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Summary

Immunity of States – with special consideration of the practice in Switzerland

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Scope of state immunity

1. For the prevailing doctrine, the concept of state immunity has since its inception been closely linked to the concept of the sovereign respectively sovereign ruler. According to this view, the evolution of the State as holder of this sovereignty leads to the concept of State immunity embodying a system-inherent and specific State prerogative. Accordingly, its legal foundation can be found in the maxim "*par in parem non habet imperium (jurisdictionem)*". However, some authors would object that State immunity only constitutes an exception from national jurisdictional sovereignty which should be interpreted rather restrictively, and that moreover this national jurisdictional sovereignty should only be restricted if justified by a common or mutual interest of the States.

2. Whether historically *derived* from the immunity of the prince or more recently from the State as such, there exist also a number of (*derived) immunities* of various State representatives (diplomatic immunities, general immunities of State representatives etc.) and of specific State property such as real estate, bank accounts, cultural property or specific vehicles such as ships/vessels, air crafts etc. It should be noted, however, that in particular for the latter category, the distinction between immunity and inviolability is not always clearly established in the doctrine and legal practice.

3. The exact *scope* of State immunity, i.e. whether it is absolute or relative respectively restricted, has always tended to be controversial. Indeed, different opinions in State practice and doctrine have existed at different times. There may also be considerable differences, depending on the legal system involved, in the national implementation of State immunity in particular as regards procedural questions.

4. Essentially, State immunity protects a State from the domestic jurisdiction of another State and from the compulsory enforcement of, or other measures to secure, such awards against the State´s property. The distinction between *immunity from jurisdiction* and *immunity from enforcement* can thus be considered as rather recognized. It should be noted, however, that this distinction only becomes relevant if one accepts that Immunity can be limited and then differentiates between the different stages of a classical domestic law enforcement procedure including court decisions and enforcement measures.

5. The differing national and international *attempts at codification* reflect this problem until today. Worth mentioning in this context is in particular the European Convention on State Immunity of the Council of Europe adopted at Basel on 16 May 1972, which did enter into force, but was only ratified by eight States (including Switzerland, Germany and Austria). More recently, the UN Convention on Jurisdictional Immunities of States and their Property was adopted on 2 December 2004, but will only enter into force once 30 States will have ratified it (at the time of writing, 28 States have signed it and 13 have ratified it, of which both Switzerland and Austria; Germany has so far not

signed it). Similar differences can be seen in domestic attempts at codification, such as the United States Foreign Sovereign Immunities Act (1976). In the absence of a comprehensive international codification, these few national codifications and relevant State practice mostly rely on what can be considered customary international law.

Restrictions on grounds of commercial transactions

6. States have been traditionally granting each other absolute immunity. However, soon the question arose as to whether there should be an exception to this rule in cases where a State was engaging in *commercial transactions*. Ratio of this distinction was the fact that where the State does not act within the confines of its State *sovereignty* but engages as a normal commercial actor, the enjoyment of immunity does not seem to be warranted anymore.

7. In particular in view of the importance of their taking part in commercial transactions and in order to avoid legal insecurity, States have started early on to *waive* their immunity. Normally, the other States (implicitly or explicitly) accept this practice, though the exact scope of the *waiver of immunity* may – in particular in the frame of arbitral proceedings – sometimes be contentious. Generally, it can be said that a waiver or loss of State immunity at the jurisdictional stage can be more easily assumed than at the enforcement stage, which may entail problems during the enforcement of judicial and arbitral decisions arising from proceedings to which the State in question has consented.

8. Historically, the restriction of immunities (not only of) States concerned chiefly commercial transactions. Already in the late 19th century, respective State practice was relatively widespread in certain economically important countries (such as the United Kingdom) and found later expression in the respective norms in international codifications and national decrees.

9. This development has led to the distinction between sovereign acts (*acta jure imperii*) and commercial acts or transactions (*acta jure gestionis)*. The exact classification of an act can in practice often be controversial.

10. A special case in this context is the restriction of immunity for contracts of employment with *lower-level or auxiliary staff*, even if this case is normally not directly classified as an *acta jure gestionis*. However, the idea is the same, distinguishing between the rather more sovereign character of the employment of *higher-level or professional staff* (such as diplomatic agents, consular officers or persons performing particular functions in the exercise of governmental authority) and the rather commercial character of the employment of lower-level or auxiliary staff for purposes of running the embassy and similar tasks.

11. The distinction between enforcement into State assets (real estate, bank accounts etc.) that serve a sovereign purpose and those that are of a more commercial nature, may be understood in the same vein, even though doctrine and legal practice prefer to treat these aspects of immunity from enforcement separately from jurisdictional immunity because of various specific questions. This has led to the distinction, now codified in several international treaties, between *vessels and aircrafts used for a sovereign purpose* and other objects *used for a commercial purpose*.

12. A further sub-category of this distinction can be seen in the exception, now also contained in several codifications, existing for *claims in relation with or arising from the*

acquisition of real estate, intellectual property rights or the participation in legal persons and companies in general.

Restrictions on „humanitarian" grounds

13. More recently, the question has arisen as to whether violations of obligations of public international law in general and of *certain norms considered fundamental* by the international community in particular should lead to a restriction of State immunity. Doctrine and jurisprudence have indeed been split over this question, both as to whether this should be the case and which norms could found such a finding. In this respect, certain judgments rendered over the past years are of particular importance; such as the judgment of the Greek Constitutional Court against Germany from 2000 (*Prefecture Voitio v. Germany – Distomo*); the judgment of the Italian Court of Appeal from 2004 (*Ferrini v. Germany*); the different decisions and execution orders in relation to the former two judgments; and of course in particular the judgment of the ICJ in the proceedings between Germany and Italy (*Jurisdictional Immunities of the State*) of 3 February 2012.

