AJEE
ACCESS TO JUSTICE IN EASTERN EUROPE
Peer-reviewed Journal

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Research Article

STATE IMMUNITY, BETWEEN PAST AND FUTURE

Cristina Elena Popa Tache

Submitted on 20 Dec 2023 / Revised 27 Jan 2023/
Approved **30 Jan 2023** / Published: **15 Feb 2023**

Keywords: *state immunity, sovereignty, jurisdiction, tribunal, international law, treaty*

ABSTRACT

Background: *State immunity, a subject rarely encountered in the East, is being brought to light more and more often lately. In the process of being detached from customary law, it has been subject to several attempts at codification. These attempts appear to have been overtaken by developments in doctrine, which demonstrates the existence of potentially delicate situations of public international law. In this context, we recall the United Nations Convention on Jurisdictional Immunities of States and their Property*

Cristina Elena Popa Tache
Associate Professor of International Law and an Active Researcher at CIRET- Centre International de Recherches et Études Transdisciplinaires Paris, France cristinapopatache@gmail.com https://orcid.org/0000-0003-1508-7658
Corresponding author, solely responsible for writing and research. **Competing interests:** No competing interests. Disclaimer: The author declares that her opinion and views expressed in this manuscript are free of any impact of any organizations. **Translation:** The content of this article was written in English by the author.
Managing editor – Dr Oksana Uhrynovska. **English Editor** – Dr Sarah White.

How to cite: Cristina Elena Popa Tache 'State Immunity, Between Past and Future' 2023 1(18) Access to Justice in Eastern Europe 97-110. https://doi.org/10.33327/AJEE-18-6.1-a000121

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

(New York, December 2004), which has not yet entered into force.[1] *In this context, we also note the initiatives for the establishment of the European Court of State Immunity contained in the European Convention on State Immunity of 1972 and its Additional Protocol, which has never been operational.*[2]

Methods: *This article aims to take stock of the status quo of the doctrine of state immunity in international law as a whole by highlighting the existing normative aspects in relation to the problems of implementation.*

Results and Conclusions: *The arguments and conclusions are intended to underline the importance of understanding the reality, in particular, of how this doctrine works together with its exceptions. The method of scientific introspection based on primary and secondary data from scientific journals, books, documents, expert opinions, and other publications has been used to develop this article.*

1 INTRODUCTION

State immunity has gone through several stages of conceptual evolution over time, which were marked by the parallel evolution of other branches of law, such as human rights, for example. Although state immunity includes inalienability under international law, it can lead to impunity from jurisdiction in cases where certain human rights recognised as a peremptory norm of general international law (*jus cogens*) have been violated.[3] This demonstrates the existence of exceptions.

This topic, considered taboo during the communist period, has been left almost untouched by theory and practice in Eastern Europe, although it is encountered and debated globally. Whether or not this shortcoming is closely related to access to justice is not yet clear. In the past and still today, it has been and continues to be important to understand what state immunity is and when and where it can be claimed – knowledge that serves to reduce the likelihood of risks in relations with a particular state or state entity. Today, there is no state

1 For signatory parties and status of proceedings, see 'Status of Treaties' (*United Nation Treaties Collection*, 2004) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=_en> accessed 26 January 2023. Reservations and declarations were made by Finland, Iran, Italy, Liechtenstein, Norway, Saudi Arabia, Sweden, and Switzerland. Switzerland stressed that, in accordance with General Assembly resolution 59/38 adopted on 2 December 2004, it is understood that this Convention does not cover criminal proceedings and, as a matter of interpretation, Switzerland considers that Art. 12 does not cover the issue of pecuniary compensation for serious human rights violations allegedly attributable to a state and committed outside the state of the forum. Switzerland also stated that the Convention is to be interpreted without prejudice to developments in international law in this regard (see Switzerland's statement of interpretation). Sweden stated that, in its interpretation, the Convention does not apply to military activities, including the activities of armed forces during armed conflict, under international humanitarian law, nor does it apply to activities undertaken by the military forces of a state in the exercise of their official functions. It was also noted that the express mention of heads of state in Art. 3 should not be interpreted as suggesting that the immunity *ratione personae* which other state officials might enjoy under international law might be affected by this Convention.

2 Jörg Polakiewicz, 'The Contribution of the Council of Europe to State Immunity through its Conventions and the Case Law of the European Court of Human Rights' in Committee of Ministers of the Council of Europe, *State Immunity under International Law and Current Challenges: Seminar on the occasion of the 54th meeting of the Committee of Legal Advisers on Public International Law (CAHDI), Strasbourg (France), 20 September 2017* (Public International Law and Treaty Office Division CoE; DLAPIL 2017) 18 <https://rm.coe.int/final-publication-state-immunity-under-international-law-and-current-c/16807724e9> accessed 26 January 2023.

3 Selman Özdan, 'State Immunity or State Impunity in Cases of Violations of Human Rights Recognised as Jus Cogens Norms' (2019) 23 (9) The International Journal of Human Rights 1521, doi: 10.1080/13642987.2019.1623788; Adrian Corobană, 'Non-Recognition of States as a Specific Sanction of Public International Law' (2019) 9 (3) Juridical Tribune 591.

outside public international law, and nation-states evolved into Westphalian states in the 17th century through the exercise of territorial integrity and sovereignty.

