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THE HOLY SEE AND THE PERSONAL INJURY EXCEPTION TO FOREIGN STATE IMMUNITY IN AUSTRALIA

'[I]nternational law does not require the courts of a State to refrain from deciding a case merely on the ground that a foreign State or State instrumentality is an unwilling defendant.'[1]

'In the case of personal injuries and property claims dealt with in [*FSIA*] s 13, the basis of the exception to immunity is that, where a foreign State wrongfully causes death or injury or damage to tangible property in Australia, there is no merit in requiring the plaintiff to litigate in the defendant's national courts when Australian courts can provide the obvious and convenient local remedy.'[2]

Abstract

This article is focused on the response to civil claims put forward by Australian nationals in which the respondent is the Holy See, Vatican City, or a senior officeholder of either of those entities. The scope for immunity from process for such defendant parties under the *Foreign States Immunities Act 1985* (Cth) ('*FSIA*') is interrogated. It is argued that even if a relevant statehood status is recognised, a well-founded claim in tort will satisfy the requirements in the *FSIA* for exceptions to State-based immunity over personal injury suffered by Australian nationals in Australia. Norms of international law relating to statehood-based protections are substantially influenced by certain decisions of national courts, including Australian courts, especially when such decisions converge across jurisdictions. In applying Australian law, a court will be contributing to the engendering of an international regime of accountability for

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1 JR Crawford, 'A Foreign State Immunities Act for Australia?' (1978) 8(1) *Australian Yearbook of International Law* 71, 81 ('A Foreign State Immunities Act').

2 *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31, 88–9 [198] (Nettle and Gordon JJ) ('*Firebird*'), discussing Law Reform Commission, *Foreign State Immunity* (Report No 24, 1984) ('ALRC 24').

institutions and natural persons who seek to cloak under colour of sovereignty their territorially distributed conduct causing harm in Australia.

I Introduction

This article seeks to clarify the judicial process for civil suit when a complaint is made in Australia against a foreign entity or natural person pleading — or otherwise found as enjoying — a statehood-based immunity under the *Foreign States Immunities Act 1985* (Cth) ('*FSIA*').[3] Its central focus is on complaints in tort made against one or other manifestation of the central decision-making institution of the Roman Catholic Church as headquartered in Rome, whether referred to as the Holy See or Vatican City ('Vatican-based entities'). For example, potential actions in tort might arise due to a failure by Church officials based in Rome, whether by act or omission, properly to direct or constrain the conduct of persons causing harm in Australia and over whom the Church has sufficient influence. Overseas experience provides little comfort to Australian litigants seeking civil remedies for harms when the respondent is one of that class of institutions or persons.[4] In order to contextualise this central focus, the broader international landscape of statehood-based immunities and inviolabilities is first surveyed.[5] As discussed below there are — from the perspective of such litigants — some welcome indications in foreign case law, including preliminary and procedural decisions such as declining dismissal of the suit. However complainants, generally speaking, continue to be disappointed by final outcomes in the United States ('US') and at the European Court of Human Rights ('ECtHR'), where considerations of immunity based on foreign statehood have prevailed.[6]

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3 *Foreign States Immunities Act 1985* (Cth) s 9 ('*FSIA*'). 'Immunities' will at times be used in this article in an inclusive sense, to encompass both immunities from judicial process and inviolabilities (from physical constraint).

4 Ioana Cismas, *Religious Actors and International Law* (Oxford University Press, 2014) 194; Meredith Rae Edelman, 'Judging the Church: Legal Systems and Accountability for Clerical Sexual Abuse of Children' (PhD Thesis, Australian National University, 2020); Geoffrey Robertson, *The Case of the Pope: Vatican Accountability for Human Rights Abuse* (Penguin, 2010) 8.

5 See, eg: Joanne Foakes, *The Position of Heads of State and Senior Officials in International Law* (Oxford University Press, 2014); Hazel Fox and Philippa Webb, *The Law of State Immunity* (Oxford University Press, 3rd ed, 2015); Roger O'Keefe, Christian Tams and Antonios Tzanakopoulos (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press, 2013); Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019).

6 Characteristic recent decisions, discussed below, include: *Doe v Holy See*, 557 F 3d 1066 (9th Cir, 2009) ('*Doe*'); *O'Bryan v Holy See*, 556 F 3d 361 (6th Cir, 2009) ('*O'Bryan*'); *Robles v Holy See*, (SD NY, No 20-CV-2106 (VEC), 20 December 2021) ('*Robles*'); *JC v Belgium* (European Court of Human Rights, Section III, Application No 11625/17, 12 October 2021) ('*JC*').

The tension between forum jurisdiction, on the one hand, and deference under the colour of comity or otherwise to a foreign sovereign authority, on the other, is not a question of a balance of rights. Rather, State immunity is an exception to the default principle of territorial curial sovereignty.[7] Rosalyn Higgins, formerly President of the International Court of Justice ('ICJ'), has written that '[i]t is very easy to elevate sovereign immunity into a superior principle of international law and to lose sight of the essential reality that it is an exception to the normal doctrine of jurisdiction'.[8] In a similar vein, as the Australian Law Reform Commission ('ALRC') has pithily observed:

> Where a foreign state wrongfully causes death or personal injury or damages property within the forum state, the forum's interest in asserting jurisdiction over the wrongful act seems clear. … [T]he primary justification for asserting jurisdiction in this case is that the foreign state has no privilege to commit local physical injury or property damage …[9]

It might be said that it should therefore always be an uphill battle for forum jurisdiction to be overturned, somewhat along the lines of the burden of the criminal standard of proof borne by State prosecutors which similarly represents a principled asymmetry in favour of the individual justified by the disparate gravity of outcomes. A refusal of jurisdiction is doubtless graver for an individual seeking redress of a tortious wrong than allowing jurisdiction would be for the State.[10]

The article proceeds in the following way. Part II provides an overview of general matters relating to statehood-based protection, with a focus on: (1) the methodology of the restrictive theory of foreign State immunity applicable in Australia; and (2) related issues of the relationships between national courts and international norms. Part II focuses on norms constituted by international agreements and expectations forming a general background to the operation of Australia's law of foreign State immunity. Drawing on this analysis, Part III interrogates the Australian law of State immunity in order to articulate the grounds on which a civil claim may (under

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7 *Benkharbouche v Embassy of the Republic of Sudan* [2019] AC 777, 821 [59] ('*Benkharbouche*'). See generally Pierfrancesco Rossi, *International Law Immunities and Employment Claims: A Critical Appraisal* (Hart, 2021) 13–14.

8 R Higgins, 'Certain Unresolved Aspects of the Law of State Immunity' (1982) 29(2) *Netherlands International Law Review* 265, 271.

9 ALRC 24 (n 2) 66–7 [113]–[114]. Similarly, 'the time of the "sacrosanctity" of foreign states is over — domestic courts must accept that they have a duty to decide cases presented before them and as part of that duty they must strive equitably to take into account all interests in the litigation': Richard Garnett, 'Foreign States in Australian Courts' (2005) 29(3) *Melbourne University Law Review* 704, 732.

10 As observed in *Estate of Michael Heiser v Iran* [2019] EWHC 2074 (QB), [129] ('*Heiser*'), access to justice is inevitably challenged by the invocation of State-based immunity.

Australian domestic law) be properly subject to the jurisdiction of Australian courts when the respondent is one or more of the Vatican-based entities.[11]

It should be emphasised that while international legal norms are discussed before the law of Australia, this is primarily for contextual purposes. It is with Australian law that this article is most centrally concerned. Australian law of State immunity represents an interface of national and international law — but it manifests that interface in terms of Australian courts looking out, not international law looking in. On this basis, Part III includes some subsidiary reference to overseas findings and international norms. In Australia such findings or associated norms may be invoked under certain circumstances to aid in the interpretation of applicable law. The High Court of Australia ('High Court') has made it clear that international treaties 'should be interpreted uniformly by contracting states'.[12] A treaty applied directly by an Australian statute should be interpreted using the rules of treaty interpretation under international law.[13] Judicial consideration of the *Diplomatic Privileges and Immunities Act 1967* (Cth) ('*DPIA*') provides an example. The *DPIA* incorporates in part the *Vienna Convention on Diplomatic Relations* 1961 ('*VCDR*')[14] to which Australia is a party. *DPIA* s 7 identifies a total of 18 articles of the *VCDR*, giving the 'provisions' of these 'the force of law' in Australia.[15] In addition, the entirety of the *VCDR* comprises the Schedule to the *DPIA*.[16] The United Kingdom ('UK') *Diplomatic Privileges Act 1964* ('*DPA* (UK)') similarly incorporates a selection of articles from the *VCDR*.[17] On the basis of these *VCDR* articles being law in both

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11 The focus of this article is on impediments to a tort suit, not on criteria as to the merits thereof. Australian law imposes a duty on various persons both natural and legal, to take reasonable precautions when carrying out their lawful activities, in order to avoid causing foreseeable harm in ways that would not be adequately addressed by contractual or other arrangements; this is 'an obligation to exercise reasonable care': *Roads and Traffic Authority of New South Wales v Dederer* (2007) 234 CLR 330, 337–8 [18] (Gummow J); or more succinctly, a 'duty to take care': Justice Geoffrey Nettle, 'The Changing Position and Duties of Company Directors' (2018) 41(3) *Melbourne University Law Review* 1402, 1406.

12 See, eg: *Povey v Qantas Airways Ltd* (2005) 223 CLR 189, 202 [25] (Gleeson CJ, Gummow, Hayne and Heydon JJ) ('*Povey*'); *Spain v Infrastructure Services Luxembourg Sàrl* (2023) 97 ALJR 276, 286 [38] ('*Spain v ISLS*'). The High Court added in *Povey*, '[b]ut, of course, the ultimate questions are, and must remain: what does the relevant treaty provide, and how is that international obligation carried into effect in Australian municipal law?': at 202 [25].

13 See, eg, *Maloney v The Queen* (2013) 252 CLR 168, 180–1 [14] (French CJ), 256 [235] (Bell J).

14 *Vienna Convention on Diplomatic Relations*, opened for signature 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964) ('*VCDR*').

15 *Kumar v Consulate General of India, Sydney* (2018) 329 FLR 90, 99 [52]. The selected *VCDR* (n 14) articles are arts 1, 22–4, and 27–40: *Diplomatic Privileges and Immunities Act 1967* (Cth) s 7(1) ('*DPIA*'). See also *Spain v ISLS* (n 12) 286 [38].

16 *DPIA* (n 15) sch.

17 *Diplomatic Privileges Act 1964* (UK) s 2, sch 1 ('*DPA* (UK)').

Australia and the UK, and the shared context of their inclusion in a statute on diplomatic protection, Australia's Federal Court relied on the reasoning of the UK Supreme Court in *Al-Malki v Reyes* when interpreting arts 31 and 39 of the *VCDR*.[18]

Following the analysis of Australian law, focused on the *FSIA* and the *DPIA*, Part IV gives an overview of recent indicative case law from the US and from Europe concerning the Holy See as respondent. Australian courts may observe trends in reasoning and may seek for insights into the puzzles generated by this species of litigation worldwide. Part V draws the threads together.

Before moving on to Part II, some brief comment is required on the legal nature of the Vatican-based entities. The complexity, rich history and manifold interconnectivities of the Vatican, Vatican City, the Holy See, the Papacy and the Roman Catholic Church are undeniable. Correspondingly, scholarship in international law is still evolving on the question of the statehood, as a sovereign independent entity, of either or both of the Vatican City and the Holy See, whether severally or in a combined or integrated form.[19] It is paradigmatic of modern international law that statehood when recognised confers a formal equality on entities that are highly diverse, for example in terms of population size, territorial extent and economic

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18 *Mahmood v Chohan* [2021] FCA 973, [15]–[17], citing *Al-Malki v Reyes* [2019] SC 735, 749 [4] (Lord Sumption JSC, Lord Neuberger agreeing), 771–2 [55] (Lord Wilson JSC, Baroness Hale PSC and Lord Clarke agreeing). *DPA* (UK) (n 16) sch 1 prescribes the same selection of articles from the *VCDR* as having the force of law in the UK, as the *DPIA* prescribes with respect to Australia, but with the addition of art 45. In interpreting the *VCDR* in the context of the *DPA* (UK), the UK Supreme Court has indicated in *Basfar v Wong* [2023] AC 33, 55 [16] (Lords Briggs and Leggatt JJSC, Lord Stephens JSC agreeing) ('*Basfar*') that

> [t]he text of an international convention is intended to be given the same meaning by all the states which become parties to it. The provisions of the [*VCDR*] enacted into UK law by the [*DPA* (UK)] must therefore be interpreted, not by applying domestic principles of statutory interpretation, but according to the generally accepted principles by which international conventions are to be interpreted as a matter of international law.

