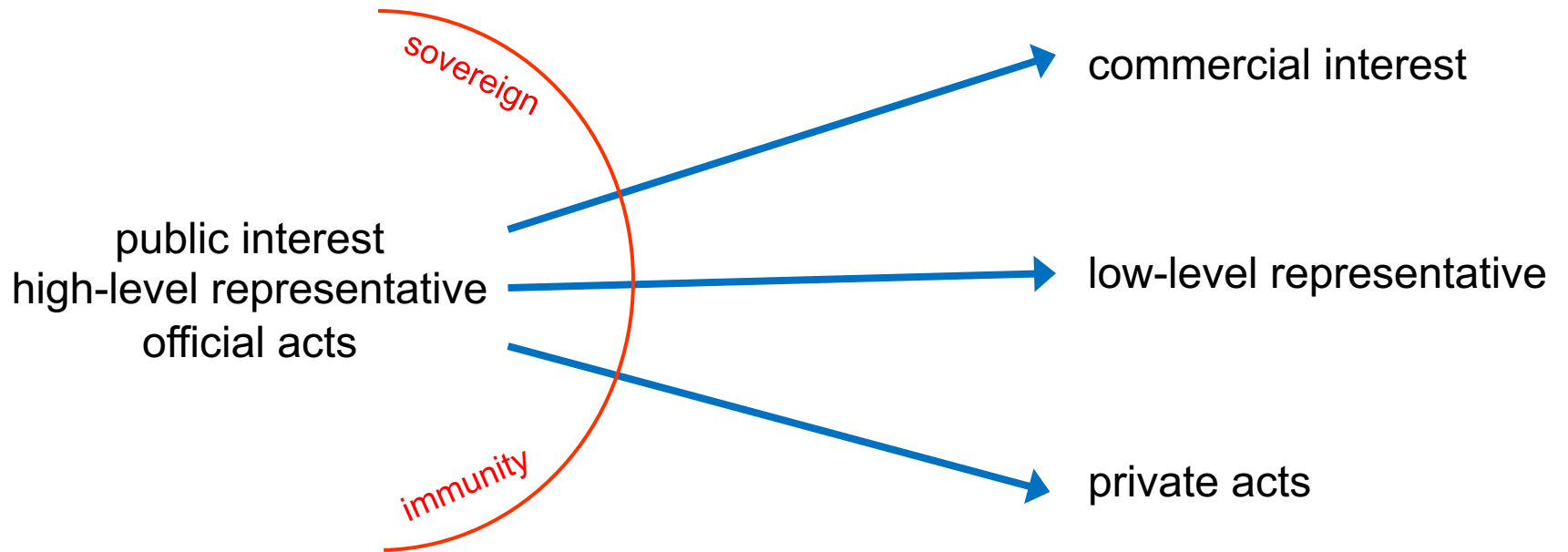


Immunity

- When should acts of representatives be equated with acts of the state?
 - states versus representatives (versus diplomats)
 - high- versus lower-level representatives

- Should all acts of state be immune from scrutiny by another state's courts?
 - public versus private acts (of state)
 - official versus private acts (of representatives)



Immunity

State immunity

Schooner Exchange v. McFaddon et al. (U.S. Supreme Court, 1812)

This was one of the seizures under the Rambouillet decree. **We do not justify that decree**, but we say that whenever the act is **done by a sovereign** in his sovereign character, it becomes a **matter of negotiation, or of reprisals, or of war**, according to its importance....

[T]he *Exchange*, being a **public armed ship in the service of a foreign sovereign** with whom the government of the United States is at peace, and having **entered an American port open for her reception** on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she **should be exempt from the jurisdiction of the country**.

Acts jure gestionis

UN Convention on Jurisdictional Immunities (2004, *not in force*)

Article 10

If a State engages in a commercial transaction with a foreign natural or juridical person and... differences relating to the commercial transaction fall within the jurisdiction of a court of another State, **the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction.**

Article 12

[A] State cannot invoke immunity from jurisdiction before a court of another State... in a proceeding which relates to **pecuniary compensation for death or injury to the person, or damage to or loss of tangible property**, caused by an act or omission which is alleged to be attributable to the State, if the act or omission 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.

Acts *jure imperii*

Jurisdictional Immunities of the State case (ICJ, 2012)

[A] State is entitled to **immunity in respect of acts *jure imperii* committed by its armed forces on the territory of another State....** [T]he Court considers that customary international law continues to require that a State be accorded **immunity in proceedings for torts** allegedly committed on the territory of another State by its armed forces and other organs of State **in the course of conducting an armed conflict.**

Personal immunity for state representatives

Arrest Warrant case (ICJ, 2002)

The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys **full immunity from criminal jurisdiction and inviolability**. That immunity and that inviolability protect the individual concerned against **any act of authority of another State which would hinder him or her in the performance of his or her duties**.