State immunity is a doctrine of international law invoked mainly by way of legal process exceptions, whereby a state claims that a particular court or tribunal does not have jurisdiction over it or to prevent the enforcement of a foreign judgment or order against any of its property. The counterparty may be another state or state entity, or even an individual or legal entity, as the case may be.[4] These situations are encountered, for example, in international investment arbitrations in cases of awards made in favour of foreign investors seeking enforcement of such awards against the state that has breached the applicable investment treaty. In this area, the invocation of state immunity comes very close to the invocation of the act of state on account of the complexity of the legal relationships. Some details of the *Yukos SARL v. OJSC Rosneft Oil Company (Yukos)* case[5] can be presented in this context. Its legal actions to enforce the arbitral award were brought in the Netherlands, the UK, and the US by subsidiaries of the GML shareholder group, which held approximately 70% of Yukos shares. The former Yukos shareholders asked a London judge in October 2022 to allow enforcement of the record $50 billion award against Russia, using, among other reasons, grounds relating to the Russian-Ukrainian war, in that the sanctions on Russia have the increased potential to cause the Russian Federation to withdraw its assets from the UK, perhaps even from many areas or sectors globally.[6] An application has been made to the High Court in London to lift a 2016 temporary stay on the enforcement of the judgment in the UK. This strategy also comes in the wake of a November 2021 ruling by the Dutch Supreme Court which upheld almost the entirety of the judgment that Russia must pay damages.[7] State immunity exceptions will again be raised by Russia before the English courts.[8] Initially, in *Yukos*, the issue was whether English jurisdiction could extend to the transaction of the original parties, which were foreign companies once associated in a single holding company group. In the debate at the time, issues such as: 1) identifying whether there is a more general principle in English law that the courts will not adjudicate on foreign sovereign state transactions; 2) whether the doctrine will not apply to foreign state acts which violate clearly established rules of international law or are contrary to English principles of public policy or where there is a serious breach of human rights; 3) whether judgments may be to the effect that state immunity does not preclude the possibility of domestic courts referring to international law when determining the legal obligations of their own governments under such rules; and 4) in the same proceedings, whether judgment could be given under section 35A of the Senior Courts Act 1981, which demonstrates that in foreign

4 For the practical application aspects of state immunity, see the expert opinion of lawyers: David Caps and Lianne Sneddon, 'State Immunity: an Overview' (Ashurst, 18 June 2019) <https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---state-immunity--an-overview> accessed 26 January 2023.

5 Case No 2005-04/AA227 *Yukos Universal Limited (Isle of Man) v The Russian Federation* (UNCITRAL, PCA, 18 July 2014) <https://pca-cpa.org/en/cases/61> accessed 26 January 2023, was decided in 2014 in favour of Yukos.

6 Katharine Gemmell, 'UK Court Restarts Yukos Award Suit Against Russia' (*Bloomberg*, 26 October 2022) <https://www.bloomberg.com/news/articles/2022-10-26/uk-court-restarts-50-billion-yukos-award-suit-against-russia?leadSource=overify%20wall> accessed 26 January 2023.

7 The decision of the Dutch Supreme Court was given in the case ECLI:NL:HR:2021:1645, *Russian Federation v Veteran Petroleum Ltd, Yukos Universal Ltd and Hulley Enterprises Ltd*, decision available in Dutch here: Case No 20/01595 ECLI:NL:HR:2021:1645 (Supreme Court of the Netherlands, 5 November 2021) <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:HR:2021:1645> accessed 26 January 2023.

8 Enforcement of the arbitral award proved very difficult. The shareholders of the former Yukos company sought enforcement of assets of the Russian Federation located on the territory of the UK. *Yukos Capital Sarl v OJSC Rosneft Oil Co* [2012] EWCA Civ 855 <https://newyorkconvention1958.org/index.php?lvl=notice_display&id=1182&opac_view=6> accessed 26 January 2023. Rosneft is the Russian company that absorbed all Yukos' assets.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

state-to-state relations, the terms of conditions will be varied in the English courts even if the transaction had been decided in the courts of the foreign jurisdiction.[9]

In conclusion, in order to understand from the outset the matter of state immunity, we note how, although state immunity is a doctrine of international law, it applies according to the law applicable to the proceedings, i.e., *lex fori*. As the case law has demonstrated and will continue to demonstrate, a court that must adjudicate on a defence of immunity will refer to its own national law or to the law of the seat, if it is in arbitration, for example. The party interested in resolving disputes of this kind should familiarise itself with both the national law of the chosen place of resolution of any disputes and the law of the place where the assets are located, which is usually the place of the state or state entity.

Each state is therefore able to consolidate its domestic law in accordance with its own political and economic interests and in accordance with all the treaties to which it is or decides to be a party. How? We will look at a few points of view in this paper.

2 CONCEPT, DOCTRINE, PRINCIPLE, OR RULE OF PROCEDURE?

Before moving on to the specific analysis, it is useful to try to frame state immunity as precisely as possible. Sometimes referred to as a 'concept', sometimes as a 'doctrine' or 'principle', state immunity has been defined in several ways. In practice, it has often been said to be a procedural rule, which is natural in the case of its applicability to specific cases: 'State immunity *is a procedural rule* going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a jus cogens norm but merely diverts any breach of it to a different method of settlement'.[10]

The occasional use of the phrase 'principle of state immunity' stems from the fact that state immunity is considered a pedestal of international law built on the principle of the sovereign equality of states, and which Art. 2, para. 1 of the Charter of the United Nations establishes as one of the fundamental principles of the international legal order.[11] A group of rules of public international law are referred to as principles because of their importance as well as their role in international legal regulation.

In reality, we cannot discuss the differences between principles and doctrines in this case because, as we shall see, state immunity is a doctrine that has its principles. A doctrine is a single important rule, a set of rules, a theory, or a principle that is widely followed in a field of law. It is formed via the continuous application of legal precedents. Calling something a doctrine usually means at least one of two things: that it is very important to a field of law or that it provides a comprehensive way to resolve a certain type of legal dispute.[12]

9 For details, see Zia Akhtar, 'Act of State, State Immunity, and Judicial Review in Public International Law' (2016) 7 (3) Transnational Legal Theory 354, doi: 10.1080/20414005.2016.1225358.

10 Hazel Fox, *The Law of State Immunity* (OUP 2002) 525; see *Jones v Ministry of Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26, paras 24, 44 <https://publications.parliament.uk/pa/ld200506/ldjudgmt/jd060614/jones.pdf> accessed 26 January 2023.

11 UN, Charter of the United Nations (1945) <https://www.un.org/en/about-us/un-charter/full-text> accessed 26 January 2023. According to Article 2, 'The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles. (1) The Organization is based on the principle of the sovereign equality of all its Members'.