This position has been explicitly endorsed by the High Court of Australia: *Spain v ISLS* (n 12) 286 [38].

19 Cismas (n 4) 153–238; John R Morss, 'The International Legal Status of the Vatican/Holy See Complex' (2015) 26(4) *European Journal of International Law* 927, 930; Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3(3) *Göttingen Journal of International Law* 829, 859; Ntina Tzouvala, 'The Holy See and Children's Rights: International Human Rights Law and Its Ghosts' (2015) 84(1) *Nordic Journal of International Law* 59, 66; William Thomas Worster, 'The Human Rights Obligations of the Holy See under the Convention on the Rights of the Child' (2021) 31(1) *Duke Journal of Comparative and International Law* 351, 377–84; Nicolás Zambrana-Tévar, 'Reassessing the Immunity and Accountability of the Holy See in Clergy Sex Abuse Litigation' (2020) 62(1) *Journal of Church and State* 26, 35 ('Reassessing'); Nicolás Zambrana-Tévar, 'The International Responsibility of the Holy See for Human Rights Violations' (2022) 13(6) *Religions* 520; Luca Pasquet and Cedric Ryngaert, 'The Immunity of the Holy See' (2022) 8(2) *Italian Law Journal* 837.

or military capacity.[20] Consistent with this diversity alongside formal equality, as Gleider Hernández observes, 'States may … determine freely their internal organization'.[21] Thus, international law pays little heed to the nature of the interconnections between the Vatican City and the Holy See.[22] In any event, this article does not further consider the contested question of the legitimacy of the Holy See as claimant to statehood-based immunity in an Australian court.[23] For a court to set aside such a claim ab initio would of course represent the most direct path or 'the high road' to engagement with the merits of a civil action, that is to say to the exercise of its proper competence.[24] But there is another path to the same procedural end. To anticipate, this 'low road' comprises a recognised exception to foreign State immunity. An overview of the law of foreign State immunity, including its international aspects, is therefore necessary.

II Statehood-Based Protections and the Restrictive Theory of Foreign State Immunity: International Norms

A *Jurisdiction and Statehood-Based Protections: Procedural Matters*

Protection derived from foreign statehood may take the form of declared inviolability of an institution, an object or a natural person, or of an immunity from juridical process of a natural or a legal person.[25] Thus 'immunity may be understood as a freedom from liability to the imposition of duties by the process of Australian courts'.[26] The approach to foreign statehood-based immunity applicable in Australia

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20 Gleider Hernández, *International Law* (Oxford University Press, 2019) 117.

21 Ibid.

22 However, factual matters going to civil liability might well involve scrutiny of institutional administrative arrangements.

23 In any event, the Minister could foreclose this issue under s 40 of the *FSIA* — see below n 79.

24 '[A] right to jurisdictional immunity cannot be derived from the mere fact that the Holy See participates in international law by entertaining diplomatic relations and concluding treaties *like a State*': Pasquet and Ryngaert (n 19) 854 (emphasis in original).

25 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* [2002] ICJ Rep 3, 21–2 [52]–[55], 30 ('*Arrest Warrant*'); Roger O'Keefe, 'Review of Tom Ruys and Nicolas Angelet (eds), Luca Ferro (assistant ed), *The Cambridge Handbook of Immunities and International Law*' (2021) 32(2) *European Journal of International Law* 709, 712–13 ('Review'). Immunity from process and from execution are to be distinguished: *Thor Shipping A/S v Ship 'Al Duhail'* (2008) 252 ALR 20, 40 [69] ('*Thor*'). See also: James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 9th ed, 2019) 472–4 ('*Brownlie's*').

26 Such that in Australia's *FSIA* (n 3) s 9 'jurisdiction' means 'amenability of a defendant to the process of Australian courts': *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2012) 247 CLR 240, 247 [17] (French CJ, Gummow, Hayne and Crennan JJ) ('*Garuda* HCA').

is known as the restrictive theory (or doctrine) of immunity.[27] This approach is predominant in national courts across the globe, albeit not exclusively so.[28] It is commonplace to compare the restrictive theory to an absolute (or 'unqualified') approach.[29] However, the restrictive theory cannot be characterised as a historical evolution from one customary norm of international law to another, or as the emergent consequence of cumulative inroads into the absolute approach: as 'there has probably never been a sufficient international consensus in favour of the absolute doctrine of immunity to warrant treating it as a rule of customary international law'.[30] The drafting convention used in State immunity legislation of conferring a general immunity as a rule and then providing exceptions to that rule, which may suggest a more absolute approach, should not be interpreted as articulating a substantive default status.[31] The restrictive theory of immunity is the best description of State practice in the granting of immunities, in that a foreign State 'is entitled to immunity only in respect of acts done in the exercise of sovereign authority'.[32]

The contrast between conduct of the State understood as inherent to sovereignty (acts *jure imperii*) and other conduct (acts *jure gestionis*), while somewhat imprecise as it stands, has proved robust.[33] Importantly, within the restrictive theory of immunity *jure gestionis* is seen expansively, applying to conduct 'that was open to any person (individual or corporation) however unlikely it may be such a person would have engaged in it'.[34] Protection from suit in a national court, in the form of an immunity based on (foreign) statehood, therefore requires that a set of criteria be met. While the precise specification of those criteria differs across national jurisdictions in terms of statute and other kinds of governing law, the requirements are broadly equivalent.

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27 'The [*Foreign States*] Immunities Act was enacted to give effect to the restrictive doctrine of foreign State immunity': *Firebird* (n 2) 86 [189] (Nettle and Gordon JJ).

28 Crawford, *Brownlie's* (n 25) 472–4.

29 James Crawford, 'Foreword' in Roger O'Keefe, Christian Tams and Antonios Tzanakopoulos (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press, 2013) v ('Foreword').

30 *Benkharbouche* (n 7) 819 [52]. In the English courts the 'myth surrounding … absolute immunity' was queried by Lord Denning for two decades before his Lordship's intervention in *Trendtex*: Ernest K Bankas, *The State Immunity Controversy in International Law: Private Suits against Sovereign States in Domestic Courts* (Springer, 2nd ed, 2022) 98; *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529 ('*Trendtex*').

31 *Benkharbouche* (n 7) 810–11 [38]–[39]. For Lord Sumption JSC this can be said of the US, Canadian and Australian legislation as well as that of the UK: at 810–11 [38].

32 Ibid 810 [37]. For the High Court of Australia, the restrictive approach is 'necessary in the interest of justice': *Garuda* HCA (n 26) 244 [6], quoting *Playa Larga v I Congreso del Partido* [1983] 1 AC 244, 262 (Lord Wilberforce) ('*I Congreso del Partido*').

33 *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening) (Judgment)* [2012] ICJ Rep 99, 125 ('*Jurisdictional Immunities*').

34 *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2011) 192 FCR 393, 419 [119] (Rares J) ('*Garuda* FCA').

A relevant status for a foreign entity must be shown. Depending on jurisdiction, the protection of the foreign entity may be: (1) asserted by the defendant party; (2) found by the court acting on its own motion; or (3) accepted by the court on the basis of a certificate issued by the executive branch.[35] The conduct complained of must be shown to fit within the applicable parameters of protected conduct. Falling at any hurdle may restore the judicial process to its default mode of local forum jurisdiction over process, the outcome of which is of course always open at that early point.

B *Protections Conferred on a State by International Law: An Overview*

The most important recent consideration of State jurisdictional immunities by an international tribunal is *Jurisdictional Immunities of the State* (*Italy v Germany, Greece intervening*) ('*Jurisdictional Immunities*') at the ICJ.[36] The case concerned delicts in relation to human rights, committed in Italy by German forces during World War II. These were found by the ICJ not to found exceptions to Germany's State immunity from foreign State litigation, despite the unquestioned harms inflicted.[37] From the perspective of complaints that might arise in Australia relating to conduct of a foreign State or its agencies, this finding is extremely narrow. Deployment of military forces in time of war is a paradigmatic sovereign act. Such inter-State protection is based in customary international law ('CIL'). However States around the world, from whose conduct the norm is ultimately deduced, 'do not agree on [the] scope and extent' of such a customary norm.[38] When the harmful conduct was carried out by officials of a foreign State (from the forum perspective), statehood-based immunity has in some instances been an impediment to the continuation of procedure in the complainant's own State. As discussed below in Part IV, where the focus is overseas case law on the Holy See and the Roman Catholic Church, the ECtHR has the responsibility of assessing compliance of member States of the Council of Europe with the *European Convention on Human Rights* ('*ECHR*') which provides (at art 6) a guarantee of access to justice for nationals of States parties.[39] A finding of foreign State immunity forecloses this access to justice, but this is a breach of art 6 only if the granting of the immunity was disproportionate. No breach had occurred, for example, when the Irish High Court declined — on

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35 See, eg: Fox and Webb (n 5) 11, 19; *FSIA* (n 3) s 40.

36 *Jurisdictional Immunities* (n 33).

37 Ibid 154–6 [139].

38 Sally El Sawah, 'Jurisdictional Immunities of States and Non-Commercial Torts' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019) 142, 157.

39 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 Sep 1953), as amended by *Protocol No 15 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 11 May 2021, CETS No 213 (entered into force 1 August 2021) art 6 ('*ECHR*').

grounds of UK State immunity — to allow an aggrieved Irish national to pursue a civil claim against a serving British soldier.[40]

Immunities for natural persons are an important variety of statehood-based protection. At the level of international tribunals, and in relation to protections for the highest officials of foreign States on the basis of that status, the ICJ found in *Arrest Warrant of 11 April 2000 (Congo v Belgium)* (‘*Arrest Warrant*’) that an incumbent Foreign Minister may not be made subject to an arrest warrant issued by the courts of another national jurisdiction.[41] Since the immunity subsists on behalf of the relevant State, that State may waive the protection. It was indicated that the protection is cognate with the immunity for a head of State visiting another jurisdiction and is likewise based on CIL.[42] There are some commonalities across criminal and civil actions in relation to the claim to statehood-based immunity for a high-level official. In the context of criminal charges, the 1999 extradition proceedings in London against former President of Chile Augusto Pinochet Ugarte gave rise to a claim of such immunity.[43] While decided largely under the *State Immunity Act 1978* (UK) (‘*SIA* (UK)’), significant reference was also made to CIL as variously apprehended by the Law Lords.[44]

Diplomats are protected at the international level under the *VCDR*. Relevantly, art 39 of the *VCDR* provides that protection for diplomats begins when they take that role and terminates when they complete their term of office. While incumbent, accredited diplomats are thus immune from prosecution *ratione personae* for all

40 *McElhinney v Ireland* [2001] XI Eur Court HR 37, 46–7 [38]–[40]. In general, State conduct conforming with the norms of international law will not constitute a disproportionate restriction of *ECHR* art 6(1): *Al-Adsani v United Kingdom* [2001] XI Eur Court HR 79, 100 [56]; *Jones v United Kingdom* [2014] I Eur Court HR 1.

41 *Arrest Warrant* (n 25) 24 [58].

42 It is said to be ‘firmly established’ that immunities from forum jurisdiction ‘both civil and criminal’ apply to ‘holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs’: ibid 20–1 [51]. The observation made by the ICJ is a broad-brush one and little more than ‘an introductory remark’: *Al Maktoum v Al Hussein* [2021] EWCA Civ 890, [20] (‘*Al Maktoum*’). The extensive overseas case law on such protections for high officials, and for diplomats of foreign States, is indicated below in Part III.

43 *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte [No 3]* [2000] 1 AC 147 (‘*Pinochet No 3*’).

