Minimalist Interpretation of the Jurisdictional Immunities Convention

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I. INTRODUCTION

The UN Convention on Jurisdictional Immunities of States and Their Property ("Jurisdictional Immunities Convention")[1] is the first worldwide agreement to formalize a consistent approach to jurisdictional immunity. Basically it presents a list of situations in which a person or commercial entity may sue a foreign government. Under the convention, when a foreign government engages in commercial transactions,[2] for example, it cannot invoke immunity from certain lawsuits arising out of those transactions.[3] But a foreign government can invoke immunity when it gravely violates human rights. This is because the Jurisdictional Immunities Convention lacks an immunity-waiver provision—similar to the one it contains for commercial transactions—for genocide, crimes against humanity, war crimes, torture, extrajudicial executions, and enforced disappearances.

Amnesty International finds this omission so upsetting that apparently it has blocked the convention by persuading states not to ratify it.[4] Nevertheless, "the

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1 United Nations Convention on Jurisdictional Immunities of States and Their Property, 44 ILM 803 (2005) ("Jurisdictional Immunities Convention").

2 This Comment employs "commercial transactions" as a term of art defined within the Jurisdictional Immunities Convention. American readers may be more familiar with the term "commercial activities" used in the Foreign Sovereign Immunities Act ("FSIA"), 28 USC § 1605(a)(2) (1976). For present purposes, the terms are interchangeable.

3 Jurisdictional Immunities Convention, art 10. See also Section II.B below.

4 Compare Interview with Dr. Gerhard Hafner, Professor of European, International, and Comparative Law, Vienna University (Oct 31, 2007) ("Hafner interview"), and Christopher Keith Hall, Senior Legal Advisor, International Justice Project, Amnesty International, *UN Convention on State Immunity: The Need for a Human Rights Protocol*, 55 Intl & Comp L Q 411, 426 (2006) (urging

principle of State immunity has been firmly established as a norm of customary international law."[5] Blocking the convention's ratification thus succeeds only in blocking the benefits to be achieved from transforming customary international law into treaty law: formal agreement, collaboration, and progressive development away from statism and absolute immunity. To surpass this hurdle, the International Law Commission ("ILC") is considering drafting a separate protocol concerning the issue of human rights immunity that would enable the convention to be adopted as written.[6]

This Comment embraces the separate protocol by advocating a minimalist approach to interpreting the convention. Section II begins by providing background on the international law of state immunity for commercial transactions. It then analyzes the convention's approach to commercial transactions and argues that the commercial-transaction provisions are best interpreted as a general agreement on nonabsolute or restrictive immunity rather than as instructive specifications for ratifying states. Section III supports the new human rights protocol's pragmatism. It begins by providing background on the international law of state immunity for human rights violations. Next it shows that the convention's trend away from statism and absolute immunity supports cosmopolitan goals inline with the international law of human rights. Finally it argues that progress toward restrictive immunity beneficial to the human rights movement should not be delayed by other concerns more profitably pursued elsewhere. The Comment ultimately implores Amnesty International to support the Jurisdictional Immunities Convention, because the convention, like the US Constitution, "though it may not be perfect in every part, is, upon the whole, a good one."[7]

"the UK not to ratify the Convention until a [human rights] protocol is adopted . . . coupled with a diplomatic effort to urge other states to do the same"), with Interview with Christopher Keith Hall (June 4, 2008) ("I think Dr. Hafner gives our organization entirely too much credit. It would be useful to talk to the legal advisers of a number of foreign ministries to see if this opposition is a significant factor in the reluctance of states to ratify the Convention."). The convention has been signed by only twenty-eight of the thirty states necessary for entry into force. Although the signature period expired on January 17, 2007, the convention may yet enter into force if two or more additional states accede. See the Vienna Convention on the Law of Treaties (1969), art 15, 1155 UN Treaty Ser 331 (1980).

5 The International Law Commission, the UN group responsible for drafting the convention, fully supports this claim. Sompong Sucharitkul, *Second Report on Jurisdictional Immunities of States and Their Property*, 2 YB Intl L Commn 199, 221 (1980), UN Doc A/CN.4/331 and Add.1.

6 Hafner interview (cited in note 4). For the text of an earlier proposal codifying an exception to jurisdictional immunity in cases involving violations of *jus cogens* human rights, see Jürgen Bröhmer, *State Immunity and the Violation of Human Rights* 214–15 (Martinus Nijhoff 1997).

7 Federalist 85 (Hamilton), in Mortimer J. Adler, ed, 40 *Great Books of the Western World* 257 (Britannica 2d ed 1996).

II. JURISDICTIONAL IMMUNITIES CONVENTION

A. STATE PRACTICE REGARDING COMMERCIAL-TRANSACTION IMMUNITY

Historically states were granted absolute immunity from the judicial processes of other states.[8] Chief Justice Marshall attributed this absolute immunity to the "perfect equality and absolute independence of sovereigns" and the "common interest impelling them to mutual intercourse, and an interchange of good offices with each other."[9] Today these maxims are not forgotten, as states may confer immunity "to prevent embarrassment to the conduct of foreign relations" or out of deference to a "state's legitimate right to manage its affairs."[10] But unlike in Chief Justice Marshall's era of absolute immunity, today states increasingly practice restrictive immunity, whereby exceptions are made regularly for a state's commercial transactions gone bad and occasionally for human rights violations.[11]

The major exception to immunity has long been for state behaviors that qualify as commercial transactions. Whereas all states continue to grant immunity to foreign governments for their public, noncommercial acts in exercise of sovereign or governmental authority, states increasingly deny immunity for foreign states' acts that are private and commercial.[12] But while some states still grant absolute immunity, the many others that create a commercial-transaction exception differ about how to apply it. Although "the principle of State immunity has been firmly established as a norm of customary international law," [13] within this norm, as the following sections describe, the commercial-transaction exception is practiced in inconsistent ways within and across various states. As described by Professor Gerhard Hafner, former member of the ILC and leader of the effort to draft and negotiate the Jurisdictional Immunities Convention, the legal relationships existing in such a system are unpredictable and unstable.[14] Unpredictability and instability exist

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8 Joseph M. Sweeney, *The International Law of Sovereign Immunity* 20 (US Dept of State 1963).

9 *The Schooner Exchange v McFaddon*, 11 US (7 Cranch) 116, 137 (1812).

10 Joseph W. Dellapenna, *Suing Foreign Governments and Their Corporations* 389, 393 (Transnatl 2d ed 2002).

11 For summaries of state practices regarding absolute and restrictive immunity, see generally Gerhard Hafner, Marcelo G. Kohen, and Susan Breau, eds, *State Practice Regarding State Immunities* 168–704 (Martinus Nijhoff 2006); Ernest K. Bankas, *The State Immunity Controversy in International Law* 317–60 (Springer 2005).

