



Chairmanship of the Czech Republic
Council of Europe
May – November 2017
Présidence de la République tchèque
Conseil de l'Europe
Mai – Novembre 2017

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

CAHDI (2017) Proceedings / Actes
Bilingual / Bilingue

State Immunity under International Law and Current Challenges

L'immunité des Etats en vertu du droit international et ses défis actuels

Public International Law and Treaty Office Division / *Division du Droit International
Public et du Bureau des Traités*

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INTRODUCTION

These speeches were delivered on the occasion of the Seminar on *State Immunity under International Law and Current Challenges* held in Strasbourg (France) on 20 September 2017 organized in the framework of the Czech Chairmanship of the Committee of Ministers of the Council of Europe and on the occasion of the 54th meeting of the Committee of Legal Advisers on Public International Law (CAHDI).

The contributions appear in their original versions.

Ces interventions ont été prononcées lors du séminaire sur *L'immunité des Etats en vertu du droit international et ses défis actuels* qui s'est tenu à Strasbourg (France) le 20 septembre 2017 organisé dans le cadre de la Présidence de la République tchèque du Comité des Ministres du Conseil de l'Europe et à l'occasion de la 54^e réunion du Comité des conseillers juridiques sur le droit international public (CAHDI).

Les contributions apparaissent dans leurs versions originales.

PROGRAMME

PANEL I: THE INTERNATIONAL LEGAL FRAMEWORK ON STATE IMMUNITY

Moderator:

Mr Martin SMOLEK

Deputy Minister for the Legal and Consular Section at the Ministry of Foreign Affairs of the Czech Republic

Speakers:

Mr Pavel ŠTURMA

Professor at the Charles University Law School in Prague (Czech Republic) and International Law Commission (ILC) member

Jurisdictional Immunities of State: Some Current Challenges and a Way-out from the Impasse

Mr Jörg POLAKIEWICZ

Director of Legal Advice and Public International Law, Council of Europe

The Contribution of the Council of Europe to State Immunity, through its Conventions and the Case Law of the European Court of Human Rights

PROGRAMME

PANEL I: LE CADRE JURIDIQUE INTERNATIONAL SUR L'IMMUNITE DES ETATS

Modérateur:

M. Martin SMOLEK

Vice-Ministre des Affaires juridiques et consulaires du Ministère des Affaires étrangères de la République tchèque

Intervenants:

M. Pavel ŠTURMA

Professeur à la Faculté de droit de l'Université Charles à Prague (République tchèque) et membre de la Commission du Droit international (CDI)

Immunités juridictionnelles de l'Etat: Quelques défis actuels et une possible solution à l'impasse

M. Jörg POLAKIEWICZ

Directeur, Direction du Conseil juridique et du Droit international public, Conseil de l'Europe

La contribution du Conseil de l'Europe à l'Immunité des Etats à travers ses conventions et la jurisprudence de la Cour Européenne des droits de l'homme

PANEL II : THE CASE STUDIES FROM LEGAL PRACTICE

Moderator:

Ms Päivi KAUKORANTA

Chair of the Council of Europe Committee of Legal Advisors on Public International Law (CAHDI) and Director General of Legal Service at the Ministry for Foreign Affairs of Finland

Speakers:

Mr Helmut TICHY

Legal Adviser at the Federal Ministry for Europe, Integration and Foreign Affairs of the Republic of Austria

ÖBB Personenverkehr AG v. Sachs and the Issue of Commercial Activity

Mr Paul RIETJENS

Director General of Legal Affairs at the Federal Public Service of Foreign Affairs, Foreign Trade and Development Cooperation of Belgium

The Current Issues of State Immunity before Belgian Courts

Mr Petr VÁLEK

Director of the International Law Department at the Ministry of Foreign Affairs of the Czech Republic

The Origins and Relevance of the Declaration on Jurisdictional Immunities of State Owned Cultural Property

PANEL II : LES CAS D'ETUDE DE LA PRATIQUE JURIDIQUE

Modérateur:

Mme. Päivi KAUKORANTA

Présidente du Comité des Conseillers juridiques sur le droit international public du Conseil de l'Europe (CAHDI) et Directrice Générale du Service juridique au Ministère des Affaires étrangères de la Finlande

Intervenants:

M. Helmut TICHY

Conseiller juridique au Ministère fédéral pour l'Europe, l'Intégration et les Affaires étrangères de la République d'Autriche

ÖBB Personenverkehr AG v. Sachs et la question des activités commerciales

M. Paul RIETJENS

Directeur général des Affaires juridiques du Service public fédéral des Affaires étrangères, du Commerce extérieur et de la Coopération au Développement de la Belgique

Les défis actuels de l'immunité des États devant les tribunaux belges

M. Petr VÁLEK

Directeur du Département du droit international du Ministère des Affaires étrangères de la République tchèque

Les origines et la pertinence de la Déclaration sur les immunités juridictionnelles des biens culturels appartenant à un État

PANEL I : THE INTERNATIONAL LEGAL FRAMEWORK ON STATE IMMUNITY / LE CADRE JURIDIQUE INTERNATIONAL SUR L'IMMUNITÉ DES ETATS

Opening address

Martin Smolek

*Deputy Minister for the Legal and Consular Section at the Ministry of Foreign Affairs
of the Czech Republic*

Ladies and Gentlemen, I am very pleased to chair the first panel of this Seminar on State Immunity under International Law and Current Challenges organized in the framework of the Czech chairmanship of the Committee of Ministers of the Council of Europe and on the occasion of the 54th meeting of the CAHDI.

As the Czech chairmanship's priority has been strengthening the rule of law, I welcome the initiative of my colleague from the Ministry of Foreign Affairs of the Czech Republic and CAHDI Vice-Chairman, Mr. Petr Válek to organize this Seminar. The Council of Europe contributes to the rule of law at international level in various ways and the Czech Republic actively participates in these endeavours. A practical example may be the Declaration on Jurisdictional Immunities of State Owned Cultural Property, originally prepared and presented in the CAHDI by Austria and the Czech Republic. The Declaration has been already signed by 20 signatories and was also presented within the United Nations. Petr Válek will address this initiative later within the second panel.

The first panel is going to focus on "The International Legal Framework on State Immunity".

In recent years there have been considerable developments in this particular field, with many cases before both national and international courts, some aspects of State immunity becoming more and more relevant.

In this context, I would like to mention the well-known Jurisdictional Immunities case (*Germany v. Italy*) before the International Court of Justice, where customary international law on the immunity of the State and State property under the international law was clearly confirmed by the Court.

From the point of view of a day-to-day practice of legal advisers of the Ministry of Foreign Affairs, the examples of topical issues concerning the State immunity may

be the service of process on a foreign State and the immunity of State from execution, in particular the immunity of the bank accounts of the diplomatic missions and consular posts.

In general, the rules on State immunity are currently “under fire” from different actors.

First of all, from courts that do not understand international law and sometimes fail to apply these rules in order to provide compensation to the dismissed employees of diplomatic missions or their business partners. This has happened in my country.

Second, from investors who attempt to collect debts from States any way they can, including from property used exclusively for government purposes.

And third, from States themselves, when they try to address legitimate rights of the victims of terrorism by passing laws that may be in conflict with the State immunity, like JASTA (*U.S. Justice Against Sponsors of Terrorism Act*).

Yet, the State immunity is a central pillar of the international legal order. Any derogation from the principle of immunity bears the inherent danger of causing reciprocal action by other States and an erosion of the principle as such. This development would put a burden on bilateral relations between States as well as the international order as a whole.

We therefore see from our daily work that the existence of some universal framework of the State immunity that would be respected by all is essential.

Potential universal framework for the regime of State immunities might be based on the 2004 *UN Convention on the Jurisdictional Immunities of States and Their Property* which builds upon the 1972 *European Convention on State Immunity*. The Convention is not yet in force; it requires 30 States Parties in order to enter into force and thirteen years after adoption, it has reached only 21 Contracting States.

There is evidence, however, that, in practice, the Convention has had significant influence - its provisions have frequently been referred to by commentators, as well as national and international courts, such as the European Court of Human Rights, and there are signs that a significant part of its provisions are regarded as customary international law. I believe that the first speaker, Professor Pavel Šturma is going to elaborate more on this topic.

Before I conclude, let me shortly introduce the panellists:

Pavel Šturma is a Professor and Head of the Department of International Law at the Faculty of Law of the Charles University in Prague. He has been a member of the UN International Law Commission since 2012 with renewed membership last year.

He is also a senior fellow at the Institute of State and Law of the Czech Academy of Sciences, president of the Czech Society of International Law, co-author of textbook on Public International Law and author of many publications on codification of international law, international criminal law, human rights and international investment law. He will address the issue Jurisdictional Immunities of State: Some Current Challenges and a Way-out from the Impasse.

Jörg Polakiewicz is Director of Legal Advice and Public International Law of the Council of Europe, and the Secretary to the Advisory Panel of Experts on Candidates for election as Judge to the European Court of Human Rights. He is also a professor at the Europa-Institut of the University of the Saarland in Saarbrücken, co-editor of Fundamental Rights in Europe, author of Treaty-making in the Council of Europe and other international law publications. He will talk about “The Contribution of the Council of Europe to State immunity”, through its Conventions and the Case Law of the European Court of Human Rights.

Jurisdictional Immunities of State: Some Current Challenges and a Way-out from the Impasse¹

Pavel Šturma

*Professor at the Charles University Law School in Prague (Czech Republic) and
International Law Commission (ILC) member*

I. Content

- Setting the scene: the concept of State immunity
- Old rule and new problems
- Current challenges and contradictions
- Is there a way-out from the impasse?
- Conclusion

II. Setting the scene: the concept of State immunity

- Immunities are a legal concept which means an exemption of a State or certain persons in relation to the State from the jurisdiction of another State.
 - Consequence of the sovereign equality of States
 - Old principle: *par in parem non habet imperium*
 - Procedural in nature
 - Customary rules but partly codified
 - Immunity limits the exercise of power (jurisdiction) of courts or other State authorities over foreign States and certain persons or entities and their property
 - ✦ Either the exercise of adjudicatory jurisdiction (jurisdictional immunity),
 - ✦ Or the exercise of enforcement measures (enforcement immunity)

III. Old rule and new problems

- Customary international law and its development

¹ *This intervention was delivered using a PowerPoint presentation, which is reproduced here.*

- Codification
 - European Convention on State Immunity (1972)
 - UN Convention on Jurisdictional Immunities of States and Their Property (2004) – the most modern codification
- From the doctrine of absolute immunity...
- ...to the restrictive immunity
 - Governmental acts of a State (*acta jure imperii*)
 - Commercial acts (*acta jure gestionis*)
 - More exceptions, e.g. “territorial tort exception”
- Case-law of international courts

