PLA 7092/94

Her Majesty the Queen in Right of Canada

v.

1. Sheldon G. Edelson
2. Rivka Reinhold
3. Aaron Reinhold
4. Reuven Reif, Receiver-General
5. Katriel Be'eri, Receiver-General
6. Abn Amro Bank N.V.

The Supreme Court Sitting as the Court of Civil Appeals

[June 3, 1997]

President A. Barak and Justices E. Mazza, T. Strasberg-Cohen

Appeal by leave from the decision of the Tel-Aviv/Jaffa District Court, docket numbers 581/91 and 613/93, handed down on July 11,1994, which denied an appeal from the decision of the Herziliya Magistrate Court, docket number 411/91, handed down on April 15 1991, and which also accepted an appeal from the decision of the Bat-Yam Magistrate Court, docket number 908/92, handed down on March 3 1993.

Facts: Respondents leased a house to the appellant, a foreign sovereign. The house was to serve as the residence of the Canadian ambassador to Israel. The parties disputed the right of the appellant to exercise his option to extend the lease. The magistrate court, in a declaratory judgment, rejected the appellant's claim of absolute immunity, held that the lease had ended, and ordered the appellant to vacate the property. The district court upheld the decision of the magistrate court. Appellant appealed to the Supreme Court.

Held: The Supreme Court held that a foreign sovereign enjoys only relative immunity, and not absolute immunity, from the jurisdiction of Israeli courts. As

such, in matters of private commercial law, a foreign sovereign is subject to the jurisdiction of Israeli courts. The Court also held that, in any specific case, whether Israeli courts had jurisdiction would be decided by looking to the legal nature of the transaction, rather than its underlying purpose. As the lease contract was of a private, commercial nature, Canada could not assert immunity from Israeli jurisdiction. The Court also distinguished between the sovereign immunity of the foreign state and the diplomatic immunity of its ambassador. The Court held that the ambassador could not assert diplomatic immunity in this case, as the house was rented by Canada, and the Canadian ambassador was not a party to the lease.

Israeli Supreme Court Cases Cited:

[1] C.A. 347/71 *Sensor* v. *Consul-General of Greece*, IsrSC 26(2) 328.

[2] HCJ 785/ 87 *Afu* v. *Commander of IDF Forces in the Gaza* Strip, IsrSC 42(2) 4.

[3] Cont. 41/49 *Shimshon* v. *Attorney-General*, IsrSC 4 143.

[4] Crim. App. 5/51 *Steinberg* v. *Attorney-General*, IsrSC 5 1061.

[5] Crim. App. 174/54 *Stampeper* v. *Attorney-General*, IsrSC 10 5.

[6] Crim. App. 336/61 *Eichman* v. *Attorney-General*, IsrSC 17 2033.

[7] HCJ 606/78 *Awib* v. *Minister of Defense*, IsrSC 33(2) 113.

[8] HCJ 698/80 *Kawasmeh* v. *Minister of Defense*, IsrSC 35(1) 617.

[9] HCJ 393/82 *Jamayat Askan Almalmoun Altaounia Almahdouda Almsaoulia, Registered Cooperative in the Judea and Samaria Region* v. *Commander of IDF Forces in the Region of Judea and Samaria*, IsrSC 37(4) 785.

[10] HCJ 294/89 *National Insurance Institute* v. *(Appeals) Committee Established by Virtue of the Law bestowing Benefits for Victims of Terrorism*, IsrSC 45(5) 445.

Israeli District Court Cases Cited:

[11] Cont. (Jerusalem) 1013/78, DC (Jerusalem) 300/76 *Karmi v. Dolberg* 2000 IsrDC (2) 265.

[12] DC (Jerusalem) 157/53 *Shababo Estate* v. *Heilan*, IsrDC 9 502.

Israeli Magistrate Court Cases Cited:

[13] MC (Petach Tikva) 2310/93 (unreported case).

Israeli National Labour Court Cases Cited:

[14] LCJ 32-3/81 *Weiss* v. *German Embassy in Israel* (unreported case).
[15] LCJ 3-213/61 *Navot* v. *South African Airlines* (unreported case).
[16] LCJ 3-147/88 *Leah* v. *The Republic of South Africa*, IsrLC 19 557.

Austrian Cases Cited:

[17] *Collision with Foreign Government-Owned Motor Car (Austria) Case*, 40 I.L.R. 73 (1961).

Italian Cases Cited:

[18] *United States Government v. Bracale Bicchierai*, 65 I.L.R. 273 (1968).
[19] *Embassy of the Kindgdom of Morocco v. Societa' Immobiliare Forte Barchetto*, 65 I.L.R. 331 (1979).

American Cases Cited:

[20] *The Exchange*, 11 U.S. 116 (1812).
[21] *Berizzi Bros. Co. v. S.S. The Pesaro*, 271 U.S. 562 (1926).
[22] *Victory Transport Inc. v. Comisaria General*, 336 F. 2d 354 (2d Cir. 1964).
[23] *Alfred Dunhill of London Inc. v. The Republic of Cuba*, 425 U.S. 682 (1976).
[24] *Joseph v. Office of Consulate General of Nigeria*, 830 F. 2d 1018 (9th Cir. 1987).
[25] *2 Tudor City Pl. v. Libyan Arab Republic Mission to U.N.*, 470 N.Y.S. 2d 301 (N.Y. Civ. Ct. 1983).
[26] *767 Third Ave. Association v. Permanent Mission of the Republic of Zaire to the United Nations*, 787 F. Supp. 389 (S.D.N.Y. 1992).

English Cases Cited:

[27] Alcom Ltd. v. Republic of Columbia [1984] 2 All E.R. 6 (H.L.).
[28] The Parlement Belge (1880) 5 P.D. 197 (C.A.).
[29] Compania Naviera Vascongado v. S.S. Cristina [1938] A.C. 485.
[30] Rahimtoola v. The Nizam of Hyderabad [1958] A.C. 379.
[31] Thai-Europe Ltd. v. Pakistan government [1975] 1 W.L.R. 1485 (C.A.).

[32] The Philippine Admiral [1977] A.C. 373 (P.C.).
[33] Trendex Trading v. Bank of Nigeria [1977] Q.B. 529 (C.A.).
[34] Hispano v. Central Bank [1979] 2 L1.L. Rep. 277 (C.A.).
[35] The "I Congreso" [1980] 1 L1.L. Rep. 23 (C.A.).
[36] I Congreso [1983] 1 A.C. 244; [1981] 2 All E.R. 1064 (H.L.).
[37] Planmount Ltd. v. Zaire [1981] 1 All E.R. 1110 (Q.B.).

German Cases Cited:
[38] *Philippine Embassy Bank Account Case*, 65 I.L.R. 146 (1977).
[39] *Claim Against the Empire of Iran Case*, 45 I.L.R. 57 (1963).
[40] *Land Purchase Broker's Commission Case*, 65 I.L.R. 125 (1974).

Greek Cases Cited:
[41] *Purchase of Embassy Staff Residence Case* 65 I.L.R. 255 (1967).

Jordanian Cases Cited:
[42] *Nashashibi v. The Consul-General of France in Jerusalem* 26 I.L.R. 190 (1958).

Canadian Cases Cited:
[43] *Zodiak Int'l Product Inc. v. Polish People's Republic*, [1978] D.L.R. 3d. 656.
[44] *Allan Construction Ltd. v. Le Gouvernment du Venezuela*, [1968] Que. P.R. 145.
[45] *Venne v. Democratic Republic of the Congo*, [1969] 5 D.L.R. 3d. 128.
[46] *Smith v. Canadian Javelin*, [1976] 68 D.L.R. 3d. 428.
[47] *Corriveau v. Republic of Cuba*, [1980] D.L.R. 3d. 520.
[48] *Flota Maritima Browning de Cuba S.A. v. Steamship Canadian Conqueror*, [1962] 34 D.L.R. 2d. 628.
[49] *Republic of Congo v. Venne*, [1972] 22 D.L.R. 3d. 669.
[50] *Lorac Transport v. The Atra*, [1987] 1 F.C. 108.
[51] *Re Canada Labour Code*, [1992] 91 D.L.R. 4th 449.

Swiss Cases Cited:
[52] *United Arab Republic v. Mrs. X* , 65 I.L.R. 385 (1960).

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[53] Y. Dinstein, *InternationalLaw and the State* (1971).

[54] Y. Dinstein, *The State's Internal Authority* (1972).

Israeli Books Cited:

[55] Ruth Lapidoth, *The Place of Public International Law in Israeli Law*, 19 Mishpatim 807 (1989-90).

