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INTERNATIONAL LAW AND PRACTICE

Embassy Bank Accounts and State Immunity from Execution: Doing Justice to the Financial Interests of Creditors

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Abstract

Embassy bank accounts are among the properties of states most widely present in foreign states. Accordingly, they constitute an ideal target for attachment by creditors. International instruments have largely upheld state immunity from execution regarding bank accounts, however. Likewise, state practice largely – and apparently increasingly – supports state immunity from measures of attachment, by applying a presumption that funds in embassy bank accounts are used for governmental non-commercial purposes. This approach is overly deferential to the state. Instead, it is argued that domestic courts should require that the state, at least partially, discharge the burden of proof regarding the nature (commercial/sovereign) of the funds in the bank account. A failure to discharge this burden should result in a rejection of immunity. Only such an approach adequately balances the interests of states and creditors, and does sufficient justice to the creditor's right of access to a court. In addition, it is argued that such a balance is also brought about by construing literally general waivers of immunity from attachment, as not requiring an additional specific waiver regarding embassy bank accounts.

Key words

attachment; bank accounts; burden of proof; immunity; UN Convention

Among the properties of states that are most widely present in foreign states are bank accounts held by embassies.[1] In case of the non-performance of contractual obligations entered into by states, creditors will be particularly interested in taking measures of execution (attachment) regarding those accounts.[2] However, as embassy accounts are state property that may even be used for sovereign purposes, issues of immunity loom large.

International instruments have largely endorsed state immunity from execution as regards state property, including bank accounts. The 1972 European Convention on State Immunity only allows for execution, of any state property for that matter,

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1 J. Ostrander, 'The Last Bastion of Sovereign Immunity: A Comparative Look at Immunity from Execution of Judgments', (2004) 22 BerkeleyJIntlL 541, at 564.

2 A. Reinisch, 'European Court Practice Concerning State Immunity from Enforcement Measures', (2006) 17 EJIL 803, at 828 (submitting that 'cases dealing with embassy accounts may rank among the most frequently litigated enforcement immunity cases').

if the state in question consents thereto.[3] The 2004 UN Convention on the Jurisdictional Immunities of States and Their Property (not yet in force) (hereafter the 'UN Convention') allows for execution measures against state property to the extent that '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.'[4] But it contains an express provision that considers bank accounts which are used or intended for use in the performance of the functions of the diplomatic mission of the state as property specifically in use or intended for use by the state for government non-commercial purposes,[5] and thus as property against which no measures of attachment can normally be taken.

Likewise, state practice largely supports state immunity from measures of attachment, by applying a presumption that funds in embassy bank accounts are used for governmental non-commercial purposes. Most domestic courts appear to allow this presumption to be rebutted by the creditor, but cases of creditors actually being successful in this regard are scarce. In this contribution, it is proposed to break with this creditor-unfriendly trend in domestic courts. A better solution is required that the *state* partially discharge the burden of proof regarding the nature of the funds in the bank account. A failure on the part of the state which invokes immunity to adduce convincing evidence of the non-commercial purposes which the funds serve should inexorably lead to a rejection of immunity.

In section 1, this contribution canvasses the state of the law as regards the attachment of embassy bank accounts. The dominant approach, which is also taken by the International Law Commission, employs a presumption that funds in such accounts serve sovereign purposes. A rival minority approach, however, rejects this presumption. Section 2 criticizes the dominant approach and defends the minority approach on the ground that the former fails to strike a proper balance between state and creditor interests, in violation of the creditor's (human) right of access to a court. Arguably, only by employing a split burden of proof can these interests be adequately balanced. Section 3 discusses waivers of immunities from attachment regarding bank accounts, and advocates a construction of such waivers that – again – does justice to both state and creditor interests. Section 4 concludes.

1. The attachment of embassy bank accounts: the state of the law

In state practice, there appears to be a presumption that bank accounts used for the purposes of the diplomatic mission of a state enjoy immunity from attachment. Most jurisdictions indeed presume that the state uses the funds of its embassy bank

3 Art. 23 of the European Convention on State Immunity (1972), ETS No. 074, *UNTS*, Vol. 1495, at 182.

4 2004 United Nations Convention on the Jurisdictional Immunities of States and Their Property, Art. 19(3). See General Assembly Resolution 59/38, annex, *Official Records of the General Assembly, Fifty-Ninth Session, Supplement No. 49* (UN Doc. A/59/49).

5 Ibid. Art. 21(1)(a).

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accounts for *non-commercial* purposes.[6] This means that the state need not prove the non-commercial purpose which the funds serve. It falls instead to the creditor to rebut the presumption that the funds in the account are used for commercial purposes.[7] The creditor is required to offer proof of the commercial *purpose* of the bank account; the fact that the underlying dispute concerned a commercial activity of the state (which, indeed, will ordinarily be the case) and that this commercial activity constituted the source of the funds in the account is irrelevant.[8] A commercial purpose could consist of renting property or purchasing office supplies,[9] but also of using the account to settle prior commercial debts.[10]

Most domestic courts allow *in principle* for the attachment of bank accounts used for commercial purposes, but the creditor will often face an uphill battle in establishing that the account is indeed so used. Even if the creditor can establish a partial commercial use of the account, courts may hold that such use was only exceptional to its otherwise non-commercial use,[11] or they may be unwilling to segregate funds used for commercial purposes from funds used for non-commercial purposes, and may thus uphold the immunity from attachment with regard to all funds.[12] Other courts require proof of the *exclusive* commercial use of the account for the presumption to be rebutted.[13] Some courts, however, even from the same jurisdiction, may be willing to segregate public-purpose funds from commercial-activity funds, and allow the attachment of the latter, or even of all funds.[14] Such segregation or severance has been supported in the literature.[15]

The immunity of embassy bank accounts, like other immunities, may be grounded upon the maxim of *par in parem non habet imperium* and the international-law

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6 G. Hafner, M. G. Kohen, and S. Breau, 'State Practice Regarding State Immunities' (2006), Martinus Nijhoff and Council of Europe at 163–4. See, e.g., *Z. v. Geneva Supervisory Authority for the Enforcement of Debts and Bankruptcy*, Tribunal fédéral suisse, 31 July 1990, 102 ILR 205, 207; Cass. fr., Arrêt n° 867 (09-72.057), 28 September 2011 ('les fonds affectés aux missions diplomatiques bénéficient d'une présomption d'utilité publique, puis, que les comptes bancaires d'une ambassade sont présumés être affectés à l'accomplissement des fonctions de la mission diplomatique de sorte qu'il appartient au créancier qui entend les saisir de rapporter la preuve que ces biens seraient utilisés pour une activité privée ou commerciale').

