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THE PRINCIPLE OF THE JURISDICTIONAL IMMUNITIES OF STATES: FROM NORMATIVE TO JURISPRUDENTIAL PERSPECTIVE

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SUMMARY

In the paper, the author tried to present the essence of the principle of the jurisdictional immunities of states from normative to jurisprudential perspective. Particularly, it was made an analysis of the main normative instruments enshrining that principle of customary origin, as well as there were passed in review early cases solved by the International Court of Justice in which magistrates had settled on its implications regarding the immunity recognized to the Head of the state, as the representative of the State at the highest level, and to the Minister of Foreign Affairs in office.

Key-words: *principle of jurisdictional immunity, state, normative sources, case law, International Court of Justice, Head of the State, impunity.*

PRINCIPIUL IMUNITĂȚII DE JURISDICȚIE A STATELOR: DIN PERSPECTIVĂ NORMATIVĂ LA CEA JURISPRUDENȚIALĂ

SUMAR

În prezentul articol, autorul a încercat să prezinte esența principiului imunității de jurisdicție a statelor din perspectiva normativă și jurisprudențială, în special efectuând o analiză a principalelor instrumente normative care consacră respectivul principiu de origine cutumiară, precum și trecând în revistă cauzele timpurii soluționate de Curtea Internațională de Justiție, în care magistrații s-au pronunțat asupra implicațiilor lui cu referire la imunitatea recunoscută unui șef de stat, ca reprezentant al statului în cel mai înalt grad, și unui ministru de externe în exercițiu.

Cuvinte-cheie: *principiul imunității de jurisdicție, stat, surse normative, jurisprudență, Curtea Internațională de Justiție, șef de stat, impunitate.*

The principle of the jurisdictional immunity of states, the legal rule based on the sphere of the applicability of the recognized principle of the sovereign equality between states and the inadmissibility of interference in the internal affairs of a plenipotentiary state-subject of international public law, in the 20th and 21th centuries found a new expression, sufficiently legally and politically determined.

The principle of the immunity from jurisdiction of the states derives from the fundamental principle of the international public right of sovereign equality of states as classical plenipotentiary subjects in the international relations, being found its first conceptual approaches still in the Roman gentle law (*jus gentium*). In fact, the term of "immunity" derives from the Latin words „immunus" and „immunitas", that mean „to be free, to be released" and respectively, "freedom".

The rule of jurisdiction of the immunity has been asserted as a norm of customary law, acknowledged and respected by the states in the relations between them, only in the 20th century. The rule has acquired a conventional expression on May 16, 1972, with the adoption of ***the European Convention on the Immunity of the State***, in force since 11 June 1976 [8], and four decades later, on 2 December 2004, ***the United Nations Convention on the Judicial Immunities of the States of their properties***, not in force [11].

The principle of the judicial immunity of a foreign state in public international law differs from the state's immunity from being defended by natural or legal persons in its own courts. In the latter case, the determination of the jurisdictional immunity belongs exclusively to the competences of that state and is determined by its national law and relevant international treaties to which it is part. At the same time, the immunity of a foreign state also differs from the immunity recognized and guaranteed to an international organization, although both categories of immunities denote similar legal bases [12, p. 176].

In order to define the principle of the states' immunity of jurisdiction, it is appropriate to briefly present

its approaches according to the international and internal conventions of some states. In this regard, ***the United Nations Convention on Jurisdictional Immunities of States and their properties*** establishes that a State enjoys immunity from jurisdiction in the courts of another State in regards to state and its property. A State should respect the principle of the immunity from jurisdiction of other States within the court proceedings before its courts, the conceptual meaning of judicial process initiated against another State assumes a case where the immune state is invited as part of; or the property, rights, interests or activities of that State may be affected by the respective cause.

According to ***the Comments of the Draft of the International Law Commission (ILC) about the jurisdictional immunity of the States and their property,*** the immunity from jurisdiction implies the privilege of liberation, suspending or lack of competencies to exercise the jurisdiction by the territorial jurisdiction of another State, against which it is submitted a lawful action. Also, the term "judicial immunity" refers not only to the privilege of the state not to be subjected to the exercise of the power to judge, as it is usually attributed to a judicial body or a magistrate of the state, but also to the exercise of any other administrative or executive powers or any other measure and procedures related to the trial [7].

