

# Oxford Public International Law



## State Immunity

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## A. Introduction

**1** State immunity protects a State and its property from the jurisdiction of the courts of another State. It covers administrative, civil, and criminal proceedings (jurisdictional immunity), as well as enforcement measures (enforcement immunity). It reflects the sovereign equality of States as a main pillar of the contemporary international legal order. State immunity is closely related to but distinct from diplomatic immunity and the immunity of heads of States as well as the immunity of international organizations (→ *Immunity, Diplomatic*; → *International Organizations or Institutions, Immunities before National Courts*; → *International Organizations or Institutions, Privileges and Immunities*).

**2** State immunity originated in and is still based on → *customary international law*. Since 2004, a comprehensive international instrument, the → *United Nations Convention on Jurisdictional Immunities of States and Their Property (2004)* ('UNCSI') addresses the issue; however, it has not yet entered into force.

**3** The development of the law of State immunity has importantly dealt with restrictions. Earlier, restrictions were sought and provided for in view of the ever-increasing commercial activities of States. Recently, restrictions have been discussed in view of cases of a violation of human rights or → *ius cogens*.

## B. History and Development

**4** State immunity evolved in close connection to the development of the concept of → *sovereignty* and the territorial State. It can be traced back to the principle of *par in parem non habet imperium* which was mentioned as early as 1354 by Bartolus de Saxoferrato in his *Tractatus de regimine civitatis*. It stipulates that a sovereign should not have jurisdiction over another sovereign.

**5** With the end of the era of absolutism, the State emerged as an entity distinct from the ruler. State immunity evolved at this point as a separate concept, next to the immunity of the head of State and diplomatic immunity. Obviously its roots go back to the older *par in parem* principle. Furthermore, it has probably been influenced by a doctrine concerning the immunity of the sovereign in domestic courts, which evolved at that time.

**6** When States became increasingly engaged in commerce, it was felt there was a need to secure their accountability in business transactions and thus to limit their immunity. At the end of the 19th century, some courts began to restrict immunity to acts *iure imperii* and to deny it in case of acts *iure gestionis*. Later on, this aspect has been expressly ruled upon by legislation pioneered by the UK and the US (→ *United States Foreign Sovereign Immunities Act [1976]*).

**7** Immunity and its limitations also became the subject of growing international treaty law. The → *Peace Treaties after World War I*, for instance, denied the defeated States immunity when engaging in trade (Art. 281 *Versailles Peace Treaty [1919]*). In a different way, the 1926 Brussels Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels ('Brussels Convention') must be mentioned; it became the forerunner of a number of provisions on immunity in the area of the law of the sea.

**8** The issue has been the subject of academic debate and international discussions for some time. The Institute of International Law Plenary Assembly addressed the issue in 1891 and again in 1954. Further initiatives were undertaken by Harvard University in 1932, by

the → *International Law Association (ILA)* in 1952, and by the → *International Bar Association (IBA)* in July 1960.

**9** Under the auspices of the Council of Europe, the → *European Convention on State Immunity (1972)* was concluded; it entered into force in 1976 and now has eight members. An Additional Protocol was added which primarily establishes a 'European Tribunal in Matters of State Immunity' and which, to date, has six contracting parties.

**10** On the invitation of the UN General Assembly, the → *International Law Commission (ILC)* included the issue in its work programme in 1978 and issued Draft Articles on Jurisdictional Immunities of States and their Property and Commentaries thereto ('ILC Draft Articles'; 'ILC Commentaries').

**11** It took 13 more years of discussions in the UN General Assembly's Sixth Committee and in an Ad Hoc Committee however, until the General Assembly finally adopted the UNCSI with Resolution A 59/38 of 2 December 2004. It has been signed by 28 States and, according to its Art. 30, will enter into force after the 30th instrument of ratification, acceptance, approval, or accession has been deposited.

**12** While the UNCSI is still awaiting the number of ratifications or approvals required for its entry into force, it is already widely acknowledged as an accurate, extensive, learned, and systematic reflection of this field of the law, and is widely used as a basis for legal practice and scholarly reflection.

### **C. Notion**

**13** State immunity is the immunity that a State enjoys in respect of itself (jurisdictional immunity) and its property (enforcement immunity) from the jurisdiction of the courts of another State (Art. 5 UNCSI). It is an immunity *ratione personae*, which is related to the status of a State as an international legal personality. State immunity is closely related to but distinct from diplomatic immunity and the immunity of heads of States. These latter two provide for immunity *ratione materiae*, eg in a functional context. It is understood that diplomatic immunity will prevail over State immunity, as *lex specialis*, if both are applicable. Of course, State immunity differs from the immunity of international organizations.