12 See 'Wex Legal Encyclopedia' (*Legal Information Institute; Cornell Law School*, September 2022) <https://www.law.cornell.edu/wex/doctrine> accessed 26 January 2023. The definition is provided by the Wex Definitions Team, a group of Cornell Law Students organised and supervised by LII Original Content Collections Manager Nichole McCarthy to provide enhanced definitions of important legal terms to aid the general public in understanding those terms.

It has been noted that the doctrine of state immunity has been divided into two main doctrines, namely, the doctrine of absolute immunity (this is a 19th-century approach to sovereign immunity which provides that states may be plaintiffs but not defendants in the national court of other states) and the doctrine of restrictive immunity (this is a 20th-century approach to sovereign immunity, which provides that acts of states are divided into acts of sovereign authority *acta jure imperii*, i.e., governmental activities of the state, and acts of governing authority *acta jure gestionis,* i.e., commercial acts of the state).[13] The doctrine of absolute immunity still applies today in some jurisdictions, such as China and Hong Kong.[14] In China, there are still problems connected with the enforcement of foreign judgments, for example, in the field of investment arbitration. China does not have a national law on ISDS,[15] and legal rules dealing explicitly with ISDS are extremely rare. Interested parties should consult Chinese law applicable to arbitration in general. Theorists are of the opinion that Chinese arbitration institutions are on a knife edge between a bright future and a dead end. ISDS is currently under debate in China, and success will depend on the outcome.[16] Such innovative initiatives could help the Beijing Arbitration Commission attract global attention in a positive way.[17] While states are frequently involved in various disputes and arbitration, we can observe that no uniform rules on state immunity have been formed at the international level. The doctrine of absolute immunity is hard to overcome.

Until 2015, the Russian Federation was considered one of the few remaining strong protagonists of absolute immunity. Since 2015, it has addressed the restrictive (functional) doctrine of state immunity with the adoption of the new federal law. In theory, the following reasons were put forward among others: protection of the commercial interests of private parties *vis-à-vis* foreign states (an issue that comes after attempts to enforce the *Yukos* ruling); protection of human rights; and specific features of the new 2015 law and existing case law in relation to foreign states under Russian jurisdiction.[18]

13 See Hazel Fox, 'Privileges and Immunities of the Head of a Foreign State and Ministers', in Ivor Roberts (ed), *Satow's Diplomatic Practice* (6th edn, OUP 2009) 171, doi: 10.1093/law/9780199559275.001.0001; Ernest Toochi Aniche, 'A Critical Examination of the British Municipal Court Rulings on Cases of International Immunity: Revisiting the Imperatives of Politics of International Law' (2016) 2 (1) Cogent Social Sciences <http://dx.doi.org/doi:10.1080/23311886.2016.1198523> accessed 26 January 2023.

14 According to it, any proceedings against foreign states are inadmissible unless the state expressly agrees to waive immunity.

15 Investor-state dispute settlement (ISDS) or investment court system (ICS). Among the causes of dispute are mainly the violation of the standards of treatment that should be given to the international investments – see Cristina Elena Popa (Tache), 'International Investment Protection in Front of the States Role in Crisis Times to Managing Disputes' (2020) 10 (3) Juridical Tribune 456.

16 Manjiao Chi, 'The ISDS Adventure of Chinese Arbitration Institutions: Towards a Dead end or a Bright Future?' (2020) 28 (2) Asia Pacific Law Review 279, doi: 10.1080/10192557.2020.1856309; See generally Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd edn, OUP 2015) doi: 10.1093/law/9780198744412.001.0001.

17 For details, see Xi Zhang, 'Announcement on Public Comments on the Beijing Arbitration Commission/Beijing International Arbitration Center International Investment Arbitration Rules (Draft for Comment)' (BAC, 11 February 2019) <http://www.bjac.org.cn/news/view?id=3369> accessed 26 January 2023.

18 Vladislav Starzhenetskiy, 'Russian Approach to State Immunity: If You Want Peace, Prepare for War?' in Regis Bismuth and others (eds), *Sovereign Immunity Under Pressure: Norms, Values and Interests* (Springer International Publishing 2022) 53. It is useful to analyse the whole current body of jurisprudence for a more complete approach. See Bohdan Karnaukh, 'Territorial Tort Exception? The Ukrainian Supreme Court Held that the Russian Federation Could Not Plead Immunity with regard to Tort Claims Brought by the Victims of the Russia-Ukraine War' (2022) 3 (15) Access to justice in Eastern Europe 165, doi: 10.33327/AJEE-18-5.2-n000321.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

In terms of the restrictive doctrine, economic development has spurred states to participate in various ways in global trade activities.[19] This has led to a distinction being made between sovereign and commercial acts. Immunity was triggered only in respect of acts arising from the exercise of sovereign power, so states could not invoke immunity for commercial activities or over commercial assets.

Despite these developments, neither the theory nor the relevant case law has moved state immunity into an area of legal certainty, as it can be seen how it continues to remain an unresolved part of international law. Until then, in order to analyse the level of risk in relations with a particular state or state entity, interested parties will turn to the applicable laws from state to state to determine whether and to what extent a state is entitled to claim immunity.

Without going further here into the discussion between the possibility of states being immune from suit on the basis of governmental functions, but not in the case of commercial acts, it can be said that if the doctrine of absolute immunity were chosen as a preferred practice of the majority of states, then the fight will remain on the shoulders of domestic law. As in the *Yukos* case mentioned above, some national courts must decide that state immunity does not exclude the possibility for these national courts to refer to international law when determining the legal obligations of their own governments under such rules.

With regard to the principles of the doctrine of state immunity, two main principles have been noted: the *ratione personae* principle, which confers immunity to serving government officials (i.e., the head of state/government) for both official and private acts, and the *ratione materiae* principle (i.e., functional immunity) for official acts made during the term of office by former government officials.[20] Some states extend state immunity as a matter of goodwill or comity, while others have codified this doctrine in their jurisdictional regulations.[21]

We have seen that the doctrine of state immunity prohibits a national court from trying or enforcing claims against foreign states. The definition has always been closely related to sovereign immunity, although they cannot be confused. More concisely, sovereign immunity means that a state cannot be subject to the law of another state.

