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PRAXIS · GUIDE

International immunities: a practical guide

Hennebel Avocats Modus Operandi

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IMMUNITIES, DIPLOMATIC PROTECTION AND SOVEREIGN DEFENCE

Before you read on, contact the firm in confidence if an incident is in progress.

Crisis Room - Praesidium
Attachment of an embassy account, the arrest or summons of an official with protected status, a search affecting protected premises or service of proceedings on a State calls for an immediate, confidential legal assessment. Reading the guide in full can wait. Urgent matters receive priority (Crisis Room). Encrypted channels are available (Signal, Threema). *This guide cannot replace a legal consultation. It provides guidance, while decisions depend on the individual case.*

Urgent contact

Operational summary

International immunities do not form a single body of uniform rules. They comprise distinct regimes - the State's immunity from jurisdiction, the immunity of its property from execution, the personal immunity of the highest-ranking incumbent office holders, the functional immunity of former office holders and officials, diplomatic and consular immunities, and the immunities of international organisations - each with its own sources, conditions and exceptions. Confusion between these regimes is a frequent cause of failure on both sides. Examples include challenging diplomatic immunity on grounds applicable to State immunity, or assuming that a judgment against a State gives access to its assets. This guide addresses both positions because sophisticated immunity litigation turns on the contest between them. The same body of law serves both to uphold immunity and to overcome it.

The guide advances three propositions. First, the restrictive doctrine prevails in civil and commercial matters - the State enjoys protection for its sovereign acts, but not for acts of a private-law character - and the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted but not yet in force as at 30 October 2026, is widely regarded as largely codifying customary law on this point. In practice, the debate is now rarely about the principle itself. It concerns the characterisation of the act in dispute and the application of the exceptions, foremost among them contracts of employment - on which the European Court of Human Rights gave guidance in *Cudak v. Lithuania* (2010) and *Sabeh El Leil v. France* (2011) - and the territorial tort exception.

Second, immunity from execution presents a separate and more difficult contest than immunity from jurisdiction. It determines the actual economic value of an enforceable instrument. A judgment or award against a State is worth only as much as the assets available for attachment. In France, Articles L. 111-1-1 to L. 111-1-3 of the Code of Civil Enforcement Procedures, introduced by the 2016 "Sapin II" Act, tightened the rules. Any protective measure or measure of compulsory execution against property of a foreign State requires prior judicial authorisation, and property used in the performance of diplomatic functions requires an express and specific waiver. A party that has failed to plan for enforcement when drafting the contract or commencing proceedings enters the second contest equipped only for the first.

Third, in criminal matters the dividing line lies between the personal immunity of incumbent senior office holders - emphatically affirmed by the International Court of Justice in its *Arrest Warrant* judgment of 14 February 2002 - and the functional immunity of former office holders and officials. The scope of the latter in cases involving international crimes remains one of the most contested issues in contemporary international law, from the House of Lords' decision in *Pinochet (No. 3)* in 1999 to the French Court of Cassation's judgments of 25 July 2025 and the draft articles adopted on second reading by the International Law Commission in 2026. Counsel who presents the question as settled in either direction will lose credibility before any exacting court.

The steps follow the strategic sequence of litigation. First, map the immunities at issue (step 01), establish the rules governing State immunity from jurisdiction and its exceptions (step 02), then address execution (step 03). Next come personal and functional immunities - incumbent office holders, former office holders, diplomats and consuls (steps 04 to 06) - followed by international organisations (step 07) and international criminal courts (step 08). The guide then considers how to challenge immunity and where competing rules meet - the claimant's strategy (step 09), access to a court under Article 6 of the European Convention on Human Rights (step 10), and contractual clauses (step 11) - before turning to the management of actual incidents (step 12).

Executive briefing: a decision in ten minutes

Executive decision. Identify the applicable regime before making submissions. State immunity from jurisdiction, immunity from execution, personal and functional immunities, diplomatic or consular privileges and the immunities of international organisations differ in their beneficiaries, sources and exceptions. A ruling against a State does not automatically give access to its assets. In criminal matters, the distinction between incumbent office holders and former officials remains decisive. Some questions remain

legally contested, including the exception for crimes under international law. The draft articles adopted by the International Law Commission in 2026 do not constitute a treaty.

Desired outcome. Establish who is protected, against which measure and on what legal basis, then determine how jurisdiction, execution, contractual clauses and diplomatic considerations fit together.

Sequence of action

- **Map** Identify the defendant, the beneficiary, the functions, the date, the proceedings, the property, its use and the relevant clauses. Output: the applicable regime.
- **Distinguish** Separate jurisdiction from execution, sovereign acts from acts of a private-law character, and personal immunity from functional immunity. Output: the appropriate legal argument.
- **Plead** For the defence, raise immunity in time. For the claimant, identify an exception, a waiver, a commercial asset or an alternative forum. Output: a procedural position.
- **Manage the incident** Coordinate the response before the court, with the diplomatic authorities and with the organisation concerned in the event of attachment, police custody or a search. Output: an intervention plan.

Critical mistakes

- Confusing immunity from jurisdiction with immunity from execution.
- Treating a State, its central bank, its embassy and a State-owned enterprise as a single debtor.
- Presenting the scope of functional immunity as settled. In France, under the judgments of 25 July 2025, it gives way in cases of genocide, crimes against humanity and war crimes, but remains available in principle where torture is prosecuted as a separate offence.
- Allowing a protected official to answer questions on the substance before establishing the official's status.

