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# The impact of new technologies on the law of State immunity: time for a reassessment of the scope of the territorial tort exception

## Introduction

Cyberattacks sponsored or directly conducted by States targeting properties or persons in another State, and the use of drones to inflict damages to properties or physical injuries to persons, sometimes occasioning deaths on the territory of another State, are becoming common place. The use of new technologies by States to, directly or indirectly, conduct attacks on the territory of another State pose challenges to the traditional law of State immunity.

These new challenges demand a reassessment of an established exception to State immunity from jurisdiction, the so-called territorial tort exception. Similarly to what happened with the abandonment of the doctrine of absolute immunity due to the establishment of an exception concerning acts *iure gestionis* of the State, the rapid advancement of new technologies calls for a new interpretation to some of the requirements of the territorial tort exception.

Torts committed on the territory of the State of the forum and attributable to a foreign State, such as political assassinations, originally demanded human presence on the territory of the forum State. This is not the case anymore, as acts targeting properties or persons may be performed from the territory of a State located thousands of miles away from their targets. This new situation requires a careful analysis of the law of State immunity.

The aim of this paper is to assess whether the scope of the territorial tort exception to State immunity encompasses torts causing damages to properties, injuries to persons or deaths arising from cyber or drone attacks sponsored by foreign State agencies or directly performed by foreign State agents, when the authors of those acts were outside of the territory of forum State at the time of the attacks.

### The evolution of the law of State immunity: from absolute to restrictive immunity

The law of State immunity, derived from the sovereign equality of States, establishes that one State shall not be subject to the jurisdiction of another State<sup>1</sup>. State immunity comprehends immunity from jurisdiction, which means that a State shall not be subject to the jurisdiction of the domestic courts of another State, and immunity from execution, which means that State properties shall not be subject to measures of constraint that otherwise might be taken by another State<sup>2</sup>. For the purpose of this paper, whenever the

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<sup>1</sup> A/CN.4/331/Add.1, *Second report on jurisdictional immunities of States and their property*, by Mr. Sompong Sucharitkul, *Special Rapporteur*, [in:] *Yearbook of the International Law Commission 1980*, vol. 2, part 1, *Documents of the thirty-second session (excluding the report of the Commission to the General Assembly)*, New York 1982, p. 228, para. 120. The principle of sovereign equality of States is established in the United Nations Charter and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States. M. Ney, *Sovereign Immunities of States. A German Perspective*, [in:] *Immunities in the Age of Global Constitutionalism*, eds A. Peters, E. Lagrange, S. Oeter, C. Tomuschat, Leiden–Boston 2015, p. 33.

<sup>2</sup> A. Peters, *Immune against Constitutionalisation?*, [in:] *Immunities in the...*, *op. cit.*, p. 1.

term State immunity is used, it will be a reference to immunity from jurisdiction.

The law of State immunity has evolved significantly over the years to keep up with the evolution of the international community. The doctrine of absolute immunity, founded on the sovereign equality of States and according to which a State shall be granted immunity from the jurisdiction of the courts of another State in relation to all of its acts<sup>3</sup>, once widely adopted<sup>4</sup>, started losing ground by the end of the 19<sup>th</sup> century. This happened when Belgian and Italian courts started applying a restrictive doctrine, according to which an assessment of the nature of the acts performed by the foreign State should be made, and immunity may only be granted when the State has acted in its sovereign capacity<sup>5</sup>.

This restrictive approach was followed by a number of States during the 20<sup>th</sup> century<sup>6</sup>, which can be illustrated by the Egyptian courts that started differentiating the acts of the State between acts

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<sup>3</sup> I. Pingel-Lenuzza, *Les immunités des Etats en droit international*, préface de D. Carreau, Bruxelles 1997, pp. 63–64. *Schooner Exchange v. McFaddon* is frequently referred to as the first case in which a national court has granted immunity from jurisdiction to another State. In this case, the Supreme Court of the United States granted immunity from the jurisdiction of American courts to France in 1812. A. Costi, *L'arrêt de la Cour Internationale de Justice dans l'Affaire des Immunités Juridictionnelles de l'État*, "Revue québécoise de droit international", hors-série, p. 271.

