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Specific features of the Immunity from Jurisdiction and from Execution of International Organizations

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Abstract: The paper examines the rules on jurisdictional and enforcement immunity of international organizations and warns against the frequent practice, in both national and European courts, of transposing to them the doctrine developed for State immunity. Although both regimes share a functional dimension, State immunity is grounded in sovereignty and the equality of States, whereas the immunity of international organizations derives solely from their constitutive treaties or headquarters agreements, with no basis in customary international law and no link to the exercise of sovereign powers. For this reason, distinctions such as *iure imperii/iure gestionis* are meaningless in the context of international organizations. The paper also analyses the possibility of waiving immunity, which exists but is limited by the relevant conventional provisions, and emphasises that ensuring compatibility between immunity and the right to effective judicial protection requires the existence of alternative dispute-resolution mechanisms, in line with the ECtHR's *Waite and Kennedy* doctrine and with Organic Law 16/2015 when it applies subsidiarily. The central difficulty arises when an international agreement grants full immunity without providing such mechanisms: in these cases, the paper argues that, from the perspective of the domestic judge, the applicability of the agreement should be interpreted in conformity with the Constitution and the ECHR.

Keywords: International organizations, Jurisdictional immunity and immunity from execution, Effective judicial protection.

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(A) INTRODUCTION

Jurisdictional and enforcement immunities are one of the areas in which Professor Concepción Escobar's work has been most successful[1], particularly her reports on the immunities of State officials submitted to the International Law Commission between 2012 and 2019[2]. In this contribution, I offer some reflections on the application of jurisdictional and enforcement immunities to international organizations. This subject has generated significant case law in recent years; for example, STC 120/2021 31 May 2021[3] and the *Supreme Site Services and Others* judgment of the Court of Justice of the European Union[4]. Both decisions share a common feature: they transpose the rules governing State immunity to international organizations. Given the broader practice

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1 See C. Escobar Hernández, "Las inmunidades de los Jefes de Estado, Jefes de Gobierno y Ministros de Asuntos Exteriores", in J. Martín y Pérez de Nanclares (dir.), *La Ley Orgánica 16/2015 sobre Privilegios e Inmunidades: Gestación y Contenido*, *Cuadernos de la Escuela Diplomática*, 2016, núm. 55, pp. 307-324.

2 Report of the International Law Commission (A/74/10, 2019), Chapter VIII, p. 310.

3 *BOE*, 7 July 2021, https://www.boe.es/boe/dias/2021/07/07/pdfs/BOE-A-2021-11302.pdf, accessed 30 November 2025.

4 Judgment of 3 September 2020, *Supreme Site Services and Ohters*, C-186/19, EU:C:2020:638.

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regarding State immunity and the greater familiarity of legal practitioners with it, the temptation to rely on those rules when an international organization claims immunity is understandable. However, as we shall see, the use of principles developed for State immunity would require careful justification, because there are profound differences between the rationale and structure of State immunity and that of international organizations.

This tendency to apply the regime of State immunity when the beneficiary is an international organization is not new, nor is the criticism it has attracted[5]. Nonetheless, it is useful to highlight the factors that distinguish these two types of immunity, as they stem not only from the differing nature of States and international organizations, but also from the implications that immunities have for the protection of fundamental rights[6].

(B) SIMILARITIES AND DIFFERENCES BETWEEN STATE IMMUNITIES AND THE IMMUNITIES OF INTERNATIONAL ORGANIZATIONS

Starting with what State immunities and the immunities of international organizations have in common, it is important to emphasise that both are necessary to facilitate international relations. Allowing the courts of one State to adjudicate claims against another international actor whether a State or an international organization or to adopt enforcement measures against its property would likely have diplomatic repercussions, or, more broadly, consequences for international relations. This consideration also operates as the functional justification for immunities: they are necessary for international organizations to carry out their functions[7]. In the case of States, although their immunities are grounded in sovereignty and the equality of States, they also possess a functional dimension, insofar as immunity facilitates the ability of States (and their representatives) to act in foreign States an activity that would be significantly hindered without rules shielding them from judicial proceedings abroad[8]. This functional dimension is particularly evident in immunities that are not strictly State immunities, but rather derive from them, such as those protecting heads of State or other high-ranking officials[9].

