Immunity from Jurisdiction and Immunity from Measures of Constraint

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1. Introduction

In its judgment of 3 February 2012 in *Jurisdictional Immunities of the State*, the International Court of Justice observed:

> [T]he 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, with a view to enforcing the judgment in question. 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.
>
> The rules of customary international law governing immunity from enforcement and those governing jurisdictional immunity (understood *stricto sensu* as the right of a State not to be the subject of judicial proceedings in the courts of another State) are distinct, and must be applied separately.[1]

Later in the judgment, the Court applied this distinction in the context of Germany's claim that the Italian judgments declaring Greek decisions enforceable in Italy violated Germany's jurisdictional immunity. The Court noted:

> [T]he claim in Germany's third submission is entirely separate and distinct from that set out in the preceding one … The Court is no longer concerned to determine here whether a measure of constraint—such as the legal charge on the Villa Vigoni—violated Germany's immunity from enforcement, but to decide whether the Italian judgments declaring enforceable the pecuniary awards pronounced in Greece did themselves—independently of any subsequent measures of enforcement—constitute a violation of the Applicant's immunity from jurisdiction.[2]

In these passages, the Court confirmed the general opinion that immunity from suit and immunity from execution are two separate matters.[3] As Ian Sinclair wrote in 1979,

> (p. 14) whatever may be the theoretical relationship between jurisdictional immunity and immunity from execution, the sensitivities of foreign States are likely to be aroused if, following upon the denial of a claim to jurisdictional immunity, the courts of the State of the forum authorize the levying of forced execution against the property of the defendant State.[4]

It follows from this separateness that one should not view restrictions on immunity from execution as flowing automatically from restrictions on immunity from suit. The Swiss courts are sometimes cited for a different view, but if one looks beyond the rhetoric it is clear that in fact they admit the distinction,[5] which is also reflected in various codification projects[6] and national laws.[7]

The Convention embodies this important conceptual and practical distinction, differentiating between ‘immunity from jurisdiction’, as regulated by Parts II and III and the accompanying ‘understandings’ annexed to the Convention, and ‘immunity from measures of constraint’, as dealt with in Part IV and in the understanding with respect to Article 19.

2. Background

In the International Law Commission’s oft-cited words, immunity from execution may be viewed as ‘the last bastion of immunity’.[8] This is meant in the sense that, procedurally, immunity from execution may be a long-stop protection for the State even when immunity from suit has been removed. Such protection is of particular importance where the defendant State does not accept, in principle, the restriction on immunity applied by the courts of the forum or does not accept that the restriction has been properly applied.

As a practical matter, once the restrictive doctrine of immunity became established in the last century, immunity from measures of constraint became one of the most important issues within the law of State immunity. The ability, should it prove necessary, to enforce a judgment is obviously vital for a claimant, since there is, for most litigants, little point in securing a favourable judgment if the defendant State can simply refuse to pay the judgment debt and get away with it.[9] However satisfactory the rules on immunity (p. 15) from jurisdiction may be, if a judgment cannot be executed against a recalcitrant State, it may prove to be worth little or nothing. But execution is also a very sensitive matter in inter-State relations. Execution against State property located in the territory of another State can be a source of intense friction.

It is not, therefore, surprising that immunity from execution has been one of the most contested aspects of State immunity, indeed an ‘intractable aspect’.[10] As Gerhard Hafner has put it, ‘enforcement measures are considered to be more likely to intrude into the sovereign rights of a State so that States apply a more cautious approach’.[11] Even after the acceptance of restrictions on immunity from suit, immunity from execution was often regarded as absolute, absent treaty exceptions. There were in fact a number of early treaty exceptions. Article 281 of the Treaty of Versailles provided that, ‘[i]f the German Government engages in international trade, it shall not in respect thereof have or be deemed to have any rights, privileges or immunities of sovereignty’.[12] Under the International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships (1926 Brussels Convention),[13] State-owned ships, except warships etc, may be arrested and detained in the same way as privately owned merchant vessels. But these are specific treaty provisions addressing particular circumstances or classes of property, and it is difficult to discern in them any move towards the development of customary exceptions to immunity from execution.