12 See Bankas, *State Immunity Controversy* at 103 (cited in note 11).

13 Sucharitkul, *Second Report on Jurisdictional Immunities of States and Their Property* 221 (cited in note 5).

14 Hafner, Kohen, and Breau, eds, *State Practice Regarding State Immunities* at x (cited in note 11).

within the context of commercial-transaction immunity along at least three dimensions: the definition of "commercial," the treatment of state agencies, and the jurisdictional nexus requirement.

1. Definition of "Commercial"

One of the largest puzzles a court faces when deciding to confer immunity on a foreign state is whether the state's transactions giving rise to the suit are an exercise of sovereign power or are commercial. Many states look to the "nature" of an activity to determine if it is commercial. Under the nature test, courts ask whether the transaction is of the type that a private or ordinary person could have performed.[15] One court found that an ordinary person can sell a fighter jet, for example, and therefore that a state's sale of a fighter jet is commercial.[16] But one could also view the transaction as noncommercial under the nature test because owning and selling fighter jets seems unrealistic or impractical for an ordinary person to do. Ultimately the test is "complicated by the diverse social organizations of different countries embodying differing concepts of what is the proper sphere of private activity."[17]

States also may determine the commerciality of an activity by examining its "purpose."[18] Under the purpose test, courts ask whether the state's transaction serves a private purpose. If so, the transaction is properly considered commercial. Whether a transaction serves a public or private purpose, however, spawns much disagreement, especially among nations with vastly different public sectors proceeding with vastly different purposes. For example, a small state may be forced to contract for basic commodities essential to its existence and claim immunity for that purpose.[19] But even a large state with an international military presence that contracts with local food vendors to feed its troops may be said to be acting for a public purpose. The test ultimately becomes unusable because a state's activity always can be plausibly framed as having a public purpose.[20]

The result of trying to distinguish between public and private acts by a government, according to Justice Frankfurter, is "irreconcilable conflict" and "inevitable chaos."[21] This may overstate matters as they exist today, but

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15 See, for example, *Saudi Arabia v Nelson*, 507 US 349, 360–62 (1993); *Argentina v Weltover*, 504 US 607, 614 (1992).

16 *Virtual Defense and Development Intl, Inc v Moldova*, 133 F Supp 2d 1, 4 (DDC 1999).

17 Dellapenna, *Suing Foreign Governments and Their Corporations* at 360–61 (cited in note 10).

18 See id at 341. See, for example, *Kingdom of Roumania v Guaranty Trust Co*, 250 F 341, 345 (2d Cir 1918).

19 *Reid v Republic of Nauru* [1993] 1 VR 251 (Austl).

20 *Berizzi Bros Co v The Pesaro*, 271 US 562, 574 (1926).

21 *Indian Towing Co v United States*, 350 US 61, 65 (1955).

inconsistencies persist nevertheless. "[T]he plethora of different terms and tests are [sic] only evidence for the difficulty of finding generally acceptable as well as applicable criteria."[22] In a world where commercial transactions increasingly cross state borders and deal with foreign governments,[23] the unpredictable nature of a nonuniform system adds considerable risk to the parties involved.

2. Treatment of State Agencies

Another conundrum a court faces in deciding whether to afford a defendant immunity is the question whether the defendant is a "state"—a term that eludes easy definition. When the defendant is a foreign-state government with whom a private party contracts directly, the private party may understand the risk of losing a suit arising out of the contract, for the foreign government constitutes a state for purposes of immunity. As a result of this clear designation, the private party may be able to deal with the risk, for example, by charging higher prices or by obtaining insurance available on the public market[24] or the private market.

By contrast, a private party dealing with a foreign government's agency or instrumentality, such as a national bank or railway administration, may be unaware of the need to combat the risk of immunity. Furthermore, the calculation of risk in this situation is less predictable and therefore makes insurance costlier. State practice diverges regarding whether a court will treat a state agency as sufficiently controlled by the state so as to consider immunity,[25] and indeed this is an unresolved matter of international law.[26] Within states as well, courts may apply vague balancing tests that invite different results.[27] Novel

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22 Stephan Wittich, *The Definition of Commercial Acts* in Hafner, Kohen, and Breau, eds, *State Practice Regarding State Immunities* 21, 21 (cited in note 11).

23 Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 Yale J Intl L 383, 383–85 (2006) (recounting how states and international organizations increasingly are turning to private actors to perform core military, foreign-aid, and diplomatic functions).

24 See, for example, the Multilateral Investment Guaranty Agency, available online at <http://www.miga.org> (visited Dec 5, 2008); the Overseas Private Investment Corporation, available online at <http://www.opic.gov> (visited Dec 5, 2008).

25 Hazel Fox, *The Law of State Immunity* 323 (Oxford 2002). For a description of diverse state practices regarding immunity for state agencies, see id at 336–53.

26 The amount of state direction or control necessary for the state to incur responsibility to aliens is an unresolved issue of international law. Compare *Military and Paramilitary Activities (Nicar v US)*, 1984 ICJ 392, 436 (requiring a high degree of "effective control" of operations), with *Prosecutor v Tadic*, Case No IT-94-1-A, Judgment of the Appeals Chamber (ICTY 1999) ¶¶ 131–37 (requiring only "overall control . . . regardless of any specific instruction by the controlling state"). See also Richard Morgan, *Professional Military Firms under International Law*, 9 Chi J Intl L 213, 232–35 (2008).

27 See, for example, *First National City Bank v Banco para el Comercio Exterior de Cuba*, 462 US 611, 629 (1983) (allowing immunity only when either the control is so extensive "that a relationship of principle and agent is created" or to do otherwise "would work fraud or injustice").

issues may arise regarding the treatment of agency subsidiaries and agencies controlled by more than one state. In summary, transactions with state-controlled agencies are made more expensive by inconsistencies in the definition of "state" for the purposes of state immunity.

3. Jurisdictional Nexus Requirement

As President of the International Court of Justice Rosalyn Higgins once stated,

> [T]his is really a question of jurisdiction, not of immunity. It is for countries to formulate the circumstances in which they will be prepared to assert jurisdiction over events occurring abroad. I see no reason of principle why jurisdiction over a foreign State should not stand or fall on these principles . . . .[28]

States disagree about the nexus required before a forum state may exercise jurisdiction over claims brought against a foreign state.[29] The US, for example, applies extraterritorial jurisdiction when the commercial activity causes a "direct effect" in its borders.[30] Other states, including those that practice restrictive immunity, do not apply the effects test, relying instead on more traditional jurisdictional nexuses such as the place of incorporation or contracting. Furthermore, American circuit courts apply the effects test inconsistently.[31] Given this inconsistent practice among and within states, additional uncertainty is added to the already uncertain calculation by private parties of whether they will be able to hail foreign-state defendants into court.