From another perspective no longer that of the State benefiting from immunity but that of the forum State immunity is also linked to the separation of powers, insofar as bringing a foreign State or another beneficiary of immunity before domestic courts

5 See P. Andrés Sáenz de Santa María, in J. Martín y Pérez de Nanclares (dir.), *supra* n. 1, "Las inmunidades de las organizaciones internacionales: perspectiva general y española", pp. 205-231, pp. 223-224. In earlier approaches, however, the analysis begins by assuming an initial equivalence between State immunities and the immunities of international organizations, and then proceeds to highlight the differences between them, see D.W. Bowett, *The Law of International Institutions*, Londres, Stevens & Sons, 1982, p. 345.

6 Andrés Sáenz de Santa María, *supra* n. 5, pp. 225 y 231.

7 Andrés Sáenz de Santa María, *supra* n. 5, p. 208.

8 See M.N. Shaw, *International Law*, Cambridge, Cambridge University Press, 9th ed., 2021, p. 1162.

9 Using a graphic metaphor, they are figures projected onto different mirrors from a single underlying object, L.I. Sánchez Rodríguez, *Las Inmunidades de los Estados Extranjeros ante los Tribunales Españoles*, Madrid, Civitas, 1990, p. 29.

would constitute interference with the executive branch[10]. This line of reasoning may likewise be projected onto the immunities of international organizations.

The similarities, however, end there. As noted above, State immunities are rooted in the principle of sovereignty and the equality of States, which prevents one State from exercising a sovereign function namely, adjudicating disputes and enforcing judgments over another State (*par in parem non habet imperium*, which also implies a lack of "*jurisdiction*" over an equal). This principle does not apply to international organizations, which, although subjects of international law, are not States and do not possess the nature of States.

Moreover, international organizations are relatively recent institutions[11], and the regime governing their immunities is not customary in nature; rather, it is based on the treaties by which they are established and on the agreements concluded to regulate their presence in the territories of various States[12]. Consequently, the immunities of international organizations do not stem from structural principles of international law but instead arise from specific agreements between the States that create them and those with which they interact.

In the context of State immunity, the distinction between acts *iure imperii* and *iure gestionis* is of great significance, given that the doctrine of absolute immunity has largely been abandoned in favour of the doctrine of restrictive immunity. For international organizations, however, this distinction is meaningless, since they do not exercise sovereign functions[13]. One may instead differentiate between activities that are necessary for the organization to fulfil its functions[14]. This distinction is reflected even in conventional instruments dealing with the immunities of international organizations[15]. Nevertheless, because the regulation of such immunities is treaty-based, a categorisation that cannot ultimately be grounded in the relevant texts has limited relevance (as will be seen). In the case of States, differentiating between acts *iure imperii* and *iure gestionis* is useful, as it serves to interpret the applicable treaties and rules of customary international law. By contrast, for international organizations we must adhere strictly to the treaty provisions and determine, on that basis, whether the immunity granted is "total" (a more appropriate term than "absolute," given that the distinction between sovereign and non-sovereign acts is inapplicable) or limited.

The distinction between jurisdictional immunity and immunity from execution is indeed relevant. If jurisdictional immunity is total, there is no need to consider

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10 See R. Arenas García, *El control de oficio de la competencia judicial internacional*, Madrid, Eurolex, 1996, pp. 54-55 and the references contained therein.

11 Shaw, *supra* n. 8, pp. 1133-1135; C.F. Amerasinghe, *Principles of the institutional law of international organizations*, Cambridge, Cambridge University Press, 2nd ed. 2005, p. 315; see also Bowett, *supra* n. 5, pp. 1-10.