<sup>4</sup> M. Krajewski, C. Singer, *Should Judges Be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights*, [in:] *Max Planck Yearbook of United Nations Law*, vol. 16, eds A. von Bogdandy, R. Wolfrum, Leiden–Boston 2012, p. 7. Others argue that State immunity was never absolute. M. Bothe, *Remedies of Victims of War Crimes and Crimes against Humanities. Some Critical Remarks on the ICJ's Judgment on the Jurisdictional Immunity of States*, [in:] *Immunities in the...*, *op. cit.*, p. 102. It is also worth mentioning that according to Michel Cosnard the existence of exceptions to the principle of immunity was never completely ruled out, as disputes involving real estate property situated on the territory of the forum State were understood to be settled by its domestic courts. M. Cosnard, *La soumission des États aux tribunaux internes: face à la théorie des immunités des États*, préface de B. Stern, Paris 1996, p. 362.

<sup>5</sup> H. Fox, P. Webb, *The Law of State Immunity*, 3<sup>rd</sup> ed. rev. and updated, Oxford 2015, p. 153.

<sup>6</sup> M. Krajewski, C. Singer, *Should Judges Be Front-Runners?*, *op. cit.*, p. 9.

*iure imperii* and acts *iure gestionis*, granting immunity to the former while denying immunity to the latter<sup>7</sup>.

Thus, the doctrine of absolute immunity was gradually replaced by a restrictive doctrine, which established that the State was only entitled to immunity from jurisdiction with regards to its sovereign acts, or acts *iure imperii*, and not to its private acts, or acts *iure gestionis*<sup>8</sup>. The development of an exception to State immunity concerning acts *iure gestionis* was the first step to adapt the law of State immunity to the evolution of the role of the State in the international community<sup>9</sup>.

Even though it was not until the second half of the 20<sup>th</sup> century that a majority of States started adopting a restrictive doctrine to State immunity<sup>10</sup>, the understanding that the State is not entitled to immunity regarding its private acts, or acts *iure gestionis*, is currently widespread<sup>11</sup>.

Applying this general exception to immunity from jurisdiction, it is safe to argue the State cannot claim immunity from jurisdiction in proceedings before the domestic courts of another State concerning its commercial activities<sup>12</sup>, such as when the State enter into agreements to purchase goods or to rent properties for its diplomatic mission<sup>13</sup>, as those are definitely to be classified as acts *iure gestionis* of the State<sup>14</sup>.

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<sup>7</sup> A/CN.4/357. Fourth report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur, [in:] *Yearbook of the International Law Commission, 1982*, vol. 2, part 1, *Documents of the thirty-fourth session*, New York 1984, p. 213, para 56, p. 214, paras. 58, 60.

<sup>8</sup> T. Weatherall, *Jus Cogens: International Law and Social Contract*, Cambridge 2015, pp. 402–403.

<sup>9</sup> J.F. Flauss, *Droit des immunités et protection internationale des droits de l'homme*, "Swiss Review of International and European Law" 2000, vol. 10, p. 302.

<sup>10</sup> M. Cosnard, *La soumission...*, *op. cit.*, p. 23.

<sup>11</sup> M. Krajewski, C. Singer, *Should Judges Be Front-Runners?*, *op. cit.*, p. 8.

<sup>12</sup> Document A/CN.4/357..., *op. cit.*, p. 210, para. 46.

<sup>13</sup> H. Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, "British Yearbook of International Law" 1951, vol. 28, pp. 239–240.

<sup>14</sup> I. Pingel-Lenuzza, *op. cit.*, p. 341.

The exception regarding acts *iure gestionis* is not the only one, as State immunity is also subject to a territorial tort exception, as it will be demonstrated in the next section.

### The territorial tort exception

The territorial tort exception has been recognized in international conventions, national legislation, decisions of domestic courts and writings of international law scholars<sup>15</sup>.

The territorial tort exception to State immunity was already established by the Institut de Droit International in its 1891 resolution on the competence of national courts in suits against foreign states<sup>16</sup>. According to Article 4, paragraph 6, of this 1891 resolution adopted by the Institut de Droit International, domestic courts should have competence to hear claims concerning damages founded on a tort or quasi-tort attributable to a foreign State committed on the territory of the forum State<sup>17</sup>.

One hundred years later, the Institut de Droit International reaffirmed its understanding that there is a territorial tort exception to State immunity from jurisdiction when it underlined that:

the organs of the forum State are competent in respect of proceedings concerning the death of, or personal injury to, a person, or loss of or damage to tangible property, which are attributable to activities of a foreign State and its agents within the national jurisdiction of the forum State<sup>18</sup>.

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<sup>15</sup> P.D. Mora, *Jurisdictional Immunities of the State for Serious Violations of International Human Rights Law or the Law of Armed Conflict*, "Canadian Yearbook of International Law / Annuaire canadien de droit international" 2013, vol. 50, p. 275.