7 See, e.g., *State of the Netherlands v. Azeta BV*, Rechtbank Rotterdam (District Court, Rotterdam), 14 May 1998 KG 1998, 251, English summary at NYIL (2000), at 264; *Société Eurodif v. République islamique d'Iran*, Cour de cassation (1st Civil Chamber), 14 March 1984, *Revue critique de droit international privé* (1984) 644, 77 ILR 513; and the Botswanan judgment of *Angola v. Springbok Investments (Pty) Ltd*, Application for review, MISCA No. 4/2002; *Oxford Reports ILDC* 7 (BW 2003); H. Fox, *The Law of State Immunity* (2008) at 628–9; Reinisch, *supra* note 2, at 829 ('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').

8 See, e.g., *Af-Cap, Inc. v. Republic of Congo and Ors*, 383 F.3d 361 (5th Cir 2004); *Oxford Reports ILDC* 119 (US 2004) (overruling the lower court in this regard).

9 Ostrander, *supra* note 1, at 565.

10 *Af-Cap, Inc. v. Republic of Congo and Ors*, *supra* note 8.

11 Ibid.

12 E.g., *Alcom Ltd v. Colombia*, (1984) AC 580; *Liberian Eastern Timber Corp v. Government of Liberia*, 89 ILR 360, 659 F. Supp. 606 (D.D.C. 1987).

13 See, e.g., *Republic of 'A' Embassy Bank Account Case*, Supreme Court of Austria, 3 April 1986, 77 ILR 488, at 494.

14 E.g., *Birch Shipping Corp. v. Embassy of Tanzania*, Misc. No. 80–247 (D.D.C. Nov. 18, 1980), 507 F. Supp. 311, 313 (D.D.C. 1980).

15 J. Crawford, 'Execution of Judgments and Foreign Sovereign Immunity' (1981) 75 AJIL 820, at 864. It indeed appears to be desirable to protect the legitimate interests of the creditor (and ultimately of the state itself, as creditors may no longer be willing to contract with governments if their loans are not guaranteed by the possible attachment of government property). See, on the legitimate interests of the creditors, below, section 2.

principle of non-interference in the internal affairs of the state. As this justification has lost force over the years in the law of state immunity, which has indeed allowed for immunity to be lifted in a considerable number of situations, in the context of the possible attachment of embassy bank accounts some courts have referred specifically to the maxim of *ne impediatur legatio* to insulate embassy bank accounts from general evolutions in the law of state immunity.[16] This maxim is recalled by the Preamble to the 1961 Vienna Convention on Diplomatic Relations (VCDR), which sets out that the purpose of immunities is 'to ensure the efficient performance of the functions of diplomatic missions as representing states'. Article 25 of the same Convention provides in this respect that '[the] receiving state shall accord full facilities for the performance of the functions of the mission'. Reliance on the VCDR to defend the said presumption is not entirely convincing, however. As such, the immunity from attachment of embassy bank accounts is *not* provided for in the VCDR.[17] State immunity from execution is only, and should only, be governed by relevant customary international law on *state immunity*, as, at least in part, codified by Article 19 et seq. of the UN Convention on Jurisdictional Immunities of States and Their Properties.[18] Pursuant to this Article 19, measures of constraint, including attachment, *can* be taken against property if that

> 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.

The article does not set forth a presumption that government property is in use for government non-commercial purposes. Nevertheless, the UN Convention does set forth such a presumption in Article 21(1)(a), where it provides, in rather categorical terms, that

> 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 . . . shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes.

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16 See, e.g., *Russian Federation v. Noga Import/Export Company*, 10 August 2000, Court of Appeal of Paris (First Chamber), 127 ILR 155, at 160–1 (holding that 'the protection of the funds held in the bank accounts, opened in the name of the embassy for the requirements of its public activities on the territory of the receiving State, is based on the rules of the law of diplomatic relations *and* the specific regime governing diplomatic immunities') (emphasis added). See also *Philippine Embassy Bank Account Case*, Federal Republic of Germany, Federal Constitutional Court, 13 December 1977, 65 ILR 146.

17 Art. 22(3) VCDR provides that 'the 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', but clearly, embassy accounts held at a private bank are not located on the premises of the mission. See also P.-T. Stoll, 'State Immunity', *Max Planck Encyclopedia of International Law* (online), para. 63 (also rejecting Art. 30(2) VCDR and Art. 31(4) of the 1963 Vienna Convention on Consular Relations as legal bases for the attachment of bank accounts).

18 See also Stoll, *supra* note 17, para. 66 ('Art. 21 (1) (a) [UN Convention], which in effect secures the immunity of State property used or intended for diplomatic or consular functions explicitly, includes "bank accounts" and thereby covers what is missing in the two Vienna Conventions [on respectively Diplomatic and Consular Relations]').