B. THE CONVENTION'S APPROACH TO COMMERCIAL TRANSACTIONS

In 1977, the UN General Assembly asked the ILC to begin its work on jurisdictional immunities "with a view to its progressive development and codification."[32] In 2004, when the General Assembly adopted the convention

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28 Rosalyn C. Higgins, *Certain Unresolved Aspects of the Law of State Immunity*, 29 Neth Intl L Rev 265, 273 (1982).

29 Fox, *The Law of State Immunity* at 64 (cited in note 25). See also Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 Mich J Intl L 1003, 1019–21 (2006) (discussing the different jurisdictional paradigms of common law and civil law states).

30 FSIA, 28 USC § 1605(a)(2) (1976).

31 Compare *Voest-Alpine Trading USA Corp v Bank of China*, 142 F3d 887, 897 (5th Cir 1998) (holding "that a financial loss incurred in the United States by an American plaintiff . . . constitutes a direct effect sufficient to support jurisdiction"), with *United World Trade, Inc v Mangyshlakneft*, 33 F3d 1232, 1238 (10th Cir 1994) (declining to exercise jurisdiction when the plaintiff "lost profits . . . as a result of the defendants' actions").

32 General Assembly Res No 32/151, UN Doc A/RES/32/151 (1977). See also United Nations Charter, art 13, ¶ (1)(a) (granting UN General Assembly the power to "initiate studies and make

and invited states to become parties, it stressed "the importance of uniformity and clarity in the law of jurisdictional immunities."[33] Seeing as uniformity and clarity of restrictive-immunity rules elude today's unstable and unpredictable approach to state immunity,[34] the key to achieving the General Assembly's twin goals of uniformity and clarity is "progressive development,"[35] or change for the better.

Thus this section begins by recognizing that uniformity and clarity are the recognized goals in a progressively developed system of immunity, whereby states are denied immunity for claims arising out of their commercial transactions. The following subsections analyze the degree to which the convention achieves these goals of uniformity and clarity.

1. Strengths

After thirty years of work toward achieving uniformity and clarity, the ILC's accomplishments, embodied in the Jurisdictional Immunities Convention, are numerous. To begin with, the convention takes the initial step in providing a single multilateral agreement or starting point for analysis from which parties can direct their courts to analyze whether to grant immunity in specific cases. The convention provides a common source of law, which is necessary to achieve uniformity.

Furthermore, specific to the issue of state immunity for commercial transactions, the convention takes the first step in agreeing upon a common definition of "commercial transaction," emphasizing the nature test over the purpose test[36] and listing specific examples to crystallize this definition. Regarding other issues, such as the definition of "state" and the nexus requirement, the convention achieves agreement, if not uniformity, so as to work around a hurdle to codification.

Finally, and perhaps most importantly, the convention embodies a large-scale effort whereby states have enjoyed a forum to debate these issues, gain recognition for the significance of jurisdictional immunity, and attach legitimacy to the notion that uniformity and clarity are essential to predictability and stability. The convention mobilizes nations to think about jurisdictional immunity and, significantly, may push nations to switch from practicing absolute immunity to practicing restrictive immunity.

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recommendations for the purpose of promoting international cooperation in the political field and encouraging the progressive development of international law and its codification").

33 General Assembly Res No 59/38, UN Doc A/RES/59/38 (2004).

34 See Section II.A.1 above.

35 General Assembly Res No 32/151 (cited in note 32).

36 These tests are discussed in Section II.A.1 above.

2. Opportunities

Despite these successes, opportunities remain to achieve uniformity and clarity, specifically in the areas that need it most: the definition of "commercial," the treatment of state agencies, and the jurisdictional nexus requirement.

a) Definition of "commercial." The convention provides the following guidance for determining whether a transaction is commercial: look primarily to its nature, but also to its purpose, and nevertheless look to treaties or relevant domestic law.[37] This guidance combines various states' vague definitions of state practice rather than providing a more precise definition. Despite this imprecision, the convention increases uniformity and consistency insofar as it encourages wholesale abandonment of absolute immunity rather than accepting the current mixed regime whereby some states practice restrictive immunity and others practice absolute immunity. States may see the convention as a justification for abandoning the doctrine of absolute immunity, as if the commercial disadvantages were not enough,[38] because the convention provides the legitimacy of multilateral agreement.

Yet a move toward restrictive immunity may decrease predictability. States that practice absolute immunity are nothing but predictable in the way they decide whether to grant immunity—they always grant it. States that change from practicing absolute to restrictive immunity, however, perhaps due to signing the convention, are left with a clean slate to determine what constitutes a commercial transaction for purposes of commercial-transaction immunity. Such countries may follow inconsistent practices not only among themselves in this regard, as before, but also within themselves in a struggle to apply the nature/purpose test.

b) Treatment of state agencies. The convention affords immunity to state agencies and instrumentalities "to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State."[39] This provision leaves the decision as to whether a state agency may qualify for immunity to the various states, whose state agencies vary in size and

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37 Jurisdictional Immunities Convention, art 2, stating:

> In determining whether a contract or transaction is a "commercial transaction" . . . reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the noncommercial character of the contract or transaction.

38 Commercial disadvantages are what have prompted numerous nations to abandon the practice of absolute immunity. See, for example, Letter from Jack Tate, Acting Legal Adviser to the Secretary of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), in 26 Dept St Bull 984 (1952).

39 Jurisdictional Immunities Convention, art 2(1)(b)(3).

scope due to differing ideologies and economic and political systems. For centrally run economies like China's, for example, agencies such as transportation and housing authorities more clearly comprise part of the state. For economies like that of the US, which rely more on the private market, such agencies more closely approximate private corporations, thereby increasing the chances that the agency's state and the forum state will disagree about whether the agency qualifies for immunity.[40] Rather than resolving this disagreement, the convention safeguards a patchwork of clashing national laws that may do no better than absolute immunity at fostering amicable foreign relations and efficient commerce.

c) Jurisdictional nexus requirement. Meeting the previous two opportunities, that is, providing a unifying definition of "commercial" and a unifying treatment of state agencies, would succeed in reforming substantive laws. By contrast, a unifying jurisdictional nexus requirement would succeed in dictating whose substantive law would govern. As greater international commerce and technological advances increase the frequency and scope of conflict over application of law, the question of how to allocate judicial authority among states grows increasingly critical. Yet the convention exempts commercial transactions from immunity only if "the applicable rules of private international law" confer jurisdiction to adjudicate disputes over the commercial transaction.[41] Thus, for example, the convention permits the US to continue to apply its effects test to confer personal jurisdiction, and moreover permits it to continue applying it inconsistently among its circuit courts, while other states that do not employ the effects test do not become empowered to use the test but rather are left to their own devices. As with the treatment of state agencies, the convention codifies clashing national laws rather than encouraging a unified approach.