[56] Y. Silberschatz, *The Absorption of International Law into Israeli Law—Reality and Ideal*, 24 Mishpatim 317 (1994-95).

[57] E. Benevisti, *The Influence of Security and Foreign Relations Considerations on the Applicability of Treaties to Local Law*, 21 Mishpatim 221 (1991-92).

[58] E. Benevisti, *The Influence of International Human Rights Law on the Israeli Legal System: Present and Future*, 28 Isr. L. Rev. 136 (1994).

[59] Y. Dinstein, *Diplomatic Immunity in England and in Israel*, 22 Hapraklit 5 (1966).

[60] A. Barak, *The Israeli Legal System its History and its Culture*, 40 Hapraklit 197 (1991-93).

[61] Y. Moritz, *Cracks in the Principle of Diplomatic Immunity*, 28 Hapraklit 317 (1972-73).

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[62] C.J. Lewis, State and Diplomatic Immunity (3rd ed., 1990).

[63] P.W. Hogg, Constitutional Law of Canada (3rd ed., 1992).

[64] G.M. Badr, State Immunity: An Analytical and Prognostic View (1984).

[65] 1 L.F.L. Oppenheim International Law (R. Jennings & A. Watts eds., 1992).

[66] 4 W. Blackstone, Commentaries on the Laws of England.

[67] I. Brownlie, Principles of Public International Law (4th ed., 1990).

[68] C.H. Schreuer, State Immunity: Some Recent Developments (1988).

[69] J.G. Castel, International Law (3rd ed., 1976).

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[70] H.L. Molot & M.L. Jewett, *The State Immunity Act of Canada*, 20 Can.

Y.I.L. 79 (1982).

[71] C.M. Schmitthoff, *The Claim of Sovereign Immunity in the Law of International Trade*, 7 Int. Comp. L.Q. 452 (1958).

[72] H. Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 B.Y.I.L. 220 (1951).

Miscellaneous:

[73] Restatement (Third) of the Foreign Relations Law of the United States.

[74] Jurisdictional Immunities of States and their Property, II Y.B.I.L.C. 7 (1986).

For the appellant—Gad Nashitz, Rasael David Meir
For respondent no. 1—David Leshem
For respondent nos. 2-3—Abraham Sokovolsky, Helen Eisen

JUDGMENT

President A. Barak

A house was rented to a foreign state, which intended to use the premises as a residence for its ambassador to Israel. A dispute arose between the lessor and the lessee regarding the terms of the lease. The Court was asked to issue a declaratory judgment regarding the lessor's rights. In addition, the Court was asked to determine the appropriate amount of rent to be paid. The issue before the Court is whether or not the lessee has immunity with respect to the dispute's adjudication before an Israeli court.

The Facts

1. Rivka and Aaron Reinhold are the owners of a house in Herzliya. As of May 13, 1986, they let the house to Her Majesty, the Queen in Right of Canada.

The Canadian ambassador to Israel acted as the lessee. The house was to serve as the residence of the Canadian ambassador to Israel. The lease was set for five years, ending on May 13, 1991. The lessee was granted the option of extending the lease for three additional periods. The maximum period for which the lease could be extended was set at a total of five years. Exercise of this option and extension of the lease was contingent on securing the consent of Bank Mizrahi, in whose name a mortgage on the house was registered. The Bank Mizrahi notified the Canadian government that it had transferred the mortgage rights to Mr. Edelson, and that the latter—and, as such, Bank Mizrahi itself—did not consent to the lease's extension. The owners then demanded that the Canadian government vacate the premises at the end of the original five-year period. The Canadian government refused, claiming that it had the option of extending the lease.

Proceedings in the Magistrate Court

2. Reinhold applied to the Herzliya Magistrate Court, seeking a declaratory judgment stating that the lease had expired with the passage of the original five years, which had elapsed since the beginning of the lease on May 13, 1991. This being the case, they claimed that they were entitled to demand that the Canadian government vacate the premises.

The Canadian government was summoned to the hearing but did not appear in court. Instead, the Canadian ambassador to Israel dispatched a letter to the judge on his government's behalf. The letter stated that, in accordance with international law, a foreign sovereign is not subject to the jurisdiction of an Israeli court. Instead, it enjoys absolute immunity with respect to all legal proceedings. The Court was therefore requested to dismiss the suit.

The Court summoned the Attorney-General to participate in the hearing. It considered the submission of the Canadian government. In a well-reasoned judgment, which skillfully and comprehensively reviewed both Israeli and international law, Judge Y. Gellin held that the sovereign immunity enjoyed by foreign states is restricted immunity, applying

exclusively to the foreign state's acts in its "sovereign" capacity, not to its acts in a "private" capacity. The latter category also includes the foreign sovereign's financial and commercial transactions. As per Judge Gellin's opinion, renting premises to serve as an ambassadorial residence falls into the category of the foreign sovereign's financial or commercial transactions. Therefore, he concluded, the foreign sovereign's immunity does not apply to a dispute over a lease of an ambassador's residence.

Judge Gellin was aware of the Supreme Court's ruling in CA 347/71 *Sensor* v. *Consul-General of Greece* [1]. According to *Sensor* [1], a diplomat enjoys absolute immunity from the jurisdiction of Israeli courts. This having been said, Judge Gellin deemed the *Sensor* [1] ruling *obiter dictum*, which was therefore not binding upon his court.

Judge Gellin accepted the petition and granted the declaratory judgment requested by Reinhold. The Canadian government appealed to the magistrate court, requesting that it revoke its ruling, by reason of it having been decided *in abstentia* and without the presentation of a defense. The magistrate court, again per Judge Gellin, rejected this request.

3. The Canadian ambassador did not vacate the premises upon the expiry of the original lease. As a result, Reinhold filed an additional suit with the magistrate court. This time, they filed the suit in the magistrate court in Bat-Yam, demanding payment of appropriate rent for the period following the lease's original term, after May 13, 1991. Moreover, they requested an interlocutory decision, obligating the Canadian government to pay the sum, which it admitted to owing under the terms of the original lease. In response, the Canadian government repeated its claim of sovereign immunity. The magistrate court, per Judge M. Tranto, accepted the Canadian government's argument and dismissed the suit outright. While Judge Tranto agreed that sovereign immunity is relative, rather than absolute, he nonetheless ruled that renting premises to serve as an ambassadorial residence falls within the scope of the foreign sovereign's relative immunity. Indeed, he held, renting premises to serve as an ambassadorial residence is necessary for discharging a foreign

sovereign's functions. Its purpose is not for profit. Nor is it a commercial transaction to which the restricted sovereign immunity would not apply.

The Appeal to the District Court

4. Her Majesty the Queen, as the guardian of Canada's rights, appealed the Herzliya Magistrate Court's decision before the district court. *See* CA 581/91. Reinhold, for his part, independently appealed the Bat-Yam Magistrate Court's ruling. *See* CA 613/93. These appeals were combined and heard jointly. The Attorney-General was summoned and, when asked to present his position, supported Judge Gellin's decision. Mr. Edelson—to whom the mortgage rights were transferred by the Mizrahi Bank—was joined as an additional respondent to the appeal.

Once again, the Canadian government claimed immunity with respect to all suits filed against it. Indeed, it claimed both sovereign and diplomatic immunity. For their part, Reinhold and Edelson argued that the contractual agreement was with the sovereign, and that, as such, diplomatic immunity was not an issue in this case. The District Court (per Judges Gross, Ben-Shlomo and Shalev) accepted this position.

Judge Gross, who delivered a comprehensive and erudite judgment, held that the suit was both filed and conducted against the sovereign—not against the ambassador. Hence, the issue at bar involves the scope of sovereign immunity. No discussion of the scope of diplomatic immunity is required. Judge Gross discussed the issue of sovereign immunity comprehensively and in depth. He indicated that the trend in a significant number of states is to recognize restricted sovereign immunity of foreign states, and to reject absolute immunity. This is the law in England, America, Germany, Italy, France, Belgium and in many other states. Modern legislation in many other countries adopts a similar position. This is also the approach of international law scholars. Judge Gross also analyzed the Israeli law governing sovereign immunity. He held that Justice Sussman's comments in *Sensor* [1] were *obiter dicta* and are therefore not binding. In applying the rules of restricted immunity to the facts of the case before him, Judge Gross ruled that the transaction in

dispute was of a commercial-private nature, and that the issue of whether or not the transaction was carried out for profit was irrelevant. Rather, the applicable criterion is the character of the legal sphere in which the foreign sovereign acts, namely, whether it is private or public. The determining factor is not the purpose of or the motivation underlying the act, but its nature and the legal relationships it creates. Judge Gross proposed a test for classifying sovereign acts. According to this test, the court should ask itself whether the relevant act could have been carried out by a private individual, or whether it requires the exercise of sovereign power and authority that a state alone wields.