IV. Current challenges and contradictions

- Contradiction between the protection of State sovereignty and interests of foreign traders and investors
- Contradiction between the protection of a State and its officials (immunity) and the protection of human rights
- Contradiction between the claim of the procedural nature of immunity and the contested relevance of substantive rules of international law
- Contradiction between the assertion of immunity in international customary law and its contestation on a national level, through the legislatures and courts of an individual State
- State sovereignty x trade:
- Commercial transaction
 - Nature of the contract or transaction
 - Ownership, possession and use of property situated in the State of the forum
 - Infringement of intellectual property rights
 - Participation in companies or other collective bodies
- Contracts of employment in respect of a foreign State
- “Territorial tort exception”

- Proceedings relating to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property caused by that State's act or omission
- 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
- But: not to military activities / armed conflict
 - ICJ in *Jurisdictional Immunities* case
 - “General understanding” in the Statement of the Chairman of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property
- Protection of a State x protection of human rights
- The rights of victims (compensation)
- The interests of criminal justice (no impunity)
- Territorial tort and its interpretation
 - Not only so-called insurable risks, but also
 - intentional physical harm, torture, kidnapping, political assassination
- ICJ judgment and its interpretation
 - Current customary international law and its possible development
- ECtHR, *Al-Adsani* and other cases
 - Critique and interpretation
 - Prohibition of torture (jus cogens) x immunity
 - What is *lex specialis*?
 - Test of proportionality?
- Procedural nature of immunity x the relevance of substantive rules
 - If immunity is to be considered a procedural bar to the exercise of jurisdiction that the court must apply *a limine*
 - It implies the need to examine a nature of acts
 - The independence of procedural and substantive rules appears to be relative

- Difference between procedural rules and substantive rules is not always obvious, e.g. the access to court
- ECtHR: *Jones v. UK* case, “in light of the developments currently under way in this area of public international law, this is a matter which needs to be kept under review”
- The assertion of immunity in international law and its contestation on national level
- ICJ, *Jurisdictional Immunities* judgment (2012)
- National resistance:
 - Italian Constitutional Court, decision (*Sentenza*) No. 238 of 22 October 2014
 - the relevant provisions of the implementing Law No. 5 of 2013 unconstitutional
- Relationship between international law and internal law
 - A shift to unilateralism and dualism bears the risk of weakening the authority of international law

V. Conclusion: a way-out of the impasse ?

- Customary IL should serve certain social needs
 - To carry out their public functions and to secure the orderly conduct of international relations
 - But: the stability of the inter-state system is sustainable only if it is perceived as being fair.
- Restrictive immunity
 - Commercial exception = well established in customary international law
 - Territorial tort exception...
 - Interpretation of judicial decisions in the proper context
 - The procedure/substance distinction relative
 - Interpretation and the progressive development of international law
 - Ratification and entry into force of the UN Convention
 - Work of the ILC

The Contribution of the Council of Europe to State Immunity through its Conventions and the Case Law of the European Court of Human Rights

Jörg Polakiewicz

Director of Legal Advice and Public International Law, Council of Europe

Mr Deputy Minister,

Professor Šturma,

Dear CAHDI members,

Colleagues and friends,

First of all, allow me to thank Mr Martin Smolek, Deputy Minister for the Legal and Consular Section of the Ministry of Foreign Affairs of the Czech Republic for his personal participation in our seminar. I would like to pay tribute to the support that the Czech Chairmanship of the Committee of Ministers is making to the development of public international law in the framework of the Council of Europe, the organisation of this seminar being a prime example.

I. Introduction

As Legal Adviser of the Council of Europe, most of my personal experience with immunities relates to that of international organisations. Speaking about State immunities is for me somehow like skating on thin ice.

That being said, I shall remain within the Council of Europe's remit and address the topic from the following two angles:

- Firstly, the Council's contribution through its conventions, and in particular the European Convention on State Immunity; and
- Secondly, the relevant case law of the European Court of Human Rights.

II. The contribution of the Council of Europe to State Immunities through its Conventions.

Among the 221 conventions and protocols drafted within the framework of the Council of Europe, we indeed have one convention and one protocol specifically devoted to the subject of State immunities, namely the *European Convention on State Immunity* (which I shall refer to hereafter as the "European Convention") and its Protocol.

Like so many of our conventions in the legal field, this treaty is the result of an initiative of the European Ministers of Justice. At their meeting in Dublin in May 1964, the Austrian delegation submitted a comprehensive report dealing not only with jurisdictional immunity but also with immunity from execution.² The third Conference of European Ministers of Justice endorsed the approach of this report on State immunities, and a committee of experts drew up the draft convention during a series of meetings between 1965 and 1970.

At that time, some Council of Europe members still applied the classical doctrine of absolute State immunity, while others had already adopted a more restrictive approach limiting immunity to acts performed in the exercise of sovereign authority, known as *acta iure imperii*, as distinct from *acta iure gestionis* (the exercise of management authority). Indeed, the Convention's preamble emphasises that it had been drafted "[t]aking into account the fact that there is in international law a tendency to restrict the cases in which a State may claim immunity before foreign courts."

The Convention sought to strike a balance, cautiously espousing the restrictive approach through the enumeration of a series of exceptions to State immunity, largely based on the *de iure imperii/iure gestionis* distinction. The Convention's rules applicable to judicial proceedings are not automatically, but only optionally, extended to the execution of judgments under the regime of Chapter IV. As stated in its Explanatory Report, the Convention "*represents a compromise in that it combines an obligation on States to give effect to judgments (...) with a rule permitting no execution*".³ This is still of relevance and use today.

The Convention and its Protocol have been ratified by respectively 8 and 6 member states. The European Tribunal provided for has never been operational. On that basis, you may think these instruments have not had a huge impact. However, the 1972 *European Convention* has in fact been influential as a source of customary international law, a fact acknowledged by the European Court of Human Rights⁴ and the International Court of Justice.⁵ It is relevant, above all, because, it was not until 2004 that the General Assembly for the United Nations adopted the *UN Convention on Jurisdictional Immunities of States and Their Property*, which has still not entered into force.

What is the relationship between the European and the UN Convention?

² The report was largely based on the article by K. Herndl 'Zur Frage der Staatenimmunität' ("Observations on the question of State immunity") *Juristische Blätter* 1962, 15 et seq.

³ Explanatory Report on the European Convention on State Immunity - ETS 74 (1972), para. 92.

⁴ See, for example, *Manoilescu and Dobrescu v. Romania* (dec.), no. 60861/00, §§ 74, 79 and 85, ECHR 2005-VI ; *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 80, 12 November 2008.

⁵ *Jurisdictional Immunities of the State (Germany v Italy - Greece Intervening)* (Judgment), International Court of Justice, General List No 143, 3 February 2012.

The relevant provisions are not without ambiguity. Whereas Article 33 of the European Convention provides that it “*shall not affect existing or future international agreements in special fields which relate to matters dealt with in the present Convention*”, the UN Convention States that “*nothing ... shall affect the rights and obligations of States Parties under existing international agreements which relate to matters dealt with in the present Convention as between the parties to those agreements*” (Article 26).

CAHDI members discussed the relationship between the two Conventions on several occasions, first at two informal meetings of members representing the Parties in 2006⁶ and, more recently, in the context of follow-up to the Secretary General’s convention review.

In 2006, there was agreement among the Contracting States that the UN Convention should eventually supersede the European one in their mutual relations. Denunciation of the European Convention once the UN Convention has entered into force appeared as the most straightforward option to achieve this result.

When the issue came up again in 2016, a number of CAHDI delegations stated that they considered the UN Convention to be more modern and complete and thus to constitute a *lex posterior*, to be given precedence over the European Convention. The UN Convention would fall within the category of agreements to which precedence should be given under Article 33 of the European Convention.⁷

However, as I have pointed out, our Convention continues to reflect in some respects customary international law and remains a valuable source of international law. As happens so often, the Council of Europe did valuable pioneering work, seeking to find pragmatic solutions in a highly complex legal environment. The fact that the UN tasked the International Law Commission to start its work on jurisdictional immunities of States and their property only five years after the opening for signature of the European Convention⁸ bears witness to the importance of the subject matter. It is also significant to note that the core provisions of the two conventions are substantially similar. It may therefore be too early to consign the European Convention to the archives of legal history.

There are other Council of Europe conventions that, though not addressing questions of State immunity directly, may nevertheless become relevant in this

⁶ The reports of the ‘Informal Meetings of the Parties to the European Convention on State Immunity’ are reproduced respectively in Appendix V of CAHDI’s 31st (March 2006) and 32nd meeting report (September 2006).

⁷ See Meeting report of the 50th meeting of the CAHDI, CAHDI (2015) 23, para. 83. Available: <http://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805a6c86>.

⁸ See UNGA resolution 32/151 of 19 December 1977, which invited the ILC to commence work on the topic.

context. Let me just give you one topical example. Under the *Criminal Law Convention on Corruption*, States parties commit themselves to establishing a number of criminal offences related to certain corrupt behaviour under their domestic law. States are required to provide for effective and dissuasive sanctions and measures, including deprivation of liberty that can lead to extradition. Article 16 provides that the Convention is “*without prejudice to provisions laid down in treaties, protocols or statutes governing the withdrawal of immunity.*” The provision does not exclude the acknowledgement of customary international law.⁹

With respect to State immunity, the question may arise whether acts of corruption, if carried out in an official function, can benefit from immunity, be it State immunity or immunity that members of international parliamentary assemblies¹⁰ or judges and officials of international courts¹¹ enjoy. This issue has recently been revisited in domestic courts in respect of allegations of corruption regarding (former) members of the Council of Europe’s Parliamentary Assembly. On 6 June 2017, the Italian Court of Cassation held that a former member of the Assembly, Mr Luca Volontè, accused of acts of corruption and money laundering can be prosecuted.¹² It quashed a judgment by a Milan court (“*giudice dell’udienza preliminare del Tribunale di Milano*”) which had found that Mr Volontè benefitted, as far as acts of corruption are concerned, from immunity under both the Italian constitution and the *Council of Europe’s General Agreement on Privileges and Immunities*. In reaching its decision, the Court of Cassation referred explicitly to our *Criminal Law Convention on Corruption*. Given the development of international law in this field, it might perhaps be considered to apply certain of the principles advanced by the Court of Cassation *mutatis mutandis* in the field of State immunity.

III. The contribution of the Council of Europe to States Immunities through the case law of the European Court of Human Rights.

In the limited time available, I can only address two aspects of the extraordinarily rich case law relating to State immunity. After having presented the Court’s general approach, I shall examine case law relating to accountability for human rights violations and employment disputes.

⁹ See paragraph 77 of the Explanatory Report, [2].

¹⁰ Article 10 of the Criminal Law Convention on Corruption (ETS 173).

¹¹ Article 11 of the Criminal Law Convention on Corruption (ETS 173).

¹² Corte di Cassazione (Sezione Penale 6), judgment no. 36769/2017.

A. State immunity and the right of access to court

Most of the ECHR cases primarily concern Article 6 of the Convention. Indeed, State immunities may operate to prevent applicants from having their claim adjudicated by a court, thus interfering with their right of access to court guaranteed by article 6 (1) ECHR.

