States' obligations under public international law in relation to the immunity of State officials – the European Court of Human Rights' perspective

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Dear Alina, dear members of the CAHDI, colleagues and friends,

I must start my presentation with an important caveat. Cases in which issues related to immunity of State officials from criminal jurisdiction have been brought before the European Court of Human Rights ('ECtHR') are rare.

The bulk of ECtHR cases addressing immunity issues have been brought before the Court in the context of civil proceedings. Criminal proceedings have only rarely featured in the Court's case law on State immunity and even less so criminal proceedings against named State officials. In the case of *Naït-Liman v Switzerland*, the applicant had initially lodged a criminal complaint against the Tunisian Minister of the Interior alleging that he had been a victim of torture. These proceedings were however discontinued, and the Grand Chamber judgment eventually only dealt with the applicant's civil claim for compensation.[1] Criminal proceedings are, however, at the centre of the recent admissibility decision in the case of *Association des familles des victims du JOOLA v. France*.[2]

I shall come back to this case later in my intervention. Let me first briefly recall the main principles that can be deduced from the Court's case law regarding State immunity in general. I shall be brief, drawing on my presentation to the CAHDI seminar organised in 2017 under Czech chairmanship of the Committee of Ministers.[3] In a second step, I shall examine the Court's case-law on human rights exceptions to State immunity and in particular the immunity of State officials from criminal jurisdiction.

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* The views expressed in this intervention are those of the author and do not necessarily reflect the official position of the Council of Europe.

[1] *Naït-Liman v Switzerland [GC]*, no. 51357/07, judgment of 15 March 2018.

[2] *Association des familles des victims du JOOLA v. France* (dec.), no. 21119/19, 24 February 2022.

[3] State Immunity under International Law and Current Challenges (coe.int)

General principles on State immunity in the Court's case-law

It was only in November 2001 that the Court addressed issues of immunity for the first time comprehensively, delivering three Grand Chamber judgments in the cases of *Fogarty*,[4] *McElhinney*[5] and *Al-Adsani*.[6] The Court held that immunity as granted by the jurisdictions of Ireland and the United Kingdom was compatible with Article 6, paragraph 1 of the Convention. 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.[7] Put differently, the grant of immunity is to be seen not as qualifying a substantive right but as an impediment on the national courts' power to determine this right.[8] Furthermore, a foreign State may waive its right to immunity before the courts of another State by giving clear and unequivocal consent as was clarified by the ECtHR in a more recent case concerning an employment dispute.[9]

According to the Court, in cases where the application of the principle of State immunity from jurisdiction restricts the exercise of the right of access to a court, it must be ascertained whether the circumstances of the case justify such restriction.[10] The restriction must pursue a legitimate aim and be proportionate to that aim.[11] The Court has acknowledged, in the context of civil proceedings, that State immunity serves to promote comity and good relations between States through the respect of another State's sovereignty[12] and thus pursues a legitimate aim.

With regard to the proportionality of the limitation on the applicants' right of access to a court, the need to interpret the Convention as harmoniously as possible with the other rules of international law, of which it forms an integral part, including those governing State immunity, have led the Court to conclude that restrictions which reflect generally recognised principles of international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as guaranteed by Article 6,

[4] *Fogarty v. the United Kingdom* [GC], no. 37112/97, 21 November 2001.
[5] *McElhinney v. Ireland* [GC], no. 31253/96, 21 November 2001.
[6] *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, 21 November 2001.
[7] *McElhinney*, supra note 5, para. 37; *Fogarty*, supra note 4, para. 36; *Sabeh El Leil v. France* [GC], no. 34869/05, 29 June 2011, para. 49.
[8] *J.C. and Others v. Belgium*, no. 11625/17, 12 October 2021, para. 59: "La Cour rappelle que l'octroi de l'immunité ne doit pas être considéré comme un tempérament à un droit matériel, mais comme un obstacle procédural à la compétence des cours et tribunaux nationaux pour statuer sur ce droit."
[9] *Ndayegamiye-Mporamazina v. Switzerland*, no. 16874/12, 5 February 2019, paras 57, 59.
[10] *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98,12 July 2001, para. 74.
[11] *Cudak v. Lithuania* [GC], no. 15869/02, 23 March 2010, para. 59; *Sabeh El Leil*, supra note 7, paras 51-54.
[12] *Fogarty*, supra note 4, para 34, *Al-Adsani*, supra note 6, para. 54.

paragraph 1. The Court has further explained that, just as the right of access to a court is inherent in the guarantee of a fair trial granted by that article, certain restrictions on access, e.g., based on State immunity, must be regarded as inherent in it.[13] In all three above-mentioned Grand Chamber judgments and in many subsequent cases, the Court has accepted that the resulting restrictions to the right of access to a court were proportionate.