The reluctance on the part of States, even within Europe, to acknowledge exceptions to immunity from execution is reflected in the European Convention on State Immunity, adopted under the auspices of the Council of Europe in 1972.[14] The ECSI was based on a unique (and complex) approach, which took as a starting point that States are immune from measures of execution. The Convention provided that ‘[n]o measures of execution or preventive measures against the property of a Contracting State may be taken in the territory of another Contracting State except where and to the extent that the State has expressly consented thereto in writing in any particular case’.[15] At the same time, the Contracting States undertook, in most circumstances, to give effect to any judgment given against them in application of the Convention’s exceptions to immunity for jurisdiction.[16] In addition, there were optional provisions under which, if accepted, Contracting States

accepted enforcement in limited circumstances.[17] As of 2012 the ECSI had secured eight Contracting States, of which six had accepted the optional provisions.[18]

The insistence on retaining immunity from execution may be thought to raise doubts about the reality of States' acceptance of the restrictive doctrine of immunity. Can it (p. 16) really be said that the restrictive doctrine is gaining headway if judgments cannot be enforced against the State? The better view is that the prevalence of the restrictive doctrine in the context of immunity from jurisdiction is nonetheless significant, since most States most of the time give effect to judgments, sometimes even if they do not themselves accept the restrictive doctrine.

3. The Convention

The United Nations Convention on Jurisdictional Immunities of States and Their Property embodies two important distinctions: first, between immunity from jurisdiction (or immunity from suit) and immunity from measures of constraint (or immunity from execution),[19] which are dealt with in separate Parts; and, second, between measures of constraint that are taken before judgment on the merits and those that are taken to enforce a judgment on the merits, as elaborated in Part IV.[20]

The first distinction, the origins of which lie deep in the history of State immunity, was always fundamental to work on the Convention. The distinction between immunity from jurisdiction and immunity from measures of constraint is reasonably easy to draw, although in *Jurisdictional Immunities of the State* the Court was compelled to explain in some detail that a court decision declaring a foreign judgment enforceable constituted a violation of immunity from jurisdiction, rather than immunity from execution.[21]

The second distinction is novel,[22] and only came to the fore in the 1999 Working Group of the ILC. It had not been present in the Commission's 1991 draft articles. The Working Group 'concluded that a distinction between prejudgement and post-judgement measures of constraint may help to sort out the difficulties inherent in this issue'.[23]

The provisions on measures of constraint are among the most important and innovative of the Convention. They were the subject of difficult negotiations, especially in the period after the ILC adopted its final draft articles in 1991.[24] They were discussed at length by States in the context of the ILC Working Group, the Working Group of the Sixth Committee, the Sixth Committee itself, and the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property. The provisions of Part IV of the (p. 17) Convention as ultimately adopted reflect a workable compromise between those States that were opposed to any form of execution against State property and those that wanted execution to be widely available. The outcome represents a fair balance. It largely protects the State against pre-judgment measures of constraint while permitting, in certain circumstances, execution of an eventual judgment against property 'specifically in use or intended for use by the State for other than government non-commercial purposes'.

Achieving a reasonable compromise on immunity from measures of constraint was probably the most important step on the long march towards the adoption of the Convention by the UN General Assembly in December 2004. Adoption was without a vote—that is to say, without a single State objecting. The solution found in Article 19 (including the 'understanding' in the annex) has been described as 'a major achievement of the Convention'.[25] It was also a major achievement by two members of the ILC who were also active in the Sixth Committee, namely Ambassador Carlos Calero-Rodrigues of Brazil and Professor Gerhard Hafner of Austria. It was largely due to their knowledge, skill, and

persistence that the complex negotiations were eventually brought to a successful conclusion.[26]

