State Immunity – Trends and Problems Encountered in Recent Swiss Practice

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The issue of state immunity has long been a very prominent topic in general international law as well as in (international) civil procedural law and debt recovery law. At different times, different aspects were of particular importance, so that there is nevertheless a certain dynamic that makes it appropriate to explain from time to time the current state of the legal debate and state practice. This contribution looks at historic and, in particular depth, at recent Swiss practice. At the moment, the theoretical focus worldwide is certainly on the issue of restricting state immunity in the event of serious human rights violations. The development with respect to the immunities for state organs (in particular the use of criminal law against individuals) may influence eventually the state practice regarding states as such. In the Swiss practice, the accepted limitations of state immunity for related to economic activities remain of particular relevance. The general acceptance of these restrictions of state immunity in the economic sphere, and the abundance of cases relying on this exception may pave the way for similar developments with regard to international crimes in order to make the international legal system somewhat more coherent in this respect as well.

Keywords: State practice – Switzerland – state immunity – Swiss Federal Supreme Court – state trading – impunity

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I. Introduction

A. Recent writings and discussions in Switzerland

As in international law in general[1], learned societies of importance for Switzerland have taken up the topic state immunity quite regularly in the past – for example in 1968, when Wilfried Schaumann gave a lecture on the subject of «Immunity of foreign states under international law» for the German Society of International Law (DGIR) or in 2013[2], when the biennial meeting of the DGIR was held in Lucerne and was entirely dedicated to the question of immunities under international law.[3] In view of the importance of Switzerland as a hub for economic activities and asset allocation, the topic occupied, for example, the Swiss Society already in the first half of the 20th century several times.[4]

1 Instead of many, see only the following, more recent, comprehensive overviews: Hazel Fox & Philippa Webb, The Law of State Immunity, 3rd ed., Oxford 2015; Xiaodong Yang, State Immunity in International Law, Cambridge 2012; Sally El Sawah, Les immunités des Etats et des organizations internationales: immunités et procès équitable, Brussels 2012; Gerhard Hafner, Marcelo G. Kohen & Susan Breau (eds), State Practice Regarding State Immunities/La Pratique des Etats Concernant les Immunites des Etats, Leiden 2006; Ernest K. Bankas, The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts, Berlin 2005; Andrew Dickinson, Rae Lindsay & James P. Loonam, State Immunity: Selected Materials and Commentary, Oxford 2004; Olivier Beaud (ed.), Le droit international des immunités: contestation ou consolidation?, Paris 2004; Isabelle Pingel, Les immunités des Etats en droit international, Brussels 1997.

2 Die Immunität ausländischer Staaten nach Völkerrecht und deutschem Zivilprozessrecht: Arbeiten der 2. Studienkommission der Deutschen Gesellschaft für Völkerrecht, Berichte der Deutschen Gesellschaft für Völkerrecht, Karlsruhe 1968.

3 Deutsche Gesellschaft für internationales Recht, Internationales, nationales und privates Recht: Hybridisierung der Rechtsordnungen – Immunität, Band 46, Heidelberg 2014.

4 See Hans Fritzsche, «Die Schweizerische Vereinigung für internationales Recht (1914–1944)», in: Vom Krieg und vom Frieden, Festschrift der Universität Zürich zum siebzigsten Geburtstag von Max Huber, Zürich 1944, 77–98, and Andreas R. Ziegler, «The Role of Learned Societies in the Development of International and European Law in Switzerland», 32 Swiss Rev. Int'l & Eur. L. (2022), 3–21.

B. Trends

At the moment, the focus is certainly on the issue of restricting state immunity in the event of serious human rights violations, as it was in particular the reason for the judgment of the International Court of Justice (hereinafter ICJ) of 3 February 2012, in the case of Jurisdictional Immunities of the State (Germany versus Italy).[5]

The distinction between immunities of the state as such and of related entities and persons representing is not always easy.[6] In principle, one can decide in the doctrine between state immunities as such (for the state itself and dependent entities[7]) and those of its representatives (persons) which historically can be seen as an extension of state immunity (or sovereign immunity) *per se*.[8]

For diplomats, consular staff, as well as special missions, the attempts to codify their immunities were relatively successful while the functional immunities of state representatives[9] in general and the further reaching personal immunities of high-ranking state representatives (i.e., Heads of state, Heads of Governments, Foreign Ministers and maybe others) remain more controversial and make codification more difficult.[10] These person-related immunities shall not be addressed here except where they are relevant to understand the general developments related to immunities (human rights issues). I would also like to note that in practice, many cases involve questions as to whether property or specific acts are addressed as being in the possession of or undertaken by specific persons (and sometimes whether they really represent a

5 See IGH, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of February 3, 2012.

6 This can be the case when persons claim diplomatic or functional/personal immunity without clear credentials or when the ownership of assets or objects (personal or by the state is unclear). See for examples from Switzerland Judgment 1B_106/2017 of 8 June 2017 and 1B_134/2017 of 3 July 2017 (République de Guinée équatoriale, séquestre d'automobiles) as well as 1B_200/2017 of the same date (République de Guinée équatoriale, séquestre d'automobiles). It is particularly relevant when specific economic entities are concerned and whether they benefit as state organs from state immunity. See for a recent example from Switzerland Judgment 1B_135/2017 of 3 July 2017 (state as mere shareholder of company detaining movable assets to be seized).

7 Whereby the sufficient link is often controversial in practice. See from the case law of the Swiss Federal Supreme Court Judgments 1B_588/2012 of 10 January 2013; 5A_200/2013 of 17 July 2013: 1B_134, 1B_135 and 1B200/2017 of 3 July 2017, as well as 1B_384 and 1B_387/2017 of 10 January 2018.

8 The immunity of international organizations can also be derived from the concept of state immunity if one considers that they are made up (at least in part) by States parties but will not be deepened here.

9 See for example from the recent case law of the Swiss Federal Supreme Court: Judgment 1B_539/2020 of 26 July 2021 (on the members of a presidential guard).

10 See most importantly the work currently undertaken by the International Law Commission on «Immunity of State officials from foreign criminal jurisdiction», see <https://legal.un.org/ilc/guide/4_2.shtml>.

state) or the state *per se*.[11] This can also lead to interesting questions regarding immunity as such and the concept of «inviolability» in diplomatic and consular relations.[12]

C. Swiss practice

Precisely because the topic is also highly relevant in practice and, unlike many other topics of international law, gives rise to numerous court decisions in national courts[13], I would like to address current legal practice with the help of recent cases from Switzerland[14] and, in particular, to present practical problems of a financial and arbitration centre of international importance and seat of many international institutions, as Switzerland is. The latter led to the enactment of a special federal law in 2007 on the privileges, immunities and facilities granted by Switzerland as a host state, as well as financial contributions[15], which will not be discussed further here. This law only regulates the treatment of international institutions in the broadest sense, i.e., not the actual implementation of state immunity – but it is informative with regard to the options for granting immunity, which may go beyond the obligations under international law.

11 See for examples in the practice of the Swiss Federal Supreme Court: Judgment 4A_618/2014 of 7 July 2015 (diplomate or State) or Judgment 1B_588/2012 of 10 January 2013 (§ 2.2. distinction between diplomatic immunity and state immunity).

12 See for examples in the practice of the Swiss Federal Supreme Court: Judgment 1B_106/2017 of 8 June 2017, Judgment 1B_134/2017 and Judgment 1B_200/2017 of 3 July 2017.

13 See for other countries, for example, Ekaterina Bykhovskaya, State Immunity in Russian Perspective, London 2008; Ulrich von Schönfeld, State Immunity in American and English Law, Berlin 1983; Manfredi Siotto-Pintor, «La dottrina dell'immunità degli stati esteri dalla giurisdizione interna e la recentissima giurisprudenza italiana», in: Festgabe für Fritz Fleiner on his 60th birthday, January 24, 1927, Tübingen 1987, 233–254.

14 On the older practice in Switzerland, see Jean-François Egli, «L'immunité de juridiction et d'exécution des Etats étrangers et de leurs agents dans la jurisprudence du Tribunal fédéral», in: L. Dallèves et al. (eds), Centenaire de la LP, Zurich 1989, 201–216; Rolando Forni, «Die Gerichts- und Vollstreckungsimmunität fremder Staaten in der bundesgerichtlichen Rechtsprechung», in: Annuaire Suisse de droit international 1986, 15 et seqq.; Christian Dominicé, Immunités de juridiction et d'exécution des Etats et chefs d'Etat étrangers, SJK (Geneva), 1993; Jolanta Kren Kostkiewicz, Staatenimmunität im Erkenntnis- und Vollstreckungsverfahren nach schweizerischem Recht, Bern 1998; Dominique Favre, «L'immunité de juridiction des Etats et des organisations internationales: La pratique suisse», in: I. Pingel (ed.), Droit des immunités et exigences du procès équitable, Paris 2004, 43–55, and «L'immunité de juridiction et d'exécution dans la jurisprudence du Tribunal fédéral», in: Richterliche Rechtsfortbildung in Theorie und Praxis: Festschrift für Hans Peter Walter, Bern 2005, 471–485.

15 The so-called Host State Act (Federal Act on the Privileges, Immunities and Facilities and the Financial Subsidies granted by Switzerland as a Host State) of 22 June 2007, RS 192.12. It states in Article 1 Paragraph 2: «Privileges, immunities, facilities, and financial subsidies arising under international law or other federal statutes are unaffected.»