It was only in November 2001 that the Court addressed the issue comprehensively, delivering three Grand Chamber judgments in the cases of *Fogarty*,¹³ *McElhinney*¹⁴ and *Al-Adsani*.¹⁵ The Court held that State immunity as granted by the jurisdictions of Ireland and the United Kingdom was compatible with Article 6 (1) ECHR. Emphasising their character as a merely procedural bar, it took the view that recognised rules of State immunity do not automatically constitute disproportionate restrictions on the right of access to a court.¹⁶

The Court acknowledged that State immunity serves to promote comity and good relations between States through the respect of another State's sovereignty¹⁷ and thus pursues a legitimate aim. In all three above-mentioned and many subsequent cases, the Court accepted that the resulting restrictions to the right of access to a court were proportionate. Since the ECHR must be read in the context of public international law, certain restrictions to the right of access to a court are indeed an inherent part of the fair trial guarantee.¹⁸ The case law thus takes into account that the High Contracting Parties not only have obligations towards individuals, but also towards other States.

By contrast, if national courts simply uphold immunity, without any analysis of the legal nature (commercial or not) of the underlying transactions, or the applicable principles of customary international law, they violate the applicant's right of access to court even in cases where State immunity does in fact apply.¹⁹

The Court's third potential criterion for finding a breach of Article 6 ECHR relates to "*the very essence of the right*". Hence, even if it pursues a legitimate aim and is proportionate, an impairment of this "very essence" could render the grant of immunities illegitimate.²⁰ However, some judges have criticised this approach as being "*unorthodox and illogical*".²¹ It has been suggested that this test may not be

¹³ *Fogarty v United Kingdom*, no. 37112/97, judgment of 21 November 2001.

¹⁴ *McElhinney v Ireland*, no. 31253/96, judgment of 21 November 2001.

¹⁵ *Al-Adsani v United Kingdom*, no. 35763/97, judgment of 21 November 2001.

¹⁶ *McElhinney*, para. 37, *Fogarty*, para. 36 and *Sabeh El Leil v France*, no. 34869/05, para. 49.

¹⁷ *Fogarty* [12], para 34, *Al-Adsani*, para. 54.

¹⁸ *Fogarty* [12], paras. 35-36.

¹⁹ *Oleynikov v Russia* . no. [36703/04](#), Judgment of 14 March 2013, paras. 71-73.

²⁰ *Ashingdane v the United Kingdom*, no. 8225/78, judgment of 28 May 1985, para 57. See also the Dissenting opinion of Judge Loucaides in the case of *McElhinney v Ireland*: "It is correct that Article 6 may be subject to inherent limitations, but these limitations should not affect the core of the right."

²¹ See the concurring opinion of Judge Costa in the *Prince Hans-Adam II of Lichtenstein*, no. [42527/98](#), judgment of 12 July 2001.

appropriate in such cases, since immunities based on international law constitute by definition a bar to judicial action, it is indeed arguable that they “*totally eliminate the right, not leaving any scope for its exercise.*”²²

B. State immunity and human rights violations

The existence of so-called exceptions to State immunities for serious human rights violations has been the subject of judicial developments and a rich academic debate worldwide. Some years ago, it seemed that a tendency to reject claims of State immunity in cases involving crimes under international law would gain traction. In the European context, I refer in particular to the judgments of Greek²³ and Italian²⁴ supreme courts regarding war crimes committed by German occupying forces in their countries as well as the England and Wales House of Lords judgment in the *Pinochet* case. In November 1998, the House of Lords ruled that Senator Augusto Pinochet, former president of Chile, was not entitled to claim immunity from the jurisdiction of the English courts because the acts of torture, for which he was allegedly responsible, were a crime against humanity. This was the first time ever that a national court handed down such a ruling.²⁵

The issue surfaced also in the Council of Europe, in the context of the Secretary General’s inquiry under Article 52 ECHR regarding secret detention and transport of detainees suspected of terrorist acts.²⁶ One of the reports’ findings was “*that the existing rules on jurisdiction and State immunity can create considerable obstacles for effective law enforcement in relation to the activities of foreign agents, especially when they are accredited as diplomatic or consular agents.*” In September 2006, the Secretary General proposed to define common procedures for obtaining waivers of immunity in cases of serious human rights violations,²⁷ a topic that might well have

²² Matthias Kloth *Immunities and the Right of Access to Court under Article 6 of the European Convention on Human Rights* (Nijhoff - Leiden 2010), at 18.

²³ *Prefecture of Voiotia v Federal Republic of Germany*, Supreme Court (*Areios Pagos*), case no. 11/2000, 4 May 2000, published in extract form with comment by Gavouneli and Bantekas, in 95 AJIL (2001) 198.

²⁴ Corte di Cassazione (Sezioni Unite), judgment no 5044 of 6 Nov. 2003, registered 11 Mar. 2004, 87 Rivista diritto internazionale (2004) 539.

²⁵ *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* 3 WLR 1,456 (H.L. 1998). The decision was later quashed by the House of Lords, but a second hearing resulted in the same conclusion to deny immunity to Mr Pinochet, however founded rather on the 1984 UN Convention against Torture than on the character of the crimes allegedly committed, see *Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* [1999] UKHL 17 (24 March 1999).

²⁶ Secretary General’s report under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies, SG/Inf (2006) 5, 28 February 2006.

²⁷ The Secretary General’s proposals took also into account the Parliamentary Assembly report of rapporteur Dick Marty, “Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states”, Doc. 10957, 12 June 2006, the Parliamentary Assembly’s Resolution 1507(2006) and Recommendation 1754(2006), as well as the Venice Commission’s opinion of March 2006.

been entrusted to the CAHDI if the Committee of Ministers had decided to follow-up on the Secretary General's proposals.

The issue is indeed an extremely complex one, not least because it involves very different concepts of immunity. In the *Pinochet* case for example the question was one of the immunity of a former head of State, which is of course to be distinguished from the immunity of States, my chosen topic today.²⁸ I shall therefore limit myself to the relevant ECHR judgments, of which there are essentially two, *Al-Adsani* and *Jones*. Both cases concerned civil liability for acts of torture allegedly inflicted by State officials.

In both cases, the Court found that the immunity granted by the UK to Kuwait and Saudi Arabia respectively constituted a proportionate restriction on Article 6 (1) ECHR. *Al-Adsani* and *Jones* have been criticised as being overcautious and failing to draw the consequences from the *ius cogens* character of the prohibition of torture. I am not so sure. A State that grants immunity in civil proceedings does not sanction acts of torture, nor does it promote impunity, because criminal responsibility is not at stake. Indeed, there are other *fora* which may provide a more appropriate response. Due to their substantive character *ius cogens* norms do not necessarily contradict *in law* the rules on State immunity, which are of a procedural nature.

I agree with Sir Michael Wood, who commented on *Jones* at the 2014 CAHDI seminar.²⁹ He saw this judgment – together with the ICJ's *Germany v. Italy* case³⁰ – as confirming (contrary to the position taken by the interveners – Redress, Amnesty International, Interights and Justice) that there is not a discernible trend in State practice, or in court decisions, towards greater exceptions to the rule of immunity for cases of crimes under international law. There is, nevertheless, some State and court practice supporting the international crime exception. Such an “exception” may be theorised in two manners. While some decisions have invoked *ius cogens* as a basis for an exception, others have held that certain acts, for example torture, can never constitute acts performed in an official capacity. Under the latter argument, the concept of immunity would not apply at all. I shall not go into details; you can find some references in the latest report of Ms Concepción Escobar Hernández,³¹ the International Law Commission's Special Rapporteur on the topic of “Immunity of State officials from foreign criminal jurisdiction”. The issue has been the subject of intense debates during the last session of the Commission on which its Chairperson, Prof Georg Nolte, will brief us tomorrow.

²⁸ For a discussion of the differences in state and individual immunity for criminal and civil liabilities, see Lorna McGregor 'State Immunity and Human Rights: Is There a Future after *Germany v. Italy*?' 11 *Journal of International Criminal Justice* (2013), 125-145, at <https://doi.org/10.1093/jicj/mqs081>.

²⁹ Speech to the Council of Europe Seminar 'Immunity of State officials from foreign criminal jurisdiction' (21 March 2014), at <https://rm.coe.int/1680097837>.

³⁰ *Jurisdictional Immunities of the State (Germany v Italy - Greece Intervening)* [4].

³¹ <http://legal.un.org/ilc/reports/2017/english/chp7.pdf>

Returning to the ECHR, I think it would be ill advised for the Court to assume the role of a 'moderniser of international law'.³² This would not only lead to more fragmentation, but also ignore that the Convention must not be interpreted in isolation of the existing rules of public international law, as indeed the court acknowledged in *Fogarty* and many other cases. Only where the rules of State immunity are uncertain should it be considered to give precedence to Convention rights. To do otherwise may leave undesirable gaps in the protection of human rights; to do more may create new uncertainty. Borrowing from the sources of international law (Article 38 of the ICJ Statute), possible indicators to guide the ECHR could be whether:³³

- the question is conclusively clarified in an international treaty, which has been ratified by a sufficient number of States;
- the ICJ has decided on this question;
- the ILC considers the legal question to be conclusively clarified;
- draft instruments prepared by international bodies composed of experts of international law, such as the International Law Commission, the International Law Association or the Institute of International Law, provide for an exemption from immunity;
- national courts of several countries have answered the question of immunity differently;
- the doctrine of international law is split over the question whether or not to grant immunity in the case in question.

C. State immunity in employment disputes

Employment disputes usually involve recruitment and employment matters in a foreign mission or embassy, military base or in foreign State-owned enterprises, schools or cultural institutions. Originally an area in which State immunity was considered to be absolute, it has been the subject of notable developments in the Court's case law.

Referring to the 1991 Draft Articles and the *2004 UN Convention on Jurisdictional Immunities of States and their Property*, the Court has noted a trend in international law limiting the application of State immunity to three situations:³⁴

- where the subject of the dispute is the recruitment, renewal of employment or reinstatement of an individual;
- where the employee is a national of the employer State;

³² See C. Maierhöfer, 'Der EGMR als „Modernisierer“ des Völkerrechts' 29 *EuGRZ* (2002), 391.

³³ This approach was proposed by M. Kloth, 'Die zivilrechtliche Immunität von Staatsbediensteten bei Verstößen gegen das Folterverbot' 52 *Archiv des Völkerrechts* (2014), 256 (275).

³⁴ *Cudak v Lithuania*, no. 15869/02, paras. 28-30, and *Sabeh El Leil* [15] paras. 19-20.

- where there is a written agreement to that effect between the employer and the employee.

The mere allegation that employees could have had access to confidential information³⁵ or may have participated in acts of governmental authority³⁶ is not sufficient to decline jurisdiction. National courts cannot simply uphold immunity but are required to analyse the applicable rules of international law and to give relevant and sufficient reasons why they apply in the case under consideration. The ECHR thus forces national courts to exercise close scrutiny and to respect international law.

IV. Concluding remarks

As I mentioned in the beginning of my intervention, in my practice I am not dealing with State immunities but with the immunities of the Council of Europe and its officials. However, even though State immunities are distinct, by origin and scope, from those of international organisations, there are certain common trends.

