Some Considerations on State Immunity and Sovereign Debt

By:

Luca Pasquet

October 16, 2020

Relegated to the domain of procedure by courts and commentators, State immunity could be seen as a highly technical and uninteresting topic. Yet, this area of international law raises some important questions on the kind of (global) society in which we live and the values prevailing in it, especially with respect to the role of States in society. Aimed at protecting the Sovereign equality of States, and operationalised through the distinction between private and sovereign acts, this set of norms touches upon one of the fundamental questions of our time: that of the relationship between private and collective interest and the legal protection they should be granted. This emerges even more clearly when immunity is studied in conjunction with public debt restructuring; in fact, in this field, disputes concerning the application of immunity are only the consequence of a more fundamental tension between the necessity to protect the rights of creditors and the need to preserve the financial capacity of States to perform their prerogatives.

Since the 1950s (the turning point is normally identified with the judgment

Dralle v. Czechoslovakia), it is generally accepted that State immunity does not apply in relation to commercial acts. This means, in short, that under certain conditions the legal certainty of credit protection prevails over the protection of the State's financial margin of manoeuvre. Market rationality has therefore succeeded in opening a breach in the wall of immunity; a wall meant to protect the "public realm" from external interferences and which, in the words of Klabbers, is "largely based on the idea that States require a space for the conduct of unencumbered politics without fear of legal ramifications". As Annamaria Viterbo explains in her book, it is mainly through this breach – the so-called commercial exception to immunity - that creditors have managed to sue foreign States in relation to bonded debts.

The transition from absolute to relative immunity required international lawyers to develop criteria to determine which specific acts can be qualified as sovereign acts (covered by immunity) and which ones shall rather be qualified as private acts (excluded from immunity). As described in Viterbo's book, the approaches taken by national courts are so numerous and diverse in this respect that one could hardly identify a universally accepted criterion. To start with, while some courts focus on the purpose of the act, others focus on its nature. With regards to bonded debts, moreover, some courts (e.g. the US Supreme Court) focus on the act of issuing bonds, which is private in nature, while others (e.g. the Italian Court of Cassation) prioritize the legislative measures taken by debtor States to address a financial crisis, which are public in nature. Finally, certain States (e.g. the U.S.A.) have adopted specific legislations positing immunity as a general rule and containing a list of exceptions; an approach, the latter, followed also by the International Law Commission in the drafting of the UN Convention on Jurisdictional Immunities of States and their Property. This Babel of legal standards is only partially mitigated by the fact that some articles of the UN Convention – which has not entered into force yet - are regarded by the International Court of Justice (ICJ) as reflecting customary international law.

If the method of the list may provide legal interpreters with some clarity in the midst of so much uncertainty, its application is not unproblematic. Besides the hermeneutic problems that every legal text inevitably poses, a more fundamental question has been raised by some commentators: normative

instruments following the method of the list would inevitably lead legal interpreters towards adopting an axiomatic approach to immunity, discouraging the application of alternative methods based on the balancing of principles. In short, this would imply tackling the problem of immunity exclusively in terms of rules and exceptions, meaning that if no exception is applicable, then the rule - immunity – should apply. While this is a commonly accepted way to proceed, it is not the only method which is available to legal interpreters. Thanks to legal philosopher Ronald Dworkin, for instance, we know that besides rules and exceptions the legal world is populated also by legal principles which are not "applied in an all or nothing fashion" (ibid, p. 25), but weighed against each other. In other words, the balancing approach requires the legal interpreter to find a balance, or point of equilibrium, between principles suggesting different solutions for the same problem in light of the circumstances of each case. This is for instance what constitutional and human rights courts do when they decide in light of principles which are in tension with each other, such as individual freedom and public order. According to some authors, this is also what courts should do when deciding whether to uphold State immunity or not.

Along this line, in their separate opinion to the *Arrest Warrant* case, judges Higgins, Koijmans and Buergenthal of the ICJ conceptualized immunity as "an interest of its own that must always be balanced, however, against the interest of that norm to which it is an exception." Their view has however never been espoused by the majority of the Court, which insists on using normative categories prior to Dworkin. For the Court, immunity is not a principle, or interest, but a rule whose scope of application can only be restricted by the emergence of an exception under customary international law. Such an approach led the ICJ to declare, in *Germany v. Italy*, that even an act constituting a grave breach of human rights such as torture shall be qualified as a sovereign act covered by immunity. Under the axiomatic approach, this conclusion is inevitable, because the only accepted exception to immunity is the commercial one, and torturing someone is not a commercial act. Under the balancing approach, however, a judge could have weighed the interest of the State to be immunized against the interest of the victims of torture to have access to a court (which is protected by international law). This may have led to a different conclusion.

