

***Delicta imperii* and State Immunity**

The Governing Principles

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Introduction

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Multiple sources for sovereign immunities

- Foundation is in public international law
 - ▣ At least some rules of customary int'l law apply

- ECtHR controls compatibility with human rights
 - ▣ Essentially immunity from jurisdiction
 - ▣ Far reaching case law of ECtHR

Introduction

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Multiple sources for sovereign immunities

- National statutes on sovereign immunities
 - ▣ *UK State Immunity Act 1978*
 - ▣ *US Foreign Sovereign Immunities Act 1976*
- Many national laws primarily judge made

Are there common governing principles?

Agenda

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1. The relevance of international law
2. The relevance of the ECHR
3. The importance of national law

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1 – Relevance of International Law

The general principle

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State immunity finds its source in int'l law

- Principle of sovereign equality of States
 - ▣ No hierarchy between equals
 - Thus no power exercised in equals
 - *par in parem non habet imperium*
- Principle of customary international law
 - ▣ ICJ, *Germany v. Italy*, 2012, § 57

Problem: the details of the regime

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- Can it be waived? How?
- What is the scope of the immunity?
 - ▣ Is it absolute?
 - ▣ Is it limited to sovereign acts of States?
 - ▣ Are there exceptions
 - for commercial activities?
 - for (territorial) torts?

Are there rules in int'l law?

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- One international treaty in Europe
 - ▣ 1972 European Convention on State Immunities
 - ▣ Ratified by 7 European States
 - ▣ Only applies between the Contracting States

- The 2004 U.N. Convention on Jurisdictional Immunities of States and Their Property
 - ▣ Not ratified by enough States to enter into force

Are there rules in int'l law?

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In the absence of treaty,

- Customary int'l law applies ...
- But only if it actually exists:
 - ▣ Practice of states should converge
 - ▣ States should feel bound by customary rule
- Determination is complex and cumbersome
 - ▣ Identification of numerous States following rule

2004 UN Convention?

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- Does it reflect customary int'l law?
 - ▣ It states that it partly codifies it

- ICJ: only if rule confirmed by State practice
 - ▣ Art 12: Personal injuries and damage to property
 - ▣ ICJ, *Germany v. Italy*, 2012
 - declined to rule on whether it reflects customary int'l law

Territorial tort exception

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- Significant variations among States
 - ▣ Does it apply to sovereign acts?
 - ▣ Does it only apply to monetary compensation?
 - ▣ How is territoriality defined?
 - Negligence and/or damage?
 - ▣ Special regime for certain torts?
 - Defamation?
 - Terrorism?
 - Acts of armed forces?

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2 – Human rights

Right of access to court

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- Art. 6 ECHR affords a right of access to court
 - ▣ Raises an issue for immunity of jurisdiction

- ECtHR: limitations to art. 6 are possible
 - ▣ Must be legitimate and proportionate
 - ▣ Rules of int'l law meet these requirements
 - ▣ Determination of int'l law by ECtHR becomes critical

Determination of int'l law by ECtHR

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- In recent years, ECtHR has relied on UN Convention
 - ▣ Deemed to reflect customary int'l law
 - ▣ Applied to States which have not opposed it

- Most frequent example: employment contracts
 - ▣ Art 11 is deemed to reflect customary int'l law
 - ▣ Although this has been strongly doubted
 - By two CJEU Advocate Generals
 - By the UKSC, *Benkharbouche*, 2017

Determination of int'l law by ECtHR

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- Certain Contracting States follow ECtHR
 - ▣ French and Belgian *Cour de cassation*
 - ▣ Rule that Art 11 reflects customary int'l law
 - ▣ Merely to satisfy ECtHR?

- Some national courts go even further
 - ▣ French *Cour de cassation* since 2011
 - Immunity from enforcement

Territorial tort exception

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ECtHR will likely follow the same approach

- ECtHR, *Jones*, 2014
- ECtHR, *JC c. Belgique*, 2021
 - ▣ *Ghent, J.C. v Holy See*, 2016
 - Art 12 does not reflect customary int'l law
 - But its conditions would not be met anyway
 - ▣ Belgian ruling verified whether Art 12 applied

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Conclusion

Importance of national law

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- There is limited convergence at international level
 - ▣ There are few rules of customary international law
- Regime of State immunities is essentially national
- ECtHR has brought confusion
 - ▣ Which has influenced certain supreme courts
 - ▣ And can thus be used strategically

Thanks for your attention

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