Questions for decision-makers

- Which characterisation of the defendant and of the act will withstand scrutiny by the court of the forum?
- Which asset would make a decision enforceable in practice without infringing a specific protection?
- What judicial and diplomatic outcome should be pursued simultaneously?

This briefing provides initial guidance. It cannot replace an analysis of the case file or verification of the law applicable at the time of the proposed action. The twelve steps below give the details.

01

Mapping the immunities at issue: six regimes, two questions

Timing for the reader: **immediately, before taking any procedural step** · At stake: choosing the wrong regime undermines the entire strategy

Every immunity case begins with an exercise that practitioners neglect at their peril: identifying precisely *who* is protected, *under which regime* and *against what*. International law recognises at least six distinct categories of immunity. State immunity from jurisdiction protects the State itself - and, to an extent disputed across legal systems, its constituent units and instrumentalities - against the adjudicative authority of foreign courts. Immunity from execution protects its property against measures of constraint, including protective attachment. Personal immunity (*ratione personae*) protects a narrow group of senior representatives - the head of State, head of government and minister for foreign affairs - throughout their term of office and in respect of all their acts, official or private. Functional immunity (*ratione materiae*) covers acts performed in an official capacity by State representatives and officials, and survives the end of their term of office. The Vienna Conventions of 1961 and 1963 govern diplomatic and consular immunities. Their provisions are precise, and applying them requires, first and foremost, careful attention to their wording. Finally, the immunities of international organisations derive from specific treaties - the 1946 Convention on the Privileges and Immunities of the United Nations and headquarters agreements - independently of the customary law applicable to States.

Two distinctions cut across these categories and govern the rest of the analysis. The first is between jurisdiction and execution. Persuading a court that it has jurisdiction is one victory. Securing payment is another, and the law governing execution affords the State appreciably greater protection than the law governing jurisdiction (step 03). The second is between civil and criminal matters. The restrictive doctrine governing civil and commercial matters cannot simply be transposed to criminal proceedings, where the current case law of the International Court of Justice recognises no exception to the personal immunity of incumbent senior office holders before foreign national courts (step 04). Confusing these questions - invoking criminal-law solutions in civil proceedings, or vice versa - is a common error among litigators unfamiliar with this field.

Mapping the immunities also requires mapping their sources. Customary international law predominates. Its most comprehensive codification is the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property. Adopted by the General Assembly in 2004, the Convention had not entered

into force as at 30 October 2026 because it had not received the thirty instruments of ratification, acceptance, approval or accession required by Article 30 (the United Nations Treaty Collection publishes the current status). It is nevertheless widely regarded - including by international and national courts - as largely reflecting customary law in civil matters. It therefore provides a framework for analysis rather than applicable treaty law. Other sources include treaties in force (the Vienna Conventions of 1961 and 1963 and the 1946 Convention), domestic legislation - France has legislated on execution in Articles L. 111-1-1 to L. 111-1-3 of the Code of Civil Enforcement Procedures - and leading international decisions. These include the International Court of Justice's judgment of 3 February 2012 in *Jurisdictional Immunities of the State (Germany v. Italy)* on State immunity, its 2002 *Arrest Warrant* judgment on personal immunities, and the case law of the European Court of Human Rights on the tension between immunity and access to a court.

Finally, the purpose of mapping is primarily strategic. A party invoking immunity must raise it at the right time and in the manner required by the forum. A waiver, participation on the merits, even subject to a reservation, or a longstanding contractual clause may undermine the plea. Before bringing proceedings, the party challenging immunity must identify the weakness in the opposing party's position: an act capable of being characterised as one of a private-law character, an asset used for commercial activity, a waiver buried in financial documentation or an alternative forum. For either party, this assessment precedes the contest.

What to gather

The precise identity of the defendant or potential beneficiary of immunity (State, ministry, central bank, State-owned enterprise, diplomatic mission, organisation, or individual and the exact functions held on the relevant dates). The nature of the proceedings (civil, commercial, employment, criminal or enforcement proceedings). The full set of contractual documents and their provisions on governing law, jurisdiction, arbitration and waiver. A chronology of the acts in dispute and their possible characterisation (sovereign or private-law acts). A preliminary inventory of the assets concerned and their use. The state of diplomatic relations and of bilateral agreements between the States concerned.

What not to do

Bringing proceedings against a State without first analysing immunity, in the hope of "seeing what the court says". In addition to wasting time and incurring costs, announcing the claim hardens the other side's position. Appearing on the merits for a State without raising immunity in the first written submissions. Under Article 8 of the 2004 Convention, a State that has participated on the merits loses immunity. A reservation alone makes no difference, unless the State establishes that it could only have learned of the relevant facts later and invokes them without delay. Treating the central bank, embassy and State-owned enterprise as a single debtor. Each enjoys a different regime of protection. Overlooking the diplomatic dimension of the case, which comes to the fore with the first measure of constraint.

Key takeaway

Six distinct regimes, with two distinctions running through them: **jurisdiction / execution** and **civil / criminal**. Each immunity has its own sources, conditions, exceptions and beneficiaries. The initial assessment - who is protected, under what rule and against what - determines the entire strategy for claimant and defendant alike.