The Court emphasises the necessity for courts to engage in the proportionality test already at the domestic level. If national courts simply uphold immunity, without any analysis of the legal nature (e.g., whether 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.[14]

The Court's third potential criterion for finding a breach of Article 6, paragraph 1 of the Convention 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,[15] while in other cases it may not.[16] Some judges have criticised this approach as being "unorthodox and illogical."[17] It has been suggested that this test may not be appropriate in all 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."[18] Or, as Lord Bingham put it in *Jones v Saudi Arabia*, "I do not understand how a State can be said to deny access to court if it has no access to give."[19]

Immunity and human rights violations in general

For some decades already, the existence of so-called 'exceptions' to immunities for serious human rights violations, in particular those that constitute crimes under international law, has

[13] *Jones and Others v. the United Kingdom*, nos. 34356/06 and 40528/06, 14 January 2014, para. 189; in the same vein, see, inter alia, *McElhinney*, supra note 5, paras 36-37; *Al-Adsani*, supra note 6, paras 55-56; *Fogarty*, supra note 4, paras 35-36; *Kalogeropoulou and Others v. Greece and Germany* (dec.), no. 59021/00, 12 December 2002; *Cudak*, supra note 11, paras 56-57; *Sabeh El Leil*, supra note 7, paras 48-49.

[14] *Oleynikov v. Russia*, no. 36703/04, 14 March 2013, paras. 71-73.

[15] *Ashingdane v. the United Kingdom*, no. 8225/78, 28 May 1985, para. 57; *Cudak*, supra note 11, para. 74; *Sabeh El Leil*, supra note 7, para 49; *Naku v. Lithuania and Sweden*, no. 26126/07, 8 November 2016, para. 95. See also the Dissenting opinion of Judge Loucaides in *McElhinney*: "It is correct that Article 6 may be subject to inherent limitations, but these limitations should not affect the core of the right."

[16] *Al-Adsani*, supra note 6, para. 67; *Fogarty*, supra note 4, para. 39; *McElhinney*, supra note 5, para. 38; *J.C. and Others*, supra note 8, para. 75.

[17] See the concurring opinion of Judge Costa in the *Prince Hans-Adam II of Lichtenstein*, supra note 10.

[18] M. Kloth, *Immunities and the Right of Access to Court under Article 6 of the European Convention on Human Rights* (Nijhoff, Leiden 2010), p. 18.

[19] *Jones v Saudi Arabia* [2006] UKHL 26 (2007) 1 AC 270, 2006 2 WLR 1424, para. 64.

been the subject of judicial developments and a rich academic debate worldwide.[20] The issue surfaced also briefly 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.[21] One of the report's 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,[22] a topic that might well have been entrusted to the CAHDI had the Committee of Ministers 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 aspects of immunity. As I explained in my introduction, the Court developed its case-law essentially in respect to cases involving civil proceedings. There have been essentially two judgments, *Al-Adsani* and *Jones and Others* as well as one notable decision, *Stichting Mothers of Srebrenica*, that are relevant in this context. All of them were brought under Article 6, paragraph 1 of the Convention.

In *Stichting Mothers of Srebrenica* relatives of victims of the 1995 Srebrenica massacre (determined by the ICTY as genocide[23]) and an NGO representing victims' relatives, complained of the Netherlands court's decision to declare their case against the United Nations ('UN') inadmissible on the ground that the UN enjoyed immunity from national courts' jurisdiction. Extending the ICJ's reasoning in the *Jurisdictional Immunities* case, the Court found that a civil claim should not override immunity from jurisdiction for the sole reason that it was based on an allegation of a particularly grave violation of a norm of international law, even a peremptory one.[24] It held in particular that bringing military operations under Chapter VII of the Charter of the UN within the scope of national jurisdiction would mean

[20] See 2022 ILC report, UN doc A/77/10, draft articles on immunity of State officials from foreign criminal jurisdiction, commentary to draft article 7, paragraph 1, paras 9 et seq. with extensive references.
[21] 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.
[22] 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.
[23] ICTY, *Prosecutor v. Radislav Krstić* (IT-98-33-A), 19 April 2004.
[24] *Stichting Mothers of Srebrenica and Others v. the Netherlands* (dec.), no. 65542/12, 11 June 2013, para. 158.

allowing States to interfere with the key mission of the UN to secure international peace and security. The Court rejected the complaint of the individual applicants as manifestly ill-founded, as the granting of immunity to the UN served a legitimate purpose. The applicant NGO was not even accorded standing before the Court.