**14** State immunity is closely related to national law. In many civil law jurisdictions, State immunity is considered a matter of forum and jurisdiction. In common law, the concept of domestic immunity of the sovereign seems to have been quite influential, resulting in some sort of a substantial or material kind of doctrine, such as → *comity* and the → *act of State doctrine*. However, these different structures at the national level have to be clearly distinguished from State immunity as a rule of international law.

**15** These national law structures may and should reflect the international law obligations of a State to give effect to State immunity as requested by Art. 6 UNCSI. The provision also requires that a State 'shall ensure that its courts determine on their own initiative that the immunity of [another] State ... is respected'.

**16** The international law on State immunity, to some extent, addresses national law and, more specifically, national procedural law by requiring certain standards of treatment in view of States participating in national court proceedings.

**17** Aside from the more general framework of the UNCSI and related customary law, State immunity is specifically addressed in a number of treaties. As regards the law of the sea, a number of such treaty provisions exist. In a similar way, State immunity is addressed in view of aircraft and space objects (ILC Commentaries 53 et seq). Furthermore, State immunity is typically ruled upon in headquarters agreements, in seat agreements, and in investment law.

**18** State immunity is not subject to → *reciprocity*. It may, however, be denied as a matter of reprisal (→ *Reprisals*). On the other hand, an unjustified denial of State immunity may result in → *State responsibility*. This is the subject of a case currently pending before the ICJ (*Jurisdictional Immunities of the State [Germany v Italy] [Application]* [23 December 2008]).

## **D. Jurisdictional Immunity**

### **1. 'States' as Beneficiaries of Immunity**

**19** State immunity has to be accorded to any sovereign State. The law of State immunity in this regard relies on the definition of a State according to general rules of international law. Thus, the earlier practice of denying immunity to States not recognized by the foreign State lacks any legal basis in contemporary international law, as sovereignty no longer depends on → *recognition*. Likewise, → *non-recognition* of a government does not constitute a basis for denial of immunity.

**20** A number of specific issues arise in view of the question of whether certain sub-structures or agencies, or even representatives of a State, are also protected. The law of State immunity is quite encompassing at this point. Roughly, State immunity protects the State as an international legal personality as well as its organs, components, entities, and representatives. The UNCSI can be considered to properly reflect the state of customary international law in its Art. 2 (1) (b). It states that the notion of a 'State' includes various organs of government as well as constituent units of a federal state or political subdivisions of the State. Furthermore, other entities and State agencies are included as far as they are entitled to and do perform acts in the exercise of sovereign authority. If they act in such a capacity, this notion of a State also covers its representatives. Immunity also applies in proceedings where a State is not named as a party but where the proceeding 'in effect seeks to affect the property, rights, interests or activities of that other State' (Art. 6 (2) (b) UNCSI).

**21** It is worth mentioning that this notion of the State will also cover heads of States, which can be either considered to be organs of a government or State representatives. Furthermore, according to what has just been stated, heads of States will also enjoy the protection of State immunity in cases brought against them, insofar as the claims aim at the State itself. It should be highlighted that this adds a second level of immunity to → *heads of States*, who already enjoy immunity as heads of States proper in the sense of an immunity *ratione materiae*.

### **2. The Scope of State Immunity**

**22** State immunity entails that a State itself or its property is not subjected to the proceedings of the court of another State. It does foreclose any proceedings or judgment on the merits, but does not hinder the service of process and a court decision about the admissibility. Likewise, it protects the property of a State against any measure taken in relation to the proceedings.

**23** The foreign State is under a duty to give effect to State immunity. In this regard, such a State has an obligation to ensure that its courts determine that the immunity of another State is respected on their own initiative (Art. 6 UNCSI).

### **3. Immunity and Consent**

**24** A State may waive its immunity or consent to the exercise of jurisdiction (→ *Waiver*). It is required that the State does so explicitly. Art. 7 UNCSI addresses this issue in detail. Furthermore, a State cannot invoke immunity in a case where it itself instituted the proceedings, intervened in such proceedings, or has taken any other step relating to the merits (Art. 8 UNCSI). Also, a State cannot invoke immunity where it instituted a proceeding before a court of another State and a counterclaim is lodged which arises out of the same legal relationship or facts (Art. 9 UNCSI).