C. RESTRICTIVE IMMUNITY CODIFIED

The convention focuses on eliminating practices that allow governments to escape suit after injuring private parties. Significantly, it may further the trend from absolute to restrictive immunity. But as the previous section demonstrates, the convention cannot reasonably be interpreted as a vehicle for the General Assembly's stated goals of uniformity and clarity[42] with respect to the individually codified rules of commercial-transaction immunity. Rather, as this section argues, one should interpret uniformity and clarity to describe the convention's general and unmistakable step away from the general theory of

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40 Fox, *The Law of State Immunity* at 337 (cited in note 25).

41 Jurisdictional Immunities Convention, art 10(1).

42 General Assembly Res No 59/38 (cited in note 33).

absolute immunity today, with a view to achieving uniformity and clarity of specific restrictive-immunity rules in the future.

1. The Convention's Preamble

The ILC recognizes the need for progressive development to achieve the goals of the convention. The convention's preamble states that, if adopted, the convention "would enhance the rule of law and legal certainty, particularly in dealings of States with natural or juridical persons, and would contribute to the codification and development of international law and the harmonization of practice in this area."[43] The preamble speaks not only of the "development of international law," but also of achieving goals through a verb that implies change or departure from the past ("enhance"). The preamble thus presages international law's progressive development. More specifically, as discussed below, the preamble and indeed the rest of the convention call for harmonization and enhancement of legal certainty with respect only to a wholesale abandonment of absolute immunity, not to the individual rules that enforce restrictive immunity.

The ultimate objectives of the convention, as stated in its preamble, do not reference the specific terms "uniformity" or "clarity," the importance of which the General Assembly emphasizes in calling on states to ratify the convention.[44] Instead, the preamble employs the terms "harmonization" and "legal certainty." Harmonization, depending on the dictionary one uses, implies agreement or coordination, not necessarily strict uniformity.[45] Furthermore, mere agreement or coordination away from absolute immunity is a more plausible goal than uniformity of individual rules, given varying state practices with respect to rules regarding the definition of "commercial," the definition of "state," and the jurisdictional nexus requirement.[46] Thus, if harmonization does not imply uniformity, then it must indicate an agreement to depart from absolute immunity. If it does imply uniformity, uniformity must be interpreted to refer only to a uniform departure from absolute immunity, because as previous sections have demonstrated, the convention indisputably does not codify a uniform set of rules.

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43 Jurisdictional Immunities Convention, preamble.

44 General Assembly Res No 59/38 (cited in note 33).

45 Compare *Black's Law Dictionary* 595 (West 8th ed 2005) (defining harmony as "agreement or accord; conformity"), with Peter E. Nygh and Peter Butt, eds, *Australian Legal Dictionary* 543 (Butterworths 1997) (defining harmonization as "cooperation between governments to make laws more uniform and coherent").

46 See Section II.A above.

"Legal certainty," as also stated in the preamble, is directly inline with the General Assembly's twin goals of uniformity and clarity. Uniformity of legal rules may drive legal certainty, but again the codification of a patchwork of rules creates more legal uncertainty than before. To illustrate, a state that practices absolute immunity is certain to immunize states within its courts. If the same state joins the convention, the only certainty is that the state has now embraced restrictive immunity. Sometimes the state will allow suits against foreign governments but when it will allow such suits remains uncertain. More plausibly, legal certainty can refer only to the adoption of restrictive immunity because the convention affords a private plaintiff no certainty as to whether a state practicing restrictive immunity will or will not grant immunity in the individual case. When a state joins the convention, one can be certain only that the state will no longer practice absolute immunity.

In sum, the goals of harmonization and certainty, as written in the preamble, and of uniformity and clarity, as stated by the General Assembly, seem to apply not to the rules codified specifically in the convention. Rather, they must apply to the adoption of restrictive immunity in general.

2. The Convention's Approach to Commercial Transactions

One can interpret the convention to take either a formal or a functional approach. With either interpretation, uniformity and clarity are achieved with respect only to the step toward restrictive immunity, not to the form or the function of how that step is to be taken.

a) Formal interpretation. One approach to interpreting the convention, which indicates only an agreement to abandon absolute immunity, is formal. Under a formal interpretation, the convention provides a set of precise rules that everyone can agree upon, such as a list of all transaction types that qualify as commercial. A formal approach requires unprecedented foresight, however, to codify the novel situations that courts will face. Realizing as much, formal approaches typically provide escape hatches based on old standards suffering from the very inconsistent application formalization intends to prevent. For example, the convention enumerates the following examples of commercial transactions: "any commercial contract or transaction for the sale of goods or supply of services" and "any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction."[47] This enumeration is useful for crystallizing what is meant by commercial versus sovereign transactions, but parties are left interpreting this language in light only of the nature/purpose test to determine if unenumerated transactions are commercial versus sovereign, because in the law

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47 Jurisdictional Immunities Convention, art 2.

of state immunity "there are no clear-cut criteria ready-made in all instances."[48] Therefore, to eliminate the inconsistent results produced by the nature/purpose test,[49] the convention's formal rules are not formal enough.

Nor are they comprehensive enough to eliminate other inconsistent state practices. With respect to the definition of "state" and the jurisdictional nexus requirement, the convention provides no rules of its own. The convention enumerates no rules, for example, that qualify an agency for immunity based on the percentage of a state's stock ownership or the degree of separation from a state via subsidiary corporations.[50] Nor does the convention attempt to make uniform rules of private international law or refer to the Hague Conference on Private International Law, whose mandate is "to work for the progressive unification of the rules of private international law."[51]

Thus, under a formal interpretive approach, the convention lacks the comprehensiveness necessary to achieve uniformity and clarity with respect to formal rules that enforce restrictive immunity. Rather, the convention formalizes only the uniform abandonment of absolute immunity.

b) Functional interpretation. The functional interpretive approach, like the alternative formal approach, also indicates only an agreement to abandon absolute immunity. Under a functional interpretation, the convention focuses on and provides the objectives rather than the conditions of state immunity. Whereas a formal approach asks *when* or under what conditions ought courts grant immunity, a functional approach asks *why* should courts grant it, especially when a case does not fall into one of the enumerated conditions. A functional approach benefits from simplicity and concentrates agreement on a much smaller number of issues. To hypothetically achieve perfect uniformity, it might also require a supranational court to create precedent for all states to follow until the next disagreement over a novel issue. Such a supranational court is outside the scope of the convention, so reaching a certain level of uniformity is possible only if all parties themselves were to agree on the function of states or of state immunity.