The two judgments in the cases of *Al-Adsani* and *Jones and Others* concerned civil liability cases for acts of torture allegedly inflicted by named State officials. The Court found that the immunity granted by the UK to Kuwait and Saudi Arabia respectively constituted a proportionate restriction on Article 6, paragraph 1 of the Convention. *Al-Adsani* and *Jones* have been criticised as being overcautious, failing to draw the consequences from the *ius cogens* character of the prohibition of torture as well as blindly following ICJ jurisprudence on State immunity although it was the immunity of officials that was at stake here.[25]

In general, immunity still seems to prevail over the right of victims to access to court, in particular when the alleged serious human rights violations or crimes have taken place outside the forum State. There is however growing support in recent national case-law for an exception with respect to civil claims involving serious violations of international law within the forum State's territory, in particular where no alternative judicial remedies exist for victims.[26] Most recent examples are judgments by the Supreme Court of Ukraine in April/May 2022.[27] This approach is in line with the so-called 'territorial tort exception' which can be found in both the UN and the Council of Europe immunity conventions,[28] even though neither convention mentions international crimes in this context and the Council of Europe convention is not even applicable to claims arising during armed conflicts.

[25] *Al-Adsani*, supra note 6, Joint Dissenting Opinion by Judges Rozakis and Caflish, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic. See, also, discussions of the criticism by T. Schilling 'The Case-Law of the European Court of Human Rights on the Immunity of States' in: A. Peters et al. (eds.) *Immunities in the Age of Global Constitutionalism* (Brill, 2014), p. 267, at 277; P. Webb 'A Moving Target. The Approach of the Strasbourg Court to Immunity' in: A. van Aaken/I. Motoc (eds.), *The European Convention on Human Rights and General International Law* (Oxford University Press, 2018), p. 253.

[26] V. Terzieva 'State Immunity and Victims' Access to Court, Reparation and the Truth' 22 International Criminal Law Review 780-804 (2022) citing cases from Brazil, Italy, Korea and Slovenia. See also High Court, *Al-Masarir v Saudi Arabia*, judgment of 19 August 2022 [2022] EWHC 2199 (QB) with an interesting discussion whether the use of the spy software Pegasus on an iPhone in the UK, operated from abroad, may be considered as an act within the UK.

[27] See I. Badanova 'Jurisdictional Immunities v Grave Crimes: Reflections on New Developments from Ukraine' EJIL:Talk! (8 September 2022).

[28] Article 12 of the UN Convention on Jurisdictional Immunities of States and Their Property and Article 11 of the European Convention on State Immunity (ETS No. 74).

Immunity of State officials from foreign criminal jurisdiction in particular

In the *Jurisdictional Immunities* case, the ICJ addressed only the immunity of the State itself from the jurisdiction of other States and explicitly "not the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State."[29]

Let me try to summarise the rather limited ECtHR case-law regarding immunities of State officials in criminal proceedings. As I already said, the ECtHR has so far not addressed the issue in greater detail, having had to deal almost exclusively with civil claims for compensation.

In the case of *Association des familles des victims du JOOLA*, the applicant association, whose members lost relatives or friends in the sinking of the Senegalese ferry Joola or victims who survived the accident, complained before the Court that they had been deprived of their access to a court on account of the jurisdictional immunity which led to the discontinuance of the proceedings initiated by their criminal complaints in France. The Court declared the application manifestly ill-founded holding that the members of the applicant association, acting as civil parties in the criminal proceedings against Senegalese State officials before French courts, had not been deprived of all access to justice since they had been able to seek compensation under the scheme for indemnifying the victims of crime. Consequently, the applicant association and the other civil parties had not found themselves in a situation where there was no remedy at all.[30]

The relevance of reasonable alternative means of redress is a regular feature of the Court's case-law. It was first used in respect of the immunity of international organisations, notably in *Waite and Kennedy* and *Beer and Regan.* In these cases, the Court balanced the denial of an access to court resulting from the granting of jurisdictional immunity against the availability of "reasonable alternative means to protect effectively [the applicants'] rights under the Convention."[31]

Rather surprisingly, the Court did not apply this test in the already mentioned case of *Stichting Mothers of Srebrenica and Others v. the Netherlands*. Before the Court, the applicants of the case had argued that there was an absence of an alternative remedy if the Dutch courts did not