While most state practice, like the ILC, appears to be reluctant to allow for attachment of embassy bank accounts, there is some practice going in the other direction. In this respect, it is noted that the 1991 Commentary of the ILC to the then Article 19(1) (now Article 21(1)) of the draft articles which later became the UN Convention, noted a divergent practice of states as regards the attachment of bank accounts. In fact, by considering, in the said article, 'property including any bank account, which is used or intended for use for the purposes of the diplomatic mission of the State' as not being 'property specifically in use or intended for use by the State for other than government non-commercial purposes', the ILC intended to counter, in its own words, an existing 'trend in certain jurisdictions to attach or freeze assets of foreign states, especially bank accounts',[19] and to endorse another trend, specifically in relation to 'mixed' bank accounts, held for both commercial and non-commercial purposes, pursuant to which 'the balance of such a bank account to the credit of the foreign State should not be subject to an attachment order issued by the court of the forum State because of the non-commercial character of the account in general'.[20] This endorsement by the ILC has indeed translated into the majority of domestic courts espousing a restrictive approach toward the attachment of embassy bank accounts. But irrespective of whichever trend is carrying the day, the fact remains that a 'trend' does not satisfy the requirements for the crystallization of a norm of customary international law.[21] By countering and endorsing trends, the ILC does not find or make law, but rather engages in the *progressive development* of international law.[22] One could, therefore, legitimately wonder whether the solution propounded by the ILC actually constitutes international law, or rather just one interpretation of the law. In this respect, as regards state immunities in general, the ILC itself has recognized the existence, *de lege lata*, of a 'grey area in which opinions and existing case law and, indeed, legislation still vary'.[23] And, as Judge Gaja held in *Jurisdictional Immunities of the State* (*Germany* v. *Italy*) (2012), with respect to the existence to a tort

19 'Report of the International Law Commission on the Work of Its Forty-Third Session, 29 April–19 July 1991, Official Records of the General Assembly, Forty-Sixth Session, Supplement No. 10' (1991), YILC, UN Doc. A/46/10 vol. II(2) at 58.

20 Ibid. 59.

21 *North Sea Continental Shelf Cases* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Pleadings, Oral Arguments and Documents, Judgment of 20 February 1969, at 43, para. 74 (observing, as regards the practice and *opinio juris* requirements for a norm to constitute customary international law: 'State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved'). Compare Ostrander, *supra* note 1, at 568 ('The position of the ILC on [the attachment of bank accounts] remains somewhat unclear').

22 Commentary (1) to Art. 1 of the UN Convention, UN Doc. A/46/10, 1991 YILC, vol. II(2). ('The present articles apply to the immunity of a State and its property from the jurisdiction of the courts of another State') limits itself to stating that '[t]he purpose of the present articles is to formulate rules of international law on the topic of jurisdictional immunities of States and their property'. This was not lost on the Brussels Court of Appeal, which held in a case regarding the attachment of a foreign state's bank accounts, *NML Capital Ltd v. Republic of Argentina* (2011): 'les articles de la Convention des Nations Unies sur les immunités des Etats ne peuvent être considérés comme le résultat d'une codification de coutumes établies, sinon commes des dispositions créer pour régler un domaine en evolution, exigeant une intervention jugée *"nécessaire et opportune"* (. . .) servant de fil conducteur aux pratiques en la matière'. *NML Capital Ltd v. Republic of Argentina*, Brussels Court of Appeals, RG No. 2009/AR/3338, 21 June 2011, at 8.

23 ILC, Introductory remarks, 1991 YILC, vol. II(2), at 23.

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exception under Article 12 of the UN Convention as regards the act of armed forces, '[i]n this "grey area" States may take different positions without necessarily departing from what is required by general international law.'[24] Arguably, the attachment of embassy bank accounts constitutes exactly such a grey area, where dominant state practice does not exclude competing practice.

The exceptional status of embassy bank accounts vis-à-vis other state properties – against which, pursuant to Article 19 of the UN Convention, enforcement measures can be taken if they are not used for sovereign non-commercial purposes – is further undermined by a *dictum* in that same case of *Jurisdictional Immunities of the State*, where the majority cited a number of domestic court decisions regarding immunity from attachment of embassy bank accounts to back up its general statement

> that there is at least one condition that has to be satisfied before any measure of constraint may be taken against property belonging to a foreign state: that the property in question must be in use for an activity not pursuing government non-commercial purposes, or that the state which owns the property has expressly consented to the taking of a measure of constraint, or that that state has allocated the property in question for the satisfaction of a judicial claim.[25]

In so doing, arguably the ICJ was of the view that embassy bank accounts are subject to a *general* customary-law regime of immunity from enforcement that does not necessarily employ a presumption that state property cannot be attached. Moreover, it is of particular relevance to our argument that the ICJ explicitly refused to decide 'whether all aspects of Article 19 of the UN Convention reflect current customary international law',[26] a *dictum* that could apply with even more force to the much more specific categorical rules of Article 21 of the UN Convention.

Of course, it could well be that the ILC's codification effort as regards the immunity from attachment of embassy bank accounts has strengthened the majority approach and silenced any competing practice, thereby in effect raising the majority approach to a norm of customary international law. However, the Court of Appeals of Brussels (Belgium) has recently injected new blood into the competing practice by, in the case of *M* v. *Democratic Republic of the Congo (DRC)* (2010), rejecting the presumption that embassy bank accounts cannot be attached.[27] This judgment makes it clear that the dominant approach still faces opposition, and, even more, that the rival approach may be making a comeback. Like their foreign counterparts, (higher) Belgian courts traditionally upheld immunity from the attachment of foreign states' bank accounts absent proof of commercial use provided by the creditor,[28] thereby overruling lower

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24 ICJ, *Jurisdictional Immunities of the State (Germany v. Italy)*, Judgment of 3 February 2012, dissenting opinion of Gaja, J., para. 9.

25 Ibid, para. 118. In so doing, the ICJ distanced itself from the absolute rule enshrined in Article 23 of the 1972 European Convention on State Immunity, pursuant to which '[no] 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'.

26 Ibid., para. 117.

27 *M v. The Democratic Republic of Congo, Fortis Bank SA, The State of Belgium and the French Community*, Appeal Judgment, 2008/AR/2441; *Oxford Reports ILDC* 1623 (BE 2010), 26 April 2010.