II. The scope and nature of state immunity

A. Historical foundations

The concept of state immunity, according to the the prevailing doctrine[16], has always been closely related to the concept of the sovereignty or historically of the sovereign ruler. For most practitioners and academics, with the development of the state as the holder of this sovereignty, the concept of state immunity arises as a specific prerogative of the state that is almost inherent in the modern system based on territorial states and triggers a corresponding duty of other states to observe the immunity of each sovereign state.[17] Correspondingly, the dominant school of thought refers to the principle «*par in parem non habet imperium (jurisdictionem)*».

The Swiss Federal Supreme Court has also regularly commented on the theoretical derivation of state immunity in its case law and repeatedly invoked this maxim, for example in a decision of 19 June 1980:

> According to a general rule of international law, the sovereignty of each state is limited by the immunity of the other states, in particular in cognizance and enforcement proceedings. In principle, a state cannot be held accountable before foreign domestic courts and authorities *(par in parem non habet iurisdictionem)*.

Or more recently in its decision BGE 130 III 136 of 21 November 2003:

> Les immunités de l'Etat sont destinées à garantir le respect de sa souveraineté lorsque ses agents, sa législation ou ses biens sont en rapport direct avec la souveraineté territoriale d'un autre Etat. L'absence de toute hiérarchie entre les Etats exclut que l'un d'entre eux soit soumis à des actes d'autorité, y compris juridictionnels, d'un autre Etat, conformément à la maxime selon laquelle «par in parem non habet jurisdictionem», les immunités étant une exception au principe de la souveraineté territoriale.

This contradicts (at least in part) the view that for certain authors, state immunity is just an exception (to be interpreted as narrowly as possible) from the individual state jurisdiction, which should only be restricted to the extent that it is in the common or mutual interest of the states located.[18]

In addition, there are immunities of state representatives derived either from the state itself or, historically in parallel, directly from the sovereign ruler[19], diplomatic

16 For an overview of state practice, see, inter alia, the work of the International Law Commission in: Yearbook of the International Law Commission, 1980, Vol. II (2), 142 et seqq.

17 See IGH, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, § 56.

18 See also IGH, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, § 57 in fine or Rosalyn Higgins, «Certain Unresolved Aspects of the Law of State Immunity», Netherlands Yearbook of International Law (1982), 265–276.

19 For Switzerland, see the unpublished decisions of the Swiss Federal Supreme Court: 1B_588/2012 of 10 January 2013; 6B_83/2010 of 8 July 2010; 6B_51/2007 of 3 September 2007; 8G.80/2002 of 23 July 2002, and 4P.277/2003 of 2 April 2004.

immunity, consular immunity[20], immunity of state officials in general[21] or of certain state assets such as real estate and accounts, cultural assets, or special vehicles such as ships, aircraft, etc. With the latter in particular, or in general, when enforcing coercive measures, the distinction between immunity from seizure, attachment or enforcement and inviolability in doctrine and practice is not always consistent.[22] One can add to these the immunity of international organizations[23] and their employees[24] and representatives of member and partner states, or specific cases like the ICRC[25].

20 See BGE 131 III 511 and the unpublished decision of the Swiss Federal Supreme Court 5C.158/2000 of 6 October 2000.

21 For Switzerland, see the unpublished decision of the Swiss Federal Supreme Court 1B_542/2012 of 8 November 2012; the unpublished decision of the Swiss Federal Supreme Court 1C_239/2007 of 5 September 2007; BGE 133 IV 40 (corruption in Greece); BGE 132 II 81 (Evgeny Adamov); BGE 130 III 136 and the unpublished decision of the Federal Court 4P.147/2003 of 21 November 2003; the unpublished decision of the Swiss Federal Supreme Court 1A.80/2003 of 24 July 2003; the unpublished decisions of the Swiss Federal Supreme Court 1A.94/2001 of 25 June 2001 and 1A.218/2002 and 1A.219/2002 of 9 January 2003; the unpublished decision of the Swiss Federal Supreme Court 1A.2/2001 of 2 March 2001; the unpublished decision of the Swiss Federal Supreme Court 1P.581/2000 of 8 December 2000; the unpublished decision of the Swiss Federal Supreme Court 1A.228/2000 of 3 November 2000; the unpublished decision of the Swiss Federal Supreme Court 1A.192/1999 of 7 January 2000; the unpublished decisions of the Swiss Federal Supreme Court 1A.212/2000, 1A.87/2000, 1A.85/2000, 1A.82/2000 and 1A.83/2000 (appeal to immunity of third parties) of 19 June 2000 as well as BGE 113 Ib 257 (Marcos and consorts against the Canton of Geneva).

22 See, for example, Article 25 of the Convention of 8 December 1969 on Special Missions (SR 0.191.2) or Article 38 of the Vienna Convention of 18 April 1961 on Diplomatic Relations (SR 0.191.01). See the rather unclear distinction between diplomatic immunities and inviolability with regard to diplomatic relations on one side and state immunity in the unpublished Judgment 1B_588/2012 of 10 January 2013 at § 2.2 or Judgment 1B_106/2017 of 8 June 2017 and 1B_134/2017 of 3 July 2017 (République de Guinée équatoriale, séquestre d'automobiles) as well as 1B_200/2017 of the same date (République de Guinée équatoriale, séquestre d'automobiles).

23 For Switzerland, see in particular BGE 137 I 371 and BGE 136 III 379 (BIS); the unpublished decision of the Federal Court 4A_216/2009 of 21 December 2009 (X. against the Organization for Islamic Cooperation); the unpublished decision of the Federal Supreme Court 5A_483/2008 of 29 August 2008 (IATA); BGE 130 I 312 (X against the Swiss Federal Council and CERN); the unpublished decision 5P.156/2003 of 7 July 2003 (IIe Cour civile; WIPO); the unpublished decision of the Swiss Federal Supreme Court of 25 January 25 1999 (X. against the League of Arab States) E. 4b. (cited in Favre footnote 54); BGE 118 Ib 562 (CERN).

24 For Switzerland, see the unpublished decision of the Swiss Federal Supreme Court 5A_851/2011 of 31 January 2012; the unpublished decision of the Swiss Federal Supreme Court 5A_745/2010 of 15 December 2010; the unpublished decision of the Swiss Federal Supreme Court 9C_182/2009 of 2 March 2010; the unpublished decision of the Swiss Federal Supreme Court 4A_132/2008 of 16 May 2008; BGE 133 III 539 (X. against Y. and Z.); BGE 133 V 233; the unpublished decision of the Swiss Federal Supreme Court 7B.160/2005 of 8 November 2005 (UIT); BGE 131 V 174; the unpublished decision of the Swiss Federal Supreme Court 2P.36/2004 of 9 May 2005; the decision BGE 130 III 430 and the unpublished decision of the Swiss Federal Supreme Court 4P.234/2003 of 8 April 2004; the unpublished decision of Swiss Federal Supreme Court 1A.231/2003 of 6 February 2004 and the unpublished decision of Swiss Federal Supreme Court 4P.264/2002 of 15 April 2003.

25 See the unpublished decision of the Swiss Federal Supreme Court 5A_106/2012 of 20 September 2012 and the unpublished decision of the Swiss Federal Supreme Court 5A_637/2011 of 25 November 2011.

B. Specific aspects

1. Historic developments

The exact extent of these immunities (absolute or relative/limited)[26] has been controversial in history over and over again, especially with regard to state immunity. State practice and academic writings have come to different conclusions at different times. Overall, one can say that during the 19th century, numerous national courts still granted other states absolute immunity, but over time, certain restrictions were applied, which resulted in the more common practice of limited or relative state immunity of today.[27]

2. Codification attempts

The various national and international attempts at codification reflect this problem up to this day. Of particular note is the European Convention on state Immunity, signed in Basel on 16 May 1972, within the framework of the Council of Europe[28], which remains open for signature. It was ratified by only a small number of parties (including Switzerland, Germany and Austria) so far.[29] More recent is the United Nations Convention on the Immunity of States and their Property from Jurisdiction of 2 December 2004, which can only come into force after 30 states have ratified it (as of 1 January 2022: 22 contracting states – the last acceding in on 30 May 2018, among the latter both Switzerland and Austria; however, Germany has not yet signed the convention).[30] Also, worth mentioning is the 1983 draft of an Inter-American Convention on Jurisdictional Immunity of States by the Inter-American Juridical Committee of the Organization of American States[31] and the International Law Association (ILA) Draft Articles Convention on State Immunity of 1982[32].

According to the Swiss Federal Supreme Court, the UN Convention of 2 December 2004, on the immunity of states and their property represents a codification of

26 Corresponding to absolute/restricted immunity (in English) and *immunité absolue/relative ou restreinte* (in French).

27 See, for example, Eleanor Wyllys Allen, The position of foreign states before national courts: chiefly in continental Europe, London 1933.

28 European Agreement on State Immunity of 16 May 1972 (European Treaty Series (ETS), No. 74; SR 0.273.1. UNTS, vol. 1495, p. 182), In addition, Conseil de l'Europe, Rapports explicatifs concernant la Convention européenne sur l'immunité des Etats et le protocole additionnel, Strasbourg: Ed. du Conseil de l'Europe, 1972.

