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# European Court Practice Concerning State Immunity from Enforcement Measures

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## Abstract

*The practice of national courts in Europe with regard to enforcement immunity is far from uniform. Nevertheless, certain common principles have emerged over the last decades. Absolute immunity from enforcement measures has been largely abandoned and almost all jurisdictions have adopted a restrictive approach to enforcement immunity in one or another form. Enforcement measures are usually permitted in case of waiver or with regard to earmarked property. In practice, the most important exception from immunity concerns non-governmental property. Here it is primarily the purpose of the property against which enforcement measures are sought that determines whether or not immunity will be granted. This article surveys the judicial practice in Europe, focusing on the case-law of the last 50 years, in order to permit an assessment of whether various recent codifications, most importantly the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, actually codify such practice or depart from it.*

## 1 Introduction

Immunity from execution or immunity from enforcement measures is distinct from jurisdictional immunity. Immunity from jurisdiction refers to a limitation of the adjudicatory power of national courts,<sup>1</sup> whereas immunity from execution restricts the enforcement powers of national courts or other organs.

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<sup>1</sup> See H. Fox, *The Law of State Immunity* (2002); Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States', 28 *British Yearbook Int'l L* (1951) 220; I. Pingel-Lenuzza, *Les Immunités des Etats en Droit International* (1997); C. Schreuer, *State Immunity: Some Recent Developments* (1988); Sinclair, 'Law of Sovereign Immunity—Recent Developments', 167 *RdC* (1980) 113; Trooboff, 'Foreign State Immunity: Emerging Consensus on Principles', 200 *RdC* (1986) 200 and the contributions to 10 *Netherlands Yearbook Int'l L (NYIL)* (1979).

In the course of the twentieth century many European states have changed from an absolute to a restrictive jurisdictional immunity concept. With regard to limiting a broad immunity from enforcement measures, however, a more hesitant approach prevailed in the case law of most European countries. Traditionally, it seemed that, unlike ‘restrictive’ or ‘relative’ adjudicatory immunity concepts, immunity from execution was considered to be absolute. This may have led to its characterization as ‘the last bastion of State immunity’.<sup>2</sup>

The main reason for this difference between absolute and relative immunity is usually seen in the more intrusive character of enforcement measures compared with merely adjudicatory powers.<sup>3</sup> However, also in the field of enforcement measures immunity is no longer generally considered to be the unequivocal rule. A number of national courts have clearly expressed their opinion that enforcement immunity is also no longer absolute. They do, however, wrestle with the precise conditions and criteria under and by which such enforcement immunity should be granted or denied. Equally, scholarly conceptualizations concerning the correct delimitation between permissible and impermissible enforcement actions frequently encounter difficulties.<sup>4</sup>

In addition to the possibility of waiving enforcement immunity, the most important general trend points towards opening up certain types of state property, not serving public purposes, to measures of execution. However, contrary to the requirements of immunity from jurisdiction, the distinctive criterion is not the nature of the act in issue but rather the purpose of the property to be subjected to enforcement measures. This implies that limitations on enforcement immunity are less intrusive than in the field of immunity from jurisdiction. Thus, a more cautious view is also reflected in various national and international codification attempts.

National immunity legislation regularly prohibits enforcement measures against foreign states in principle. One of the few pieces of such genuine European statutory law, the 1978 UK State Immunity Act (SIA)<sup>5</sup> is an example of this approach.<sup>6</sup> It permits enforcement measures only ‘in respect of property which is for the time being in use or intended for use for commercial purposes’.<sup>7</sup>

<sup>2</sup> ILC Report on Jurisdictional Immunities of States and their Property in: [1991] Yearbook Int’l L Commission (YBILC), ii, Part Two, 1, at 56.

<sup>3</sup> Cf. Schreuer, *supra* note 1, at 126; Sinclair, *supra* note 1, at 218.

<sup>4</sup> See Bouchez, ‘The Nature and Scope of State Immunity from Jurisdiction and Execution’, 10 *NYIL* (1979) 3, at 17ff.

<sup>5</sup> State Immunity Act 1978, c. 33 (UK), 17 ILM (1978) 1123.

<sup>6</sup> S. 13(2) UK SIA, *supra* note 5, provides: ‘subject to sub-sections 3 and 4 below b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale’. Similarly, s. 1609 of the US Foreign Sovereign Immunities Act of 1976 (FSIA), 15 ILM (1976) 1388, provides: ‘subject to existing international agreements to which the United States is a party at the time of enactment of this act the property in the United States of a foreign State shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter’.

<sup>7</sup> S. 13(4) UK SIA, *supra* note 5.

A rather peculiar approach is pursued by the 1972 European Convention on State Immunity,<sup>8</sup> which prohibits enforcement measures in general, subject only to the possibility of an express waiver.<sup>9</sup> As a substitute for generally non-available enforcement measures, the Convention stipulates that the Contracting States shall give effect to judgments delivered against them in accordance with the provisions of the Convention.<sup>10</sup> As between states which have made an optional declaration in accordance with Article 24 of the Convention and with respect to judgments concerning industrial or commercial activities, enforcement measures remain possible against property 'used exclusively in connection with such an activity'.<sup>11</sup> The solution offered by the European Convention clearly does not, and does not purport to, codify existing customary law on the subject. Rather, it represents a compromise between states adhering to a rule of absolute immunity from enforcement measures and those permitting such measures under certain conditions, 'in that it combines an obligation of States to give effect to judgments with a rule permitting no execution'.<sup>12</sup>

The Draft Convention on State Immunity prepared by the ILA<sup>13</sup> comes closer to a codification of trends perceived in the actual practice of state immunity decisions. Like the US FSIA, it provides for three main exceptions to the general rule of immunity from enforcement measures: waiver, property in use for commercial purposes, and property taken in violation of international law.<sup>14</sup> In a similar fashion, the 1991 Basel Resolution of the Institut de Droit International (IDI Resolution) permits measures of constraint against property serving non-sovereign purposes and in case of waiver.<sup>15</sup>

The 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (UN Convention),<sup>16</sup> based on the 1991 ILC Draft Articles on Jurisdictional Immunities of States and Their Property (ILC Draft Articles),<sup>17</sup> also reflects the

<sup>8</sup> European Convention on State Immunity 1972 (European Convention), 16 May 1972, in force since 11 June 1976, ETS No. 74, 11 ILM (1972) 470.

<sup>9</sup> *Ibid.*, Art. 23.

<sup>10</sup> *Ibid.*, Art. 20(1).

<sup>11</sup> *Ibid.*, Art. 26.

<sup>12</sup> Council of Europe, Explanatory Report on the European Convention on State Immunity (1972), available at <http://conventions.coe.int/Treaty/EN/Reports/HTML/074.htm>, at para. 92.

<sup>13</sup> International Law Association, Montreal Draft Articles for a Convention on State Immunity 1982 (ILA Draft Convention), 22 ILM (1983) 287; the Buenos Aires Revised Draft Articles for a Convention on State Immunity, ILA Report (1994) 21, did not change the provisions on enforcement immunity.

<sup>14</sup> Art. VIII ILA Draft Convention, *supra* note 13, at 291.

<sup>15</sup> Institut de Droit International, Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement, Basel Session 1991, 64 *Annuaire de l'Institut de Droit International* (1992 II) 389.

<sup>16</sup> UN GAOR, 59th Session, Supp. No. 22 (A/59/22), 16 Dec. 2004, Annex I, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N04/478/54/PDF/N0447854.pdf?OpenElement>. The Convention was opened for signature on 17 Jan. 2005. See Stewart, 'The UN Convention on Jurisdictional Immunities of States and Their Property', 99 *AJIL* (2005) 194.

<sup>17</sup> Draft Articles on Jurisdictional Immunities of States and Their Property [1991] YBILC, ii, Part Two, 13. See also Kessedjian and Schreuer, 'Le Projet d'Articles de la Commission du Droit International des Nations Unies sur les immunités des Etats', 96 *Revue Générale de Droit International Public* (1992) 299; Heß, 'The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and their Property', 4 *EJIL* (1993) 269.

restrictive approach taken by many national courts to enforcement immunity. It phrases the exceptions to the general rule of immunity from enforcement in such a restrictive way that actual enforcement measures will rarely be permissible. Article 18 of the ILC Draft Articles<sup>18</sup> provided for three main exceptions from enforcement immunity: (1) waiver, (2) property specifically set aside for the satisfaction of the underlying claim, and (3) assets serving commercial purposes, present in the forum state and connected with or linked to the underlying claim or defendant entity. The new UN Convention departs from this approach by introducing a basic distinction between ‘pre-judgment measures of constraint’ and ‘post-judgment measures of constraint’. With regard to the first type of measures Article 18 of the new UN Convention permits enforcement measures only in the case of (1) consent and (2) earmarked property.<sup>19</sup> With regard to post-judgment measures of constraint the UN Convention has retained the three exceptions of the 1991 ILC Draft Articles. It did, however, modify the link criteria of the property serving commercial purposes by eliminating the ‘connection with the underlying claim’.<sup>20</sup>

This article undertakes to analyse recent European court practice in the field of enforcement immunity<sup>21</sup> with a view to establishing whether the existing trends in the law, as embodied in the aforementioned conventions, are reinforced, modified, or discontinued.

<sup>18</sup> See Byers, ‘State Immunity: Article 18 of the ILC’s Draft’, 44 *Int’l & Comp LQ* (1995) 882.

<sup>19</sup> Art. 18 UN Convention, *supra* note 16, provides: ‘[n]o pre-judgement measures of constraint, such as attachment or arrest, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) the State has expressly consented to the taking of such measures as indicated:

- (i) by international agreement;
- (ii) by an arbitration agreement or in a written contract; or
- (iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or

(b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding.’

<sup>20</sup> Art. 19 UN Convention, *supra* note 16, provides: ‘[n]o post-judgment measures of constraint, such as attachment, arrest and execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

...

(c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.’

<sup>21</sup> This article is based on a collection of national court decisions prepared for the Council of Europe’s Committee of Legal Advisers on Public International Law (CAHDI) in the framework of a Pilot Project on State Practice regarding State Immunity, to which I contributed a chapter on enforcement immunity. See Reinisch, ‘State Immunity from Enforcement Measures’, in G. Hafner, M. Kohen, and S. Breau (eds), *State Practice Regarding State Immunities* (forthcoming). This article considerably broadens the scope of inquiry and includes numerous cases not reported in the Pilot Project.

## 2 General Judicial Conceptualizations of Enforcement Immunity

Most European states seem to accept that immunity from execution measures can also no longer be considered absolute.<sup>22</sup> However, in the various conceptualizations of a restrictive immunity understanding states have been generally far more reluctant to remove the traditional immunity shield. This seems to reflect the awareness that enforcement measures imply a far greater and more direct interference with a foreign state's sovereignty than adjudicatory jurisdiction.

### A Absolute Immunity from Enforcement Measures

Only very few cases reflect the understanding that immunity from enforcement measures should still be regarded as absolute in principle. Most of them are older cases no longer reflecting the current law, although, in particular, French courts have tended until very recently to regard enforcement immunity as absolute.<sup>23</sup> Such a paucity of cases may be somewhat misleading with regard to countries where the law is fairly clearly in favour of absolute immunity from execution. Thus, it is not from the case law but rather from the legislation in force that one may assume that, for instance, Russian courts will accord absolute immunity from enforcement measures (in the absence of a waiver).<sup>24</sup>

### B The Major Distinction in the Application of the Concept of Restrictive Immunity

While in the field of jurisdictional immunity the nature of an act as *iure imperii* or *iure gestionis* is decisive, concerning immunity from execution it is prevalingly the purpose of the property against which enforcement measures are sought that determines whether or not immunity will be granted.<sup>25</sup>

<sup>22</sup> Cf. *Irak v. SA Dumez*, Tribunal civil, Brussels, 27 Feb. 1995, [1995] Journal des Tribunaux (JT) 565, 106 International Law Reports (ILR) 284, holding that '*en droit international public, le principe de l'immunité d'exécution n'a pas non plus une portée absolue*'. In the famous *Philippine Embassy Bank Account Case* the Bundesverfassungsgericht formulated this idea slightly differently: 'there is as yet no custom which is sufficiently general and is backed by the necessary legal consensus to constitute a general rule of customary international law whereby the State of the forum is debarred outright from taking measures of forced execution against a foreign State': Bundesverfassungsgericht, 13 Dec. 1977, 46 BVerfG 342; 65 ILR 146, at 167.

<sup>23</sup> See the unequivocal early opinions of French courts, speaking about the 'absolute and complete exemption from execution of the property belonging to the State': *Socifros v. USSR*, Cour d'Appel, Aix, 23 Nov. 1938, 9 Ann.Dig. (1938–40) 236, at 238. See also more recently *Clerget v. Banque Commerciale pour l'Europe de Nord and Banque de Commerce Ectériure du Vietnam*, Cour d'Appel, Paris, 7 June 1969, 52 ILR 310, at 315: '[i]mmunity from execution is in no way connected with immunity from jurisdiction, the absolute principle stated above must be applied, even in the case of an act of a private law character': Cour de Cassation (First Civil Chamber), 2 Nov. 1971, 65 ILR 54, at 56: 'funds—their origin and destination not having been determined—could not be subjected to attachment'. Also in *Procureur de la République v. SA Ipitrade International*, Tribunal de grande instance, Paris, 12 Sept. 1978, [1979] Clunet 857; 65 ILR 75, at 77, the court held that 'a judge seised with an application for the vacation of an attachment order is obliged to acknowledge the absolute nature of the immunity from execution'. See, however, the more restrictive approach of French courts in the 1980s *infra*, at the text to note 131.