Both types of immunities are being challenged, in particular from a human rights point of view. Examples include the *Haiti Cholera* case³⁷ or employment disputes affecting the human rights of the litigants.³⁸

The interplay between accountability and immunity is a complex one that requires a careful balancing of the rights and interests at stake. For our continent, the European Court of Human Rights has an important task in formulating meaningful tests to weigh the various interests and reconcile human rights with the applicable rules of international law. However, any substantial change of the customary rules on State immunity requires a change of State practice and *opinio iuris* and is difficult to predict.

One thing is, however, certain. Immunities can no longer be taken for granted; they must be explained and justified. This is an important task, not only for courts and tribunals, but also for legal advisers. I am therefore more than grateful to my friend and colleague, the Vice-Chair of the CAHDI, Mr Petr Válek, who invited me to skate on thin ice and to reflect on the fascinating topic of State immunities.

Thank you for your attention.

³⁵ *Čudak v Lithuania* [32].

³⁶ *Sabeh El Leil v France* [15].

³⁷ United States Court of Appeals for the Second Circuit, *Georges v. United Nations*, judgment of 18 August 2016, 834 F.3d 88 (2016).

³⁸ See for instance the judgment of the Supreme Court of the Netherlands in *SUEPO and Others v. the European Patent Organisation ("EPO")*, judgment of 20 January 2017, ECLI:NL:HR:2017:57 and Supreme Court of Canada, *World Bank Group v. Wallace*, judgment of 29 April 2016, [2016] 1 R.C.S. The issue is also discussed in the report of the 52nd meeting of the CAHDI, CAHDI (2016) 23.

PANEL II : THE CASE STUDIES FROM LEGAL PRACTICE / LES CAS D'ÉTUDE DE LA PRATIQUE JURIDIQUE

Opening address

Päivi Kaukoranta

Chair of the Council of Europe Committee of Legal Advisors on Public International Law (CAHDI) and Director General of Legal Service at the Ministry for Foreign Affairs of Finland

Mr Deputy Minister, Professor Šturma, Dear CAHDI colleagues, Ladies and Gentlemen. I am very happy and honored to get to moderate the second Panel dealing with the case studies from legal practice. I believe that this part of the seminar is of particular relevance to all of us who deal with state immunities in our daily life at ministries of foreign affairs.

The first speaker of the panel is Ambassador, Dr. **Helmut Tichy**, who has served as the Legal Adviser at the Austrian Foreign Ministry since 2010. We will hear his presentation on *ÖBB Personenverkehr AG v. Sachs and the Issue of Commercial Activity*.

The versatile presentation by Helmut Tichy of a subject is not only legally speaking very interesting but also provides an example of case law which carries significant practical value and draws the line for cases which do not merit adjudication before foreign courts.

The second speaker is **Paul Rietjens**, my predecessor as the President of CAHDI (2015-2016). He is a longstanding Director-General of Legal Affairs at the Belgian Foreign Ministry. Belgian courts have produced over the years a rich variety of case law in the field of state and diplomatic immunities and we are thus privileged to hear an overview by Paul Rietjens of *the Current Issues of State Immunity before Belgian Courts*.

Paul Rietjen's presentation covers the question of state immunities in relation to jurisdiction as well as execution. The case of Belgium gives us a very good overview of questions that arise in the context of state immunities.

As a last speaker we have Dr. **Petr Válek**, Director of the International Law Department and the vice chair of the CAHDI. Thank you, Petr, for initiating this seminar as part of your Council of Europe Presidency programme. Petr Valek will

speaking about the *Origins and Relevance of the Declaration on Jurisdictional Immunities of State Owned Cultural Property*. At this point I dare to say that this Austrian – Czech initiative has already by now proved to be a success. The CAHDI follows it up in its meetings and solicits signatures of the Declaration. Also my own country, Finland, has signed the declaration and my assessment is that it has also served practical purposes in certain cases by facilitating cultural exchange between Finland and other countries.

ÖBB Personenverkehr AG v. Sachs and the Issue of Commercial Activity

Helmut Tichy

*Legal Adviser at the Federal Ministry for Europe,
Integration and Foreign Affairs of the Republic of Austria*

Thank you for inviting me to talk at this seminar, organised by our friend and CAHDI Vice-Chairman Petr Válek. In this seminar, I would like to present a case concerning an important jurisdiction and immunity issue that was decided by the US Supreme Court on 1 December 2015, a case known to some of you here because of the supportive role your countries played in these proceedings, for which I would also like to use this opportunity to thank again: the Case of ÖBB Personenverkehr AG (that is the Austrian Federal Railways Passenger Transport Company) v. Sachs, to be cited as case 577 U.S. (2015). To make things easier I shall refer to the party that brought the case successfully to the US Supreme Court not as “ÖBB Personenverkehr AG” or as “OBB”, as the Supreme Court did it, but as “Austrian Railways”.

The other party, Ms Carol P. Sachs of Berkeley in California, is a US citizen who, in 2007, tried to board a train that was already moving at the Innsbruck train station. She fell and suffered severe injuries. Both her legs had to be amputated above the knee. In 2008, she sued the Republic of Austria, the ÖBB Holding AG (that is the Austrian Federal Railways Holding Company) and the Austrian Railways before the US District Court for the Northern District of California. Austrian Railways is a company 100 per cent owned by the Austrian Railways Holding Company, which in turn is 100 per cent owned by the Republic of Austria. Ms Sachs asserted claims amounting to 20 million US Dollars for negligence, strict liability for design defects in the train and the platform as well as for failure to warn of those design defects and breach of implied warranties of merchantability and fitness for providing a train and platform unsafe and unfit for their intended uses. In the course of the proceedings, only the lawsuit against Austrian Railways was continued, whereas the Republic of Austria and the Holding Company ceased to be parties to the case.

Ms Sachs claimed that US courts were competent to decide the case because she had bought her ticket, a Eurail pass, on the internet from the Rail Pass Experts company based in Massachusetts. As the purchase of the ticket occurred in the United States, she invoked both US jurisdiction and the commercial activity exception from state immunity contained in §1605(a) (2) of the US Foreign

Sovereign Immunities Act (FSIA) of 1976.³⁹ The FSIA deals with both jurisdiction and state immunity from jurisdiction as its full title explains, which reads “An Act to define the jurisdiction of United States courts in suits against foreign states, the circumstances in which foreign States are immune from suit and in which execution may not be levied on their property [...]”. The same words are contained in the Act’s preamble.⁴⁰ §1605 FSIA already referred to contains “General exceptions to the jurisdictional immunity of a foreign state”, and its sub-section (a)(2) stipulates that “A foreign state shall not be immune from the Jurisdiction of courts of the United States or of the States in any case [...] in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States”.

The Massachusetts-based travel agency Rail Pass Experts was authorised to sell Eurail passes by the Eurail Group, an association with distinct legal personality, organised under the law of Luxembourg and owned by 30 European railway companies including the Austrian Railways. The Eurail Group is, inter alia, tasked with the marketing and sale of Eurail passes.

Austrian Railways, however, had no relations with Rail Pass Experts in Massachusetts, and had not even been aware of the company’s existence. Therefore, in Austrian Railways’ and the Republic of Austria’s opinion, the activities of Rail Pass Experts could not be attributed to Austrian Railways. Two US court decisions, by the District Court and a panel of the US Court of Appeals for the Ninth Circuit, were of the same view and dismissed the claim because of lack of US jurisdiction. The Court of Appeals, however, ordered a rehearing of the case by the full court (“en banc”) and decided on 6 December 2013 that the sale of the Eurail pass could be imputed to Austrian Railways for purposes of establishing that it carried on commercial activity in the United States, that the commercial activity exception of the FSIA applied and that, therefore, US jurisdiction over the case was established.

³⁹ Perhaps I may mention that Austria had not always had very happy experiences with the interpretation of the FSIA by the US Supreme Court, as the Court, in 2004, held in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), to Austria’s surprise and perhaps not fully in conformity with customary international law, that the FSIA applies retroactively. That case involved a claim by the descendants of owners of famous Klimt paintings against Austria for return of those paintings, which were allegedly seized during the Nazi era. A Hollywood version of these facts and proceedings is the film “Woman in Gold”, first publicly shown in 2015, starring Helen Mirren.

⁴⁰ The preamble reads as follows: “To define the jurisdiction of United States courts in suits against foreign states, the circumstances in which foreign States are immune from suit and in which execution may not be levied on their property, and for other purposes.”

The case raised fundamental questions of interpretation of the FSIA. If the Court of Appeals' opinion prevailed, States all over the world would have been affected and US jurisdiction would have been extended to cases with no other connection to the United States than the purchase of a ticket online from a US company. Therefore, Austrian Railways, assisted by the Republic of Austria through the Statutory Lawyers of Austria (Finanzprokurator), filed a petition for review by the US Supreme Court, for a "writ of certiorari". The Netherlands filed an amicus curiae brief, supporting the view that the Supreme Court should take up the case. The Netherlands brief stated that the Court of Appeals decision was clearly inconsistent with international law, was likely to generate jurisdictional conflicts with other sovereigns and would expose foreign state owned entities to large US class actions for activities entirely carried on abroad.⁴¹

The US Solicitor General, however, upon invitation by the Supreme Court, filed a statement on the case, unfortunately arguing that the legal questions at hand did not warrant review by the Supreme Court.

The parties agreed that another potentially relevant state immunity exception of the FSIA, the tort exception,⁴² did not apply to the case because the injury or damage had not occurred on the territory of the United States but in Innsbruck in Austria. Therefore, the only FSIA exception relevant to the case was the commercial activity exception. This exception, as we have seen, deprives foreign States of their immunity in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state". Leaving aside the issue whether the action was "based upon" a commercial activity in the United States for a moment, I would like to focus first on the more state immunity related question whether Austrian Railways could benefit from that exception.

The definition of a "foreign state" provided by §1603(a) FSIA⁴³ "includes [...] an agency or instrumentality of a foreign state"; and §1603(b) FSIA defines an "agency

⁴¹ Brief of the Government of the Kingdom of the Netherlands as amicus curiae in support of the petitioner in its petition for a writ of certiorari of 7 April 2014.

⁴² "§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the Jurisdiction of courts of the United States or of the States in any case [...]

"(5) not otherwise encompassed in paragraph (2) above, 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; except this paragraph shall not apply to [...]"

⁴³ "§ 1603. Definitions

For purposes of this chapter

(a) A 'foreign state', except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An 'agency or instrumentality of a foreign state' means any entity

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

or instrumentality of a foreign state” as “any entity (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof [...]” As Austrian Railways fulfils these criteria, there was no dispute that it was an “agency or instrumentality” of the Republic of Austria and therefore covered by the notion of “foreign state” within the meaning of the FSIA.

Another question, however, was whether the activities of the Massachusetts-based company Rail Pass Experts could be attributed to Austrian Railways. This was disputed by Austrian Railways, as Rail Pass Experts was no “agency or instrumentality” of Austria within the meaning of the FSIA. Consequently, the action in question could not be regarded as based upon a commercial activity of an Austrian agency carried on in the United States.