Consecutively, ***the European Convention on State Immunity*** does not expressly define the principle of judicial immunity, and does not list its characters, but prescribes the legal situations in which the rule of immunity cannot be invoked, namely disputes relating to: commercial transactions, labor contracts, causing injury to the person or to property, establishment of ownership and use of immovable property, establishment of ownership of property in accordance with succession and donation, protection of intellectual and industrial property rights, participation in the founding or management of commercial companies, the exploitation of maritime ships, arbitral cases.

Analyzing legal provisions of some states where the principle of judicial immunity it is expressly recognized, it is found that in 1976 the US Congress adopted ***the US Foreign Sovereign Immunities Act*** [10], in which it was established that foreign states enjoy immunity from jurisdiction before the US courts, with certain exceptions. Essentially, these exceptions referred to the commercial activity in which the respondent State is involved, actions on liability arising out of damages and counter-claims from individuals if the foreign state directly sues in US law. In 2006, the terrorist state exception was introduced, according to which, in case of the submitting of the request for compensation for damage caused by acts of terrorism produced outside the United States, and the respondent State is recognized by the State Department as a terrorist financing agent, he will not benefit from legal immunity. Consequently, four countries in the world are considered as finance terrorism (Cuba, Sudan, Syria and Iran) [2, p. 221].

In its turn, ***the United Kingdom State Immunity Act*** from 1978 [9] provides in the Article 1 that a State benefits from the immunity of jurisdiction before the British courts with certain exceptions. At the same time, it is emphasized that the court will apply the rule of immunity from jurisdiction of the office, even if the defendant foreign state does not appear in the process and does not expressly request it. Within the art. 13 of the same law, other procedural privileges are established, namely: the inadmissibility of the application of judicial fines to the respondent State, which refuses to present any evidence or to disclose information in the proceedings; the impossibility of issuing judicial orders oriented against the properties of the foreign state; the impossibility of executing court decisions on the confiscation, possession or alienation of property belonging to the foreign state. In particular, Article 14 of the law expressly establishes that the recognized privileges and immunities are applicable to any foreign state or member of Commonwealth State, as well as to the Head of State in its capacity as a public authority, to the Government and to any government department.

In the same vision, ***the Australian Foreign States Immunities Act*** from 1985 [1] stipulates in Article 9 that foreign states benefit from the immunity from jurisdiction before the Australian courts in judiciary proceedings, except as provided by the law. Among these exceptions are listed: commercial transactions, employment contracts, damages, property rights, intellectual property, participation in transnational corporations, property retention, bills of exchange, taxes and fees.

As we see, the international and internal normative sources establish similar exceptions from the applicability of the principle of the immunity of the jurisdiction of states.

In terms of the situation of our state, we mention that ***the Civil Procedure Code of the Republic of Moldova*** [6] stipulates in art. 457 par. (1) in the case of proceedings with a foreign element, that bringing an action in the court of the Republic of Moldova to another state, involving it in the process as a defendant or an intervener, seizure of his property placed on the territory of the Republic of Moldova or the taking actions against property by applying other measures to secure the action or seizure thereof in the enforcement procedure could be made only with the consent of the competent bodies of that state if the national law or the international treaty to which Moldova is part of, does not provide otherwise.

Thus, the national legal framework establish the

rule of immunity from the jurisdiction of the foreign state, exceptions of which are governed by the special laws or by the provisions of the international treaties to which both states are part of. Although the abovementioned normative acts (international and internal/national) do not develop a clear definition of the principle of the immunity from jurisdiction, they allow to determine the concrete framework of its applicability and to reveal the characteristics that are inalienable.

The principle of the immunity of the jurisdiction of the states represents a certain expression not only according to the international instruments that regulate it or the doctrinal sources that give it a distinct prominence, but also in the light of the relevant case lawdeveloped by international forums. The principal approaches, arguments and comments made by international magistrates form a solid legal basis to define as precisely as possible the concept of jurisdictional immunity and to set out the particular framework in which it is applicable.

Analysing the principle of the jurisdictional immunity from a jurisprudential perspective, there could be seen that the International Court of Justice had developed notorious judicial practice in which that principle found its clear expression. It is to be noted that a new approach of the principle is found in the jurisprudence of the ICJ since 2000, the reasoning of the senior magistrates culminating in the revolutionary decision in the case of ***Jurisdictional Immunity of the State (Germany v. Italy, Greece intervening)*** [5], but that judgement is not the object of the present research.

It is striking that the jurisdictional immunity of a state can be viewed not only from the perspective of the state *per s*e, but also in the context of the immunity enjoyed by a high rank dignitary (official), as is natural Head of state, representative of the state in the highest level on the international arena, and more rarely, Minister of government.