Applying these criteria to the case at bar, the district court saw the case as a dispute over a private lease and its interpretation. This being the case, the Canadian government could not be said to have exercised its sovereign powers in entering into the lease. As such, the dispute was entirely within the realm of private law, to which sovereign immunity does not apply. Consequently, the district court rejected Canada's appeal of Judge Gellin's decision and accepted Reinhold's appeal of Judge Tranto's judgment. It returned the case to the magistrate court, which was to adjudicate the claim.

The Appeal to the Supreme Court

5. Her Majesty the Queen, to whom Canada's rights are entrusted, applied for leave to appeal the district court's decision. Permission was granted. I summoned the parties to a preliminary hearing, with the intention of arriving at an out-of-court settlement. This solution appeared particularly appropriate, as I had been informed that Canada had in fact vacated the premises on April 30, 1995. I suggested that the monetary dispute between the parties be resolved by arbitration. The Canadian government agreed. Nevertheless, this arrangement was never carried out, due to the civil disputes between Reinhold and Edelson. These cases are pending before this Court. *See* PLA 2419/92; PLA 3095/94; PLA 4841/94; PLA 4914/94.

6. Mr. Naschitz, who represented Canada, stressed that the district

and magistrate courts were bound to rule in accordance with the *Sensor* [1] precedent, and were not authorized to deviate from it. This is true, he argued, irrespective of the subsequent changes in public international law since then. Regarding the substantive dispute, he argued that a distinction must be drawn between the foreign sovereign's immunity and that of its diplomatic representative. According to the appellant, the adjudication of a dispute over property being rented to serve as an ambassadorial residence is precluded both by diplomatic immunity, according to the provisions of the Vienna Convention on Diplomatic Relations (1961) and by sovereign immunity, which the appellant claims is absolute. The trend towards restricted immunity, according to appellant, applies only to the commercial realm. Rental of premises to serve as an ambassador's residence, he submits, does not fall within the sphere of the sovereign's commercial acts. Instead, it is part of its sovereign activity: the nature of an act should be determined from the sovereign's perspective.

7. The respondents support the rulings of Judge Gellin and Judge Gross. They claim that the rules of diplomatic immunity do not apply, as the ambassador is not a party to the proceedings. The immunity of the litigant, Her Majesty the Queen in Right of Canada, is relative immunity. Moreover, they submit, the *Sensor* [1] precedent is *obiter dictum* and does not reflect modern international law. Nor does it extend to the circumstances of this case—the lease of a property for use as an ambassadorial residence. Whether the act is for profit is not a deciding factor. The criterion is defined by the nature of the legal relationships raised between the parties. Edelson also argued that, in light of Canada's behavior, it should be deemed to have relinquished its immunity.

Sovereign Immunity or Diplomatic Immunity

8. There are various sorts of international immunity: We can distinguish, *inter alia*, between state immunity and diplomatic immunity. Both immunities find their origin in the sovereign's personal immunity. *See* C.J. Lewis, *State and Diplomatic Immunity* 1 (1990) [62].

Despite their common historical origin, a distinction should be drawn

between them. Thus, while state immunity refers to the immunity granted to a foreign state with respect to (civil) legal proceedings, diplomatic immunity signifies the immunity granted diplomatic representatives. The personal immunity of a head of state may be considered as belonging to either category. The dividing line between sovereign immunity and diplomatic immunity is often blurred. Conceivably, both kinds of immunity may apply to the same set of facts. Thus, for example, if soveriegn immunity regarding a specific case of "seizure" of an embassy's bank account, pursuant to a civil ruling against that country, is not recognized, the case could still fall under the category of diplomatic immunity. It is possible that state immunity does not apply to the facts of the case, whereas diplomatic immunity may apply to the same facts. *See Philippine Embassy Bank Account Case* 65 I.L.R. 146 (1977) [38]; *Alcom Ltd.* v. *Republic of Columbia*, 2 All E.R. 6 (H.L. 1984) [27]).

9. Does the dispute over the interpretation of the lease agreement, (the subject of this appeal) fall under the category of "state immunity" or that of "diplomatic immunity"? The lease's preamble states:

> Made in Tel Aviv, Israel, this thirteenth day of May, 1986 between HER MAJESTY THE QUEEN in Right of Canada, represented by Mr. James K. Barteman, Canadian ambassador to Israel (hereinafter referred to as the 'Lessee') of the one part and RIVKA REINHOLD [hereinafter referred to as 'the Lessor'] of the other part.

The contract itself sets out the conditions of the lease. It stipulates that the premises shall serve as the residence of the Canadian ambassador and his family. They are "to use the Premises only for residential purposes of the Canadian ambassador and members of his family." Among the lease's conditions, section 25 stipulates as follows:

> Notwithstanding any provisions of this agreement, Her Majesty the Queen in Right of Canada shall not have been deemed by any provisions hereof to have waived any of the

> privileges and immunities enjoyed by her officers, agents, or employees, under international law or under the laws of Israel.

What then is the nature of this lease? Is the dispute over it to be classified as involving state immunity, as claimed by the respondents, or diplomatic immunity, as appellant argues?

10. In my opinion, the dispute, in its entirety, falls within the realm of state immunity. The lease was drafted between Canada and Reinhold. The legal entity party to the lease is Canada. The lessee of the property is Her Majesty the Queen in Right of Canada. The reference to the Queen is symbolic as, in Canada, the Queen symbolizes the State. Hogg pointed this out in the following remarks:

> The legal system of Canada recognizes the state as a legal entity, capable of acquiring rights and liabilities…
>
> …the state (or government) is commonly referred to as "the Crown"... the Crown continues to be used as a convenient symbol for the State.

P.W. Hogg, *Constitutional Law of Canada* 258 (1992) [63]. The expression "the Queen in Right of Canada" indicates that the Queen acts in her capacity as Canada's symbol, rather than that of the United Kingdom or Australia. It further signifies that the Queen's actions are taken on behalf of Canada as a federation, rather than on behalf of one of its provinces. To this effect, Hogg, *Id.*, at 259, writes:

> In order to reflect this strange notion of a single Queen recognized by many separate jurisdictions, it is usual to speak of the Crown "in right of" a particular jurisdiction. Thus, the government of the United Kingdom is described as the Crown in Right of the United Kingdom; the federal government of Canada is the Crown in Right of Canada (or the Dominion);

> And each of the provincial governments is the Crown in Right of British Columbia or whichever province it may be.

This being the case, the rental agreement is not the Queen's "personal" lease. It is the Canadian government's lease. The Canadian ambassador was not a party to the lease; he merely acted in his capacity as the Queen's representative, this is to say, as Canada's representative. The case before us therefore involves a dispute over an option granted in the lease to Canada, and over Canada's obligation to pay appropriate rent. The respondent before the magistrate court and the Appellant in this Court is Canada. The ambassador is not a party to these proceedings. Neither his personal immunity, nor the "immunity" granted to the property is at issue before this Court. The dispute between the parties relates to the scope of the contractual right created by a lease contracted with Canada, to exercise the option of extending the rental period and of Canada's obligation to pay appropriate rent for the extra-contractual period. Canada, as a party to the lease, claims that it enjoys immunity from adjudication of this dispute in an Israeli court of law. This is a claim premised on state immunity, not diplomatic immunity.

State Immunity in Israeli Law

11. Does a foreign country have immunity from being sued in an Israeli civil court?

A significant number of countries have enacted specific legislation concerning this issue. This is the case in England, *see* the State Immunity Act, 1978, in the United States, *see* the Foreign Sovereign Immunities Act, *codified at* 28 U.S.C. § l330 (1997) et seq., in Canada, *see* The Sovereign Immunity Act, R.S.C. 1985, c. S-18, in Australia, *see* the Foreign Sovereign Immunities Act, 1985, and many other countries. *See* G.M. Badr, *State Immunity: An Analytical and Prognostic View* (1984) [64]. Israel, for its part, does not have any specific legislation concerning the immunity of foreign states. What, then, is the law in this case?