As to the notion of agency, Austrian Railways argued, as we have seen, that the applicable definition of agency was set out in §1603(b) FSIA. The Court of Appeals, however, based its considerations on the broader concept of agency under the Common Law and applied a Common Law test to the question whether Rail Pass Experts had acted as an agent of Austrian Railways. Austrian Railways argued that the Court of Appeals was wrong to refer to the Common Law concept of agency, as the language of the FSIA did not leave room for any agency standard beyond that provided by its explicit definition. Consequently, the Court of Appeals’ invocation of vague Common Law principles disregarded the specific delimitation of the concept of agency contained in the FSIA.

The US Solicitor General, however, did not support this view in his statement to the Supreme Court. He argued that the definition of §1603 (b) FSIA determined the entities that were to be treated as foreign states. This did not exclude that foreign States availed themselves of an agent within the meaning of the Common Law. Otherwise, foreign States could exclude US jurisdiction and benefit from the commercial activities exception by the simple means of engaging a Common Law agent. The Solicitor General concluded that the case did not warrant a review by the Supreme Court. At the same time, however, he questioned whether Rail Pass Experts would indeed pass a thorough Common Law test concerning its qualification as an agent.

As to the nexus of the claims of Ms Sachs with the commercial activity, Austrian Railways argued that the claims were not “based upon” the sale of the ticket in the United States, but rather on alleged acts or omissions of Austrian Railways – like negligence – that occurred in Innsbruck in Austria. Austrian Railways referred in this

(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (d) of this title, nor created under the laws of any third country.”

context to the 1993 US Supreme Court case of *Saudi Arabia v. Nelson*⁴⁴, in which the Supreme Court had indicated that in order to serve as basis for jurisdiction under the FSIA, the commercial activity in question must be the “gravamen” – the essence or gist – of the claim, not simply a link in the chain of events that led to an overseas injury. The Solicitor General agreed that the Court of Appeals’ interpretation of this issue in the *Sachs* case was overly permissive and showed that different US courts had come to different rulings on the notion of “based upon” in §1605(2) FSIA. However, the Solicitor General concluded that the *Sachs* case was not a good example for the Supreme Court to decide on this question, as in his opinion the elements of the facts had not been clearly elaborated, neither by the parties nor by the Court of Appeals.

The Netherlands and Switzerland, through a letter of their Washington embassies,⁴⁵ supported Austrian Railways in its efforts to argue that the case should be taken up by the Supreme Court, underlining their concern about an extension of the extraterritorial jurisdiction of US courts over cases without a sufficiently close factual nexus to the United States.

On 23 January 2015, the US Supreme Court decided to admit the case (“to grant certiorari”). In April 2015, Austrian Railways received renewed amicus curiae support from the Netherlands and Switzerland⁴⁶, but unfortunately not from the European Commission. After an oral hearing on 5 October 2015 the Supreme Court, on 1 December 2015, delivered its decision No. 13-1067 “on writ of certiorari to the United States Court of Appeals for the Ninth Circuit in the case of *OBB Personenverkehr AG v. Carol P. Sachs*”.

Rather than on the question of agency and attribution to Austria, the Supreme Court focussed on the question whether Ms Sachs’ lawsuit for damages caused by her railway accident in Innsbruck was “based upon” the sale of the Eurail pass within the meaning of the commercial exception clause of §1605(a)(2) FSIA. It referred to its judgment in *Saudi Arabia v. Nelson* and stated that this case provided sufficient guidance to resolve the *Sachs* case concerning the interpretation whether an action was “based upon” a commercial activity carried on in the United States. The Court recapitulated that, in *Saudi Arabia v. Nelson*, a married couple had brought a suit against Saudi Arabia and its state-owned hospital, seeking damages for intentional and negligent torts resulting from the husband’s allegedly wrongful arrest, imprisonment, and torture by Saudi police while he was employed at a hospital in Saudi Arabia. The Saudi defendants claimed sovereign immunity under the FSIA, arguing, inter alia, that the commercial exception clause of the FSIA was inapplicable

⁴⁴ 507 U.S. 349 (1993).

⁴⁵ Letter of 21 August 2014.

⁴⁶ Brief amici curiae of The Governments of the Kingdom of the Netherlands and the Swiss Confederation, filed on 24 April 2015, see <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/13-1067.htm>.

because the suit was “based upon” sovereign acts – the exercise of Saudi police authority – and not upon a commercial activity. The Nelsons countered that their suit was “based upon” the defendants’ commercial activities in recruiting Mr Nelson for work at the hospital, signing an employment contract with him, and subsequently employing him. The US Supreme Court had rejected the Nelsons’ arguments and had held that the interpretation of “based upon” required a court to identify the particular conduct on which the plaintiff’s action was based. In order to fulfil the “based upon” requirement, the commercial activity in question had to be the “gravamen” – the essence or gist – of the plaintiff’s claim. With this analysis, the Supreme Court found that the commercial activities, while they “led to the conduct that eventually injured the Nelsons”, were not the particular conduct upon which their suit was based. The suit was instead based upon the Saudi sovereign acts that actually injured the Nelsons. The Nelsons’ suit therefore did not fit within the commercial exception of the FSIA.

In *Nelson*, the Supreme Court had further stated that any other approach would allow plaintiffs to evade the FSIA’s restrictions through artful pleading. Under that view, a plaintiff could recast virtually any claim of international tort as a claim of failure to warn. The Supreme Court had rejected this approach in *Nelson* and confirmed that rejection in *Sachs*.

In the *Sachs* case, the US Court of Appeals of the Ninth Circuit had seen the “based upon” requirement satisfied by the fact that an element of the case, namely the purchasing of the ticket, had taken place in the United States. The Supreme Court, however, held that such a “one-element approach” was flatly incompatible with the ruling in the *Nelson* case, according to which an action was based upon the particular conduct that constitutes the gravamen of the suit. The Supreme Court reasoned that “[u]nder this analysis, the conduct constituting the gravamen of *Sachs*’s suit plainly occurred abroad. All of her claims turn on the same tragic episode in Austria, allegedly caused by wrongful conduct and dangerous conditions in Austria, which led to injuries suffered in Austria.” However Ms *Sachs* framed her suit, the incident in Innsbruck remained at its foundation.

To make matters crystal-clear, the Supreme Court quoted a letter by Justice Holmes of 1915 who had stated that the “essentials” of a personal injury narrative were to be found at the “point of contact” – “the place where the boy got his fingers pinched.” The Supreme Court therefore concluded that Ms *Sachs*’ suit fell outside the commercial activity exception of the FSIA and was therefore barred by sovereign immunity. The Supreme Court thus followed the pleadings of Austrian Railways in this point, and the judgment of the United States Court of Appeals for the Ninth Circuit was reversed.

As the case was solved by answering the “based upon” question, the Supreme Court saw no need to address the question whether Rail Pass Experts was attributable to Austrian Railways by means of the Common Law concept of agency.

Analysing the legal questions involved in the Sachs case from the point of view of international law, one notes that the Supreme Court examined a criterion – the territorial link – legally related to the question of jurisdiction, but concluded that the case was “barred by sovereign immunity”. It seems therefore that this decision does not differentiate between the legal concepts of jurisdiction and of state immunity. The reason for this originates in the FSIA: As the full title and the preamble of the FSIA state, the act refers to both jurisdiction regarding lawsuits against foreign States and to state immunity. In accordance with this approach, the commercial activity exception of §1605(a)(2) FSIA includes a territorial link to the United States as one of the conditions for its applicability, thereby addressing the issue of jurisdiction rather than state immunity. In comparison to the FSIA, the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property presupposes the existence of jurisdiction without defining it and leaves jurisdiction to the applicable rules of law. Consequently, the commercial activity exception of Article 10 of the Convention⁴⁷ does not refer to any link to the territory of a state.

⁴⁷ 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property:

Article 2

Use of terms

1. For the purposes of the present Convention:

[...]

(c) “commercial transaction” means:

- (i) any commercial contract or transaction for the sale of goods or supply of services;
- (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction;
- (iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

2. In determining whether a contract or transaction is a “commercial transaction” under paragraph 1 (c), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction. [...]

Article 10

Commercial transactions

1. If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction.

2. Paragraph 1 does not apply:

- (a) in the case of a commercial transaction between States; or
- (b) if the parties to the commercial transaction have expressly agreed otherwise.

3. Where a State enterprise or other entity established by a State which has an independent legal personality and is capable of:

- (a) suing or being sued; and
- (b) acquiring, owning or possessing and disposing of property, including property which that State has authorized it to operate or manage,

is involved in a proceeding which relates to a commercial transaction in which that entity is engaged, the immunity from jurisdiction enjoyed by that State shall not be affected.

[...]

In conclusion, when the Supreme Court confirmed the Nelson case in order to prevent plaintiffs from “evad[ing the FSIA’s] restrictions through artful pleading” in the context of the territorial link requirement of the FSIA’s commercial activity exception, from an international law perspective this can be analysed as restricting US courts in the exercise of jurisdiction in cases where no US jurisdiction could lawfully be established because of the lack of a sufficient territorial link with the United States. As all of those that have helped Austrian Railways, but also Austria, in this case have appreciated, its implications for US jurisdiction seem to be more important than those for the immunity of the Austrian Federal Railways.

Les défis actuels de l'immunité des Etats devant les tribunaux belges

Paul Rietjens

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Introduction

Les règles en matière d'immunité des États font partie du droit coutumier international, même s'il y a eu quelques cas de codification, comme par exemple la « *Convention européenne sur l'immunité des États (et son Protocole additionnel)* », faite à Bâle le 16 mai 1972 (et approuvée en Belgique par la loi du 19 juillet 1975), et la « *Convention des Nations Unies sur les immunités juridictionnelles des États et de leurs biens* », faite à New York le 2 décembre 2004 (signée mais non encore approuvée par une loi en Belgique et donc non encore ratifiée).

Essentiellement, le droit international fixe seulement les grandes lignes de l'immunité des États. Le point de départ a toujours été et reste aujourd'hui encore l'égalité souveraine des États. Ce principe de base implique qu'aucun État ne peut exercer une autorité sur son égal. Nous connaissons ce principe sous sa formulation en latin « *par in parem non habet imperium* ». Mais les États gardent évidemment une certaine marge dans l'application et/ou la spécification desdits principes. Ainsi les règles concrètes peuvent varier d'un État à l'autre. Dans les pays anglo-saxons, l'immunité des États est en général réglé par une loi, par exemple la « *State Immunity Act* » au Royaume-Uni et la « *Foreign Sovereign Immunities Act* » aux États-Unis, alors que la plupart du temps cela n'est pas le cas dans les pays de l'Europe continentale. Pour ce qui concerne la Belgique, force est de constater que jusque récemment, ce sont les juges qui, par leurs décisions ont élaboré les règles applicables, lesquels ont ensuite, en différentes étapes, été reprises dans le code judiciaire, dernièrement encore par un nouvel article 1412 *quinquies*. J'y reviendrai plus tard.