<sup>16</sup> M. Kaldunski, *The Law of State Immunity in the Case concerning Jurisdictional Immunities of the State (Germany v. Italy)*, "The Law & Practice of International Courts and Tribunals" 2014, vol. 13, p. 81.

<sup>17</sup> Institut de Droit International, *Projet de règlement international sur la compétence des tribunaux dans les procès contre les Etats, souverains ou chefs d'Etat étrangers*, Hambourg 1891.

<sup>18</sup> Institut de Droit International, *Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement*, Basel 1991, article 2 section 2e.

The territorial tort exception was also codified in treaties on the jurisdictional immunities of the State, such as the 1972 European Convention on State Immunity, and the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property<sup>19</sup>.

Article 11 of the European Convention on State Immunity establishes that a State party to the convention shall not have immunity from the jurisdiction of the domestic courts of another State party in proceedings relating to

redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred<sup>20</sup>.

Likewise, article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property followed the same approach, stating that unless otherwise agreed between the States concerned, a State shall not be entitled to immunity before the courts of another State in proceedings regarding

pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission<sup>21</sup>.

The territorial tort exception has also been recognized in domestic legislation addressing the jurisdictional immunities of the State, such as the Foreign Sovereign Immunities Act of 1976 (FSIA) of the United States<sup>22</sup>, the State Immunity Act of 1978 (SIA) of the United

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<sup>19</sup> M. Kaldunski, *State Immunity and War Crimes. The Polish Supreme Court on the Natoniewski Case*, "Polish Yearbook of International Law" 2010, no. 30, pp. 245–246. Whilst the European Convention is already in force between the contracting parties, the UN Convention is not yet in force.

<sup>20</sup> Council of Europe, *European Convention on State Immunity* (ETS No. 074), Basel 16.05.1972.

<sup>21</sup> UN General Assembly, *United Nations Convention on Jurisdictional Immunities of States and Their Property*, 2.12.2004.

<sup>22</sup> § 1605 (a) (5) of the FSIA states that: "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any

Kingdom<sup>23</sup>, Canada's State Immunity Act<sup>24</sup>, Israel's Foreign State Immunity Law, South Africa's Foreign States Immunities Act, Australia's Foreign States Immunities Act, Singapore's State Immunity Act, Law n. 24,488 of Argentina and the Act on the Civil Jurisdiction of Japan with respect to a Foreign State<sup>25</sup>.

Decisions of national courts are also another source of state practice regarding the recognition of a territorial tort exception to the law of State immunity. For instance, Italian courts have denied immunity to Germany in *Ferrini*, a case concerning acts practiced by Germany during World War II on the territory of Italy<sup>26</sup>. Greek courts have also denied immunity to Germany in *Distomo*, a case also concerning acts of German forces on the territory of Greece<sup>27</sup>.

US courts have also relied upon the territorial tort exception to deny immunity to Chile in *Letelier*, a case concerning the political assassination of a former Chilean Defense Secretary in Washington by agents of the Chilean government<sup>28</sup>. US courts have also denied

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case [...] in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment [...]", United States, Foreign Sovereign Immunities Act of 1976.

<sup>23</sup> Article 5 of the SIA determines that: "A State is not immune as respects proceedings in respect of (a) death or personal injury; or (b) damage to or loss of tangible property, caused by an act or omission in the United Kingdom", United Kingdom, Sovereign Immunity Act 1978.

<sup>24</sup> Section 6 of the State Immunity Act of Canada determines that: "A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to (a) any death or personal or bodily injury, or (b) any damage to or loss of property that occurs in Canada", Canada, State Immunity Act (R.S.C., 1985, c. S-18).

<sup>25</sup> L.M. Alcici, *As Imunidades Jurisdicionais do Estado e o Papel do Tribunal Internacional de Justiça na Proteção Diplomática*, Lisboa 2021, pp. 81–82.

<sup>26</sup> P.D. Mora, *Jurisdictional Immunities...*, *op. cit.*, p. 276.

<sup>27</sup> R. O'Keefe, *Jurisdictional Immunities*, [in:] *The Development of International Law by the International Court of Justice*, eds C.J. Tams, J. Sloan, Oxford 2013, p. 132.