02

State immunity from jurisdiction: the restrictive doctrine and the application of its exceptions

Timing for the reader: **before serving proceedings or immediately upon service** · At stake: **the characterisation of the act determines jurisdiction**

The principle is familiar: *par in parem non habet imperium* - one State does not sit in judgment on its equal. Since the mid-twentieth century, however, prevailing practice has replaced absolute immunity with a restrictive doctrine. The State is protected in respect of acts performed in the exercise of sovereign authority (*acta jure imperii*), but not acts of a private-law character (*acta jure gestionis*), meaning acts that a private operator could have performed. The 2004 United Nations Convention - adopted but not yet in force, and widely regarded as largely codifying customary law - gives effect to this doctrine through a general rule of immunity subject to specified exceptions. These concern commercial transactions, contracts of employment, personal injury and damage to property in the territory of the forum, rights in property, intellectual property,

participation in companies, ships in commercial service and the effects of an arbitration agreement. In practice, litigation rarely turns on the principle itself. It turns on the characterisation of the act and the scope of each exception.

Characterising the act calls for a close analysis of its features. The predominant criterion is the nature of the act rather than its purpose. A contract to purchase equipment remains an act of a private-law character even if the equipment serves a sovereign purpose. The 2004 Convention looks primarily to the nature of the transaction, but allows its purpose to be considered if the parties have so agreed or if the practice of the forum State treats it as relevant (Article 2(2)). Legal systems differ as to the residual role of purpose. Counsel must therefore do more than invoke the distinction. They must assemble the evidence supporting their characterisation - the contractual documentation, the context of the transaction, the parties' conduct and the comparison with a private transaction - and anticipate how the law of the forum seised will characterise the act, since it is through that law that the court applies custom.

The exception for contracts of employment deserves particular attention because it is where employment courts most frequently encounter immunity and because it has given rise to important applications of Article 6 by the European Court of Human Rights. In *Cudak v. Lithuania* (Grand Chamber, 2010), and subsequently in *Sabeh El Leil v. France* (Grand Chamber, 2011), the Court held that granting immunity to a foreign State in an employment dispute involving a locally recruited embassy employee - a secretary and switchboard operator in the first case, an accountant in the second - had violated the right of access to a court. Their duties did not involve the exercise of governmental authority, and the immunity granted exceeded the requirements of international law. The Court relied in particular on the rules reflected in the 2004 Convention. The practical lesson applies to both parties. An employer State can no longer assert immunity as a matter of principle against locally recruited employees performing subordinate or technical duties. The defendant State nevertheless retains substantial grounds for claiming immunity where the dispute concerns recruitment, renewal of employment or reinstatement, or where the employee's duties involve the exercise of governmental authority.

The territorial tort exception appears in the 2004 Convention and in several national statutes. Article 12 concerns pecuniary compensation for death, personal injury or damage to tangible property where the act or omission attributed to the State occurred wholly or partly in the territory of the forum and its author was present there at the time. Applying this exception requires particular care in light of the International Court of Justice's judgment of 3 February 2012 in *Jurisdictional Immunities of the State (Germany v. Italy)*. The Court held that customary international law required recognition of Germany's immunity for acts of its armed forces during the Second World War, including before the courts of the territory where the damage occurred. It rejected the contention that the gravity of the alleged violations - even violations of peremptory norms - deprived the State of immunity. The judgment thus draws a clear distinction between the lawfulness of the act and immunity, a procedural rule. A claimant seeking to establish jurisdiction on the basis of a

territorial tort must therefore verify that the act in dispute falls outside the category of acts of armed forces in an armed conflict. More generally, the exception is directed primarily at ordinary insurable losses - accidents and property damage - and has more limited application to litigation over serious violations.

This framework has generated tensions. In judgment No. 238/2014, the Italian Constitutional Court declined to give domestic effect to the rule of immunity identified by the International Court of Justice in 2012. It relied on the right of access to a court under the Italian Constitution, reopening the way for judgments against Germany and measures against German property in Italy. This domestic resistance has sustained a prolonged dispute. In 2022, Italy established a compensation fund in place of measures of execution against German property for the claims concerned (Article 43 of Decree-Law No. 36/2022, upheld by the Constitutional Court in judgment No. 159/2023). Germany brought fresh proceedings before the International Court of Justice that year (*Questions of Jurisdictional Immunities of the State and Measures of Constraint against State-Owned Property*). Those proceedings were suspended at Germany's request by an order of 17 December 2024 and remained suspended as at 30 October 2026. The dispute must be understood on its own terms. It reveals a tension between a domestic constitutional order and international law as ascertained by the World Court - it does not establish a change in international law. Practitioners can cite it as evidence of the political fragility of the consensus. It offers no transferable precedent before a court faithfully applying customary law.

What to gather

For characterisation, gather the complete documentation of the disputed transaction (contracts, correspondence and administrative acts), evidence of its commercial nature or, conversely, its connection with the exercise of sovereign authority, and the case law of the forum on the distinction between private-law and sovereign acts. For an employment dispute, gather the contract, descriptions of the duties actually performed, the mission's organisational chart, the employee's nationality and residence, and the place of performance - all matters to which *Cudak* and *Sabeh El Leil* attach decisive weight.