28 *Etat d'Irak v. Vinci Constructions Grands Projets SA de droit français*, Cour d'appel, Brussels, 4 October 2002, *JT* (2003) 318; *République du Zaïre v. d'Hoop et crts*, Cour d'appel, Brussels, 8 October 1996, *JT* (1997) 100.

courts which had started to shift the burden of proof onto foreign states.[29] Creditors continued to argue in favour of a shift of the burden of proof onto states, however. Eventually, the Brussels Court of Appeals – which in its previous judgments had required that the creditor discharge the burden of proof of the commercial use of a bank account – lent a sympathetic ear to those arguments, and decided indeed, on the face of it, to *split* the burden of proof in the case of *M* v. *Democratic Republic of Congo* (DRC). In this case, a creditor had obtained an *exequatur* to enforce a DRC judgment in Belgium, but failed to have DRC bank accounts in Belgium attached after the first-instance court of Brussels had lifted the attachment on the ground that the DRC enjoyed immunity from attachment under international law.[30] On appeal, the creditor reiterated, as creditors had done before him, that the state bore the burden of proof that the attached property served non-commercial purposes, and that the state had not discharged this burden. He backed up this claim by referring to his right to the peaceful enjoyment of his property under Article 1 of the First Protocol to the ECHR,[31] and his right to a fair trial under Article 6 of the ECHR.[32]

The Brussels Court of Appeals met the creditor halfway and ruled that it was not contrary to the principle of state immunity from attachment to *partially* discharge the *state* of the burden of proof regarding the nature (commercial/sovereign) of the attached goods, and to verify the nature of the goods of which attachment is sought *in concreto*.[33] In so deciding, the Court may have been swayed by the creditor's human rights arguments. The Court pointed out, with respect to some assets which the creditor had failed to attach on the basis of the Court's proposed test, that restrictions on an individual's (a corporation's) access to a court pursuant to Article 6 ECHR are allowed, e.g., by limiting immunity from attachment to goods serving sovereign purposes and by not accepting the state's assertion that goods served such purposes as sufficient proof of their non-commercial nature, as long as the restrictions serve a legitimate purpose and are not disproportionate.[34] The restrictions on Article 6 ECHR countenanced by the Court in this case are conspicuously less far-reaching than in its earlier decision in *Iraq* v. *Vinci Constructions Grands Projets SA* (2002), in which it had ruled that placing the burden of proof of the commercial purpose of an embassy bank account on the creditor was an acceptable restriction of Article 6

29 *Zaire v. d'Hoop and Another*, Tribunal civil, Brussels, 9 March 1995, *JT* (1995) 567, 106 ILR 294; *Irak v. SA Dumez*, Tribunal civil, Brussels, 27 February 1995, *JT* (1995) 565; 106 ILR 284, at 290.

30 Judgment of the Brussels Attachment Section (*Beslagrechter/Juge des saisies*); *Congo, the Democratic Republic of v. M*, 31 July 2008, not published.

31 First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (20 March 1952), 213 UNTS 262.

32 European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950), 213 UNTS 222; 312 ETS 5.

33 *M v. The Democratic Republic of Congo and Others*, *supra* note 27, at para. 40, second part.

34 Ibid., at para. 41. This balancing of human rights considerations and sovereignty/immunity imperatives recognized by international law is based on the case law of the European Court of Human Rights. See *McElhinney v. Ireland*, 34 EHRR (2002) 322; *Fogarty v. United Kingdom*, 34 EHRR (2002) 302; and *Al-Adsani v. United Kingdom*, 34 EHRR (2002) 273, with respect to state immunity, and *Waite and Kennedy v. Germany*, (2000) 30 EHRR 261; *Beer and Regan v. Germany*, (2001) 33 EHRR 3, with respect to the immunity of international organizations.

ECHR.[35] It is not fully clear what can explain this shift, except the court's increased sympathy for the plight of creditors. As regards the specific circumstances of the case, the Court eventually ruled, with regard to the technical bank account of the DRC embassy in Belgium, that the DRC had failed to demonstrate that this account was indeed necessary for the exercise of its sovereign powers. Therefore, the Court considered that the DRC was not entitled to immunity from attachment with regard to the account.[36] In contrast, the Court held that other goods – bank guarantees, a state-to-state loan, and funds available for development projects in the DRC – did enjoy immunity, as apparently the DRC had offered sufficient proof of the non-commercial purposes of these funds.[37]

If anything, this judgment casts further doubt on the customary-law status of Article 21(1)(a) of the UN Convention and its rule that embassy bank accounts are presumed not to be subject to attachment. Possibly, this judgment may embolden other courts to return to the 1980s tendency to reject state immunity from attachment in respect of embassy bank accounts if the non-commercial purpose of the funds has not unambiguously been established. It is the author's view that this restrictive construction of a state's immunity from attachment is particularly appropriate from a policy perspective, as discussed in the next section.

2. A CRITIQUE OF THE PRESUMPTION THAT EMBASSY BANK ACCOUNTS ARE USED FOR GOVERNMENT NON-COMMERCIAL PURPOSES: SHIFTING THE BURDEN OF PROOF TO STATES

As explained in section 1, the choices made by the ILC and most domestic courts may not reflect customary international law, and accordingly, the special treatment reserved for embassy bank accounts has a shaky legal basis. But not only may the presumption that embassy bank accounts are used for government non-commercial purposes not be required by international law, it is also undesirable from a policy perspective in that in practice it is almost non-rebuttable. What is more, it may violate international human rights law by failing to strike an adequate balance between creditors' legitimate interests and state immunity considerations.

The presumption that embassy bank accounts are used for non-commercial purposes logically benefits the state. Pursuant to this presumption, a creditor intending

35 *Iraq v. Vinci Constructions Grands Projets SA*, Appeal judgment, *Oxford Reports ILDC* 49 (BE 2002); *JT* 2003, 318, para. 45.

36 *M v. The Democratic Republic of Congo and Others*, *supra* note 27, at para 40, III ('La République Démocratique du Congo soutient que ce compte technique est nécessaire à l'exercice de la puissance publique dans la mesure où il est affecté au fonctionnement du Consulat Général à Anvers de la République Démocratique du Congo, et que dès lors il est couvert par l'immunité d'exécution. Comme la République Démocratique du Congo n'est pas en mesure de démontrer que cette affirmation est exacte alors que Monsieur Mabibi-ma-Kibebi [the creditor] se trouve dans l'impossibilité de démontrer le contraire (l'affectation à des fins privées de ce compte) et comme la République Démocratique du Congo ne dépose aucune pièce et ni fournit aucune explication convaincante à ce sujet, il y a lieu d'admettre que pour le montant créditant ce compte, la République Démocratique du Congo ne peut pas se prévaloir d'une immunité d'exécution').