Vu l'importance, certainement en Belgique, des décisions judiciaires pour le développement et la consécration de l'immunité des États, je vous donnerai donc un bref aperçu de la jurisprudence belge en la matière. Il est aussi bon à savoir qu'en Belgique le juge n'invoque pas automatiquement l'immunité d'un État étranger, il faut que l'État concerné le fasse lui-même par le biais d'un conseil qui le représente.

Je vous propose de passer en revue d'abord la manière dont les tribunaux belges abordent l'immunité de juridiction et dans un deuxième temps la manière dont ils abordent l'immunité d'exécution. Là où cela peut être utile je m'attarderai aussi sur quelques cas (relativement) récents.

1. Immunité de juridiction

1.a) Comme vous le savez, depuis le début du 20^e siècle l'immunité de juridiction a évolué d'une immunité absolue vers une immunité plus restreinte. La participation croissante des États aux échanges commerciaux a rendu presque intenable le principe d'une immunité absolue. Ainsi a été introduit dans le droit coutumier un critère pour déterminer si, pour un acte précis, un État peut oui ou non se prévaloir de son immunité. Ce critère revient à une distinction entre, d'une part, « *acta juri imperii* » et, d'autre part, « *acta juri gestionis* » ou « *acta iure privatorum* » : pour la première catégorie d'actes, posés dans l'exercice de l'autorité publique, l'État jouit de l'immunité, mais cette dernière ne peut être invoquée pour la deuxième catégorie d'actes, à savoir des actes de gestion ou des activités commerciales. Les juges belges peuvent être considérés comme faisant partie des forces motrices derrière cette évolution du droit coutumier à ce sujet. En effet, c'est à la jurisprudence belge (et à la jurisprudence italienne) que revient le mérite d'avoir prôné, parmi les premiers, la théorie de l'immunité restreinte ou relative. Préconisée déjà par la Cour d'Appel de Bruxelles en 1840, cette théorie fut sanctionnée par la Cour de Cassation dès 1903.

Pour distinguer les deux catégories d'actes, la jurisprudence belge utilise le critère *de la nature* de l'acte (est-ce un acte de nature de droit privé ou un acte d'exercice de l'autorité publique?). Dans d'autres États par contre, c'est *la finalité* de l'acte qui est prise en compte.

1.b) Ainsi, dans son fameux arrêt du 11 juin 1903 (*La Société anonyme des chemins de fer liégeois c. l'État néerlandais*) la Cour de cassation belge a dit pour droit, à l'époque, que « *la compétence dérive non du consentement du justiciable mais de la nature de l'acte et de la qualité en laquelle l'État y est intervenu* ». Pour apprécier la qualité en laquelle l'État y est intervenu, il n'est pas inutile de rappeler que, dans le cas soumis à la Cour de cassation, l'État néerlandais était à la cause en qualité d'industriel ou de commerçant, effectuant à prix d'argent le transport des voyageurs et des marchandises. Il traitait, d'égal à égal, avec un autre entrepreneur de transports et, comme précisait l'arrêt « *ne mettait pas en œuvre la puissance publique mais faisait ce que des particuliers peuvent faire et, partant, n'agissait que comme personne civile ou privée* ». Le premier avocat général Terlinden précisait par ailleurs que l'État néerlandais s'était comporté comme un commerçant et qu'il importait de vérifier si, par l'acte qui servait de base à l'action, le gouvernement défendeur avait exercé son imperium, sa *publica auctoritas*, ou était entré dans le domaine des intérêts particuliers, non pour soumettre ces intérêts à son action

régulatrice, mais pour y mêler sa personne (par conséquent, la Cour de Cassation a cassé l'arrêt de la Cour d'Appel de Bruxelles qui avait décidé qu'un Etat étranger, ayant traité comme personne civile, ne pouvait être justiciable des tribunaux belges, et ce à raison de sa souveraineté).

1.c) La théorie de l'immunité relative a inspiré depuis lors progressivement le droit d'autres États européens et, par exemple, ce n'est qu'en 1963 qu'elle a été adoptée en Allemagne (la RFA de l'époque) par un important arrêt de la Cour constitutionnelle fédérale. D'autres États restaient cependant favorables au principe de l'immunité absolue.

1.d) En Belgique, la restriction de l'immunité de juridiction des États étrangers aux seuls actes accomplis « *iure imperii* » est donc consacrée depuis longtemps dans la jurisprudence et son application y est constante jusqu'à ce jour. Pour l'illustrer je voudrais vous citer quelques extraits de décisions plus ou moins récentes des tribunaux belges à différents niveaux. Les cas dans lesquels le juge belge a rejeté l'immunité de juridiction et s'est déclaré compétent concernent souvent des contrats de travail.

1.e) Ainsi il convient de citer par exemple un arrêt de la Cour de Travail (instance d'appel) du 7 octobre 2015 (*États-Unis d'Amérique contre Monsieur V.*) Il s'agissait d'un employé de l'Ambassade des États-Unis à Bruxelles qui avait été licencié pour motif grave suite à un différend avec son employeur et relatif à une interruption de carrière. Le Tribunal de travail (première instance) avait déclaré l'action de Monsieur V. recevable et partiellement fondé. Les États-Unis avaient soulevé, avant tout autre défense, leur immunité de juridiction. Ils la soulevaient à nouveau en appel, tout en admettant que l'immunité de juridiction des États n'était pas absolue, mais il n'étaient pas d'accord pour considérer que le critère par lequel on distingue un acte de souveraineté – bénéficiant de l'immunité de juridiction – d'un acte de gestion – qui en principe n'en bénéficie pas – est la « nature » de cet acte et non sa finalité.

Dans son arrêt, la Cour de Travail souligne, entre autres, que « *la jurisprudence belge (cf. Cass., 11 juin 1903) et particulièrement celle de la Cour du travail de Bruxelles, est fixée en ce sens qu'il y a lieu de s'attacher à la nature de l'acte pour déterminer s'il s'agit d'un acte de souveraineté ou d'un acte de gestion : l'engagement, le paiement de la rémunération (en ce compris l'assujettissement à la sécurité sociale) et le licenciement d'un membre du personnel administratif et technique d'une ambassade, à savoir du personnel qui n'est pas chargé d'une mission diplomatique, sont généralement considérés comme des actes de gestion privée, que tout employeur privé peut accomplir et qui n'échappent donc pas à la compétence des tribunaux belges (...)* La Convention des Nations Unies sur les immunités juridictionnelles des Etats et de leurs biens du 2 décembre 2004, qui propose une codification en la matière, adopte cette approche. Elle repose, en effet, sur la distinction entre acte de souveraineté ou d'autorité et acte de commerce ou de

gestion. Bien que cette Convention ne soit pas encore entrée en vigueur, faute d'un nombre suffisant d'Etats l'ayant ratifiée, elle constitue le reflet du droit coutumier ».

Après avoir fait référence au fait que « *la Convention des Nations Unies stipule [dans son article 11] que les Etats ne peuvent pas invoquer l'immunité de juridiction devant un tribunal d'un autre Etat dans les procédures se rapportant aux contrats de travail* », la Cour analyse les exceptions à cette dernière disposition, telles qu'énumérées à l'article 11 et rejette l'interprétation trop extensive de ces exceptions par les États-Unis. Elle conclut que « *l'exception suppose que l'employé, par les tâches et les responsabilités qui lui sont confiées par l'Etat employeur, participe à l'exercice de prérogatives caractéristiques de la puissance souveraine de cet Etat. Le fait de participer à des tâches le cas échéant essentielles au bon fonctionnement de l'Ambassade est insuffisant (tous les membres du personnel y participent)* ». La Cour rejette dès lors l'immunité de juridiction telle qu'invoquée par les États-Unis et confirme le jugement du Tribunal.

1.f) Un autre jugement qui me semble intéressant de mentionner est celui du Tribunal de Travail de Bruxelles du 30 mars 2015 (*Monsieur O. contre la Tunisie*), car il établit un lien avec la Convention de Vienne sur les relations diplomatiques. Il s'agissait d'un employé de l'Ambassade de Tunisie (avec un contrat de durée indéterminée) qui avait entamé une action afin d'obtenir de son employeur des importantes arriérés de salaire qu'il n'avait pas reçues. La République de Tunisie avait soulevé l'irrecevabilité de la demande sur la base de l'immunité de juridiction, vu que Monsieur O. exerçait des fonctions de trésorier de l'Ambassade, fonction qui selon la Tunisie relevait de l'exercice de sa souveraineté.

Dans son jugement, le Tribunal a précisé que « *l'Etat étranger jouit de l'immunité de juridiction dans la mesure où l'acte qui fait l'objet du litige est un acte de puissance publique et non lorsque l'Etat agit comme personne civile, dans le cadre de rapports régis par le droit privé. Dans le cas des ambassades, les actes de puissance publique peuvent être définis par référence à la Convention de Vienne sur les relations diplomatiques (Convention du 18 avril 1961), qui décrit les fonctions d'une mission diplomatique : représenter l'Etat accréditant auprès de l'Etat accréditaire, protéger dans l'Etat accréditaire les intérêts de l'Etat accréditant et de ses ressortissants, négocier avec le gouvernement de l'Etat accréditaire, s'informer des conditions et de l'évolution des événements dans l'Etat accréditaire et faire rapport à ce sujet au gouvernement de l'Etat accréditant, promouvoir des relations amicales et développer les relations économiques, culturelles et scientifiques entre l'Etat accréditant et l'Etat accréditaire (article 3). A l'inverse, les actes de gestion sont ceux que tout particulier pourrait accomplir (Cass. 11 juin 1903). La Convention de Vienne distingue, parmi les membres du personnel de l'ambassade, « d'une part, les membres du personnel diplomatique et, d'autre part, les membres du personnel administratif et technique » (article 1^{er}). Elle prévoit que les actes diplomatiques, énumérés ci-dessus, ne peuvent être posés que par des membres du personnel*

diplomatique ; les membres du personnel administratif et technique ne peuvent poser que des actes relevant de la gestion administrative courante de l'ambassade.

Compte tenu de ces dispositions, l'engagement et le licenciement d'un membre du personnel administratif et technique de l'ambassade, qui n'est pas chargé de missions diplomatiques, ne sont pas des actes relevant de la puissance publique de l'Etat accréditant, mais bien des actes de gestion privée. Par analogie, il en va de même des problèmes relatifs au paiement de la rémunération correcte. Tout employeur privé peut en effet occuper une personne pour lui confier des tâches administratives ou techniques. De même, la déclaration de ce travailleur aux administrations sociales et fiscales compétentes, et l'exécution des obligations qui en découlent, constituent des actes de gestion administrative pour lesquels l'Etat étranger ne bénéficie pas d'une immunité de juridiction ».