[T]he immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs **do not represent a bar to criminal prosecution in certain circumstances**....
[A]fter a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of **acts committed prior or subsequent to his or her period of office**, as well as in respect of acts committed **during that period of office in a private capacity**.

Functional immunity for state representatives

Certain Questions of Mutual Assistance case (ICJ, 2008)

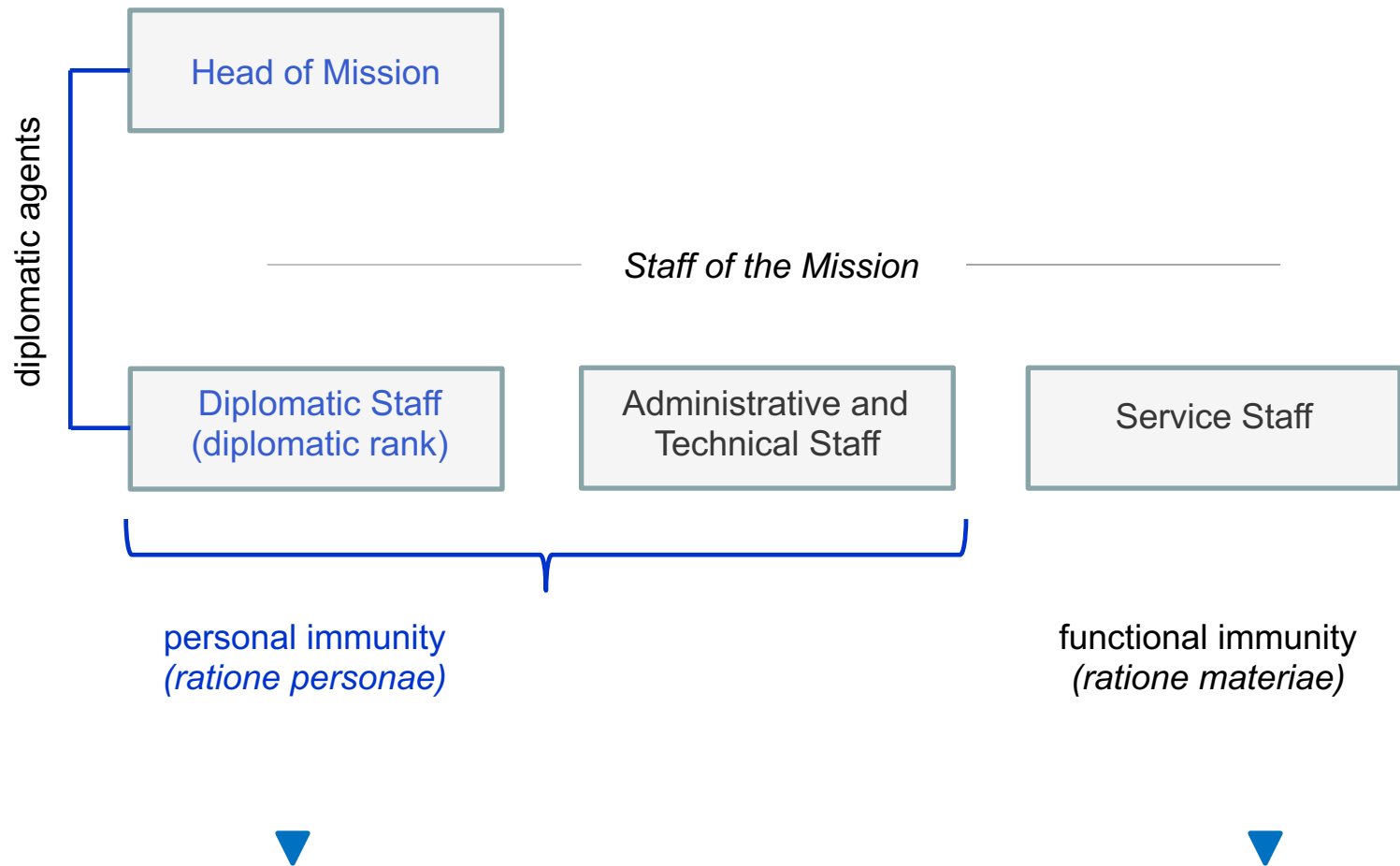
At no stage have the French courts (before which the challenge to jurisdiction would normally be expected to be made), nor indeed this Court, been **informed by the Government of Djibouti that the acts complained of by France were its own acts....** The State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned. This would **allow the court of the forum State to ensure that it does not fail to respect any entitlement to immunity....**