[29] *Jurisdictional Immunities of the State (Germany v Italy - Greece Intervening*) (Judgment), International Court of Justice, 3 February 2012, I.C.J. Reports 2012, para. 91.
[30] *Association des familles des victimes du JOOLA*, supra note 2, para. 32.
[31] *Waite and Kennedy v. Germany* [GC], no. 26083/94, 18 February 1999, para 68.

set aside the UN's immunity. The agreement on the status of the United Nations Protection Force in Bosnia and Herzegovina of 1993 mandated a claims commission to be set up, but this had never happened.[32] The applicants argued that domestic proceedings in the Netherlands thus represented their only opportunity for redress. The Court turned a blind eye to this argument by distinguishing the case from its earlier jurisprudence related to employment disputes at international organisations,[33] holding that the relevant judgments could not be interpreted in such absolute terms. The Court observed that the recognition of immunity, in the absence of an alternative remedy, did not *ipso facto* lead to a violation of the right of access to a court and that hence the void left by the UN's failure to set up a dispute-settlement system for such cases did not oblige the national courts to step in.[34] In the case of *Jurisdictional Immunities* the ICJ had indeed firmly rejected conditioning entitlement to State immunity on the availability of an effective alternative remedy holding that there was no evidence that entitlement to immunity would be subject to such a precondition.[35] Both *Stichting Mothers of Srebrenica* and the ICJ *Jurisdictional Immunities* case concerned however civil proceedings.

In a quite recent case on immunity of the Holy See, *J.C. and Others v. Belgium*, 24 applicants had sought compensation before Belgian courts for damage caused by the structurally deficient manner in which State authorities, including those of the Holy See, had dealt with the problem of sexual abuse in the Church. While accepting the domestic courts finding that it had no jurisdiction in respect of the Holy See on account of its sovereign immunity, the Court noted that given the seriousness of the interests at stake for the applicants as victims of sexual abuse, the existence of an alternative means of redress would have at least been desirable.[36]

It is probably too early to draw any firm conclusions about a trend from these cases, which, with the exception of the admissibility decision in *Association des familles des victims du JOOLA*, did not concern the exercise of criminal jurisdiction against foreign State officials. Civil and criminal proceedings have in common that public international law rules on State immunity operate as an obstacle for the exercise of jurisdiction. This is probably the reason why the ECtHR judges immunity cases primarily through the lens of Article 6, paragraph 1 – the right of access to a court. However, applying a more or less identical test to proceedings

[32] In fact, no UN peacekeeping mission has ever established a claims commission even though this is a standard provision in peacekeeping agreements.
[33] *Waite and Kennedy*, supra n. 31; *Beer and Regan v. Germany* [GC], no. 28934/95, 18 February 1999.
[34] *Stichting Mothers of Srebrenica and Others*, supra n. 24, paras 164-165.
[35] *Jurisdictional Immunities*, supra n. 29, para. 101. See also *Ndayegamiye-Mporamazina*, supra note 9, para. 64.
[36] *J.C. and Others*, supra note 8, para. 71.

that differ by nature, purpose and scope is not without risk.[37] In criminal proceedings it is not only access to court that is at stake from a human rights perspective. The rights of victims, the fight against impunity and more generally the very idea of justice are rather weighty reasons that in such cases may tilt the balance against immunity.

Exercise of universal jurisdiction

Questions of State immunity are closely linked to the exercise of universal jurisdiction. Many countries worldwide exercise criminal jurisdiction over foreign State officials when it comes to crimes such as genocide, crimes against humanity, war crimes, the crime of apartheid, torture, or enforced disappearances. In its latest 2022 report, the ILC confirmed that those crimes would not be covered by immunity *ratione materiae* from foreign jurisdiction.[38] We shall hear more about this important development by the ILC's special rapporteur Ms. Concepción Escobar Hernández.