29 Entered into force for Switzerland on 7 October 1982 but with only 21 ratifications, the last one in 2010 (as of 1 January 2022), see <www.fedlex.admin.ch/eli/cc/1982/1792_1792_1792/de>.

30 See <www.fedlex.admin.ch/eli/treaty/9999/2691/de>.

31 Reprinted in: ILM, Vol. 22, Issue 2 (March 1983), 292 et seqq.

32 Reprinted in: ILM , Vol. 22 , Issue 2 (March 1983), 287 et seqq.

the principles of immunity under international law, at least in many areas.[33] In view of the fact that the Convention is still not entered into force due the limited number having ratified it, it is astonishing that the Swiss Federal Supreme Court so lightly reiterates this finding on many occasions without an in-depth analysis.[34]

By contrast, in the opinion of the Swiss Federal Supreme Court, the European Convention of 16 May 1972 on State Immunity only expresses more recent tendencies in international law in relation to non-contracting states to a certain extent.[35] As a result, the Swiss Federal Supreme Court has shown repeatedly the greatest restraint regarding the applicability of the rules contained in this regional treaty and their recognition as an expression of the customary international law. For example, in its decision 134 III 122 E 5.1, it stated (as it had done earlier in the decision BGE 120 II 400 E. 3d):

> Le Tribunal fédéral a jugé que la plus grande réserve s›imposait quant à l'application, à titre de droit coutumier, de cette Convention à des Etats non-parties, cela même pour de simples références aux solutions retenues.[36]

Similar divergences can be seen in domestic attempts at codification such as the United States Foreign Sovereign Immunities Act (1976).[37] Due to the lack of comprehensive international codification, these few national codifications and state practice are at least roughly based on what is regarded as customary international law.[38] Interestingly, a project for a domestic codification of a regulation on enforcement immunity was also discussed in Switzerland in the 1920s. Today, the clearest reference to the implementation of international rules on state immunity can be found in Article 92 Paragraph 11 of the Federal Act on Debt Enforcement and Bankruptcy (DEBA): «Property belonging to a foreign state or a foreign central bank which is

33 See BGE 136 III 575 E 4.3.1. and BGE 134 III 122 E. 5.1 with reference to the dispatch dated 25 February 2009, on the approval and implementation of the UN Convention on the Immunity of States and Their Property from Jurisdiction, BBl 2009 1732 No. 2.4.

34 See also more recently Judgments 4A_544/2011, 4A_331/2014 and 2C_820/2014 (immunité d'état – Banque centrale de la Syrie).

35 BGE 136 III 575 E 4.3.1; BGE 112 Ia 148 E. 3a; BGE 120 II 400 E. 3d and BGE 134 III 122E. 5.1. Also Charles-Mathias Krafft, «La convention européenne sur l'immunité des Etats», Swiss Yearbook for International Law (1986), 16–26, at 18; Federal Office of Justice, International Legal Assistance in Civil Matters, Guide, 3rd edition 2003 [as of July 2005], No. II.F.1.

36 With reference to Dominique Favre, «L'immunité de juridiction et d'exécution dans la jurisprudence du Tribunal fédéral», in: Richterliche Rechtsfortbildung in Theorie und Praxis: Festschrift Hans Peter Walter, Bern 2005, 471–485, at 476.

37 In addition, the laws of the United Kingdom, Singapore, Argentina, Australia, Canada, Israel, Japan, South Africa and Pakistan were dealt with in the proceedings before the IGH (Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012) discussed.

38 See also IGH, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, Section 55 in fine.

assigned to tasks incumbent on them as holders of public authority shall be exempt from seizure.»[39]

3. Procedural aspects

In a dispatch dated 29 January 1923, the Federal Council submitted to the Federal Assembly a draft of a «Federal Law on Arrest and Foreclosure Measures against Assets of Foreign State», according to which arrest against a foreign state that holds reciprocal rights should not have been ordered.[40] The proposal failed, however, because the National Council – in contrast to the Council of States – did not want to advocate it.[41] After all, the federal authorities have, in some cases, provided the cantonal authorities with guidelines on the confiscation of goods from foreign countries, and there are now provisions in the federal law on debt collection and bankruptcy.[42]

The domestic regulation or implementation of state immunity, particularly with regard to procedural law, can also turn out very differently depending on the legal system. In its judgment of 3 February 2012, the ICJ[43] stated that national courts had to deal with the question of (state) immunity as a preliminary question at the beginning of a procedure before alleged violations of the law would be analyzed in terms of substantive law, and that accordingly, the result of this possibly subsequent analysis of the content also had no influence on the granting of immunity.[44] This surfaces also in the text of the United Nations Convention on the Immunity of States and their Property from Jurisdiction of 2 December 2004[45]. Accordingly, it is demanded that a state must ensure «that its courts determine ex officio that the [...] immunity of this

39 Introduced by Art. 3 of the Federal Act of 28 September 1949 (RO 1950 I 57; FF 1948 I 1201). New wording in accordance with Chapter I of the Federal Act of 16 December 1994, in force since 1 January 1997 (AS 1995 1227; BBl 1991 III 1).

40 BBl 1923 I 419.

41 See Official Bull. N 1924 p. 134 et seqq. and 153 et seqq., N 1925 p. 417 et seqq.; Official bull. N 1923 p. 153 et seqq., N 1925 p. 47 et seqq., N 1926 p. 17 et seqq; on this BGE 106 Ia 142 E. 2a.

42 See «Directives concernant le séquestre de biens d'Etats étrangers», Letter from the Federal Department of Justice and Police of 8 July 1986 to the cantonal government, BlSchK 1986 p. 234 et seqq.

43 IGH, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012.

44 IGH, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, § 107.

45 Not yet in force, printed in BBl 2009 1761–1777. On this, Roger O'Keefe, Christian J. Tams & Antonios Tzanakopoulos (eds), The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary, Oxford 2013; Robin Falk Lengelsen, Current Problems of State Immunity in Proceedings Before Civil and Administrative Courts: With Special Consideration of the «UN Convention ... and Your Assets of Jurisdiction», Frankfurt a.M. 2011.

other State is observed» and that it waives «exercising its jurisdiction» if state immunity is granted (Art. 5).[46]

In accordance with this principle, the Swiss Federal Supreme Court, for example, has regularly stated: «It would hardly be compatible with the concept of immunity itself to force a litigant to conduct the proceedings in the matter, even though they consider themselves outside of the State's jurisdiction.»[47] Correspondingly, the question of the immunity of a foreign state has to be assessed by the court as part of the assessment of jurisdiction, «as it would be contrary to this principle if the state referring to it had to submit to the material decision of the court of the foreign State.»[48] In another judgment, the Swiss Federal Supreme Court believes that (diplomatic) immunity should be treated as an obstacle to the process that «fundamentally prevents the material continuation of the proceedings».[49]

4. Types of state immunity

In essence, state immunity protects the foreign state from the exercise of domestic jurisdiction by another state and the enforcement or protection of such decisions by means of coercive measures against its assets. The distinction between immunity from jurisdiction, on one side, and immunity from execution or from any search, seizure, on the other side, is therefore relatively well recognized, as the distinction becomes particularly relevant if one admits the slightest possibility of deviation from absolute state immunity and then wishes to differentiate between the different phases of a classic legal enforcement procedure with court decisions and coercive measures (or possibly security measures[50]). Due to the current restriction of jurisdiction immunity, a practice for enforcing the resulting decisions has also developed. It is repeatedly stated that the existence of such a rightly issued decision does not automatically remove any enforcement immunity, but that a new decision must be made here as to which assets can be enforced. This principle was also recognized by the ICJ in the

46 See also the unpublished decision of the Swiss Federal Supreme Court 5P.344/2006 of 4 December 2006 on the question of whether it is possible to return to these aspects later in higher instances.

47 For example, in BGE 124 III 382 E. 3b or BGE 134 III 27 E. 6.2.2.

48 So the Third Chamber of the Social Insurance Department of the Swiss Federal Supreme Court in an unpublished decision K168/04 of 9 February 2005 or in the unpublished decision of the Federal Supreme Court 4A_430/2007 of 11 December 2007.

49 See the unpublished decision of the Swiss Federal Supreme Court 1P.372/2000 of 1 September 2000.

50 An interesting field concerns the increased adoption of sanctions by States against other States and their representatives (as well as their entourage). This is normally seen as outside the applicability of immunities but can lead to problems in the exact application, see e.g., from the practice of the Swiss Supreme Court: Judgment 2C 820/2014 of 16 June 2017 (Assets of the Syrian Central Bank).

aforementioned decision of 2012 (though as a mere *obiter dictum*) that a new decision must be made here as to which assets can be enforced.[51]

A special situation also arises when a state is asked, in the context of a request for mutual legal assistance, to enforce a judgment given in a third state, i.e., normally to issue the *exequatur*.[52] According to the ICJ, this is the (renewed) exercise of jurisdiction by the requested state with regard to the third state and, not a mere execution of a decision, that is not to be enforced.[53] The requested court must ask itself whether it would have had to grant jurisdiction immunity in the event that it had to pass the factual judgment to be enforced.[54]

51 IGH, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, § 113: «[T]he Court observes that the immunity from enforcement enjoyed by States in regard to their property situated on foreign territory goes further than the jurisdictional immunity enjoyed by those same States before foreign courts. Even if a judgment has been lawfully rendered against a foreign State, in circumstances such that the latter could not claim immunity from jurisdiction, it does not follow ipso facto that the State against which judgment has been given can be the subject of measures of constraint on the territory of the forum State or on that of a third State. This seems particularly important in view of the increasing number of enforcement requests following investor-state dispute settlement proceedings (normally) through arbitration», see Andrea K. Bjorklund, «State Immunity and the Enforcement of Investor-State Arbitral Awards», in: C. Binder et al. (eds), International Investment Law for the Twenty-First Century: Essays in Honour of Christoph Schreuer, Oxford 2002, 302 et seqq., at 304, and Adrian Lai, «State Immunity in the Context of Enforcement of Investment Arbitration Awards», in: J. Chaisse et al. (eds), Handbook of International Investment Law and Policy, Singapore, 2020, <https://doi.org/10.1007/978-981-13-5744-2_21-1>.