What not to do

Arguing before a civil court that the gravity of a violation entails loss of immunity. The 2012 judgment in *Germany v. Italy* precludes that argument under current customary law, and advancing it weakens the credibility of the rest of the case. Invoking the 2004 Convention as an applicable treaty. It is not in force and carries weight only as a widely accepted reflection of customary law. Allowing the State to address the merits on the assumption that an express reservation suffices to preserve immunity. Article 8 of the 2004 Convention distinguishes participation on the merits from an appearance solely to invoke immunity.

Spotlight

Immunity is a **procedural** rule and must be determined before any examination of the merits. This is a central holding of *Germany v. Italy* (ICJ, 2012). Immunity neither renders the act lawful nor extinguishes the claim - it shifts the dispute to other forums, including the courts of the defendant State, arbitration, diplomatic protection and inter-State negotiation. The first step in challenging immunity is to choose a forum in which it does not apply.

Key point

As at 30 October 2026, the 2004 United Nations Convention had been **adopted but had not entered into force**. It may be invoked as a framework for identifying customary law - the European Court of Human Rights refers to it in *Cudak* and *Sabeh El Leil* - but does not apply as treaty law. The distinction directly affects how the case is pleaded. Counsel invokes "customary law as reflected in the Convention", while retaining the right to challenge the customary status of a particular article.

03

Immunity from execution: the second, decisive contest

Timing for the reader: **plan for execution when drafting the contract and when commencing proceedings** · At stake: the actual economic value of the enforceable instrument

A judgment against a State that cannot be enforced amounts to an opinion bearing an order for execution. International law draws a strict distinction between immunity from jurisdiction and immunity from execution. Waiver of the former does not entail waiver of the latter, and the conditions for taking measures of constraint are appreciably stricter than those for adjudication. The customary rules, largely reflected in the 2004 Convention, identify three circumstances in which post-judgment measures of constraint may reach the property of a foreign State. The State may have expressly consented. It may have allocated or earmarked property to satisfy the claim. Or, in the category of greatest practical importance, the State may specifically use or intend to use the property for purposes other than government non-commercial purposes, provided that the property is in the territory of the forum State and has a connection with the entity against which

the proceedings were directed (Article 19(c)). Before judgment, Article 18 requires express consent or the allocation or earmarking of property to satisfy the claim.

In France, the "Sapin II" Act of 9 December 2016 incorporated this regime into Articles L. 111-1-1 to L. 111-1-3 of the Code of Civil Enforcement Procedures, subject to two safeguards. The first is procedural. No protective measure or measure of compulsory execution may be taken against property belonging to a foreign State without prior judicial authorisation in a reasoned order made on application. The enforcement judge of the Paris Judicial Court has exclusive jurisdiction to determine the application, challenges to measures against movable property authorised by that judge, and proceedings for attachment of immovable property so authorised, except for immovable property in Bas-Rhin, Haut-Rhin and Moselle (Article R. 111-1 CPCE). If the application is refused, the creditor may appeal within fifteen days of the order being made. The appeal is lodged, examined and determined under the rules for non-contentious proceedings. The original order is presumed to have been delivered on that day. If applicants establish by any means that they became aware of it later, the time limit runs from that later date. A late appeal is inadmissible (Article R. 111-6 CPCE and Court of Cassation, Second Civil Chamber, 28 March 2024, No. 22-11.631). Every attachment is therefore subject to prior judicial scrutiny without notice to the State. The order, made without hearing the other party, is enforceable on production of the original alone (Article R. 111-3 CPCE). Where it authorises a protective measure, the authorisation lapses unless the measure is carried out within three months of the order. A creditor who has no enforceable instrument must institute proceedings or complete the formalities required to obtain one within one month of carrying out the measure, failing which the measure lapses. If a timely application for an order for payment is refused, the creditor may still bring proceedings on the merits within one month of refusal. For a surety falling within Article 2320 of the Civil Code, the first one-month period runs from the date of payment by the surety to the creditor (Articles R. 111-4, R. 511-6 and R. 511-7 CPCE). The creditor must serve on the third party against whom the attachment is made a copy of the documents evidencing the steps taken within eight days of their date, and notify the debtor of the protective attachment of debts within eight days of attachment. Failure to meet either deadline causes the measure to lapse (Articles R. 511-8 and R. 523-3 CPCE). The second safeguard is substantive. The creditor must establish that the property falls within one of the permitted categories (express consent, allocation of the property to satisfy the claim or, only where a judgment or arbitral award has been rendered against the State, use for purposes other than government non-commercial purposes and a connection with the entity against which the proceedings were directed, Article L. 111-1-2 CPCE). For property used or intended for use in the performance of the functions of diplomatic and equivalent missions, the waiver must be both **express** and **specific**, meaning that it must specifically identify that category of property. However carefully drafted, a general waiver of immunity from execution is therefore insufficient to reach an embassy account in France. For other State property, by contrast, the Court of Cassation holds that an express waiver of immunity from execution suffices without any requirement of specificity (Court of Cassation, First Civil Chamber, 13 March 2024, No. 21-17.599, concerning an aircraft assigned to the presidency of a foreign State), subject to

the special rules for property of foreign central banks (Article L. 153-1 of the Monetary and Financial Code) and, in all cases, to prior judicial authorisation.