The ECtHR has so far only dealt with the issue of universal civil jurisdiction, in particular in the case of *Naït-Liman v Switzerland*,[39] which concerned the refusal by Swiss courts to examine a civil claim for compensation for the non-pecuniary damage arising from acts of torture allegedly inflicted on the applicant in Tunisia. In this Grand Chamber judgment, the Court confirmed and highlighted the right for victims of acts of torture to obtain appropriate and effective redress. While acknowledging that States are encouraged to give effect to this right by endowing their courts with jurisdiction to examine claims for compensation, including where they are based on facts which occurred outside their geographical frontiers, it eventually accepted that Swiss courts had acted within their margin of appreciation when they denied jurisdiction in this particular case. The Court did not examine the immunity of the respondents, following the ICJ's approach in the *Arrest Warrant* case that "as a matter of logic", "it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard of the exercise of that jurisdiction."[40]

This judgment very well illustrates the deference to international law which characterises the Court's general approach to State immunity questions. After having found no violation, the Court recalled at the very end of its judgment that States are under the duty to follow the

[37] Webb supra note 25, pp. 256, 262,
[38] Article 7 of the draft articles on immunity of State officials from foreign criminal jurisdiction, supra note 20.
[39] *Naït-Liman v Switzerland* [GC], no 51357/07, supra note 1.
[40] Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), judgment of 14 February 2002, para. 46.

potential developments in this dynamic area of law and update their laws and practices accordingly.[41] Under the heading "Positivism as a dark side of international law", Judge Dedov encapsulated the resulting dilemma in his dissenting opinion: "I cannot find any morality and justice in international law which, on one hand, allows tyrants and dictators to enjoy one of the best banking and medical care systems in the world and, on the other hand, refuses access to the courts for their victims."[42]

Concluding remarks

While being rather limited on the specific point of immunity of State officials from foreign criminal jurisdiction, I do think the jurisprudence of the Court offers ample material from which we can draw useful guidance for the purposes of our Seminar.

It seems fair to conclude that the Court has so far in its case-law consistently accepted the guiding role of international law when it comes to the definition and limits of State immunity, acting in accordance with its self-declared aim to interpret the Convention in harmony with rules of international law. In essence, the Court adopts the position that any immunity granted is necessarily incompatible with Article 6 ECHR if and to the extent that it goes beyond what is afforded in accordance with customary international law.

When it comes to considering exceptions to State immunity, the Court has been neither a 'forerunner'[43] nor a 'moderniser'[44] of international law. The Court consistently looks for consensus of the international community which it finds in State practice, ICJ and domestic judgments, occasionally also in the UN and Council of Europe conventions on jurisdictional immunities.[45] This is a powerful example of the 'generating effect of treaties'. The mere fact that States do not visibly object to rules contained in a major codification treaty is taken as evidence of custom that universalises the rules contained therein.

[41] Ibid. para 220: "Nonetheless, given the dynamic nature of this area, the Court does not rule out the possibility of developments in the future. Accordingly, and although it concludes that there has been no violation of Article 6 § 1 in the present case, the Court invites the States Parties to the Convention to take account in their legal orders of any developments facilitating effective implementation of the right to compensation for acts of torture, while assessing carefully any claim of this nature so as to identify, where appropriate, the elements which would oblige their courts to assume jurisdiction to examine it."
[42] Dissenting opinion *Naït-Liman v Switzerland*, supra note 1, pp. 73-74.
[43] Concurring opinion of Judge Pellonpää joined by Judge Bratza *Al-Adsani*, supra note 6, p. 27.
[44] See C. Maierhöfer 'Der EGMR als „Modernisierer" des Völkerrechts' 29 EuGRZ (2002), p. 391.
[45] See for example *J.C. and Others*, supra note 8, para. 68.

Deference to public international law is certainly to be welcomed, not only in terms of legal certainty, but also with a view to avoiding fragmentation. As Judge Pellonpää so pertinently observed in *Al-Adsani*, "[i]nternational cooperation, including cooperation with a view to eradicating the vice of torture, presupposes the continuing existence of certain elements of a basic framework for the conduct of international relations. Principles concerning State immunity belong to that regulatory framework."[46] In some cases, however, the Court's deference went so far that it exposed itself to the criticism to have missed opportunities to contribute to the development of the rules of State immunity, not in a revolutionary, but rather in an incremental, narrow, case-specific manner.[47]

Indeed, the Court cannot – or should not – give priority to State immunity in an absolute, blanket ban manner, i.e., without looking at the particular circumstances of each case, e.g., as to proportionality or type of alternative remedies at hand. The Court must not lose sight of its ultimate task of monitoring that the High Contracting Parties secure the rights and freedoms enshrined in the Convention to everyone within their jurisdiction.

Thank you for your attention.

[46] Concurring opinion of Judge Pellonpää joined by Judge Bratza *Al-Adsani*, supra note 6, p. 27.
[47] Webb, supra note 25, p. 256; D. Rietiker 'The Case of Naït-Liman v. Switzerland Before the European Court of Human Rights: Where Are the Limits of the Global Fight Against Torture?' Harvard International Law Journal filed under: content, online scholarship, perspectives (2019/03).