<sup>24</sup> See *infra*, the text to note 94.

<sup>25</sup> Bouchez, *supra* note 4, at 25; Fox, *supra* note 1, at 399.

In one of the best-known enforcement immunity cases, the *Philippine Embassy Bank Account Case*, the German Constitutional Court stated that

[t]here is a general rule of international law that execution by the State having jurisdiction on the basis of a judicial writ of execution against a foreign State, issued in relation to non-sovereign action (*acta iure gestionis*) of that State upon that State's things located or occupied within the national territory of the State having jurisdiction, is inadmissible without assent by the foreign State, insofar as those things serve sovereign purposes of the foreign State at the time of commencement of the enforcement measure.<sup>26</sup>

This view, confirming a basic distinction between property serving sovereign, on the one hand, and non-sovereign purposes, on the other hand, is reflected in many other court decisions in European countries. A Dutch court qualified it as a 'rule of international law ... that public service assets are exempt from measures of execution in another country'.<sup>27</sup> More recently the rule was upheld in a Belgian judgment in which the court '*confirme, dans le cadre de l'immunité d'exécution, la distinction entre les biens affectés à des fins souveraines (iure imperii) et les biens affectés aux fins de gestion (iure gestionis)*'.<sup>28</sup> Similarly, according to the Italian Constitutional Court, in order '[t]o deny immunity from execution ... it is also necessary that the property to which the request for attachment or the process of execution refers is not destined to accomplish public functions (*iure imperii*) of the foreign State'.<sup>29</sup> Similarly, the Italian Court of Cassation found that 'the idea that immunity from execution in the forum State is limited to the assets of the State ... used in the exercise of sovereign functions or devoted to public purposes is now accepted as a rule in the international community'.<sup>30</sup> Even Swiss courts, which have been very liberal in denying immunity from enforcement measures to foreign states,<sup>31</sup> respect the immunity of assets allocated for the performance of acts of sovereignty.<sup>32</sup>

As will be shown below, it is the exact determination of whether or not this requirement of a public purpose is fulfilled which forms the core issue of the majority of enforcement immunity decisions.

<sup>26</sup> *Philippine Embassy Case*, *supra* note 22, at 164 (ILR), confirmed in the *NIOC Revenues Case*, Bundesverfassungsgericht, 12 Apr. 1983, BVerfGE 64, 1, 65 ILR 215, at 242. See also *Spanish Consular Bank Accounts Case*, Landgericht, Stuttgart, 21 Sept. 1971, 65 ILR 114, at 117, where the court had held that 'there is a rule of customary international law under which execution against the property of a foreign State which is devoted to sovereign purposes is not admissible'.

<sup>27</sup> *Cabotent v. NIOC*, The Hague Court of Appeal, 28 Nov. 1968, 1 NYIL (1970) 225; 47 ILR 138, at 148.

<sup>28</sup> *Leica AG v. Central Bank of Iraq et Etat irakien*, Cour d'appel, Brussels, 15 Feb. 2000 [2001] JT 6 'confirms, in the context of immunity from execution, the distinction between goods destined for sovereign purposes (*iure imperii*) and goods destined for non-sovereign purposes (*iure gestionis*)'.

<sup>29</sup> *Condor and Filvem v. Ministry of Justice*, Case No. 329, 15 July 1992; 101 ILR 394, at 402.

<sup>30</sup> *Libya v. Rossheton SRL*, Case No. 2502, 25 May 1989, 87 ILR 63, at 66.

<sup>31</sup> See *infra* text starting at note 33.

<sup>32</sup> 'A foreign State which in a particular case does not enjoy jurisdictional immunity is not entitled to immunity from execution either, unless the measures of execution concern assets allocated for the performance of acts of sovereignty': *République Arabe d'Égypte v. Cinetel*, Tribunal fédéral suisse, 20 July 1979, 65 ILR 425, at 430.

### C Equalization of Enforcement and Jurisdictional Immunity

Some court decisions suggest that immunity from enforcement measures should be treated in the same way as restrictive immunity from jurisdiction. This has become the established case law in particular in Switzerland, where the highest court, the Federal Court, developed a case law which regarded enforcement as a 'logical consequence' of jurisdiction and thus denied immunity from execution where jurisdictional immunity had already been denied.

The Federal Court has consistently held that immunity from execution should be seen as a consequence of jurisdictional immunity.<sup>33</sup> Accordingly, it has also tended to deny immunity from enforcement measures with regard to foreign state property. The major policy argument in favour of such further restriction of enforcement immunity seems to have been the fact that a denial of jurisdiction on the enforcement level would render the adjudicatory jurisdiction, granted under a restrictive immunity concept, meaningless.<sup>34</sup> The resulting liberal approach in granting enforcement measures was only restricted by a rather rigid, judicially created requirement of a Swiss nexus of the underlying subject-matter of the dispute (*Binnenbeziehung*) which goes beyond the requirement that the property subject to enforcement should be present in Switzerland.

This is illustrated by the attempted enforcement of the arbitral award in the *LIAMCO v. Libya* oil concessions dispute.<sup>35</sup> In order to satisfy its claim against Libya, the American oil company obtained the attachment of Libyan state property held in Swiss banks. When Libya challenged these seizures by claiming immunity, the Swiss Federal Court annulled the attachment orders for lack of a sufficient legal link (*Binnenbeziehung*) between the underlying expropriation dispute and Switzerland. The mere fact that the seat of the arbitration was Geneva was not considered sufficient.<sup>36</sup>

This notion of a Swiss nexus of the underlying subject-matter of the dispute (*Binnenbeziehung*) was already developed in earlier Swiss decisions, such as the important *Julius Bär* Case, where the Court said with regard to a foreign state's activities:

In order that a legal relationship to which a foreign State is a party may be considered to be connected with Swiss territory, it must either have its origin in Switzerland or fall to be performed in Switzerland, or the debtor must have at least taken certain steps which make Switzerland a place of performance.<sup>37</sup>

<sup>33</sup> 'The Federal Court considers immunity from execution as simply the consequence of jurisdictional immunity': *Cinétel*, *supra* note 32, at 430 (ILR).

<sup>34</sup> 'As soon as one admits that in certain cases a foreign State may be a party before Swiss courts to an action designed to determine its rights and obligations under a legal relationship in which it had become concerned, one must admit also, that that foreign State may in Switzerland be subjected to measures intended to ensure the forced execution of a judgment against it. If that were not so, the judgment would lack its most essential attribute, namely, that it will be executed even against the will of the party against which it is delivered': *Royaume de Grèce v. Banque Julius Bär & Cie*, Tribunal fédéral suisse, 6 June 1956, ATF 82 I 75, 18 ILR 195, at 198.

<sup>35</sup> *Liamco v. Libya*, Arbitral Award, 12 April 1977, 20 ILM (1981) 1.

<sup>36</sup> *Lybie v. LIAMCO*, Tribunal fédéral Suisse, 19 June 1980, ATF 106 Ia 142, 62 ILR 228.

<sup>37</sup> *Julius Bär & Cie*, *supra* note 34, at 197 (ILR).

The decision in *Julius Bär* was in turn based on a 1918 precedent. In *Dreyfus*<sup>38</sup> the Swiss Federal Court allowed the attachment of bank accounts held at Swiss banks in favour of the Austrian state in order to secure claims arising from the issue of Austrian government bonds, an activity which was qualified as *iure gestionis*. This reasoning was upheld in the *Walder* case,<sup>39</sup> where the Federal Court dismissed the claim only for lack of a sufficiently close nexus to Switzerland.

These precedents were reaffirmed after 1945 not only in the already mentioned *Julius Bär* decision but also in other cases where litigants used the comparably liberal approach of Swiss courts towards permitting enforcement measures against foreign states as a consequence of a denial of jurisdictional immunity.<sup>40</sup>

In *République Arabe Unie v. dame X*, for instance, the plaintiff, a lady domiciled in Zurich, successfully sought the attachment of state property as a provisional measure in order to secure rent due under a lease concerning a villa in Vienna.<sup>41</sup> The court apparently saw a sufficient Swiss nexus in the fact that the lease contained a choice-of-forum clause in favour of the Swiss courts and provided for payment to be made into a Swiss bank account. The Federal Court further rejected the argument that the state property should be considered exempt from enforcement measures because it had been used to make payments for weapons purchases. The court found that because this specific purpose no longer applied at the time of sequestration there was no impediment to the enforcement jurisdiction of Swiss courts.<sup>42</sup>

The discussion shows, however, that the liberal Swiss approach also finds its limits where attachment or other measures of constraint may affect property clearly devoted to sovereign purposes, such as running diplomatic or consular missions, etc. In this respect the Federal Court has clarified that its approximation of jurisdictional and enforcement immunity finds its limits in the exemption of property specifically assigned for public purposes. It held:

The Federal Tribunal considers immunity from execution as simply the consequence of jurisdictional immunity. A foreign State which in a particular case does not enjoy jurisdictional immunity is not entitled to immunity from execution either, unless the measures of execution concern assets allocated for the performance of acts of sovereignty.<sup>43</sup>

<sup>38</sup> *K.K. Oesterreichisches Finanzministerium v. Dreyfus*, Tribunal fédéral suisse, 13 Mar. 1918, ATF 44 I 49, 5 Ann.Dig. (1929–1930) 122 (note 2).

<sup>39</sup> *Greek Republic v. Walder and Others*, Tribunal fédéral suisse, 28 Mar. 1930, ATF 56 I 237, 5 Ann.Dig. (1929–1930) 121.

<sup>40</sup> *Banque centrale de la République de Turquie v. Weston Compagnie de Finance et d'Investissement SA*, Tribunal fédéral suisse, 15 Nov. 1978, ATF 104 Ia 367, 65 ILR 417.

<sup>41</sup> *RAU v. dame X*, Tribunal fédéral suisse, 10 Feb. 1960, ATF 86 I 23; 65 ILR 385.

<sup>42</sup> 'The absence of a specific allocation allows an attachment obtained in Switzerland over assets of a foreign State to be recognized as valid': *RAU*, *supra* note 41, at 392 (ILR).

<sup>43</sup> *Cinétel*, *supra* note 32, at 430 (ILR). See also subsequent Tribunal fédéral suisse decisions in which the approximation of jurisdictional and enforcement immunity was qualified in the following way: '*ce qui vaut pour l'immunité de juridiction vaut en principe aussi pour l'immunité d'exécution, la seconde n'étant qu'une simple conséquence de la première, sous la seule réserve que les mesures d'exécution ne concernent pas des biens destinés à l'accomplissement d'actes de souveraineté*': *Banque Bruxelles Lambert (Suisse) SA et huit consorts v. Paraguay*, Tribunal fédéral suisse, 20 Aug. 1998, ATF 124 III 382, at 389, cited in *Kazakhstan et la société H v. l'ordonnance rendue le 29 juin 2000 par la Chambre d'accusation du canton de Genève*, Tribunal fédéral suisse, 8 Dec. 2000, 1P.581/2000, available at <http://www.bger.ch/index/federal.htm>.



With this qualification, the seemingly very special approach of the Swiss courts towards enforcement against foreign states moves more into line with the general trend exempting property serving sovereign purposes.<sup>44</sup>

States have sometimes shown tendencies to approximate jurisdictional and enforcement immunity. An example can be found in *Socobel v. Greece*,<sup>45</sup> one of the national court judgments of the protracted *Socobel* arbitration and litigation,<sup>46</sup> where a Belgian court was asked to enforce an arbitral award made against the Greek state. The Brussels *Tribunal civil* expressly noted an 'intrinsic connection between immunity [from execution] and immunity from jurisdiction from which it proceeds'.<sup>47</sup> It thought that foreign states should lose their immunity from execution with regard to any *iure gestionis* acts as a direct result of their lack of immunity from jurisdiction with regard to such acts:

The general interest which attaches to the exemption from execution of the Belgian State on its own territory does not exist in the case of a foreign State which has transacted some *negotium* in Belgium. Such a State has subjected itself to Belgian laws and cannot claim to benefit from considerations of authority and prestige belonging in Belgium to those authorities which there exercise and must exercise sovereign power.<sup>48</sup>

In general, however, Belgian courts do not follow such reasoning, but rather adhere to the public versus private purpose distinction when determining immunity from execution claims.<sup>49</sup>

The Italian Court of Cassation also relied on the parallel treatment of jurisdictional and enforcement immunity for pragmatic reasons

[i]f immunity from jurisdiction does not apply to activities *jure privatorum*, the same must be true for immunity from the execution of a judgment that has recognized a private claim, where the foreign State does not comply with that judgment.<sup>50</sup>

However, in the *Condor and Filvem Case* the Italian Constitutional Court clearly rejected such an approximation, holding that '[t]he immunity of foreign States from provisional measures and execution in the State of the *forum* is not a simple extension of immunity from jurisdiction'.<sup>51</sup>

## D *Inspiration from Diplomatic Immunity*

In the relevant case law one can recognize a certain overlap between genuine state immunity considerations and the need to protect the diplomatic and consular representation of states as it finds its expression in customary as well as conventional

<sup>44</sup> See *supra* text starting at note 25.