Exceptions to state immunity in U.S. law

Foreign Sovereign Immunities Act (1976, as amended)

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an **act of torture, extrajudicial killing, aircraft sabotage, hostage taking**, or the provision of material support or resources for such an act if such act or provision of material support or resources is **engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.**

Members of the Diplomatic Mission



Morning Mix

A U.S. diplomat's wife killed a British teen in a wrong-way collision, police say. She claimed immunity and fled the U.K.

By [Meagan Flynn](#) and [Jennifer Hassan](#)

Oct. 7, 2019 at 5:06 a.m. PDT

Under the [1961 Vienna Convention on Diplomatic Relations](#), family members of diplomats living in other countries are covered by immunity, allowing them to avoid arrest for virtually any crime and escape civil liability in most circumstances. However, the diplomat's home country can also choose to waive immunity — and that's what British authorities and Dunn's loved ones are calling for in this case.



Diplomatic Immunities

Teheran Hostages case (ICJ, 1981)

In the view of the Court, the obligations of the Iranian Government here in question are not merely contractual obligations established by the Vienna Conventions of 1961 and 1963, but also **obligations under general international law**....

[T]he Iranian Government failed altogether to take any “appropriate steps” **to protect the premises, staff and archives of the United States’ mission** against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion....

Such events cannot fail to undermine the edifice of **law carefully constructed by mankind over a period of centuries**, the maintenance of which is **vital for the security and well-being of the complex international community** of the present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected.

Criminal Immunity

Eichmann case

Jerusalem District Court (1961)

The abhorrent crimes defined in this Law are crimes not under Israeli law alone. These crimes which **offended the whole of mankind** and shocked the conscience of nations are grave offences against the law of nations itself ("delicta juris gentium"). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, **in the absence of an International Court, the international law is in need of the judicial and legislative authorities of every country**, to give effect to its penal injunctions and to bring criminals to trial. **The jurisdiction to try crimes under international law is universal.**

Genocide Convention (1948, in force 1951)

Article 4

Persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible **rulers, public officials or private individuals.**

Pinochet case

Torture Convention (1984, in force 1987)

Article 5

Each State Party shall take such measures as may be necessary to **establish its jurisdiction** over the offences referred to in article 4 in the following cases:

- (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
- (b) When the alleged offender is a national of that State;
- (c) When the victim is **a national of that State if that State considers it appropriate.**

House of Lords (2000)

The development of international law since the Second World War justifies the conclusion that by the time of the 1973 coup d'état, and certainly ever since, international law condemned **genocide, torture, hostage taking and crimes against humanity** (during an armed conflict or in peace time) as **international crimes deserving of punishment**. Given this state of international law, it seems to me **difficult to maintain** that the commission of such high crimes may **amount to acts performed in the exercise of the functions of a Head of State**.

Acts *jure imperii* (cont.)

Jurisdictional Immunities of the State case (ICJ, 2012)

Immunity from jurisdiction is an immunity not merely from being subjected to an adverse judgment but **from being subjected to the trial process**.... If immunity were to be dependent upon the State actually having committed a serious violation of international human rights law or the law of armed conflict, then it would become necessary for the national court to hold an enquiry into the merits in order to determine whether it had jurisdiction.

This argument therefore depends upon the existence of a conflict between a rule, or rules, of *jus cogens*, and the rule of customary law which requires one State to accord **immunity** to another. In the opinion of the Court, however, no such conflict exists.... **The two sets of rules address different matters**. The rules of State immunity are **procedural in character** and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question **whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful**.... Recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule....

Noriega case

U.S Court of Appeals (1997)

The Executive Branch has not merely refrained from taking a position on this matter; to the contrary, by pursuing Noriega's capture and this prosecution, the **Executive Branch has manifested its clear sentiment that Noriega should be denied head-of-state immunity.**

Noriega has cited no authority that would empower a court to grant head-of-state immunity under these circumstances. Moreover, given that the record indicates that Noriega never served as the constitutional leader of Panama, that **Panama has not sought immunity for Noriega** and that the charged acts relate to Noriega's **private pursuit of personal enrichment**, Noriega likely would not prevail even if this court had to make an independent determination regarding the propriety of immunity in this case.