12 Andrés Sáenz de Santa María, *supra* n. 5, pp. 206-207.

13 See S. El Sawah, *Les immunités des états et des organisations internationals. Immunités et procès equitable*, Bruselas, Bruylant, 2012, pp. 701-702.

14 Amerasinghe, *supra* n. 11, p. 316.

15 Art. 105 of the United Nations Charter; although the Convention on the Privileges and Immunities of the United Nations subsequently transformed this immunity into a "total" one (rather than using the term "absolute," which would correspond more closely to the absolute/relative immunity dichotomy linked to the distinction between acts *iure imperii* and acts *iure gestionis* a distinction which, as we have seen, is not appropriate in the context of international organizations).

immunity from execution, since no judgment could ever be rendered against the international organization – just as, during the period in which States enjoyed absolute jurisdictional immunity, discussing immunity from execution was unnecessary[16]. However, if jurisdictional immunity is not total, it becomes necessary to determine which assets may be subject to enforcement. In general, immunity from execution is broader than immunity from jurisdiction; thus, even if a judgment is issued against an international organization, it may not be enforceable if the organization's assets benefit from execution immunity. In this regard, it is noteworthy that the Convention on the Privileges and Immunities of the United Nations expressly provides that a waiver of immunity by the organization does not apply to enforcement measures[17]. In the case of the European Union, although jurisdictional immunity is not provided for[18], the Union's assets are protected against any enforcement measures, which may only be authorised by the Court of Justice[19].

Finally, international organizations are not States; this means that they generally lack their own judicial system. This point is significant because, in the case of States, the fact that they cannot be sued before the courts of another country does not prevent proceedings from being brought before the courts of the State benefiting from immunity. This consideration matters: in many cases, the impossibility of obtaining a decision on the merits is not absolute, since the claimant who is adversely affected by the invocation of immunity may be referred to the courts of the defendant State[20]. For international organizations, however, this is not possible in most situations. The exception is the European Union, which has its own judicial system and whose courts have jurisdiction to hear actions brought against the institutions of the organization[21]. Moreover, the EU courts are composed of judges who enjoy the same guarantees of independence as their national counterparts: they are not subject to instructions in the exercise of their functions, cannot be arbitrarily removed from office, and benefit from clear financial autonomy. Other international organizations, by contrast, lack equivalent mechanisms, meaning that whatever dispute-resolution procedures they may have cannot be compared to national judicial systems.

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16 See R. Higgins, "Execution of State Property in English Law", in P. Bourel *et al.*, *L'inmmunité d'éxecution de l'État étranger*, París, 1990, pp. 101-109, p. 101; R. Frank, "L'immunité d'éxecution de l'État et des autres collectivités publiques en droit allemand", in R. Frank *et al.*, "L'immunité d'éxecution de l'État et des autres collectivités publiques", in *Immunité d'exécution, extradition et responsabilité des parents*, Bruselas, Bruylant, 1990, pp. 3-32, p. 14.

17 Art. 2.

18 Art. 274 del TFEU.

19 Art. 1 of the Protocol on the Privileges and Immunities of the European Union.

20 See the case of the Italian diplomat, tenant of a dwelling in Madrid, who was sued by its owner. Once the diplomat's jurisdictional immunity was upheld – based in this case on the 1961 Vienna Convention on Diplomatic Relations – the matter ultimately reached the Spanish Constitutional Court (Judgment 140/1995 of 28 September). The Court held that the diplomat's immunity was compatible with the right to effective judicial protection enshrined in Article 24 of the Constitution, and stated that the claimant could bring her claim before the Italian courts (Legal Ground 10). It should be noted, however, that in the case at hand – namely the lease of immovable property located in Spain – the Italian courts would lack jurisdiction, since jurisdiction would lie exclusively with the Spanish courts pursuant to Article 16 of the Brussels Convention of 27 September 1968, the instrument applicable *ratione temporis* to any action brought in Italy after the Spanish courts had upheld the diplomat's jurisdictional immunity.