To demarcate certain differences, the doctrine of state immunity is not to be confused with the foreign act of state doctrine. The latter is a rule of private international law invoked procedurally under the public policy exception, which courts should use to promote the modest goal of international uniformity when faced with the manifest impossibility of proper application of foreign public law.[22] Or, put another way, such an exception would be controversial if the doctrine existed to protect foreign state sovereignty in public international law because, as the state immunity cases show, public international law is undecided whether one state can disregard another's sovereignty in order to uphold certain fundamental values.[23]

19 The main source of English law on state immunity is the State Immunity Act 1978, which gives effect to the restrictive doctrine. United Kingdom, State Immunity Act 1978 c 33 [1978] 17 ILM 1123 <https://www.legislation.gov.uk/ukpga/1978/33> accessed 26 January 2023.

20 For an extensive analysis, see Malcolm N Shaw, *International Law* (5th ed, CUP 2003) doi: 10.1017/CBO9781139051903; or Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2011) 21 (4) European Journal of International Law 815, doi: 10.1093/ejil/chr065.

21 James E Berger and Charlene Sun, 'Sovereign Immunity: A Venerable Concept in Transition?' (2011) 27 (2) International Litigation Quarterly 57.

22 Marcus Teo, 'Public Law Adjudication, International Uniformity and the Foreign Act of State Doctrine' (2020) 16 (3) Journal of Private International Law 361, doi: 10.1080/17441048.2020.1846257.

23 See *Jurisdictional Immunities of the State (Germany v. Italy, Greece Intervening)* [2012] ICJ Rep 99 (3 February 2012) <https://www.icj-cij.org/en/case/143> accessed 26 January 2023, cf *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet* (No 3) [2000] 1 AC 147 <http://www.uniset.ca/other/cs5/2000AC147.html> accessed 26 January 2023, apud Teo (n 23).

In general, it has been noted how the act of state doctrine absolves state action from judicial review by a foreign court. However, the trends promoted by theorists are directed towards the fact that courts should develop a doctrine that allows for judicial activism when wrongs are committed by states which breach the customary international law.[24] This direction appears natural in the context of the instability of the precise meaning of state immunity.

In concrete terms, state immunity is a rule of law arising from the sovereign equality of states. Like any system of law, public international law is made up of legal rules. State immunity can be defined as a norm of international law, a general rule of conduct, codified or not, created by states as subjects of international law, which regulates international law relations concerning immunity between them and is recognised as binding. It is procedurally activated by way of exceptions invoked in certain cases relating to: 1) judicial immunity – lack of state jurisdiction in the court of a foreign state; 2) immunity from prior claims; 3) immunity from enforcement of a foreign judgment; 4) immunity of state property (it is the legal regime of inviolability of state property located in the territory of a foreign state); 5) immunity from the application of foreign law in relation to transactions involving the state.[25] These immunities operate independently, without any link between them, although in practice, there may be some links on a case-by-case basis.

From the definitions presented, it follows that state immunity has, both from a theoretical and from a jurisprudential perspective, an oscillating evolution of its typology, which has led and continues to lead to different interpretations.

3 DEVELOPMENTS AND POSSIBILITIES

Since we are discussing state immunity as a classical subject of international law, the thread of scientific research inherently leads to the identification of a possible similarity with the regime of other subjects of international law. For example, do international organisations have similar immunity or not? Or, how is the natural person, the individual, affected?

The doctrine of state immunity, developed on the dogmatism of a state-centric perspective, 'has unduly underestimated and irresponsibly neglected the position of the human person in international law'.[26] Here, too, much of state immunity has centred on its relationship with *jus cogens*. Even if we consider the arguments concerning the protection of human rights, we find that it cannot be said that there have been no disagreements between the principle of state immunity and *jus cogens* rules, and issues have generated some debate. In theory, it has been argued that state immunity has been excessively formalistic and dissociated from the truth of human rights protection; and, last but not least, it has been argued that it has separated substantive prohibitions from procedural commitments by creating an unbridgeable line between them.[27]

International organisations, for example, do not enjoy state immunity unless an express immunity has been granted to them by statute, such as, in the UK, the International

24 Akhtar (n 10).

25 Serhij Kravtsov, 'The Definitive Device of the Term "International Commercial Arbitration"' (2022) 12 (3) Juridical Tribune 364.

26 *Jurisdictional Immunities of the State* (n 24) Dissenting opinion of Judge Cançado Trindade, para 181. The case of Germany v Italy was brought before the International Court of Justice in 2008 by Germany, which claimed that its sovereign immunity was violated before Italian courts.

27 Riccardo Pavoni, 'Human Rights and the Immunities of Foreign States and International Organizations' in Erika de Wet and Jure Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (OUP 2012) 75, doi: 10.1093/acprof:oso/9780199647071.003.0004.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Organisations Act (1968).[28] Similarly, the United Nations, the Council of Europe, the North Atlantic Treaty Organisation, and the World Trade Organisation are protected by legislation granting them immunity.

In the exercise of immunities, both states and international organisations will follow the logic set out below. Of course, there is a wealth of discussion on all specific immunities, but this article aims to open the door to further research and debate on this dense subject. Theorists have noted how through the theory of normative hierarchy, *jus cogens* norms prevail over non-precedential norms in international law. Human rights norms, some of which are considered *jus cogens* norms, theoretically go beyond the principle of state immunity. Therefore, the jurisdictional immunity of the state must be abandoned when the state violates certain human rights that are considered *jus cogens*.[29] The same can be argued for international organisations. There is also a general view that states and high-ranking state officials cannot be exempted from criminal proceedings before foreign courts when they violate *jus cogens* norms by invoking state immunity. In the hierarchy of norms of international law, the principle of state immunity ranks below *jus cogens* norms, and this is clearly established.[30]

However, if the analysis of responsibilities becomes simpler, difficulties arise in establishing rights, i.e., in determining the set of immunities specific to these situations for each subject of international law. I will simply note that there has always been an inspirational transfer from the state to international organisations and vice versa.