Diplomatic property presents particular difficulties. In prevailing practice, mission bank accounts are presumed to serve the mission's sovereign purposes. The creditor bears the burden of proving that an account is not used for the mission's functions, yet ordinarily has no access to the mission's financial records. In France, property, including bank accounts, used or intended for use in the exercise of those functions may be attached only where there is an express and specific waiver (Article L. 111-1-3 CPCE). Proof of some commercial use therefore does not suffice to permit attachment of an account that also serves the mission. Mission premises are inviolable under Article 22 of the 1961 Vienna Convention, which also prohibits measures of execution against them. Many legal systems afford particularly strong protection to central bank property. In France, Article L. 153-1 of the Monetary and Financial Code provides that such property is in principle exempt from attachment. A creditor holding an enforceable instrument evidencing a claim for an ascertained amount that is due and payable may seek the enforcement judge's authorisation for attachment only upon establishing that property held or managed by the central bank for its own account forms part of a pool of assets that it allocates to a principal activity governed by private law. The 2004 Convention likewise lists central bank property among the specifically protected categories (Article 21). By contrast, commercial debts owed to the State by private operators, shareholdings in companies, certain immovable property outside the mission and sums owed to State entities acting as market operators provide genuine opportunities for attachment - provided that the requisite use and the connection with the debtor entity can be established.

Successful enforcement requires advance preparation. For the creditor, this means identifying and monitoring assets from an early stage (the assets available for attachment on the date of judgment will differ from those available when proceedings are served), drafting waivers in two parts - jurisdiction and execution - with specific reference to protected categories of property, choosing enforcement forums with established practice, and coordinating action across jurisdictions because the debtor State holds its assets in different places. For the defendant State, it means reviewing waivers granted in earlier financial documentation, exercising discipline in the use of accounts (strictly separating commercial flows from mission funds), responding immediately to any application for authorisation of which the State becomes aware, and making measured use of diplomatic protests to support the legal defence without displacing it. The Praxis guide to investments in situations of conflict examines the relationship with investment arbitration and the enforcement of awards in greater detail.

ILLUSTRATIVE CASE · EXECUTION

Attempted attachment of an *embassy account* following a commercial judgment

An anonymised scenario drawn from the published practice of enforcement courts and international case law.

Profile	A creditor holds a final judgment against a foreign State in a commercial dispute in which the court rejected immunity from jurisdiction (act of a private-law character). The State does not comply voluntarily.
Mechanism	The creditor attempts to attach the bank account of the debtor State's embassy in the forum State on the ground that the account is allegedly also used for commercial transactions.
Grounds invoked	The distinction between jurisdiction and execution. The presumption that mission accounts serve sovereign purposes. Article 21(1)(a) of the 2004 Convention as a reflection of customary law. In France, the requirement of prior authorisation from the enforcement judge of the Paris Judicial Court and, for mission property and bank accounts, an express and specific waiver (Articles L. 111-1-1 to L. 111-1-3 and R. 111-1 CPCE).
Typical outcome	In the absence of an express and specific waiver, the attachment is lifted in the State's favour unless the creditor establishes that the account is neither used nor intended for use in performing the mission's functions. The creditor must look to other assets (commercial receivables, shareholdings) or to negotiation. The dispute shifts to a new issue: identifying property that can actually be attached. *For the legal framework, see ICJ, Germany v. Italy (2012), on the distinction between immunity from jurisdiction and measures directed against property.*

Common mistake

Assuming that a waiver of "all immunity" makes embassy accounts available for attachment. Under French law following Sapin II, diplomatic property requires an **express and specific** waiver. Elsewhere, the presumption that mission accounts serve sovereign purposes produces similar effects. A waiver of immunity from jurisdiction precludes reliance on that immunity within the limits of the clause. The court's jurisdiction must be established separately. If the clause expressly covers immunity from execution, it permits attachment in France, with judicial authorisation, of State property other than mission property (Court of Cassation, First Civil Chamber, 13 March 2024), subject to the special rules governing central bank assets. It never permits attachment of mission property or accounts in the absence of a specific waiver.

Key takeaway

Enforcement is a **second set of proceedings**, with its own law, its own court and its own evidentiary requirements. Waiver of immunity from jurisdiction ≠ waiver of immunity from execution. Mission property ≠ commercial property. Prior judicial authorisation is required in France. A prudent creditor argues jurisdiction with the target asset already in mind.

04

Personal immunity of incumbent senior office holders: the three offices and their full protection

Timing for the reader: **as soon as an incumbent senior office holder faces proceedings or contemplates travel** · At stake: freedom of movement and the validity of prosecutorial measures

The International Court of Justice's judgment of 14 February 2002 in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* remains the leading authority. Belgium had issued an international arrest warrant against the incumbent Congolese minister for foreign affairs in respect of acts characterised as crimes under international law. The Court held that an incumbent minister for foreign affairs enjoys full immunity from jurisdiction and inviolability before foreign criminal courts, covering both official and private acts, whether performed before or during the term of office. It found no established customary exception for war crimes or crimes against humanity before *national* courts. The issue and international circulation of the Belgian warrant were held to breach Belgium's obligations. Sitting in plenary, the French

Court of Cassation reached the same conclusion on 25 July 2025 in respect of an incumbent head of State (appeal No. 24-84.393, step 05). This protection, known as immunity *ratione personae*, attaches to the office rather than the individual. It preserves the State's ability to conduct international relations through its highest organs.