14. Ratio of this further restriction of State immunity is for advocates of this theory to arrive at a *hierarchy* between public international law norms which would justify such a denial or suppression of State immunity. Accordingly, this theory is also called „normative hierarchy theory". The scope and delineation of these norms vary, though serious violations of human rights usually at the forefront.

15. A possible point of reference are peremptory norms of international law as already mentioned as special category of norms in the Vienna Convention of 23 May 1969 on the Law of Treaties and the 2001 Draft articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts. It has been argued in legal practice and doctrine that in analogy to the generally accepted exceptions for commercial transactions, the violation of *ius cogens* should always be considered a non-sovereign act and thus no *acta jure imperii*. To accept this analogy would indeed have the benefit of providing for greater coherence between different areas of public international law, though at the same time, it would also risk transferring the uncertainties inherent in the notion of *ius cogens* to the law of State immunity.

16. A further argument which could possibly also justify a restriction of the principle of State immunity in the ambit of guaranteed human rights can be found in the general right, based on human rights law, of the individual (or collective entities composed by individuals) to *access to justice* and to *effective remedy*, as e.g. provided for in Articles 6 and 13 of the European Convention on Human Rights (for the rights provided for by that Convention). Here the question arises as to whether the risk of a *denial of justice* would in any case justify an exception from the principle of State immunity.

17. In the absence of the direct possibility of punishing States (such as in analogy to the criminal responsibility of enterprises under national penal law), the demand for the possibility to enforce violations of public international law by individuals before national jurisdictions also seems to fulfil the postulate that certain actions not remain unpunished, even though this issue is mostly raised with respect to individual criminal responsibility. The restriction of State immunity would in those cases thus lead to a consolidation of the postulate against *impunity* respectively the lack of consequences of certain acts.

18. In the above-mentioned case *Jurisdictional Immunities of the State*, the majority of the judges of the ICJ could not find a basis in customary international law for accepting an exception or a restriction of State immunity in these cases. Even the above-mentioned UN Convention is silent on this issue, this in spite of extensive discussions of this question during the elaboration of the text by the International Law Commission. Even with respect to immunities of individuals, only very few national courts have under certain circumstances accepted exceptions, while international criminal tribunals nowadays refuse to give effect to immunities of individuals in the case of *international crimes*.

Final observations: Scope of immunity and appropriate forum

19. A possible interpretation of the historical and topical discussions on the appropriate scope of (State) immunity could certainly be found in the continuing dissatisfaction (if not frustration) by certain circles concerning the enforceability of public international law (and possibly of other legal obligations) *vis-à-vis* States in general and *vis-à-vis* the individual in particular. Various options could serve as corrective.

20. National courts and diplomatic protection: Where the protection of the individual against his own (territorial) State has led to the construction of a modern administrative and constitutional legal system with an increased level of legal protection, violations of public international law could also be judged by the national courts of the individual´s own State. Indeed, in particular for violations of public international law and *vis-à-vis* foreigners, this possibility of legal protection is in many States highly deficient. In particular also in the case of a denial of justice properly speaking, diplomatic protection has been in this respect a known and supplementary instrument for long time, facing however also certain continuing problems.

21. Foreign courts: Several more recent national and international codifications have taken up in a rather pragmatic manner the idea of granting to concerned individuals in certain cases a general right to sue foreign States before national jurisdictions, even if the act in question was sovereign in nature. This includes in particular the waiver of immunity for tortious liability for acts that occurred partially or entirely on the territory of the State before whose national jurisdiction the claim is being brought. On the other hand, the ICJ rejected in the already mentioned decision the possibility of finding a further restriction of State immunity in the case of acts of war on the basis of the aforementioned (already very narrow) exception (paras. 64-79). Even more controversial is the fact of some national courts in third States offering legal remedies without any sufficient link to the claimant or the underlying breach of obligations (e.g. the ATCA in the United States). Whether the decentralized enforcement through national courts, which may be appropriate for individuals in view of the number of potential perpetrators and their mobility, seems also advisable for States is questionable, and the risks for the system should not be underestimated.

22. Arbitral tribunals: In particular in the ambit of commercial transactions and more specifically in the case of contractual claims against States, the waiver of State immunity and the submission to an agreed-upon arbitral jurisdiction has gained ground as a common method to facilitate these proceedings. However, in many areas, this instrument cannot be used, has again grown increasingly controversial (in particular investor-State arbitration) and can solve the problems arising from the enforcement of arbitral decisions only to a limited extent.

23. International tribunals: Given the extant problems in delineating in which cases State immunity should be opposable to private claims and their enforcement before national jurisdictions, the question arises as to whether alternatively the creation of international institutions, in particular tribunals, would be advisable in view of the transnational dimension. Similar attempts in order to solve the problem of immunity of State representatives have thus led to the creation of international criminal tribunals. The European Tribunal on State Immunity created in the frame of the adoption of an Additional Protocol to the 1972 European Convention on State Immunity (which may however only review national judgments rendered in denial of State immunity) is also one such example. Yet, the fact that only 6 States parties have recognized its jurisdiction, as well as the absence of a similar institution in the 2004 UN Convention would seem to indicate that States are not in favour of such an option. States that submit to an international jurisdiction with the possibility of claims by individuals can also be considered to explicitly waive their State immunity, in particular where the system provides for the enforcement of the decisions (e.g. damages), such as in the European Convention on Human Rights. The further development of an international and regional jurisdiction, which grant direct standing to individuals in cases of serious violations of human rights, seems thus particularly recommendable in order to remedy the shortcomings of State immunity.