21 Arts. 263.4, 265.3, 268, 270, 272 of the TFEU.

(C) THE IMMUNITIES OF INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS

There is a certain amount of case law concerning the immunities of international organizations before national courts. Most cases in which immunity has had to be addressed involve employment disputes[22], although commercial disputes also exist[23]. In such cases, both the functional scope of immunity and the possibilities of waiving it have been examined. We will return shortly to the first issue (the functional scope of immunity), but for now we shall focus on the second, since the waiver of immunity by an organization is, in principle, possible, although it has given rise to considerable difficulties.

Thus, on the one hand, there may be situations in which waiver is not possible, cannot be made in advance, or cannot extend to immunity from execution[24]. On the other hand, however, there are cases in which the possibility of waiving immunity has been interpreted broadly, including instances of implicit waivers derived from choice-of-court or choice-of-law clauses[25]. The case of arbitration clauses also warrants specific attention. On the one hand, as we will examine later, ensuring compatibility between immunity and the requirements of effective judicial protection demands that individuals who enter into relations with an international organization have access to some means of dispute resolution outside the courts; in this sense, the inclusion of an arbitration clause in agreements between the organization and third parties may satisfy this requirement. From that point, however, if the arbitration clause does not also entail the possibility of recourse to the courts, it will not be possible to seek judicial assistance in support of the arbitration, to challenge the award, or to request its recognition or enforcement; this would limit the effectiveness of the protection that arbitration could provide[26]. This objection is nonetheless a limited one, since, as noted earlier, a waiver of jurisdictional immunity does not imply a waiver of immunity from execution; consequently, the effectiveness of any remedy obtained will in any event depend on the will of the international organization.

On the other hand, it has been argued that agreeing to arbitration also entails a waiver of immunity before national courts[27], which would allow the arbitral proceedings

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22 Andrés Sáenz de Santa María, *supra* n. 5, p. 222. The already-cited Constitutional Court Judgment 120/2021 also dealt with an employment matter.

23 See J. Klabbers, *An Introduction to International Organizations Law*, Cambridge, Cambridge University Press, 3rd edition, 2015, pp. 133-135. See also A. Reinisch, *International Organizations Before National Courts*, Cambridge, Cambridge University Press, 2000, pp. 35-229, which examines a large number of cases, from various jurisdictions, brought before national courts concerning the immunities of international organizations.

24 See, for example, Art. II of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946: "The United Nations, its property and assets wherever located and by whomsoever held shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity shall extend to any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution". On *ad hoc* waiver clauses, Reinisch, *supra* n. 23, pp. 218-219.

25 Reinisch, *supra* n. 23, pp. 222-226.

26 Reinisch, *supra* n. 23, p. 265.

27 Reinisch, *supra* n. 23, pp. 226-229.

to unfold in a "normal" manner — something that, as is well known, often presupposes judicial support[28]. However, whether such a waiver exists will always depend on the conventional instrument governing the immunity, since, as noted, this immunity derives from an international treaty; unlike State immunity, there is no relevant international custom nor any structural principle of international law from which it may arise.

Courts nevertheless tend — just as previously mentioned — to overlook the essential differences between State immunity and the immunity of international organizations, projecting onto the latter reasoning that properly belongs to the former. As already discussed, the distinction between absolute and relative immunity characteristic of State immunity, which relies on differentiating between acts *iure imperii* and *iure gestionis*, is meaningless for international organizations, which, not being States, do not exercise sovereign functions. For international organizations, the relevant (though not equivalent) distinction would instead concern acts necessary for the functioning of the organization versus those unrelated to its purposes — a functional approach[29]. This functional approach, however, is frequently "contaminated" by the transposition of principles and rules specific to State immunity. This occurred, for example, in Spanish Constitutional Court judgment 120/2021[30] and, in a certain sense, in the *Supreme Site Services and Others* case before the Court of Justice of the European Union[31], and it remains a common practice among national courts[32].