The group of beneficiaries is narrow. The Court's reasoning proceeds from three offices - head of State, head of government and minister for foreign affairs. Extension to other senior officials (minister of defence, minister of the interior, heads of services) is disputed and must be argued with caution. The 2008 judgment in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* offers two practical lessons. First, the Court distinguished measures that infringe the immunity and inviolability of a head of State from those that do not. A non-compulsory invitation to testify does not in itself violate immunity - although the manner in which it is issued may give rise to other complaints. The Court did, however, find that France had breached its obligation to give reasons for refusing mutual legal assistance. Second, the Court did not accept that other senior officials - in that case, Djibouti's public prosecutor and head of national security - enjoyed the same personal immunity. It observed that Djibouti had not indicated that the acts in question were those of its organs acting on its behalf. Courts must give effect to the personal immunity of holders of the three offices without any prior claim. For other officials, the Court expects the State claiming functional immunity to notify the forum (paragraph 196). According to the ILC's 2026 commentary on Article 10, however, an express invocation is not a prerequisite to its application. Any extension of personal protection beyond the three offices remains to be established.

Protection *ratione personae* is comprehensive but temporary. The 2002 judgment itself identifies four avenues through which criminal justice may still be pursued. The office holder may be tried before the courts of their own State. The State they represent may waive immunity. After they leave office, foreign courts may exercise jurisdiction under the conditions laid down by international law - the Court referred in particular to acts performed in a private capacity. Finally, certain international criminal courts with jurisdiction may hear the case (step 08). For counsel advising an incumbent office holder, the practical consequence is clear. Immunity affords protection today, but that protection is finite. The long-term strategy - characterising the acts, preserving documentation and preparing for departure from office - must be developed while protection is in place.

In civil matters, international case law defines the position of incumbent senior office holders less clearly. Prevailing practice nevertheless recognises extensive protection operating in conjunction with the State's own immunity where the acts in issue are official. Counsel considering a civil claim against a foreign office holder personally must recognise how narrow that avenue is, how vigorously the characterisation of an act as private will be contested, and how the diplomatic cost of serving an incumbent office holder personally may work against the client's underlying objective.

Key point

Immunity *ratione personae* covers **all acts** - official and private, before and during the term of office - but **only while the person holds office**, and only for a narrow group of office holders. Immunity *ratione materiae* (step 05) covers **official acts only**, but **without any time limit**. The transition from one to the other is central to the criminal litigation strategy of senior office holders.

Contact Hennebel Avocats

Do you need to assert immunity, overcome a claim to immunity or respond to an ongoing incident? The firm can give priority to urgent enquiries and develop a strategy suited to the defence or challenge.

Contact the firm

05

Functional immunity of former senior office holders and officials: contested ground

Timing for the reader: before any travel by a former senior office holder or as soon as a complaint is filed · At stake: the most uncertain area of the law of immunities

Immunity *ratione materiae* protects acts performed in an official capacity on behalf of the State, regardless of the rank of the person performing them, and survives the end of the term of office. An official act is, in substance, an act of the State, and prosecuting the official for it would amount to sitting in judgment on the State through the individual. That foundation is settled. What follows is contested, and practitioners must identify precisely where the disagreements lie. Which acts are "official"? Can international crimes be characterised as official acts? Has a customary exception to functional immunity crystallised for such crimes before foreign criminal courts?

The leading decision remains *Pinochet (No. 3)*, delivered by the House of Lords in 1999. The former Chilean head of State, arrested in London on a Spanish extradition request, invoked his functional immunity as a former head of State. A majority of the Law Lords rejected immunity for acts of torture committed after 8 December 1988, the date on which the United Kingdom ratified the 1984 Convention against Torture. The prevailing reasoning, shared by several Law Lords, was that torture, defined by the Convention as conduct by a

public official or at a public official's instigation or with their consent, could not simultaneously be an offence in respect of which States parties had undertaken to prosecute or extradite and an official act protected by immunity before their courts. The precise scope of the decision has nevertheless been debated for a quarter of a century. The Law Lords differed over its basis - the particular scheme of the 1984 Convention, the definition of an official act, or an emerging customary exception - and the decision determined neither the position of other international crimes nor the question of civil immunity. To cite it as having abolished functional immunity for all international crimes is to read too much into it. To disregard it is an error.

The civil case law confirms the need for caution. In *Jones and Others v. the United Kingdom* (2014), the European Court of Human Rights held that granting immunity to Saudi Arabia and its officials in civil actions concerning alleged torture did not violate Article 6. The Court found no established customary exception to the immunity of the State or its officials in civil proceedings for torture, while observing that the law was evolving and that States should keep developments under review. Read together with *Al-Adsani v. the United Kingdom* (2001) on the immunity of the State itself (step 10), this case law draws a deliberate distinction between criminal proceedings - where *Pinochet* opens an avenue - and civil proceedings - where immunity currently holds.