Two other conventions are paradigmatic of how the Jurisdictional Immunities Convention could possibly achieve uniform restrictive-immunity rules, not merely an abandonment of absolute immunity, by formalizing an

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48 Wittich, *The Definition of Commercial Acts* at 47 (cited in note 22).

49 See Sections II.A.1 and II.B.2.a above.

50 See, for example, Gabe Shawn Varges, *Defining a Sovereign for Immunity Purposes*, 26 Harv Intl L J 103, 152–54 (1985) (proposing a formal approach to the definition of "state" for sovereign-immunity purposes).

51 Statute of the Hague Conference on Private International Law, art 1, 15 UST 2228 (1964).

agreement on function. The Vienna Convention on Diplomatic Relations[52] and the Vienna Convention on Consular Relations and Optional Protocol on Disputes,[53] both of which have been widely adopted,[54] confer various degrees of immunity on diplomats, consuls, and their premises from the local laws of the jurisdictions in which they operate. The two Vienna Conventions begin by detailing an internationally agreed list of functions performed by diplomats and consuls and proceed to confer immunity when necessary to avoid interference with the functions of the diplomatic and consular missions. Diplomats and consuls have well-defined functions on which everyone can agree, such as the promotion of amicable relations between states and the protection of foreign nationals.[55] The functional approach toward diplomats and consuls enjoys almost universal acceptance thanks to common understandings of diplomatic and consular functions.

Common understandings of a state government's function, however, do not exist. Thus they are nowhere to be found in the Jurisdictional Immunities Convention, even though its purpose is to allocate jurisdictional immunities to state governments, just as the Vienna Conventions' purposes are to allocate jurisdictional immunities to diplomats and consuls. That the Jurisdictional Immunities Convention omits a definition of "state" is unsurprising given the controversy over what constitutes a state for purposes of immunity.[56] Moreover, despite the Washington consensus in favor of global market liberalism, the proper functions of a state are widely disputed among socialists, liberals, conservatives, and libertarians. These differences highlight the nonexistence of customary international law regarding the proper functions of a state and there is no reason to think that any convention will resolve these differences.

Given a global society of differently constructed states, the Jurisdictional Immunities Convention alternatively might focus on the function of state immunity instead of on the function of a state, for at least two reasons. First, the precise rules enumerated in the Jurisdictional Immunities Convention are few and therefore require courts to administer a different test in the remaining classes of cases. For example, the convention does not enumerate noncontractual activities that may be seen as commercial. Even if the enumerated rules were expanded, courts still would require a different test for

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52 Vienna Convention on Diplomatic Relations, 23 UST 3227 (1972).

53 Vienna Convention on Consular Relations and Optional Protocol on Disputes, 21 UST 77 (1969).

54 Over 180 states are parties to the Vienna Convention on Diplomatic Relations and about 170 states are parties to the Vienna Convention on Consular Relations.

55 See Vienna Convention on Diplomatic Relations, art 3; Vienna Convention on Consular Relations, art 5.

56 See also the discussion of state agencies in Sections II.A.2 and II.B.2.b above.

novel cases unforeseen at the time of enumeration. Hence a clear statement within the convention of the purpose of state immunity would provide guidance in these unenumerated or novel cases. Second, a test based on the function of state immunity may be more predictable than the alternative nature/purpose test required by the convention. A functional test would encourage states to think about why to grant or deny immunity, not how to grant or deny it. Achieving eventual harmony or uniformity of state practice requires states to align laws or legal reasoning, which a functional test would measure. By contrast, the nature/purpose test seeks to align definitional understandings of "sovereignty" and "commerciality," which courts may manipulate variously to achieve state interests without declaring the actual legal reasons for their conclusions. But it is better to increase transparency in courts' calculations so as to foster empirical data gathering which could lead to future enumeration of additional precise rules. A functional approach would achieve this goal by encouraging judges to state the real reasons for their opinions rather than molding an elastic formal test to reasons that remain unspoken.

Although this type of functional approach would be useful, inevitably it would be defined by an open-ended balancing test providing little uniformity and clarity. The historical function of state immunity is to respect the sovereignty of states.[57] The Jurisdictional Immunities Convention, however, is unique in that it invites states to use their sovereign powers to produce a joint solution. After the convention enters into force, respecting a sovereign may be reduced to respecting the convention. If everyone is in agreement, including the foreign-state defendant, then no longer should there be a concern with offending the foreign state's sovereignty. To the degree the convention fosters agreement among competing state interests, therefore, a test based on the function of state immunity would focus on forum states' interests in granting or denying immunity. A state may have an interest in exercising jurisdiction over a foreign state to achieve fairness for plaintiffs and to promote the security and predictability of the law merchant. Conversely, a state may have a reciprocity interest in avoiding being a putative defendant in foreign courts due to retaliation for its exercise of jurisdiction. A functional approach to conferring immunity, then, would invite states to balance their competing interests in exercising jurisdiction and in reciprocity, taking into account, for example, whether the forum state has waived its own immunity from suit, whether enforcing a judgment in the case (or as precedent in cases that may follow) would bankrupt a state so as to prevent it from providing a base-level of security

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57 See, for example, Bröhmer, *State Immunity and the Violation of Human Rights* at 9–11 (cited in note 6) (classifying the historical reasons for state immunity as resting on the principles of sovereign dignity, equality, and independence).

to its citizens, and any views expressed by the executive branch, which is uniquely situated to assess the reciprocity interest as the "sole organ" of foreign relations.[58] These balancing factors are provided merely as examples of the types of concerns states might consider. In any event, interest analysis is notorious for its open-ended, unpredictable results,[59] and states often differ in individual cases about which balancing factors are most dispositive. Hence the functional approach cannot provide uniformity and clarity of restrictive-immunity rules. The only clear function the convention provides is a general move toward restrictive immunity.

III. ADDITIONAL HUMAN RIGHTS PROTOCOL

This section begins by providing background on the international law of state immunity for human rights violations and Amnesty International's laudable stance in this area. It then shows why the convention's general trend toward restrictive immunity supports cosmopolitan goals inline with international human rights law. Finally it argues that progress toward restrictive immunity beneficial to the human rights movement should not be delayed by other concerns more profitably pursued elsewhere.