<sup>45</sup> *Socobel v. l'Etat hellénique et la banque de Grèce*, Tribunal civil, Brussels, 30 Apr. 1951, [1951] JT 302; 18 ILR 3.

<sup>46</sup> Cf. Bülck, 'Société Commerciale de Belgique Case', IV *Encyclopaedia of Public International Law* (2000) 446.

<sup>47</sup> *Socobel*, *supra* note 45, at 5 (ILR).

<sup>48</sup> *Ibid.*, at 6.

<sup>49</sup> See *supra* note 28.

<sup>50</sup> *Libya v. Rosseton*, *supra* note 30, at 67 (ILR).

<sup>51</sup> *Condor and Filvem*, *supra* note 29, at 401 (ILR).

diplomatic and consular law. This rationale appears in a number of cases involving embassy accounts,<sup>52</sup> where the reason for exempting them from the enforcement jurisdiction of the forum state seems to lie primarily in protecting the ability of embassies to serve their diplomatic functions. This overlap also becomes evident when diplomatic or consular premises are the object of enforcement proceedings. In such situations both diplomatic<sup>53</sup> and consular<sup>54</sup> law, on the one hand, and the law of state immunity, on the other hand, provide for exemptions.<sup>55</sup> Thus, cases of attempted enforcement against embassy buildings have been largely unsuccessful in European courts.<sup>56</sup>

Sometimes, granting state property immunity from enforcement measures finds its justification in diplomatic or consular law. In an Italian case it was decided:

The provisions in articles 22, paragraphs 1 and 3, and 31, paragraph 1.a. of the Vienna Convention on Diplomatic Relations, of April 18, 1961, provide not only for immunity of the premises of a foreign Embassy from any measures of civil judges, but also for the exemption from jurisdiction, in case concrete measures are taken on immovable property.<sup>57</sup>

The Swiss Federal Court also expressly referred to Article 22(3) of the Vienna Convention on Diplomatic Relations when holding that embassy bank accounts allocated for the financing of a diplomatic mission enjoyed immunity from attachment.<sup>58</sup> In another case concerning the attachment of embassy accounts the Dutch Council of State held that

[it] is necessary to take into account in this connection that great importance has traditionally been attached to the efficient performance of the functions of embassies and consulates; confirmation of this is provided in the Vienna Conventions on diplomatic relations (1961) and consular relations (1963).<sup>59</sup>

<sup>52</sup> See *infra* text starting at note 164.

<sup>53</sup> Art. 22(3) Vienna Convention on Diplomatic Relations 1961, 500 UNTS 108, provides: '[t]he premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution'.

<sup>54</sup> Art. 25(3) Vienna Convention on Consular Relations 1963, 596 UNTS 288, merely provides: '[t]he consular premises, their furnishings, the property of the consular post and its means of transport shall be immune from any form of requisition for purposes of national defence and public utility'.

<sup>55</sup> Art. 21 UN Convention, *supra* note 16, based on Art. 19 ILC Draft Articles, *supra* note 17, on State Immunity, provides:

'1. The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under article 19 subparagraph (c):

(a) property, including any bank account, which is used or intended for use for the purposes of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences.'

See also s. 16(1) UK SIA, *supra* note 5.

<sup>56</sup> *Embassy Eviction Case*, Court of First Instance, Athens, No. 2626/1965, 65 ILR 248.

<sup>57</sup> *Cecchi Paone v. Czechoslovakia*, Pretore, Rome, 31 Mar. 1989 [1990] *Rivista di diritto internazionale privato e processuale* 153.

<sup>58</sup> *Z. v. Geneva Supervisory Authority for the Enforcement of Debts and Bankruptcy*, Tribunal fédéral suisse, 31 July 1990, 102 ILR 205.

<sup>59</sup> *M.K. v. State Secretary for Justice*, Raad van State, President of the Judicial Division, 24 Nov. 1986, 94 ILR 357, at 360.

Diplomatic immunities and inviolabilities have also served as important considerations for courts when interpreting, and frequently limiting, the scope of waivers of immunity.<sup>60</sup>

### E *Total Denial of Immunity from Enforcement Action*

As far as one can tell from the cases reviewed, courts in European states are reluctant to deny immunity from enforcement measures entirely. Nevertheless, courts sometimes use sweeping language that seems to leave (almost) no room for any immunity from execution. For instance, in a 1973 Dutch immunity case, the Dutch Supreme Court expressed adherence to a very limited immunity concept. It held

[i]nternational law is not opposed to any execution against foreign State-owned property situated in the territory of another State.<sup>61</sup>

Apparently Turkish courts generally refuse to grant immunity from execution to foreign states. In a number of recent cases Turkish courts have held that foreign state property may be seized and subjected to conservatory measures. In 1993 the Turkish Cour de Cassation held that foreign states did not enjoy immunity from execution and that their property in Turkey could be seized because the applicable Turkish legislation exempted only assets of the Turkish state.<sup>62</sup> For the same reasons, a Turkish execution tribunal held that movable and immovable property of a foreign state could be seized.<sup>63</sup>

### F *Executive Authorization for Enforcement Measures*

In a number of states enforcement measures against the property of foreign states still require executive authorization.<sup>64</sup> This implies that any enforcement measure against a foreign state and its property necessitates, normally express, permission which is usually given by the foreign ministry of the forum state, sometimes in conjunction with its justice ministry.

This procedure has attracted substantial criticism.<sup>65</sup> The decision to grant or deny immunity from execution thereby becomes politicized, subject to political considerations of the executive branch, and, unless the executive regularly grants immunity, is likely to lead to even more friction than an exclusively judicial decision. At the same time an

<sup>60</sup> See *infra* text at note 104.

<sup>61</sup> *Société Européenne d'Etudes et d'Entreprises en liquidité volontaire (SEEE) v. Yugoslavia*, Hoge Raad, 26 Oct. 1973, 65 ILR 356. A summary of the decision of the Court of Appeal to which the case was remitted can be found at [1975] NYL 374.

<sup>62</sup> *Société X v. Etats-Unis d'Amérique*, Cour de cassation, 11 June 1993 (on file with the author).

<sup>63</sup> *Société v. La République Azerbaïdjan*, Tribunal d'exécution, 21 Feb. 2001 (on file with the author).

<sup>64</sup> For instance, in Croatia Art. 18 of the Execution Act provides that 'an act of execution or an act of securing cannot be issued against the property of a foreign State without previous consent of the Ministry of Justice of the Republic of Croatia, except when a foreign State agrees on execution or insurance': Execution Act, 28 July 1996, Official Gazette of the Republic of Croatia, No. 57/96 (on file with the author).

<sup>65</sup> Schreuer, *supra* note 3, at 136.

authorization requirement severely limits the rights to a remedy of potential plaintiffs. In some states this has even been viewed as a potential infringement of a fundamental right of access to justice. As a result of this criticism, the authorization requirement was abolished in a number of states. One of the most prominent examples is the US, where the FSIA has transferred the decision whether or not to grant immunity from execution to the judiciary.<sup>66</sup> In some European states, too, the law has changed in this direction.

Italy is an example of such a development. However, the change did not occur through legislative intervention. Rather, it resulted from judicial review exercised by the Italian Constitutional Court. Originally, a 1926 law provided that ‘there shall be no attachment, seizure or, in general, measures of execution against the movable or immovable property, vessels, funds, securities and any other assets belonging to a foreign State, without the authorization of the Minister of Justice’.<sup>67</sup>

In contrast to Italy’s rather progressive court practice with regard to jurisdictional immunity, permission to take enforcement measures was rarely granted.<sup>68</sup> After some unsuccessful attempts,<sup>69</sup> the requirement of such executive authorization was successfully challenged in the *Condor and Filvem* Case as being contrary to the constitutional right of access to court enshrined in Article 24 of the Italian Constitution. The Constitutional Court found

the single article of Royal Executive Decree No. 1621 of 30 August 1925, transformed into Law No. 1263 of 15 July 1926, is invalid under the Constitution in so far as it makes it necessary to obtain the authorization of the Minister of Justice for measures of protection or execution against property belonging to a foreign State other than property which, pursuant to the generally recognized rules of international law, cannot be subject to coercive measures.<sup>70</sup>

Almost at the same time as the Italian Constitutional Court dealt with this fundamental rights challenge, the Spanish Constitutional Court had to address a similar problem in the *Abbott* case.<sup>71</sup> Although the case did not concern an authorization requirement, the Spanish Court had to address the issue whether absolute immunity from execution would be contrary to a right of access to courts. The Constitutional Court partially recognized the violation of the fundamental right to a fair hearing by a tribunal, as established in Article 24 of the Spanish Constitution. It held that ‘[g]iven that the current position in international law does not impose absolute immunity

<sup>66</sup> See also House Report, 15 ILM (1976) 1402.

<sup>67</sup> Art. 1 of Decreto Legge, 30 Aug. 1925, No. 1621 turned into law by Statute of 15 July 1926, No. 1263. See on this legislation Condorelli and Sbolci, ‘Measures of Execution against the Property of Foreign States: The Law and Practice in Italy’, 10 *NYIL* (1979) 197.

<sup>68</sup> Schreuer, *supra* note 1, at 136.

<sup>69</sup> See, for instance, *Prefect of Milan v. Federici and Savoldi*, Corte di Cassazione, 30 Sept. 1968, 65 ILR 270, where a lower court attachment of Japanese assets was quashed as a result of a lack of executive authorization. See also *Banamar-Capizzi v. Embassy of the Republic of Algeria*, 4 May 1989, 87 ILR 56, where the Corte di Cassazione disallowed enforcement measures against foreign embassy accounts, expressly relying on the 1925/1926 legislation which it (then) considered to be in conformity with the Italian Constitution.

<sup>70</sup> *Condor and Filvem*, *supra* note 29, at 406 (ILR).

<sup>71</sup> *Diana Gayle Abbott v. República de Sudáfrica*, Tribunal Constitucional, 1 July 1992, [1992] Aranzadi, Decision No. 107, 113 ILR 413.

from execution [it] must be treated as a breach of Article 24(1) of the Constitution, in that it imposes a restriction on the right of execution for which there is no ground in law'.<sup>72</sup> Having said that there was a fundamental right to the enforcement of judicial decisions, the Constitutional Court also established that this right was not absolute, and that it did not cover the measures of constraint against the property of foreign states protected by international immunities. According to the Constitutional Court, measures of constraint against bank accounts of embassies were covered by the scope of the immunity of execution and, therefore, not subject to an embargo by domestic courts.

The *Abbott* case was followed by a 1994 case against Brazil in which the Spanish Constitutional Court reaffirmed that the fundamental right to a judicial decision and its execution may be limited by legitimate exceptions—the immunity of execution of foreign state property being one of these legitimate exceptions.<sup>73</sup> In a subsequent case the same court held that 'enforcement is an integral part of the fundamental right provided for in Article 24 of the Constitution—any other interpretation would deprive the law of its efficacy and would transform it into a mere declaration of intentions'.<sup>74</sup> The Constitutional Court further declared that the lower courts had not exhausted the execution possibilities available, such as credits, aid, or subsidies granted to the foreign state.

In a 2001 decision the Spanish Constitutional Court, though reaffirming its earlier case law according to which the right to a fair hearing includes the right to enforce the court's judgment, made it explicit that diplomatic and consular property is always immune from execution, and that the determination of property as *iure gestionis* or *iure imperii* is not a constitutional question, and, therefore, must be made by ordinary courts.<sup>75</sup>

In Greece, too, the requirement to obtain executive authorization for enforcement measures against foreign states is based on legislation.<sup>76</sup> In addition, Greek case law has clarified that the authorization requirement applies to interim measures as well.<sup>77</sup> The issue whether the requirement of prior executive authorization for enforcement measures was compatible with the right of access to court, as discussed by the Italian courts,<sup>78</sup> was also raised before the Greek courts. In the course of the *Distimo Massacre Case*,<sup>79</sup> brought by World War II victims against Germany, Greek courts had doubts,

<sup>72</sup> *Abbott*, *supra* note 71, at 422 (ILR).

<sup>73</sup> *Esperanza Jequier Beteta v. Embajada de Brasil*, Tribunal Constitucional [1994] Aranzadi, No. 292 BOE (29 Nov. 1994).

<sup>74</sup> *Emilio Blanco Montero v. Embajada de Guinea Ecuatorial*, Tribunal Constitucional [1997] Aranzadi, No. 18 BOE (14 Mar. 1997), No. 63 (suplemento).