37 Ibid., IV, para 40. ('Pour ce qui est des autres biens qui ont fait l'objet des saisies litigieuses, sur la base d'une analyse des éléments de fait et d'une motivation judicieuse que la cour approuve et fait siennes, le premier juge a estimé à bon droit qu'ils doivent bénéficier de l'immunité d'exécution'). The Court did not go into further detail as to the 'factual elements and the judicious motivation' which the DRC had offered in its view.

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to rebut the presumption would bear the burden of proving that the bank account that is the target of attachment is really used for commercial purposes. Some states have even gone as far as to exclude a possible rebuttal of the presumption that bank accounts are used for sovereign purposes, by requiring specific earmarking for commercial purposes by the government for a bank account to be attachable, or by accepting, at face value, government statements that the funds are used for non-commercial purposes.[38] But even in the jurisdictions that in principle allow for attachment, in practice, it will often be far from obvious for a creditor to offer conclusive proof of the non-commercial purpose of a (portion of) the funds in an embassy bank account.[39] In order to offer such proof, the creditor needs to inquire into the character of the funds, and thus to have access to the debtor state's bank statements. Some case law has precisely rejected such an inquiry on the ground that bank statements are covered by Article 24 VCDR, which stipulates that '[t]he archives and documents of the mission shall be inviolable at any time and wherever they may be'.[40] Other case law has blocked *any* inquiries into the purposes of an account's funds,[41] to avoid obliging the state to divulge possibly sensitive information about the sources of transfers to the account.[42]

Because of the creditor's practical difficulties of refuting the presumption that the state enjoys immunity from attachment in respect of its bank accounts, in the past some literature advocated that it should fall to the foreign *state* to prove the governmental non-commercial purposes of the funds in the account and the potential interference of measures of attachment.[43] As is known, this suggestion fell on deaf ears in most jurisdictions and at the ILC, but in the author's view it is time to reconsider it. There is no cogent reason why embassy bank accounts should be subjected to a special regime that is more protective of state interests than the regime governing other state properties; the argument that bank accounts are 'archives and documents of the mission' in accordance with Article 24 VCDR is at any rate hardly convincing.[44]

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38 E.g., *X. v. Brazil*, Landgericht, Frankfurt am Main, 23 May 2000, *Recht der Internationalen Wirtschaft* (2001), 308. A large number of cases is mentioned in Reinisch, *supra* note 2, 827–33.

39 Crawford, *supra* note 15, at 864 ('Whether a liquid fund can be severed in this way will depend as much on availability of evidence and the problems of discovery as on any underlying principle').

40 See *Etat d'Irak v. Vinci Constructions Grands Projets SA de droit français*, Cour d'appel, Brussels, 4 October 2002, *JT* (2003) 318.

41 See, e.g., *Philippine Embassy Bank Account Case*, *supra* note 16, 65 ILR 189 (holding that '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').

42 *Iraq v. Vinci*, *supra* note 35, analysis S. Vande Walle, A9. This commentator concludes, however, that the court, by placing the burden of proof on the creditor to show that the funds were used for commercial purposes, apart from allowing attachments on mixed accounts of embassies, seems to strike a careful balance between the interests of states and those of creditors. Above, we have argued that only partially shifting the burden strikes a balance between state and creditors' interests.

43 See C. Schreuer, *State Immunity: Some Recent Developments* (1988), 155.

44 Cf. E. Denza, *Commentary on the Vienna Convention on Diplomatic Relations*, (2008) 195 (construing Art. 24 VCDR broadly to cover 'all *physical items* storing information' (emphasis added) and citing ILC Yearbook 1958 Vol. I, 135–6, which clarified that the words 'and documents' were added to the text in order to cover, for example, negotiating documents and memoranda in draft). Also, in *Shearson Lehman Bros Inc. v. MacLaine Watson & Co. Ltd and Others*, [1988] 1 All ER 116, the Court emphasized the *communicative* character of the documents

It is the author's view that also embassy bank accounts should be covered by the 'general' rule concerning state immunity from execution, as it is laid down in Article 19(1)(c) of the UN Convention, pursuant to which measures of constraint, including attachment, can be taken against property if that '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'. The outcome of the analysis under this provision should not to be prejudiced by considering a number of property categories as necessarily being in use for government non-commercial purposes, i.e., the solution chosen in Article 21(1)(a) of the UN Convention, or by employing a presumption that such property is indeed so used, as many domestic court decisions do.

Unlike the text of Article 21 of the UN Convention, which continues to set great store by the principled immunity from attachment of a foreign mission's bank accounts, funds in such accounts only deserve protection if they relate to a sovereign activity of the state, and if they serve the mission's purposes, but not if they serve economic, commercial, or private purposes.[45] Somewhat paradoxically perhaps, this may ultimately also be the understanding of the ILC, which in its Commentary to Article 21(1)(a) appeared to call into question its willingness to really insulate embassy bank accounts from other state properties; in this Commentary the ILC observed that the prohibition of attaching embassy bank accounts 'obviously excludes . . . bank accounts maintained by embassies for commercial purposes'.[46]

Thus, considering that the funds in embassy bank accounts only deserve protection if they relate to a sovereign activity of the state, without presuming that such funds are used for government non-commercial purposes, is in accordance with the basic principles of state immunity from execution, whatever one thinks about the exact legal value of the particular provisions of the UN Convention, such as Article 21.[47] Furthermore, it is our view that abandoning the said presumption that embassy bank accounts are in use for government non-commercial purposes

protected under Art. 24 VCDR ('The underlying purpose of the inviolability is to protect the privacy of diplomatic communications'). One cannot reasonably submit that embassy bank accounts are instruments of communication.

45 See also *NML Capital Ltd v. Republic of Argentina*, Brussels Court of Appeals, RG No. 2009/AR/3338, 21 June 2011 (on file with the author), at 9. This passage is in fact *obiter dictum*, as the Court subsequently held that the state had waived its immunity from attachment. Accordingly, the *ratio decidendi* of this judgment is Art. 19(a) of the UN Convention (consent) rather than Art. 19(c) or Art. 21(1)(a). See on waiver/consent section 3 of this contribution.