This approach is probably mistaken. It would be advisable to draw a clear distinction between State immunity and the immunity of international organizations. For the latter, the applicable regime is defined by the international agreements that establish the organization or by the headquarters agreements concluded with States. Thus, for example, in the case decided by Spanish Constitutional Court judgment 120/2021, Article 11 of the Headquarters Agreement between Spain and the International Commission for the Conservation of Atlantic Tunas of 29 March 1971 (*BOE*, 17 November 1971) should have been applied. That provision grants the organization full immunity, except where waived, in line with Article II of the Convention on the Privileges and Immunities of the United Nations. The distinction between acts *iure imperii* and *iure gestionis* has no support in the text of the Agreement and therefore should not have been taken into account by the Spanish courts, although they did so. Moreover, although the rationale for the immunity of international organizations is the proper performance of their functions,

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28 See J.C. Fernández Rozas, "Arbitraje y jurisdicción: una interacción necesaria para la realización de la justicia", *Derecho Privado y Constitución*, 2005, año 13, núm. 19, pp. 55-91, esp. pp. 67-70; *id.*, "Arbitraje comercial internacional", in J.C. Fernández Rozas *et al.*, *Derecho de los Negocios Internacionales*, Madrid, Iustel, 7th ed., 2024, pp. 689-808, pp. 767-804.

29 On the case law of domestic courts on this issue, Klabbers, *supra* n. 23, pp. 131-136; Reinisch, *supra* n. 23, pp. 205-214.

30 *Supra* n. 3. For a critique of the use of criteria derived from State immunity in this context, vid. R. Arenas García, "Inmunidad de jurisdicción de las organizaciones internacionales y distinción entre actos *iure imperio* y *iure gestionis* [A propósito de la STC 120/2021 (Sala Segunda), de 31 de mayo], *REEI*, 2021, nº 42, DOI:10.17103/reei.42.18, pp. 7-15, pp. 11-12.

31 *Supra* n. 4. See R. Arenas García, "Inmunidad de ejecución, materia civil o mercantil y competencias exclusivas [A propósito de la STJ (Sala Primera) de 3 de septiembre de 2020, As. C-186/19, *Supreme Site Services GmbH y otros c. Supreme Headquarters Allied Powers Europe*]", *REEI*, 2020, nº 40, DOI:10.17103/reei.40.16, pp. 34-41.

32 Reinisch, *supra* n. 23., pp. 258-261.

that principle cannot operate as a limitation on immunity unless it is expressly reflected in the conventional instrument governing it.

The problem with this interpretation is that it is hardly compatible with access to effective judicial protection if no alternative dispute-resolution mechanism exists; this would run counter to the requirements of the right to effective judicial protection under both domestic constitutional orders and Article 6 of the European Convention on Human Rights. This follows from the doctrine laid down by the ECtHR in its judgment of 18 February 1999, *Waite and Kennedy v. Germany* (Application 26083/94), where, faced with an alleged incompatibility between the jurisdictional immunity of the European Space Agency (ESA) and Article 6 ECHR, the Court held that no such incompatibility existed because dispute-resolution mechanisms were available within the ESA[33]. Thus, the existence of alternative mechanisms to judicial proceedings, even within the organization itself, provided that they operate independently[34], is sufficient to justify immunity. This same principle is now reflected in Article 35(1), second subparagraph, of Organic Law 16/2015[35], which, in private-law or employment disputes involving staff of an international organization, requires, for immunity to be upheld, proof that there is "an alternative mechanism for resolving the dispute, whether provided for in the constituent treaty, the statutes, the internal regulations or any other applicable instrument of the international organization."