### **4. Exceptions from Immunity**

**25** As has been seen, the coverage of State immunity has been restricted as a result of legal developments which were initiated and promoted by national legislation, as well as by international case-law and academia. These restrictions pertain to the subject matter of proceedings and most notably resulted in a restriction of State immunity to proceedings relating to *actae iure imperii*, while proceedings related to *actae iure gestionis* are no longer covered by State immunity.

**26** Largely drawing upon customary law and case-law, the UNCSI, in this regard, addresses the issue of commercial transactions and a number of other more specific legal issues, where immunity cannot be invoked. In essence, the restricted approach to immunity implies that immunity cannot be invoked where a State engages in commercial activities. While the principle has been very much agreed upon, the details and particularly the definition of such commercial transactions have been the subject of much uncertainty.

#### **(a) Commercial Transactions**

**27** The definition of commercial transactions of a State refers to a number of contracts and transactions which are considered commercial, including the sale of goods and the supply of services. Furthermore, financial transactions, such as loans, obligations of guarantee, or obligations of indemnity, are considered commercial transactions. For example, Art. 2 (1) (c) (iii) UNCSI, providing its definition of commercial transactions, also mentions any 'other contract or transaction of a commercial, industrial trading or professional nature'. It has been rightly stated that this definition to some extent has a circular character as far as it uses the term 'commercial'. However, the convention thus follows the prevailing approach of defining commercial transactions by reference to the nature and type of the transaction.

**28** There has also been a tendency to take into consideration the purpose of transactions as well. It has been emphasized that, today, States often use means of commercial transactions to achieve public goals. The purpose of a transaction can be taken into account where the parties to the transaction so agreed or where in practice the purpose is relevant for determining the non-commercial character of a transaction in the foreign State.

**29** Concerning the activities of State enterprises, the immunity of a State is not affected. According to this rule, any proceedings arising out of a commercial transaction of a State enterprise, or any other entity established by a State, do not have an effect on the State's immunity. This applies to a State enterprise which holds an independent legal personality, which is capable of suing or being sued, and which is capable of any transaction in property,

including property which the State at hand has authorized the State enterprise to operate or manage.

**30** In effect, according to the provision, a State remains immune in cases where proceedings are instituted against its enterprise. Therefore, in general, proceedings against a State enterprise do not affect the respective State. It should, however, be added that the potential for abuse in this kind of rule has been expressed in an understanding in the Annex to the UNCSI, which clarifies that this rule does not prejudge the question of 'piercing the corporate veil'.

### **(b) Employment Contracts**

**31** Another specific restriction on State immunity relates to contracts of employment; for contracts on work performed or to be performed, in whole or in part in another State. Such contracts are not considered commercial transactions.

**32** The reason to restrict immunity results from the legitimate interest of the forum State to see its laws and public policies respected, as far as they relate to labour relations. This interest has to be balanced against the legitimate interest of the employer State concerning the management and treatment of its employees.

**33** Generally speaking, immunity prevails when the employee is recruited to perform functions exercising government authority. This applies if he or she is a diplomatic agent, consular officer, a member of a permanent mission to an international organization or of a special mission, or represents a State at an international conference. Immunity also applies if the employee enjoys diplomatic immunity through his function in the work for the employer State.

**34** Aside from upholding immunity for proceedings relating to these groups of employees, immunity prevails in view of certain subject matters. Art. 11 UNCSI provides some detailed rules on this. Immunity is maintained in proceedings relating to the recruitment, renewal of employment, or reinstatement of an individual, and in proceedings concerning the dismissal or termination of employment of an individual, if such a proceeding would interfere with the security interests of that State, which has to be determined by the head of State, the head of government, or the minister for foreign affairs of the employer State.

**35** Another issue relates to the nationality of the employee and his status of residence in the forum State. In contrast to earlier proposals to apply the restrictions to immunity only in view of nationals of the forum State or its permanent residents, the UNCSI now envisages a different approach. According to Art. 11 (2) (e) UNCSI, immunity will only be maintained if the employee is a national of the employer State and is not a permanent resident in the forum State.

**36** These rules are subject to provisions concerning other agreements that may be concluded between the respective States. This would most likely be headquarters agreements or seat agreements. Furthermore, explicit agreements between the employer State and the employee might deviate from these provisions.