46 Commentary, *supra* note 22, at 59.

47 Scholars have also cast doubt on the customary-law character of other provisions of the Convention regarding attachment. See, e.g., regarding the immunity from attachment of *central* bank accounts provided for in Art. 21(1)(c) of the UN Convention: *AIG Capital Partners Inc. and CJSC Tema Real Estate Co. Ltd v. Kazakhstan and Ors, Enforcement Decision*, (2005) EWHC 2239; ILDC 94 (UK 2005), analysis J. C. Barker, A8 (observing that 'it remains to be seen whether this provision will provide a stumbling block to those states which currently make such a distinction and which might be reluctant to extend absolute immunity from enforcement jurisdiction to the property of states' central banks in this way'). See on the immunity of central-bank accounts from attachment: E. I. Nwogugu, 'Immunity of State Property: The Central Bank of Nigeria in Foreign Courts', (1979) 10 NYIL 179–96; D. Asiedu-Akrofi, 'Central Bank Immunity and the Inadequacy of the Restrictive Immunity Approach', (1991) 28 *Canadian Yearbook of International Law* 263–307; M. Hess,

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is all the more called for in light of the increasing importance of the individual's right of access to a court, as enshrined in Article 6 ECHR and Article 14 ICCPR. While state immunity may impose restrictions on this right, any such restrictions should pursue a legitimate aim and should be proportionate to the aim pursued. It is recalled in this respect that the European Court of Human Rights has not shied away from finding, in the context of state immunity claims, a contracting party to the ECHR responsible for a violation of Article 6 ECHR for failing to 'preserve a reasonable relationship of proportionality' between the measure taken – the granting of immunity and the limitation of the individual's right of access to a court – and the aim pursued – the stability of international relations.[48] It is not readily clear how allowing the attachment of embassy bank accounts which are not proved to be in use for government non-commercial purposes upsets the stability of international relations. As far as the immunity of international organizations is concerned, this principle has also been applied to the immunity of *execution* of an organization;[49] it is indeed arguable that the right to have a judgment *enforced* is an integral part of the right of access to a court under Article 6 ECHR.[50] Moreover, the European Court of Human Rights has emphasized that the protection of rights under the Convention should be practical and effective, and not theoretical and illusory.[51] Reasoning that the creditor maintains his rights as he is allowed to rebut the presumption that embassy bank accounts are used for government non-commercial purposes precisely furthers the protection of *illusory* rights, since, as shown above, in practical terms the presumption is not rebuttable by the creditor.

At a very practical level, in order to do justice to the legitimate interests of creditors, as they may be protected on the basis of the ECHR and the ICCPR, while at the same time safeguarding the legitimate rights of states, as they are protected by immunity from execution, at least in respect of property used for government non-commercial purposes, it is proposed to 'split' the burden of proof regarding the purpose of an embassy bank account targeted by a creditor, between that creditor and the state. The state should be required to make a rather strong prima facie case that the funds in an embassy bank account are used for non-commercial purposes. The creditor may subsequently rebut the state's characterization of the funds by establishing that they are used for commercial purposes. To enable the creditor to ascertain the character of the funds, the court should be willing to order the state to disclose the bank statements relating to the account. Still, to avoid that the state may

'Enforcement of Bank Claims in Switzerland : Pledge, Set-Off and Immunity', in International Monetary Fund, *Current Developments in Monetary and Financial Law* (1999) Vol. I, 469–502 (especially at 486 et seq.).

48 See notably the recent case of *Sabeh El Leil v. France*, Application No. 34869/05, Judgment of 29 June 2011, para. 67, which concerned an employment dispute. The Court noted, among other things, that France had 'failed to take into consideration the provisions of Art. 11 of the 2004 [UN] Convention, in particular the exceptions enumerated therein that must be strictly interpreted' (para. 66).

49 *General Secretariat of the ACP Group v. Lutchmaya*, Final Appeal Judgment, Cass Nr C 03 0328 F; ILDC 1573 (BE 2009), 21 December 2009; *General Secretariat of the ACP Group v. BD*, Final Appeal Judgment, Cass nr C 07 0407 F; ILDC 1576 (BE 2009), 21 December 2009.

50 R. Ergec, Examen de jurisprudence – La Convention européenne des droits de l'homme, (2002) *R.C.J.B.*, 155, No. 104.

51 See, e.g., *Folgerø and Others v. Norway* [GC], No. 15472/02, §100, 29 June 2007; *Salduz v. Turkey* [GC], No. 36391/02, §51, 27 November 2008.

have to divulge sensitive information about the sources of transfers to the account, the consideration cited above, a court which is requested to order an attachment may want to exclude some bank statements from being divulged if the state offers proof of the sensitive nature of the information. In any event, proper evidentiary rules should be devised in order to prevent the creditor's right to disprove the state's claims from becoming illusory.[52] Possibly, in civil-law countries, where judges rather than parties are supposed to establish the truth, the court itself may want to assess the merits of the state's claim.

As discussed in section 1, this argument is not simply doctrinal. There are indications in state practice – a recent judgment of the Brussels Court of Appeals – to the effect of shifting the burden of proving the non-commercial purpose of a bank account, at least in part, to the state claiming immunity from the attachment of the account, and thus of departing from the increasingly dominant state practice that placed the burden of proof on the creditor. This judgment abandons the uncritical presumption that funds in embassy bank accounts are used for government non-commercial purposes, and requires instead that states prove the sovereign purpose of the funds held in their embassy bank accounts when invoking immunity from attachment. As it takes the creditors' right of access to a court seriously, while nevertheless not turning a blind eye to the state's entitlement to immunity in case of proof of the sovereign purpose of funds, it adequately balances creditors' and states' interests in a way that the majority of court decisions have not done.