52 See also Jérôme Candrian, «L'immunité des Etats dans l'entraide internationale en matière pénale», in: M.-A. Renold (ed.), L'entraide judiciaire internationale dans le domaine des biens culturels, Zurich 2011, 83–95; Michel Cosnard, «Circulation des jugements et immunité d'exécution de l'Etat», in: Effets des jugements nationaux dans les autres Etats membres de l'Union européenne, Brussels 2001, 207–219.

53 Cf. IGH, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, § 128: «Where a court is seized [...] of an application for *exequatur* of a foreign judgment against a third State , it is itself being called upon to exercise its jurisdiction in respect of the third State in question. It is true that the purpose of *exequatur* proceedings is not to decide on the merits of a dispute, but simply to render an existing judgment enforceable on the territory of a State other than that of the court which ruled on the merits. It is thus not the role of the *exequatur* court to re-examine in all its aspects the substance of the case which has been decided. The fact nonetheless remains that, in granting or refusing *exequatur,* the court exercises a jurisdictional power which results in the foreign judgment being given effects corresponding to those of a judgment rendered on the merits in the requested State. The proceedings brought before that court must therefore be regarded as being conducted against the third State which was the subject of the foreign judgment.»

54 IGH, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, § 130.

III. Restrictions due to commercial activity

A. State trading and other commercial activity

As already mentioned, many states traditionally granted each other absolute immunity. The question arose relatively early on whether this should be deviated from in those cases in which a state takes part in commercial transactions.[55] The basic idea behind this distinction is that the state does not act in the area of its state sovereignty (sovereign action), but moves to the level of normal economic actors, which no longer justifies the granting of immunity or makes it appear necessary. In this area in particular, Switzerland, for example, accepted a restriction on state immunity very early on.

In its decision of 13 March 1918[56], the Swiss Federal Supreme Court stated that «the international law principle of the exemption of foreign states from domestic jurisdiction does not apply without restriction» and authorized an arrest for unpaid instructions from the State Treasury on an account of the Austrian Ministry of Finance in a bank in Basel, as the lower courts had already done. The Swiss Federal Supreme Court followed a practice developed in Italy from 1886 and in Belgium from 1903. It has subsequently repeatedly confirmed this case law.[57]

Historically, the restriction of the immunity (not only) of states when participating in private-sector activities was in the foreground. The corresponding state practice was already relatively widespread in certain economically particularly important states (e.g., in the United Kingdom) at the end of the 19th century and was therefore later reflected in the corresponding regulations in international conventions and domestic decrees.

This development results in the distinction between sovereign action[58] *(acta iure imperii)* and (private) economic activity *(acta iure gestionis),* whereby the exact determination of the character of an action can often be controversial in practice. In addition to clearly private-sector activities such as the sale of raw materials or the operation of companies, certain activities closely related to sovereign activity were characterized as private-sector at an early stage, such as renting premises[59] or the employment of subordinate staff. Moreover, there are problems with the attribution of actions by

55 See also IGH, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, § 59. Earlier on, Sompong Sucharitkul, State immunities and trading activities in international law, New York 1959; Helmut Damian, «State immunity and court compulsion», in: Contributions to foreign public law and international law, Vol. 89, Berlin/Heidelberg et al. 1985, or Michael W. Gordon, Foreign state immunity in commercial transactions, Salem 1991.

56 BGE 44 I 49 E. 4. (K. K. Austrian Ministry of Finance versus Dreyfus).

57 See BGE 56 I 247 E. 2, BGE 82 I 85 E. 7 et seqq.; BGE 86 I 27 E. 2 or BGE 104 Ia 368 E. 2. Recently BGE 144 III 411, E.6.3.2 obiter dictum.

58 The IGH speaks of the «exercise of sovereign power» (Jurisdictional Immunities of the State [Germany v. Italy: Greece intervening], Judgment of 3 February 2012, § 60).

59 See earlier for Switzerland BGE 82 I 80 or BGE 86 I 23 E. 3 (rental of a villa by the United Arab Republic).

state-owned companies.[60] As an example from the recent case law of the Swiss Federal Supreme Court, reference should be made to the decision BGE 136 III 575 of 7 October 2010, that the renting of an embassy building by the State of Israel in Bern is an *act iure gestionis* (E. 4.2). The Swiss Federal Supreme Court regularly considers the character of the act and not its finality to be decisive for the distinction.[61]

In decision BGE 113 Ia 172, an action was dismissed because the underlying expropriation by the Romanian State was viewed as sovereign in Romania. The Swiss Federal Supreme Court stated: «The acts of sovereignty or acts *iure imperii* do not differ in their purpose, but rather in their nature from the legal activity or the acts *iure gestionis*». The Swiss Federal Supreme Court has repeatedly ruled: «Le critère déterminant est la nature intrinsèque de l'opération envisagée et non le but poursuivi»[62].

Correspondingly, in practice, comparable recognitions of the nature of a state act are often expressed in the underlying contracts.[63] In two unpublished decisions of 23 November 2000, a contract for a «preshipment inspection» was viewed as a sovereign nature, as this competence only belongs to one state, although this type of outsourcing of modern services could have been viewed as a private sector nature.[64] Articles 2 and 10 of the UN Convention of 2004, which also provide more detailed information on this, are also of interest in this context.

The restriction of immunity for employment relationships with lower-ranking staff can be viewed as a special case, even if this is usually not directly subsumed under the term *acta iure gestionis*. The idea is the same, however, in the sense that a distinction is made between the more sovereign character of the employment of higher-ranking employees and the more economic character of the employment of lower-ranking personnel. Same thing goes for auxiliary personnel for the operation of embassies and alike. The case law in Switzerland is extensive in this regard, which is due in particular to the presence of numerous missions at international organizations in Geneva. For example, in the decision BGE 110 II 255 (E. 3–5) the complaint regarding the em-

60 See Anne-Catherine Hahn, «State Immunity and Veil Piercing in the Age of Sovereign Wealth Funds», 84 Swiss Review of Business and Financial Market Law (2012), 103–118; Peter Herz, The immunity of foreign state-owned companies with their own legal personality in French and German civil procedure law, Filderstadt 1996, or Julia Pullen, The immunity of state-owned companies in civil law enforcement proceedings, Frankfurt a.M. 2012. Cf. in particular unpublished decisions of the Swiss Federal Supreme Court 5A_156/2007 of 29 August and 5P.1/2007 of 20 April 2007.

61 «Pour distinguer les actes de gestion des actes de gouvernement, le juge doit se fonder non sur leur but, mais sur leur nature, et examiner si, à cet égard, l'acte relève de la puissance publique ou s'il est semblable à celui que tout particulier pourrait accomplir.», BGE 86 I 23 E. 2.

62 BGE 134 III 122 E. 5.2.1; BGE 130 III 136 at 2.1; BGE 113 IA 172 E 2.

63 See BGE 134 III 122 E. 5.2.1: «En l'espèce, la créance litigieuse est fondée sur le Protocole d'accord du 31 juillet 2002, dont l'Etat russe reconnaît expressément la nature privée et commerciale (...).»