<sup>75</sup> *Maite GZ v. Consulado General de Francia*, Tribunal Constitucional, 17 Sept. 2001 [2001] Aranzadi, No. 176, BOE, 19 Oct. 2001, No. 251 (suplemento).

<sup>76</sup> Art. 1(1) of Greek Emergency Law No. 15/1938. Cf. Schreuer, *supra* note 1, at 136.

<sup>77</sup> 'According to Article 689 of the Code of Civil Procedure a request for interim measures against a foreign state is admissible if the Minister of Justice has already given his/her consent': Court of First Instance of Thessaloniki, Judgment No. 1822/1981 (on file with the author).

<sup>78</sup> See *supra* text at note 70.

<sup>79</sup> *Prefecture of Voiotia v. Germany*, Court of First Instance, Livadeia, Case No. 137/1997, 30 Oct. 1997, partly reproduced in Bantekas, 'Case Note', 92 *AJIL* (1998) 765; Areiopagos, Case No. 11/2000, 4 May 2000, partly published in Gavouneli and Bantekas, 'Case Note', 95 *AJIL* (2001) 198. See also Vournas, 'Prefecture of Voiotia v. Federal Republic of Germany', 21 *New York Law School J Int'l and Comparative L* (2001) 629.

at one point, ‘whether prior consent of the Minister of Justice, which is necessary according to Article 923 of the Greek Code of Civil Procedure to start enforcement proceedings against a foreign State, is contrary to Article 6 para. 1 of the European Convention on Human Rights and Articles 2 para. 3 as well as 14 of the International Covenant on Civil and Political Rights’.<sup>80</sup> The Chamber of the Supreme Court therefore decided to refer the case to the Full Court. It held that

the right to effective remedies in case of enforcement proceedings may, under certain conditions, be subject to restrictions. Such restrictions should be provided for by law and should not violate the substance of the protected right or be disproportionate to the aim pursued and the means employed’.<sup>81</sup>

The Supreme Court further opined that the refusal of the Minister of Justice to consent to enforcement proceedings against a foreign state was not contrary to the aforementioned rules of the ECHR and the ICCPR if such enforcement proceedings were directed against the property of a foreign state serving *jure imperii* purposes or, if such proceedings might endanger the international relations of the country with foreign states.<sup>82</sup> An alternative enforcement attempt in Germany failed because the German Supreme Court refused recognition to the Greek judgment, which it considered to be contrary to international law principles of state immunity.<sup>83</sup>

In *Kalogeropoulou and others v. Greece and Germany*<sup>84</sup> the unsuccessful plaintiffs tried to challenge this judgment before the European Court of Human Rights, arguing that their right to the execution of a final judgment guaranteed under Article 6(1) ECHR had been infringed by the refusal to take execution measures. The European Court of Human Rights (ECtHR), however, rejected the *Kalogeropoulou* application relying on three of its own recent judgments. In *Al-Adsani v. UK*,<sup>85</sup> *Fogarty v. UK*,<sup>86</sup> and *McElhinney v. Ireland and UK*<sup>87</sup> it found no violation of Article 6 ECHR, considering that ‘the grant of immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State’s sovereignty’.<sup>88</sup> Significantly, in these cases, the ECtHR did not engage in any in-depth inquiry into the proportionality of such abrogation of the right of access to court—as it had demanded in its own earlier immunity

<sup>80</sup> *Prefecture of Boeteia v. Germany*, Areiopagos, Chamber, Judgments Nos. 301 and 302/2002, 19 Feb. 2002 (on file with the author).

<sup>81</sup> *Prefecture of Boeteia v. Germany*, Areiopagos, Full Court, Judgments Nos. 36 and 37/2002, 28 June 2002, reported under ‘Facts’ of the ECtHR’s *Kalogeropoulou* case, App. No. 59021/00, 12 Dec. 2002 (Admissibility).

<sup>82</sup> *Ibid.*

<sup>83</sup> Bundesgerichtshof, 26 June 2003, III ZR 245/98, [2003] *Neue Juristische Wochenschrift* 3488.

<sup>84</sup> *Supra* note 81.

<sup>85</sup> App. No. 35753/97, 34 EHRR (2001) 273 (Judgment).

<sup>86</sup> App. No. 37112/97, 34 EHRR (2001) 302 (Judgment).

<sup>87</sup> App. No. 31253/96, 34b EHRR (2001) 322 (Judgment).

<sup>88</sup> *Al-Adsani*, *supra* note 85, at para. 54; *Fogarty*, *supra* note 86, at para. 34; *McElhinney*, *supra* note 87, at para. 5.

case law concerning international organizations, such as *Beer and Regan*<sup>89</sup> and *Waite and Kennedy*.<sup>90</sup>

### 3 The Main Types of Exceptions to Immunity from Execution

#### A Waiver of Immunity from Execution

As with immunity from jurisdiction, it is generally accepted that immunity from enforcement measures may be waived by a state. This is clearly reflected in Articles 18 and 19 of the UN Convention which permit enforcement measures if expressly consented to by states,<sup>91</sup> and it is also found in the ECHR,<sup>92</sup> the ILC Draft Convention,<sup>93</sup> and national immunity legislation. This exception to enforcement immunity is even recognized in countries adhering to an absolute immunity standard. For instance, the new Russian Civil Procedure Code provides that 'arrest of property of a foreign State located on the territory of the Russian Federation, taking against that property other measures of constraint, attachment against that property for execution of a decision of a court may be taken only with the consent of the competent authorities of the respective State, unless otherwise provided by an international treaty of the Russian Federation or by a federal law'.<sup>94</sup>

#### 1 Does a Waiver of Immunity from Jurisdiction Encompass a Waiver of Immunity from Enforcement?

The general rule is that a separate waiver is required for purposes of enforcement measures and that a waiver of immunity from jurisdiction does not normally also imply a waiver of immunity from enforcement.<sup>95</sup> The requirement of a separate waiver is also clearly expressed in the UN Convention,<sup>96</sup> the ILC Draft Articles,<sup>97</sup> and national legislation.<sup>98</sup>

<sup>89</sup> App. No. 28934/95, 18 Feb. 1999 (Judgment).

<sup>90</sup> App. No. 26083/94, 18 Feb. 1999 (Judgment).

<sup>91</sup> See *supra* note 16.

<sup>92</sup> Art. 23 ECHR, *supra* note 8, provides: '[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'.

<sup>93</sup> Art. VIII A of the ILC Draft Convention, *supra* note 13, at 291, provides: '[a] foreign State's property in the forum State, shall not be immune from any measure for the enforcement of a judgment or an arbitral award if: 1. The foreign State has waived its immunity either expressly or by implication from such measures. A waiver may not be withdrawn except in accordance with its terms'.

<sup>94</sup> Art. 401 Civil Procedural Code of the Russian Federation, which entered into force in Feb. 2003. Art. 401 substitutes Art. 435 Civil Procedural Code of the RSFSR (Russian Soviet Federative Socialist Republic) (on file with the author).

<sup>95</sup> See *Bouchez*, *supra* note 4, at 23.

<sup>96</sup> Art. 20 UN Convention provides: '[w]here consent to the measures of constraint is required under articles 18 and 19, consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint'.

<sup>97</sup> Art. 18(2) ILC Draft Articles.

<sup>98</sup> S. 13(3) UK SIA, *supra* note 5, dealing with enforcement immunity, states that 'a provision merely submitting to the jurisdiction of the courts is not to be interpreted as a consent for the purposes of this subsection'.

On the basis of this fairly well-settled law it is not surprising that national courts also generally require an additional waiver of enforcement immunity. Adherence to this rule can be found in a decision of the Czechoslovak Supreme Court in 1987. It held that 'submission of the foreign State to the hearing in Czechoslovak courts does not imply that the foreign State submits to their jurisdiction also as regards the execution of the judgment'.<sup>99</sup> A 1997 English decision also upheld the requirement of separate waivers. In *An International Bank v. Republic of Zambia* the court held that '[s]ubmission to jurisdiction and waiver of the privileges of a State in relation to service of proceedings, do not imply a waiver of immunities/procedural privileges in relation to service of a default judgment against a foreign State and execution'.<sup>100</sup> In similar unequivocal terms, a French court holding that an arbitration clause implied a waiver of jurisdictional immunity held that '[w]aiver of jurisdictional immunity does not in any way involve waiver of immunity from execution'.<sup>101</sup>

## 2 *Scope of a Waiver*

When national courts have to interpret waivers of immunity from enforcement measures they tend to limit the scope of such waivers in order to avoid a possible conflict with immunities derived from consular or diplomatic law. A 1989 English case provides a good example of such an approach. The High Court held:

A contractual waiver of State immunity from jurisdiction and enforcement will not be sufficient to waive the inviolability and immunity of either the premises and/or property of a diplomatic mission, or the private residence and/or property of a diplomatic agent, enjoyed under, respectively, Articles 22 and 30 of the Vienna Convention on Diplomatic Relations.<sup>102</sup>

A similar issue concerning an overlap between a waiver and diplomatic immunities was decided by a French court in the *NOGA Case*.<sup>103</sup> It had to deal, on the one hand, with an express waiver in a loan agreement according to which any immunity relating to the application of an arbitral award was waived and, on the other hand, with the protection of state property, in particular embassy bank accounts, necessary for the running of a diplomatic mission. The French appellate court found in favour of immunity:

<sup>99</sup> Nejvyšší soud Ěškoslovenské socialistické republiky (Czechoslovak Supreme Court Opinion) Cpfj 27/86 published as Rc 26/1987, 27 Aug. 1987, 87 Sbíрка soudních rozhodnutí (Collection of Judicial Decisions) 9–10 (on file with the author).

<sup>100</sup> *An International Bank v. Republic of Zambia*, QBD, 23 May 1997, 118 ILR 602.

<sup>101</sup> *Socialist Federal Republic of Yugoslavia v. Société Européenne d'Etudes et d'Entreprises*, Tribunal de grande instance, Paris, 6 July 1970, 98 Journal de Droit International (JDI) (1971) 131, 65 ILR 46, at 49. See also *République Islamique d'Iran et consorts v. Sociétés Eurodif et Sofidif*, Cour d'appel, Paris, 21 Apr. 1982, 65 ILR 93, at 97, where the Court held that 'the alleged waiver of its jurisdictional immunity by the Iranian State does not in the least imply any corresponding waiver of its immunity from execution and cannot therefore have any effect on the validity of the attachment in issue'. As early as in *Socifros v. USSR*, *supra* note 23, at 237 (Ann.Dig.), a French court had held that '[t]hese two immunities are not interconnected, and the waiver of one has never, before French courts, entailed the loss of the right to invoke the other'.

<sup>102</sup> *A Co. Ltd v. Republic of X*, QBD, 21 Dec. 1989, [1990] 2 Lloyds Rep. 520, 87 ILR 412.

<sup>103</sup> *Ambassade de la fédération de Russie en France v. Société NOGA*, Cour d'Appel, Paris, 1st Chamber, section A, 10 Aug. 2000 [2001] 128 JDI 116.



*La seule mention, dans le contrat litigieux, que l'emprunteur renonce à tout droit d'immunité relativement à l'application de la sentence arbitrale rendue à son encontre en relation avec le présent contrat ne manifeste pas la volonté non équivoque de cet Etat de renoncer à se prévaloir de l'immunité diplomatique d'exécution et d'accepter qu'une société commerciale puisse, le cas échéant, entraver le fonctionnement et l'action de ses ambassades et représentations à l'étranger.*<sup>104</sup>

### 3 Implied Waiver

The most difficult issues with respect to waivers concern the question whether a waiver of immunity has to be express or whether it can also be implied and, if the possibility of an implied waiver is recognized, which acts constitute such waiver. Both the UN Convention<sup>105</sup> and the ECHR<sup>106</sup> seem to require express consent. The ILA Draft Convention, however, clearly contemplated the possibility of an implied waiver of immunity from execution.<sup>107</sup>

In this context particular problems have arisen when courts have been requested to interpret the meaning of arbitration clauses accepted by states. The restrictive language of the UN Convention, the ILC Draft Articles, and the ECHR indicates that a mere arbitration clause does not imply a waiver of enforcement immunity but rather requires an additional, express consent to such enforcement measures. This approach has been traditionally adhered to by courts in Europe.<sup>108</sup> Nevertheless, some national courts have been ready to interpret arbitration agreements more broadly.

By this broad interpretation French courts have changed their interpretation of language found in the ICC Arbitration Rules which provided: '[b]y submitting the dispute to arbitration by the International Chamber of Commerce, the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal insofar as such waiver can validly be made'.<sup>109</sup> Initially this provision was interpreted by French courts not to imply a waiver from execution measures.<sup>110</sup> However, in the *Creighton* decision the Cour de Cassation changed its approach and held:

<sup>104</sup> *Ibid.* 'The fact that the contested contract mentions that "the borrower renounces any right to immunity relating to the application of an arbitral award rendered against him concerning the present contract" does not express the unequivocal will of that State to renounce the possibility to use its diplomatic immunity from execution and to accept that a commercial enterprise could possibly hinder the functioning and actions of its ambassadors and foreign representatives'.

<sup>105</sup> Both Arts 18(a) and 19(a) UN Convention, *supra* note 16, require that a 'State has expressly consented'.