12. The answer is that the rules of sovereign immunity are part of

customary international law. *See* 1 L.F.L. Oppenheim, *International Law* (R. Jennings & A Watts eds., 1982) [65]. Customary international law is part and parcel of the law of the State of Israel. President Shamgar acknowledged this upon remarking:

> This Court has consistently held that customary international law is part of the Law of the Land, subject to Israeli legislation providing otherwise

HCJ 785/87 *Afu* v. *Commander of IDF Forces in the Gaza Strip* [2] at 35. This approach was endorsed in a long series of decisions. *See* Crim. App. 41/49 "*Shimshon*". v. *The Attorney-General* [3] at 146; Cr. App. 5/51 *Steinberg* v. *The Attorney-General* [4]; Crim. App. 174/54 *Stampeper* v. *The Attorney-General* [5] at 14; Crim. App. 336/61 *Eichman* v. *The Attorney-General* [6] at 2040; HCJ 606/78 *Ayoub* v. *Minister of Defense; Matuah* v. *Minister of Defence* [7] at 120; HCJ 698/80, *Kawasmeh* v. *Minister of Defense* [8] at 627; HCJ 393/82 *Jamayat Askan Almalmoun Altaounia Almahdouda Almsaoulia, Registered Cooperative in the Judea and Samaria Region* v. *Commander of IDF Forces in the Region of Judea and Samaria* [9] at 793.

Professor Dinstein summarized this point well:

> The law is that the rules of customary international law are automatically incorporated into Israeli law and comprise a part thereof, except in the case of direct contradiction between them and the written legislation, in which case the latter prevails

See Y. Dinstein *International Law and the State* 146 (1971) [53].

It is undisputed that this rule is firmly established in our legal system, although its analytical foundation is not free from doubt. *See* Dinstein [53], at 144; Ruth Lapidot, *The Place of Public International Law in Israeli Law* [55] 19 Mishpatim 807 (1990); Y. Silberschatz, *The Absorption of International Law into Israeli Law—Reality and Ideals*,

[56] 24 Mishpatim 317 (1994); E. Benvenisti, *The Influence of Security and Foreign Relations Considerations on the Applicability of Treaties to Israeli Law* [57], 21 Mishpatim 221 (1991); E. Benvenisti, *The Influence of International Human Rights Law on the Israeli Legal System: Present and Future* [58], 28 Isr. L. Rev. 136 (1994).

Two chief explanations have been advanced to clarify the position of customary international law in Israeli law. The first perspective sees customary international law as part and parcel of English common law. This is based upon Blackstone's well-known statement regarding customary law:

> The law of nations… is held to be a part of the law of the land.

See 4 William Blackstone, Commentaries *67 [66]. This principle, namely that customary international law is part of the internal law of the land, was absorbed into our own national law by virtue of sec. 46 of His Majesty's Order in Council-1922. *See* Y. Dinstein, *Diplomatic Immunity in England and in Israel* [59], 22 HaPraklit 5 (1966). The validity of the absorption was retained even subsequent to the repeal of sec. 46 of His Majesty's Order in Council, in accordance with section 2(b) of the Foundations of Law Act-1980. According to this view, the absorption of customary international law into Israeli law does not constitute the absorption of any external international custom or convention. Instead, according to this perspective, customary international law forms an integral part of the foundations of Israeli law, and a specific legislative act is not required to include it. *See* Dinstein, *supra*, [53], at 144.

Another perspective holds that customary international law is one of the sources of Israeli law. These sources—pending their incorporation into the Basic Laws of the country—are derived from the general structure of the Israeli legal system. Our legal structure, which is a product of our legal history, is one of mixed jurisdiction. *See* A. Barak, *The Israeli Legal System—Its History and Culture*, 40 HaPraklit 197 (1991-93) [60]. Within this system of mixed jurisdiction, we find the

influence of the basic doctrines of the common law on our legal sources. One of these basic doctrines recognizes customary international law as a source of law in Israel. A similar approach is also practiced regarding private law in Israel. *See* Oppenheim, *supra*. [65], at 63. The status of customary international law is equivalent to that of our own common law. This is to say that its legal status is below that of legislation.

Having established, based on our own legal sources, that customary international law is a source of Israeli law, we have paved the way for its absorption into Israeli law. We can therefore concur with Acting President S. Z. Cheshin, who held:

> We are obligated to rule that the said principle has become an integral part of the law of the land by virtue of the fact that Israel is a sovereign state, existing in its own right. The Declaration of Independence created an opening for the new state to absorb those international laws and customs, practiced by all states by virtue of their sovereignty, and which have enriched their legal systems with the customary principles of international law

Stampeper [5], at 15. Within the framework of this appeal, however, it is not necessary to select among these explanations.

13. What does customary international law, within the scope of its validity in Israel, provide with respect to state immunity? The National Labor Court has addressed this question. *See* LCJ 3-32/81 *Weiss* v. *German Embassy in Israel* [14]; LCJ 3-213/61 *Navot* v. *South African Airlines* [15]; LCJ 3-148/88 *Leah* v. *Republic of South Africa* [16], at 559. The matter has also been addressed by the district courts, *see* DC (Jerusalem) 300/76 *Karmi* v. *Dolberg* [11], as well as by the magistrate courts, *see* MC (Petach-Tikva) 2310/93 *The Ivory Coast v. Zilka* [13]. The issue has yet to be addressed by the Supreme Court. The case most closely related to ours—discussed at length in the judgments issued by the lower courts in this case—is *Sensor* [1]. In that case, the magistrate

court delivered a judgment *in absentia* against the Consul-General of Greece. The judgment ordered the Greek Consulate, by reason of default on rent payments, to vacate the property in question, which served as the residence of the head of the Greek diplomatic mission. Sensor, in whose favor the judgment was rendered, filed for execution of judgment. A warning notice was sent. The Attorney-General, however, appeared before the head of the Office of the Execution of Judgments and objected to the execution of the judgment, asserting arguments of immunity. It was unclear whether he asserted arguments of diplomatic immunity or state immunity.

Sensor objected to the Attorney-General's participation in proceedings before the head of the Office of the Execution of Judgments. His objection was dismissed. The District Court rejected Sensor's appeal. The Supreme Court also rejected his objection. The major part of the judgment, as per Acting President Sussman, deals with the issue of whether the Attorney-General is entitled to appear before the head of the Office of the Execution of Judgments. On the subject of immunity, Justice Sussman remarked: "we have not yet reached the stage of ruling whether this claim is legally well-founded or not." Nevertheless, for the purposes of deciding the issue of the Attorney General's standing vis-a-vis the head of the Office of the Execution of Judgments, Justice Sussman wrote:

> A judgment rendered against a diplomatic representative is void, as the defendant's immunity precludes the jurisdiction of Israeli courts. It is, quite simply, a matter of lack of jurisdiction. An Israeli court can only assume jurisdiction after having secured the foreign sovereign's consent. Absent such consent, no recourse involving legal remedies in the courts of this country are open to the creditor; his solution is to approach the foreign sovereign via diplomatic channels

Id., at 335. It is clear that Justice Sussman's remarks were *obiter dicta*. For a critical analysis of that decision, see Y. Moritz, *Cracks in the Wall*

of Diplomatic Immunity, 28 HaPraklit 317 (1973) [61].

Furthermore, Justice Sussman's *obiter dictum* referred to diplomatic immunity. Indeed, all the English cases cited by Justice Sussman dealt with the issue of foreign diplomats' immunity. The issue before this Court, as we have noted, is not one of diplomatic immunity, but of state immunity. *Compare Navot* [15]. Moreover, the issue before the Supreme Court in the *Sensor* [1] case concerned the execution of a judgment, a *sui generis* matter. *See Alcom* [27], at 10. Even when a foreign state does not enjoy state immunity, its arguments against executions of judgment and seizures involving its property may nonetheless stand up in court. This subject was summarized by Oppenheim, *supra.* [65], at 350-51:

> Even where a foreign state is properly subject to the jurisdiction of the courts, execution of any judgment against the state may not as a rule be levied against its property. Execution or other forms of attachment are sometimes permitted when the property is not dedicated to public purposes of the state and the proceedings relate to state acts *jure gestionis*.

In the matter before this Court, execution of judgment against Canada is not an issue. Our case concerns a dispute over Canada's obligation to vacate rented premises at the end of the original five year lease, and its obligation to pay appropriate rent for the subsequent additional period. This dispute, according to the hearings' procedural form, does not raise any issue of execution. Finally, the *Sensor* [1] case, is a specific instance of execution of judgment. It does not involve the execution of judgment against a foreign state's general property—such as property owned by that state, regarding which there arose a dispute—but rather execution of judgment against property, which, according to Justice Sussman's premise, served as the residence of the diplomatic representative of the foreign state. In that situation, a transition from the issue of state immunity to that of diplomatic immunity is indeed possible. It is one thing to declare that a foreign country is in unlawful possession of

property serving its diplomatic representative. It is quite another to enable the state, via its execution office, to evict that diplomatic representative from his residence. As we mentioned above, the case at bar is in no way connected with an execution of judgment of any kind against the Canadian ambassador. I therefore prefer not to discuss the issue of immunity from execution of judgment or seizure of property. This issue should be left open, pending further consideration. *See* I. Brownlie, *Principles of Public International Law* (4th ed. 1990) [67].