The content of the rules of international law is made up of the rights and obligations with which states and other subjects of international law are endowed. By working together, subjects of international law realise their rights and comply with their obligations under the rules of international law. International relations governed by the rules of public international law become legal relations under international law. By entering into such relationships, subjects of international law realise their rights and obligations.

State immunity has the characteristics of a dispositive rule of international law, which means that there is the possibility of regulation at state level. All rules of international law are binding, but in the case of dispositive rules, the states concerned may conclude treaties, which lay down other rules and act in accordance with them, and this will not constitute a breach of law if it does not prejudice the rights and legitimate interests of other states. For states with a monist system, international law will apply to the strict extent of the international rules in force.

We have seen that state immunity is closely linked to the inalienability of certain rights. From this perspective, we can discuss in a logical exercise the possibility of regulating the immunity that states have at the domestic level. While the issue may seem simpler from this angle, controversy may arise over the possibility for one subject of international law to require another subject of international law to change its own regulations. To get closer to the truth, we will turn to the legal archaeology of the theory. In the past, the issue was viewed through the prism of the right of defence, the right of conservation and the right

28 United Kingdom, International Organisations Act 1968 c 48 <https://www.legislation.gov.uk/ukpga/1968/48> accessed 26 January 2023. According with Chapter 48: 'An Act to make new provision (in substitution for the International Organisations (Immunities and Privileges) Act 1950 and the European Coal and Steel Community Act 1955) as to privileges, immunities and facilities to be accorded in respect of certain international organisations and in respect of persons connected with such organisations and other persons; and for purposes connected with the matters aforesaid'.

29 Özdan (n 4).

30 Rosanne van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (OUP 2008) 316.

of jurisdiction.[31] In the 1930s, specialists of that time were discussing whether or not it was possible for one state to impose on another state to change its laws.[32] At that time, there were two opinions: 1) one which held that the sovereign state could not allow others to interfere in its affairs and that foreign states were not entitled to ask another state to change its laws; and 2) another opinion according to which states, being in a state of increasing interdependence, could be asked to change the laws of a state which no longer corresponded to modern ideas.[33]

Analysing the work of the theorists of the 1900s, we can say that nothing is new, and there are no essential changes. Thus, in his lectures, George Meitani analyses possible answers to the question: can a sovereign state be called before the court of another foreign state? And then, as now, it was observed that the state could do two kinds of acts: political and non-political.[34] For the first category, the example was given of a case in which a Frenchman travelling in Russia was harmed by unjustified searches. On his return to France, he summoned the Tsar of Russia to appear before the French courts in his capacity as head of the Russian state. The French courts declared that they had no jurisdiction and found that the Tsar and the Russian authority had acted under their high right of surveillance and police.[35] For the second category of acts, the doctrine of those times, it is my pleasure to reproduce the views of the time according to which it can happen that the state also does acts that a private individual would do.[36] In this respect, it was noted that, by the fact that the state can do such acts, it very often happens that conflicts arise between representatives of the state and private individuals, in which case the question arises of the competence of foreign courts to judge such cases. Although one part of the doctrine continued not to admit this possibility, in view of the equality of states, the other part considered that, while in the first case, it was not recognised that foreign courts could interfere in the administration and policy of another state, when it comes to acts which the state would perform as a private individual, there is no danger of foreign courts intervening and investigating the lawsuits which would arise between the state and private individuals.[37]

The analysis has been to the effect that states, in these cases, are not acting in an authoritative capacity but are acting in a manner binding on the other parties as private individuals and that their independence cannot be raised as a shield under which they can ignore the claims of their creditors.[38] The remark is an exceptional one and has significance for the terminology of state immunity. We see here that it used to be called 'independence' and was used by states as a shield when their liability was triggered. These differences were considered restrictions on state independence and that is how they were treated at the time, i.e., they were substantial exceptions to the rule of state immunity. Meitani remarked that it was permissible, however, that for real property actions, foreign courts were competent to judge these actions since the jurisdiction of the state extended over the whole territory, but the question was how these

31 See, for example, League of Nations, 'International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, signed at Brussels, April 10th 1926, and Additional Protocol, signed at Brussels, May 24, 1934' <https://treaties.un.org/pages/showdetails.aspx?objid=0800000280166914> accessed 26 January 2023.

32 George Meitani, *Curs de Drept International Public* (AlT Doicescu 1930) 90.

33 Henry Bonfils and Paul Fauchille, *Manuel de Droit International Public (droit des gens)* (2nd edn, A Rousseau 1898) 248, 262.

34 Meitani (n 33) 92, 93.

35 George Meitani, Străini în fața tribunalelor (București 1908) 93, 94, quoting Georges Bry, Précis Élémentaire De Droit International Public (Recuel Sirey 1910) 90.

36 Meitani (n 33) 93.

37 Meitani (n 36) 94, note 2.

38 Robert Piédelièvre, *Précis De Droit International Public, Ou, Droit Des Gens,* vol 1 (Nabu Press 2012) 266. Book published before 1923, France. The manuscript has been reconstituted and republished following serious damage. It was republished by Nabu Press on 22 February 2012, although there have been other editions republished by other publishers.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

judgments could be enforced. Could the foreign state intervene in the territory of the other state and execute that state, seize its property or put it up for sale? The distinctions were made in the case of whether to enforce the judgment on the territory of the foreign state or to enforce it on the territory of the state that gave the judgment. There was unanimity in recognising that enforcement could not be carried out by a foreign authority in the territory of another state, the matter being left to the discretion of the state, which had to agree to be enforced. In this context, the importance of the role of diplomatic channels in resolving such situations was indicated. In the second case, where there is a judgment to be enforced in the territory of the state whose court has given the judgment and where there is state property in that territory on which enforcement could take place, some authors have argued that enforcement could take place on movable or immovable property in that territory. 'To invoke the principle of independence in order to evade the obligations taken, is not to invoke a rule of *jus gentium*, but to abuse a great idea in order to place oneself above the law'.[39]

Therefore, we see state immunity as it was called over 100 years ago: 'a principle of state independence'.