<sup>106</sup> Art. 23 ECHR, *supra* note 8, requires that a 'State has expressly consented' to enforcement measures 'in writing in any particular case'.

<sup>107</sup> Art. VIII A 1 of the ILA Draft Convention, *supra* note 13, provides for an exception to immunity if '[t]he foreign State has waived its immunity either expressly or by implication from such measures'.

<sup>108</sup> See *Duff Development v. Kelantan Government* [1923] 1 Ch 385 (CA), 2 ILR 124, [1924] AC 797 (HL).

<sup>109</sup> Art. 24(2) ICC Rules of Conciliation and Arbitration, in force from 1 Jan. 1988 until 31 Dec. 1997.

<sup>110</sup> In *Eurodif et Sofidif*, *supra* note 101, 65 ILR 93, at 98, the French Cour d'Appel, Paris held with regard to Art. 24 ICC Rules of Conciliation and Arbitration that 'this stipulation constitutes merely an undertaking to submit voluntarily the award and to recognise its binding force but does not contain any allusion to the immunity from execution from which a party might be entitled to benefit. It cannot therefore be interpreted as implying the waiver of a right with which it is not intended to deal'.

*L'engagement pris par un Etat signataire de la clause d'arbitrage d'exécuter la sentence dans les termes de l'article 24 du règlement d'arbitrage de la chambre de commerce international implique renonciation de cet Etat à l'immunité d'exécution.*<sup>111</sup>

Swedish courts also had to interpret arbitration agreements and their implication for immunity from enforcement measures. In a 1972 decision the Swedish Supreme Court refused to read an arbitration agreement as an implicit waiver of immunity with regard to the court appointment of an arbitrator in a situation where a foreign state refused to nominate its arbitrator.<sup>112</sup> In another case relating to arbitration, however, Swedish courts were more willing to accept the idea of an implied waiver. In a 1980 appellate decision the Svea Court of Appeal found that by approving an arbitration clause Libya had waived its immunity. The clause had been inserted into an oil licence agreement with an American company and had given rise to arbitration proceedings between the parties. The successful claimant sought the enforcement of the arbitral award before the Swedish courts, but the losing state party objected, claiming immunity.<sup>113</sup>

### **B Enforcement against Property Specifically Set Aside for the Satisfaction of the Underlying Claim (Earmarked Property)**

Property, as a rule money, transferred to and located in the forum state for the specific purpose of paying certain obligations is generally considered to be subject to execution measures and not to benefit from enforcement immunity. The availability of earmarked property or funds for enforcement measures is acknowledged in the UN Convention<sup>114</sup> as well as in the IDI Resolution.<sup>115</sup> It is also generally accepted in the case law. For instance, in a 2001 ruling of a French appellate court it was held:

*Sont saisissables les biens affectés par l'Etat à la satisfaction de la réclamation en question ou réservés par lui à cette fin, à défaut à tous autres biens de l'Etat étranger situés sur le territoire de l'Etat du for ou prévus pour être utilisés à des fins commerciales, sans qu'il soit besoin d'établir que lesdits biens étaient affectés à l'entité contre laquelle la procédure a été engagée.*<sup>116</sup>

<sup>111</sup> *Société Creighton v. Ministre des Finances de l'Etat du Qatar et autre*, Cour de cassation (1st Civil Chamber), 6 July 2000, Bulletin civil I, n°207, [2001] *Revue de l'arbitrage* 114. The same result had already been reached by a lower French court with regard to *ad hoc* arbitration in *Société Bec Frères v. Office des Céréales de Tunisie*, Cour d'Appel, Rouen, 20 June 1996 [1997] *Revue de l'arbitrage* 263, 113 ILR 485. 'The acceptance by a State signing an arbitral clause to enforce an award according to Article 24 of the Arbitration Rules of the International Chamber of Commerce implies a renunciation of the immunity from enforcement of that State'.

<sup>112</sup> *Tekno-Pharma AB v. Iran*, Svea Hovrett, 24 May 1972, Högsta domstolen (Supreme Court), 21 Dec. 1972, 65 ILR 383.

<sup>113</sup> *Libyan American Oil Company v. Libya*, Svea Hovrett, 18 June 1980, 20 ILM (1981) 89, 62 ILR 225.

<sup>114</sup> Arts 18(b) and 19(b) UN Convention, *supra* note 16, provide for an exception from enforcement immunity 'to the extent that ... the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding'.

<sup>115</sup> Art. 4(3) IDI Resolution, *supra* note 15, states that 'the following property of a State is not immune from measures of constraint: a) property allocated or earmarked by the State for the satisfaction of the claim in question'.

<sup>116</sup> *Société Creighton Ltd v. Ministère des Finances et le Ministère des Affaires Municipales et de l'Agriculture du Gouvernement de l'Etat du Qatar*, Cour d'Appel, Paris, 12 Dec. 2001 [2003] *Revue de l'arbitrage* 417, 527. 'Goods destined by a State for the satisfaction of the claim in question or reserved by it to this end may be seized, instead of all other goods of the foreign State situated in the forum State or intended to be used for

This reasoning had already been followed in an earlier French case, *Société Sonatrach*, with regard to property owned by separate State entities:

*A la différence des biens de l'Etat étranger qui sont en principe insaisissables, sauf exceptions, notamment quand ces biens ont été affectés à l'activité économique ou commerciale de droit privé qui est à l'origine du titre du créancier saisissant, les biens des organismes publics, personnalisés ou non, distincts de l'Etat étranger, lorsqu'ils font partie d'un patrimoine que celui-ci a affecté à une activité principale relevant du droit privé, peuvent être saisis par tous les créanciers, quels qu'ils soient, de cet organisme.*<sup>117</sup>

This decision was based on an earlier appellate court ruling which had held that immunity from execution could be ruled out in exceptional cases where the asset attached had been allocated by the wish of the foreign state for the achievement of a purely commercial operation carried out by it or by a body created by it for that purpose.<sup>118</sup>

The rule that earmarked funds do not enjoy immunity from execution was also confirmed by the House of Lords. In the *Alcom* case it dealt with embassy accounts which are normally considered to serve sovereign purposes, thus being immune from enforcement measures. The House of Lords acknowledged, however, that even an embassy bank account, if it is earmarked by the foreign state solely for commercial transactions, will not be immune from measures of execution.<sup>119</sup>

### **C Measures against Assets Serving other than Governmental Non-commercial Purposes**

Most immunity instruments and the case law of European courts provide for an exception from immunity for property serving non-governmental purposes. For instance, the UN Convention exempts from immunity property 'specifically in use or intended for use by the State for other than government non-commercial purposes';<sup>120</sup> similarly the ILA Draft Convention speaks of enforcement measures against property 'in use for the purposes of commercial activity'.<sup>121</sup> The UK SIA provides for enforcement measures against property which 'is for the time being in use or intended for use for commercial purposes'.<sup>122</sup>

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commercial purposes, without it being necessary to establish that such goods were destined for the entity against which the proceedings had been brought'.

<sup>117</sup> *Société Sonatrach v. Migeon*, Cour de cassation (1st Civil Chamber), 1 Oct. 1985, 77 ILR 525. 'A distinction is to be drawn between two types of assets. The assets of a foreign State are, in principle, not subject to seizure, subject to exceptions in particular where they have been allocated for an economic or commercial activity under private law which is at the origin of the title of the attaching creditor. On the other hand, the assets of public entities, whether personalized or not, which are distinct from the foreign State, may be subjected to attachment by all creditors of that entity, whoever they are, where the assets form part of a body of funds which that entity has allocated for an activity governed by private law'.

<sup>118</sup> *Eurodif et Sofidif*, *supra* note 101, at 97 (ILR).

<sup>119</sup> *Alcom Ltd v. Republic of Colombia* [1984] 2 All ER 6, 74 ILR 170, at 187 (HL).

<sup>120</sup> Art. 19(c) UN Convention, *supra* note 16.

<sup>121</sup> Art. VIII A 2 of the ILA Draft Convention, *supra* note 13.

<sup>122</sup> S. 13(4) UK SIA, *supra* note 5.

### 1 *Nexus Requirement*

One of the more controversial issues with regard to enforcement immunity remains the question whether the denial of such immunity requires some connection or nexus between the property against which enforcement measures are sought and the underlying claim or the entity involved. In fact, there are a number of different types of nexus requirements in international instruments, national legislation, and court practice that may lead to different results in specific situations.

One nexus requirement—which is clearly expressed in the US FSIA<sup>123</sup>—demands a connection between the property and the underlying claim. Similarly, the ILA Draft Convention requires that '[t]he property is in use for the purposes of commercial activity or was in use for the commercial activity upon which the claim is based'.<sup>124</sup> The generally restrictive approach of the ECHR is also reflected in its Article 26 which permits enforcement measures only against property 'used exclusively in connection with [an industrial or commercial] activity'.<sup>125</sup>

Another related type of nexus prerequisite can be seen in a required connection between the property and the defendant state entity. The ILC Draft Articles stipulated that one of the two main types of links is present, requiring that the property 'has a connection with the claim which is the object of the proceeding or with the agency or instrumentality against which the proceeding was directed'.<sup>126</sup> This nexus requirement was severely criticized by some states. In fact, the wording of the nexus requirement in the ILC Draft Articles remained controversial until the end of the ILC's deliberations on this subject.<sup>127</sup> In the new UN Convention it has been modified in so far as the link between the property and the underlying claim has been discarded, leaving a 'connection with the entity against which the proceeding was directed' as the only nexus requirement.<sup>128</sup>

The most liberal approach is pursued by the UK SIA which requires only that the property against which enforcement measures are sought 'is for the time being in use or intended for use for commercial purposes'<sup>129</sup> without demanding a special nexus.

European court practice is not uniform with regard to a nexus requirement. Many decisions seem to distance themselves from any such requirement. For instance, the Italian Constitutional Court characterized a 'specific link with the subject matter of the request, namely the specific allocation of the property for the commercial transaction from which the dispute arose' as a 'further restriction [which] is not generally

<sup>123</sup> S. 1610(a)(2) US FSIA, *supra* note 6, permits execution measures if 'the property is or was used for the commercial activity upon which the claim is based'.

<sup>124</sup> Art. VIII A 2 ILA Draft Convention, *supra* note 13.

<sup>125</sup> Art. 26 ECHR, *supra* note 8.

<sup>126</sup> Art. 18(1)(c) ILC Draft Articles, *supra* note 17, provided: '[n]o measures of constraint, such as attachment, arrest and execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that ... the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum and has a connection with the claim which is the object of the proceeding or with the agency or instrumentality against which the proceeding was directed'.

<sup>127</sup> See Heß, *supra* note 17, at 277f.

<sup>128</sup> Art. 19(c) UN Convention; see *supra* the text in note 20.

<sup>129</sup> S. 13(4) UK SIA, *supra* note 5.

recognized, and in particular is rejected in Western Europe, including the United Kingdom'.<sup>130</sup> The fact that many national courts do not even discuss a nexus requirement indicates that they look only at the purpose of the property concerned without requiring a specific connection or nexus.

On the other hand, there is still practice in some European states that supports the upholding of such a nexus requirement: French courts have traditionally adhered to it. In both the *Eurodif*<sup>131</sup> and the *Sonatrach*<sup>132</sup> cases the Cour de Cassation upheld the requirement of a special connection between the state property seized and the activity underlying the claim. However, in a more recent decision of the Paris Court of Appeal, in the *Creighton* case, even the French courts seem to have relinquished such a nexus requirement.<sup>133</sup>

## 2 *The Distinction between Property Available for Enforcement Measures and Property not Subject to such Measures*

The availability for enforcement measures of property used for *iure gestionis* or non-public purposes, or, as it is somewhat awkwardly put in the UN Convention, for 'other than government non-commercial purposes',<sup>134</sup> is recognized in many states.<sup>135</sup> The true difficulty lies in defining and identifying the scope of property not used for sovereign purposes and thus subject to enforcement jurisdiction.<sup>136</sup> In the case law reviewed one can clearly recognize that the broad categories, identifying types of property generally considered to serve sovereign or non-commercial purposes as they are found in the UN Convention and other immunity instruments, have been followed and refined.

<sup>130</sup> *Condor and Filvem*, *supra* note 29, at 402 (ILR).

<sup>131</sup> *Société Eurodif v. République islamique d'Iran*, Cour de cassation (1<sup>st</sup> Civil Chamber), 14 Mar. 1984 [1984] *Revue critique de droit international privé* 644, 77 ILR 513, at 515: 'immunity [from execution] can be set aside in exceptional cases such as where the assets attached have been allocated for an economic or commercial activity of a private law nature.' Immunity from execution enjoyed by a foreign state or public entity acting on its account can be set aside only exceptionally if the attached debt had been destined for a private activity which gave rise to a claim.

<sup>132</sup> *Société Sonatrach*, *supra* note 117: 'l'immunité d'exécution dont jouit l'Etat étranger ou l'organisme public agissant pour son compte ne peut être exceptionnellement écartée que lorsque la créance saisie a été affectée à une activité privée qui est celle-là même qui sert de base à la demande,' 'immunity from execution enjoyed by a foreign State or public entity acting on its account can be set aside only exceptionally if the attached debt had been destined for a private activity which gave rise to the claim'.