14. The laws of immunity arising from the *Sensor* [1] case are *obiter dicta*. Moreover, they have no bearing whatsoever on the case before us. The discussion of state immunity there relates to specific instance of execution of judgment, concerning which state immunity may apply. The case at bar does not raise any issues of execution of judgment. Consequently, *Sensor* [1] does not apply to the case at bar. The Supreme Court has not rendered any other judgments on the subject of sovereign immunity. As we have seen, there have been decisions by the magistrate, district and National Labor Court. I will refer to these judgments in the course of my examination of the customary international law applicable to the case at bar. Thus, I now turn my attention to customary international law, in an attempt to establish its implications for the case before us.

Foreign State Immunity in Customary International Law

15. Customary international law recognizes the immunity granted to foreign states against civil legal proceedings. This immunity is "procedural." The foreign state may waive it, either explicitly or implicitly. It is not based upon an extra-territorial approach, but rather on the concept of a "protective umbrella." *See* Y. Dinstein *The State's Internal Authority* 105 (1972) [54]. Although the grounds for this immunity are not free from doubt, the recognition of state immunity reflects the current state of customary international law. Oppenheim writes:

> State practice is sufficiently established and generally

> consistent to allow the conclusion that, whatever the doctrinal basis may be, customary international law admits a general rule, to which there are important exceptions, that foreign states cannot be sued.

Oppenheim, *supra* [65] at 343. In a similar vein, the American Restatement provides:

> The immunity of a state from the jurisdiction of the courts of another state is an undisputed principle of customary international law.

Restatement (Third) of the Foreign Relations Law of the United States 390 [73]. This basic approach is generally accepted in international custom as it is practiced both in common law and civil law countries. In principle, both recognize state immunity.

16. What is the scope of state immunity? There has been a transition in customary international law in this regard. Originally, state immunity was recognized as applying to all state acts, regardless of their nature. Later, towards the end of the 19th century, a distinction emerged between those states which followed the common law and those which followed the continental approach. While the former continued to recognize comprehensive and "absolute" state immunity, their continental counterparts, on the other hand, recognized only restricted and "relative" state immunity. *See* Badr *supra.* [64], at 21.

In the 20th century, this gap began to narrow. Indeed, most states in which absolute immunity had previously been practiced adopted "relative" immunity in one form or another. The theory of restricted immunity is based on the premise that state immunity does not apply when the foreign state acts in a commercial capacity in the private law sphere (*jure gestioni*). Immunity will apply only when the state exercises sovereign authority in the public law sphere (*jure imperii*). In this vein, Schreuer writes:

> From a general perspective it can be said that the doctrine of restricted immunity has been strengthened to a point where practically all countries from which any substantive material is available have embraced it

C.H. Schreuer *State Immunity: Some Recent Developments* 168 (1988) [68]. Likewise, Lewis remarks:

> The restrictive theory, with variations, had by the 1950's been adopted by most civilized countries

Lewis *supra.* [62], at 11. Similarly, in this case, President Shamgar so noted upon granting leave to appeal:

> New conventions, as well as recent legislation, indicate a transition in customary international law from absolute immunity to restricted immunity.

This transition in customary international law stems, *inter alia,* from the evolution of state acts. Indeed, the state increasingly performs acts, which are of a commercial, rather than sovereign, nature. In many cases, the modern state began to act as an individual would. This change in behavior gave rise to a need—in both the common law and continental traditions—to limit state immunity, and restrict it to its sovereign aspect. To this effect, Justice Nathan noted in the *Karmi* case [11], *Id.*, at 281:

> The law of absolute immunity developed primarily towards the end of the nineteenth century, when the scope of state activity was limited and related to the very narrow realms of protection of borders, protection of public order and maintenance of the judiciary. However, in modern times, since the end of the First World War, states have acted in an increasingly broad spectrum of activities, not limited to strictly sovereign acts. As such, many states reached the conclusion that the rule of absolute immunity has become untenable.

Indeed, a foreign state that chooses to function in the "marketplace" of private law should be subject to the laws of that marketplace. If a foreign state wishes to do business with the man in the street it must observe the rules of the market. We will now turn to examine this development in several countries.

17. English common law began from a stance of absolute state immunity. *See The Parlement Belge* 5 P.D. 197, 207 (C.A. 1880) [28]; *Compania Naviera Vascongada* v. *S.S. Cristina*, 1 All E.R. 719 (1938) [29]. A transition in the English understanding of immunity began to emerge by the end of the 1950's. The change was heralded by Lord Denning's ruling in *Rahimtoola v. The Nizam of Hyderabad*, 3 W.L.R. 884 (1958) [30].

Lord Denning proposed that state immunity be restricted. In his opinion, state immunity should not apply when a foreign state has performed a commercial transaction entirely within the jurisdiction of English law. The other judges did not concur with this approach. Lord Denning repeated his position in *Thai-Europe Ltd. v. Government of Pakistan*, 1 W.L.R. 1485 (C.A. 1975) [31].

A further development occurred in the case of *The Philippine Admiral*, A.C. 373, 397 (P.C. 1977) [32]. There, the Privy Council, hearing an appeal of a ruling rendered by the Supreme Court of Hong Kong, held that sovereign immunity is restricted and relative, and does not apply to *in rem* claims against ships of foreign states. Lord Cross of Chelsea wrote:

> There is no doubt … that since the Second World War there has been both in the decisions of courts outside this country and in the views expressed by writers on international law, a movement away from the theory of absolute sovereign immunity towards a more restrictive version. This restrictive theory of sovereign immunity seeks to draw a distinction between acts of state which are done *jure imperii* and acts done

> by it *jure gestioni*.

He adds, *Id.*, at 402:

> the trend of opinion in the world outside the Commonwealth since the last war has been increasingly against the application of the doctrine of sovereign immunity to ordinary business transactions. Their Lordships themselves think that it is wrong that it should be so applied.

And further, *Id.*, at 403:

> Thinking as they do that the restrictive theory is more consonant with justice they do not think that they should be deterred from applying it so far as they can.

A further development took place in the case of *Trendex Trading v. Bank of Nigeria*, 1 Q.B. 529 (1977) [33]. The Court of Civil Appeals remarked that State immunity does not apply to *in personam* claims. Lord Denning stressed that customary international law recognizes relative state immunity. This approach was endorsed in later legislation. *See Hispano Americana Mercantile SA v. Central Bank of Nigeria*, 2 Lloyd's Reports 277 (1979) [34].

In another case, decided soon after, Lord Denning held as follows:

> The restrictive theory holds the field in international law: and by reason of the doctrine of incorporation it should be applied by the English courts, not only in actions *in rem* but also in actions *in personam*.

The "I Congreso", 1 Lloyd's Reports 23, 29 (C.A. 1980) [35]. His position was upheld in an appeal to the House of Lords in *I Congreso*, 2 All E.R. 1064 (H.L. 1983) [36].

In another case, adjudicated a year later, *see Alcom* [27], at 9, Lord

Diplock summarized the position of English common law, which had incorporated the rules of customary international law, in the following words:

> [A]s respects the immunity of foreign states from the jurisdiction of national courts the critical distinction drawn by the existing law, English common law and public international law alike, was between what a state did in the exercise of its sovereign authority and what it did in the course of commercial or trading activities. The former enjoyed immunity, the latter did not.

In 1978, the legislature intervened, passing the State Immunity Act (1978). This statute recognized restricted state immunity. Section 3 therein states that immunity does not apply to "a commercial transaction" or a state's obligation arising from a contract, the performance of which is wholly or partly in the United Kingdom. The law provides that a "commercial transaction" means any contract for the provision of goods or services, any loan, and likewise, any transaction or act in which the state functions without the exercise of sovereign authority.

18. Originally, American jurisprudence favored absolute state immunity. This approach was expressed by United States Supreme Court Chief Justice Marshall in *The Exchange*, 11 U.S. 116 (1812) [20], and was followed by American courts until the second half of the 20th century. *See Berrizi Bros. Co. v. S.S. The Pesaro*, 271 U.S. 562 (1926) [21]. The shift in the American position occurred in 1952. In the Tate Memorandum, the State Department declared that the American position favored restricted state immunity, based on the distinction between acts of the sovereign and those of a commercial nature. United States courts attached decisive significance to this position statement. Consequently, the relative State immunity came to be the accepted approach in American Common Law. *See* Restatement, *supra* [73], at 392; Lewis, *supra* [62] at 107; *see also Victory Transport Inc. v. Comisaria General*,

336 F.2d 354 (2d Cir. 1964) [22]). In the case of *Alfred Dunhill of London v. Republic of Cuba*, 425 U.S. 682, 703 (1976) [23], Justice White, speaking for the United States Supreme Court, writes:

> Nothing in our national policy calls on us to recognize as an act of state a repudiation by Cuba of an obligation adjudicated in our courts and arising out of the operation of a commercial business by one of its instrumentalities. For all the reasons which led the Executive Branch to adopt the restrictive theory of sovereign immunity, we hold that the mere assertion of sovereignty as a defense to a claim arising out of purely commercial acts by a foreign sovereign is no more effective given the label "Act of State" than if it is given the label "sovereign immunity."