<sup>28</sup> C. Tomuschat, *The International Law of State Immunity and its Development by National Institutions*, "Vanderbilt Journal of Transnational Law" 2011, vol. 44, p. 1124.

immunity to the Republic of China in *Liu*, another case concerning a political-motivated assassination, this time of a journalist executed in California by orders of an agent of the Taiwanese government<sup>29</sup>.

Canadian courts followed the understanding of the US courts that denied immunity to foreign States by means of the application of a territorial tort exception to political assassinations taking place on American soil, which was the case in *Schreiber v. Federal Republic of Germany and the Attorney General of Canada*<sup>30</sup>.

(a) Scope of the exception: applicable to acts *iure imperii* and acts *iure gestionis*

There is a general understanding that no distinction is made by article 11 of the European Convention on State Immunity and article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property between acts *iure imperii* and acts *iure gestionis*<sup>31</sup>.

Even though the territorial tort exception was originally envisaged to be limited to 'insurable risks', such as traffic accidents<sup>32</sup>, the International Law Commission highlighted that this exception is broad enough to encompass: "[...] intentional physical harm such as assault and battery, malicious damage to property, arson or even homicide, including political assassination"<sup>33</sup>.

This understanding of the International Law Commission is evidenced by State practice that may be found in the form of national legislation not making a distinction between acts *iure imperii* and

<sup>29</sup> M. Kaldunski, *The Law of State Immunity...*, *op. cit.*, p. 84.

<sup>30</sup> M. Abdollahi, *Alleged Support of Terrorism as a Ground for Denying State Immunity*, [in:] *The International Legal Order: Current Needs and Possible Responses – Essays in Honour of Djamchid Momtaz*, eds J. Crawford, A.G. Koroma, S. Mahmoudi, A. Pellet, Leiden–Boston 2017, p. 191.

<sup>31</sup> R. Van Alebeek, *The immunity of States and their Officials in International Criminal Law and International Human Rights Law*, Oxford 2008, p. 59. International Court of Justice, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Separate Opinion of Judge Bennouna, I.C.J. Reports 2012, p. 173, para. 6; L.M. Alcici, *As Imunidades Jurisdicionais...*, *op. cit.*, p. 87.

<sup>32</sup> A. Costi, *L'arrêt de la Cour Internationale de Justice...*, *op. cit.*, p. 274.

<sup>33</sup> *Yearbook of the International Law Commission, 1991*, vol. 2, part 2, p. 45, para. 4.



acts *iure gestionis* and decisions of domestic courts<sup>34</sup>. Moreover, this is also backed by international law scholars<sup>35</sup>.

Thus, currently, the territorial tort exception may be applicable not only to acts that have caused deaths, damages to properties or injuries to persons derived from traffic accidents or other 'insurable risks' but also to acts of political violence, including political assassination, provided that the act has been committed on the territory of the State of the forum, irrespective of whether it is an act *iure imperii* or *iure gestionis*<sup>36</sup>. Therefore, it shall be applied as a broad and comprehensive exception, not limited to 'insurable risks'<sup>37</sup>, as long as its requirements are met.

#### (b) Requirements of the exception: the territorial connection with the state of the forum

According to the International Law Commission, two cumulative requirements must be met in order to apply the territorial tort exception to the law of State immunity. Firstly, the act or omission attributable to the State which caused the death or injury to the person,

<sup>34</sup> R. O'Keefe, *Jurisdictional Immunities*, *op. cit.*, p. 132.

<sup>35</sup> H. Fox, P. Webb, *The Law of State Immunity*, Oxford 2015, p. 468; M. Krajewski, C. Singer, *Should Judges Be Front-Runners?*, *op. cit.*, p. 19.

<sup>36</sup> M. Kaldunski, *The Law of State Immunity...*, *op. cit.*, p. 81. On the one hand, Italy's argued before the International Court of Justice (ICJ) in the case *Jurisdictional Immunities of the State* that there was a territorial tort exception, applicable to acts *iure imperii*, in customary international law. On the other hand, Germany argued that the territorial tort exception was not part of customary international law as it denied immunity for acts *iure imperii* of the State and, for this reason, it would be advancing beyond the general exception regarding acts *iure gestionis*. The International Court of Justice did not decide whether there was a territorial tort exception applicable to acts *iure imperii* in general, arguing it was not called upon to rule on that matter. International Court of Justice, *Jurisdictional Immunities of the State*, (*Germany v. Italy: Greece Intervening*), Judgment, I.C.J Reports 2012, pp. 126–127, paras. 62–65. For some scholars, the approach taken by the ICJ could be interpreted as an admission of the possibility of the application of the territorial tort exception to at least some acts *iure imperii*. H. Fox, P. Webb, *op. cit.*, p. 478.