64 See unpublished decisions of the Swiss Federal Supreme Court 4C.250/2000 and 4P.190/2000 of 23 November 2000, E. 2b (SGS Société Générale de Surveillance Holding SA v Islamic Republic of Pakistan).

ployment relationship of an Italian, who worked at the Indian embassy in Switzerland first as a radio telegraphist, later as an office assistant, assigned to the non-sovereign area of activity of the sending state and consequently affirmed by Swiss jurisdiction. In the decision BGE 120 II 408 of 16 November 1994, the complaint by a chauffeur from the Egyptian mission to the United Nations in Geneva regarding benefits from the employment relationship was admitted. Likewise, a lawsuit brought by an interpreter and translator employed by the Permanent Mission of Iraq to the United Nations (BGE 124 III 382, judgment of 16 November 1994). On 22 November 2001, the Swiss Federal Supreme Court was given an unpublished decision to the chauffeur or secretary of the permanent mission of Nicaragua to the United Nations in Geneva.[65] In two unpublished decisions of 16 July 2002[66] and 17 January 2003[67], the lawsuit of a cleaning lady of the consulate general of a foreign country was admitted. A domestic worker and a chauffeur from the permanent mission of Chile to the WTO were also granted permission to file a labour lawsuit in 2011, as was a domestic worker from the Saudi consul. State immunity could not be held against a telephone operator either. The same conclusion was drawn for a cook/*maître d'hôtel* at the residence of an ambassador.[68]

In the decision BGE 134 III 570 of 9 July 2008, the assignment as a legal expert within the framework of a United Nations commission was not regarded as a subordinate activity, which is why the employing state's immunity from jurisdiction was recognized.[69] Even a secretary who, so to speak, independently carried out the consular services of a foreign state, was classified as so high-ranking that the employing state could assert jurisdiction immunity was granted.[70]

B. Waivers in the commercial practice

Particularly with regard to participation in economic life and in order to avoid possible misunderstandings, it also became common practice early on for states to waive their immunity on their own initiative. Normally, this approach is approved (implicitly or explicitly) by other states, whereby the extent of the waiver of immunity (especially

65 Unpublished decision of the Swiss Federal Supreme Court 4P.227/2001 of 22 November 2001.
66 Unpublished decision of the Swiss Federal Supreme Court 4C.214/2002 of 16 July 2002.
67 Unpublished decision of the Swiss Federal Supreme Court 4C.338/2002 of 17 January 2003.
68 Unpublished decision of the Swiss Federal Supreme Court 4A_331/2014 of 31 October 2014.
69 Unpublished decision of the Swiss Federal Supreme Court 4A_214/2008 of 9 July 2008, E. 3 (Republic of the Congo-Brazzaville v X.).
70 Unpublished decision of the Swiss Federal Supreme Court 4A_386/2011 of 4 August 2011.

in the context of arbitration but also other areas like labour relations[71]) sometimes leads to legal assessment problems in practice.[72]

An example from the recent case law of the Swiss Federal Supreme Court is the decision BGE 134 III 122 of 15 August 2007.[73] This is one of the many proceedings in connection with the claims of Compagnie Noga d'Importation et d'Exportation SA against the Russian Federation in connection with the payment of grain deliveries for an amount in excess of one billion US dollars. Here, the Swiss Federal Supreme Court ruled that a waiver of immunity must be expressly made, but that even a waiver of enforcement immunity for assets that were used for sovereign purposes is possible and considerable. The Swiss Federal Supreme Court stated in detail:

> En conséquence, le Gouvernement (de la Fédération de Russie) reconnaît expressément la nature privée et commerciale du présent protocole d'accord et renonce expressément et sans réserves à toutes immunités de juridiction et/ou d'exécution dont il pour être bénéficiaire. ... La recourante ne peut donc échapper à l'alternative suivante: soit les biens saisis relèvent de l'activité iure gestionis de l'Etat russe et la clause de renonciation est superflue faute d'immunité; soit il s'agit de biens de l'Etat affectés à l'exercice de la puissance publique, qui tombent sous le coup de la renonciation expresse du 31 juillet 2002. Elle ne saurait en particulier prétendre que la renonciation ne vise que des actes iure gestionis pour lesquels précisément aucune immunité n'existe. Cela reviendrait à priver la clause de renonciation de toute portée. Or, aux termes de celle-ci, la Fédération de Russie a «renoncé expressément» et «sans réserves» à «toutes immunités de juridiction et/ou d'exécution». Le cumul de ces expressions manifeste la volonté de donner à la clause de renonciation la plus large portée possible; partant, elle ne peut que viser les biens affectés à une activité *iure imperii*.

In general, it can be said that a waiver or loss of state immunity in respect of the jurisdictional phase is more easily accepted than in respect of the application of coercive measures, which in particular causes problems for the enforcement of judicial and arbitral awards resulting from proceedings in which the state concerned has engaged in (in particular, commercial, or investor-state arbitration). This fundamental distinction is also supported by the ICJ and can also be relevant when granting legal assistance with regard to the enforcement of lawfully issued decisions.[74]

71 See unpublished judgment by the Swiss Federal Supreme Court 4A_372/2016 of 2 February 2017.

72 See Dhisadee Chamlongrasdr, Foreign State Immunity and Arbitration, London 2007; Jean-Flavien Lalive, «Quelques observations sur l'immunité d'exécution des Etats et l'arbitrage international», in: Y. Dinstein (ed.), International Law at a Time of Perplexity: Essays in Honor of Shabtai Rosenne, Leiden et al. 1989, 369–383; Jochen Langkeit, State Immunity and Arbitration. Does a state waive its immunity by signing an arbitration agreement?, Heidelberg 1989. For the practice of the Swiss Federal Supreme Court see Judgment 4A_396/2017 of 23 November 2017.

73 BGE 134 III 122; see also the unpublished decision of the Swiss Federal Supreme Court 5A_618/2007 of 10 January 2008; confirmed in the unpublished decision of the Federal Court 5A_55/2008 of 22 April 2008. See also the unpublished decisions of the Federal Court 4A_541/2009 of 8 June 2010, 4A_531/2009 of 21 January 2010, 1A.180/2003 and 1A.176/2003 from 17 November 2003.

74 Cf. IGH, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, § 113: «Similarly, any waiver by a State of its jurisdictional immunity before a foreign court does not in itself mean that that State has waived its immunity from enforcement as regards property belonging to it situated in foreign territory.» and § 132: «Court will confine itself to noting, in general

In the same sense as the restriction of jurisdiction immunity to non-economic activities, the distinction in foreclosure between assets (real estate, accounts, etc.) that serve a sovereign purpose and those that serve to participate in economic transactions can be understood, even if doctrine and practice prefer to treat these aspects of enforcement immunity separately from jurisdiction immunity because of the numerous specialized questions.[75] Article 92 Paragraph 11 of the Federal Act on Debt Enforcement and Bankruptcy (DEBA) expressly provides that assets of a foreign state or a foreign central bank that serve sovereign purposes cannot be seized.[76]

According to the case law of the Swiss Federal Supreme Court,[77] bank accounts must be clearly marked as intended for a governmental purpose and, if necessary, also separated from other assets so that they can be viewed as evaded foreclosure. In the unpublished decision 5A_92/2008 (judgment of 25 June 2008 – 2nd civil law department), the Swiss Federal Court had to deal with the seizure of the accounts of the Central Bank of Syria. As in an earlier decision (judgment 5P.362/1995 of 19 December 1995), the Swiss Federal Supreme Court stated that the protection of immunity can extend to assets owned by a foreign state in Switzerland and used for its diplomatic purposes service or other tasks incumbent on him as a public authority.[78] It was acknowledged that: «Ultimately, only the complainant, as the central bank, is able to provide information about the sovereign purpose of an asset. It does not only have to make general claims about it, but also to provide specific information and to substantiate it, for example, by means of officially certified extracts from its business books.»[79]

The depots at international institutions such as the IATA in Geneva and the BIZ in Basel appear to be particularly problematic. While for the latter, the absolute en-

terms, that it may perfectly well happen, in certain circumstances, that the judgment rendered on the merits did not violate the jurisdictional immunity of the respondent State, for example because the latter had waived its immunity before the courts hearing the case on the merits, but that the exequatur proceedings instituted in another state are barred by the respondent's immunity. That is why the two issues are distinct.»

75 Though the distinction is not always made clearly as even an example from the case law of the Swiss Federal Supreme Court shows: Judgement 5A_200/2013 of 17 July 2013.

76 Unfortunately, not all judgments do clearly use this criterion which should be distinguished from the criterion of «*acta jure gestionis*» relevant with regard to jurisdictional immunities although there is of course a logical connection. See e.g., the rather unclear wording in an unpublished judgment by the Federal Supreme Court 5A_200/2013 of 17 July 2013.

77 BGE 134 122 E 5.2.1: «En revanche, les liquidités, en espèces ou créances contre une banque, ne peuvent être soustraites à la saisie que si elles ont été clairement affectées à des buts concrets d'utilité publique, ce qui suppose leur séparation des autres biens»; so already BGE 111 Ia 62 E. 7b.

78 E. 4 para. 3, with references; since: BGE 134 III 122 E. 5.2.3. For the use of land see Swiss Federal Supreme Court, unpublished Judgment 5A_836/2016 of 29 March 2017.

79 See E. 3.2 and BGE 111 Ia 62 E. 7b; more recently also BGE 142 II 643 et seqq., 644. In detail on the question of evidence: Pascal Simonius, «Private Law Demand and State Immunity», in: Festgabe zum Schweizerischen Juristentag 1985, Basel 1985, 335 et seqq., at 348 et seqq.; Jérôme Candrian, L'immunité des Etats face aux droits de l'homme et à la protection des biens culturels, Fribourg 2005, 388 et seqq.

forcement immunity of the BIS as an international organization usually comes into play, the balances of states are, for example, with the IATA[80] to be judged according to the normal principles of state immunity.

This results in the differentiation codified today in various international treaties between officially used watercraft and aircraft and commercially used objects. With regard to cultural goods and properties for maintaining cultural relationships, the attitude has clearly emerged in recent years not to classify them as serving commercial purposes.[81] Examples are the decision of the Swiss Federal Council in the case of Noga against Russia in 2005[82] or the considerations of the IGH on the Villa Vigoni used as a cultural centre near Lake Como in the decision of 2012. A further sub-case of this distinction is the exception for lawsuits in connection with land acquisition, intellectual property rights or participation in legal persons and companies in general as mentioned in various domestic laws and international codification projects.