44 In this context see, eg, ibid 167–8, 172, 174, 176–7, 210, 240–5. Since the *Trendtex* decision and related developments, English courts had enjoyed the possibility of direct incorporation of such international legal norms by the bench when compatible with applicable statute: Crawford, *Brownlie’s* (n 25) 64; *Trendtex* (n 30). In this context, the Law Lords found that the conduct of a former head of State in instigating acts of torture and directing political assassinations overseas during his incumbency, falls outside the conduct that continues to be protected from process under English law once they have left office: ibid 291–2. Egregious conduct has also been found to lie outside the sphere of protected private conduct in a Head of Government: *Al Maktoum* (n 42) [20].

criminal conduct, and civil conduct with some specified exceptions. Under the relevant articles of the *VCDR*, the only conduct for which protection for a diplomat persists beyond their time in office, in the form of immunity *ratione materiae*, is 'acts performed … in the exercise of his functions as a member of the mission'.[45]

C *The* European Convention on State Immunity *and the* United Nations Convention on Jurisdictional Immunities of States and Their Property

Despite not having entered into force, the 2004 *United Nations Convention on Jurisdictional Immunities of States and their Property* ('*UNCSI*')[46] has been referred to by courts in several jurisdictions and exhaustively analysed by commentators.[47] *UNCSI* was cited by the ICJ in *Jurisdictional Immunities* in 2012.[48] Reference was also there made to the 1972 *European Convention on State Immunity* ('*ECSI*')[49] art 11.[50] The ECtHR has suggested that *UNCSI* corresponds to CIL in relation to the rights and obligations that it expresses.[51]

UNCSI provides for statehood-based immunities of various kinds and articulates exceptions to those immunities.[52] Those exceptions include: commercial transactions;[53] contracts of employment;[54] dealing in moveable and immoveable

45 *VCDR* (n 14) art 39(2).

46 *United Nations Convention on Jurisdictional Immunities of States and Their Property*, GA Res 59/38, UN GAOR, 59th sess, 65th plen mtg, Agenda Item 142, UN Doc A/RES/59/38 (16 December 2004) annex ('*UNCSI*').

47 O'Keefe, Tams and Tzanakopoulos (n 5).

48 *Jurisdictional Immunities* (n 33) 129.

49 *European Convention on State Immunity*, opened for signature 16 May 1972, 1495 UNTS 181 (entered into force 11 June 1976) ('*ECSI*'). States parties include Austria, Belgium, Cyprus, Germany, Luxembourg, Netherlands, Switzerland and the UK. The *SIA* (UK) was itself closely based on *ECSI*: ALRC 24 (n 2) 14 [16].

50 *Jurisdictional Immunities* (n 33) 128–9 [67].

51 See, eg: *Oleynikov v Russia* (European Court of Human Rights, First Section, Application No 36703/04, 14 March 2013) 17 [66] ('*Oleynikov*'); *Cudak v Lithuania* (European Court of Human Rights, Grand Chamber, Application No 15869/02, 23 March 2010) 18 [67]. However, the claim that worldwide State practice is well represented by the wording of *UNCSI* is questionable and in any event, the universal adoption of *UNCSI* might give rise to a somewhat hollow uniformity of high-level rules: Roger O'Keefe, 'The Restatement of Foreign Sovereign Immunity: *Tutto il Mondo è Paese*' (2022) 32(4) *European Journal of International Law* 1483, 1496.

52 *UNCSI* (n 46) art 3. See generally Roger O'Keefe, 'Article 3', in Roger O'Keefe, Christian Tams and Antonios Tzanakopoulos (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press, 2013) 73.

53 *UNCSI* (n 46) art 10.

54 Ibid art 11.

property;[55] intellectual and industrial property;[56] and participation in certain collective bodies.[57] For present purposes the key exception is provided at art 12, wherein immunity is displaced in the case of

> death or injury to the person … caused by an act or omission … attributable to [a] State [which] occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.[58]

Article 12 of *UNCSI* is unusual among international instruments, in its exclusion of immunity being based on territorial location and not on the non-sovereign nature of the impugned act.[59] As a result, this ground for exception to immunity has been referred to curially and by commentators, as the 'territorial tort' exception or principle.[60] Sally El Sawah cautions in the context of what she more often terms 'the non-commercial tort exception' that 'disparity of State practice … cannot be ignored'[61] and that 'the exact contours of the material and territorial scope of the non-commercial tort exception are still ambiguous and uncertain'.[62]

Circumscribing the ostensible inclusivity of the 'in whole or in part' clause is the 'author present' clause ('if the author of the act or omission was present'), a clause shared only with *ECSI* art 11.[63] As cited by Joanne Foakes and Roger O'Keefe, the 'author present' clause was intended by the International Law Commission ('ILC') — in drafting what became *UNCSI* — to exclude 'transboundary injuries or trans-frontier torts or damage'.[64] To paraphrase, such transboundary effects would comprise three kinds of circumstance: (1) non-deliberate but possibly negligent harm through exporting fireworks, hazardous substances and the like; (2) deliberate infliction of harm across a frontier in real time as by firing a weapon or in a delayed

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55 Ibid art 13.

56 Ibid art 14.

57 Ibid art 15.

58 Ibid art 12. See generally Joanne Foakes and Roger O'Keefe, 'Article 12' in Roger O'Keefe, Christian Tams and Antonios Tzanakopoulos (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press, 2013) 209.

59 El Sawah (n 38) 144–5; Foakes and O'Keefe (n 58) 209, 218–19.

60 *JC* (n 6) 21 [2] (Judge Pavli); *Jurisdictional Immunities* (n 33) 126 [62]. The term is often used 'for convenience': Foakes and O'Keefe (n 58) 209.

61 El Sawah (n 38) 156.

62 Ibid 157. The term 'non-commercial tort' itself is also unsatisfactory — it should be glossed as 'a tort that is not necessarily commercial' and 'commercial' can be given very wide scope. See below n 157.

63 *ECSI* (n 49) art 11, framed as applying 'if the author of the injury or damage was present in that territory at the time when those facts occurred'. This article is also referred to in *Heiser* (n 10) [149] and in the dissent of Judge Pavli in *JC* (n 6) 23 [10]: see Part IV(A) below.

64 Foakes and O'Keefe (n 58) 221–2.

manner by means of a time bomb or letter bomb; and (3) the possibly negligent (or otherwise wrongful) 'spill-over' effects of armed conflict within sovereign borders.[65] Always conditional on facts, transboundary or trans-frontier torts might be glossed as torts (or other wrongful acts) whose components are distributed across a frontier and may also be distributed temporally and as between actors whether legal or natural. In the analysis of Foakes and O'Keefe, and consistent with the ILC ruminations that they cite, absent the 'author present' clause such trans-frontier torts might well satisfy art 12 in the light of its 'in whole or in part' provision. There is no 'author present' clause in the national statutes of the US[66] or the UK[67] — or that of Australia,[68] to which we now turn.[69]

III Australian Law

A *The* Foreign States Immunities Act 1985 *(Cth): General and Procedural Aspects*

In Australia the primary governing statute is the *Foreign States Immunities Act 1985* (Cth) ('*FSIA*'). As stated by the High Court in *Firebird Global Master Fund II Ltd v Republic of Nauru* ('*Firebird*'), the *FSIA* 'was enacted to give effect to the restrictive doctrine of foreign State immunity'.[70] It provides 'a considered regime of immunities, and exclusions from immunity'.[71] No Australian common law of statehood-based immunity survived the coming into force of the *FSIA*.[72] Australia's statute is broadly comparable to that of the UK, in form as well as in substance. Thus *FSIA* s 9 provides a 'general' form of immunity for public conduct, not of a criminal nature, by a range of entities in similar terms to that provided by the *SIA* (UK).[73]

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65 Ibid.

66 *Foreign Sovereign Immunities Act*, 28 USC §§ 1602–11 (1976) ('*FSIA* (US)').

67 *State Immunity Act 1978* (UK) ('*SIA* (UK)').

68 *FSIA* (n 3).

69 As observed by Foakes and O'Keefe, the 'author present' clause is integral to the 'territorial tort exception' as in *UNCSI* art 12 — absent that clause, it would be misleading to use the term 'territorial tort' in respect of the foreign States immunities statutes of the US, UK, or Australia: Foakes and O'Keefe (n 58) 221–2.

70 *Firebird* (n 2) 86 [189] (Nettle and Gordon JJ).

71 *Garuda* FCA (n 34) 415 [107] (Rares J); *FSIA* (n 3) s 9 concerns 'general' immunity: *Firebird* (n 2) 42 [7] (French CJ and Kiefel J).

72 *Garuda* HCA (n 26) 245 [8] (French CJ, Gummow, Hayne and Crennan JJ); *Firebird* (n 2) 42 [5] (French CJ and Kiefel J). It was anomalous for the sole judge of the Victorian Supreme Court in *Vale v Daumeke* (2017) 323 FLR 418 ('*Vale*') to have entertained the possibility of a residual common law of State immunity: at 423 [40]. The *FSIA* may have narrowed the scope of the former common law rule: *Rosa v Venezuela* [2019] ACAT 33, [7] ('*Rosa*').

73 *SIA* (UK) (n 67) s 1.

To enjoy general but conditional immunity from Australian legal process as a 'foreign State', a country outside of Australia must be 'an independent sovereign state; or … a separate territory (whether or not it is self-governing) that is not part of an independent sovereign state'.[74] The reference to 'foreign State' includes both legal persons (political sub-divisions, the executive government or part thereof) as well as the head of the State or of a political sub-division acting in their public capacity.[75] For example, the Attorney-General of Fiji has been found to fall under s 3(3)(c) of the *FSIA* and attained immunity under s 9.[76] A 'separate entity' of a foreign State is defined as a natural or corporate person acting as 'an agency or instrumentality of the foreign State' but not part of its executive government.[77] The Commissioner of Police of Fiji was a 'separate entity' for these purposes.[78] Under s 40 of the *FSIA*, the Minister for Foreign Affairs may determine under certificate the status of a certain foreign person or entity under s 3(3).[79]

B FSIA*: Immunities under Part II*

Provision is made for exceptions to the *FSIA* s 9 immunity. Exceptions include submission to jurisdiction[80] as well as commercial transactions[81] and, separately, contracts of employment.[82] Thus, as considered by the High Court in *Firebird*, *FSIA* s 11 provides that '[a] foreign State is not immune in a proceeding in so far as the proceeding concerns a commercial transaction'.[83] At s 11(3) it is provided that 'commercial transaction' refers to

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74 *FSIA* (n 3) s 3(1) (definition of 'foreign State').

75 Ibid s 3(3).

76 *Vale* (n 72) 422 [34].

77 *FSIA* (n 3) ss 3 (definition of 'separate entity'), 22. With three exceptions, the term 'State' in relation to immunity within *FSIA* ostensibly includes those separate entities. A separate entity may be a 'natural person other than an Australian citizen': *Garuda* FCA (n 34) 400 [26] (Lander and Greenwood JJ), or the 'central bank or monetary authority': *FSIA* (n 3) s 35(1). Commercial conduct in a separate entity will nullify any immunity: *Garuda* FCA (n 34) 419 [120] (Rares J), citing Commonwealth, *Parliamentary Debates*, House of Representatives, 21 August 1985, 142 (Lionel Bowen, Attorney-General). In the later High Court decision, Heydon J endorsed the observation by ALRC 24 (n 2) 37 [69] that '[i]n practice, it is unlikely that claims to immunity by separate entities will succeed': *Garuda* HCA (n 26) 262 [65].

78 *Vale* (n 72) 422 [35]: the Police Commissioner is 'an agent or instrumentality of the Republic of Fiji and not a department or organ of [its] executive government' — note the Commissioner was granted immunity in *Vale* on the basis of the Fiji location.

79 Where applicable, the certificate from the Minister is 'conclusive as to those facts and matters': *FSIA* (n 3) s 40(5). However, the Minister is not empowered to determine the status of a separate entity: *Garuda* HCA (n 26) 246 [12] (French CJ, Gummow, Hayne and Crennan JJ).

80 *FSIA* (n 3) s 10.