<sup>37</sup> X. Yang, *Absolute Immunity of Foreign Armed Forces from Tort Proceedings*, "The Cambridge Law Journal" 2012, vol. 71, no. 2, p. 285.

or damage to the property, shall have taken place on the territory of the forum State. Moreover, the author of the act or omission shall have been present on the territory of the forum State at the time of the act or omission<sup>38</sup>.

Traditionally, it was understood that while the first requirement serves to place the *locus delicti commissi* on the territory of the State of the forum, the second one works to exclude from this exception transboundary harm<sup>39</sup>. The foundation for the exercise of jurisdiction over the foreign State under the territorial tort exception is, without a doubt, the territoriality. The *locus delicti commissi* guarantees a substantial territorial connection with the State of the forum, regardless of the motivation of the act or omission, whether accidental or intentional<sup>40</sup>.

The territorial connection to the State of the forum is an essential element to this exception<sup>41</sup>. Arguably, the courts of the State where the damage, injury or death attributable to a foreign State was committed would likely be the most appropriate for exercising jurisdiction over the act or omission of that State<sup>42</sup>.

### The territorial connection element and the scope of the territorial tort exception in light of new technologies

No argument is made in this paper against the understanding that the territorial tort exception is limited to damages to properties and physical injuries to persons, including deaths, caused by acts practiced, entirely or partially, on the territory of the State of the forum. It is argued that in light of new technologies, which make cyberattacks and attacks by drones, controlled entirely from abroad by State agents or private persons sponsored by a State, and which target and have the capability of inflicting damage to properties,

<sup>38</sup> *Yearbook of the International Law Commission, 1991, op. cit.*, p. 45, para. 6.

<sup>39</sup> *Ibidem*, p. 45, para. 7.

<sup>40</sup> *Ibidem*, p. 45, para. 8.

<sup>41</sup> S. El Sawah, *Les immunités des États et des Organisations Internationales*, Bruxelles 2012, p. 158.

<sup>42</sup> J. Ferrer-Lloret, *La Inmunidad de Jurisdicción del Estado ante Violaciones Graves de los Derechos Humanos*, "Revista Española de Derecho Internacional" 2007, vol. 59, no. 1, p. 30.

injuries to persons or even deaths in another State not only possible, but ever more common, the territorial connection element essential to the territorial tort exception should be interpreted differently to make the application of this exception suitable even if the author of the act was not present in the territory of the State of the forum at the time the damage, injury or death happened.

There have already been cases arguing that State immunity should be denied for cyberattacks attributable to foreign States due to the territorial tort exception. The courts of the United States, for instance, have denied the application of the territorial tort exception established in the Foreign Sovereign Immunity Act in one of those, which is a case concerning the alleged hacking by Ethiopia of the computer of an Ethiopian national living in the United States by ruling that the inapplicability of the exception was due to the tort not occurring entirely on the territory of the United States<sup>43</sup>.

Despite having denied the application of the territorial tort exception in this particular case, the US judgment may have done so by distancing itself from the interpretation of earlier cases ruled by US courts, which argued that the territorial tort exception established in the FSIA would not require the whole tort taking place in the United States<sup>44</sup>.

Cyberattacks and attacks conducted by drones sponsored or directly executed by a foreign State are transnational in nature, as those acts are often performed by a person – or group of people – located outside of the territory of the State where the damage or injury takes place. The advance of new technologies makes those harmful acts attributable to a foreign State possible without the need of human presence on the territory where the properties or victims targeted are situated<sup>45</sup>.

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<sup>43</sup> B. Kurland, *Sovereign Immunity in Cyber Space: Towards Defining a Cyber-Intrusion Exception to the Foreign Sovereign Immunities Act*, "Journal of National Security Law & Policy" 2019, vol. 10, pp. 259–261.

<sup>44</sup> K. Carlberg, *Suing a State for Cross-border Cyber Torts? Overcoming the Immunity of the Hacking State*, magister thesis, supervisor: T. Radwan, Örebro 2017, p. 18.

<sup>45</sup> *Ibidem*, p. 19.

Some argue that a new, separate, exception to the FSIA should be adopted to determine that regardless of the location of the author of a cyber-intrusion attributed to a foreign State occurring in the United States, this foreign State shall not be granted immunity from jurisdiction of the US courts in cases in which money damages are sought<sup>46</sup>.