### **(c) Pecuniary Compensation for Personal Injuries or Damage to Property**

**37** Under Art. 12 UNCSI, immunity is also excluded in proceedings concerning pecuniary compensation for the death or injury of a person and for damage or loss of tangible property, where the act or omission causing such injuries can be attributed to the State at

hand and took place ‘in whole or in part in the territory of’ the forum State. This provision covers State conduct *iure imperii* as well as *iure gestionis*.

**38** In a way, this restriction of immunity mirrors the *locus delicti commissi* rule. It secures that the injured person can undertake proceedings in the forum at hand. One area of application will be traffic accidents, and it has been understood that insurance will be available in most cases (ILC Commentaries 45 at para. 4).

**39** Due to its rather broad wording, the exemption will also cover ‘intentional physical harm such as assault and battery, malicious damage to property, arson or even homicide, including political assassination’ (ILC Commentaries 45 at para. 4).

**40** As the provision is confined to damages caused by State conduct which took place at least partly within the territory of the forum State, it may not cover cases where proceedings are brought against individuals responsible for human rights violations in the forum of another State. Thus, the provision cannot be readily applied in the kind of procedural setting as envisaged by the → *United States Alien Tort Statute*. Further, it would not cover a case such as *Al-Adsani v United Kingdom* before the → *European Court of Human Rights (ECtHR)* (G Hafner and U Köhler ‘The United Nations Convention on Jurisdictional Immunities of States and their Property’ [2004] 35 *Netherlands Yearbook of International Law* 3-49, at 32).

#### **(d) Real Estate and Intellectual Property**

**41** Furthermore, States cannot invoke immunity in proceedings concerning its rights and obligation in real estate or property situated in the forum State, or its own or third party intellectual property rights as existing in such a forum State. These restrictions to immunity, which are provided for by Arts 12 and 13 UNCSI, are based on the understanding that a State cannot rely on immunity where it deliberately undertakes transactions in a third State and thereby participates in the legal order of such a State.

#### **(e) Participation in Foreign Companies or Other Collective Bodies**

**42** In a similar way, Art. 15 UNCSI excludes immunity in cases where a State participates in a foreign company or other collective body. A State may not invoke immunity before a court of the State where such a company or other collective body is incorporated or constituted under the law of the State of the forum, or has its seat or principal place of business in such a State (Art. 15 (1) (b)).

#### **(f) State-Owned or State-Operated Ships**

**43** Tendencies to restrict State immunity have matured particularly early in the area of the immunity of State-owned ships. While earlier, immunity was granted to ships owned by a State and thus on the basis of ownership, the 1926 Brussels Convention had focused on the kind of use made of a ship and awarded immunity in case that such a ship is ‘employed exclusively ... on government and non-commercial service’ (at Art. 3 (1)). The 1958 Geneva Convention on the High Seas ([done 29 April 1958, entered into force 30 September 1962] 450 UNTS 82) and particularly the United Nations Convention on the Law of the Sea (‘UNCLOS’ [done 10 December 1982, entered into force 16 November 1994] 1833 UNTS 397) endorsed this approach. The latter convention provides, inter alia, for the immunity of warships and of ships owned or operated by a State and used only on government non-commercial service on the high seas (Arts 95 and 96 UNCLOS) and in view of the provisions of the convention regarding the protection and preservation of the marine environment (Art. 236 UNCLOS). Also, Art. XI Convention on Civil Liability for Oil Pollution Damage

([done 29 November 1969, entered into force 19 June 1975] 973 UNTS 3) may be mentioned.

**44** Drawing from those developments, Art. 16 UNCSI comprehensively addresses the issue. Art. 16 (1) UNCSI stipulates that no immunity can be invoked in view of a ship owned or operated by a State, unless such a ship was used other than for government non-commercial purposes at the time the cause of action arose.

**45** Art. 16 UNCSI (2) excludes from that rule ‘warships, or naval auxiliaries’ or ‘vessels owned or operated by a State and used, for the time being, only on government non-commercial service’ and thus clarifies that immunity applies in those cases. Arts 16 (3) and (4) UNCSI contain a similar rule in view of the cargo carried. Lastly, Art. 16 (6) UNCSI determines that

a certificate signed by a diplomatic representative or other competent authority of that State and communicated to the court shall serve as evidence of the character of that ship or cargo.

**46** While Art. 16 UNCSI contains a lengthy provision on State-owned ships or ships operated by States, military aircraft, and space objects are not addressed. Instead, Art. 3 (3) UNCSI simply refers to the relevant international agreements.