This is precisely the subject of the International Law Commission's work on the immunity of State officials from foreign criminal jurisdiction. Following completion of its first reading in 2022, the Commission adopted on second reading, on 15 May 2026, seventeen draft articles distinguishing immunity *ratione personae* from immunity *ratione materiae*. Article 6 (Article 7 on first reading) excludes immunity *ratione materiae* for a list of crimes under international law - genocide, crimes against humanity, war crimes, apartheid, torture and enforced disappearance, to which the second reading added the crime of aggression, slavery and the slave trade. Adopted by a recorded vote in 2017 and put to a vote again in April 2026, this provision remains the most contested in the draft. Some States and commentators regard it as progressive development rather than codification of an established customary rule, given the absence of general, representative and consistent practice. The draft must be presented according to its legal status. It is a text of considerable authority produced by the Commission, which recommended it to the General Assembly on 20 July 2026 as the basis for a future convention. It is not a treaty, and Article 6 cannot be pleaded as a statement of the law in force. Counsel arguing today for or against the immunity of a former minister must address that uncertainty and explain it to the client. The outcome will depend largely on the forum seised, its legislation and its case law. In France, the Court of Cassation, sitting in plenary on 25 July 2025, held that, subject to the provisions of international conventions, particularly those relating to diplomatic and consular relations, functional immunity cannot be invoked in prosecutions for genocide, crimes against humanity or war crimes (appeal No. 24-84.071, *Mayaleh*). On the same day, it declared void the arrest warrant issued on 13 November 2023 against Bachar al-Assad, then an incumbent head of State. Under international law as it stood, the crimes against humanity and war crimes specified in that warrant did not constitute exceptions to the personal immunity of an incumbent head of State. The Court made clear that annulment

had no bearing on a warrant issued after he ceased to hold that office (appeal No. 24-84.393). According to press reports, French investigating judges issued new arrest warrants against the former head of State in 2025. These judgments confine the holding to genocide, crimes against humanity and war crimes. They do not extend it to torture or enforced disappearance prosecuted as separate offences, for which, according to early commentary, functional immunity remains *in principle* available before the French courts. In a case concerning foreign State officials prosecuted for acts falling within the exercise of that State's sovereignty, the Criminal Chamber held that the offence of torture and acts of barbarity, however grave, did not fall within the exceptions to immunity from jurisdiction under international law as it stood (Criminal Chamber, 13 January 2021, No. 20-80.511, cited in *Mayaleh*). It had reached the same conclusion on the distinct question of the personal immunity of an incumbent foreign head of State (Criminal Chamber, 2 September 2020, No. 18-84.682). Where the facts permit, the prosecuting party should therefore examine whether the acts constitute a crime against humanity or a war crime, which requires proof of the contextual elements specific to each. In France, however, a distinction is necessary. French criminal law may apply to a crime committed abroad because the perpetrator is French or the victim was a French national at the time of the offence (Articles 113-6 and 113-7 of the Criminal Code, with *Mayaleh* itself concerning a French national). Outside those cases, extraterritorial jurisdiction over such crimes committed abroad requires the person to be habitually resident in France, defined by a sufficient connection with France. It may be exercised only at the request of the national counter-terrorism public prosecutor and only if no international or national court requests surrender or extradition. The prosecution must also ascertain that there are no proceedings before the International Criminal Court (Article 689-11 of the Code of Criminal Procedure). Torture, by contrast, may be prosecuted if the alleged perpetrator is present in France (Articles 689-1 and 689-2 of the same Code).

ILLUSTRATIVE CASE · FUNCTIONAL IMMUNITY

Former minister facing a *criminal complaint for torture* in a third State

An anonymised scenario drawn from the published practice of national courts and international case law.

Profile	A former minister of a third State, now out of office, faces a criminal complaint filed in a European State by alleged victims who have applied to join the proceedings as civil parties. The complaint concerns acts of torture committed during the minister's term of office.
Mechanism	An investigation is opened on the basis of extraterritorial jurisdiction. The former minister risks arrest if travelling. The State of origin claims functional immunity for its former official.
Grounds invoked	Immunity *ratione materiae* for official acts. Against immunity, the reasoning in *Pinochet (No. 3)* (1999), based on the Convention against Torture. Absence of personal immunity (term of office ended, office outside the three identified in *Arrest Warrant*, 2002). The ILC draft articles adopted on second reading in 2026, Article 6 of which excludes immunity for torture, although its customary status remains contested.

Typical outcome

The outcome depends on the forum. Depending on domestic legislation and case law, functional immunity may be denied for torture or upheld outside the specific treaty framework. In France, the judgments of the plenary assembly of the Court of Cassation of 25 July 2025 exclude functional immunity for genocide, crimes against humanity and war crimes. They do not extend that holding to torture prosecuted as a separate offence, for which, according to early commentary, immunity remains *in principle* available. Where the facts permit, the prosecuting party must consider whether the acts constitute a crime against humanity or a war crime. In France, however, under Article 689-11 of the Code of Criminal Procedure, that avenue requires habitual residence in the territory and proceedings initiated exclusively by the national counter-terrorism public prosecutor. Those conditions are rarely met by a former minister on a visit, unless French criminal law applies because the perpetrator is French or a victim was a French national at the time of the offence (Articles 113-6 and 113-7 of the Criminal Code). The defence must address three issues simultaneously - characterisation of the acts, a formal claim to immunity by the State of origin, and management of travel risks - while the prosecuting party's case depends on the strength of its treaty basis. *See Pinochet (No. 3), House of Lords, 1999, and ICJ, Arrest Warrant, 2002.*

> *Spotlight - The formal claim to immunity*
>
> The former official's State has an interest in **formally claiming immunity** and identifying the acts performed on its behalf (*Djibouti v. France*, ICJ, 2008, paragraph 196). Prolonged silence leaves the official with an evidentiary difficulty. For the claimant, that silence is a fact to document, but does not in itself constitute a waiver by the State of its official's immunity. The court will also assess the evidence already on the record.