This exception, however, only applies where there is no conventional regulation of immunity. Organic Law 16/2015 envisages the existence of international agreements governing immunity [Article 35(1)] and, in their absence, grants immunity to international organizations on a functional basis, that is, "in respect of any conduct linked to the performance of their functions." It is this immunity conferred by Spanish domestic law which is qualified by the requirement of an alternative dispute-resolution mechanism, meaning that the regime laid down by the Organic Law is not a minimum standard, but a subsidiary one[36]. As a result, the problem persists in relation to those immunities that are recognised in treaties to which Spain is a party and which do not provide for such mechanisms. To uphold jurisdictional immunity in these cases would entail a breach of Article 6 ECHR; yet refusing to do so would mean infringing the international instrument that establishes the immunity. The most reasonable course would be to revise those international instruments so as to introduce an explicit reference to an alternative dispute-resolution mechanism. Until such revision takes place, however, they should be interpreted in conformity with the Constitution, making full use of any interpretative possibilities in the text either to narrow the scope of immunity or to make it conditional on the existence of a dispute-resolution mechanism in line with the requirements of the ECtHR.

If, despite all the above, it proves impossible to reconcile the requirements of the treaty with the demands of the right of defence, we would face a conflict that is difficult

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33 See n. 68 of the Judgment: "For the Court, a material factor in determining whether granting ESA immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention".

34 See n. 69 of the Judgment *Waite and Kennedy v. Germany*.

35 LO 16/2015, de 27 de octubre, sobre privilegios e inmunidades de los Estados extranjeros, las Organizaciones Internacionales con sede u oficina en España y las Conferencias y Reuniones internacionales celebradas en España, *BOE*, 28-X-2015.

36 On this distinction, Andrés Sáenz de Santa María, *supra* n. 5, pp. 228-230.

to resolve: from the standpoint of international law, the international organization could insist on the application of the treaty establishing the immunity, and neither the Spanish Constitution nor the European Convention on Human Rights would constitute an obstacle to this. This primacy of the treaty is also reflected in the Constitution, since Article 96 provides that international treaties validly concluded and published in Spain may only be repealed, amended, or suspended in the manner provided for in the treaties themselves or in accordance with the general rules of international law.

Even so, I believe we should distinguish between the effectiveness of the international treaty and its applicability[37]. From the perspective of the domestic judge, the treaty with the international organization, the Spanish Constitution, and the ECHR are all norms forming part of the legal order that must be applied, and when irreconcilable contradictions arise among them, the judge must identify a way to resolve them. From this perspective — that of applicability — priority should be given to constitutional obligations, particularly where the treaty conferring immunity predates the Constitution itself (as in the case examined in the aforementioned Constitutional Court judgment 120/2021), even if doing so entails Spain's breach of an international obligation. After all, upholding immunity in such cases would likewise entail a breach of an international obligation, namely Spain's obligations towards the States parties to the ECHR. It is the responsibility of the executive — and, insofar as it is competent, the legislature — to ensure that Spain does not assume mutually incompatible international obligations.

(D) CONCLUSION

The immunities of international organizations and those of States are fundamentally different. Nonetheless, domestic practice has tended to transpose onto the former the well-established doctrine developed in relation to the latter. This is an error that ought to be corrected.

For the immunities of international organizations, the starting point is the conventional law contained in their constitutive treaties and headquarters agreements. Strictly speaking, nothing need be added to this conventional framework: without a treaty-based provision granting it, an international organization would enjoy no immunity at all. Spain, however, has chosen to introduce a general rule on the immunity of international organizations, which operates only in the absence of a conventional regulation.

The immunities of international organizations may result in a breach of the right to effective judicial protection, insofar as they deprive individuals of the possibility of obtaining a judicial resolution of disputes with such organizations. This violation, however, does not arise where an alternative dispute-resolution mechanism exists. Spain should therefore revise its agreements with international organizations so that all of them comply with this requirement, which stems not only from Article 24 of the Spanish Constitution, but also from Article 6 of the ECHR.

[37] This is a line of reasoning on which the Constitutional Court has insisted, shifting the problem of the relationship between international norms and domestic legislation to the terrain of applicability — an issue to be resolved by the ordinary courts, not by the Constitutional Court, vid. the references collected in A. Villaseca Ballescá, "La compleja relación entre la ley nacional y el tratado internacional", *Revista de Derecho, Empresa y Sociedad*, 2019, núm. 15, pp. 278-296, pp. 289-290.