In cases where the state accepted the jurisdiction of a foreign court, this was called accession and could be achieved: 1) by express accession, i.e., when the state expressly recognised this jurisdiction by a convention (this is what we call today: the arbitration clause, for example); and 2) tacit accession, i.e., when it is called upon before foreign courts, the state, instead of invoking the plea of lack of jurisdiction receives to be judged before these courts or, when the state directs itself its action before a foreign court.[40]

From this historical description, we noted that exceptions to state immunity were called 'restrictions on the principle of state independence' or state sovereignty. Some authors have distinguished between restrictions on state sovereignty and international servitudes, distinguishing them.[41] Meitani, however, was convinced that all these restrictions were, in reality, international servitudes, arguing that by these servitudes, we must understand any conventional restriction placed on the territorial sovereignty of the state in favour of another state.[42]

On the other hand, immunity from jurisdiction comes with its own history. We recall in this context two relevant cases: 1) *The Schooner Exchange v. McFaddon & Others*, in which the US Supreme Court in 1812 dismissed on the basis of the immunity of the French state the claim of the plaintiffs claiming a property right in a French fleet vessel in Philadelphia);[43] 2) High Court of Admiralty, *The Charkieh Case* (6200.), 1873 March 18, 19, 20, 21; May 7, a case in which Sir Robert Phillimore refused to grant immunity to the Kediv of Egypt on the ground that jurisdictional immunity is inextricably connected with the exercise of public functions and dignities and the performance of sovereign public acts and not private acts.[44]

39 Ibid.

40 Meitani (n 33) 95.

41 Amedee Bonde, *Traité Élémentaire De Droit International Public* (Dalloz 1926) 236.

42 Meitani (n 33) 96, citing 3. Johann Caspar Bluntschli, *Le Droit International Codifie Par M Bluntschli* (Librairie de Guillaumin et Cie 1881) art 353. Meitani notes Bluntschli's idea that these servitudes should be perpetual, but realistically asks 'what can be perpetual in the world?' and argues that 'many such restrictions or servitudes were provided for by various treaties which today are no more'.

43 The *Schooner Exchange v McFaddon & Others [1812] 11 US* (7 Cranch) 116 <https://supreme.justia.com/cases/federal/us/11/116> accessed 26 January 2023, is a United States Supreme Court case on the jurisdiction of federal courts over a claim against a friendly foreign military vessel visiting an American port. The court interpreted customary international law to determine that there was no jurisdiction.

44 *The Charkieh* (6200) [1873] LR. 4 A & E 59 <http://uniset.ca/other/cs2/LR4AE59.html> accessed 26 January 2023. According to the judgment, Jurisdiction of the Court to entertain a Suit of Damage instituted against a Vessel belonging to the Khedive of Egypt - Sovereign Prince - Maritime Lien - Proceedings in Rem - Waiver of Privilege.

In the historical analysis, mention should be made of the attempts of the Institute of International Law to address the problem of non-uniform practices. Thus, in 1891 the Institute drafted rules on the jurisdiction of courts over claims against other states, which proposed to not cognisable actions based on sovereign acts committed by a particular state.[45] Then followed the history of the efforts that led to the United Nations Convention on Jurisdictional Immunities of States and their Property, adopted by the General Assembly on 2 December 2004.

We have also found identified a number of old treaties that contained these kinds of restrictions or servitudes and which, although abrogated, may be a source of inspiration for modern treaties that may include or regulate exceptions to state immunity, as we say today. Examples: 1) the prohibition of fortification of cities such as Dunkirk after the Treaty of Utrecht, 1713 and Antwerp after the Treaty of Paris, 1814 and London, 1831 (negative easements such as not to do certain acts, not to fortify certain cities, not to have too large an army or fleet, and positive easements); 2) the Treaty of London 1867, which provided for the demolition of the fortifications of Luxembourg; 3) the Treaty of Versailles, which required Germany to reduce its army, navy, and air force, etc.; 4) the negative easements in the treaties concluded by various states with the Ottoman Porte concerning Christian worship; 5) the positive easements concerning the right to use the roads of a state, the right to police and tax a foreign territory or the right to establish customs and postal services; 6) the Treaty of St Germain signed on 10 September 1919 by the representatives of Austria and the diplomatic representatives of 17 states, which provided in Art. 60 that Romania consents to the insertion in a subsequent treaty of provisions designed to protect the interests of inhabitants differing by race, language or religion from the majority; or 7) other restrictions that could be placed on the independence of states resulting from the perpetual neutrality of some states.[46]

We have seen how in older doctrines, state immunity was considered one of the principles/attributes of state independence, stemming from sovereignty. States that faced the communist/socialist period defined sovereignty as meaning its independence without any limits, i.e., without restrictions.[47] Historical reality has been seriously disregarded, and the works of great specialists have been put to the test of destruction out of an overzealousness that has led nowhere. The theorists of that era could not express themselves freely, although, in their works, one can see the intelligence, diplomacy and ideological battle that forced them to expose their arguments. Eastern theorists believed that when the Western literature discussed relative sovereignty, it was, in fact, discussing the subjection of sovereignty to all sorts of limitations that could be brought about by the conclusion of international treaties, which would reduce the freedom of action of states.[48] It is understood that state immunity (especially) was also one of the attributes of sovereignty. It was felt that transferring some attributes of sovereignty to the competence of supra-state international bodies or organisations would make sovereignty itself a meaningless notion.[49]

45 Institute of International Law, 'Draft International Regulations on the Competence of Courts in Suits Against Foreign States, Sovereigns, or Heads of States' in James Brown Scott (ed), *Resolutions of the Institute of International Law dealing with the Law of Nations: with an historical introduction and explanatory notes* (OUP 1916) art 5: 'Actions brought for acts of sovereignty are not cognizable, nor acts arising out of a contract of the plaintiff as an official of the State, nor actions concerning the debts of the foreign State contracted through public subscription'.