How far do the provisions of Part IV of the Convention reflect customary international law? This is part of the wider question concerning the Convention as a whole, and retains all its importance, since there are very few relevant treaties, or treaty provisions, in force. The Convention itself is not (yet) in force, and it may well be a very long time, if ever, before it is binding, as a treaty, for most States. Nevertheless, the signs are there that many of its provisions are already viewed by international and domestic courts, by governments, and by writers as reflecting customary international law.[27] This is likely to become even more the case with the passage of time. But it remains important to assess the Convention's provisions individually to see how far this is justified.[28] The provisions on measures of constraint, when negotiated, probably involved a degree of progressive development as well as codification. But the reception of these provisions by States over time, including their adoption by the General Assembly without a vote, means that courts and tribunals called on to apply customary international law in this field may well regard the content of this Part as largely reflecting custom. At the very least they will treat its provisions as an important element in the identification of the rules of customary international law in this field.

(p. 18) 4. Conclusion

In *Jurisdictional Immunities of the State*, the Court noted that 'both Parties agree that immunity is governed by international law and is not a mere matter of comity', and emphasized 'that the rule of State immunity occupies an important place in international law and international relations'.[29] The Preamble to the United Nations Convention on Jurisdictional Immunities of States and Their Property expresses the belief that

> an international convention on the jurisdictional immunities of States and their property would enhance the rule of law and legal certainty, particularly in dealings of States with natural or juridical persons, and would contribute to the codification and development of international law and the harmonization of practice in this area.

One matter of particular importance for the future acceptance of common rules of law of State immunity is a proper appreciation of the distinction between the rules relating to immunity from jurisdiction and those relating to immunity from measures of constraint, as set out in the Convention and as they are to be found in customary international law.

Footnotes:

1 *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening), Judgment*, 3 February 2012, International Court of Justice, para. 113.

2 *Jurisdictional Immunities of the State* (n. 1), para. 124.

3 Among the writings on State immunity, including immunity from execution, see J. Crawford, 'Execution of Judgments and Foreign Sovereign Immunity' (1981) 75 *AJIL* 820; R. Jennings and A. Watts (eds), *Oppenheim's International Law. Volume I: Peace* (9th edn) (London: Longmans, 1992), 341–65; N. Turck, 'French and US Courts Define Limits of Sovereign Immunity in Execution and Enforcement of Arbitral Awards' (2001) 17 *Arbitration International* 327; A. Dickinson, R. Lindsay, and J. Loonam, *State Immunity: Selected Materials and Commentary* (Oxford: Oxford University Press, 2004); G. Hafner and U. Köhler, 'The United Nations Convention on Jurisdictional Immunities of States and Their Property' (2004) 35 *NYIL* 3; D. Stewart, 'The UN Convention on Jurisdictional Immunities of States and Their Property' (2005) 99 *AJIL* 194; A. Reinisch, 'European Court State Practice Concerning State Immunity from Enforcement Measures' (2006) 17 *EJIL* 803; E. Wiesinger, 'State Immunity from Enforcement Measures' (2006) http://intlaw.univie.ac.at/fileadmin/user_upload/int_beziehungen/Internetpubl/wiesinger.pdf; H. Fox, *The Law of State*

Immunity (2nd edn) (Oxford: Oxford University Press, 2008), chap. 18; M. Shaw, *International Law* (6th edn) (Cambridge: Cambridge University Press, 2008), 697–750; G. Hafner, 'United Nations Convention on Jurisdictional Immunities of States and Their Property', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2012), vol. X, 319; S. Murphy, *Principles of International Law* (2nd edn) (St Paul, MN: West Law, 2012), 302–23; J. Crawford (ed.), *Brownlie's Principles of International Law* (8th edn) (Oxford: Oxford University Press, 2012), 502–5; X. Yang, *State Immunity in International Law* (Cambridge: Cambridge University Press, 2012), chap. 9.

4 I. Sinclair, 'Law of Sovereign Immunity: Recent Developments' (1979) 167 *RdC* 113, 219–20. Hazel Fox likewise refers (n. 3), 605, to 'the separate regime of immunity from execution'.

5 See Fox (n. 3), 604.

6 See eg the Institut de Droit international's 1991 resolution 'Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement' (Basel session, 2 September 1991), in 64 *Annuaire de l'Institut de Droit international* (1992), vol. II, 388. See also the ILA Revised Draft Articles.