81 Ibid s 11.

82 Ibid s 12.

83 Ibid s 11(1); *Firebird* (n 2) 42 [8] (French CJ and Kiefel J).

> a commercial, trading, business, professional or industrial or like transaction into which the foreign State has entered or a like activity in which the State has engaged and, without limiting the generality of the foregoing, includes [a contract, a loan agreement, a guarantee or indemnity].[84]

The geographical location of a commercial transaction, even if established on the facts, is not salient so long as a sufficient territorial nexus is found. Thus, in *Garuda* HCA, the High Court rejected the appellant's proposal that s 11 might not apply on the basis that its (airline) business activity took place 'outside Australia'.[85] It was conduct 'which allegedly affected markets in Australia' thereby falling within the scope of s 11.[86] A broad understanding of commerce in the context of s 11 is called for.[87]

With reference to the further exceptions provided in *FSIA* ss 12, 13, 15, 16 and 20, the High Court has observed that the recommendation of the ALRC was that

> proceedings concerning certain other matters be the subject of exceptions to the general immunity from the jurisdiction of Australian courts. … The proceedings the subject of these exceptions are also expressly required to have a territorial nexus with Australia.[88]

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84 *FSIA* (n 3) s 11(3).

85 *Garuda* HCA (n 26) 260 [62] (Heydon J).

86 Ibid. Effects on markets in Australia are such that a jurisdictional connection is not in doubt, irrespective of geographical considerations as such: at 255 [50]. The meaning of a 'market in Australia' was rigorously examined in *Air New Zealand Ltd v Australian Competition and Consumer Commission* (2017) 262 CLR 207 — here it was observed that (1) 'market identification depends upon the issues for determination' (rather than being a stand-alone, preliminary determination): at 235 [59] (Gordon J) (citations omitted); (2) a market is not a physical entity: at 222 [14] (Kiefel CJ, Bell and Keane JJ); and (3) substitutability may be significant in determining the presence of competition and of a market: at 226 [27]–[28] (Kiefel CJ, Bell and Keane JJ). The supply of what might be termed 'faith services' to consumers across borders by religious organisations, might loosely be said to represent a market in which substitutability and consumer choice play a role. Opportunities and costs for nationals of a State are substantially governed by decision processes beyond borders.

87 See *Garuda* HCA (n 26) 264 [73] (Heydon J), emphasising that commercial activities under s 11 are not required to have contractual force nor to be transactions that 'promote trade'. Importantly in *Firebird* (n 2) 59 [80], French CJ and Kiefel J observed that

> [c]onsistently with the approach taken to the construction of s 9, where 'proceeding' is given its widest meaning in order to give effect to the general immunity from the jurisdiction of Australian courts, a wider meaning should be given to 'the proceeding concerns a commercial transaction' in order to give effect to the restriction on immunity which s 11(1) seeks to achieve. Such a construction of the two provisions gives effect to Australia's international obligations.

88 *Firebird* (n 2) 43 [10] (French CJ and Kiefel J), citing ALRC 24 (n 2) xviii–xx.

The nature of such a 'territorial nexus with Australia' requires scrutiny. That nexus is not all of one kind. It is indeed the case that, unlike s 11, each of ss 12–16 (and s 20) makes some explicit reference to Australia in defining grounds for exceptionality. It should be noted that few of the exceptions in ss 12–16 and 20 require concrete, physical presence of something or somebody geographically within Australia's sovereign borders as a precondition for exception to immunity.[89] Illuminated by these contextual matters, s 13 requires particular attention as attempted below. To anticipate, the common thread connecting these exceptions is that they concern 'acts and omissions and some forms of property *which are so closely connected to Australia* that it is appropriate that a foreign State be amenable to the jurisdiction of Australian courts in proceedings concerning such matters'.[90] In this formulation, close connection is not expressly tied to territory as such even if the nuance is a subtle one.

Of particular significance for claims in tort, at s 13 of the *FSIA* it is provided that:

> **13 Personal injury and damage to property**
>
> A foreign State is not immune in a proceeding in so far as the proceeding concerns:
>
> (a) the death of, or personal injury to, a person; or
>
> (b) loss of or damage to tangible property;
>
> caused by an act or omission done or omitted to be done in Australia.

As explained by Nettle and Gordon JJ in *Firebird*:

> In the case of personal injuries and property claims dealt with in s 13, the basis of the exception to immunity is that, where a foreign state wrongfully causes death or injury or damage to tangible property in Australia, there is no merit in requiring the plaintiff to litigate in the defendant's national courts when Australian courts can provide the obvious and convenient local remedy.[91]

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89 For *FSIA* (n 3) s 12, a contract of employment may have been made in Australia yet performed only partly, or not at all, therein. Under s 13, a failure to act can attract the exception. Under s 15, ownership, registration or protection of intellectual property 'in Australia' or an infringement of such rights 'in Australia' clearly has an extended or conceptual sense cognate with the 'effects on Australian markets' discussed above in the context of s 11. For s 16, membership of a body corporate 'controlled from Australia', even if not established under the law of Australia, may bring a foreign State into jurisdiction regarding disputes between it and other members of the body corporate.

90 *Firebird* (n 2) 89 [199] (Nettle and Gordon JJ) (emphasis added).

91 Ibid 89 [198], citing ALRC 24 (n 2) 55–9 [94]–[100].

Here it is the effect in or relating to Australia that is the focus. There is no doubt that geographical or territorial location can be a determinative factor. In *Vale*, the complainant was severely injured by a motor vehicle driven by a police officer in Fiji. All relevant conduct and harm (other than any continuing and consequent harm) had occurred in Fiji and the defendants were Fijian persons or entities. As a result, s 13 clearly did not counter the immunity provided to either the Attorney-General or the Police Commissioner of Fiji under s 9.[92] Yet on other facts, there is room for the view that harm to Australian nationals, in Australia, might suffice to satisfy the s 13 exception irrespective of ambiguities around the geographical location of a perpetrator or 'author'.[93]

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92 *Vale* (n 72) 423 [39]; nor did the respondent submit to Australian jurisdiction which would likewise have lifted immunity.

93 The ALRC observed in ALRC 24 (n 2) 67 [114] (emphasis added):

> Difficulties occur where some acts occur in one jurisdiction, some in another or where the acts occur in one jurisdiction and the damage in another. … Since the primary justification for asserting jurisdiction in this case is that the foreign state has no privilege to commit local physical injury or property damage, and since determining the place where the wrongful act or omission occurred is *usually* simpler than determining *where* damage occurred *or the cause of action arose*, it is recommended that Australian legislation follow the United Kingdom provision to this effect.

It might be glossed that on some facts, it is the determination of where damage occurred that is 'simpler' than determining a location of wrongful conduct. The latter is difficult with a distributed actor. If that is so, location of harm might be in effect determinative of a decision on jurisdiction under s 13. It should be noted that private international law was found unhelpful as to discerning 'any clear, agreed rule as to the appropriate forum in … transboundary tort cases': at ALRC 24 (n 2) 67 [114]. Clarity over somewhat analogous conflict of laws questions might have contributed to the design of Australia's *FSIA*. The question of territorial location of tortious conduct relative to jurisdictional boundaries, has been an issue *within* the Commonwealth of Australia, that is to say across the boundaries of states and territories. In *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, a conflict of laws question arose when Rogerson, an employee of Pfeiffer whose residence and connections with Pfeiffer were located in the ACT, was injured while working for Pfeiffer in NSW. A new rule of *lex loci delicti* was identified, according to which the place where a person is exposed to risk of injury shall determine the proper applicable law: at 544 [102]–[103] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ). See also Gary Davis, '*John Pfeiffer Pty Ltd v Rogerson*: Choice of Law in Tort at the Dawning of the 21st Century' (2000) 24(3) *Melbourne University Law Review* 982. Turning to international conflict of laws questions, in *Regie Nationale des Usines Renault SA v Zhang* (2002) 187 ALR 1 it was found that *lex loci delicti* also applies: at 520 [75] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), 539 [133] (Kirby J). See also Geoffrey Lindell, '*Regie Nationale des Usines Renault SA v Zhang*: Choice of Law in Torts and Another Farewell to *Phillips v Eyre* but the *Voth* Test Retained for *Forum Non Conveniens* in Australia' (2002) 3(2) *Melbourne Journal of International Law* 364. This position in Australian private law is consistent with the position discussed above in *Vale* (n 72).

C *Immunities under* FSIA *Part V and the* DPIA

Any application of immunity for an incumbent foreign head of State arising from his or her public functions is to be found in pt II of the *FSIA* as discussed above.[94] With respect to private conduct for an incumbent head of State, extension of a form of diplomatic protection — derivative of foreign State immunity — is provided in pt V 'Miscellaneous' at s 36. This provision was closely modelled on s 20 of the *SIA* (UK).[95] However, while incumbency may be read into *SIA* (UK) s 20 (since it refers to the head of State and his or her household in the present tense), it is made express in the *FSIA*. Section 36 provides that the *DPIA* is extended 'with such modifications as are necessary in relation to the person who is for the time being' head of State (or spouse thereof); and 'as that Act applies in relation to a person when he or she is the head of a diplomatic mission'.[96] Just as pt II of the *FSIA* provides no guidance as to Australian law on criminal conduct in public office for an incumbent head of State, so pt V is silent on the question of any immunity for private conduct surviving incumbency. The immunity that is conferred by recourse to the *DPIA*, and hence the *VCDR*, is an unqualified immunity with respect to criminal matters and a qualified immunity with respect to civil matters.[97] Notwithstanding the element of continuing immunity *ratione materiae* provided for diplomatic personnel directly under the *DPIA*, which arises solely in relation to their official conduct, it is not yet

94 '[A] head of a foreign state, in his or her public capacity, generally enjoys the same immunity as does a foreign state': *Thor* (n 25) 37 [61].

95 ALRC 24 (n 2) 103 [163]: with the benefit of hindsight, more specification might have been recommended therein in relation to private conduct of heads of State. The ALRC report indicates that such matters are 'rarely litigated': at 103 [163]. The application of the analogue to diplomatic protection is not without unwelcome consequences, as interrogated by Judge Dowsett in *Thor* (n 25) 39–40 [66]–[68].

96 *FSIA* (n 3) s 36(1) provides (emphasis added):

> the *Diplomatic Privileges and Immunities Act 1967* extends, with such modifications as are necessary, in relation to the person *who is for the time being*:
>
> (a) the head of a foreign State; or
>
> (b) a spouse of the head of a foreign State;
>
> as that Act applies in relation to a person *at a time when he or she is* the head of a diplomatic mission.

Further, s 36(3) provides '[t]his section does not affect the application of any other provision of this Act in relation to a head of a foreign State in his or her public capacity'.

97 *DPIA* (n 15) s 7, sch. Under *VCDR* (n 14) art 31(1)(c), State-based immunity *ratione personae* is not available for (diplomats') real estate dealings; actions in relation to succession; or to an action relating to any professional or commercial activity exercised by the diplomatic agent 'in the receiving State [but] outside his official functions'.

clear what conduct of a head of State, either public or private, attracts protection under Australian law beyond their incumbency.[98]

In *Thor Shipping A/S v Ship 'Al Duhail'* ('*Thor*') the Amir of Qatar (an incumbent foreign head of State) was the private owner of a fishing vessel which was the subject of a dispute in rem relating to charterparty.[99] *FSIA* s 36, linking to the *DPIA* and hence *VCDR*, was the only route for immunity from suit for a head of State acting in his private capacity.[100] However, for Judge Dowsett the salient questions concerning immunity, and exceptions thereto, are not exhaustively resolved by reference to the *FSIA*. His Honour refers to an observation in the 1984 ALRC report that the applicable law (either international law or common law) concerning the scope of immunity for private dealings of an incumbent head of State was unclear at that time.[101] Determining that despite the enactment of the *FSIA* he could not restrict his reasoning to Australian law, English law was therefore consulted. This consisted of the *SIA* (UK) and the case law concerning the extradition proceedings against Pinochet Ugarte (see Part II(B) above).[102] In relation to immunity, art 31(1) of the *VCDR* was found in *Thor* to be applicable via s 36 of the *FSIA* and its extension of the *DPIA*, insofar as they together conferred qualified civil immunity on the Amir for private acts.[103] Exceptions to that immunity under *VCDR* art 31(1)(a)–(c) were found non-applicable.[104]

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98 In relation to allegations made against the former King of Spain Juan Carlos, the UK High Court found that *SIA* (UK) (n 67) s 20 provides no protection to a former sovereign either in civil or in criminal proceedings: *Zu Sayn-Wittgenstein-Sayn v HM Juan Carlos de Borbón y Borbón* [2022] 1 WLR 3311, 3333 [60]. It should be noted that on appeal, protection for those of the former King's actions that were carried out during his incumbency, was in fact found: *Zu Sayn-Wittgenstein-Sayn v HM Juan Carlos de Borbón y Borbón* [2023] 1 WLR 1162, 1188 [76] (Simler LJ, Popplewell and King LJJ agreeing).