IV. Humanitarian exceptions

A. Trend

More recently, there are considerations as to whether violations of obligations under international law, and in particular of certain fundamental norms, should lead to a restriction of immunity in the international community.[83] Whether this should be

80 See the unpublished decisions of the Swiss Federal Supreme Court 5A_483/2008 of 29 August 2008 and 5A_156/2007 of 29 August 2007. See also BGE 134 III 122.

81 See Nout van Woudenberg, State Immunity and Cultural Objects on Loan, Leiden 2012; M. A. Renold (ed.), L'entraide judiciaire internationale dans le domaine des biens culturels, Zurich 2011, or Jérôme Candrian, L'immunité des Etats face aux Droits de l'homme et à la protection des biens culturels: immunité de juridiction des Etats et droits de l'homme, immunité d'exécution des Etats et de leurs biens culturels, Zurich et al. 2005.

82 See BGE 134 III 177.

83 Cf. at least relatively early on Jürgen Bröhmer, State Immunity and the Violations of Human Rights, Leiden 1997, or Ǧamāl M. Badr, State Immunity: An Analytical and Prognostic View, Leiden 1984. More recently: Beatrix Real, State immunity and human rights: The enforcement of claims for reparation after violations of human rights, Berlin 2004; Christian Appelbaum, Restrictions on State Immunity in Cases of Serious Human Rights Violations: Lawsuits by citizens against a foreign state or foreign state officials before national courts, Berlin 2007; Rosanne Van Alebeek, The Immunities of States and Their Officials in International Criminal Law and International Human Rights Law, Oxford 2008; Annyssa Bellal, Immunités et violations graves des droits humains: vers une évolution structurelle de l'ordre juridique international?, Geneva 2008; Lucius Caflisch, «Immunité des Etats et droits de l'homme: évolution récente», in: International Community and Human Rights: Festschrift for Georg Ress on his 70th birthday on January 21, 2005, Cologne et al. 2005, 935–948; Candrian, supra n. 81; Christian Tomuschat, «L'immunité des Etats en cas de violations graves des droits de l'homme», Revue Générale de Droit International Public (2005), 51–74; Andrea Bianchi, L'immunité des Etats et les violations graves des droits de l'homme: la fonction de l'interprète dans la détermination du droit international, Revue Générale de Droit International Public (2004), 63–101.

the case in principle and which norms would justify this procedure was answered differently in the doctrine and by individual courts in their practice. The decision of the Greek Constitutional Court against Germany from 2000 (Prefecture Voiotia versus Germany – Distomo) and the Italian Court of Cassation from 2004 (Ferrini versus Germany) and the various related judgments and enforcement orders have been of particular importance in recent years, but in particular the judgment of the IGH in the proceedings Germany versus Italy (Jurisdictional Immunities of the State) of 3 February 2012[84].

B. Foundations

Most advocates for a further restriction of state immunity are concerned with building a hierarchy between international law norms that would justify such a non-granting or suppression of immunity. Accordingly, «normative hierarchy theory» is often used in this context.[85] The scope and delineation of these norms are approached differently, mostly with serious human rights violations in the foreground.

Norms of compulsory international law, such as those in the Vienna Convention of 23 May 1969 on the Law of Treaties and in the draft article for the responsibility of states for actions contrary to international law of the International Law Commission from 2001 as a special group of norms, could represent an at least already known reference variable be mentioned. As part of the work on the UN Convention, the question of a corresponding exception was discussed in detail by the ILC but was ultimately rejected on the basis of the opinion that it would not correspond to the then recognized standard of customary law. No state made such a proposal in the debates.[86] Accordingly, a majority of nine (against eight) judges in a large chamber of the ECHR came to the conclusion in 2001 that torture does not constitute an excep-

84 IGH, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012.

85 Compare in place of many Lee M. Caplan, «State Immunity, Human Rights, And Jus Cogens: A Critique Of The Normative Hierarchy Theory», 97 American Journal of International Law (2003), 741–781, or Paola Gaeta, «Immunity of States and State Officials: A Major Stumbling Block to Judicial Scrutiny?», in: A. Cassese (ed.), Realizing Utopia, Oxford 2012, 227–238; Brigitte Stern, «Vers une limitation de l'‹irresponsabilité souveraine› des Etats et chefs d'Etat en cas de crime de droit international?», in: La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international: «Liber Amicorum» Lucius Calfisch, Leiden 2007, 511–548. See also Thomas Giegerich, «Do Damages Claims Arising from Jus Cogens Violations Override State Immunity from the Jurisdiction of Foreign Courts?», in: C. Tomuschat & J.-M. Thouvenin (eds), The fundamental rules of the international legal order: jus cogens and obligations erga omnes, Leiden 2006; Tomuschat, supra n. 83, at 57, 58.

86 See IGH, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, § 89, and the debates of the ILC (Yearbook of the International Law Commission, 1999, Vol. II [2], p. 171–172) or in the UNGA (United Nations Doc. A/C.6/54/L.12, p. 7, para. 47).

tion to state immunity based on customary international law.[87] In its argument in the aforementioned judgment from 2012, the ICJ referred in particular to its own judgment in the Arrest Warrant Case of 11 April 2000 (Democratic Republic of Congo v. Belgium, Judgment, ICJ Reports 2002) that the violation of a *ius cogens* rule alone does not allow a fundamental exception to the granting of immunity for an incumbent foreign minister, and found this principle to be applicable analogously to state immunity.[88] Accordingly, apart from the Italian judgments, no divergent domestic judgments can be ascertained with regard to the jurisdiction immunity of states in domestic civil proceedings.[89]

The judgment of the ICJ from 2012 has of course already been discussed in detail in the literature and in practice and also has had an impact on other immunities in international law, as it becomes apparent in a judgment of the Dutch Constitutional Court of 13 April 2012, where parallels between the state immunity and the immunity of international organizations, particularly the United Nations.

C. Swiss practice (relating to individual responsibility)

On the other hand, the Swiss Federal Criminal Court does not mention the ICJ judgment at all in a case concerning the functional immunity of a former defence minister. Without wanting to go into the judgment in detail here – also out of consideration for my subsequent speaker – I allow myself to quote a central passage of the judgment:

Or, il serait à la fois contradictoire et vain si, d'un côté, on affirmait vouloir lutter contre ces violations graves aux valeurs fondamentales de l'humanité, et, d'un autre côté, l'on admettait une interprétation large des règles de l'immunité fonctionnelle (ratione materiae) pouvant bénéficier aux anciens potentats ou officiels dont le résultat concret empêcherait, ab initio, toute ouverture d'enquête. S'il en était ainsi, il deviendrait difficile d'admettre qu'une conduite qui lèse les valeurs fondamentales de l'ordre juridique international puisse être protégée par des règles de ce même ordre

87 «Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it has any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.» (Al-Adsani v. United Kingdom [GC], Application No. 35763/97, Judgment of 21 November 2001, ECHR Reports001-XI,P. 101, para. 61; ILR, vol. 123, p. 24). Cf. also Application No. 59021/00, Decision of 12 December 2002, ECHR Reports 2002-X, p. 417; ILR, Vol. 129, p. 537. See Christos L. Rozakis, «The Contribution of the European Court of Human Rights to the Development of the Law on State Immunity», in: Liber Amicorum Luzius Wildhaber, Kehl 2007, 387–402. Also the Federal Supreme Court in its unpublished decision 6B_133/2007 of 29 May 2008.

88 IGH, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, § 95.

89 See IGH, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, § 96.

juridique. Une telle situation serait paradoxale et la politique criminelle voulue par le législateur vouée à rester lettre morte dans la quasi-totalité des cas. Ce n'est pas ce qu'il a voulu.[90]

This finding and the decision not to deal with the ICJ ruling of 2012 are all the more astonishing, as the ICJ itself also addressed this question of the necessity of the consequences of violations of international law and especially of the *ius cogens,* in particular with the statement in Section 100:

In that context, the Court would point out that whether a State is entitled to immunity before the courts of another State is a question entirely separate from whether the international responsibility of that State is engaged and whether it has an obligation to make reparation.

D. A quest for coherence

One argument in practice and doctrine on this is that a violation of the *ius cogens,* analogous to the generally accepted exceptions for economic activities, always represents a non-sovereign action and therefore no *acta iure imperii* could exist. This contradicts the prevailing doctrine and in particular the ICJ, for which the illegality of an act committed in the exercise of sovereign authority does not constitute a reason not to classify these acts as sovereign and thus *acta iuris imperii*.[91] Basing on these norms would actually lead to a certain coherence between different regulatory areas of international law but would at the same time transfer the uncertainties inherent in this term to the area of state immunity.

Crimes under international law, as defined in various (but individual criminal law) conventions of more recent date, in particular now also in the statutes of the International Criminal Court (ICC), could represent another known reference variable.[92] Here, too, a certain coherence could be established in the evaluation or hierarchy formation between different sub-areas of international law, whereby the degree of concretization would be much higher than if it were based on mandatory international law or serious human rights violations in general – at the price of a restriction that was previously limited to a few types of behaviour. While these crimes were occasionally referred to by courts and states as relevant exceptions for granting immunity for state representatives, the ICJ rejected these individual criminal offenses as irrelevant in the context of state immunity, deliberately leaving it open.[93]

90 Decision of the Federal Criminal Court BB.2011.140 of 25 July 2012, E. 5.4.3.

91 IGH, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, § 60.

92 See in detail Italy and the IGH in the said proceedings, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, § 80.

93 See IGH, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, §§ 87 and 91.

The well-known domestic court decisions in this report are, on the one hand, the Pinochet judgment of the House of Lords in 2000[94] and most recently the decision of the Swiss Federal Criminal Court in the Nezzar case.[95] Domestically, reference can be made to the amendment to domestic legislation on state immunity, which was added in the context of the counter-terrorism campaign in 1996 to include an exception for torture or «extra-judicial killings» if the state in question is designated by the United States as a «State sponsor of terrorism».[96] In the opinion of the ICJ, this is an exception.