The first case in which the IJC approached in a complex manner the issue of the principle of jurisdictional immunity is ***concerning the arrest warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*** [3], which referred to the immunity of the incumbent Foreign Minister. In fact, on April 11th 2000, an investigative judge of a court in Brussels issued an „International arrest warrant in absence" against Mr Abdulaye Yerodia Ndombasi, accusing him, as author or co-author, of crimes that constituted serious violations of The Geneva Conventions of 1949 and of the Additional Protocols thereto, as well as the crimes against humanity. At the time when the arrest warrant had been issued, Yerodia was Congolese Minister of Foreign Affairs.

The arrest warrant was handed over to the State of Congo on 7 June 2000 and was received by the Congolese authorities on July 12th 2000. According to Belgium, the mandate was, at the same time, sent to the International Police Organization (Interpol), this way being delivered at international level.

According to the arrest warrant, Yerodia was accused of the fact that his public speeches in August 1998 incited to racial hatred. These offenses are punishable in Belgium under the Law of June 16th 1993 „regarding the punishment of serious violations of the International Geneva Convention of August 12th 1949 and Protocols I and II of June 8th 1977 additional to it" as fined by the Law of February 10th 1999 „regarding the punishment of serious violation of international humanitarian law".

Article 7 of the Belgian law provided that Belgian courts were competent regarding to the offenses provided by this law, whichever was committed. In this case, according to Belgium, the complaints under which the arrest warrant was issued came from 12 persons domiciled in Belgium, of whom five were of Belgian nationality.

However, Belgium did not dispute that the alleged acts covered by the arrest warrant were committed outside Belgian territory, that Yerodia was not a Belgian citizen at the time of those events and that he was not in Belgium at the time of the issue of the arrest warrant. The fact that no Belgian citizen was victim of the violence resulting from Yerodia's alleged crimes had also been challenged. Article 5 (3) of the Belgian law provides that immunity from the official capacity of a person shall not prevent the application of this law.

On October 17th 2000, Congo seized the IJC, requesting the Court to declare that the Kingdom of Belgium should cancel the international arrest warrant issued on April 11th 2000. Congo invoked in its application two separate legal grounds. Firstly, it was argued that the universal competence which the Belgian State attributes pursuant to Art. 7 of the law in question constituted a violation of the principle that a state could not exercise its authority in the territory of another State and the principle of sovereign equality between members of the United Nations in accordance with art. 2 (1) of the Charter of the United Nations.

Secondly, it was argued that the non-recognition under Art. (5) of the Belgian law, of the immunity of a foreign minister in office constituted a breach of the diplomatic immunity of the Minister of Foreign Affairs of a sovereign State, as recognized by the case law of the Court and resulting from Art. 41 (2) of the Vienna Convention of 18 April 1961 on Diplomatic Relations.

Developing legal rationale, the International Court of Justice noted that international law firmly established that, as well as diplomatic and consular agents, certain high-ranking officials such as Head of state, Head of the Government, and Minister of foreign affairs, enjoy immunity from the jurisdiction of other states, both civil and criminal.

Examining the role of minister in a state, the IJC has determined that the functions of the Minister of Foreign Affairs are such that, throughout his term of office, he or she, abroad, enjoys full immunity from criminal jurisdiction and inviolability. This immunity and inviolability protect the person concerned against any act of authority of another State that would prevent from performing his/her duties.

As regarding Belgium's argument that the immunities accorded to current ministers of foreign affairs can in no way protect them in the situation where they are suspected of having committed war crimes or crimes against humanity, the Court carefully examined the practice of states, including national legislation and several decisions of higher national courts such as the House of Lords or the French Court of Cassation. From this practice, it was not possible to deduce, under international law, any forms of exception to the rule of granting immunity from criminal jurisdiction and inviolability to ministers of foreign affairs if they are suspected of committing war crimes or crimes against humanity. The Court also examined the rules governing the immunity to persons with official capacity included in legal instruments establishing international criminal tribunals and which are particularly applicable to the latter. It found that those rules also did not allow it to conclude that there was such an exception in customary international law as regards national courts at the time of the examination of the application.

Additionally, the IJC noted that the rules governing the jurisdiction of national courts should be carefully differentiated from those governing jurisdictional immunities: jurisdiction did not imply a lack of immunity, while the absence of immunity did not imply competence. Although various international conventions for the prevention and punishment of certain serious criminal offenses impose obligations on the states for criminal prosecution or extradition, thus requiring the extension of their criminal jurisdiction, this extension of jurisdiction did not in any way affect the immunities of customary international law, including the immunities of ministers of foreign affairs. They remain opposable to the courts of a foreign state, even if those courts exercise such jurisdiction under these conventions.