99 *Thor* (n 25) 21 [1].

100 It was 'common ground', and not further enquired into, that 'for present purposes, any relevant immunity is that which the Amir enjoys in his private capacity. Section 36 regulates that matter': *Thor* (n 25) 37 [61].

101 Ibid 34–5 [52]–[55].

102 Judge Dowsett draws from *Pinochet No 3* (n 43) the questionable result that under the common law of UK and the *SIA* (UK) (n 67), an incumbent head of State has complete immunity for private and public conduct, with no attention paid to the (civil jurisdiction) exceptions under the *VCDR* (n 14): *Thor* (n 25) 35 [56]. Judge Dowsett also asserts that the *SIA* (UK) and *FSIA* are sufficiently similar that the bench may read across from the case-law of the former, to the latter: at 37 [59].

103 *Thor* (n 25) 37–8 [61]–[63], 39–40 [67]–[69].

104 Ibid 38–9 [64]–[67]. *VCDR* (n 14) art 31(1) provides:

> A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

Article 31(1)(c) provides that immunity is unavailable in the case of 'an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions'.[105] Judge Dowsett found no basis for that exception on the facts.[106] The final clause seems otiose in the context of the private conduct of a head of State, and there certainly was commercial activity. However, Judge Dowsett found that the Amir did not carry out such (commercial) activity in Australia and '[i]ndeed, there is no suggestion that he has ever entered Australia'.[107]

That observation enabled interrogation by Judge Dowsett of the issue of presence in forum and, in this way, clarification of the role of the *VCDR* for immunity of a head of State via s 36 of the *FSIA* and *DPIA*. As explained by Judge Dowsett, the meaning of the *VCDR* in the context of diplomats (that is to say when the *DPIA* is applied directly) cannot be taken to be that protections for an incumbent diplomat are lost at any time that they leave the forum (the receiving State) even temporarily, while remaining in post.[108] Diplomats may spend some of their time in post in their home ('sending') State or a third country, whether for official or private purposes. Thus, '[t]he error in the plaintiff's submission is the characterization of [*VCDR*] Art 39 as a geographical limitation upon diplomatic immunity'.[109]

> (a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
>
> (b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
>
> (c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

105 *VCDR* (n 14) art 31(1)(c).

106 *Thor* (n 25) 38–9 [64].

107 Ibid. Thus, '[i]t would seem to follow that as a head of state, he enjoys the same immunity, without exception, as is conferred upon diplomatic agents by article 31, that is, immunity from criminal, civil and administrative jurisdiction, including immunity from execution': at 38 [64].

108 '[Article] 39 [of the *VCDR*] does not deprive a head of mission, who remains in post, of his or her immunity during any temporary absence from the receiving state. It would be strange if a head of state were to lose such immunity upon departure': ibid 39 [66]. *VCDR* (n 14) art 39 provides:

> 1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post …
>
> 2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country … However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

109 *Thor* (n 25) 39 [67].

Following the same reasoning, incumbent foreign head of State protection for private conduct under pt V of the *FSIA*, with respect to judicial proceedings in Australia, appertains to and is in effect an incident of his or her incumbency. It does not rely on physical presence within the forum:

> The geographical references in [art] 39 reflect the nature of the diplomatic agent's duties which generally require that he or she be in the relevant country in order to perform them. However he or she enjoys immunity whilst in post, regardless of location. It is that degree of immunity which must be extended to heads of state pursuant to s 36 of the States Immunities Act.[110]

The scope of 'such modifications as are necessary' to the *DPIA* under *FSIA* s 36 has not yet been determined. It would seem unlikely for such necessary modifications to include the limiting of the protection of head of State's private conduct to such conduct carried out when the head of State is physically present on the soil of the forum State.[111] Of course a visit to the forum State might on occasion be for private purposes.[112] The immunity, when applicable, cannot be simplistically limited by geography in this sense. But if that is correct then on the same reasoning, and in this respect somewhat at odds with Judge Dowsett's remark noted above, physical presence cannot be required in order to satisfy *exceptions* to incumbent head of State immunity for private acts under *FSIA* pt V, that is to say based on the content of *VCDR* art 31.[113] This analysis supports the analysis above of pt II of the *FSIA*, in pressing the point that effects 'in' or 'on' Australia cannot be understood simplistically or uniformly as necessitating the physical presence of some foreign body.

Reference to such matters in pt II of the *FSIA*, while reflective of a generic requirement of effective connection to Australia, above all indicates the significance of various parameters of duty, of breach of duty and of causality or other threshold criteria in civil suit. Facts which would in any case go to the causation element of a claim in negligence would play a key role in such consideration. If facts otherwise support a finding in tort that a duty had been breached causing the harm in Australia complained of, then the *FSIA* s 13 exception to immunity may on its face be satisfied

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110 Ibid. According to Judge Dowsett, *VCDR* art 39 'is designed to give immunity whilst the relevant diplomatic agent is in post, whether or not he or she is in the receiving state. It commences upon arrival in that state for the purpose of taking up the post, and terminates upon completion of his or her functions and departure': at ibid 39 [67].

111 *Pinochet No 3* (n 43) 203 (Lord Browne-Wilkinson). See also: *Harb v HRH Prince Fahd Bin Abdul Aziz* [2014] 1 WLR 4437, 4448–9 [34]; and on geographical limitations conveyed by *VCDR* art 31(1)(c), *Apex Global Management Ltd v Fi Call Ltd* [2014] 1 WLR 492, 507–10 [44]–[58].

112 Pinochet Ugarte's physical presence in London in 1999 was for medical reasons: *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte [No 1]* [2000] 1 AC 61, 87 (Lord Lloyd).

113 The *Firebird* High Court's pertinent observation on interpretive consistency is noted above: n 87.

irrespective of what might be termed merely geographical as against truly jurisdictional factors.[114]

IV The Roman Catholic Church, the Holy See and Related Respondents in Overseas Courts: Selected Cases

A *The European Court of Human Rights*

The ECtHR has issued a number of judgments salient for the status of the Roman Catholic Church and its various emanations. In many cases the ECtHR disputes are between a natural person and the State of which they are a national, alleging breach of the complainant's rights under the *ECHR*.[115] While such cases, on their facts, are closely connected with the role of the Roman Catholic Church in its global infrastructure of education and spiritual guidance, in temporal jurisdictions far from Rome, they remain disputes between a national and her or his own State. The *ECHR* right to a private life was not violated in the treatment of a married priest hired to teach in a public funded Catholic school in Spain, and subsequently dismissed.[116] Similarly reasoned, the dismissal and disqualification of a lay teacher of religious education from Catholic Schools in Croatia, consequent on his divorce and re-marriage, did not constitute a violation of his *ECHR* rights at the hands of Croatia.[117] In both cases the ECtHR examined the balance of interests between the complainant and the Catholic Church itself, and found that State endorsement of Church decisions did not excessively shift that balance to the detriment of the complainant.

However, the ECtHR has not always viewed State management of actions by the Catholic Church administration so charitably. For example, Ireland's protection of its own national against inhuman or degrading treatment under *ECHR* art 3 was found insufficient in *O'Keeffe v Ireland*.[118] O'Keeffe had been the victim of sexual abuse by a teacher (who was not a priest) in a state-funded Catholic school. The ECtHR found that the court proceedings conducted in Ireland had resulted in a violation of art 13 of the *ECHR*, as the result was that the applicant did not have an

114 When the Commonwealth of Australia established and oversaw detention facilities on Nauru for alien persons refused entry to Australia, it arguably committed a tortious act: *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 168 [410] (Gordon J) — noting that Gordon J was in dissent. Were this hypothetically the case, geographical factors would play a role in curial deliberation of such an alleged tort but would not give rise to preliminary issues of jurisdiction over the defendant. A transnational tort would have been subjected to norms of civil wrongfulness applicable under Australian law.

115 *ECHR* (n 39).

116 *Fernández Martínez v Spain* [2014] II Eur Court HR 449, 491 [152]–[153].

117 *Travaš v Croatia* (European Court of Human Rights, Section II, Application No 75581/13, 4 October 2016) 35 [114]–[115].

118 [2014] I Eur Court HR 155, 199 [169].

'effective domestic remedy' available to her.[119] The Irish Government was therefore instructed to compensate the complainant under art 41 of the *ECHR*.[120]

The case of *JC v Belgium*, before the ECtHR, was likewise framed as a complaint under the *ECHR*. The appellants — who included Belgian, French and Dutch survivors of abuse — claimed that access to justice, as provided under art 6 of the *ECHR*, had been denied to them by Belgium.[121] Complaints had been made in the Belgian courts against Belgian bishops, superiors of religious orders and the Holy See, under the Belgian Civil Code art 1382.[122]

The applicants' evidence stated that instructions sent to Belgian Church authorities in 1962 by the Holy Office, under the title *Crimen Sollicitationis*, prescribed what has been termed a 'code of silence' for clergy over claimed abuse, and that this policy was in effect reaffirmed in 2001 with *Sacramentorum Sanctitatis Tutela*. That evidence had not been considered by the Belgian courts and in endorsing the Belgian courts' decisions, the majority in *JC* at the ECtHR likewise set that claim aside.[123] No principal and agent relationship was found as between the Holy See and the bishops in Belgium.[124] Instead, as the Court of Appeal of Ghent had found, the diocesan bishop was found to possess his own decision-making power. Moreover, the misconduct attributed to the Holy See had not been committed on Belgian territory but in Rome, with neither the Pope nor the Holy See present on Belgian territory when the misconduct attributed to the leaders of the Church in Belgium had been committed.[125]

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119 Ibid 204 [183]–[186].

120 Ibid 204–5 [196], 205–6 [199]–[203].

121 *JC* (n 6). On the issue of access to justice under art 6 of *ECHR*, see also Roger O'Keefe, 'State Immunity and Human Rights: Heads and Walls, Hearts and Minds' (2011) 44(1) *Vanderbilt Journal of Transnational Law* 999, 1002.

122 *JC* (n 6) 25 [14] (Judge Pavli).

123 Ibid 25 [15]; Cismas (n 4) 204.

124 *JC* (n 6) 18 [69].

125 Ibid (in French only):

> [L]es fautes reprochées directement au Saint-Siège, … n'avaient pas été commises sur le territoire belge mais à Rome … ni le Pape ni le Saint-Siège n'étaient présents sur le territoire belge quand les fautes reprocheés aux dirigeants de l'Eglise en Belgique auraient été commises.

The matter of the Pope's non-presence in Belgium, as a matter of evidence by way of judicial notice, itself raises some questions. Conceptual uncertainty as to 'presence' of a somewhat arcane kind may arise in the case of papal involvement in a civil suit. The canonical power of the pope is (purportedly) unlimited by human jurisdictional boundaries since he is 'Pastor of the universal Church on earth. Consequently, … he has supreme, full, immediate and universal ordinary power in the Church' and 'can always freely exercise' his universal power (Canon 331), suggesting administrative effect beyond temporal borders: Cismas (n 4) 210, quoting Knut Walf, 'The Roman Pontiff and the College of Bishops' in John P Beal, James A Coriden and Thomas J Green (eds), *New Commentary on the Code of Canon Law* (Paulist Press, 2000) 431, 431.

The assertion that the Holy See 'was not present on Belgian territory' at the relevant time also calls for comment.[126] As with the authority of the Pope, connections to geography are by no means territorial in the sense usually understood by international or municipal law. In any event the strong majority in *JC* held that the Belgian Court had, as proxy for the State (Kingdom) of Belgium, properly responded to the appellants in deferring to State immunity for the Holy See.[127] However, the point was made that different facts might give rise to a different outcome. The Court considered that it would require an additional step to conclude that the jurisdictional immunity of States no longer applied to the failure to act claimed against the Holy See in *JC*, which had not occurred on the basis of current State practice.[128]

In the sole dissent Judge Pavli points to the 'territorial tort' exception to statehood-based immunity as codified in art 12 of *UNCSI*, which he asserts to represent CIL.[129] According to Judge Pavli, that exception to immunity was applicable on the facts since what it requires is that 'a cause of action under the territorial exception must relate to the occurrence or infliction of physical damage occurring in the forum State'.[130] In Judge Pavli's view, the Belgian courts erroneously applied to the benefit of the Holy See a 'carve out' from that exception to immunity. This 'carve out', applied for acts *jure imperii*, in effect brought the conduct back into the protected zone. Judge Pavli found that the Court of Appeal of Ghent had saved immunity on the basis of the inappropriate extension of principles established in the ECtHR itself, such as in *McElhinney* and *Jones*, and by the ICJ in *Jurisdictional Immunities*.[131] His argument relies on the formulation of art 12 of the *UNCSI* being taken to define the default position for territorial exceptions to immunity.