7 See the laws discussed with respect to Part IV UNCSI.

8 ILC commentary, draft art. 18, para. 2.

9 An exception would be those cases, increasingly frequent, where legal proceedings are instituted against a State as part of a campaign against the government's policies, for example the various Falun Gong cases against the People's Republic of China. In such cases, principle rather than money is what matters to the claimant.

10 Fox (n. 3), 8.

11 Hafner (n. 3), para. 37.

12 The same language appeared in the treaties of peace with Austria, Bulgaria, Hungary, and Turkey.

13 Brussels, 10 April 1926, 176 LNTS 199. See also its Additional Protocol, Brussels, 24 May 1934, 176 LNTS 215.

14 Basel, 16 May 1972, 1495 UNTS 182. See Expl. Rep. ECSI, paras 76–95 and 104–106; R. O'Keefe, 'European Convention on State Immunity (1972)', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2012), vol. III, 889.

15 Art. 23 ECSI.

16 See Art. 20 ECSI.

17 Art. 26 ECSI.

18 The relationship between the ECSI and the UNCSI has been discussed within the Council of Europe. See O'Keefe (n. 14). It seems to be generally accepted that the UNCSI will supersede the ECSI as and when the latter enters into force for the parties to the former. For details see the commentary to Art. 26.

19 The term 'measures of constraint' was viewed in the ILC as broader or less technical than 'execution'. See ILC commentary, draft Part IV, para. 2. The terminology of the Convention, including 'measures of constraint', seems to have been adopted by the ICJ in *Jurisdictional Immunities of the State*, an example of the contribution of the Commission's

output to the harmonization of the use of terms in international law. See the commentary to Part IV.

20 See Art. 18 (pre-judgment measures) and Arts 19 and 21 (post-judgment measures) UNCSI. See also the commentaries to Part IV and Arts 18, 19, and 21 UNCSI.

21 See *Jurisdictional Immunities of the State* (n. 1), paras 121–133. The Court said, para. 128, that '[w]hen a court is seised, as in the present case, 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'.

22 The only national legislation to embody the distinction is the FSIA (US), which recognizes a broader immunity from pre-judgment than from post-judgment measures. See s. 1610(*a*) and (*b*) versus 1610(*d*) FSIA (US), although see also s. 1610(*e*), on the immunity of State vessels. As for the ECSI, the immunity accorded by Art. 23 ECSI is the same as between 'measures of execution' and 'preventive measures'. At the same time, Art. 26, an optional provision, seeks to restrict immunity from execution only.

23 1999 report ILC Working Group, 171, para. 126.

24 See the commentaries to Arts 18, 19, and 21.

25 Hafner (n. 3), para. 40.

26 For tributes to Carlos Calero-Rodrigues, including his work on the topic of jurisdictional immunities of States and their property, see summary record 3129th ILC meeting, UN doc. A/CN.4/SR.3129.

27 See eg P.-T. Stoll, 'State Immunity', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2012), vol. IX, 498, para. 4, stating that the Convention 'is already widely acknowledged as an accurate, extensive, learned, and systematic reflection of this field of the law, and is widely used as a basis for legal practice and scholarly reflection'. See also para. 83.

28 One might, for example, question the European Court of Human Rights' statement in *Cudak v Lithuania*, application no. 15869/02, Judgment (Merits and Just Satisfaction), ECtHR (GC), 23 March 2010, para. 67, that 'it is possible to affirm that Article 11 of the International Law Commission's 1991 Draft Articles, on which the 2004 Convention was based, applies to the respondent State under customary international law'. Art. 11, on contracts of employment, is a very specific provision, and sets out in a detailed manner a particular negotiated compromise. This is perhaps why the Court focused on the 1991 draft, which was quite unusual when the General Assembly had already adopted a Convention with a quite different provision. See the commentary to Art. 11 UNCSI for details.

29 *Jurisdictional Immunities of the State* (n. 1), paras 53 and 57.