Taking a slightly different approach, it is argued in this paper that interpreting the already established territorial tort exception in light of new technologies shall be sufficient to apply this exception to State immunity for torts committed by cyber and drone attacks which caused damages to properties, injuries to persons or deaths on the territory of the forum State<sup>47</sup>. In this sense, referring to the political assassination cases ruled by US courts, which have been mentioned in a previous section of this paper, Gilmore argues that:

[...] the assassination cases provide compelling analogies for cross-border cyber torts. In both instances, foreign states intentionally target victims in the United States. And they do so through coordinated operations that are executed in U.S. territory but directed from abroad. The difference? In the 1980s and 1990s, foreign states had to rely on human agents to infiltrate U.S. borders. Today, they can use remote-controlled malware – or, for that matter, drones – to accomplish the same ends<sup>48</sup>.

Cyberattacks and attacks performed by drones, often executed or directed by a person who, taking advantage of the new technologies, is situated outside of the territory of the State of the forum, whenever successful, cause damages to properties, injuries to persons and deaths on the territory where their targets are located. That means that at least in part the tortious act will have been performed on the territory of the State of the forum, which shall

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<sup>46</sup> B. Kurland, *Sovereign Immunity in Cyber Space...*, *op. cit.*, p. 267.

<sup>47</sup> In this sense, Kristin Carlberg argues that "Cross-border cyberattacks, where the hacker has been virtually present in the forum State, fall under the scope of the 'territorial tort exception' provided that the attack has resulted in damage or injury encompassed by the exception", *eadem*, *Suing a State for Cross-border Cyber Torts?*, *op. cit.*, p. 22.

<sup>48</sup> S.A. Gilmore, *Suing the Surveillance States: The (Cyber) Tort Exception to the Foreign Sovereign Immunities Act*, "Columbia Human Rights Law Review" 2015, vol. 46, no. 3, p. 257.

be sufficient to establish the territorial connection with the forum State. What is fundamental to establish the territorial connection is that the act has been practiced, entirely or partially, on the territory of the State of the forum<sup>49</sup>.

### Concluding remarks

The law of State immunity has consistently changed over the years to adapt to the evolution of international relations, with the aim of reaching a balance between sovereignty and accountability. That led to the establishment and consolidation of exceptions to the law of State immunity, such as the exception concerning acts *iure gestionis* of the State and the territorial tort exception.

The development of new technologies, similarly to what happened with the expansion of international trade, which demanded the crystallization of an exception to State immunity for commercial acts, calls for a reassessment of the territorial tort exception. The territorial connection to the State of the forum, which is a fundamental element to the territorial tort exception, shall be sufficiently established when torts committed on the territory of the forum State, producing damages to properties, injuries to persons or deaths, are caused by cyber or drone attacks sponsored or executed by a foreign State, regardless of the physical presence of the authors of the acts on the territory of the forum State.

Therefore, the territorial tort exception shall be enforced and immunity from jurisdiction shall be denied to a foreign State in proceedings before the domestic courts of the State where damages to properties, injuries to persons or deaths have been caused by cyber or drone attacks attributable to that foreign State, irrespective of the physical presence of the foreign State agents – or private persons sponsored by the foreign State – responsible for such acts on the territory of the State of the forum at the time when the torts occurred. This reassessment is in line with the necessary evolution of the law of State immunity due to the impact of new technologies which allow cyber and drone attacks to, while being controlled

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<sup>49</sup> H. Fox, P. Webb, *The Law of State Immunity*, *op. cit.*, p. 471.

from the territory of one State, target properties and persons situated in another State aiming to cause damages and injuries to them.

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## Abstract

### **The impact of new technologies on the law of State immunity: time for a reassessment of the scope of the territorial tort exception**

This paper argues that there should be a reassessment of the scope of the territorial tort exception to State immunity from jurisdiction. Due to the advance of technology, it is not uncommon that torts committed on the territory of a State, causing damages to properties, injuries to persons or deaths, have been originated, executed, or directed by a person situated on the territory of another State. This is usually the



case with cyberattacks or attacks performed by drones, which have a transnational nature. When those torts are attributed to a foreign State, being committed by foreign State agents or private persons sponsored by a foreign State, the issue of State immunity arises in proceedings seeking redress before the courts of the State of the forum. This article claims the issue may be resolved by reinterpreting the territorial connection element of the territorial tort exception in light of the impact of new technologies to the law of State immunity.

**Key words:** State immunity, territorial tort exception, new technologies, cyberattacks, attacks performed by drones