E. Right to a fair trial

Another subject area, which could also justify restrictions on state immunity in the area of guaranteed human rights, is the general (human rights-based) claim of the individual (or collectives made up of it) to access to a court and the review of civil law claims, such as they can be derived from Article 6 or 13 ECHR (at least for the rights recognized in the ECHR).[97] This raises the question of whether the risk of denial of justice should in any case be permitted as a mandatory exception to state immunity. Accordingly, one hears the argument that national courts would then have to allow the assertion of individual claims despite existing immunity, if otherwise no enforcement would be possible, as a «forum of necessity», as is sometimes known in international civil law[98]. However, the ICJ has also rejected this for state immunity.[99] The case law of the European Court of Human Rights remains rather unchanged in this respect as well and keeps accepting the needs of international cooperation and trust at the inter-state level as a legitimate public interest justifying an exception from the right to a fair trial even if it means impunity and often leads to frustrating situations for the claimants (which could certainly be eased by the forum state denying jurisdiction if wanted).[100]

94 [2000] 1 AC 147; ILR, Vol. 119, p. 136; on this IGH, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, § 87.

95 Decision of the Federal Criminal Court BB.2011.140 of July 25, 2012.

96 28 USC 1605A; on this IGH, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, § 88.

97 See Isabelle Pingel, Droit des immunités et exigences du procès équitable, Paris 2004.

98 See the unpublished decision of the Federal Supreme Court 4C.379/2006 of 22 May 2007 (X against the Republic of Tunisia). On this Ingeborg Schwenzer & Alain Hosang, «Human Rights Violations – Damages before Swiss Courts», 21 Swiss Rev. Int'l & Eur. L. (SZIER/RSDIE) (2011), 273–291; cf. also BGE 131 III 153 (IBM).

99 IGH, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, §§ 101–103.

100 See most recently the Judgment by the ECtHR in Case of J.C. and Others v. Belgium (application no. 11625/17–12.10.2021) where a majority (six votes to one) held that there had been no violation of Article 6 § 1 ECHR (right of access to a court) when Belgium granted immunity to the Holy See from the jurisdiction of domestic courts regarding an action for compensation brought by 24 applicants against

F. Compromise

In the absence of a direct possibility of punishing states (for example by analogy with the criminal liability of companies in domestic criminal law), the demand for the possibility of the individual to assert violations of international law against states in domestic courts also fulfils the postulate that certain acts must not remain unpunished, even if this topic is mostly only openly expressed in relation to the criminal liability of individuals. In these cases, the restriction of immunity would lead to a strengthening of the postulate to prevent impunity or at least the impunity of certain acts. But most states and diplomats remain cautious. In Italy, the Courts have tried to maintain their position but the Government refrains from implementing it.[101] Even the otherwise rather proactive US Supreme Court noted still very recently that «[a]s the International Court of Justice recently ruled [in its 2012 Jurisdictional Immunities of the State Judgment] when considering claims brought by descendants of citizens of Nazi-occupied countries, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law».[102]

In the aforementioned Jurisdictional Immunities of the State proceedings, the majority of the judges at the ICJ were unable to identify any customary international law basis for accepting an exception or a restriction of state immunity in these cases. The UN Convention is also silent on such a restriction despite extensive discussions in the context of the drafting of the text by the International Law Commission. Even with regard to the immunity to be granted to individuals, very few domestic courts have permitted exceptions in certain cases, while international criminal courts today exclude the assertion of immunity by individuals in the event of crimes under international law.

V. Final considerations

A. Scope of immunity and appropriate forum

The prevailing doctrine and the ICJ have repeatedly emphasized that the granting of immunity is solely a question of the appropriate forum for asserting claims against

the Holy See relating to sexual abuse in the Church. The Belgian courts had found that they did not have jurisdiction in respect of the Holy See.

101 For an overview, see: Carlo Focarelli, «State Immunity and Serious Violations of Human Rights: Judgment No. 238 of 2014 of the Italian Constitutional Court Seven Years on», Italian Review of International and Comparative Law (2021), 29–58.

102 Supreme Court (United States), Federal Republic of Germany et al. v. Philipp et al., Judgment of 3 February 2021, 13–15.

states and their representatives or enforcement against their assets and not the evaluation of the underlying legal violations.[103]

One possible interpretation of the historical and current discussions on the appropriate extent of state immunity is certainly the continuing dissatisfaction (if not frustration) of certain circles with regard to the enforceability of international law (and possibly other legal obligations) against states in general and against the individual particularly. Various options are already available as corrective measures.

B. Domestic courts and diplomatic protection

Where the protection of the individual against his own (territorial) state led to the establishment of a modern administrative and state law with more or less extensive legal protection, the violation of (international) legal obligations by one's own could in principle also affect national courts. In fact, this legal protection is very weak in many countries, especially for violations of international law and against foreigners. Diplomatic protection – especially in the case of an actual denial of justice – is a supplementary instrument that has been known for a long time in this regard, but which is also exposed to certain persistent problems.

C. Foreign domestic courts

In a very pragmatic way, various more recent domestic and international codifications have already taken up the idea that in certain cases affected individuals should have a general right of action against foreign states before national courts, even if state action is «sovereign in nature».

This includes, in particular, the waiver of immunity for non-contractual fault liability for acts that took place in whole or in part on the territory of the state in which an action is brought before a domestic court.[104] This exception is mostly referred to in English as «(extraterritorial) tort exception» or «territorial tort principle».[105] The

103 IGH, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, § 100. The IGH 2012 said: «In that context, the Court would point out that whether a State is entitled to immunity before the courts of another State is a question entirely separate from whether the international responsibility of that State is engaged and whether it has an obligation to make reparation.»

104 Cf. Art 11 of the European Convention on State Immunity and Art. 12 of the United Nations Convention on the Immunity of States and Their Property from Jurisdiction; IGH, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, § 62: «Italy points [...] to the fact that nine of the ten States it identified which have adopted legislation specifically dealing with State immunity (the exception being Pakistan) have enacted provisions similar to those in the two Conventions.»

105 So also from the IGH in its judgment Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, § 64.

exact scope of this general exception is again rather unclear. In particular, in state practice and in the discussion of this explicitly granted exception, it is unclear to what extent sovereign acts can and should really fall under it in practice.

While it is practically unanimously stipulated that (car) accidents and similar incidents in particular should fall under this, any application going beyond this is already controversial. This becomes clear from the discussion by the ILC itself and the explanatory declarations mentioned by the states that have actually proceeded to ratification.[106]

Here, too, one can again detect a certain consternation, even downright frustration, among certain authors when they discover that an exception should be granted for banal incidents such as a car accident, while systematic human rights violations or other flagrant violations of international law should not justify any restriction of state immunity. The statements of Giorgio Gaja in his dissenting opinion on the judgment of the ICJ are exemplary in this regard.[107] From the work on the UN Convention, it emerges that at least the ILC deliberately wanted to dispense with a restriction of the applicability of the resulting Art. 12 to non-sovereign acts.[108] Accordingly, this was criticized as a deviation from the applicable customary law.[109]

On the other hand, in the aforementioned decision, the ICJ refused to accept a restriction of state immunity from this (already very narrow) restriction, e.g., for acts of war (Sections 64–79). Article 31 of the European Convention of 1972 also provides that this exception to the granting of immunity for the actions of foreign armed forces is not applicable.

Also within the framework of the UN Convention, various circumstances indicate that the «tort exception» there should also not be applicable to military actions.[110] In this sense, we are particularly interested in the interpretative declaration made by Switzerland in the context of the ratification of the UN Convention, which reads:

In Switzerland's opinion, Article 12 does not regulate the question of claims for compensation in money for serious human rights violations, which ostensibly are attributable to the state and were

106 See also in detail IGH, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, Dissenting Opinion of Judge ad hoc Gaja.

107 «It would indeed be extraordinary if a claim could be entertained on the basis of the ‹tort exception› when the obligation breached is of a minor character while this exception would not apply to claims relating to breaches of obligations under peremptory norms.», IGH, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, Dissenting Opinion of Judge ad hoc Gaja, § 11.

108 In addition, IGH, Germany v. Italy: Greece intervening, Judgment of 3 February 2012, § 64.

109 See for example the statements of the Chinese delegation in the context of the discussions in the General Assembly of the United Nations in 1990 (United Nations Doc. A/C.6/45/SR.25, p. 2), also cited by the IGH, Germany v. Italy: Greece intervening, Judgment of 3 February 2012 § 64.

110 So in particular the declarations of Norway and Sweden on the occasion of the ratification, see IGH, Germany v. Italy: Greece intervening, Judgment of 3 February 2012, § 69.

committed outside the jurisdiction of the jurisdiction. Consequently, this Convention does not prejudice the further development of international law in this area.