<sup>133</sup> *Creighton v. Qatar*, *supra* note 116: 'sont saisissables les biens affectés par l'Etat à la satisfaction de la réclamation en question ou réservés par lui à cette fin, à défaut tout autre bien de l'Etat étranger situé sur le territoire de l'Etat du for et utilisé ou prévu pour être utilisé à des fins commerciales,' 'goods destined by a State for the satisfaction of the claim in question or reserved by it to this end may be seized, instead of all other goods of the foreign State situated in the forum State or intended to be used for commercial purposes'.

<sup>134</sup> Art. 19(c) UN Convention, *supra* note 16, based on Art. 18(1)(c) ILC Draft Articles.

<sup>135</sup> See *supra* text at note 26.

<sup>136</sup> See *Société de droit irakien Rafidain Bank et crts v. Consarc Corporation, société de droit américain et crts*, Cour d'Appel, Brussels, 10 Mar. 1993 [1994] JT 787, where the court reasoned that 'l'immunité d'exécution a pour but de soustraire certains biens de l'Etat étranger aux mesures d'exécution de ses créanciers', ('immunity from execution aims at removing certain assets of a foreign State from measures of execution of its creditors') but did not make it clear which assets might be available for execution.

## (a) Embassy premises

Diplomatic and consular premises as well as related property serving diplomatic or consular functions are the paradigmatic examples of property serving non-commercial purposes and thus being immune from execution. This immunity, derived from the inviolability of such premises under diplomatic and consular law,<sup>137</sup> is also expressly reaffirmed in a number of state immunity codifications.<sup>138</sup> Court practice is relatively uniform in respecting the immunity of embassy premises and buildings.<sup>139</sup> Courts have, however, clarified that the immunity from execution of embassies extends only so far as the performance of the duties of the mission requires. Thus, state-owned immovable property no longer used for diplomatic purposes ceases to be protected by immunity from enforcement measures.<sup>140</sup>

## (b) Cultural centres

In a case concerning the seizure of real property destined to serve as a cultural centre for a state which owned the premises and buildings, the Swiss Federal Court modified its earlier case law according to which it treated jurisdictional and enforcement immunity in a strictly parallel fashion. It held that, according to public international law, certain objects serving public purposes were generally exempted from enforcement measures:

Immunity from forced execution extends, independently from the nature of the dispute, 'to assets which a foreign State possesses in Switzerland and which it has designated for its diplomatic service or other task incumbent upon it in the exercise of its sovereign powers'.<sup>141</sup>

In the particular case, the Federal Court held that the Spanish Institute was to be regarded as having been allocated to tasks 'related to the exercise of sovereign powers',<sup>142</sup> and thus not subject to attachment.

In a similar way, execution measures sought against the Goethe Institute in Athens in order to enforce the Greek Supreme Court's judgment in the *Distimo Massacre Case* were unsuccessful.<sup>143</sup> Though it was not the court which refused enforcement measures against the Goethe Institute and the German Archaeological Institute in Athens but the executive, which refused to give permission, the effect remained the same: real property which serves as a cultural centre is not available for enforcement measures.

<sup>137</sup> See *supra* notes 53 and 54.

<sup>138</sup> Art. 21(1)(a) UN Convention, *supra* note 16, based on Art. 19(1)(a) ILC Draft Articles on State Immunity; Art. VIII C 1 of the ILA Draft Convention, *supra* note 13. See also Fox, *supra* note 1, 390; Schreuer, *supra* note 1, 145.

<sup>139</sup> See the *Legation Building Case*, Bundesgericht, 15 Mar. 1921, 1 Ann.Dig. (1919–1922) 291, in which the court held that 'embassy buildings of a foreign state are not an object for execution'. See also *Embassy Eviction Case*, Court of First Instance, Athens, 1965, 65 ILR 248; NOGA, *supra* note 103.

<sup>140</sup> *Hungarian Embassy Case*, Bundesgerichtshof, 26 Sept. 1969, 65 ILR 110.

<sup>141</sup> *Espagne v. X SA*, Office des poursuites du canton de Berne et Président du Tribunal d'arrondissement 4 du canton de Berne, Tribunal fédéral suisse, 30 Apr. 1986, ATF 112 Ia 148; [1987] *Annuaire suisse de droit international* 158; 82 ILR 38, at 41.

<sup>142</sup> *Ibid.*, at 45 (ILR).

<sup>143</sup> *Prefecture of Boeteia v. Germany*, *supra* note 81.

## (c) Information office

The Swiss Federal Court held that premises used as information offices also served the public purposes of a state and were thus exempt from enforcement measures. The court reasoned, very broadly distinguishing state property in the following way:

Only the patrimonial assets (*biens patrimoniaux*) of these authorities and not their administrative assets (*biens administratifs*) may be seized, because the latter are assets of the local authority directly allocated for the performance of its tasks under public law.<sup>144</sup>

## (d) Military property, in particular, warships

Warships and other military equipment are generally regarded as not available for enforcement measures.<sup>145</sup> This is clearly reflected in the UN Convention which expressly characterizes ‘property of a military character or used or intended for use in the performance of military functions’ as government non-commercial property.<sup>146</sup> Thus, in a 1987 Dutch case, an interlocutory injunction attaching a cruiser in order to secure rights and obtain payment of the salvage money was not permitted because a warship served non-commercial purposes, even when not ‘on duty’.<sup>147</sup> On the other hand, in a 1993 Dutch Supreme Court decision it was held that the provisional seizure of a state-owned ship was not precluded from enforcement by immunity where the seized vessel was used by a commercial shipping company with which the plaintiff had entered into contractual relations for the sale of goods:

There is no rule of unwritten international law to the effect that seizure (provisional or otherwise) of a vessel belonging to the State and intended for commercial shipping, is permissible only if the seizure is levied for the purpose of insurance or to recover a (‘maritime’) claim resulting from the operation of the vessel.<sup>148</sup>

The notion that state-owned ships in commercial service are subject to enforcement measures can already be found in the 1926 Brussels Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels.<sup>149</sup> The idea of denying any enforcement immunity of commercial ships is also upheld in the case law of various states.<sup>150</sup> Sometimes courts expressly invoke the commercial versus public use rationale. For instance a French court held:

<sup>144</sup> *Egypte v. Cinetel*, *supra* note 32, at 435 (ILR).

<sup>145</sup> See Fox, *supra* note 1, at 391.

<sup>146</sup> Art. 21(1)(b) UN Convention, *supra* note 16.

<sup>147</sup> ‘A warship delivered by a foreign State to Dutch companies for refitting not only has to spend a long time in dock but must also undergo sea trials, during which it sails under national command and is manned in part by a national crew, should also be regarded as a ship intended for use in the public service even during the execution of the work’: *Wijsmuller Salvage BV v. ADM Naval Services*, Rechtbank Amsterdam (District Court), Amsterdam, 19 Nov. 1987 [1989] NYIL 294.

<sup>148</sup> *The Russian Federation v. Pied-Rich BV*, Hooge Raad der Nederlanden (Netherlands Supreme Court), 28 May 1993 [1994] NYIL 512.

<sup>149</sup> International Convention for the Unification of Certain Rules Relating to the Immunity of State-owned Vessels, Brussels, 1926, and Additional Protocol, Brussels, 1934, 176 League of Nations Treaty Series (LNTS) 201.

<sup>150</sup> *Szczesniak v. Backer and Others*, Cour d’Appel, Brussels, 14 July 1955 [1957] II Pasicrisie 38; 65 ILR 23.

A ship belonging to a foreign State which carries freight by sea for a private person performs a private commercial act which has nothing in common with the performance of a public or governmental service. The rules concerning the immunity of State ships do not therefore apply to such a ship, which can be subjected to attachment if liability may have been incurred in the course of such carriage.<sup>151</sup>

### (e) Central bank funds

That central bank funds, as typically non-commercial property, are immune from enforcement measures is reflected in the UN Convention which exempts ‘property of the central bank or other monetary authority of the state’ from the types of property possibly subject to execution measures.<sup>152</sup> A similar, though more limited, exemption can be found in the ILA Draft Convention<sup>153</sup> and in the IDI Resolution.<sup>154</sup> The UK SIA provides that ‘[p]roperty of a State’s central bank or other monetary authority shall not be regarded ... as in use or intended for use for commercial purposes’.<sup>155</sup> A 2001 English case clearly recognized the resulting immunity of central bank funds from enforcement proceedings:

The immunity from enforcement proceedings of a central bank (section 14(4) State Immunity Act), is a relevant factor for a Court to consider when deciding whether to exercise a discretion allowing proceedings to be served outside the jurisdiction.<sup>156</sup>

One should note that this decision—based on the SIA—differs from the *Trendtex* case, decided on the basis of customary international law. In that case the Court of Appeal considered that the Central Bank of Nigeria was not an emanation of the state entitled to claim immunity and that, since the Bank was not immune, its funds were not immune from seizure or injunction.<sup>157</sup>

In the French *NOGA* case, discussed above,<sup>158</sup> the attachment of central bank funds was also in issue. However, the court did not refuse attachment because the funds served public purposes. Rather, it considered that the funds of the Russian central bank, a separate legal entity, could not be used to satisfy the debt of a third party, the Russian Federation.<sup>159</sup>

But respect for the exemption of central bank funds is not unlimited in European courts. A good example is provided by a 1985 decision of the Swiss Federal Court in which the court recognized in principle that foreign state property serving public

<sup>151</sup> *Société Paul Liegard v. Capitain Serdjuk and Mange*, Tribunal de commerce, La Rochelle, 14 Oct. 1964, 65 ILR 38, at 39.

<sup>152</sup> Art. 21(1)(c) UN Convention, *supra* note 16.

<sup>153</sup> Art. VII(C)3 of the ILA Draft Convention, *supra* note 14, prohibits attachment or execution if ‘[t]he property is that of a State central bank held by it for central banking purposes’.

<sup>154</sup> Art. 4(2)(c) IDI Resolution, *supra* note 15, accords immunity from measures of constraint to ‘property of the central bank or monetary authority of the State in use or set aside for use for the purposes of the central bank or monetary authority’.

<sup>155</sup> S. 14(4) UK SIA, *supra* note 5.

<sup>156</sup> *Banca Carige SpA Cassa di Risparmio Geneva e Imperia v. Banco Nacional de Cuba and another*, Ch.D (Companies Court), 11 Apr. 2001 [2001] 3 All ER 923.

<sup>157</sup> *Trendtex Trading Corporation v. Central Bank of Nigeria*, CA, 13 Jan. 1977 [1977] 2 WLR 356, 64 ILR 111.

<sup>158</sup> *NOGA*, *supra* note 103.

<sup>159</sup> See Fox, *supra* note 1, at 411.



purposes was exempted from enforcement measures in Switzerland. With regard to a foreign central bank's property held at the Swiss National Bank it refused, however, to exempt such property unless it was specifically demonstrated that the property in question served public purposes:

Immunity can therefore only be claimed by reason of the nature of the assets subjected to the attachment where those assets are allocated in an identifiable manner for the performance of a sovereign function. ... a plea of immunity is inadmissible, in respect of money and securities, unless the documents or specified sums have been designated for the performance of such tasks.<sup>160</sup>

In fact, it refused to quash an attachment order of a lower Swiss court because the appellant state 'failed to give any details as to the designated purpose of th[e] deposit [which] could equally well form part of the private fiscal assets of the Libyan Central Bank'.<sup>161</sup> Earlier, the same Swiss court had also denied immunity from attachment to funds of the Turkish central bank held in various Swiss banks.<sup>162</sup>

A restrictive approach was also adopted in the German *Central Bank of Nigeria Case*. The court reaffirmed the basic premise that only assets dedicated to the public service were exempted from forcible attachment and execution and, with regard to the assets specifically affected, it held that the 'petitioner's attachment seeks to reach the respondent's cash and securities accounts, i.e., assets which are not "in the public service" of the respondent. . . . A possible use of these assets in the future to finance state business cannot serve to establish their present immunity.'<sup>163</sup>

#### (f) Embassy accounts

Embassy and consular<sup>164</sup> accounts, at least as far as they are used for running a diplomatic or consular mission, are normally considered to serve non-commercial (public) purposes and are thus protected by immunity from execution measures, in particular immunity from attachment. This exemption is also expressly provided for in the UN Convention, which clarifies that the immunity is not limited to embassy accounts, but extends to 'property, including any bank account, which is used or intended for use for the purposes of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences'.<sup>165</sup> The underlying idea of protecting the functioning of state missions (*ne impediatur legatio*) is generally accepted by national courts. However, questions have arisen with regard to issues such as mixed accounts,

<sup>160</sup> *République socialiste du peuple arabe de Lybie-Jamahiriya v. Actimon SA*, Tribunal fédéral suisse, 24 Apr. 1985, ATF 111 Ia 62; 82 ILR 30, at 35.

<sup>161</sup> *Ibid.*, at 36 (ILR).