A. THE LAW OF STATE IMMUNITY FOR HUMAN RIGHTS VIOLATIONS

It has long been established that states have an international legal responsibility not to injure aliens within their borders or else must be held responsible for such injuries.[60] Since the Nazi trials at Nuremburg, international law has recognized the duty of a state to respect the human rights of its own nationals.[61] Amnesty International estimates that about 125 nations, including the US and the UK, provide judicial access to foreign individuals and refuse to

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58 *United States v Curtiss-Wright*, 299 US 304, 319 (1936). See Joan E. Donoghue, *Taking the "Sovereign" out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception*, 17 Yale J Intl L 489, 520–21, 532–35 (1992) (suggesting an interest-balancing approach in the context of US law).

59 See, for example, *Phillips v General Motors Corp*, 995 P2d 1002, 1008–09 (Mont 2000); *Wood Bros Homes, Inc v Walker Adjustment Bureau*, 601 P2d 1369, 1372–73 (Colo 1979); Restatement (Second) of Conflict of Laws § 6 (1971).

60 See International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc No A/CN.4/L.602/Rev.1 (2001) ("Draft Articles on State Responsibility").

61 See International Covenant on Economic, Social, and Cultural Rights, 993 UN Treaty Ser 3 (1976); International Covenant on Civil and Political Rights, 999 UN Treaty Ser 171 (1966).

grant state immunity when a foreign government has gravely violated an individual's human rights.[62]

This estimate overstates matters,[63] for granting immunity in tort proceedings is the "prevailing practice and opinion on state immunity."[64] Furthermore, the issue of state immunity for claims involving human rights remains highly contested.[65] Much of the controversy may stem from the fact that judicial access is often provided to foreign plaintiffs under the principle of universal jurisdiction, which requires no nexus with the forum state in order to exercise jurisdiction. Compared with commercial matters, which require some sort of jurisdictional nexus, respect for the defendant state's sovereignty becomes more of an issue when the forum state has no connection with the suit. Even when the forum state has a connection with the plaintiff, reasonable justices disagree on what connection suffices to exercise jurisdiction.[66] The result is a patchwork of different rules that often results in letting human rights violations go unpunished.

B. AMNESTY INTERNATIONAL'S VIEW

Amnesty International is a nongovernmental civil-society organization dedicated to campaigning for human rights. One of its missions is to prevent state immunity for grave human rights violations. Therefore, the group campaigns for universal jurisdiction over these violations.[67] Universal jurisdiction would empower courts everywhere to hear cases involving grave human rights violations no matter who was victimized or where the crimes were committed.

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62 See Amnesty International, *Universal Jurisdiction: The Duty of States to Enact and Implement Universal Jurisdiction*, 3 AI Index: IOR 53/014/2001 (Sept 2001).

63 See, for example, *Sosa v Alvarez-Machain*, 542 US 692, 715 (2004) (recognizing only a "narrow set of violations" under which the US may exercise universal jurisdiction in civil matters); Fox, *The Law of State Immunity* at 537 (cited in note 25) (discussing how the US and UK generally do not exercise universal criminal jurisdiction in criminal matters, with terrorism being the sole exception in the US). See also *United States v Usama Bin Laden*, 92 F Supp 2d 189, 222 (SDNY 2000) (suggesting that universal jurisdiction applies over terrorist bombings); *United States v Yunis*, 924 F2d 1086, 1092 (DC Cir 1991) (suggesting that universal jurisdiction applies over air piracy).

64 Bröhmer, *State Immunity and the Violation of Human Rights* at 144 (cited in note 6).

65 Dellapenna, *Suing Foreign Governments and Their Corporations* at 7–8 n 44 (cited in note 10) (citing myriad contrasting cases and articles).

66 Compare Justice White's concurrence in *Saudi Arabia v Nelson*, 507 US 349, 364–76 (1993), with Justice Kennedy's dissent, id at 370–77.

67 Amnesty International, *Universal Jurisdiction*, available online at <http://www.amnesty.org/en/international-justice/issues/universal-jurisdiction> (visited Dec 5, 2008).

Universal jurisdiction over grave human rights violations also would further Amnesty International's business-and-human-rights campaign,[68] which seeks stronger legal frameworks to hold business enterprises accountable for violations of the human rights standards encoded in the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.[69] While the UN Norms require respect for and promotion of a broad number of civil, political, economic, social, and cultural rights, they also call on business enterprises to refrain from engaging in or benefiting from the types of grave human rights violations that are the subject of Amnesty International's universal jurisdiction campaign. If, for example, the prisoners at Abu Ghraib prison in Iraq could sue the US for human rights violations perpetrated by private-contractor employees working there as interrogators and translators, the employees might have checked their behavior and indeed the US might have done a better job monitoring such behavior. Universal jurisdiction would provide a way for individuals to bring local suits regarding human rights violations not only against individuals or business enterprises—whose inadequate finances may leave them generally judgment-proof or locally attachment-proof—but also against their government-employers. This rationale for universal jurisdiction gains force given that states increasingly outsource their foreign-affairs functions to private parties,[70] and that the conduct of the private parties legally may be attributed to the state if directed and controlled by the state.[71]

For the foregoing reasons, and recognizing that the current state of customary international law is inadequate for its purposes,[72] Amnesty International understandably seized an opportunity in the Jurisdictional Immunities Convention to foster agreement on universal jurisdiction by pressing for the addition of an immunity-waiver provision whereby states may be held accountable for grave human rights abuses. Given that universal jurisdiction is a highly controversial issue, agreement on the convention is blocked. As a result, progress toward restrictive immunity is halted.

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68 Amnesty International, *Business and Human Rights*, available online at <http://www.amnesty.org/en/business-and-human-rights> (visited Dec 5, 2008).

69 United Nations, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

70 See Dickinson, 31 Yale J Intl L at 383–85 (cited in note 23).

71 Draft Articles on State Responsibility, arts 5, 8.

72 See Section III.A above.

C. THE BENEFITS OF RESTRICTIVE IMMUNITY

There are several schools of academic thought regarding international law and global governance, including (but hardly limited to) statism and cosmopolitanism.[73] For those who subscribe to statism, or to "realism" as it is also known in the academic literature, individual states are the primary players on an international scene where global relations are the natural outcome of differences in state power.[74] As one author explains, statism is "the principle that man's life belongs to the state."[75] Critics of the Jurisdictional Immunities Convention may argue that statism associates with the current varied practice of commercial-transaction immunity, whereby states individually determine their own rules based on calculations of realpolitik for when to grant immunity. Although states increasingly trend away from absolute immunity and toward adjudicating individual claims against foreign states, the trend is subject to national, not international, laws—notwithstanding the pending Jurisdictional Immunities Convention—and as such is primarily statist in focus, or so the argument goes. But, more fundamentally, statism closely associates with the historical practice of absolute immunity, whereby state sovereigns are given absolute deference. By trending away from absolute immunity, the Jurisdictional Immunities Convention reduces statism and fosters cosmopolitanism.