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126 The State of Iran, named as respondent in civil suit over injuries to US nationals abroad, had been found not to have been present in the USA: *Heiser* (n 10) [187].

127 *JC* (n 6) 19 [75].

128 *JC* (n 6) 17 [65] (in French only):

> La Cour estime qu'il faudrait un pas additionnel pour conclure que l'immunité juridictionnelle des États ne s'applique plus à de telles omissions. Or, elle ne voit pas de développements dans la pratique des États qui permettent, à l'heure actuelle, de considérer que ce pas a été franchi.

129 Ibid 21 [2]. Judge Pavli suggests the general applicability of *UNCSI* and its 'territorial tort exception to State immunity' to States parties to the Council of Europe, with reference to *Oleynikov* (n 51): at 22 [6].

130 *JC* (n 6) 26 [17].

131 Ibid 22–3 [7]–[9]: for Judge Pavli, those decisions by the ECtHR and ICJ, declining to find an applicable CIL basis for a 'territorial tort exception', are strictly limited to their context of military activity or alleged torture, and in the case of *Jones* conduct which occurred outside the territory of the forum State. The applicable exception to immunity at *UNCSI* art 12 is not limited to *jure gestionis* in any case: at 23–4 [10]. Further, it might be glossed as vicarious liability: at 24–5 [13], the de facto convergence with which is also observed by Foakes and O'Keefe (n 58) 215, 220. For the majority in *JC* case law of both the ECtHR and ICJ straightforwardly manifested a proper deference to the equality of States by recourse to an immunity from jurisdiction: *JC* (n 6) 14–15 [59]–[61].

Judge Pavli further suggests that vicarious liability in tort might be an acceptable way of reading art 12 so as to impugn the incumbent Pope on the facts.[132] Article 12 includes the 'author present' clause, which for Judge Pavli is provided mainly to exclude such trans-border events as the export of fireworks or the firing of weapons across a border.[133] In any event, for Judge Pavli 'author' can here refer to a natural person herself or himself present in the forum territory and acting as representative or agent of the foreign entity. If harm was conveyed via such an agent of the vicariously liable foreign State or entity, which by definition would not itself have been 'in' the forum territory, then according to Judge Pavli *UNCSI* art 12 might be satisfied.[134]

To the extent that *UNCSI* art 12 does represent CIL, the observations of Judge Pavli are of value — despite their dissenting character — in relation to the concept of a 'territorial tort' exception to immunity more generally. As Judge Pavli observes, in this form of exception to a statehood-based immunity, harm must occur in the forum State, a factor emphasised by commentary of the ILC in its development of the *UNCSI* articles.[135] Thus art 12 provides that, subject to any applicable exceptions, relief should be available for those who suffer in their home State from an act or omission intentionally or negligently caused by a foreign State whether directly or by means of an agent, so long as the somewhat cryptic 'author present' clause is satisfied.[136]

B *United States*

In the US, as in other federal jurisdictions, parallel jurisprudence may emerge that reflects regional variations in the application or interpretation of uniform law.[137] For this reason among others jurisprudence from US courts is complex.[138] In *Doe v Holy See* ('*Doe*'), which originated in the federal District of Oregon and was heard by the Court of Appeals for the Ninth Circuit, the complainant alleged that

132 *JC* (n 6) 23–4 [13]. For an Australian court's perspective on vicarious liability in personal injury, see also *Bird v DP* [2023] VSCA 66.

133 *JC* (n 6) 26–7 [18] n 15; *UNCSI* (n 46) art 12.

134 *JC* (n 6) 26–7 [18].

135 Ibid 26 [17], citing *Report of the International Law Commission on the Work of its Forty-Third Session (29 April–19 July (1991)*, UN Doc A/46/10 (1991) ch II(D) 45–6 [9].

136 *JC* (n 6) 25 [14].

137 With the US Supreme Court ('USSC') decision in *Samantar v Yousuf*, 560 US 305 (2010) ('*Samantar*'), the US retains a globally exceptional position of procedural deference to the executive by the judicial branch concerning questions of foreign State immunity: Chimène Keitner, 'Immunities of Foreign Officials from Civil Jurisdiction' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019) 525, 540.

138 Cismas (n 4) 209; *Robles* (n 6) 23–5, 27–8. See also William Dodge, 'Jurisdiction, State Immunity, and Judgments in the Restatement (Fourth) of US Foreign Relations Law' (2020) 19(1) *Chinese Journal of International Law* 101, 134–5 [55]–[57].

the Holy See was liable for harms he had suffered from the conduct of a priest, Ronan.[139] In *O'Bryan*, originating in the federal District of Kentucky and heard by the Court of Appeals for the Sixth Circuit, a class action was initiated naming the Holy See, in which abuse by numerous clergy in the US was alleged.[140] In *Robles*, a first instance decision heard in the Southern District of New York, a victim of historic abuse by a parish priest took action against (among others) 'the Holy See, otherwise known as the Vatican'.[141]

In all three cases, a key statute was the United States *Foreign Sovereign Immunities Act* ('*FSIA* (US)').[142] It should be noted that attempts to bring international legal norms directly to bear in civil suit were of only limited success in *O'Bryan*[143] and unsuccessful in *Robles*.[144] In the latter it was observed that, although the US Supreme Court ('USSC') allows claims based directly on CIL, the bar is very high; generally speaking such norms do not of themselves generate causes of action under US law.[145] This does not vitiate the desirable convergence of the scheme of immunities, and exceptions thereto, with international norms; indeed, 'Congress had violations of international law by foreign states in mind when it enacted the *FSIA*'.[146]

Before addressing these cases, it is important to clarify the scope and limitations of the *FSIA* (US). This statute governs immunity from suit for foreign States and some other entities with cognate legal personality, but unlike the closest corresponding legislation in the UK and in Australia, is only incidentally concerned with the question of protection for natural persons (officials). The *FSIA* (US) provides that foreign States and their 'organs or instrumentalities'[147] are to be granted immunity from suit, with certain exceptions being specified. In 2010, the USSC confirmed that the exceptions to immunity provided by the *FSIA* (US) are the sole statutory

139 *Doe* (n 6) 1069–71 (Judge Wright).

140 *O'Bryan* (n 6) 369–70.

141 *Robles* (n 6) 1.

142 *FSIA* (US) (n 66) § 1605. Section 1605(a)(2) displaces foreign State immunity when

> the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

143 *O'Bryan* (n 6) 387.

144 *Robles* (n 6) 36.

145 '[T]he Supreme Court allows for the recognition of a claim based on violations of Customary International Law if: (1) there is a specific, universal, and obligatory norm at issue; and (2) the court finds it should exercise "judicial discretion" to create a cause of action': ibid 36.

146 *Argentine Republic v Amerada Hess Shipping Corp*, 488 US 428, 435 (1989) ('*Amerada Hess*').

147 *FSIA* (US) (n 66) § 1603(a).

avenue for civil claims over a foreign State.[148] Moreover, the *FSIA* (US) does not allow suit for damages against current or former senior foreign State officials as 'organs or instrumentalities' of a State.[149] Unless their conduct is assimilated to the conduct of a State, and hence governed as such by *FSIA* (US), the immunity of foreign officials is a matter for federal common law and in some circumstances for executive determination.[150] Some other statutes also play a role.[151] In any event, the *FSIA* (US) does not codify immunity for officials.[152] Further, immunity granted to natural persons *ratione materiae* based on the function or context of their conduct, and in principle persisting beyond their incumbency, is a matter of common law.[153] Under US common law, a former head of State therefore enjoys immunity to the extent that their past conduct is attributable to the State, thus excluding private acts or criminal acts.[154] Any blanket immunity for an incumbent head of a foreign State *ratione personae* is likewise provided by common law rather than statute law within the US.[155]

Returning to the three cases under examination, in which the *FSIA* (US) was invoked, relevant exceptions to immunity as argued by the plaintiffs were those

148 *Samantar* (n 137) 313–14 [5, 6]. See also *Amerada Hess* (n 146) 434.

149 Natural persons may not be treated as 'organs or instrumentalities' of a foreign State under the *FSIA* (US): Keitner (n 137) 534; O'Keefe, Restatement (n 51) 1486 n 6, 1491; *Samantar* (n 137) 315. The finding in *Samantar* differed from the majority of Circuits: Jennifer K Elsea, Congressional Research Service, *Samantar v Yousef: The Foreign Sovereign Immunities Act (FSIA) and Foreign Officials* (CRS Report No 7-5700, 16 December 2013) 4.

150 *Samantar* (n 137) 325; Dodge (n 138) 130 [48]. The advisory role of the executive branch in respect of immunity *ratione materiae* is to be distinguished from its determinative status in respect of immunity *ratione personae* for incumbent natural persons: Elsea (n 149) 14.

151 '[C]ivil proceedings against foreign officials in the United States … operate outside the US FSIA': Keitner (n 137) 538. A suit regarding aliens may in some circumstances be initiated under such statutes as the *Alien Tort Statute* 28 USC § 1350 (1948) as noted in *Amerada Hess* (n 146) 436–7. See also: Cismas (n 4) 208; *Torture Victim Protection Act of 1991*, Pub L No 102–256, 106 Stat 73 (1992) under which torture or extrajudicial killing by an alien, with sufficient nexus to US nationals, may be pursued against them: *Yousuf v Samantar*, 699 F 3d 763, 777 (4th Cir, 2012) ('*Yousuf*').

152 *Samantar* (n 137) 325.

153 Dodge (n 138) 130 [48]; *Samantar* (n 137) 325.

154 *Yousuf* (n 151) 775.

155 Ibid 768–9. This form of immunity *ratione personae* is 'a doctrine of customary international law' and survives questions of *jus cogens* violations: at 777. See also Dodge (n 138) 130 [48].

for commercial activity[156] and for tortious conduct in an official or employee.[157] The latter exception to immunity is routinely referred to by the US courts as the 'non-commercial tort' exception. As to the former, in *Doe* the Court of Appeals for the Ninth Circuit determined (Judge Berzon dissenting) that no consideration could be given to the question of commercial activity as grounding an exception to immunity.[158] The robust dissent from Judge Berzon expressed the view that commercial activity in the context of foreign State immunity must be interpreted broadly, so as to exclude truly sovereign conduct but not conduct that non-sovereign entities may also carry out. In the view of Judge Berzon,

> Ronan was not a civil service, diplomatic, or military employee — the types of employees that only sovereign states can employ … the Holy See hired Ronan to perform ecclesiastical and parochial services — [this] is not a peculiarly governmental function; it is something that non-governmental employers can do.[159]

In effect Judge Berzon was taking a similar position to that set out by Lord Wilberforce in *Playa Larga v I Congreso del Partido* — to the effect that within the restrictive theory of immunity, purportedly sovereign conduct must meet a high bar of exclusivity.[160]

In *Doe*, there was no direct negligence by the Holy See over its retention and supervision of Ronan despite awareness of his past conduct, because of the application of *FSIA* (US) § 1605(a)(5)(A) by which exercise or performance of a 'discretionary function' reverses any displacement of immunity.[161] However, there were sufficient grounds to maintain the question of jurisdiction under *FSIA* (US) § 1605(a)(5), in remitting the case back to District Court level, because of unresolved factors related to the employment status of Ronan.[162]

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156 *FSIA* (US) (n 66) § 1605(a)(2); *O'Bryan* (n 6) 370; *Doe* (n 6) 1071 (Judge Wright); *Robles* (n 6) 5.

157 *FSIA* (US) (n 66) § 1605(a)(5); *O'Bryan* (n 6) 370; *Doe* (n 6) 1071; *Robles* (n 6) 5. While the term 'non-commercial tort' is used by US courts with reference to the *FSIA* (US) tort exception (as in *O'Bryan* (n 6) 382), and in that respect contrasts with the commercial exception as such, the role played by employment in the tort exception should be noted and this term of art perhaps used with caution.

