germany* ECHR No.0059021/00 Admissibility, 12 December 2002; 129 ILR 537; *Al Adsani v UK* ECHR Application 35753/97 Merits, 21 November 2001 (2002) 29 EHRR 111, 123 ILR 24; *Fogarty v UK* ECHR Application 37112/97 Merits, 21 November 2001; (2001) 34 EHRR 302, 123 ILR 53; and *McElhinney v Ireland and UK* ECHR Application 31253/96 Merits, 21 November 2001 (2002) 34 EHRR 13, 123 ILR 73.

with international law to promote comity and good relations between states through the respect of another state's sovereignty'.

Impact of UN convention

So what has been the impact of the convention so far? In view of the uneven and uncoordinated approach adopted by national courts in the past, can it be said to have contributed to a greater conformity in the practice of states? Clearly we are still a long way from the 'harmonization of practice' referred to in the preamble, although it is probable that complete 'harmonization' was always a somewhat ambitious objective given the inevitable differences between legal systems. Indeed it could be argued that the convention itself recognizes this and, in practice, allows states some latitude in interpreting and applying its provisions. It is equally clear, however, that many national courts and international courts such as the ICJ and the ECtHR have frequently referred to the convention and relied upon its provisions in interpreting and applying the relevant rules of international law. There are very clear signs that some of its provisions are already viewed by those courts and by many governments and commentators as reflecting customary international law.⁶⁵ It is almost certainly too early to say whether the convention can succeed in its objective of enhancing legal certainty and harmonizing practice in this area but national courts have, in the convention, an important tool available to them for the identification of the appropriate rules. In the past the international law on state immunity was developed almost exclusively by national courts which were not always familiar with the relevant international rules, nor indeed with developments in foreign courts. The internet and increased access to reports of foreign judgments have changed the latter, and some national courts have demonstrated an increasingly sophisticated awareness of the relevant rules. In this connection, the convention has become an important point of reference.

‘ In practice the law on state immunity, in particular the restrictive doctrine, was developed by a relatively small minority of states ’

Does it matter that so few states have become party to the convention? In practice the law on state immunity, in particular the restrictive doctrine, was developed by a relatively small minority of states. The key feature of the UN convention is that it has the potential to broaden that consensus from being the favoured position of a number of largely Western states with active commercial courts into a generally accepted law. That transition has yet to occur and, unless it does so, it would be difficult to argue that the convention had properly fulfilled its potential.

But it is not just those countries which have traditionally adhered to the absolute doctrine of immunity which have hung back. In practice, some states with comprehensive state immunity legislation modelled on the restrictive approach have also proved slow to participate. Does this matter?

Should the United Kingdom and other states with laws based upon the restrictive doctrine become parties to the convention?

It has been argued by some that early ratification by states with a developed practice can be important in shaping and resolving inherent ambiguities and interpretative conflicts in ways that are acceptable to such states. The example has been given of early ambiguities in the Vienna Convention on Diplomatic Relations and the beneficial effect of the United Kingdom and other states parties promulgating their practice widely and vigorously objecting to inap-

⁶⁵ See Tomuschat, 'The International Law of State Immunity and its Development by National Institutions' [2011]44 *Vanderbilt Journal of Transnational Law* 1105 where it is stated that 'as a reflection of the restrictive theory of state immunity, its provisions reflect customary international law'. See also *Svenska Petroleum Exploration AB v Lithuania* [2007] QB 886 (UK (EWCA) 2006); and *AIG Capital Partners Inc v Kazakhstan* [2005] Comm (UK (EWHC) 2239.

appropriate reservations. Unless they become party to the UN convention treaty, it is difficult for states to take a lead and influence others and, in practice, such issues will be left to be resolved by the courts of other countries or international courts such as the ECtHR. There is some force in this argument, although it is arguably less compelling in the context of a law applied mainly by national courts rather than by the actions of the Executive. It is also notable that the fact that the United Kingdom is not a party to the UN convention has not prevented the UK courts from referring to its provisions and drawing upon them as a reflection of customary international law. Another argument in favour of ratification by such states is that their failure to participate somehow diminishes the status of the convention and discourages ratification by others. There is, however, little evidence to suggest that, if states with an established law based on the restrictive doctrine – such as Germany, the United Kingdom, Canada or Australia – were to become parties this would cause other states such as China, India or Brazil to become more enthusiastic about the convention.

Remaining uncertainties

It is possible that some states have been deterred by the convention's rather confusing treatment of some of the matters excluded from its scope, particularly in respect of military activities referred to above. Can it be said that such uncertainties have been removed or, at least, diminished in the years following the adoption of the convention? The ICJ judgment in *Jurisdictional Immunities of the State (Germany v Italy)*, although not conclusive in this regard, has undoubtedly reinforced the arguments in favour of the exclusion of such military activities with a clear statement that Article 12

cannot be taken as affording any support to the contention that customary international law denies state immunity in tort proceedings relating to acts ... committed in the territory of the forum state by the armed forces and associated organs of another state in the course of an armed conflict.

The decision was, of course, confined to the particular facts of the case and did not formally extend to acts of visiting armed forces present in the territory in peacetime. However, the reasoning adopted by the court and the sources referred to, in particular Article 31 of the European Convention on State Immunity,⁶⁶ strongly suggest that it would have reached the same conclusion with regard to such acts.