1.g) La thèse de l'immunité de juridiction restreinte, telle que développée dans l'arrêt de Cassation précité de 1903, a de nouveau été confirmée dans un arrêt de la Cour de Cassation du 23 octobre 2015 (relative au fameux dossier de la Banque Fortis), mais cette fois-ci pour confirmer l'immunité. Dans une affaire entamée par des actionnaires contre, entre autres, l'État néerlandais, qui avait soulevé son immunité de juridiction, la Cour de Cassation a d'abord répété que *« pour déterminer si les actes accomplis par un État ou une entité d'un État l'ont été dans l'exercice de la puissance publique, il convient d'avoir égard à la nature de cet acte et à la qualité en laquelle cet État ou cette entité est intervenu en tenant compte du contexte dans lequel l'acte a été accompli »*.

En l'espèce, la Cour d'Appel, contre l'arrêt de laquelle un pourvoi en Cassation avait été lancé, avait constaté *« qu'aucun investisseur privé ne disposait des capacités financières suffisantes pour venir raisonnablement en aide au groupe Fortis, sous la forme soit de reprise d'actifs, soit d'augmentation de capital, soit de prêt ou encore d'émission de garantie, raison pour laquelle les États ont été contraints de se substituer au marché et d'intervenir en urgence, après avoir été prévenus par leurs banques centrales et autorités de contrôle ; il ne peut donc être soutenu que des particuliers auraient pu faire ce que les États ont fait »* et la Cour avait continué que *« dans leurs domaines de compétence, les États sont garants de la stabilité financière du pays, laquelle est indispensable pour assurer la pérennité de l'activité économique et sociale ; à ce titre, il est de leur responsabilité d'intervenir d'autorité en cas de crise systémique; une telle intervention ressortit à l'exercice de la puissance publique »*.

Dans son arrêt du 23 octobre 2015, la Cour de Cassation se range à ce raisonnement et conclut que la Cour d'Appel a décidé légalement *« que c'est à bon droit que la défenderesse soulève également l'immunité de juridiction »*.

1.h) Un dernier jugement belge que je voudrais mentionner en relation avec l'immunité de juridiction est l'arrêt de la Cour d'Appel de Gand du 25 février 2016 dans une procédure engagée en Belgique, aussi bien contre le Saint-Siège que contre les évêques belges, par différentes personnes qui avaient été dans leur jeunesse (alors qu'ils étaient mineurs d'âge) victimes d'abus sexuels de la part de ministres de l'Église catholique. Les appelants avaient en première instance requis de déclarer les intimés solidairement responsable pour le dommage qu'ils avaient subi suite aux abus sexuels, plus précisément suite au fait que les autorités ecclésiastiques avaient mené une politique d'étouffement en refusant, pendant de longues années et de manière fautive, de reconnaître l'existence de ces abus au sein de l'Église, de s'attaquer au problème, de dépister les auteurs et les victimes, de reconnaître ces derniers officiellement comme victimes et de leur offrir de l'aide et/ou une indemnisation. Parmi les intimés, le Saint Siège soulevait devant le tribunal d'abord son immunité de juridiction. Le premier juge s'était par la suite en effet déclaré incompétent pour traiter la plainte contre le Saint-Siège. La motivation dudit juge pour ce faire a été résumé comme suit dans l'arrêt de la Cour d'Appel (l'arrêt original est en néerlandais, mais j'ai obtenu une traduction officieuse en anglais) : « *by virtue of the so-called doctrine of limited State immunity and case law from the Belgian Court of Cassation, immunity from jurisdiction must also apply in relation to misconduct in the context of the exercise of public authority, in respect of which it should be observed that the "policy failings" of which Appellants accused the Pope – and therefore also the Holy See – fall under the exercise of governing powers and State authority and should therefore be considered as "acta iure imperii" and not as acts committed in the capacity of a private individual in the defence of private interests* ». Puisque les appelants s'étaient également référés à l'article 6 de la Convention européenne des Droits de l'Homme, le premier juge avait dans son jugement de rejet également répondu à cette question, en précisant (je cite à nouveau de la traduction anglaise) : « *Appellants' right of access to justice is not violated because, according to case law of the European Court of Human Rights (ECHR), the granting of State immunity serves the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty and this aim is proportionate to the Holy See's immunity under international law.* »

La Cour d'Appel de Gand a suivi le raisonnement du premier juge et a donc à son tour rejeté l'appel à l'égard du Saint-Siège en raison de l'immunité de juridiction de ce dernier. Dans sa motivation, la Cour d'Appel, en se référant à l'arrêt de Cassation de 1903, a précisé (je cite une fois de plus de la traduction anglaise) : « *In light of this case law, the first court was therefore correct to state that a distinction should be made between the foreign sovereign acting as a government or in the exercise of its public authority, and the foreign sovereign acting as a private person. As far as unlawful acts are concerned, the Court of Cassation stated in the judgment cited above that it should not be a matter of a 'liability due to a wrong outside the political order', which implies that immunity from jurisdiction should also apply to wrongful*

acts in the course of the exercise of public authority. The Holy See is sued by Appellants based on Article 1382-1383 of the Civil Code, as the government of the Church (...), because allegedly it had failed in the universal policy of the Church with regard to sexual abuse and because it had allegedly neglected to support the diocesan bishops and the superiors of the congregations and eliminate the known dysfunctions, which moreover was within the power and the duty of the Pope. These 'policy failings' of which Appellants accused the Holy See fall within the exercise of administrative powers and public authority and are therefore to be considered as "acta iure imperii" and not as acts performed in the capacity of a private individual in the defence of private interests. »

2. Immunité d'exécution

2.a) Contrairement à l'immunité de juridiction, qui tend à soustraire certains actes d'un État étranger au pouvoir de juridiction des tribunaux du for, l'immunité d'exécution a pour but de soustraire certains biens de l'État étranger aux mesures d'exécution de ses créanciers. Les États ont très longtemps considéré comme absolue l'immunité d'exécution. Ce n'est qu'au cours des dernières décennies du 20^e siècle qu'un revirement des opinions s'est manifesté. Ici aussi la jurisprudence belge a joué un rôle de pionnier. Les juridictions de fond ont dans les années '90 développé à cet égard une jurisprudence contrastée, mais faisant très majoritairement droit à la théorie de l'immunité d'exécution restreinte. Consacrée par certaines des plus hautes juridictions étrangères, cette théorie ne paraît plus, à l'heure actuelle et en son principe, contraire au droit international général.

2.b) Le 27 février 1995, dans une affaire civile impliquant l'Irak, le juge des saisies du tribunal de première instance de Bruxelles considérait déjà que le principe traditionnel de l'immunité d'exécution n'a pas en droit international public la portée absolue que l'État lui prête. Selon ce juge « *il s'agit de savoir si les fonds déposés entre les mains du tiers saisi sont affectés en tout ou en partie à des activités de la souveraineté* », l'immunité d'exécution n'étant accordée qu'en ce dernier cas (*Civ. Bruxelles (sais.), Irak contre D*).

2.c) Dans les années d'après, plusieurs autres jugements sont allés dans le même sens, consacrant une conception restreinte de l'immunité d'exécution. Mais la portée précise de la restriction n'était pas toujours claire et la jurisprudence de la Cour d'Appel de Bruxelles n'était pas univoque. Dans son arrêt du 15 février 2000 cette Cour retint la conception restreinte de l'immunité d'exécution dans une affaire relative à la saisie des comptes de l'ambassade d'Irak (*Leica AG contre Central Bank of Iraq and Republic of Iraq*). Elle statuait à cet égard que « *sans préjudice de l'immunité diplomatique ou consulaire, l'immunité d'exécution de l'État peut seulement être invoquée pour des avoirs qui appartiennent au domaine public et qui n'ont pas reçu une affectation privée (...); l'immunité d'exécution peut seulement être écartée, s'il apparaît, non seulement que les sommes déposées sur les comptes*

de la Générale de Banque ne pourraient pas être utiles à l'exercice des fonctions de la mission, mais aussi que ces sommes, qui font partie du patrimoine de l'État iraquien, n'appartiennent pas au domaine public de l'Iraq, mais sont affectées à des fins privées ».

Dans un autre arrêt, du 8 avril 2002, cette même Cour garantissait par contre à nouveau à l'État étranger partie au litige (il s'agissait de la RDC) l'immunité d'exécution absolue, tandis qu'en octobre 2002, en appel du jugement (précité) prononcé par le juge des saisies contre l'Irak le 27 février 1995, la même Cour rappelait, sans contester la théorie de l'immunité d'exécution restreinte, à laquelle les parties s'étaient par ailleurs ralliées, que c'est le critère de « *l'affectation des biens saisis qui décide des limites de cette immunité d'exécution* », les biens saisissables étant ceux qui « *sont affectés à des activités commerciales ou de droit privé* » (Irak contre Vinci).

2.d) Plus récemment, la Cour d'Appel de Bruxelles a confirmé dans un arrêt du 14 avril 2015 (opposant la SA Sorelec à l'État libyen), que (traduction libre, de ma main, car l'arrêt était en néerlandais) « *qu'en principe les biens appartenant à une personne de droit public ne sont pas saisissables. Cette interdiction de principe d'une exécution forcée, vaut pour tous les biens domaniaux, aussi bien pour ceux du domaine public que pour ceux du domaine privé (...)* Le principe de l'immunité d'exécution n'a pas de caractère absolu dans le droit international, mais un caractère relatif, qui se limite aux biens nécessaires pour la souveraineté de l'État, de sorte qu'il est important de vérifier la destination du bien saisi. Il n'est pas contraire à ce principe de laisser l'État poursuivi porter une partie de la charge de la preuve quant à la destination des biens saisis ».

2.e) Depuis 2015 la Belgique a légiféré au sujet du principe de l'immunité d'exécution des biens d'États étrangers, en insérant un article 1412 *quinquies* dans le code judiciaire qui reprend les grandes lignes du droit coutumier, tel que celui-ci a été développé et précisé, entre autres, dans la jurisprudence belge et a ensuite été cristallisé dans la Convention de New York de 2004. Dans un arrêt du 16 juin 2016, la Cour d'Appel de Liège (dans une affaire opposant M. M-MK à la RDC et à l'État belge) a abordé la question de la non-application à des personnes morales de droit public étranger, des dispositions du Code Judiciaire belge (à savoir l'article 1412 bis) réglant les conditions auxquelles une exécution forcée peut être poursuivie sur certains biens des personnes morales de droit public belge. A ce sujet l'arrêt dit que « *les travaux préparatoires de la loi du 23 août 2015 qui introduit dans le Code judiciaire un article 1412 quinquies prévoyant l'insaisissabilité des biens appartenant à une puissance étrangère qui se trouvent sur le territoire du Royaume et organise les modalités des exceptions à ce principe confirment qu'il n'existait auparavant dans notre dispositif législatif aucune dispositif générale prévoyant l'insaisissabilité des biens appartenant à des puissances étrangères* ». Ensuite la Cour cite de ces travaux préparatoires : « *Il y a régulièrement des incidents diplomatiques avec des*

Etats tiers parce qu'un huissier de justice belge saisit, sur demande d'un créancier des biens appartenant à ces Etats. Il s'agit souvent des comptes bancaires d'une ambassade d'un Etat tiers dans notre pays. Bien qu'il y ait actuellement dans le Code judiciaire déjà une insaisissabilité principale pour les biens culturels qui se trouvent sur le territoire belge en vue d'y être exposés publiquement et temporairement, et pour des avoirs détenus ou gérés par des banques centrales des Etats tiers ou par des autorités monétaires internationales, une telle insaisissabilité n'est actuellement pas reprise dans ce Code, même pas pour des biens appartenant aux missions diplomatiques de ces Etats tiers (...) L'adoption antérieure des articles 1412ter et 1412 quater du Code judiciaire prévoyant l'insaisissabilité des biens culturels propriétés de puissances étrangères exposés publiquement et temporairement en Belgique et des avoirs y détenus par des banques centrales étrangères ou des autorités monétaires internationales démontrait déjà que la règle générale énoncée à l'article 1412bis ne s'appliquait pas aux Etats étrangers ».