For cosmopolitans, the primary focus shifts from the state to the individual. Under cosmopolitanism, "all human beings are fundamentally members of one world order, no matter in what nation they dwell."[76] Though cosmopolitans welcome a humanitarian focus on individual rights, they do not call for the seemingly impracticable removal of nation-states as do other, more radical theories of global governance.[77] Instead they "seek to entrench and develop democratic institutions at regional and global levels as a necessary complement

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73 For a fuller typography, see generally, for example, Oona A. Hathaway and Harold Hongju Koh, *Foundations of International Law and Politics* 26–204 (Thomas West 2005); Alison Van Rooy, *The Global Legitimacy Game: Civil Society, Globalization, and Protest* 130–33 (Palgrave Macmillan 2004).

74 See, for example, Henry Kissinger, *Diplomacy* 17–28 (Simon & Schuster 1994).

75 Ayn Rand, *Capitalism: The Unknown Ideal* 193 (New American 1966).

76 Martha Nussbaum, *Cultivating Humanity in Legal Education*, 70 U Chi L Rev 265, 266 (2003). See also David Held, *What Hope for the Future? Learning the Lessons of the Past*, 9 Ind J Global Legal Stud 381, 398 ("National or ethnic or gendered boundaries should not determine the limits of rights or responsibilities for the satisfaction of basic human needs.").

77 See, for example, Van Rooy, *The Global Legitimacy Game* at 132–33 (cited in note 73) (describing the theories of world polity and radical communitarianism); Luke Martell, *Capitalism, Globalisation, and Democracy: Does Social Democracy Have a Role?*, available online at <http://www.theglobalsite.ac.uk/press/104martell.htm> (visited Dec 5, 2008) ("[R]adical communitarians would rather see global governance without global government or nation-states.").

to those at the level of the nation-state."[78] Cosmopolitanism, therefore, would call for a regime whereby each state would be just as accountable as any other state—indeed, just as accountable as any individual—in regard to its dealings with individuals and commercial entities. In other words, cosmopolitanism would have states be subject to restrictive immunity rather than absolute immunity, given a choice between the two. If everyone were following one legal regime regarding restrictive versus absolute immunity with "a certain generally acceptable uniformity," then private persons and states would benefit alike.[79]

To the degree the Jurisdictional Immunities Convention strives to accomplish these cosmopolitan goals simply by moving away from absolute immunity, as this Comment argues is the best way of interpreting the convention, it is strange that civil-society organizations would oppose its passage. The London School of Economics' definition of "civil society" is illustrative:

> Civil society refers to the arena of uncoerced collective action around shared interests, purposes and values. In theory, its institutional forms are distinct from those of the state, family and market, though in practice, the boundaries between state, civil society, family and market are often complex, blurred and negotiated.[80]

Civil-society organizations such as Amnesty International aim to foster cosmopolitan goals including but not limited to those that would be fostered by a uniform move away from absolute immunity. Accordingly, if not for other priorities, one might expect Amnesty International to support a Jurisdictional Immunities Convention that succeeds in achieving such uniformity.

D. THE BENEFITS OF ACCOUNTABILITY FOR COMMERCIAL TRANSACTIONS

The convention is best interpreted as a general move toward restrictive immunity or as a way to begin legitimating the notion that states may hold other states accountable in court.[81] Even if one alternatively interprets the convention as a move specifically toward a commercial-transaction exception to immunity, cosmopolitan goals are served and human rights groups should applaud insofar

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78 David Held, *Democracy and Globalization*, MPIfG Working Paper 97/5 (May 1997), available online at <http://www.mpi-fg-koeln.mpg.de/pu/workpap/wp97-5/wp97-5.html> (visited Dec 5, 2008).

79 Hafner, Kohen, and Breau, eds, *State Practice Regarding State Immunities* at xii (cited in note 11).

80 London School of Economics, *What Is Civil Society?*, available online at <http://www.lse.ac.uk/collections/CCS/what_is_civil_society.htm> (visited Dec 5, 2008).

81 See Section II.C above.

as individuals thereby come to be treated on an equal footing in their dealings with foreign governments.

Of course, governments of developing states may respond plausibly that when they take foreign property to redistribute to the poor, they further the right to the development of their peoples and therefore should retain the ability to invoke commercial-transaction immunity. However, from an economic perspective, it is unclear that such redistributions result in aid to the intended recipients or, if they do, that they confer long-term economic benefits. The economic development of a state may be related more closely to the state's rule of law than to foreign aid resulting in governmental corruption or poor economic incentives.[82] Developing states also may call attention to the fact that rich states harm their poor farmers by erecting protectionist policies,[83] and may argue that they play Robin Hood only in retaliation. But the World Trade Organization is a more direct remedy for protectionist policies, and for the resulting source of the human right to development, than the continuance of commercial-transaction immunity.

The human right to development is captured in the UN Declaration on the Right to Development:

> The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources. [84]

Amnesty International believes that "everybody has equal rights."[85] To the degree that individuals are left without judicial recourse when the governments

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82 See *Economics and the Rule of Law: Order in the Jungle*, Economist 83–85 (Mar 13, 2008). See also Gary S. Becker, *Is There a Case for Foreign Aid?*, and Richard A. Posner, *Should the United States Provide Foreign Aid?*, The Becker-Posner Blog (Sept 21, 2007), available online at <http://www.becker-posner-blog.com/archives/2007/01/> (visited Dec 5, 2008) (debating the duty of rich nations to give aid to developing nations).

83 See *The End of Cheap Food*, Economist 11 (Dec 8, 2007) (discussing the impact of rich-nation protectionist policies on developing nations). On the other hand, the EU, the US, and the World Bank economically incentivize developing countries to improve human rights standards. See *Economics and the Rule of Law* at 84 (cited in note 82). See also Stephen Marks, *The Human Right to Development: Between Rhetoric and Reality*, 17 Harv Hum Rts J 137, 167 (2004) (discussing the US's aid conditioned on human rights successes in conjunction with the right to development).

84 Declaration on the Right to Development, UN GAOR, 41st Session, Supp No 53, at 183, UN Doc A/RES/41/128 (1986).

85 Amnesty International, *Human Rights Defenders*, available online at <http://www.amnesty.org/en/human-rights-defenders> (visited Dec 5, 2008).

with which they deal injure them economically, preventing state immunity for commercial-transaction lawsuits should resonate with the human rights movement. Human rights activists should be concerned that governments can injure peoples economically and indiscriminately.

Despite all this, Amnesty International views human rights hierarchically and focuses on extreme violations of civil and political rights more than mere economic rights.[86] Opposition to the convention, therefore, may be exercised as leverage to include a human rights provision. However, if one takes a minimalist approach to interpreting the convention, the convention itself may be seen as leverage for implementing a separate human rights protocol.