### **(g) Arbitration Agreements**

**47** Furthermore, according to Art. 17 UNCSI, a State cannot invoke immunity in proceedings in the courts resulting from a commercial arbitration. The restriction to immunity in this case is based on the commercial nature of the underlying transaction, and additionally on the idea that the State at hand deliberately agreed to arbitration.

**48** Commercial arbitration and the resulting awards are subject to some ‘supervisory jurisdiction under the internal law of the State of forum’ (ILC Commentaries 54 para. 2). Thus, Art. 17 UNCSI refers to:

(a) the validity, interpretation or application of the arbitration agreement; (b) the arbitration procedure; or (c) the confirmation or the setting aside of the award.

It should be noted that such supervisory authority of the court may be restricted, as is the case according to Arts 53 and 54 Convention on the Settlement of Investment Disputes between States and Nationals of Other States ([opened for signature 18 March 1965, entered into force 14 October 1966] 575 UNTS 159).

## **E. Enforcement Immunity**

### **1. Development and Notion**

**49** State immunity also protects the property of a State against enforcement measures of a foreign State. Such enforcement immunity is closely related to jurisdictional immunity. As part of the larger concept of State immunity, enforcement immunity is based on the same doctrinal structures and sources as jurisdictional immunity. It is thus rooted in customary law. Some treaty provisions specifically deal with the enforcement aspect of immunity. It is also addressed by Arts 18-21 UNCSI.

**50** In the past, enforcement immunity was sometimes considered to form part of jurisdictional immunity. Today, there is no doubt that enforcement immunity is a distinct



feature of State immunity. The significance of enforcement immunity was hardly apparent at a time when jurisdictional immunity was seen as an absolute one.

**51** However, when the aforementioned restrictions to jurisdictional immunity in view of commercial transactions took shape, the enforcement dimension of immunity became a matter of critical importance. While these changes made it possible to litigate against a State, the enforcement of an eventual judgment often turned out to be impossible, as enforcement immunity did not undergo changes in the same way. Therefore, enforcement immunity has been sometimes characterized as 'the last bastion of State immunity' (ILC Commentaries 56). However, some inroads have recently been made to the previously near total coverage of enforcement immunity in the context of the elaboration of UNCSI.

## **2. State Property and Measures of Constraint**

**52** Enforcement immunity protects the property of a State in a broad sense. It covers all sorts of assets including immovables, land, premises, movable property, and all sorts of rights including intellectual property rights and bank accounts. It is required, that such property is owned by a State. The protection afforded to such State property in the context of enforcement immunity is quite comprehensive. It covers any measures of constraint, including attachment, arrest, and execution.

**53** Recently, Art. 19 UNCSI has introduced a distinction in view of the stage of proceedings. In contrast to the ILC Draft Articles, the UNCSI contains different provisions for 'pre-judgment measures of constraint' (Art. 18 UNCSI) and 'post-judgment measures of constraint' (Art. 19 UNCSI). While both provisions include attachment and arrest, for obvious reasons, the latter provision also includes 'execution'. The distinction has been introduced in discussions in the Sixth Committee of the General Assembly in the context of a two-tiered regime of restrictions. That regime envisages that no limitations apply to enforcement immunity at pre-judgment stage without the consent of the State party concerned, whereas Art. 19 UNCSI provides for an additional exemption in the post-judgment stage in view of 'property ... specifically in use or intended for use by the State for other than government non-commercial purposes'.

## **3. Restriction of Immunity by Consent**

**54** A State can waive its immunity right to protection of its property in the same way as is true for jurisdictional immunity. As Arts 18 (a) and 19 (a) UNCSI properly reflect, this can be done by international agreement; by arbitration agreement; in a written contract; by declaration before the court; or by written communication after the dispute has arisen.

**55** It has to be highlighted that this consent to measures of constraint cannot be derived by way of implication from the consent of a State regarding jurisdiction. Jurisdictional immunity and enforcement immunity are separate. Therefore, separate waivers are required. In this vein, Art. 20 UNCSI clearly states that a waiver granted in view of jurisdictional immunity does not encompass consent by the State at hand in view of enforcement measures.

**56** In a similar way, UK and US law require an express consent in order for enforcement measures to take place. The same obviously holds true for French law, with one notable exception: in *Creighton Ltd v Qatar* the *Court de cassation* found that the undertaking of the State of Qatar, which according to the International Chamber of Commerce Rules of Arbitration included the obligation 'to carry out any award without delay and shall be

deemed to have waived their right to any form of recourse insofar as such waiver could validly be made', can be read as a consent to execution.