However, the Court emphasized that the immunity from jurisdiction enjoyed by foreign ministers did not mean that they enjoy impunity in respect of the offenses they would have committed, irrespective of their gravity. The immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. Although judicial immunity is of a procedural nature, criminal liability is a matter of substantive law. Jurisdictional immunity may be removed in criminal proceedings for a certain period or for certain offenses; immunity can not exonerate the person to whom criminal liability applies.

Thus, the immunities that are benefited from under international law, by a current or former Minister of Foreign Affairs, do not constitute an obstacle to prosecution in certain circumstances.

Such persons do not benefit of a criminal immunity under international law in their countries and can therefore be judged by the courts of those countries in accordance with the relevant rules of the internal law. More than that, they will cease to enjoy immunity from foreign jurisdictions if the state they represent or represented decides to relinquish this immunity.

Once a person ceases to hold office as Minister of Foreign Affairs, he will no longer benefit from the immunities accorded by international law to other states. Provided that it has jurisdiction under international law, a court of a state may judge a former Foreign Minister of another State for acts committed before or after his term of office, as well as for acts committed privately during that period.

Finally, a current or former Minister of Foreign Affairs may be subjected to criminal proceedings before certain international criminal tribunals, if they have jurisdiction and are competent to judge – the International Criminal Court, the International Criminal Tribunal for former Yugoslavia, the International Criminal Tribunal for Rwanda.

In the same vein, the IJC noted that the issue of the arrest warrant is an act of the Belgian judicial authorities that was aimed at allowing the arrest of a current Minister of foreign affairs of another state on the territory of Belgium on the basis of the war charge of crimes and crimes against humanity. The fact that the warrant is enforceable clearly results from the order given to all bailiffs of the court and agents of the public authority to execute this arrest warrant and from the statement in the mandate according to which the office of Minister of Foreign Affairs currently held by the accused does not imply immunity of jurisdiction and enforcement. The Court noted that the mandate certainly made an exception in the case of an official visit by Mr Yerodia to Belgium and that he had never been arrested or detained in Belgium. However, the ICJ had to find that, given the nature and purpose of the mandate, its mere issuance violated the benefiting immunity by Yerodia as Congo Foreign Minister. Consequently, the IJC concluded that the issuance of the mandate and, in particular, its transmission to Interpol constituted a violation of Belgium's obligation towards Congo by failing to respect the immunity of Minister Yerodia and, in particular, violated the immunity from criminal jurisdiction and inviolability he was benefiting in accordance with international law.

In another ***case concerning certain questions of mutual assistance in criminal matters (Djibouti v. France)*** [4], the ICJ also addressed aspects of the immunity principle in terms of the immunity enjoyed by the Head of State, the circumstances being particular.

In this case, on 19 October 1995, the lifeless body of judge Bernard Borrel, a French citizen who was seconded as technical adviser to Djibouti Ministry of Justice, was discovered 80 km from Djibouti. Because some aspects of Borrel's death remained inexplicable, the Prosecutor of the Republic of Djibouti initiated a judicial investigation on 28 February 1996 in the cause of the French judge's death; this investigation has concluded on suicide and was closed on 7 December 2003.

In France, a judicial inquiry to determine the cause of Judge Borrel's death was opened on 7 December 1995 by a court in Toulouse. On March 3, 1997, Borrel family filed an action as a civil party based on the same facts and, following additional medical reports that questioned the suicide hypothesis, a judicial inquiry was opened on 22 April 1997 for the murder of Bernard Borrelat the tribunal in Toulouse. These two proceedings were joined on 30 April 1997, the case being referred to a court in Paris. Within these investigation procedures, one of the witnesses (Mohamed Saleh Alhoumekani, former Djibouti presidential guard officer) said that several Djibouti citizens, including Ishmael Omar Guelleh, President of the Republic of Djibouti, and Hassan Gouled Aptidon, at that time, principal private secretary of the President of the Republic of Djibouti, were involved in the assassination of Bernard Borrel.