46 For details, see Meitani (n 33) 98-101.

47 Grigore Geamănu, Dreptul International Contemporan (Didactica e Pedagogica 1965) 112.

48 Marek Stanislaw Korowicz, 'Some Present Aspects of Sovereignty in International Law' in Hague Academy of International Law, *Collected Courses*, vol 102 (Springer 1961) 108, 109, doi: 10.1163/1875-8096_pplrdc_A9789028613928_01.

49 See Comitetul Central al Partidului Comunist Român, *Declarație cu privire la poziția Partidului Muncitoresc Romîn în problemele mișcării comuniste și muncitorești internaționale: adoptată de Plenară Lărgită a CC al PMR din aprilie 1964* (Politică 1964) 32, 33.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

The analysis of the historical evolution of state immunity can continue to help us understand the reality, as there is some historical material that is somewhat unexplored due to difficulties in identifying the terminology used. There is now a trend in various states towards substantial exceptions to the immunity rule; in particular, a state may be sued when the dispute arises from a commercial transaction entered into by a state or other 'non-subterranean activity' of a state.

1) the European Convention on State Immunity, signed in Basel on 16 May 1972 and currently in force in eight states: Austria, Belgium, Germany, Luxembourg, the Netherlands (for the European Netherlands), Switzerland, and the UK. Five of these (Austria, Belgium, the Netherlands, Luxembourg, and Switzerland) are also parties to its Additional Protocol, which establishes the European State Immunity Tribunal (the special tribunal never became operational);[50]

2) the United Nations Convention on State Immunities and Property, adopted by the General Assembly on 2 December 2004, which has not yet entered into force but is said to reform and harmonise their rules and exceptions.[51]

Until then, at the domestic level, the signatory states themselves can normatively reinforce the inalienability of their values/assets. State immunity is, after all, by definition, a set of inalienabilities.

4 CONCLUSIONS

It can be deduced that state immunity has a long way to go before it becomes a norm of international law. The first step towards this goal is to have a thorough knowledge of the historical path so that we can then have a modern doctrine, harmonised as far as possible at the international level by multilateral consensus on the subjects of international law.

Against this background, it is natural that various issues arise concerning the limits of competence and restrictions. However, state protection under state immunity ultimately means protecting individual states and their supervisory institutions in many cases where they act unlawfully but together or in parallel with other states and have been shown to affect the chance of injured parties to obtain compensation.[52] An example is the recent decision of the International Court of Justice in the case of Germany and Italy with the intervention of Greece, where the principle of immunity was invoked to protect the German government from paying reparations for what Germany itself has admitted were flagrant crimes committed during World War II.[53] The ruling is judged by experts to be technically correct, but whether it does full justice to the situation is another question.[54]

In the face of imprecise regulations, interested parties resort to contracts in which they insert immunity waivers, called waivers, under certain very precise conditions, among which we

50 Council of Europe, European Convention on State Immunity (16 May 1972) ETS No 074 <https://rm.coe.int/16800730b1> accessed 26 January 2023. For details, see 'Chart of signatures and ratifications of Treaty 074' (*Council of Europe Traty Office,* 2023) <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=074> accessed 26 January 2023.

51 United Nations, Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004 UNGA Res 59/38) <https://undocs.org/en/A/RES/59/38> accessed 26 January 2023.

52 Akhtar (n 10).

53 *Jurisdictional Immunities of the State* (n 24) Press release 2012/7. The Court holds that the action of the Italian courts in denying Germany the immunity to which the court has held that it was entitled under customary international law constitutes a breach of the obligations owed by the Italian State to Germany.

54 James Crawford, 'Interview with Magda Karagiannakis, Barrister and Academic, State immunity, war crimes and human rights (Melbourne, 24 September 2012)' (2014) 26 (1) Global Change, Peace & Security 85, doi: 10.1080/14781158.2013.808992.

can mention: the inclusion of the waiver in all transaction documents; it must be accepted by all states or state entities that may be a party to the transaction or that own assets relevant to the transaction; and it must be an express and clear waiver of both immunity from suit and immunity from execution. States may also, by unilateral acts such as waiver, voluntarily abandon certain rights such as immunity from jurisdiction or enforcement.[55]

State immunity is an evolving feature of legal personality. Legal personality also includes the capacity to enforce its own rights as well as to bind other entities to fulfil their obligations under international law. For example, this means that a subject of international law should be able to: (1) make claims before international and national courts and tribunals to exercise its rights; (2) have the capacity or power to become a party to international conventions that are legally binding under international law, e.g., treaties; (3) enjoy immunity from jurisdiction before foreign courts, e.g., immunity for acts of state; (4) be subject to obligations under international law and have the right to create rules of international law. Subjects of international law do not have the same rights, obligations, and capacities. The International Court of Justice states in its 1949 Advisory Opinion on 'Reparation for Injuries Suffered in the Service of the United Nations' that subjects of law in a legal system are not necessarily identical in the nature or extent of their rights.

All are old, and all are new, and specialists can work together to find the most realistic and best suited solutions.