The Foreign Sovereign Immunities Act, which adopted the restrictive approach to state immunity, was enacted in 1976. It provided that state immunity does not apply to "commercial activity."

19. Of particular interest in this case is the conceptual development of the Canadian approach to state immunity, Canada being the state claiming immunity in the case at bar. Canadian law originally shared the practice of English law of recognizing absolute state immunity. *See* J.G. Castel, *International Law* 649 (3rd ed. 1976) [69]. Over the years, however, a shift towards relative immunity occurred. This was most apparent in the rulings coming from the province of Quebec. These decisions endorsed the distinction between the foreign state's so called state acts, and its commercial activity. State immunity was solely recognized in cases involving state acts. *See Zodiak Int'l Product Inc*. v. *Polish People's Republic* [1978] 81 D.L.R. 3d 656 [43]. Thus, for example, a court held that Venezuela was not entitled to claim state immunity in a case involving a monetary dispute respecting the contract for the construction of the Venezuela Pavilion for the Expo '67 exhibit. *See Allan Construction v. Le Gouvernement du Venezuela*, [1968] Que. P.R. 145 [44]. Similarly the Congo's claim of immunity in a dispute

involving payment to a plaintiff who had drafted plans for the Congo pavilion at Expo '67 was denied. *See Venne* v. *Democratic Republic of the Congo* [1969] 5 D.L.R. 3d 128 [45]).

A similar approach was adopted by the courts of Ontario. *See Smith* v. *Canadian Javelin* [1976] 68 D.L.R. 3d 428 [46]. Thus, for example, an Ontario court refused to dismiss a statement of claim filed against a foreign state, on the grounds of negligence in the upkeep of an ambassador's residence that had been rented by the plaintiff to the ambassador of that state. *See Corriveau* v. *Republic of Cuba*, [1980] 103 D.L.R. 3d 520 [47]. The Canadian Supreme Court, for its part, did not take a clear stand regarding this issue, *see Flota Maritima Browning de Cuba S.A.* v. *Steamship Canadian Conqueror* [1962] 34 D.L.R. 3d 669 [48]; *Republic of Congo* v. *Venne* [1972] 22 D.L.R. 3d 669 [49]. Nevertheless, the developing trend led to the recognition of restricted immunity in the Federal Court. *See Lorac Transport* v. *The Atra* [1987] 1 F.C. 108 [50]. In 1982, the State Immunity Act (1982) was enacted. This statute specifically adopted state immunity in its restricted form. The Act states categorically, in section 5, that immunity does not apply to a foreign state's commercial activity. Commercial activity is defined as any transaction or act "that by reason of its nature is of a commercial character." *See* H.L. Molot & M.L. Jewett, *The State Immunity Act of Canada*, 20 Can. Y.I.L. 79 (1982) [70].

20. The concept of relative state immunity has been equally accepted in continental countries. *See* Lewis *supra.* [62], at 112; *see also* C.M. Schmitthoff, *The Claim of Sovereign Immunity in the Law of International Trade*, 7 Int. Comp. L.Q. 452, 560 (1958) [71]. This is reflected by the European Convention on State Immunity (1972). This convention illustrates, for the most part, the approach as reflected in the practice of various states regarding the issue of state immunity. *See* Oppenheim *supra.* [65], at 343. Similarly, in 1986, the International Law Commission drafted the Convention on Jurisdictional Immunities of States and their Property [74], which provided that state immunity is restricted. It therefore does not apply in cases of commercial contracts,

labor contracts, injury to persons or to property, claims of ownership, possessory rights and use of properties, or intellectual property.

State Immunity in Israeli Law—Restricted and Relative Immunity

21. What conclusions are dictated by this comparative survey? The conclusion is that customary international law recognizes foreign state immunity, in its relative and restricted, rather than absolute form. Customary international law comprises part of the law of the State of Israel.

Thus, Israeli law too recognizes foreign state immunity in its limited, restricted form. The first indications of this were already apparent in Judge Vitkon's District Court judgment in DC (Jerusalem) 157/53 *Shababo Estate* v. *Heilan* [12] at 503. There, Justice Vitkon made reference to the concept of absolute state immunity, as it was practiced in England at the time, adding:

> There is growing opposition to this practice, at least in actions of *jure gestionis* and not in acts of *jure imperii*.

This approach was adopted in Judge Nathan's decision in *Karmi* [11] at 281. Judge Nathan examined the issue comprehensively, remarking:

> It would seem that the tendency of most States today is towards a restricted form of State immunity. This is also true of the Commonwealth states, including Britain, which until recently adopted absolute state immunity...that has now totally repudiated the doctrine, endorsing the restricted version of state immunity.

The National Labor Court adopted a similar position in *Navot* [15]. This was also Judges Gellin and Tranto's view in their respective Magistrate Court rulings regarding the case at bar. Judges Gross, Ben-Shlomo and Shalev of the District Court shared their opinion.

We now delineate the parameters of restricted state immunity. Having done so, we will proceed to study the facts of the case at bar.

The Scope of State Immunity in Israel

22. The assertion that state immunity is restricted under Israeli law requires that we determine this restriction's parameters. This is not a simple undertaking by any means. Indeed, while it is one thing to reject the absolute application of immunity, it is quite another to determine restricted immunity's scope. The difficulty in delineating the scope of restricted immunity stems from the lack of clarity surrounding the very rationale underlying the doctrine of State immunity. How can we define the parameters of the doctrine of State immunity if its underlying rationale is unknown?

It has been argued that immunity is based upon the equality between states. This assumption of equality dictates that one country not judge another: *par in parem non habet imperium*. It has further been argued that the foreign state's independence and dignity provide ample justification for granting it immunity.

These arguments are far from convincing. *See* Dinstein *supra.* [54], at 105; Oppenheim *supra.* [65], at 341; Schmitthoff *supra.* [71]. Equality between states, as well as their dignity and independence are not violated in the least when one state is subject to the internal jurisdiction of another. The subjection of a foreign state to the rule of law cannot possibly violate that state's dignity. On the contrary, the foreign state's dignity lies in its being subject to justice. Lord Denning made this point admirably in *Rahimtoola* [30], at 418:

> It is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to be above it, and his independence is better ensured by accepting the decision of a court of acknowledged impartiality than by arbitrarily rejecting their jurisdiction.

Indeed, just as the state is subject to the jurisdiction of its own judiciary, it is appropriate that it be subject to the jurisdiction of foreign courts. It is only logical to adopt the position that the scope of a foreign country's immunity from proceedings in foreign courts should be no greater than the extent of its immunity before its own courts. *See* H. Lauterpacht◌*The Problem of Jurisdictional Immunities of Foreign States*, 28 B.Y.I.L. 220 (1951) [72].

The rule of law demands that it be so. And, indeed, the rule of law is violated by the notion of state immunity. Where there is no judge there is no justice, and might becomes right. Equality between states necessitates placing the foreign state within the jurisdiction of a court of law. Justice demands that a right be upheld by way of adjudication, rather than allowing brute force to flaunt it. The protection of individual rights from violation by the authorities—any authorities, domestic or foreign—demands the negation of foreign state immunity.

Indeed, harsh criticism has been voiced with respect to absolute state immunity. Professor Lauterpacht, *supra* [72], at 226, writes:

> [T]he objections to the doctrine of absolute immunity are, it is believed, decisive. It has been abandoned in most countries. It is productive of inconvenience, injustice, and resentment which may be more inimical to friendly international intercourse than assumption of jurisdiction.

This Court fully concurs with this criticism.

23. Indeed, if the decision respecting the issue of state immunity was subject to my own personal discretion, I would consider the possibility of establishing a rule—subject to very few exceptions, *see* Lauterpacht, *Id.*, [72]—that the doctrine of state immunity does not apply in Israel, and that the relationship between the foreign state and the Israeli judiciary is identical to that of the State of Israel to its own judiciary. We are, however, not at liberty to rule as such. Rather, in all matters that touch upon customary international law, the courts must rule in accordance with

the rules of customary international law, and we cannot invent our own laws. The rule of law means that the judge too is subject to it. We must therefore act in accordance with the rules of customary international law, which recognize the restricted immunity of foreign states with respect to affairs of state. However, from the various possible alternatives offered by customary international law, we may choose the alternative most consistent with the basic principles of international law, on the one hand, and the basic values of Israeli law on the other. Within this framework, we can choose the option, which most restricts state immunity and consequently broadens the scope of the rule of law.