E. SEPARATE HUMAN RIGHTS PROTOCOL

As Section II demonstrates, the Jurisdictional Immunities Convention is best understood as a method for getting states to move away from absolute immunity and toward restrictive immunity. That is, it is a way for the courts of forum states to begin holding foreign states accountable for their actions. This feat is significant. At least eleven of the twenty-eight signatory states practiced absolute immunity at the time of the convention's signing period, including China, India, Iran, and Japan.[87] Entering the convention into force would codify a significant move toward restrictive immunity.[88]

Amnesty International blocks this significant move because the convention does not explicitly implore courts to find foreign states accountable for human rights violations. But the convention is only two votes away from making a significant step toward restrictive immunity in general, which, as this section has argued, human rights groups should applaud.[89] Furthermore, as evidenced by the thirty years it took to get to this point, reworking the entire convention to include human rights provisions—not to mention taking advantage of the opportunities to provide more uniform and clear rules—would be a step backward. The situation is comparable to the adoption of the US Constitution, when Alexander Hamilton convinced the remaining few states to adopt the

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86 Id.

87 The current signatory status is available online at <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=283&chapter=3&lang=en> (visited Dec 5, 2008). For a classification of state practices around the time of the convention, see generally Bankas, *The State Immunity Controversy in International Law* 317–60 (cited in note 11).

88 See also Hazel Fox, *In Defence of State Immunity: Why the UN Convention on State Immunity Is Important*, 55 Intl & Comp L Q 399, 399 (2006) (noting that the convention "provides a source of certainty and detailed international rules for" the national courts of "States . . . which until recently adhered to an absolute doctrine of State immunity").

89 See Sections III.C and III.D above.

Constitution despite the absence of a bill of rights. Borrowing from Hamilton's advice, "it will be far more easy to obtain subsequent than previous amendments"[90] to the Jurisdictional Immunities Convention.

The convention achieves uniformity and clarity in the abstract sense of restrictive immunity. This is a good thing for human rights activists because it promotes the general idea that other states cannot claim absolute immunity for their actions. To these conclusions, the following sections identify and address possible criticisms.

1. The Perfectionist's Critique

One possible criticism to advocacy of a human rights protocol separate from the convention may be labeled perfectionist. First, perfectionists would support fostering agreement on perfect uniformity and clarity of rules. This perfectionism would require broad measures, for "[t]he vexing problem of distinguishing commercial activities from immune transactions will exist so long as [a state] wishes to permit its courts to exercise jurisdiction over some, but not all, activities of foreign states."[91] Disagreement about commercial versus sovereign classifications surely will continue in a commercially changing world that sees an increasing amount of transactions between state governments and private parties.[92] Such disagreement is illustrated by cases in which justices applying the same statute disagree about an activity's commerciality.[93] Second, perfectionists would include provisions eliminating immunity for human rights violations.

Perfectionists, therefore, would build on the trend away from absolute immunity and eliminate disagreement by abandoning state immunity altogether.[94] However, this could create incalculable liability risks that could bankrupt a state and leave it without the ability to guarantee the security of its citizens.[95] It also could lead to states misusing courts for political goals despite the existence of other safety hatches, such as the act-of-state doctrine.[96] Generally it could foster unpredictably undesirable results due to the sweeping nature of the proposed

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90 Federalist 85 (Hamilton) at 257 (cited in note 7).

91 Donoghue, 17 Yale J Intl L at 522 (cited in note 58).

92 See Dickinson, 31 Yale J Intl L at 383–85 (cited in note 23).

93 See, for example, *Saudi Arabia v Nelson*, 507 US at 364–79.

94 See, for example, Michael Singer, *Abandoning Restrictive Sovereign Immunity: An Analysis in Terms of Jurisdiction to Prescribe*, 26 Harv Intl L J 1, 59 (1985) (proposing the abandonment of state immunity in favor of the act-of-state doctrine); Richard Falk, *The Role of Domestic Courts in the International Legal Order* 139–69 (Syracuse 1964) (proposing the same).

95 Bröhmer, *State Immunity and the Violation of Human Rights* at 13 (cited in note 6).

96 See generally, for example, *Banco Nacional de Cuba v Sabbatino, Receiver*, 376 US 398 (1964).

reform. Hence the convention focuses on minimal steps, and in doing so aims to secure a solution that realistically could foster agreement.

Minimalists "believe in rulings that are at once narrow and theoretically unambitious."[97] They prefer minimal steps toward ultimate goals. Movements toward restrictive immunity achieve the minimal goal of abandoning absolute immunity. As described in the area of commercial-transaction immunity, the convention takes only minimal steps toward the goals of uniformity and clarity of rules. Much work remains toward unifying and clarifying the rules of commercial-transaction immunity.

The minimalist nature of interpreting the convention also is inline with embracing a separate protocol to meet humanitarian concerns. Whether humanitarians would abandon immunity entirely or only for grave human rights violations, minimalism more closely averts the risks described above, and a separate protocol can meet humanitarian concerns.

2. The Statist's Critique

Statists believe that states always act out of self-interest to increase power relative to other states. Under this theory, a state has incentives to adhere to a uniform law only if it finds costly either its own law or the coexistence of different rules.[98] Therefore, only states that stand to benefit from the convention will join it, whereas states that foresee no benefit will refrain. Statists may support a less than perfect convention or they may balk at the convention altogether, for states will do what is in their best interests anyway. In other words, statists may believe Amnesty International's opposition to the convention does not matter. Two objections respond to this critique. First, that states have come willingly to the negotiating table in the first place indicates that those states believe a possible benefit exists. Second, a clear, uniform policy toward restrictive immunity may benefit everyone, self-interested states included, by increasing accountability and thereby reducing risk. The convention seeks to solve a collective-action problem wherein benefits can be achieved only through multilateral efforts.

IV. CONCLUSION

This Comment supported the ratification of the Jurisdictional Immunities Convention and the creation of a separate protocol to address jurisdictional immunity for human rights violations. As reasons to support the separate human

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97 Cass R. Sunstein, *Burkean Minimalism*, 105 Mich L Rev 353, 353 (2006).

98 Souichirou Kozuka, *The Economic Implications of Uniformity in Law*, in Jürgen Basedow and Toshiyuki Kono, eds, *An Economic Analysis of Private International Law* 73, 74–82 (Mohr Siebeck 2006).

rights protocol, this Comment cited a minimalist interpretation of the Jurisdictional Immunities Convention, the benefits derivable from this interpretation, and the pragmatism of taking minimal steps toward restrictive immunity.