3. Waiving immunity from attachment

The difficulties of ascertaining the commercial or non-commercial purposes for which an embassy bank account is used may be avoided if it can be established that the state has waived its immunity from attachment or otherwise consented to execution measures.[53] Waivers are contemplated by Article 19(a) of the UN Convention.[54] Loan contracts between states and investors will often contain a waiver of immunity regarding measures taken to execute an arbitral award or

52 See also Reinisch, *supra* note 2, at 829 ('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.'). On disclosure see Art. 18 of the European Convention on State Immunity (16 May 1972): 'A Contracting State party to proceedings before a court of another Contracting State may not be subjected to any measure of coercion, or any penalty, by reason of its failure or refusal to disclose any documents or other evidence. *However the court may draw any conclusion it thinks fit from such failure or refusal.*' (Emphasis added.)

53 Some jurisdictions may even view a waiver as the sole exception to the immunity of embassy bank accounts from attachment. See *General Health Insurance Company of the Czech Republic v. Embassy of the State of Palestine* [1997], Obvodni sond pro Prahu 6 (District Court), Prague 6/case No. E 1426/97, 15 Dec. 1997, cited in Reinisch, *supra* note 2, at 829, n. 176.

54 Arts. 18(a) and 19(a) of the UN Convention allow measures of constraint to the extent that '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'. Art. 20 clarifies that '[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', thereby confirming that a waiver of immunity from jurisdiction has no bearing on the immunity from execution or attachment.

judicial decision.[55] However, it will always have to be ascertained whether such a waiver clause also extends to attachment measures regarding bank accounts. The case law is not entirely consistent on the scope of waivers and their application to bank accounts. Some courts appear to require an explicit reference to attachment measures relating to bank accounts. French courts are a case in point. In *Russian Federation* v. *Noga Import/Export Company* (2000), the Paris Court of Appeals held that '[the] simple statement in the contracts in dispute, without further detail, that "the borrower waives all rights of immunity with regard to the application of the arbitral award rendered against it in relation to this contract" does not manifest the unequivocal intention of the state borrower to waive.' [56] Along the same lines, in *NML Capital and Argentina* (2011), the French Court of Cassation required a *specific and explicit* waiver for immunity from attachment to be waived:

> [Selon] le droit international coutumier, les missions diplomatiques des Etats étrangers bénéficient, pour le fonctionnement de la représentation de l'Etat accréditaire et les besoins de sa mission de souveraineté, d'une immunité d'exécution autonome à laquelle il ne peut être renoncé que de façon expresse et spéciale ; que cette immunité s'étend, notamment, aux fonds déposés sur les comptes bancaires de l'ambassade ou de la mission diplomatique ; . . . il devait être donné mainlevée de la saisie conservatoire dès lors que les fonds de la mission diplomatique argentine bénéficiaient de cette immunité de sorte que, faute de renonciation particulière et expresse à celle ci, la renonciation de la République Argentine, à l'égard du créancier, à l'immunité d'exécution des Etats était inopérante.[57]
>
> According to customary international law, the diplomatic missions of foreign States enjoy, for the functioning of the representation of the sending State and for the needs of its sovereign mission, an autonomous immunity from execution which can only be waived in an express and specific manner. This immunity applies notably to the funds on the bank accounts of the embassy or the diplomatic mission . . . the attachment has to be lifted in case the funds of the Argentine diplomatic mission enjoy this immunity. In the absence of a specific and express waiver of this immunity, the waiver of the Republic of Argentina vis-à-vis the creditor with respect to the immunity of execution of States is not applicable. (author's own translation)

Other courts, however, hold that bank accounts are covered by a general waiver of immunity (from attachment), such as the Brussels Court of Appeals in the case of *NML Capital Ltd* v. *Republic of Argentina* (2011), which involved the same parties as the case before the French Court of Cassation:

> Contrairement à la thèse défendue par une certaine jurisprudence et doctrine, qui n'a pas de caractère normatif et ne s'impose dès lors pas à la cour de céans ce point de vue ne peut être suivi : ni la Convention de Vienne ni aucune autre convention en vigueur ni la coutume internationale ne prévoient un mode de renonciation spécifique pour les

55 See, e.g., Council of Europe, Explanatory Report to Article 23 of the European Convention on State Immunity (1972), para. 94.

56 See, e.g., *Russian Federation v. Noga Import/Export Company*, France, Court of Appeal of Paris (First Chamber), *supra* note 16, 127 ILR 160. The relevant contracts provided in Arts. 8(iii) and 9(iii) respectively that 'the borrower shall not rely, neither for itself nor for its funds or revenues, on any immunity from judicial proceedings, enforcement, attachment or any other legal proceedings relating to his obligations under this contract'. Ibid, at 157.

57 Cass. fr., Arrêt No. 867 (09–72.057), 28 September 2011.

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> avoirs bancaires des missions diplomatiques. Une renonciation expresse à l'immunité d'exécution suffit. Il n'est nullement requis qui cette renonciation porte explicitement sur les comptes bancaires utilisés par les missions diplomatiques. . . L'exigence d' une renonciation expresse n'est pas synonyme de l'exigence – inexistante – d'une renonciation portant spécifiquement sur les avoirs bancaires de la mission diplomatique . . . Telle renonciation peut porter sur l'immunité d'exécution sans distinction en fonction des biens visés puisqu'elle peut être générale et porter sur tous les avoirs de l'Etat qui émet sa renonciation à l'immunité d'exécution. [58]
>
> Unlike the thesis defended by certain case law and doctrine, which does not have a normative character and is thus not binding on the court, this point of view cannot be followed: neither the Vienna Convention nor any other convention that has entered into force nor international custom provide for a specific waiver for the bank accounts of diplomatic missions. An express waiver of the immunity from execution suffices. It is not required that this waiver explicitly cite the bank accounts used by the diplomatic missions . . . The requirement of an express waiver is not synonymous with the – inexisting – requirement that a waiver applies specifically to the bank accounts of the diplomatic mission . . . Such a waiver could apply to the immunity from execution without distinguishing between the goods meant by the waiver, because it can be general and apply to all the goods of the State that issues a waiver of immunity from execution. (author's own translation)

In our view, while it is understandable that general contractual waivers of immunity from execution cannot apply to property that is protected from enforcement measures under the VCDR,[59] it is not readily apparent why they cannot apply to bank accounts. As observed above, the VCDR, as such, does not provide for the immunity of embassy bank accounts from attachment. Neither do the UN Convention and the Commentary thereto, or the European Convention on State Immunity and its Explanatory Report require that embassy bank accounts be explicitly included in a waiver for such accounts to be protected from measures of attachment. If states wish to exclude such measures, nothing prevents them from inserting a specific provision into the loan agreement to this effect.