158 *Doe* (n 6) 1069, 1075.

159 Ibid 1091 (Judge Berzon) — thus at 1092 [76]–[77] (emphasis in original):

> The FSIA's purpose is not to insulate religious institutions from suit; it juxtaposes commercial activities not to *religious* activities, but to *governmental* activities. The Holy See … is like other sovereigns in the respect essential here: It engages in a range of non-sovereign activities in the United States, and the FSIA's commercial activity exception lifts the shield of immunity from such non-sovereign activities.

160 *I Congreso del Partido* (n 32) 262 (Lord Wilberforce).

161 *Doe* (n 6) 1081 (Judge Wright).

162 Ibid 1069. *Doe* was the first occasion on which such suit was allowed to proceed in the US: Cismas (n 4) 202. It should also be noted that certiorari was denied by the USSC in *Doe*: *See v Doe*, 561 US 1024 (2009); Robertson (n 4) 157.

In a somewhat similar manner, the plaintiff in *Robles* alleged a relevant employment relationship with sufficient evidence that a Holy See motion to dismiss was denied and discovery was allowed.[163] Judge Caproni noted, with reference to *Doe* and *O'Bryan*, that '[i]n two similar cases' the Courts of Appeal for the Ninth and Sixth Circuits had decided to similarly accept that plaintiffs 'had alleged facts sufficient to survive a motion to dismiss'.[164] It might also be noted that the Holy See was unsuccessful in seeking to show that the plaintiff's appeal in argument to religious doctrine violated the Establishment Clause (the First Amendment) in the *United States Constitution*.[165] The Holy See in *Robles* also argued a lack of causal nexus, but it was found that the alleged abuse was indeed 'fairly traceable' to the alleged negligence of supervising clergy and the Archbishop.[166]

Headway has therefore been made, from the point of view of plaintiffs, with preliminary phases of litigation: if not yet a glass half full, still a glass not completely empty. The significance of details within the factual matrix should also be noted. Thus a timely and appropriate response by the Vatican, in relation to a request for laicisation, was pointed to by its own counsel in an extra-curial context as evidence of the proper and responsible conduct of the Holy See in relation to *Doe*.[167] The complainant had alleged that the Holy See had negligently retained the offender and had failed to warn those coming into contact with him despite knowing of his history of offending.[168] Consideration of this allegation was barred by reason of the 'discretionary functions' test in the *FSIA* (US) and for this reason left undecided on its merits as making out the tortious act exception to immunity under the *FSIA*.[169] In many ways then, the course of litigation in the US over such harms is characterised

163 *Robles* (n 6) 25:

> While further fact-finding may demonstrate that the Holy See did not at the relevant time exert sufficient control for American clergy to be 'employees' of the Holy See as a matter of federal common law, at the motion to dismiss stage, Plaintiff has adequately alleged an employment relationship. … [A]t this stage Plaintiff has alleged sufficient facts to allow discovery on this issue.

164 Ibid 18–19.

165 Ibid 39. See also Cismas (n 4) 203.

166 *Robles* (n 6) 37–8.

167 Ronan, the offender in *Doe* (n 6), had been laicised in 1966. On the advice of counsel for the Holy See Jeffrey Lena, the Vatican in 2011 published documentation concerning its related decisions and actions. Lena is reported as saying:

> What the documents show, very clearly, is that the Holy See did not have any knowledge of this priest's propensity for abuse until after the abuse occurred, when it was notified by the petition for laicization that arrived from the priest's religious order. And when that petition arrived, it was granted by the Holy See without delay.

Cindy Wooden, 'Appeals Court Dismisses Sexual Abuse Lawsuit Against Vatican', *National Catholic Reporter* (online, 7 August 2013) <https://www.ncronline.org/news/accountability/appeals-court-dismisses-sexual-abuse-lawsuit-against-vatican>.

168 *Doe* (n 6) 1083.

169 Ibid.

by curial scrutiny of the facts as contrasted with early dismissal of complaints as the Holy See, in common with most defendants, might request.

In the context of the 'non-commercial' tort exception to State immunity, the issue of what is termed in *Robles* the 'situs requirement' at *FSIA* (US) § 1605(a)(5)[170] must be addressed. This limits the exception to 'personal injury or death, or damage to or loss of property, occurring in the United States'. According to *Robles*, relevant jurisprudence of the Second Circuit (which incorporates New York courts) 'requires that the "entire tort" must have 'occurred within the United States'.[171] On the facts of *Robles*:

> The Holy See's alleged conduct, such as promulgating policies and supervising its employees and officials, occurred in large part in the Vatican. … As a result, the Holy See is immune from Plaintiff's claims arising from the Holy See's conduct that occurred outside the United States — such as the Holy See's own negligent supervision or its promulgation of the 1962 Policy.[172]

Consistent with this interpretation of the *FSIA* (US) by the District Court in New York, and referred to in *Robles*, the Court of Appeals in *O'Bryan* had found an 'entire tort' requirement in the *FSIA* (US).[173] Yet the reasoning of the superior level bench is nuanced. In *Amerada Hess*, the USSC had resolved a dispute respecting damage to property on the high seas which resulted from foreign military bombardment. It was determined by the USSC that an exception to State immunity could not be found in the *FSIA* (US) '[b]ecause respondents' injury unquestionably occurred well outside the … territorial waters of the United States'.[174] Thus an allegedly tortious act merely having 'direct effects' in the US, fails to meet the criteria operative for the non-commercial tort exception.[175]

There is little room for doubt that an 'entire tort' requirement represents the current common law position within the US in respect of the non-commercial tort exception in *FSIA* (US).[176] A note of circumspection may perhaps be detected in the Sixth

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170 *Robles* (n 6) 28.

171 Ibid 28–9.

172 Ibid 29.

173 '[I]t seems most in keeping with both Supreme Court precedent and the purposes of the FSIA to grant subject matter jurisdiction under the tortious activity exception only to torts which were entirely committed within the United States': *O'Bryan* (n 6) 382. See also Cismas (n 4) 205.

174 *Amerada Hess* (n 146) 441. The 'injury' was the scuttling of an oil tanker subsequent to bombing by Argentinian military during the 1982 Malvinas conflict: at 432.

175 Cismas (n 4) 205. Consequential effects such as economic flow-on effects may suffice for the fulfilment of the commercial exception to immunity, even if insufficient for the non-commercial tort as such: ibid 441.

176 The entire tort requirement in non-commercial tort claims has no USSC endorsement: John J Martin, 'Hacks Dangerous to Human Life: Using JASTA to Overcome Foreign Sovereign Immunity in State-Sponsored Cyberattack Cases' (2021) 121(1) *Columbia Law Review* 119, 145–6 n 172.

Circuit's disposition on this point when noting decisions from other Circuits to the effect that just one 'entire' tort among the torts claimed by plaintiff suffices for the claim under the *FSIA* (US) to proceed.[177]

It was in the context of property loss (rather than personal injury), that the USSC in *Amerada Hess* was able to say that '[s]ection 1605(a)(5) is limited by its terms … to those cases in which damage to or loss of property occurs *in the United States*'.[178] Harm or damage occurring within the US is clearly non-negotiable as a requirement, but the concept of 'entire tort' seems less impregnable and is in any case a creature of common law, not of the *FSIA* (US) itself. As cautiously noted by Jennifer Elsea, writing on behalf of the Congressional Research Service, '*some* courts have limited the [non-commercial] tort exception to the FSIA to torts that occur entirely inside the United States, for example, traffic accidents'.[179]

Without doubt an 'entire tort' requirement is a challenge for complaints regarding conduct of the Holy See in Rome or another foreign State, and having substantive harmful effects in the US. The challenge is conceptual as much as factual. It is not clear 'where' a failure to warn took place, in the Vatican or in Portland, Oregon.[180] When an institution with global reach like the Roman Catholic Church exercises administrative powers, the question of the geographical localisation of conduct loses some of its validity. A relevant comparison, albeit to be drawn with caution, is with the components of the tortious conduct of terrorism that causes such conduct to be excluded from State immunity under *FSIA* (US).[181] The distributed nature of terrorism gives rise to jurisdictional complexities. After the enactment of the *Justice Against Sponsors of Terrorism Act* ('*JASTA*'), the component acts need not all have

177 *O'Bryan* (n 6) 382. Judge Mosman in the District Court level of *Doe* also seemed reluctant to conclude that the 'entire tort' proposition requires both 'acts and injury occurring in the United States': *Doe v Holy See*, 434 F Supp 2d 925, 952–3 [30]–[31] (2006) ('*Doe* D Or'); Cismas (n 4) 208. In *Doe* (n 6), it was observed that with the finding of inapplicability of the tortious act exemption to immunity, there was no occasion to consider 'whether the *entire* tort must occur in the United States': at 1085 (emphasis in original).

178 *Amerada Hess* (n 146) 439 (emphasis in original).

179 Elsea (n 149) 4 n 20 (emphasis added).

180 *Doe* (n 6) 1092–3; *Doe* D Or (n 177) 953 [30]; Cismas (n 4) 208.

181 Enacted under the *Justice Against Sponsors of Terrorism Act of 2016*, Pub L No 114-222, 130 Stat 852 (2016) ('*JASTA*'). *JASTA* s 3 amends *FSIA* (US) (n 66) by creating a new exception for States providing financial support to terrorists, even where they have not been formally designated as sponsors of terrorism by the State Department: Martin (n 176) 129–30; AJIL Contemporary Practice of the United States, 'US Supreme Court Rules That Victims of State-Sponsored Terrorism Can Sue Foreign States For Retroactive Punitive Damages Under the Foreign Sovereign Immunities Act' (2020) 114(4) *American Journal of International Law* 761, 764; El Sawah (n 38) 154–5; Rachael Hancock, '"Mob-Legislating": JASTA's Addition to the Terrorism Exception to Foreign State Immunity' (2018) 103(5) *Cornell Law Review* 1293, 1309–10.

taken place within the US.[182] This adjustment of course recognises the complexity and the distributed nature of the transnational funding and infrastructural features that may causally underlie the harming of US nationals at home.[183]

Writing when the *JASTA* legislation was still at Congress level, Elsea observed that in the absence of an entire tort requirement, the proposed legislation

> would not alter the [non-commercial] tort exception's requirement that the tort be committed within the United States, but would clarify that it is the place where the injury occurs that matters, regardless of where the underlying tortious act or omission was committed.[184]

It is possible that the more inclusive criterion deemed applicable in the case of terrorism may assist in the clarification of the general provision. Indeed, terrorism is not unique in the distributed nature of its infrastructure of harmfulness. This is an essential feature of cybercrime. It is also essential to worldwide administrative systems that are designed for benevolent or at least lawful purposes, yet on occasion give rise to harm**.**

Jurisprudence of the commercial act exception to State immunity under the *FSIA* (US) may also be of relevance here. It suffices for the purposes of this exception to immunity, that 'commercial activity of the foreign state … causes a direct effect in the United States'.[185] Despite this generosity of criteria, the role (if any) of geographical location ('in the United States') has been said to remain problematic even with the *Restatement (Fourth) of Foreign Relations Law of the United States*; according to William Dodge, 'questions of geographic scope will arise in future cases'.[186]

As shown by the variations in geographical criteria for the tort exception introduced in the terrorism context by *JASTA*, and by features of the commercial conduct exception, conceptual alternatives to an all or nothing approach to liability in non-commercial tort are available within the US jurisprudence. To that extent the 'entire tort' requirement in US law is less of a monolith than may have formerly been thought. Abuse by priests is not like a traffic accident, spatiotemporally

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182 Martin (n 176) 145–6. In *Heiser* (n 10) [87], a suggestion that the state of Iran was substantively 'present' in the USA as a consequence of its seat at the (New York located) UN, was given short shrift, yet serves as a reminder of the legal and conceptual complexities of location.

183 The locational complexities of cyberattack scenarios, for example, render an 'entire tort' approach inappropriate: Samantha Sergent, 'Extinguishing the Firewall: Addressing the Jurisdictional Challenges to Bringing Cyber Tort Suits against Foreign Sovereigns' (2019) 72(1) *Vanderbilt Law Review* 391, 407. In respect of analogies with terrorism, a State's capacity to prevent foreseeable harm beyond its borders may give rise to liability: Cismas (n 4) 234.