This methodological issue, which has formed the object of a doctrinal debate concerning the relationship between State immunity and human rights, might be of interest also with regard to public debt. Indeed, if one accepts the applicability of the balancing approach, there is no reason why the necessity to protect debtor States from speculators shouldn't be taken into account to restrict the scope of application of the commercial exception to immunity. To be sure, this is not just academic speculation. When affirming that in proceedings concerning public debt "exceptions [to immunity] should be restrictively interpreted", the UN General Assembly's *Basic Principles on Sovereign Debt Restructuring*seem to move along a similar line of reasoning. It should be noted, in fact, that under the axiomatic approach there would be no space to "restrict" or "expand" the scope of application of either the rule or the exception based on the interests at stake; on the contrary, the judge should ignore underlying interests and values, focusing exclusively on the formal nature of the act at stake, and less frequently on its purpose. Even without mentioning the balancing method, therefore, the *Basic Principles* seem to exhort the courts of UN member States to mitigate the rigidity of the rule/exception dichotomy by means of a policy-oriented interpretation of international law.

Such a methodological approach would allow national and international judges to weigh the interests of creditors against the social consequences of States' lack of resources, which may include the violation of human rights. As noted by Cephas Lumina, former UN Independent Expert on foreign debt and human rights, "under international human rights law, States have the primary responsibility for ensuring that all people under their jurisdiction enjoy basic human rights, such as the rights to health care, education, food, safe drinking water and adequate housing. Thus, Governments should not be placed in a situation where they are unable to ensure the realization of basic human rights because of excessive debt repayments" (pp. 292-293). Reducing the States' financial margin of manoeuvre cannot but have an impact of human rights. For this reason, continues Cephas Lumina, "it may be contended that States' responsibility to ensure the enjoyment of basic human rights may take priority over their debt service obligations, particularly when such payments further limit the ability of States to fulfil their human rights obligations" (ibid., p. 293). Along a similar line, the restrictive interpretation of the commercial exception

could be justified as a consequence of the particular importance (and normative weight) acquired by human rights in the international law system.

Many of these considerations apply also with respect to immunity from enforcement. In this regard, it is interesting to note that although such immunity constitutes an almost insurmountable barrier for most creditors, “lawsuits against defaulting States have proliferated” (Viterbo, p. 63). As hinted by Viterbo, this might be the result of a speculative practice consisting in using the threat of “endless litigations” as an instrument to force the debtor State to repay the creditors’ claim in full or “even abstain from defaulting” (p. 63). Remarkably, this strategy is based on the exploitation of extra-legal dynamics to circumvent the legal obstacle of immunity. Indeed, the mere fact of instituting a proceeding “drives sovereign credit ratings downwards, negatively influencing bond pricing and debt restructuring negotiations” (ibid.), thus increasing the bargaining power of the claimants. As Viterbo points out, “a way to counter this strategy would be to temporarily grant debtor States greater immunity from enforcement” or, as suggested by the UN Technical Study Group, to “expan[d] the scope of sovereign immunities like immunizing payment systems, in order to deter disruptive litigation that harms both debtor countries and cooperating creditors of those countries”. The problem, however is that “it is difficult to imagine what legal instrument can provide such a strong layer of protection” (ibid.). This observation certainly captures the state of the art in international law, but also shows (once again) the consequences of conceiving of immunity as a rule rather than a principle. If lawyers (especially judges) regarded immunity as an “interest which in certain circumstances prevails over another interest”, perhaps such “strong layer of protection” could be achieved by means of interpretation, i.e. by recognizing that in certain cases the interests underlying immunity (preservation of State’s ability to ensure the realization of basic human rights) have in international law a greater normative importance than those underlying the exercise of jurisdiction.

In conclusion, the way in which State immunity is applied can tell us something about the scale of values of the society in which we live. It is striking, for instance, to note that despite the rhetoric of human dignity in international law, the international community rejects the possibility of a “human rights exception” to immunity but accepts the commercial exception. The individual

interest to make profit seems to able to impose itself in society without needing bombastic statements or heartbreaking speeches, whereas social and economic rights are often treated as slogans rather than moral and legal imperatives that should be implemented in practice. It is also striking to observe that immunity can be circumvented through the dynamics of financial markets, so much so that one could wonder about the actual normative value of international law in our society, especially if compared to market normativity. These are just few of the thoughts that sprang to my mind while reading the section on immunity of Annamaria Viterbo's book. I have always thought that when analyzing international law, one should never allow technical considerations to obscure the big picture. Viterbo's book respects this rule. For this reason, reading it is not only an informative exercise, but also an intellectually stimulating one.

View online: Some Considerations on State Immunity and Sovereign Debt

Provided by Afronomicslaw