It is all the more controversial when domestic courts in third countries open up legal protection options without sufficient reference to the plaintiff or the underlying infringement (e.g., the Alien Tort Claims Act in the United States). In Switzerland, too, the question of whether there is a sufficient internal relationship with serious violations of international law in third countries regularly confronts the courts with certain legal problems, but these are more of a civil procedural nature[111] are, although this could of course also represent an interesting question in principle for international law.[112] Such a sufficient internal relationship is usually present when subordinate employees are employed by diplomatic and consular representations.[113] On the other hand, the enforcement of an arbitration award against the Republic of Libya in the absence of an international obligation to recognize the arbitration award concerned (Liamco v. Libya) due to the national law required internal reference was rejected in 1980 without a simultaneous corresponding international law obligation to recognize the arbitration award issued in Geneva.[114] In the meantime, this practice has changed to the extent that the mere fact that the assets against which the enforcement is to be carried out are located in Switzerland or that the corresponding arbi-

111 See. Wilfried Schaumann, «Immunity of foreign states according to international law», at 65, and Walther J. Habscheid, «The immunity of foreign states according to German civil procedure law», at 165, both in: Reports of the German Society for Völkerrecht, No. 8, Karlsruhe 1968. See also the explanations of Federal Supreme Court in BGE 135 III 608.

112 Cf. Jolanta Kren Kostkiewics, «‹Internal Relationship› and State Immunity: A Phenomenon of Swiss Jurisprudence», in: R. Dörig et al. (eds), Versicherungsbranche im Wandel, Bern 2009, 287–305, and Schwenzer & Hosang, supra n. 98, 273–291, regarding the unpublished decision of the Federal Supreme Court 4C.379/2006 of 22 May 2007 (X vs. Republic of Tunisia). On this and the Swiss practice see in particular: Andreas R. Ziegler & Alexander Laute, «Vereinbarkeit des Merkmals der hinreichenden Binnenbeziehung mit dem New Yorker Übereinkommen zur Anerkennung und Vollstreckung von ausländischen Schiedssprüchen – Zugleich Besprechung des Urteils des Bundesgerichts v. 7. Sept. 2018–Az.: 5A_942/2017, BGE 144 III 411, 18 Zeitschrift für Schiedsverfahren (2020), 286–293.

113 See BGE 120 II 408 and BGE 124 III 382.

114 A sufficient internal relationship in foreclosure measures against foreign states was first (tacitly) demanded by the Federal Court in BGE 44 I 55. In the later decisions (BGE 104 Ia 370, BGE 86 I 27 E. 2, BGE 82 I 85 E. 7, BGE 56 I 249) this was done explicitly: «The requirement of such an internal relationship does not arise from the aforementioned international law rules, therefore does not belong to customary international law. Likewise, a State is not obliged by international law to allow the investigation or enforcement proceedings against foreign States for non-sovereign matters. Rather, he is empowered to impose a certain self-restraint on himself in this regard within the framework of his domestic law. According to its national law, every State has to determine the limits by regulating the local jurisdiction of its authorities within which it feels called upon to resolve issues arising from non-sovereign actions of foreign States would regulate such cases, it is up to the Federal Supreme Court to determine the competence of the Swiss authorities in response to a constitutional complaint within the framework of Article 84 (1) (d) OG (BGE 56 I 246 f.). The requirement of a sufficient internal relationship is therefore an expression of Swiss national law.»

tration award was issued in Switzerland is regarded as sufficient for the required domestic reference.[115]

Whether decentralized enforcement by national courts, as it may be appropriate for individuals due to the size of the potential perpetrators and their mobility[116], is appropriate between states appears rather doubtful and the dangers for the system should not be underestimated. Even in the highly emotional (and frustrating) case relating to the well-known atrocities committed against the so-called comfort women during WW II, the Seoul Central District Court (South Korea) held still in April 2021:

> [...] the Japanese government enjoys sovereign immunity under customary international law, by which principle it is exempt from the jurisdiction of courts in other countries. ... If [the court] accepts an exception in State immunity, a diplomatic clash is inevitable in the process of the ruling and enforcing it, [...] Resolution of the comfort women issue should be made through diplomatic discussions.[117]

It should be noted that the same court in different composition had decided in January of the same year in favour of another group of claimants and denied immunity to Japan.[118] This shows that the principle seems no longer totally sacred (as evidenced by the mentioned decisions in Italy and Greece as well). It may take more time but maybe the accepted exceptions relating to core crimes for individuals (at least without increased personal immunities[119]) may lead to more acceptance for a parallel exception for states. It is (normally) no longer an absolute principle as the long-established practice regarding other exceptions (in particular *acta jure gestionis*) proves.

115 See BGE 134 III 122, E 5.2.1: «La prétention déduite en poursuite doit ensuite être issue d'un rapport de droit qui présente un rattachement suffisant avec la Suisse (internal relationship). Ce lien est suffisant lorsque le rapport d'obligation est né en Suisse ou qu'il doit y être exécuté, ou lorsque l'Etat étranger a procédé en Suisse à des actes qui sont propres à créer un lieu d'exécution; il est insuffisant s'il résulte de la seule localisation des biens du débiteur en Suisse ou du seul fait que la créance a été constatée par un tribunal arbitral qui a son siège en Suisse [...].»

116 See the more abundant case law in this field, as exemplified by also by a judgment of the Swiss Federal Criminal Court (Nezzar) of 25 July 2012 and most recently BGH (Germany), 3 StR 564/19 of 28 January 2021 (Afghan army officer accused of coercing, mistreating, and desecrating captured Taliban fighters [relatively low ranking/war crimes]). See also Report of the International Law Commission to the General Assembly, 72 U.N. GAOR Su No. 10, U.N. Doc. A/72/10 (2017).

117 See Ji-Young Lee & Mintaro Oba, «Japan-Korea Relations: Difficult to Disentangle – History and Foreign Policy», 23 Comparative Connections (2021), 131–138.

118 Ibid.

119 See in this respect also African Union: 2014 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol) where personal immunities for high-ranking officials (even before international courts and tribunals) are upheld.

D. Waivers

Especially in the area of economic activity and above all in the case of contractual claims against states, a waiver of state immunity and submission to a jointly agreed arbitration system has established itself as a common means of enabling such processes. This instrument cannot be used in many areas; however, it is more controversial again today (especially investor-state arbitration) and can also only solve the problems in the enforcement of arbitral awards to a limited extent. This even applies to the ICSID procedure, which basically provides for easier enforcement, at least by the contracting parties.[120]

E. Special tribunals

In addition, however, it is also conceivable to set up an arbitration tribunal for all claims by private individuals against a state. Examples of this are the Claims Commissions or Claims Tribunals created so far, for example the Iraq Compensation Commission, established by the United Nations Security Council, the Iran-United States Claims Tribunal, or the Eritrea-Ethiopia Claims Commission, which were created on a case-by-case basis by bilateral treaty.[121]

F. International courts

Due to the existing problems with the definition of the cases in which state immunity should oppose private lawsuits and their enforcement before domestic authorities, the question arises whether, due to the intergovernmental situation, the creation of international institutions, in particular courts, is an alternative as it was attempted (among other things) to circumvent the problem of the immunity of state representatives with the creation of international criminal courts. The European Court for State Immunity, created within the framework of a protocol adopted to the Council of Europe Convention of 1972 (which, however, is only open to review judgments that have already been passed by a national court in denial of immunity) represents an application case. The fact that this is only recognized by six contracting parties and the waiver of a corresponding institution within the framework of the United Nations Convention suggest that the states do not favour such solutions for the time being. States that submit to international jurisdiction with the possibility of individual complaints also explicitly waive their state immunity, especially if the system al-

120 See Maria Carolina Graciarena, La inmunidad de ejecución del estado frente a los laudos del CIADI, Buenos Aires 2007.

121 See also the Dissenting Opinion by Judge Yusuf (Germany v. Italy: Greece intervening), Judgment of 3 February 2012), § 16.

ready provides for the enforcement of decisions (e.g., compensation for damages) (e.g., ECHR). An expansion of international and regional jurisdiction for serious human rights violations, which also allows those affected to have direct access, therefore appears to be particularly advisable in order to offset the disadvantages of state immunity. that this is only recognized by six contracting parties and the waiver of a corresponding institution within the framework of the United Nations Convention probably indicate that the states do not favour such solutions for the time being. States that submit to international jurisdiction with the possibility of individual complaints also explicitly waive their state immunity, especially if the system already provides for the enforcement of decisions (e.g., compensation for damages) (e.g., ECHR). An expansion of international and regional jurisdiction for serious human rights violations, which also allows those affected to have direct access, therefore appears to be particularly appropriate in order to offset the disadvantages of state immunity. The fact that this is only recognized by six contracting parties and the waiver of a corresponding institution within the framework of the United Nations Convention probably indicate that the states do not favour such solutions for the time being. States that submit to international jurisdiction with the possibility of individual complaints also explicitly waive their state immunity, especially if the system already provides for the enforcement of decisions (e.g., compensation for damages) (e.g., ECHR). An expansion of international and regional jurisdiction for serious human rights violations, which also allows those affected to have direct access, therefore appears to be particularly appropriate in order to offset the disadvantages of state immunity.