‘Some international conventions are inherently attractive to states – others, often of a more technical nature, can become more attractive as more states become parties’

Human rights concerns

What about concerns that the convention would ‘freeze’ the law so as to stifle its development and prevent the emergence of further exceptions, particularly with regard to serious human rights violations? On ratifying the convention, Switzerland declared that it ‘considers that Article 12 does not govern the question of pecuniary compensation for serious human rights violations which are alleged to be attributable to a state and are committed outside the state of the forum. Consequently, this convention is without prejudice to developments in international law in this regard.’ Such concerns were prompted to some extent by the structure of the convention, which provided for a general rule of immunity subject to certain enumerated exceptions. By analogy with national legislation on immunity, it has been argued there is a risk the convention will be interpreted as comprehensive and thus rule out new developments. Such concerns are readily understandable but perhaps overstate the way in which a convention of this kind can be applied. Clearly the convention does

⁶⁶ ‘Nothing in this convention shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to its armed forces when on the territory of another Contracting State.’

not cover criminal proceedings against individuals and, as we have seen, there are strong arguments that it does not apply to the actions of a state's armed forces present in the territory of the forum state. Even in the sphere of civil proceedings it has been argued that all it can do is provide a textual basis for the application of the enumerated exceptions and should not permanently prohibit a state from applying additional exceptions. In such circumstances, a state would be in breach of its international legal obligations only to the extent that such application contravened rules of customary international law. However, the omission of any exception for serious human rights violations in the convention does indicate that those involved in formulating its provisions took the view that such an exception was, at that stage, unsupported by international law and practice.

Future prospects

Some international conventions are inherently attractive to states – others, often of a more technical nature, can become more attractive as more states become parties. The UN convention undoubtedly falls into the latter category, although it seems that it has so far failed to reach the critical mass necessary to attract more than a trickle of ratifications. If, however, the convention were to become more broadly based over the next few years with the ratification or accession of one or more key states where proceedings have been unpredictable or founded on absolute principles, it is likely that other states, including the United Kingdom and other states with comprehensive state immunity legislation, would also become parties. In this context it is worth noting that China, India and Russia have all signed the convention. Without such a develop-

ment many states are unlikely to see any clear balance of advantage in ratification. As far as they are concerned, they already have effective and functioning rules on state immunity and any process of ratification is likely to require some legislative adjustment and consequent approval by the relevant legislative authority. Immunity is often a controversial issue and there is unlikely to be much political appetite for such scrutiny in the absence of any clear national benefit.

One factor which could speed matters up, so far as such states are concerned, is a situation where such scrutiny becomes inevitable as a result of the need to update and amend the relevant legislation. It is arguable that the United Kingdom has now reached this stage, as shown by the interpretative nightmare faced by the EAT in the *Benkarbouche* and *Janah* cases and the somewhat convoluted approach taken by the Supreme Court in *NML v Argentina*. If, in the light of these developments, a decision were to be taken to amend the 1978 Act, it is difficult to believe that the United Kingdom, which strongly supported the adoption of the convention and is a signatory, would not also take the opportunity to ratify.

Finally it is worth emphasizing that what is most important about the convention is not so much whether it enters into force as treaty law but whether it can exert sufficient influence so as to make the practice of states more predictable and consistent and, in particular, help to make the restrictive theory of immunity more widely accepted. The question of whether this objective can be achieved without such entry into force is open to debate but it seems clear that the convention must, at the very least, attract more ratifications or accessions from states which until now have been reluctant to accept the restrictive theory.

The International Law Programme at Chatham House

The International Law Programme was officially launched in 2004. It provides a forum for lawyers and policy-makers to discuss international legal issues and their practical application to current problems in international relations.

International Law Discussion Group

The International Law Discussion Group meets each month and is addressed by legal practitioners and other speakers drawn from academia, government, and the policy and business communities. These meetings are an opportunity to bring together a diverse community of UK-based individuals involved in various aspects of international law to discuss topical issues. Visitors from other countries are also invited where possible.

Forthcoming meetings in 2014:

- **Wednesday 22 January** – UN Fact-Finding and International Criminal Investigations: Do Either Bring Accountability?
- **Thursday 13 February** – Sanctions Workshop in partnership with Debevoise and Plimpton LLP
- **Tuesday 25 February** – Democratic Deficit and the European Union
- **Monday 10 March** – International Law and the Use of Force Against Terrorists

For further information please contact Catherine Wanjiku
Email: CWanjiku@chathamhouse.org
Tel: +44 (0) 20 7314 3686

Chatham House has been the home of the Royal Institute of International Affairs for ninety years. Our mission is to be a world-leading source of independent analysis, informed debate and influential ideas on how to build a prosperous and secure world for all.

Joanne Foakes is an Associate Fellow of the International Law Programme at Chatham House.

Chatham House
10 St James's Square
London SW1Y 4LE
www.chathamhouse.org

Registered charity no: 208223

Chatham House (the Royal Institute of International Affairs) is an independent body which promotes the rigorous study of international questions and does not express opinions of its own. The opinions expressed in this publication are the responsibility of the author.

© The Royal Institute of International Affairs, 2013

This material is offered free of charge for personal and non-commercial use, provided the source is acknowledged. For commercial or any other use, prior written permission must be obtained from the Royal Institute of International Affairs. In no case may this material be altered, sold or rented.

Cover image © iStock
Designed and typeset by Soapbox, www.soapbox.co.uk