57 Furthermore and more specifically, consent of a State to measures of constraint can also be afforded by way of allocation or earmarking of property for the satisfaction of a claim (Arts 18 (b) and 19 (b) UNCSI)

#### **4. Exceptions: Property for Other than Government Non-Commercial Purposes**

58 The general tendency to deny State immunity in areas of commercial activities, which have driven the major changes to jurisdictional immunity, has also had an impact on enforcement immunity. However, the distinction between *actae iure imperii* and *actae iure gestionis* could not be readily applied in the case of enforcement immunity where a State asset is at stake.

59 Instead, the idea of limiting State immunity is taken care of by reference to the purpose that the asset in question is to serve. This restricted approach is applied in the ILC Draft Articles and the UNCSI, as well as in national legislation on the issue. Cautiously, the convention speaks of property for 'other than government non-commercial purposes' (Art. 19 (c) UNCSI; similarly: Art. 18 (1) (c) ILC Draft Articles).

#### **5. Assets 'Serving Other than Non-Commercial Purposes'**

60 As is true for immunity from jurisdiction, it is difficult to determine the limits of immunity if a more restricted approach is chosen. The difficulties begin with the proper definition. While the term 'commercial' seems to be somewhat clear, the opposite seems to be difficult to define. Thus, the UNCSI addresses property 'specifically in use or intended for use by the State for other than government non-commercial purposes' (Art. 19 (c) UNCSI). A number of categories come into play at this point.

##### **(a) Premises and Means of Transport Used for Diplomatic and Consular Purposes**

61 First and foremost, any embassy premises, which serve diplomatic or consular purposes are exempt from enforcement action. They are protected under international law, particular under the → *Vienna Convention on Diplomatic Relations (1961)* ('VCDR') and the → *Vienna Convention on Consular Relations (1963)* ('VCCR'). Art. 22 (3) VCDR expressly states that:

[T]he premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

According to Art. 1 (i) VCDR, these premises include

the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission.

##### **(b) Embassy Accounts**

62 As a matter of *ne impediatur legatio*, accounts of diplomatic missions or consular posts enjoy immunity in view of the public purposes they serve. However, it has been the subject of considerable discussion as to whether limitations should be made in regard to possible

commercial purposes of accounts or particular funds—a situation which has often been referred to as ‘mixed accounts’.

**63** Unlike the aforementioned premises and means of transportation, bank accounts that are held in the name of missions or posts are not readily addressed by the specific instruments on diplomatic or consular relations. Art. 22 (3) VCDR stipulates that:

[T]he premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

Bank accounts can hardly be considered to represent ‘property’ on the ‘premises of the mission’. Also, Art. 30 (2) VCDR is of little help. It provides for protection of property without any limitation regarding its location, but is confined to the property of the diplomatic agent himself. Likewise, the 1963 VCCR is inconclusive. Art. 31 (4) VCCR states that ‘the property of the consular post ... shall be immune for purposes of national defence or public utility’ only.

**64** In this situation, a number of national courts have taken a restrictive approach in view of the immunity of such accounts and funds. They have required precise information as to the designated purpose of bank accounts and, even more specifically, of particular funds.

**65** However, many courts now seem to follow a more generous line. The fact that an account is held in the name of the embassy, the post, or a diplomatic note confirms its dedication to sovereign purpose, is deemed to constitute a rebuttable presumption for its non-commercial character. A request for more detailed information regarding particular funds is considered an undue interference with the sovereign functions and purposes of such account transactions. An early landmark case in this regard was the 1977 *Philippine Embassy Bank Account Case* of the German Federal Constitutional Court. In *Alcom Ltd v Republic of Colombia* (1984), the United Kingdom House of Lords took a similar view. The same holds true for the 1986 decision of the Dutch Council of State in *MK v State Secretary for Justice* and the Brussels *Cour d’Appel* in *Leica AG v Central Bank of Iraq et Etat irakien* (2000).

**66** Art. 21 (1) (a) UNCSI, which in effect secures the immunity of State property used or intended for diplomatic or consular functions, explicitly includes ‘bank accounts’ and thereby covers what is missing in the two Vienna Conventions.

