

ACCA: « Continuity and change in the law : plus ça change, plus c'est la même chose »

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A strange justice that is bounded by a door

State and diplomatic immunities and the access to justice in 2018: an age-old challenge

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Abstract

While the issue of foreign States immunities goes back to the origins of international law, it has lost none of its topicality. The jurisdictional immunity of States and their immunity from execution are based on State sovereignty and the legal equality of States. Over the past decades, this aspect of international relations has however experienced major developments, especially due to the increasing importance of fundamental rights. Among them, access to justice is a basic and fundamental right of citizens, which is guaranteed by the constitution and the Article 6 of the European Convention on Human Rights. This right has to be ensured in a binding and non-discriminatory way. That said, we easily note a contradiction between access to justice and immunities, which have « pour effet de priver les cours et tribunaux normalement compétents selon le droit interne de leur pouvoir de connaître de la demande » (Cass., 12 March 2001, *Pas.*, 2001/3, p. 390).

The aim of our presentation is to provide a comprehensive overview of the national and international principles that are relevant to State and diplomatic immunities. Our approach will rather be practical than theoretical. Indeed, we aim to address the topic through a concrete adjudicative process and the action that a plaintiff wishes to take against an embassy. We will explain for each step the conventional, customary and national rules and the conditions that should be fulfilled.

We will attempt to identify the evolution of Belgian positive law, and to highlight its recent instability (as seen by the 48/2017 ruling of the Constitutional Court). As this is a sensitive issue, a pendulum movement and a question of balance

between access to justice and international law principles may create the impression of a legislator going one step forwards and two steps back.

Presentation

Introduction

- a. Principles of the State immunity
 - i. Immunity from jurisdiction: immunity from legal proceedings before domestic courts
 - ii. Immunity from execution: No enforcement of judiciary decisions
- b. A practical study of the State immunity
- c. What about the embassies?

1) Immunity from Jurisdiction

- a. Who to sue? See Yugoslavia, Supreme Court of the People's Republic of Croatia, August 30th, 1956
- b. Different acts: Acts *jure gestionis* – Acts *jure imperii*
 - i. Cass., June 11th, 1903, Société Anonyme des Chemins de Fer Liégeois-Luxembourgeois v. The Netherlands, Pas., 294
 - ii. Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening), Judgement, I.C.J. Reports 2012, par. 59
- c. European Court of Human Rights – Cases evolution
- d. The U.N. General Assembly adopted the U.N. Convention on Jurisdictional Immunities of States and Their Property on December 2nd, 2004
- e. Acts *jure gestionis* – Acts *jure imperii*: the nature, the purpose, or the context?
- f. Three current issues
 - i. *Ius cogens*
 - ii. Cour du travail, Brussels, May 3rd, 2012, J.T.T., 2012, 346
 - iii. Cass., October 23rd, 2015, R.C.J.B., 2018
- g. Article 22 of the 2004 Convention

2) Immunity from Execution

- a. Human rights framework: access to justice v. State sovereignty
 - i. Access to justice: ECHR, Hornsby v. Greece, March 19, 1997
 - ii. Restriction to article 6: ECHR, Kalogeropoulou v. Greece and Germany, December 12nd, 2002
 - iii. Proportionality of the restriction
- b. From the UN Convention (2004) to the Constitutional Court (48/2017) through the article 1412^{quinqies} J.C
- c. Different categories of goods
- d. Conditions required for each category

	<i>IURE GESTIONIS</i> GOODS	<i>IURE IMPERII</i> GOODS	<i>PRESUMED IURE</i> <i>IMPERII</i> GOODS
J U D G E M E N T	The State has specifically earmarked the property for satisfaction of the claim		
	Express consent		Express & <i>specific</i> consent
	The property are: • located in Belgium • connected with the entity against which the proceeding was directed	X	X
A J U D G E M E N T	The State has specifically earmarked the property for satisfaction of the claim		
	Express consent		Express & <i>specific</i> consent
	The property are: • located in Belgium • connected with the entity against which the proceeding was directed	X	X

Conclusion: condensed reflection on the recent trends in the matter of State immunities