184 Elsea (n 149) 17.

185 *FSIA* (US) (n 66) § 1605(a)(2).

186 Dodge (n 138) 114 [19].

circumscribed in its key features, but distributed. As has been said in the context of cybercrime, 'a fixation with geography is not appropriate in relation to complex acts involving a multitude of actors'.[187] In what may be a straw in the wind, the District Court for the District of Columbia discussed the role of conduct outside the US as 'precipitating' harm to a US citizen within the US (in the form of cyber surveillance), although ultimately finding State immunity for Ethiopia.[188] It was observed that the 'entire tort' doctrine could not be understood as absolute since liability could not be evaded simply on the basis of any minimal overseas component to the relevant conduct.[189]

The interjurisdictional distribution of tortious conduct, including reflection on the US 'entire tort' approach, has been examined in two recent overseas decisions more significant for Australian law. In *Al-Masarir v Saudi Arabia*, the High Court of England and Wales confirmed that the personal injury exception to State immunity under *SIA* (UK) s 5 requires no more than that some relevant act or omission took place within the UK.[190] Cyber surveillance controlled from overseas reached this threshold, and the defendant's claim to immunity was declined.[191] An 'entire tort' interpretation of s 5 was rejected as inappropriately limiting grounds for the exception. Similarly, in *Shehabi v Bahrain*, the Kingdom of Bahrain installing 'spyware' on the computers of two political dissidents now resident in England was 'an act done in the UK for the purposes of [*SIA* (UK)] s 5'.[192] Moreover, under UK law psychiatric harm sufficed to satisfy the 'personal injury' requirement in the *SIA* (UK) s 5 exception to immunity.[193]

V Conclusions

Space precludes detailed examination of further grounds and case law relevant to potential liability of the Holy See in civil suit. The Italian courts have approached disputes involving the Holy See or Vatican as calling for interpretation of the Lateran agreements of 1929, under which an independent Vatican City was recognised by the Kingdom of Italy, and have narrowed the scope for immunity from Italian law. For example the operation of Radio Vaticana, found to have transmitted harmful

187 Hernández (n 20) 214.

188 *Kidane v Ethiopia*, 189 F Supp 3d 6, 28 (DDC, 2016).

189 Ibid 25. Judge Moss notes that in the modern world 'the Internet breaks down traditional concepts of physical presence': at 21.

190 *Al-Masarir v Saudi Arabia* [2023] 2 WLR 549, 557 [30] ('*Al-Masarir*').

191 Ibid 582–4 [144]–[151].

192 *Shehabi v The Kingdom of Bahrain* [2023] EWHC 89 (KB), [144]. Indeed, unless the personal injury exception were to be limited in application to 'the most straightforward of cases (eg, a road traffic accident involving a vehicle driven by an employee of a foreign embassy)', then it must be recognised that 'many, if not most, of the cases where a foreign state ought not to be immune will involve some tortious activity outside the UK': at [131].

193 Ibid [190]–[192].

electromagnetic emissions, was not such as to attract special dispensation.[194] Italian employment law applies to employees of the Pontifical Lateran University ('PLU'), an institution created by decree of the Holy See and housed, outside Vatican City, in an annex to the patriarchal Basilica of St John Lateran. No sovereign immunity arises on behalf of the Holy See in a PLU employment related dispute: the functions of PLU are not sovereign functions and PLU is not a 'central body' of the Church.[195] It might also be suggested that other exceptions to immunity under the *FSIA* might prove salient even if a relevant statehood connection be recognised. An argument might be made, along the lines indicated in the dissent of Judge Berzon in *Doe*,[196] that the administration of a religious organisation on foreign soil could not be categorised as a sovereign act *jure imperii* in which case the *FSIA* s 11 (commercial conduct) exception to immunity might apply. That conclusion would not depend on a relationship of employment being found between a Church administrative hierarchy in Rome and priests in Australia. It might be found on the basis of decisions made in the Vatican concerning the status in Australia of persons purporting to be priests. Further, a foreign State is not immune in relation to a proceeding concerning an interest of the State in immovable property in Australia[197] or an obligation that hence arises,[198] or in property that arose as a gift or by succession[199] or the administration of a trust or of an estate.[200] The administration of the Roman Catholic Church in the states and territories of Australia, including its administration directed from Rome, is intimately interconnected with such interests.

So far as *FSIA* s 13 (personal injury) is concerned, while sufficient nexus with Australia is required, doubt is cast on any reading-in of a strict requirement of physical presence in the forum on the part of a tortfeasor. It is submitted that if facts otherwise support a finding in negligence under Australian law, such that a duty has been breached by a named party causing the harm in Australia complained of, then the *FSIA* s 13 exception to immunity would on its face be satisfied.

In this respect a focus on the term 'territory' has the potential to be misleading. It would be unhelpful to refer to Australia's *FSIA* s 13 as a 'territorial tort'. 'Territory' is not determinative of jurisdiction at the fine-grained level of civil suit but is rather a 'molecular' matter going to a presumption of jurisdiction. Rather, the attention of the court should be primarily on the factual matrix. Matters of causation, which connote foreseeability and other parameters of liability in tort, will often be of the

194 Zambrana-Tévar, 'Reassessing' (n 19) 37–8.

195 Pierfrancesco Rossi, '*Migliorini v Pontifical Lateran University*, Preliminary Order on Jurisdiction, No 21541/2017, ILDC 2887 (IT 2017), 18th September 2017, Italy' in André Nollkaemper and August Reinisch (eds), *Oxford Reports on International Law* (Oxford University Press, 2019) [41], [42].

196 See above nn 159–62 and accompanying text.

197 *FSIA* (n 3) s 14(1)(a).

198 Ibid s 14(1)(b).

199 Ibid s 14(2).

200 Ibid s 14(3)(b).

essence. Causal connectivity would seem to instantiate the kind of additional step ('*un pas additionnel*') to which the ECtHR alluded in *JC*.[201] Factual details and timelines around administrative decision-making in the Vatican might be relevant, as noted above in the account of *Doe*.[202] It should also be observed that while the question has not been tested in Australia via application of *FSIA* s 13, there is no reason to think that a distinction of sovereign versus private acts on the part of a foreign State, would disturb the application of s 13 if other requirements were met.[203] In the English High Court, the plain terms of the corresponding provision in *SIA* (UK) were found to afford no space for the introduction of such a distinction.[204]

More generally, this examination of civil suit in Australian courts in circumstances when a respondent party might point to a statehood-based immunity has shown the significance of the presumption of local (forum) jurisdiction. The curial respect due to foreign sovereigns or presumptive foreign sovereigns is not unlimited and must defer to proper process.[205] As Richard Garnett has observed, consideration must be given to the possibility that 'it is now time for Australian courts to treat foreign states more akin to fellow players in the litigation process rather than a unique species worthy of exemption from ordinary adjudication'.[206] As expressed by O'Keefe, it is time for reflection on

> whether the territorial conditions found in the exceptions to state immunity generally recognized in national and international law are merely pragmatic, comity-inspired limitations on the forum state's exercise of jurisdiction over another state's non-sovereign acts or instead manifestations of a positive concern for the territorial sovereignty of the forum state that is perhaps as essential a justification for the restrictive doctrine of state immunity as the non-sovereign character of certain foreign-state activity and use of property.[207]

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201 See above n 128 and accompanying text.

202 Judicial interpretation of 'caused by an … omission … omitted to be done in Australia' might also be salient on the facts: *FSIA* (n 3) s 13.

203 '[W]hen the forum's courts provide the obvious and convenient local remedy … [t]his … applies to *all* torts properly within the jurisdiction irrespective of whether they originate in an act which might be described as "sovereign", "governmental" or *jure imperii*': ALRC 24 (n 2) 66 [113] (emphasis in original).

204 *Al-Masarir* (n 190) 575 [116].

205 'I do appreciate that [Venezuela] may be placed in a difficult, and perhaps even diplomatically embarrassing, situation by being required to respond to proceedings in this tribunal. … That alone is not a basis upon which this Tribunal can or should dismiss these proceedings': *Rosa* (n 72) [56].

206 Garnett (n 9) 705. 'Where cross-border litigation was rare and exceptional, little harm was done to private litigants by the preservation of unique protections for states — but these are harder to justify today … [D]octrines that continue to confer special treatment upon states must be closely scrutinised and clearly justified to be worthy of retention': at 705.

207 O'Keefe, 'Review' (n 25) 711.

It has been argued above that a well-founded claim in tort will ipso facto satisfy the requirements in the *FSIA* for exceptions to statehood-based immunity. The effect would be that claims in tort would be able to proceed by way of service such that the process of judicial determination would not be derailed as a consequence of putative foreign statehood status even where the validity of that status may be disputed. Developments in international law including overseas case law may be drawn upon by an Australian court to inform itself on these matters. The issue of foreign military conduct is best thought of as an extrinsic limit on the application of art 12 of the *VCDR*.[208] But while both the not in force *UNCSI* and the *ECSI* refer to the author of an injury being present in the forum, in neither case is the interpretation of that clause clarified by case law. Overseas statutes make no such demand and the territorial criteria for the *FSIA* (US) in this respect are still evolving with the inadequacies of an 'entire tort' reading becoming apparent. As Ioana Cismas observes in relation to *O'Bryan*, '[t]he strict territorial lens of the courts concerning jurisdiction therefore affected the heart of the case'.[209] The cross-border complexities of the infrastructure enabling harm in today's interconnected world are becoming patent in such criminal contexts as cyberattacks and terrorism, to which one could add trafficking of persons in its myriad forms. Some similar issues arise with any cross-border organisation that in any way facilitates harm or fails to guard sufficiently against foreseeable harm.

Hypothetical questions relating to the naming of natural alien persons in civil suit should be briefly entertained. The incumbent Pope might be found to be a head of State and hence in principle protected by *FSIA* s 36. Such protection along with its exceptions, as provided in the *VCDR*, would seem to relate to private conduct, with conduct in his public capacity being subject to other provisions of the *FSIA* (as per s 36(3)). If categorised as private conduct, administrative decisions taken by the Pope having effects in Australia would receive no protection from civil suit to the extent such conduct satisfies any of the exceptions to 'immunity from … civil and administrative jurisdiction' under *VCDR* art 31(1)(a)–(c). Thus the Pope would not have immunity from civil process with respect to 'any professional or commercial activity exercised in the receiving State outside his official functions'.[210]

208 Roger O'Keefe, 'The "General Understandings"' in Roger O'Keefe, Christian Tams and Antonios Tzanakopoulos (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press, 2013) 19, 22–3; Foakes and O'Keefe (n 58) 215.

209 Cismas (n 4) 206.

210 Administrative control over religious personnel and their status patently relates to a profession, defined as 'a vocation requiring knowledge of some department of learning or science, especially one of the three vocations of theology, law, and medicine': *Macquarie Dictionary* (online at 20 June 2023) 'profession' (def 1). '[E]xercised in the receiving state' would need interpretation along the lines indicated above in relation to *FSIA* s 13. 'Outside his official functions' would arguably be satisfied a priori since conduct within official functions is dealt with elsewhere in the *FSIA*. As observed above, the position of a former Pope under Australian law is not entirely clear and may depend on judicial recognition of obligations based directly on international law.

In relation to international norms, CIL relating to statehood-based protections is built primarily on the aggregated decisions of national courts. For better or worse, the courts of some nations, such as the courts of economically powerful English-speaking jurisdictions, exert more influence on this process than others. In straightforwardly applying Australian law, the Australian courts would be contributing in the most effective manner possible to the engendering of an international regime of accountability for any institutions or natural persons who seek to cloak under colour of sovereignty their territorially distributed conduct causing harm in Australia. Perhaps they have a duty so to do. In the words of the late James Crawford, the question of

> sovereign immunity … is *about* the operation of domestic courts in matters involving foreign States. In such cases, municipal courts … are the primary forum, and their practice must be regarded as primary rather than subsidiary.[211]

And, 'by and large, national courts have treated State immunity seriously and sometimes with distinction'.[212]

211 Crawford, 'A Foreign State Immunities Act' (n 1) 77 (emphasis in original).

212 Crawford, 'Foreword' (n 29) v.