Moreover, as Reinisch has observed, several domestic courts have even gone so far as to construe the mere existence of an arbitration clause in a contract between a state and a government as an *implicit* waiver of immunity from execution.[60] This case law may not deserve support, as it assumes state consent to execution which may in reality be ambiguous or non-existent; it is, accordingly, overly favourable to creditors. In contrast, requiring an *explicit* general waiver of immunity from enforcement, and applying it to bank accounts as well, does justice to both the legitimate expectations of states and the rightful demands of creditors.

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58 *NML Capital Ltd v. Republic of Argentina*, supra note 22, at 10–11 (original emphasis), citing Court of Appeals Brussels, 21 June 2002, *JT* 2002, 714.

59 See, e.g., *A Co. Ltd v. Republic of X*, QBD, 21 Dec. 1989, 2 Lloyds Rep. (1990) 520, 87 ILR 412.

60 See Reinisch, *supra* note 2, at 819–820, citing the French case of *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, No. 207, *Revue de l'arbitrage* (2001) 114; and the Swedish case of *Libyan American Oil Company v. Libya*, Svea Hovrett, 18 June 1980, (1981) 20 ILM 89, 62 ILR 225.

4. Concluding observations

As confirmed by the ICJ in the *Germany* v. *Italy* judgment (2012) and the UN Convention on the Jurisdictional Immunity of States and Their Properties, international law has eroded state immunity from execution to the point that only state property used for non-governmental purposes enjoys immunity from measures of attachment. As regards embassy bank accounts, however, a considerable amount of state practice has not taken this erosion so far as to require that states prove that an embassy bank account targeted by a creditor indeed serves non-governmental purposes. Under this approach, the burden of proof will have to be discharged by the creditor, who, lacking access to pertinent bank statements, may often be faced with the sheer impossibility of proving the exact purpose of an embassy bank account. Domestic courts that have espoused this approach have de facto reinforced the validity of the traditional prohibition of attaching state property, as laid down in the 1972 European Convention on State Immunity.

The said practice may be dominant, but may not necessarily be uniform, however. Moreover, there is no indication that this practice is *required* by international law (*opinio juris*). In fact, it is safe to say that an international consensus on immunity from attachment of embassy bank accounts has so far proved elusive, and the dominant *state-friendly* trend in enforcement immunity proceedings in domestic courts can still be reversed.

Arguably, the dominant state practice regarding the attachment of embassy bank accounts takes the legitimate interests of creditors insufficiently into account. As a result, proportionality between the measure taken (immunity) and the aim pursued (maintaining international stability) has not been reached. By presuming that the state uses the funds in embassy bank accounts for sovereign purposes, by making it nearly impossible for creditors to rebut this presumption due to a lack of adequate discovery powers, and thus by quasi-automatically upholding state immunity, states may impair the very essence of the creditor's right of access to a court. This right may be similarly impaired in case waivers of immunity are construed restrictively to the detriment of creditors' access to a court. Only an approach that construes general waivers as truly 'general', and that shifts the burden of proving the purpose of funds in embassy bank accounts at least in part to the state, adequately balances the legitimate interests of both states and creditors.

Notably, Belgian courts have been trailblazers of an increasingly claimant-friendly interpretation of the law of immunity (or an erosion of immunities, depending on one's perspective). This has occurred not only in relation to embassy bank accounts (as regards both the said presumption and the absence of a requirement of specific waivers), but also with respect to the immunity of international organizations. In 2009, the Belgian Court of Cassation (the Supreme Court in civil and penal matters) confirmed, in line with European Court of Human Rights precedent,[61] that an international organization only enjoys immunity – including immunity from execution – before domestic courts if it provided reasonably available alternative mechanisms

61 *Beer and Regan*, *supra* note 34; *Waite and Kennedy*, *supra* note 34.

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of dispute settlement to the plaintiff.[62] Unlike the European Court, the Court of Cassation was even willing to inquire in detail into the quality of the organization's dispute settlement mechanisms, and to set aside, to the claimant's obvious benefit, the organization's immunity on the ground that the dispute settlement mechanism offered insufficient due-process guarantees.[63]

This string of cases regarding immunity from execution shows that claimants' rights to a remedy and access to a court are making inroads into the traditional conception of immunity. Immunity is no longer conceived of as a procedural device to prevent, at all costs, state and institutional interests from being jeopardized by private litigants. States are able to invoke their immunity only with respect to sovereign activities or purposes, and organizations only if they offer alternative mechanisms of dispute settlement. In due course, possibly, state immunity, including immunity from enforcement, and including attachment of embassy bank accounts, may further be restricted by requiring that states, like international organizations, if they wish to successfully avail themselves of their immunity, provide alternative mechanisms for claimants to obtain redress.[64]

62 Court of Cassation (Belgium), *Western European Union v. Siedler M.*, Case No. S.04.0129.F; *The General Secretariat of the ACP Group v. Lutchmaya M.*, Case No. C.03.0328.F; *The General Secretariat of the ACP Group v. B.D.*, Case No. C.07.0407.F, 21 December 2009.

63 See for a comment J. Wouters, C. Ryngaert, and P. Schmitt, *Western European Union v. Siedler; General Secretariat of the ACP Group v. Lutchmaya*, Belgian Supreme Court Decisions on the Immunities of International Institutions in Labor and Employment Matters, (2011) 105 AJIL 560.

64 Compare *Germany v. Italy* (2012), *supra* note 24, diss. op. Yusuf, J., paras. 28–29, transposing the judgments of the European Court of Human Rights in respect of the immunity of international organizations to a State immunity context. ('In today's world, the use of State immunity to obstruct the right of access to justice and the right to an effective remedy may be seen as a misuse of such immunity. Such a balance has to be sought between the intrinsic functions and purposes of immunity, and the protection and realization of fundamental human rights and humanitarian law principles.')