2.f) Pour terminer, une question qui surgit de plus en plus devant les tribunaux belges à l'occasion d'une saisie de biens d'un État étranger et l'opposition faite à cette saisie par l'État affecté qui soulève son immunité d'exécution, est le lien qui est fait avec l'article 6 de la Convention européenne des droits de l'homme, qui garantit à chacun le droit à ce qu'un tribunal connaisse de toute contestation relative à ses droits et obligations de caractère civil. Le droit d'exécution d'une décision judiciaire constituerait, selon les arguments utilisés devant les tribunaux, un aspect de ce droit. A ce sujet la Cour de Cassation a pu s'exprimer dans un arrêt récent, datant du 11 avril 2014 et qui opposait la société NML Capital Ltd (en fait un fond vautour) à la République de l'Argentine. La cour a statué dans cette affaire que « *le droit d'accès aux tribunaux garanti par l'article 6, § 1er, précité, tel qu'il est interprété par la Cour européenne des droits de l'homme, ne peut avoir pour effet de contraindre un Etat de passer outre contre son gré à la règle de l'immunité d'exécution des Etats, qui vise à assurer le fonctionnement optimal des mission diplomatiques et, plus généralement, à favoriser la courtoisie et les bonnes relations entre Etats souverains* ».

The Origins and Relevance of the Declaration on Jurisdictional Immunities of State Owned Cultural Property

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I. Introduction

As Deputy Minister Smolek pointed out in his introduction, the jurisdictional immunities of States and their property is indeed a relevant issue that has become part of our daily business as legal advisers on international law.

When I was appointed Director of the International Law Department 5 years ago, the urgent issue for us has been the jurisdictional immunities of State-owned cultural property which is the topic of my presentation today.

Later on, I dealt with the Czech strategic reserves of diesel fuel that became part of a bankruptcy proceeding in Germany. Similar to the cultural property, we considered these strategic reserves to be a “specific category of property” protected from measures of constraint under Article 21 paragraph (1) (b) of the 2004 UN Convention on Jurisdictional Immunities of States and Their Property (hereinafter, the “UN Convention”): “property of a military character or used or intended for use in the performance of military functions”.

Nowadays, we are kept busy by the jurisdictional immunities of the bank accounts of diplomatic missions. In one case in Latin America, the bank account of our diplomatic mission was seized as a result of a labor dispute and we are trying, with the help of a receiving State, to reverse the judgment of a local court.

In other two cases, the Czech courts have seized the bank accounts of two diplomatic missions in the Czech Republic and we have been arguing, through amicus curiae letters addressed to the competent courts, that the applicable rules of international law on diplomatic immunities and jurisdictional immunities of States and their property must be observed.

II. The origins of the Declaration

Turning back to the State-owned cultural property and the origins of the Czech-Austrian Declaration, I would like to point out that this is not the first time that both countries made a contribution to the developments in this field of international law.

The first, rather accidental, event was the case of the Supreme Court of Austria in the case of *Dralle v. Republic of Czechoslovakia*.

This is a case from 1950 which involved a nationalized German bank in Czechoslovakia owned by the State that had a trademark dispute with its former mother company in Germany. At that time, the state-owned Czech company claimed State immunity under the absolute State immunity theory. The Austrian Supreme Court ruled that States don't enjoy jurisdictional immunity for *acta jure gestionis*. Thus it was the first Czech-Austrian contribution to this field.

The current Czech-Austrian initiative also started out from a court case, called *Diag Human vs. the Czech Republic*. This case evolved from an arbitration held in the Czech Republic during the transition period at the beginning of the 90's when the free market economy and new legislation were being established. In 1992, the Ministry of Healthcare sent a rather reserved letter of reference to a Danish company on *Diag Human*. Allegedly, because of this letter, *Diag Human* lost an opportunity to do business with plasma with the Czech State. This ended up in a domestic arbitration proceedings. There were two arbitration awards. The Czech Republic lost both of them. The first one was in 2002 and the second, which was more problematic, in 2008.

After this second award, *Diag Human* tried to enforce the arbitral award based on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in countries where the Czech Republic had property. While the proceedings ended successfully for the Czech Republic in France, The Netherlands and other countries, it is still ongoing in Luxembourg.

In May 2011, the Czech State-owned works of art on loan in the Castle of Belvedere in Vienna (Austria) were seized on the basis of the New York Convention. The Austrian court of the first instance executed the arbitral award. In this case, however, the Czech and Austrian foreign ministries cooperated very closely in order to invoke the jurisdictional immunity of these works of art. Specifically, our Austrian colleagues delivered an *amicus curiae* letter to the court of the second instance. To sum up, the *amicus curiae* letter pointed out that Austria ratified the UN Convention, which – although not in force yet – constitutes a codification of rules of customary international law in this area. It pointed out Article 21 paragraph (1)(e) and (d) of the UN Convention, which indicates specific State property that cannot be subject to measures of constrains and be executed. The Austrian court of the second instance also mentioned the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and, as such, ruled in favor of the Czech Republic. Thus, the works of art could return safely to the Czech Republic.

After this experience, it was clear that something had to be done for future possible cases and lessons should be learned from this. Indeed, the Czech Republic had a lot of State cultural property on display around Europe and has been very active in organizing international exhibitions and lending cultural property.

The Czech practice so far relied on unilateral guarantees of the concerned States (expressed in the form of “letters of comfort”, Notes Verbales or diplomatic notes) when a piece of art was being sent abroad. However, this practice was quite time consuming and complicated.

As the UN Convention was not likely to enter into force soon, an idea of a legally non-binding declaration - based on Articles 19 and 21 of the UN Convention - emerged from Austria. It could constitute a proof of *opinio juris* and could be used before national courts. In my experience, the Czech courts sometimes do not apply the rules of customary international law appropriately, and perhaps, this could be said for most courts in continental legal system. For judges that lack international law training and practice, the rules of customary international law are often hard to understand and refer to. On this matter, Sir Michael Wood’s Conclusions on the Identification of Customary International Law will be very helpful. Nevertheless, the situation will not change quickly. Thus, it is preferable to have a specific document that can be referred to, rather than a customary rule.

The initiative was launched by the Czech Republic and Austria, supported by the Netherlands and, namely, Dr. Nout van Woudenberg. In this field of international law, I can recommend his book “State Immunity and Cultural Objects on Loan”, Martinus Nijhoff Publishers, 2012. We also consulted the project with Professor Gerhard Hafner, who is one of the “fathers” of the UN Convention. Together with our Austrian colleagues, we prepared a text based on Article 19 and 21 of the Convention, which deals with the immunity from measures of constraint.

III. “Travaux préparatoires” of the Declaration:

In 2013, the declaration was first circulated in the COJUR, then in the CAHDI.

An important issue which was addressed during the drafting was the customary international law status of the UN Convention. On one hand, there were States, like the Czech Republic and Austria, that maintained that most provisions of the UN Convention constitute a codification of customary international law. On the other hand, some States did not share this opinion. In this context, it is true that the International Court of Justice identified only certain provisions of the UN Convention as a codification of customary international law in the *Germany v. Italy* case. Nevertheless, the agreement on this question was not necessary in order to finalize the text of the Declaration. The second issue was the so-called “without prejudice clause”. Some States wanted to introduce a clause saying that this declaration does

not affect a State's obligations under other treaties. Since it is a legally non-binding declaration, we managed to convince them that such clause was superfluous.

In our first draft, we had a more ambitious text, with a commitment to present the declaration to a competent court, or *amicus curiae* letter. In fact, the *amicus curiae* briefs have been recently used extensively by the Czech Ministry of Foreign Affairs. For some States, however, this was unacceptable because they have a strict view on the constitutional division of powers and judicial independence. For them, it was unimaginable for an executive branch of State to send a letter to a judge. Therefore, the initial proposal ("and will present our position, as outlined above") had to be dropped out.

IV. Summary of the key provisions of the Declaration:

In the preamble, I would like to point out the objective: "to promote the mobility of State-owned cultural property", as well as the statement: "the need to reaffirm the international legal framework applicable to State-owned cultural property on public display on the basis of the customary international law on State immunity, as codified in" the UN Convention.

Regarding the operative part, the first paragraph merged Article 21 paragraph (1) (d) and (e) of the UN Convention, which means that the Declaration applies not only to property of a State forming part of its cultural heritage or archives but also to property of a State forming part of an exhibition of scientific, cultural or historical interest. The second operative paragraph is about a possible waiver of immunity.

The final operative part contains an *opinio iuris*, a commitment of a signatory to the rules contained in the operative part and the UN Convention. This is the key part. On November 18, 2013, the Declaration was signed in Brussels by the Austrian and Czech foreign ministers. The two countries asked the Council of Europe Secretariat to perform the "depository role" for the Declaration (the CAHDI website provides updated information on the status of the Declaration, which is signed currently by 20 signatories).

Following the suggestion of the Russian Federation, in January 2017 the Declaration was circulated by the UN Secretariat under the UN General Assembly agenda item "Rule of Law", so the Declaration may serve as a reference to the rules of customary international law also for the UN members.

V. Relevance of the Declaration:

Finally, I kindly invite States that have not already done so to consider signing the Declaration or to reconsider their position, if they indicated that they do not intend to join. From States that refused to sign the Declaration, I received the following arguments. First, they have already detailed domestic legislation on this matter. I

completely understand this but then there is no legal reason to refuse signing the Declaration. Second, there are some States that have issues with the UN Convention itself. Finally, there are also States that have disputes about the ownership of certain cultural property that – as a result of historical events - ended up in a foreign museum. To these colleagues, I explained that the Declaration is a procedural tool only.

To conclude, I would like to sum up the way I see the relevance of the Declaration, although it might be too early to pronounce the final assessment of this initiative. In my view, the Declaration is a useful document for the following three reasons:

1. It makes the lending of State-owned cultural property less complicated in practice because there is no need to negotiate an *ad hoc* unilateral guarantee.
2. It strengthens the rules of international law on State immunity by confirming their customary law status.
3. It draws the attention of States to the UN Convention and, as such, may bring new State parties and its earlier entry into force. It is an incentive for them to look at it once again and possibly start the ratification process. This third point is the most important. The UN Convention was ratified by 21 States. If the UN Convention was in force, we would not need the Declaration. In conclusion, if the Declaration can contribute to the increase of the number of States parties to the UN Convention, it will serve the purpose.