<sup>162</sup> *Banque centrale de la République de Turquie v. Weston*, *supra* note 40.

<sup>163</sup> *Central Bank of Nigeria Case*, Landgericht, Frankfurt, 2 Dec. 1975 [1976] *Neue Juristische Wochenschrift* 1044, 65 ILR 131, at 137.

<sup>164</sup> With regard to immunity from execution, national courts generally do not distinguish between diplomatic and consular accounts. See *Spanish Consular Bank Accounts Case*, Landgericht, Stuttgart, 21 Sept. 1971, 65 ILR 114.

<sup>165</sup> Art. 21(1)(a) UN Convention, *supra* note 16.

burden of proof, past, present, or future use of accounts, and related problems.<sup>166</sup> There is quite some case law with regard to these issues because embassy accounts are the assets most likely to be available in foreign states. In fact, cases dealing with embassy accounts may rank among the most frequently litigated enforcement immunity cases.

As already mentioned there is ample evidence of a general acceptance of exempting embassy accounts serving public purposes from enforcement measures. For instance, the German Constitutional Court regarded it as a rule of international law that execution measures against property serving a sovereign purpose of a foreign state were inadmissible. More specifically with regard to embassy accounts it held:

Claims against a general current bank account of the embassy of a foreign State which exists in the State of the forum and the purpose of which is to cover the embassy's costs and expenses are not subject to forced execution by the State of the forum.<sup>167</sup>

Similarly, a Dutch court regarded embassy accounts as

property intended for the public service of that State. Establishing, maintaining and running embassies is an essential part of the function of government and hence of the public service. Moneys intended for the performance of this function must therefore be treated as property intended for the public service.<sup>168</sup>

In the English *Alcom* case the House of Lords explicitly considered it to be a rule of customary international law that a bank account of a diplomatic mission used to defray the expenses of running the mission enjoys immunity from execution in the receiving state.<sup>169</sup> Similarly, the Spanish Constitutional Court held that measures of constraint against bank accounts of embassies are in any case covered by the scope of immunity from execution.<sup>170</sup> In a subsequent case the same court was even more protective in expressly characterizing the property of diplomatic and consular missions as absolutely immune from measures of execution.<sup>171</sup> This is all the more remarkable, given the fact that the same court recognized that a right of access to courts which included a right to enforce judgments had a fundamental rights quality.<sup>172</sup>

Sometimes the public purpose of property may be questionable. There is some case law clarifying this notion. For instance, the Swiss Federal Court held that funds allocated to cover accommodation costs for embassy personnel are also part of the protected assets used for the financing of a diplomatic mission.<sup>173</sup> In a German case, on the other hand, not involving an embassy account proper, but rather a bank account of a foreign trade institute which also functioned as the trade section of the consulate-general of a foreign state, the court looked closely at the purpose of the accounts in

<sup>166</sup> Fox, *supra* note 1, at 380ff, 404ff.

<sup>167</sup> *Philippine Embassy Bank Account Case*, *supra* note 22, at 150 (ILR).

<sup>168</sup> *State of the Netherlands v. Azeta BV*, Rechtbank Rotterdam (District Court, Rotterdam), 14 May 1998 [1998] KG 251, English summary at [2000] NYIL 264.

<sup>169</sup> *Alcom v. Colombia*, *supra* note 119, at 182 (ILR). The House of Lords clarified, however, that it would decide the case on the basis of the 1978 State Immunity Act.

<sup>170</sup> *Abbott*, *supra* note 71, at 423 (ILR).

<sup>171</sup> *Maitte*, *supra* note 75.

<sup>172</sup> See *supra* the text at note 71.

<sup>173</sup> *Z. v. Geneva Supervisory Authority*, *supra* note 58.

issue. It denied immunity from attachment because it considered that the foreign trade institute's function was a private one furthering exclusively commercial purposes rather than the sovereign purposes served by a consulate.<sup>174</sup>

But there is also judicial practice pointing in a different direction. In some cases state-held funds have not enjoyed immunity from attachment even though they may have served public purposes. In a 1978 Dutch case the District Court of Amsterdam apparently did not look at the purposes but focused on the nature of holding a bank account when it said that a foreign state's 'reliance on the purposes for which the sums attached were intended, viz., public purposes, cannot succeed because, much as these sums were to be used for public purposes, this circumstance cannot render the moneys themselves immune from attachment'.<sup>175</sup> The case involved a tort action brought by a Dutch rehabilitation centre against Morocco in the course of which plaintiff had asked for and obtained a garnishee order on funds held by the defendant. The Dutch court denied the state's request for the withdrawal of the garnishee order.

Some jurisdictions adopting a more restrictive approach also require waiver of immunity for any embassy accounts. In a 1997 decision a Czech court departed from its earlier decision to allow execution against foreign embassy accounts, reasoning that a state 'could be subject to the jurisdiction of Czech courts only if it voluntarily submitted to such jurisdiction'.<sup>176</sup> A French court held that a waiver of immunity (which was indeed not unambiguous) could not be construed so as to include bank accounts necessary for the functioning of a diplomatic mission.<sup>177</sup>

If one accepts that the immunity of state property from enforcement measures primarily depends upon whether or not it serves a public purpose, rules, including evidentiary rules, on determining such purpose become crucial. It seems that many courts are more and more willing to presume the public purpose of property, at least if claimed by the respondent state and not disproved by the applicant.

Many European courts have been very reluctant to question the characterization of the purpose of assets provided by defendant states. The classic cases concerned the attempted attachment of embassy accounts. The *Philippine Embassy Bank Account Case*, decided by the German Constitutional Court, laid down broad principles followed by a number of other courts. While it basically held that immunity from enforcement cannot be considered absolute, it placed a high burden on plaintiffs by endorsing a quasi-presumption in favour of the sovereign purposes of an embassy account. The court held:

Because of the difficulties of delimitation involved in judging whether that ability to function is endangered, and because of the potential for abuse, general international law makes the area of protection enjoyed by the foreign State very wide and refers to the typical, abstract danger, but not to the specific threat to the ability of the diplomatic mission ....

<sup>174</sup> *Foreign Trade Institute Bank Account Case*, Landgericht, Hamburg, 26 Mar. 1981, 65 ILR 209.

<sup>175</sup> *The Kingdom of Morocco v. Stichting Revalidatie Centrum 'De Trappenberg'*, Rechtbank Amsterdam (District Court, Amsterdam), 18 May 1978 [1979] NYIL 444; 65 ILR 375.

<sup>176</sup> *General Health Insurance Company of the Czech Republic v. Embassy of the State of Palestine*, Obvodni soud pro Prahu 6 (District Court), Prague 6/case No. E 1426/97, 15 Dec. 1997 (on file with the author).

<sup>177</sup> NOGA, *supra* note 103.

... for the executing authorities of the receiving State to require the sending State, without its consent, to provide details concerning the existence or the past, present or future purposes of funds in such an account would constitute interference, contrary to international law, in matters within the exclusive competence of the sending State.<sup>178</sup>

Similarly, an official statement that certain foreign state assets were serving a public purpose was accepted in another more recent German case concerning Brazilian government bonds.<sup>179</sup> In that case the Brazilian finance minister's affirmation in lieu of an oath was sufficient proof of the sovereign purpose. In the court's view, to require further proof would have constituted an illicit interference in Brazil's internal affairs.

Following the path made by the German Constitutional Court,<sup>180</sup> the Austrian Supreme Court, in a 1986 judgment, held that execution of a judgment on an account of an embassy is permitted only exceptionally if the plaintiff proves that the account serves the exclusively private purposes of the embassy. The court considered that

although there was no rule in international law which prohibits execution against foreign States in general, there is such rule as to the execution on property which serves the performance of sovereign (embassy) functions. Due to the difficulties involved in judging whether the ability of a diplomatic mission to function was endangered international law gave wide protection to foreign States and referred to the typical, abstract danger to the ability of the mission to function and not to the specific threat in a particular case.<sup>181</sup>

With regard to mixed accounts the Austrian Supreme Court expressly departed from its 1958 decision in *Neustein v. Indonesia* according to which execution on a bank account of a foreign mission was inadmissible only if the account was exclusively allocated for the exercise of the sovereign rights of a sovereign state (representation abroad), but admissible if it was also used for private purposes. In that case the Supreme Court had held:

Before an interim injunction was issued, there should have been inquiries to discover whether what is held at the bank is extraterritorial property or an account for the making of payments on commercial transactions of private law. The mere fact that the bank account is in the name of the Republic of Indonesia 'for its legation' does not permit the inference that the account exists exclusively for the exercise of the sovereign rights of a foreign State (representation abroad) and is not an asset serving private law functions.<sup>182</sup>

In the 1986 judgment, the court instead expressly relied on the German *Philippine Embassy Bank Account Case*,<sup>183</sup> and held that mixed accounts which also cover the expenses and costs of a mission are not subject to execution in Austria without the consent of the foreign state, and that thus the creditor would have to prove that an embassy bank account 'was only used for the exercise of private functions and therefore ... not beyond execution'.<sup>184</sup>

<sup>178</sup> *Philippine Embassy Bank Account Case*, *supra* note 22, at 186, 189 (ILR).

<sup>179</sup> *X. v. Brazil*, Landgericht, Frankfurt am Main, 23 May 2000 [2001] *Recht der Internationalen Wirtschaft* 308.

<sup>180</sup> *Philippine Embassy Bank Account Case*, *supra* note 22.

<sup>181</sup> *L-W Verwaltungsgesellschaft mbH & Co. KG v. DVA*, Oberster Gerichtshof, 30 Apr. 1986, 77 ILR 489.

<sup>182</sup> *Neustein v. Republic of Indonesia*, Oberster Gerichtshof, 6 Aug. 1958, 65 ILR 3.

<sup>183</sup> *Philippine Embassy Bank Account Case*, *supra* note 22.

<sup>184</sup> *L-W Verwaltungsgesellschaft*, *supra* note 181, at 494 (ILR).

The idea of a rebuttable presumption in favour of the public purpose of state-owned property was also adopted by the French Cour de Cassation in a 1984 decision in which it opined that

*les biens appartenant à l'Etat étranger sont présumés affectés à une activité publique. Il appartient aux créanciers de l'Etat de prouver par tout moyen que les biens saisis sont affectés à une activité économique ou commerciale relevant du droit privé.*<sup>185</sup>

In England the well-known *Alcom* case<sup>186</sup> also very closely follows the reasoning of the German Constitutional Court in the *Philippine Embassy Bank Account Case*.<sup>187</sup> With regard to the purpose of embassy accounts the House of Lords held

the head of the diplomatic mission's certificate that property is not in use or intended for use by or on behalf of the state for commercial purposes is sufficient evidence of that fact unless the contrary is proved.<sup>188</sup>

The reasoning of the German Constitutional Court in the *Philippine Embassy Bank Account Case* was almost literally followed by the Dutch Council of State in a 1986 decision in which it held that it is 'beyond doubt that rules of customary law prescribe immunity from execution in respect of the enforcement of a judgment, even if the court which gave the judgment was competent to do so under these rules (as in the present case) if this execution relates to assets intended for public purposes'. The Council of State also considered that a

*note verbale* ... from the Turkish Embassy in The Hague in which it is stated that all the money in the attached account had been transferred by the Turkish Government in order to defray the costs of the Turkish Embassy in The Hague in the performance of its functions. ... [A] declaration of this kind must be deemed to be a sufficient basis for assuming that these moneys were indeed intended for the public purposes of the Turkish State.<sup>189</sup>

It continued:

to require the Turkish mission in the Netherlands to provide a further and more detailed account of the uses to which the account will be put ... would amount under international law to an unjustified interference in the internal affairs of this mission.<sup>190</sup>

This line of reasoning has been reaffirmed in other judgments. Another Dutch court held:

A letter from the deputy Foreign Minister and a 'note verbale' from the Embassy in The Hague, in which it is stated that the credit balances in the attached bank account are intended for the running of the Embassy is sufficient to support the assumption that the present moneys are intended for the public service. It was up to the defendant to adduce evidence of facts and/or circumstances to support its submission that this was not the case. The defendant wrongly demands that the Embassy should provide more detailed information about the nature and

<sup>185</sup> *Société Eurodif*, *supra* note 131. 'Assets belonging to a foreign State are presumed to be destined for a public activity. It is for the State's creditors to prove by any means that attached assets are destined for an economic or commercial activity under private law'.

<sup>186</sup> *Alcom v. Colombia*, *supra* note 119.

<sup>187</sup> *Philippine Embassy Bank Account Case*, *supra* note 22.

<sup>188</sup> *Alcom v. Colombia*, *supra* note 119, at 187 (ILR).

<sup>189</sup> *MK*, *supra* note 59, at 360 (ILR).

