CHAPTER 16

The Case-Law of the European Court of Human Rights on the Immunity of States

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1 Introduction

Invoking state immunity in court proceedings is a way for a state to prevent judicial scrutiny of its responsibility for its actions. Such scrutiny, however, is the main raison d'être at least of those human rights regimes that provide for a supervision of states' compliance with human rights. It would therefore come as no surprise if human rights jurisprudence, especially the jurisprudence of the European Court of Human Rights (the “Strasbourg Court”) would prove to be a challenge to state immunity. As we shall see, it is not, or, at most, indirectly.

Every invocation of sovereign immunity before a domestic forum involves two states: the state invoking immunity and the forum state. States in both positions have been made respondents in proceedings before the Strasbourg Court under the European Convention on Human Rights and Fundamental Freedoms (the “European Convention” or ECHR).1

2 Applications Brought against a State Invoking Immunity

Applications brought against a state for having invoked immunity before the courts of the forum state have been given short shrift by the Court. On the one hand, the duty, undertaken by the contracting states in article 1 ECHR, to secure to everyone within their jurisdiction the Convention rights, as a rule does not translate into a duty to waive defence positions those states enjoy under general international law, among them prominently the invocation to sovereign immunity. On the other hand, invoking immunity is not an exercise of jurisdiction and therefore does not open the way to protection of individuals against the invoking state by the European Convention under its

1 European Convention on Human Rights and Fundamental Freedoms, 4 November 1950, ETS No. 5.
article 1. Rather, a respondent state in civil proceedings “could be likened to a private individual against whom proceedings are instituted”. In any case, “the jurisdictional competence of a State is primarily territorial,” and the impugned judicial proceedings never take place within the state invoking immunity. Thus, for the Court, there are several reasons not to entertain an application against such a state. This case-law obviously does not pose any challenge to state immunity.

3 Applications Brought against a Forum State Extending Immunity to Another State

Applications brought against a forum state for having extended immunity to another state regularly plead an infringement of article 6 ECHR which guarantees the right to a fair trial. From early on, the Court has construed that right as presupposing a right of access to court. The Court accepts that the latter right is not absolute but may be subject to limitations. Extending immunity to a respondent state obviously is a limitation of the plaintiff’s right of access to a court. In concordance with its general pattern for dealing with such limitations, the Court grants the contracting states a certain margin of appreciation, but reserves the last word for itself; in particular, such limitations must not impair the very essence of the protected right. The limitation must also have a legitimate aim, and it must be proportionate to that aim. The Court generally accepts that compliance with international law is a legitimate aim for restricting Convention rights. Indeed, according to its established case-law, the European Convention must be interpreted as part of general international

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4 Ibid.
7 Cf. e.g. ECtHR, *Al-Adsani* (n. 6), para. 54; ECtHR, *Bosphorus Hava Yillariv Turizm Ve Ticaret Anonim Sirketi v. Ireland*, Grand Chamber Judgment of 30 June 2005, Application no. 45036/98, para. 150. Interestingly, the European Commission, in Accession of the Communities to the European Convention on Human Rights: Commission Memorandum, COM (79) 210 final,