24. The accepted approach to state immunity in customary international law differentiates between two categories of acts of state. The first deals with the foreign state's acts in its sovereign capacity *acta jure imperii*. This category includes, for example, the confiscation of property for national needs, or the revoking of licenses on grounds of public welfare. For a list of sources, see Scheuer, *supra*. [68], at 54. The foreign state enjoys immunity with respect to all these acts. The second category includes the foreign state's "private acts." This includes a contractual agreement whereby, for example, a foreign state agrees to sell its shares in a government owned company. Regarding the latter, the foreign state does not enjoy immunity. The difficulty, of course, is in drawing the line between these two categories. The dividing line must be drawn in a way which maintains a proper balance between two sets of opposing interests. The first relates to the individual's civil rights, the principle of equality under the law and to ensuring the rule of law. The other regards the foreign state's interest in fulfilling its political goals without being subject to another state's judicial supervision. *See Victory Transport* [22].

25. The accepted criterion used in customary international law for the purpose of determining State immunity distinguishes between acts of state and private (or commercial) acts. An important question in this context is the following: In determining whether an act is of a sovereign or private nature, do we consider the nature of the act—that is to say, its

legal structure—or its purpose?

If the criterion is the legal nature of the act, then the exercise of statutory authority would place the activity within the category of acts of state, which enjoy state immunity. Acts of nationalization or confiscation would therefore be understood as state acts, posed by the state by virtue of its sovereign authority. On the other hand, if an act consisted of the sovereign power's utilization of a legal tool of private law—e.g., a contract or will—the act would fall into the category of private acts, and the foreign state would not enjoy immunity. Thus, a contractual agreement by the state for the purchase of goods—regardless of the purpose of the purchase—would, therefore, not be considered an act of state.

On the other hand, if the criterion considers that act's purpose, irrespective of its legal structure, it is possible that an act of the foreign state would be considered an act of state, even if the legal tool employed is one of private law, such as contracts. A well-known example is a foreign state's contract for the purchase of shoes for its army. Using the legal structure criterion, we have before us a contract within the domain of private law; immunity would therefore not apply. However, if purpose is the criterion, the purpose is the outfitting of an army for combat, which is an act of state, and therefore enjoys immunity. *See* Lauterpacht *supra.* [72], at 223.

26. The generally, though not universally, accepted approach of customary international law is that the determinant, though not exclusive, criterion is the legal nature of the state's act rather than its purpose. Succinct expression of this was provided by the German Constitutional Court in the *Claim Against the Empire of Iran Case*, 45 I.L.R. 57 (1963) [39]. In that case, a claim was filed against Iran over payment due for repairs made to the Iranian Embassy in Germany. Iran claimed State immunity, arguing that the dispute concerned an act of state, as the purpose of the repairs was to enable the ambassador to carry out acts of state on behalf of his country. This argument was rejected. The

Constitutional Court held that:

> The distinction between sovereign and non-sovereign state activities cannot be drawn according to the purpose of the state transaction and whether it stands in a recognizable relation to the sovereign duties of the state. For, ultimately, activities of state, if not wholly, then to the widest degree, serve sovereign purposes and duties and stand in a still recognizable relationship to them. Neither should the distinction depend on whether the state has acted commercially. Commercial activities of states are not different from other non-sovereign state activities.
>
> As a means for determining the distinction between acts *jure imperii* and *jure gestioni*, one should refer to the nature of the state transaction or the resulting legal relationships, and not to the motive or purpose of the state activity. It thus depends on whether the foreign state has acted in exercise of its sovereign authority, that is in public law, or like a private person, that is in private law.

Id., at 80. These words have been favorably cited in many judgments dealing with the scope of state immunity, among them, for example, by the House of Lords in *I Congreso*, [1983] 2 All E.R. 1064 (H.L.) [36] and by the Federal Court of Canada in *Lorac Transport*, [1987]1 F.C. 108 [50].

27. A similar approach was adopted by the Austrian Supreme Court. In one case, the plaintiff's car was damaged in a collision with the vehicle of the American ambassador to Austria. The plaintiff filed a claim against the United States, which in turn claimed state immunity. The defendant pointed out that at the time of the collision, the American car was carrying mail to the Embassy.

The United States argued that, in light of its purpose, the delivery of

the letters constituted an act of state. The Austrian Supreme Court rejected this argument. In so doing, the Court considered the distinction between *acta jure imperii* and *acta jure gestionis*. It discussed the definitive criterion for distinguishing between the two. In the Court's opinion, the applicable criteria was the nature of the act, according to its legal structure—not its underlying purpose. The Court wrote:

> [A]n act must be deemed to be a private act where the State acts through its agencies in the same way as a private individual can act. An act must be deemed to be a sovereign act where the State performs an act of legislation or administration (makes a binding decision). Sovereign acts are those in respect of which equality between the parties is lacking and where the place of equality is taken by subordination of one party to the other…
>
> [W]e must always look at the act itself, which is performed by state organs and not at its motives or purpose. We must always investigate the act of the state from which the claim is derived. Whether an act is of a private or sovereign nature must always be deduced from the nature of the legal transaction, *viz.* the nature of the action taken or the legal relationships arising.

See Collision with Foreign Government-Owned Motor Car (Austria) Case, 45 I.L.R. 73, 75-76 (1961) [17].

A specific provision in this vein is found in the United States Foreign Sovereign Immunities Act of 1976, which constitutes part of American Federal law. Under this Act, state immunity does not apply to "commercial activity". The law also stipulates, 28 U.S.C § 1603(d) (1997):

> A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be

> determined by reference to the particular transaction or act, rather than by reference to its purpose.

28. Underlying the idea that the purpose of an act, as distinct from its legal nature, is not an acceptable criterion for distinguishing an act of private law from an act of public law, is the notion that the purpose criterion could well negate the distinction between private and state acts. The reason is that private law acts are often intended for public purposes also, *see* Schreuer *supra.* [68], at 15. Furthermore, when the legal nature of an act of state falls within the category of private law, we can safely assume that the adjudication of disputes relating to this framework will not interfere with sensitive acts of state which are of a sovereign nature. Therefore, the question judges must ask themselves is whether a private entity other than the state could have been a party to the act performed by it, even if doing so would require a state-issued permit or license. If the answer is in the affirmative, we have a "private" act of state, which falls outside the scope of state immunity. *See I Congreso* [36], at 1074; *Alfred Dunhill* [23], at 1866. It is immaterial whether the act was for profit or not, or whether its purpose was the implementation of a national program. *See Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018 (9th 1987) [24]. Lord Wilberforce noted this, reiterating the distinction between acts of state (*jure imperii*) and private acts (*jure gestionis*). Further, he added:

> [A] private act meaning in this context an act of a private law character, such as a private citizen might have entered into.

I Congreso [36], at 262. It was therefore decided that disputes over contracts entered into by the foreign state for purposes of providing equipment for its army are not encompassed by State immunity. For a list of sources, see Schreuer *supra.* [68], at 18. Similarly, in a series of judgments in England, Germany and the United States, the Courts held that disputes relating to contracts for the purchase of cement by Nigeria did not fall within the scope of state immunity, even though the purpose of the contracts was the provision of cement to build military bases. *Id*.

29. The distinction between sovereign and private acts is by no means clear-cut. Thus, different states may adopt different guidelines in this context. It seems to me that, pending the development of a standard international practice regarding this issue, it is inevitable that each state will apply its own locally accepted criteria in accordance with its existing national jurisprudence. The German Constitutional Court noted this in the *Claim Against the Empire of Iran Case* [39], at 80, noting:

> The qualification of state activity as sovereign or non-sovereign must in principle be made by national (municipal) law, since international law, at least usually, contains no criteria for this distinction.

Needless to say, as customary international criteria evolve, we will act accordingly.

30. It is undeniable that the criterion of the nature and essence of an act is essentially formalistic. There are obviously cases in which this criterion would be inappropriate, and which would require us to look for more substantive criteria. Often, the form is but a shell, the essence of the case being the dominant element.