REFERENCES

1. Akande D and Shah S, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2011) 21 (4) European Journal of International Law 815, doi: 10.1093/ejil/chr065.
2. Akhtar Z, 'Act of State, State Immunity, and Judicial Review in Public International Law' (2016) 7 (3) Transnational Legal Theory 354, doi: 10.1080/20414005.2016.1225358.
3. Alebeek R, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (OUP 2008).
4. Aniche ET, 'A Critical Examination of the British Municipal Court Rulings on Cases of International Immunity: Revisiting the Imperatives of Politics of International Law' (2016) 2 (1) Cogent Social Sciences <http://dx.doi.org/doi:10.1080/23311886.2016.1198523> accessed 26 January 2023.
5. Berger JE and Sun C, 'Sovereign Immunity: A Venerable Concept in Transition?' (2011) 27 (2) International Litigation Quarterly 57.
6. Bluntschli JC, *Le Droit International Codifie Par M Bluntschli* (Librairie de Guillaumin et Cie 1881).
7. Bonde A, *Traité Élémentaire De Droit International Public* (Dalloz 1926).
8. Bonfils H and Fauchille P, *Manuel De Droit International Public (droit des gens)* (2nd edn, A Rousseau 1898).
9. Bry G, *Précis élémentaire De Droit International Public* (Recuel Sirey 1910).
10. Caps D and Sneddon L, 'State Immunity: an Overview' (*Ashurst*, 18 June 2019) <https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---state-immunity--an-overview> accessed 26 January 2023.
11. Chi M, 'The ISDS Adventure of Chinese Arbitration Institutions: Towards a Dead end or a Bright Future?' (2020) 28 (2) Asia Pacific Law Review 279, doi: 10.1080/10192557.2020.1856309.
12. Corobană A, 'Non-Recognition of States as a Specific Sanction of Public International Law' (2019) 9 (3) Juridical Tribune 589.
13. Crawford J, Interview with Magda Karagiannakis, Barrister and Academic, State Immunity, War Crimes and Human Rights (Melbourne, 24 September 2012) (2014) 26 (1) Global Change, Peace & Security 85, doi: 10.1080/14781158.2013.808992.

55 See Dumitra Popescu, *Public International Law: University course* (Universitatea Titu Maiorescu 2006) 37.

14. Fox H, *The Law of State Immunity* (OUP 2002).
15. Fox H, 'Privileges and Immunities of the Head of a Foreign State and Ministers', in Roberts I (ed), *Satow's Diplomatic Practice* (6th edn, OUP 2009) 171, doi: 10.1093/law/9780199559275.001.0001.
16. Fox H and Webb P, *The Law of State Immunity* (3rd ed, OUP 2015) doi: 10.1093/law/9780198744412.001.0001.
17. Geamănu G, *Dreptul International Contemporan* (Didactica e Pedagogica 1965).
18. Gemmell K, 'UK Court Restarts Yukos Award Suit Against Russia' (*Bloomberg*, 26 October 2022) <https://www.bloomberg.com/news/articles/2022-10-26/uk-court-restarts-50-billion-yukos-award-suit-against-russia?leadSource=overify%20wall> accessed 26 January 2023.
19. Institute of International Law, 'Draft International Regulations on the Competence of Courts in Suits Against Foreign States, Sovereigns, or Heads of States' in Scott JB (ed), *Resolutions of the Institute of International Law dealing with the Law of Nations: with an historical introduction and explanatory notes* (OUP 1916).
20. Karnaukh B, 'Territorial Tort Exception? The Ukrainian Supreme Court Held that the Russian Federation Could Not Plead Immunity with regard to Tort Claims Brought by the Victims of the Russia-Ukraine War' (2022) 3 (15) Access to justice in Eastern Europe 165, doi: 10.33327/AJEE-18-5.2-n000321.
21. Korowicz MS, 'Some Present Aspects of Sovereignty in International Law' in Hague Academy of International Law, *Collected Courses*, vol 102 (Springer 1961) 1, doi: 10.1163/1875-8096_pplrdc_A9789028613928_01.
22. Kravtsov S, 'The definitive device of the term "international commercial arbitration"' (2022) 12 (3) Juridical Tribune 346.
23. Meitani G, *Străini* în *fața tribunalelor* (București 1908).
24. Meitani G, *Curs de Drept International Public* (AlT Doicescu 1930).
25. Özdan S, 'State Immunity or State Impunity in Cases of Violations of Human Rights Recognised as Jus Cogens Norms' (2019) 23 (9) The International Journal of Human Rights 1521, doi: 10.1080/13642987.2019.1623788.
26. Pavoni R, 'Human Rights and the Immunities of Foreign States and International Organizations' in Wet E and Vidmar J (eds), *Hierarchy in International Law: The Place of Human Rights* (OUP 2012) 71, doi: 10.1093/acprof:oso/9780199647071.003.0004.
27. Piédelièvre R, *Précis De Droit International Public, Ou, Droit Des Gens,* vol 1 (Nabu Press 2012).
28. Polakiewicz J, 'The Contribution of the Council of Europe to State Immunity through its Conventions and the Case Law of the European Court of Human Rights' in Committee of Ministers of the Council of Europe*, State Immunity under International Law and Current Challenges*: *Seminar on the occasion of the 54th meeting of the Committee of Legal Advisers on Public International Law (CAHDI), Strasbourg (France), 20 September 2017* (Public International Law and Treaty Office Division CoE; DLAPIL 2017) 16 <https://rm.coe.int/final-publication-state-immunity-under-international-law-and-current-c/16807724e9> accessed 26 January 2023.
29. Popa (Tache) CE, 'International Investment Protection in front of the States Role in Crisis Times to Managing Disputes' (2020) 10 (3) Juridical Tribune 455.
30. Popescu D, *Public International Law*: *University course* (Universitatea Titu Maiorescu 2006).
31. Shaw MN, *International law* (5th edn, CUP 2003) doi: 10.1017/CBO9781139051903.
32. Starzhenetskiy V, 'Russian Approach to State Immunity: If You Want Peace, Prepare for War?' in Bismuth R and others (eds), *Sovereign Immunity Under Pressure: Norms, Values and Interests* (Springer International Publishing 2022) 53.
33. Teo M, 'Public law Adjudication, International Uniformity and the Foreign Act of State Doctrine' (2020) 16 (3) Journal of Private International Law 361, doi: 10.1080/17441048.2020.1846257.
33. 'Wex Legal Encyclopedia' (*Legal Information Institute; Cornell Law School*, September 2022) <https://www.law.cornell.edu/wex/doctrine> accessed 26 January 2023.