During the official visit of the Djibouti Head of State to Paris, officer in charge of the Borrell case sent a summon to Djibouti's witness on 17 May 2005 by fax to the Djibouti Embassy in France, inviting him to appear in court at 9.30 the next day, May 18, 2005. Ambassador Djibouti to Paris sent a letter to the French Foreign Minister to protest, describing the summon as null and void in content and form, calling for the necessary action against the investigating magistrate. Djibouti deduced from the lack of excuses and from the fact that it was not declared null, the attack on the immunity, honour and dignity of the Head of state continued. Djibouti added that France must have taken preventive measures to protect the immunity and dignity of a head of state who was on its territory on an official visit, relying on Article 29 of the Vienna Convention on Diplomatic Relations. For Djibouti, France had been held responsible for illicit acts at international level, consisting of violations of the principles of international politeness and of the customary and conventional rules on immunities.

Two years later, on February 14th 2007, diplomatic channels followed a second summon addressed to the President of Djibouti to appear before the French court, published in the local press.

In the case, the Court found that the summons to the President of the Republic of Djibouti by French investigative magistrate on May 17th 2005 was not associated with the coercive measures provided by Article 109 of the French Code of Criminal Procedure; in fact, it was just an invitation to testify that the head of state could accept or refuse freely. As a result, there was no attack on the immunity from criminal jurisdiction enjoyed by head of state, since no obligation was imposed on the Borrel case.

However, the ICJ noticed that the investigative judge addressed the Djiboutian president's summons, without taking into account the official procedures provided byArticle 656 of the French Code of Criminal Procedure, quoting that written statement of the representative of foreign power, thus considering that by inviting a head of state to give testimonies by simply sending a fax and setting a very short deadline without consultation to appear, the judge did not act in accordance with the courtesy. In addition, the French law takes into account the requirements of international favour in establishing specific procedures for testimonies of representatives of foreign powers, for example by demanding that all requests for declarations will be sent via the Minister of Foreign Affairs and that the declaration will be received by the first President of the Court of Appeal. In the Court's view, it was regrettable that these procedures were not followed by the investigative judge and that, while aware of this fact, the French Ministry of Foreign Affairs did not offer excuses to the President of Djibouti.

The Court took note of all official defects in accordance with French law concerning the summons to the Head of State of Djibouti on May 17th 2005; however, considered that the case did not in itself reveal a violation by France of its international obligations regarding immunity from criminal jurisdiction and inviolability of foreign Heads of State. However, as already mentioned, France owed an excuse to Djibouti.

As regards to the second summon sent to the President, Djibouti considered that this was done in accordance with the procedure set out in Article 656, but contested the appropriateness of the time chosen by the investigative judge to undertake this action. Djibouti reminded that the second witness summons was issued on February 14th 2007, when the President of Djibouti was in France for the 24th African and French Heads of State Conference to be held in Cannes at 15th and 16th February 2007. In Djibouti's opinion, the investigative judge found the best time to get coverage of his application in the media. As for the Ministry of Foreign Affairs of France, Djibouti considered that he could have waited until President Ismael Omar Guelleh

returns home before submitting a petition to testify in writing. Moreover, Djibouti said that the judiciary informed the press at a very early stage, as information was reported on the same day, February 14th 2007, by several news agencies, some of which indicate that they received from „judicial sources". In any case, Djibouti considered that the President had been placed in a situation „which was obviously an embarrassment, especially since the respondent did not consider it necessary to apologize" and that, consequently, France did not sought to repair "damage to the immunity, honour and dignity of President Djibouti".

The IJC decided that the invitation to give testimony to the President of Djibouti of 14 February 2007 was issued following the procedure provided for in Article 656 of the French Code of Criminal Procedure and therefore in accordance with French law. The consent of the Head of State is expressly requested in this testimony act, transmitted through the authorities and in the form prescribed by law. Thus, this measure could not violate the immunity from jurisdiction enjoyed by the Head of the Djiboutian state. In addition, the Court did not consider that an attack on the honour or dignity of the President had taken place only because that summons was sent to him when he was in France to attend an international conference.

Conclusions. The principle of jurisdictional immunities of state, though it is of customary origin and is based on the very early comity relations between states as between equals, nowadays knows new trends in development and affirmation. The 20th century marked a new period of incorporation of that principles in the text of legal instruments of international character (conventions) as well as national one (acts and laws, especially in the common law system). Also, in the 21th century that customary principle, due to its practical application, was also passed in review by international forums, a special place in this row being occupied by the International Court of Justice and two early cases solved in which the jurisdictional immunity of state had been evaluated on the basis of Head of the state and the Minister immunity. Undoubtedly, early case law created strong premises for the ICJ to establish its complex legal rationale in last case on that topic – *Jurisdictional Immunity of the State (Germany v. Italy, Greece intervening)*.

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