In classifying a particular act, we can occasionally distinguish between its private and sovereign aspects, applying state immunity to its sovereign component, while maintaining the desired balance between the latter and the private aspect. *Compare Re Canada Labour Code* [1992] 91 D.L. R. 4th [51]. Sometimes the sovereign and private aspects are intertwined to the point of being inseparable, despite the sovereign aspect's predominance. Indeed, the act's purpose cannot always be categorically ignored. Often, we cannot understand the legal nature of an act until we understand its purpose. In any case, the question is one of degree. Moreover, the criterion of "the legal nature of the act," for its part, is also not easily applied. Let us consider a case in which a state, by virtue of special legislation, was authorized to act within private law: for example, to issue government bonds. Is the legal nature of the act

sovereign, as the government owes its authority to a specific law, and as private individuals are not authorized to issue such bonds, or is the legal framework "private," as the issuing of bonds is an act governed by private law? What would be the case if the legal framework were contractual, but the dominant features of the act belonged to public law? The legal nature criterion is certainly a crucial one. We cannot, however, rule out additional criteria. We must always investigate the context, which includes both form and content, in its entirety. We must also remember that the topic as a whole is in its formative stage in many states. The state's functions, as well as its modes of action, are in constant flux. We must ensure sufficient flexibility to allow for the law to adapt itself to the changing vicissitudes of life.

It is incumbent upon us to formulate a distinction that accounts for basic values such as individual rights, equality before the law and the rule of law. This having been said, we will allow the foreign state to realize its sovereign objectives, without subjecting them to judicial review in a foreign state's courts.

The balance struck between these conflicting considerations is far from simple and is certainly not immutable. It would seem that, for the time being, it is sufficient to determine that, when in doubt, we must rule in favor of recognizing internal jurisdiction. In any case, the tendency should be towards restricting immunity. This is our practice regarding any domestic matter. *See* HCJ 294/89 *National Insurance Institute* v. *(Appeals) Committee established by Virtue of the Law bestowing Benefits for Victims of Terrorism* [10], at 450. This will also be our policy regarding "external" questions. State immunity should only be recognized in clear-cut cases. Such cases are characterized by state immunity being geared towards preventing judicial proceedings in one particular state concerning the acts of another state, the dominant element of which is of the sovereign nature of the acts in question.

State Immunity and Embassy Leases

31. The law then is as follows: sovereign immunity should not be

recognized in cases of the state's "private" acts. This is to say, acts that fall within the realm of private law, and the legal essence of which are part of private law—unless those acts involve considerations of public law. It seems to me that according to this approach, we must conclude that, as a rule, state immunity should not be recognized with respect to the purchase of buildings for ambassadorial residences, nor the rental of premises for this purpose. An agreement for the lease or purchase of a building is a contract, within the sphere of private law. Not only states, but any individual can also enter into such a contract. Drafting the contract is not accompanied by sovereign considerations. It does not involve public law considerations. There is no essential difference between a contract for leasing a building for use as an embassy and a contract for the purchase of food for the ambassador's consumption. They both relate to the ambassador's physical needs, and in neither case is there any expression of the foreign state's sovereignty.

32. This is the accepted approach in comparative law. Thus, in most countries in which problems such as these arose, it was decided that state immunity does not apply to civil disputes over the purchase, construction or leasing of property to embassies and consulates. In this vein, Schreuer, *supra.* [68], at 19, writes:

> Perhaps the most obvious cases are those that concern the purchase, building, and leasing of property for diplomatic or consular premises. The official nature of the intended use is beyond doubt. Nevertheless, there are numerous decisions holding such contracts to be simple commercial transactions.

This problem arose in the Hashemite Kingdom of Jordan. It was decided that a Jordanian court was competent to adjudicate a claim for the payment of rent with respect to property let to France, to be used as the Consul-General's residence in Jerusalem. *See Nashashibi* v. *The Consul-General of France in Jerusalem*, 26 I.L.R. 190 (1958) [42]. A similar judgment was delivered in Switzerland. That case concerned a lien on a Swiss bank account, by reason of the Egyptian Embassy in Vienna's

default on rent payments. *United Arab Republic v. Mrs. X.*, 65 I.L.R. 385 (1960) [52]. The Court held that the case was within the Swiss Court's jurisdiction. We have already reviewed the German Constitutional Court's decision regarding payments for repairs of the Iranian Embassy in Germany. The Court held that the claim was not barred by Iran's immunity. *Claim Against the Empire of Iran Case* [39]). A German court similarly ruled that a claim against a foreign government concerning the commission owed to a plaintiff who had served as the agent for the rental of a building to house that country's consulate did not fall under state immunity. *See Land Purchase Broker's Commission Case* (1974) [40]). Likewise, a Greek court held that a monetary dispute between a plaintiff and a foreign sovereign over a contract for the purchase of a building for the families of the diplomatic staff does not fall under sovereign immunity. *Purchase of Embassy Staff Residence Case*, 65 I.L.R. 255 (1967) [41]). An Italian court dealt with a claim filed by the United States in a dispute between that country and a plaintiff who sought to invalidate a lease for the rental of premises in Naples as the United States Consul's residence, arguing that the matter was not under the court's jurisdiction. The court rejected the American claim of immunity. *See United States Government v. Bracale Bicchierai*, 65 I.L.R. 273 (1968) [18]. Another Italian court addressed the question of whether it had jurisdiction to adjudicate a claim for an eviction order filed by a plaintiff against the Kingdom of Morocco, which had rented a property to serve as its embassy. The Court held that this case was not encompassed by state immunity. *See Embassy of the Kingdom of Morocco v. Societa' Immobiliare Forte Barchetto*, 65 I.L.R. 331 (1979) [19]). An English court rejected a claim of immunity concerning a monetary suit for the cost of repairs to the residence of Zaire's ambassador to London. *See Planmount Ltd. v. Zaire*, [1981] 1 All E.R. 1110 (Q.B.) [37]. Similarly, in a suit filed in a New York state court against Libya concerning protected tenancy, Libya's claim of state immunity was rejected. *See 2 Tudor City Pl. v. Libyan Arab Rep. Mission to the U.N.*, 470 N.Y.S.2d 301 (N.Y. Civ. Ct. 1983) [25]. An American federal court likewise rejected Zaire's argument, regarding an eviction order from property rented by the Permanent Mission of Zaire to the United Nations, that default on rent

payments was not within the court's jurisdiction. *See 767 Third Avenue Association v. Permanent Mission of the Republic of Zaire to the United Nations*, 787 F. Supp. 389 (S.D.N.Y. 1992) [26].

From the General to the Specific

33. Does the dispute in the case at bar fall under the category of state immunity, in its restricted and relative sense? The answer is no. The legal nature of the state's act is that of a rental contract. It is an act, which, according to its nature and character, belongs to the realm of private law. It bears no sovereign aspects, nor is there any exercise of statutory authority. Any private individual could have performed a similar act. On the strength of the facts presented before the magistrate court, there are no special aspects which justify abandoning consideration of the transaction's form, in favor of considering the purposes it was intended to serve. The fact that Canada, rather than a private individual, is a party to the transaction does not affect our understanding of the transaction or its ramifications in any way. The magistrate court correctly remarked that the lease for the residence for the ambassador and his family boasts no "sovereign" indication. State immunity simply does not apply.

34. Consequently, I have decided that, in this case, Canada does not have state immunity. Under these circumstances, Judge Gellin was correct in granting the requested declaratory judgment. The claim of lack of defense and absenteeism are not sufficient cause for overturning the lower court's decision. The district court was right in dismissing the appeal of Judge Gellin's decision. For the same reasons, it is my opinion that Judge Tranto erred. As I remarked above, leasing a building to serve as an ambassador's residence is a private law act, to which sovereign immunity does not apply. The fact that the transaction was not carried out for profit has no bearing on the case. The district court correctly granted the appeal of Judge Tranto's decision.

35. Prior to concluding, I would like to call the Justice Ministry's attention to the need for enacting a law regarding state immunity, as England, the United States, Australia, and Canada have already done. All

these countries and others followed customary international law, which was replaced by specific legislation governing the matter. State immunity raises difficult questions, which should be answered by statute. My present judgment concerns a contract for the lease of an apartment to serve as an ambassador's residence. Intricate issues are raised by tort claims. It seems that the time has come, particularly since enactment of the Basic Laws concerning human rights, to consider regulating state immunity, as well as the issue of diplomatic immunity, via statutory means.

The appeal is rejected. The appellant will reimburse the first respondent's court costs, at a total of 15,000 NIS, and the expenses of respondents number two and three, totaling 15,000 NIS.

Justice E. Mazza

I concur.

Justice T. Strasberg-Cohen

I concur with my colleague's comprehensive and insightful judgment, and with his call to the legislature to regulate this important and sensitive issue in a statute.

Decided in accordance with President Barak's opinion.

Rendered today, June 3, 1997.