### **(c) Central Bank Accounts**

**67** Less controversial is the immunity of accounts of central banks. In view of the fact that these institutions enjoy immunity generally, the protection of their accounts has scarcely been put into question. Legislation on the matter, such as the UK and US foreign sovereign immunity acts, expressly provide for immunity. Likewise, Art. 21 (1) (c) UNCSI expressly mentions the ‘property of the central bank and other monetary authority of the state’. The addition of ‘other monetary authority’ makes the statement even stronger. As a result, the protection of the property of central banks from execution appears to be stronger than that afforded to other entities. This is particularly true when also taking into account that the issue of a limitation of immunity in view of commercial funds and activities has hardly been raised. It is noteworthy in this regard that a suggestion of the Special Rapporteur to add the words ‘and used for monetary purposes’ to ‘property of the central bank and other

monetary authority of the state' was not incorporated in the final text, due to a lack of consensus.

**(d) Entities for Cultural Exchange and the Dissemination of Information**

**68** Immunity from enforcement has also been applied to institutes or entities serving cultural purposes. Thus, the Swiss Federal Court denied execution by way of seizure of the premises of the Spanish Institute as it was considered to serve the exercise of sovereign powers (*Espagne v X SA*). Likewise, the Areopag has resisted enforcement measures against the Institute in Athens by virtue of its assent requirement in the *Distomo* case. The same has been held for information offices (see *République Arabe d'Égypte v Cinetel* at 435).

**(e) Property Items Forming Part of Cultural Heritage of a State**

**69** Most States in the world consider cultural objects which can be said to be part of their cultural heritage as subject to some sovereign title. Often, such objects are subject to restrictions regarding export, commercial activities, and private transactions. Likewise, a number of international instruments address the issue. The Convention for the Protection of Cultural Property in the Event of Armed Conflict ([signed 14 May 1954, entered into force 7 August 1956] 249 UNTS 240), the UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects ([done 24 June 1995] 34 ILM 1322), and the Convention on the Means of Prohibiting and Preventing Illicit Import, Export, and Transfer of Ownership of Cultural Property ([done 14 November 1970, entered into force 24 April 1972] 823 UNTS 231) afford protection to such objects of national cultural heritage at the international level. Art. 21 (1) (d) UNCSI reflects this by exempting 'property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale' from enforcement.

**(f) Property Items Forming Part of an Exhibition of Objects of Scientific, Cultural, or Historical Interest**

**70** The same holds true in view of 'property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale' (see Art. 21 (1) (e) UNCSI).

**(g) Military Property**

**71** Military activities are clearly non-commercial and, accordingly, any related property is considered immune from enforcement. Art. 21 (1) (b) UNCSI reflects this in rather elaborate terms by excluding 'property of a military character or used or intended for use in the performance of military functions' from any enforcement action. The wording indicates that the provision applies to objects which have a 'military character' by their very nature, as is true, for instance, for weapons. However, the provision also covers property which by its actual or intended use can be considered to serve military purposes. This would cover not only any equipment and vehicles, but also foodstuff, clothing, and fuels.

**(h) Warships and Ships in Governmental Use**

**72** The same holds true for warships which, however, have been subject to more specific rules for a long time. The immunity of warships has been recognized from the 18th century onwards, or even earlier, and became the subject of a specific instrument—the 1926 Brussels Convention and its 1934 Protocol. According to Art. 3 Brussels Convention,

ships of war, State owned yachts, patrol vessels, hospital ships, fleet auxiliaries, supply ships and other vessels owned or operated by a State and employed exclusively at the time when the cause of action arises on government and non-commercial service ... shall not be subject to seizure, arrest or detention by any legal process, nor to any proceedings in rem.

This is even the case, where the warship is not on duty but in the docks of a foreign company for refitting.

### **(i) Aircraft or Space Objects Owned or Operated by a State**

**73** This probably also applies *mutatis mutandis* to military aircraft or space objects. However, in contrast to the issue of State-owned ships or ships operated by States, the issue has not been ruled upon by the 2004 UNCSI. Instead, Art. 3 (3) UNCSI simply refers to the relevant international agreements.

## **6. A Link between the Property Item and the Claim?**

**74** An important but not finally settled issue relates to the question as to whether, and if so what kind of, a link is required between the property item sought for enforcement and the underlying claim or proceedings. In different ways, such a nexus is required by treaty law, legislation, and the courts.

**75** A prominent example can be found in US Foreign Sovereign Immunities Act § 1610 (a) (2), which requires that 'the property [sought for enforcement action] is or was used for the commercial activity upon which the claim is based'. On the other hand, the UK State Immunity Act never provided for any such requirement.