<sup>190</sup> *Ibid.*

scope of the bank balances held by it, since this would entail an unacceptable interference under international law in the internal affairs of this mission.<sup>191</sup>

A similar approach can be seen in Italian cases. In *Banamar-Capizzi v. Embassy of the Republic of Algeria*, for instance, the Italian Court of Cassation held

[a]ttachment or enforcement proceedings are therefore excluded because the funds in question appear to be devoted to financing the expenses necessary to fulfil sovereign purposes. Therefore any attempt to check if such funds are effectively used in whole or in part for those purposes would inevitably result in an undue interference in the affairs of the diplomatic mission.<sup>192</sup>

Belgian courts, at least initially, seemed to be willing to look at the underlying purpose of assets. In two decisions as recent as 1995 a Brussels court held that it was necessary to determine whether the funds subjected to attachment had been allocated in whole or in part for sovereign activities. In *République du Zaïre v. d'Hoop* the court held that there was power to examine assets belonging to a state in order to determine their nature.<sup>193</sup> Since the defendant state had failed to provide any evidence that the attached embassy accounts had been allocated for sovereign activities, the court found against immunity from execution. However, the Brussels Court of Appeal overruled it and held that a foreign state could not be forced to prove the nature of funds. The appellate court stated:

*III. En vertu des principes de souveraineté et d'immunité, l'Etat étranger ne peut être contraint à apporter la preuve de la nature des fonds saisis-arrêtés.*<sup>194</sup>

In *Irak v. SA Dumez* the same reversal occurred. The Brussels civil court thought that it was for the defendant state to prove the public purpose of state funds.<sup>195</sup> This decision was overruled on appeal by the Brussels Court of Appeal which relied on a presumption that embassy bank accounts had a public purpose. The court further held that requiring a state to prove the sovereign purposes of funds in embassy accounts would be contrary to the principle of immunity:

*Les sommes déposées sur le compte en banque d'une mission diplomatique bénéficient d'une présomption d'affectation à des fins souveraines.*

*Mettre la preuve de l'affectation des fonds à charge de l'Etat serait contraire au principe même de l'immunité, qui établit par définition une présomption en faveur de l'Etat qui en bénéficie.*

*Obliger un Etat à devoir systématiquement et à tout moment prouver qu'il est bien dans les conditions pour jouir de son immunité revient en pratique à lui en retirer le bénéfice.*<sup>196</sup>

<sup>191</sup> *Netherlands v. Azeta*, *supra* note 168.

<sup>192</sup> *Banamar-Capizzi v. Embassy of the Republic of Algeria*, Corte di Cassazione, 4 May 1989, 87 ILR 56, at 60.

<sup>193</sup> *Zaire v. d'Hoop and Another*, Tribunal civil, Brussels, 9 Mar. 1995 [1995] JT 567, 106 ILR 294.

<sup>194</sup> *République du Zaïre v. d'Hoop et crts*, Cour d'Appel, Brussels, 8 Oct. 1996 [1997] JT 100. 'III. By virtue of the principles of sovereignty and immunity, a foreign State cannot be forced to prove the nature of attached funds'.

<sup>195</sup> *Irak v. SA Dumez*, Tribunal civil, Brussels, 27 Feb. 1995 [1995] JT 565; 106 ILR 284, at 290.

<sup>196</sup> *Etat d'Irak v. Vinci Constructions Grands Projets SA de droit français*, Cour d'Appel, Brussels, 4 Oct. 2002 [2003] JT 318. 'Monies deposited in a bank account of a diplomatic mission are presumed to be destined for sovereign purposes. To require a State to prove the purpose of such funds would be contrary to the principle of immunity which, by definition, establishes a presumption in favour of the State enjoying it. To require from a State, systematically and at any moment, to prove that it fulfils the conditions for enjoying its immunity would in practice deprive it of its benefit'.

In a 2000 case the Brussels Court of Appeal clearly endorsed a rebuttable presumption in favour of the public purposes of embassy funds:

*En ce qui concerne la charge de la preuve, il établit une présomption en faveur de l'affectation des biens au fonctionnement de la mission, d'où une présomption en faveur de l'immunité d'exécution, sauf preuve contraire que doit apporter le demandeur.*<sup>197</sup>

Swiss courts seem also to have become more and more ready to accept a presumption in favour of the public purpose of embassy and consular accounts although, at least initially, a more restrictive attitude prevailed. In a 1982 case the Federal Court upheld an order requesting further information from a consular officer with regard to a bank account held in his personal name but used for both personal and consular expenses.<sup>198</sup> In a 1986 case the same court refused to quash an attachment order made by a lower Swiss court because the appellant state had 'failed to give any details as to the designated purpose of th[e] deposit [which] could equally well form part of the private fiscal assets of the Libyan Central Bank'.<sup>199</sup> In a 1990 case, however, the Federal Court held that Swiss authorities were entitled to rely on diplomatic notes claiming specific sovereign functions of bank accounts held in the name of a foreign permanent mission in Geneva in the absence of any evidence to the contrary from the claimant.<sup>200</sup>

#### (g) Other State property

While embassy or consular accounts serve as the basis for most of the litigation concerning execution against foreign state property, other tangible or intangible assets may also become the object of attempted enforcement measures. In such cases, it is the purpose of the assets which usually serves as the distinguishing criterion in order to determine whether or not it should be protected by immunity. For instance, in the course of French litigation aimed at enforcing an arbitration award made against Yugoslavia, debts owed by the French national airline to the Yugoslav state were held not to be subject to attachment because they were intended to cover overflight charges which directly related to the 'exercise of that State of its prerogative powers linked to its national and international sovereignty as that sovereignty applies to its territory and airspace'.<sup>201</sup>

The application of the purpose test to other state property was also reconfirmed in a 1971 Belgian case in which applicants sought to attach a film made for the state of Liberia. According to the Belgian court

<sup>197</sup> *Leica AG v. Central Bank of Iraq et Etat irakien*, Cour d'Appel, Brussels, 15 Feb. 2000 [2001] JT 6. 'As far as the burden of proof is concerned, there is a presumption that assets are destined for the functioning of the mission, from which stems a presumption in favour of immunity from execution, unless the contrary is proven by the claimant'.

<sup>198</sup> *Griessen v. Autorité de surveillance des offices de poursuite pour dettes et de faillite du canton de Genève*, Tribunal fédéral suisse, Chambre des poursuites et faillites, 23 Dec. 1982, ATF 108 III 107; 82 ILR 5.

<sup>199</sup> *Actimon*, *supra* note 160, at 36 (ILR).

<sup>200</sup> *Z. v. Geneva Supervisory Authority*, *supra* note 58, at 207 (ILR).

<sup>201</sup> *Socialist Federal Republic of Yugoslavia v. Societé Européenne d'Etudes et d'Entreprises, Crédit Lyonnais, Air France and Others*, Tribunal de grande instance, Paris, 3 July 1985, 82 ILR 58, at 73.

the solution to the problem must be sought in the light of the purpose for which the State against which the attachment is directed allocates or intends to allocate the articles in question. If the articles are allocated or in use for a purpose which concerns the *ius imperii* any attachment, even conservatory, is excluded because even in the latter case the freedom of use and the freedom of allocation of the articles subjected to attachment will be affected and the objective pursued by the State will be thwarted or prejudiced.<sup>202</sup>

On this basis, the court disallowed the attachment of the film which, it thought, would ‘without doubt serve to pay tribute to the Head of State whose picture appears in the films and will also contribute to the prestige of the State itself, as personified by the Head of State’.<sup>203</sup>

### **D Other Enforcement Measures, such as Provisional, Pre-judgment Measures of Constraint**

Apart from measures of constraint aimed at enforcing judgments already delivered against a state, the need may arise for provisional measures before final judgment to be imposed. The most important provisional measures are pre-judgment attachments of property in order to secure assets for the eventual enforcement of a subsequent judgment, followed by pre-judgment attachments for the purpose of establishing jurisdiction. This applies mostly to the attachment of bank accounts<sup>204</sup> and seizure of commercial ships.<sup>205</sup> The question arises whether the rules concerning enforcement immunity also apply to provisional measures or whether distinct rules are called for. It seems that the established practice of most European courts disregards such differentiation and uses the same test with regard to the permissibility of pre- and post-judgment measures.<sup>206</sup> For instance, the Italian Court of Cassation held:

According to an international customary law principle, the assets of a foreign State are exempt from provisional and executive measures, provided that the assets are used in the exercise of sovereign functions or to attain public goals. Hence, also in case of conservatory or enforcement acts, immunity from jurisdiction can be applied to activities carried out in the exercise of the powers of a public authority, whereas it is excluded in case of private activities.<sup>207</sup>

The German decisions in the *Central Bank of Nigeria*<sup>208</sup> and the *NIOC* cases<sup>209</sup> also concerned pre-judgment attachments, and both used the purpose test that would also have been used in regular enforcement proceedings. The Swiss courts also use the same standard for pre-judgment attachment claims as for enforcing final judgments.<sup>210</sup>

<sup>202</sup> *NV Filmpartners*, Tribunal Civil, Brussels, 27 July 1971, 65 ILR 26, at 28.

<sup>203</sup> *Ibid.*

<sup>204</sup> For instance, *Neustein v. Indonesia*, *supra* note 182.

<sup>205</sup> For instance, *Russia v. Pied-Rich BV*, *supra* note 148.

<sup>206</sup> Schreuer, *supra* note 1, at 162.

<sup>207</sup> *Libia v. Condor Srl*, Corte di Cassazione, 23 Aug. 1990 [1991] *Rivista di diritto internazionale* 679.

<sup>208</sup> *Central Bank of Nigeria Case*, *supra* note 163.

<sup>209</sup> *NIOC Revenues Case*, *supra* note 26.

<sup>210</sup> See *RAU v. Dame X.*, *supra* note 41; *Weston*, *supra* note 40; *République Arabe d’Égypte v. Cinetel*, *supra* note 32.



The US FSIA, however, introduced an important distinction by prohibiting pre-judgment attachments in order to establish the jurisdiction of US courts and by generally requiring an explicit waiver for any pre-judgment attachment.<sup>211</sup> Similarly, the UK SIA requires 'written consent' for the 'giving of any relief',<sup>212</sup> such as a *Mareva* injunction<sup>213</sup> prohibiting a defendant from removing funds from the forum state. Contrary to the rule established in the *Trendtex* case,<sup>214</sup> which was decided under common law, the pre-judgment attachment of state property in use for commercial purposes would no longer be allowed under the SIA.<sup>215</sup>

The ILA Draft Convention specifically addresses pre-judgment measures, which it permits in order to avoid a situation in which a defendant state tries to frustrate the execution of an eventual judgment.<sup>216</sup> While the ILC Draft Articles did not differentiate between the two types of forcible measures, the UN Convention makes a very clear distinction between pre- and post-judgment measures of constraint which it addresses in two separate Articles. As a result of this newly introduced differentiation, pre-judgment measures will be permissible only in cases of consent or with regard to earmarked property;<sup>217</sup> they will not be available with regard to property serving commercial purposes.<sup>218</sup>

## 4 Conclusion

This analysis of European court practice with regard to enforcement immunity confirms the emergence of certain principles in this field of the law, as reflected in recent codification attempts such as the UN Convention.<sup>219</sup> It demonstrates the consolidation of a restrictive approach which permits enforcement measures against property clearly serving non-governmental purposes. At the same time, European case law on enforcement immunity is in itself evidence of a rather high level of trans-judicial dialogue between courts in different states. This can be seen in the way the German *Philippine Embassy Bank Account Case*<sup>220</sup> discussed German and foreign precedents and was received and discussed by various other European courts in turn.<sup>221</sup>

<sup>211</sup> S. 1610(d) US FSIA, *supra* note 6.

<sup>212</sup> S.13(2) and (3) UK SIA, *supra* note 5.

<sup>213</sup> *Mareva Compania Naviera SA v. International Bulk Carriers Ltd* [1975] 2 Lloyd's Rep. 509.

<sup>214</sup> *Trendtex v. Central Bank of Nigeria*, *supra* note 157.

<sup>215</sup> Fox, *supra* note 1, at 409.

<sup>216</sup> Art. VIII D of the ILA Draft Convention, *supra* note 13, provides: '[i]n exceptional circumstances, a tribunal of the forum State may order interim measures against the property of a foreign State, available under this Convention for attachment, arrest, or execution, including pre-judgment attachment of assets and injunctive relief, if a party presents a *prima facie* case that such assets within the territorial limits of the forum State may be removed, dissipated or otherwise dealt with by the foreign State before the tribunal renders judgment and there is a reasonable probability that such action will frustrate execution of any such judgment'.

<sup>217</sup> See the text of Art. 18 UN Convention, *supra* note 19.

<sup>218</sup> This exception is retained only with regard to post-judgment measures of constraint addressed in the new separate Art. 19 UN Convention, *supra* note 20.

<sup>219</sup> UN Convention, *supra* note 16.

<sup>220</sup> *Philippine Embassy Bank Account Case*, *supra* note 22.

<sup>221</sup> See *supra* text starting at note 27.

Of course, there is still the problem of practical limits that may prevent national courts from looking beyond their own legal systems, such as the non-availability of foreign decisions or, at least, the non-availability of translations. But this problem is clearly reduced as a result of the increasing accessibility of national court decisions on the internet. It also seems that the risk that national courts may be less inclined to take foreign cases into account as a result of national state immunity codification, as in the UK, has not materialized. Quite to the contrary, the law of state immunity from enforcement has proved to be a field of positive judicial cross-fertilization.