**76** Art. 18 (1) (c) ILC Draft Articles has taken a middle-ground position in this matter. The provision reflects the restrictive US approach in requiring that the property at hand 'has a connection with the claim which is the object of the proceeding or with the agency or instrumentality against which the proceedings were directed'. However, an alternative condition was added which is far less restrictive and only requires that there be a 'connection ... with the entity against which the proceedings was directed'. However, this kind of a link has been severely disputed. As a result of these disputes, Art. 19 (c) UNCSI only incorporated this second condition. However, State practice has so far been inconclusive and the UK State Immunity Act, for instance, does not require any link or nexus at all. Whether this would conform to UNCSI is questionable.

## **F. Special Rules on States as Parties of Proceedings**

**77** The law on State immunity is accompanied by some rules which take account of the specific situation of a State participating in proceedings before a national court. Art. 16-19 European Convention on State Immunity already contain some advanced standards in this regard. In parallel, Part V of UNCSI deals with those issues. Art. 22 UNCSI contains certain specific formalities concerning service of process which, inter alia, envisage the transmission of documents through diplomatic channels. Art. 23 UNCSI concerns default judgments and in this regard contains specific time periods. Furthermore, Art. 24 UNCSI deals with privileges and immunities during court proceedings. For instance, no fines or penalties may be imposed on the State. Also, States shall not be required to provide securities, a bond, or a deposit.

## G. State Immunity and Human Rights

**78** Recently, the question has been raised whether State immunity and its application are subject to some limitation in cases where human rights violations are at stake. One starting point of the discussion has been the *Pinochet Case* (→ *Pinochet Cases*). A number of subsequent cases have dealt with the issue including the *Arrest Warrant Case* of the ICJ and the *Al Adsani Case* before the ECtHR. The issue has been considered in some detail by the Working Group of the International Law Commission on Jurisdictional Immunities of States and their Property.

**79** In analysing these developments and the rich academic debate, it has to be kept in mind that they concern different concepts of immunity. The *Pinochet Case* dealt with the immunity of a former head of State, while the *Arrest Warrant Case* did concern diplomatic immunity. As has been seen, these types of immunity have to be carefully distinguished from the immunity of States, which is at stake here. This is especially so, as the two former concepts provide for immunity on functional grounds, whereas State immunity is afforded on the basis of status.

**80** It is sometimes stated that to some extent the exception of Art. 12 UNCSI may help in this regard:

A State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State.

However, the provision furthermore requires that:

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.

Thus, Art. 12 UNCSI is helpful only in a very small number of cases.

**81** Furthermore, the argument has been made that human rights norms may trump the customary rules of State immunity in cases where they may be considered to form part of *ius cogens*, as would be the case, for instance, with regard to the prohibition of torture. Indeed, the peremptory nature of those norms may be considered to suggest that they should be given effect, and it is often concluded that this entails that State immunity does not apply in the cases at hand. However, as has been observed by the ECtHR and the ILC Working Group, there are hardly any cases where immunity has indeed been denied on those grounds. This line of argument draws a line between a human rights standard and the potential legal consequences of its violation, including a denial of State immunity. Seen from this perspective, the potential peremptory character of the former does not at once have an impact on State immunity.

## H. Outlook

**82** State immunity is a core element of the relationship between States as governed by the international legal order. It has swiftly adapted to new circumstances, as the restrictions

may indicate, which have evolved in view of the increasing engagement of States in commercial transactions.

**83** Another important development concerns the UNCSI. It is a particularly useful piece of the progressive development of international law, as it properly and reasonably reflects the customary rules and recent developments. With all its careful definitions, delimitations, complex rulings, and necessary distinctions, it importantly promotes legal security and predictability in this complex area of international law. It is beyond doubt that the speedy entry into force of the UNCSI is highly desirable.

**84** However, legal developments in this area cannot stop at this point. There is an urgent need to further consider the role that human rights and *ius cogens* should play in the context of State immunity. It is very doubtful whether these issues can be neglected for much longer in view of the promising changes in the international legal sphere, represented inter alia by the establishment of the → *International Criminal Court (ICC)*.

## Select Documents

Additional Protocol to the International Convention for the Unification of Certain Rules concerning the Immunity of State-Owned Vessels (signed 24 May 1934, entered into force 8 January 1937) 176 LNTS 214.

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*Alcom Ltd v Republic of Colombia* United Kingdom House of Lords (12 April 1984) 74 ILR 170.

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COE 'European Convention on State Immunity' (done 16 May 1972, entered into force 11 June 1976) CETS No 74.

Convention on Jurisdictional Immunities of States and their Property (adopted 2 December 2004) (2005) 44 ILM 803.

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