06

Diplomatic and consular immunities in practice: reading the Vienna Conventions closely

Timing for the reader: **immediately in the event of an incident, and in advance of any dispute involving a mission** · At stake: precise treaty provisions and the demands of applying them in practice

Unlike State immunity, which derives largely from customary law, diplomatic and consular immunities rest on two treaties in force with virtually universal application: the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations. Litigation in this field turns on a precise reading of the text. Article 22 of the 1961 Convention makes mission premises inviolable. Agents of the receiving State may not enter without the consent of the head of mission. The premises, their furnishings and other property on them, and the mission's means of transport are immune from search, requisition, attachment and execution. The building must, however, have acquired the status of premises of the mission. In *Immunities and Criminal Proceedings (Equatorial Guinea v. France)* (judgment of 11 December 2020, by nine votes to seven on this point), the International Court of Justice held that the sending State cannot unilaterally impose that status where the receiving State has objected in a timely, non-arbitrary and non-discriminatory manner. Article 29 makes the person of a diplomatic agent inviolable, precluding arrest or detention in any form. Article 31 grants the agent immunity from the receiving State's criminal jurisdiction, and from its civil and administrative jurisdiction subject to three exceptions. The first concerns a real action relating to private immovable property situated in that State, unless the agent holds it on behalf of the sending State for the purposes of the mission. The second concerns an action relating to succession in which the agent is involved in a private capacity as executor, administrator, heir or legatee. The third concerns professional or commercial activity carried on in the receiving State outside the agent's official functions. These exceptions are in principle construed narrowly, but their scope remains contested - in *Basfar v Wong* (2022), the United Kingdom Supreme Court held by three votes to two that, taking the alleged facts as established, the exploitation of a domestic worker for profit fell within the exception in Article 31(1)(c) - and applying them requires a rigorous characterisation of the activity in question.

Two provisions govern the duration of the protection and how it comes to an end. Under Article 32, only the sending State - not the agent personally - may waive immunity, and the waiver must be express. It also provides that a waiver of immunity from jurisdiction in respect of civil or administrative proceedings does not entail a waiver in respect of measures of execution, for which a separate waiver is required - the individual counterpart

of the fundamental distinction addressed in step 03. Article 39 governs duration. Privileges and immunities arise when the person enters the territory to take up the post or, if already there, when the appointment is notified. They cease upon departure or on expiry of a reasonable period. However - a decisive provision for former diplomats - after the functions have ended, immunity continues for acts performed in the exercise of functions as a member of the mission. A former diplomat thus retains residual functional immunity. The sole issue in dispute then becomes its scope - did the act fall within the functions?

The consular regime affords significantly less protection, and confusion between the two Conventions is a recurring source of error. Article 41 of the 1963 Convention grants career consular officers only limited personal inviolability, subject to Article 71 for nationals and permanent residents of the receiving State. They may be arrested or detained pending trial only in the case of a grave crime and pursuant to a decision by the competent judicial authority, and may also be detained in execution of a final judicial decision. Articles 58 and 63 govern honorary consular officers. Article 43 protects consular officers and employees in respect of acts performed in the exercise of their functions. It makes exceptions for a civil action arising out of a contract that the individual did not conclude, expressly or impliedly, as an agent of the sending State, and for an action by a third party for damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft. Article 36 establishes the right of communication between the consular post and nationals of the sending State - including the right of a detained person to be informed of the right to have their consulate notified. Breaches of this provision have generated a distinct body of international litigation, and any lawyer representing a foreign national under arrest should verify compliance immediately.

Where status is abused - through activities unrelated to official functions or offences committed under cover of that status - the receiving State has remedies, principally diplomatic. It may request a waiver of immunity from the sending State, declare the person *persona non grata*, thereby requiring recall or termination of functions, reduce the size of the mission or sever relations. For a private party harmed by a protected agent - an unpaid landlord, an accident victim or an employee - a realistic strategy combines careful examination of the Article 31 exceptions, proceedings against the sending State itself where the dispute permits (step 02, particularly for the employment contracts of locally recruited staff considered in *Cudak* and *Sabeh El Leil*), a request for waiver through diplomatic channels and, for private acts, proceedings after the end of the agent's functions once Article 39 protection ceases. Limitation periods must be considered from the outset.

What to gather

The precise status of the person concerned (diplomatic agent, member of the administrative and technical staff, consular officer, honorary consul or locally recruited employee) and notification of that status to the receiving State. The dates on which the person took up and ceased their functions (Article 39). The nature of the disputed act and its possible connection with those functions. In civil proceedings, the applicability of the three exceptions under Article 31. Evidence of any express waiver (Article 32). For a detained person, proof that they were informed of their consular rights (Article 36 of the 1963 Convention).

What not to do

Treating a consular officer as a diplomat. The officer's immunity is functional and their inviolability limited (Articles 41 and 43 of the 1963 Convention). Assuming that a waiver of immunity from jurisdiction permits execution. Article 32 requires a separate waiver. Entering mission premises or having a measure carried out there, even with an enforceable instrument. Article 22 precludes this. Negotiating a "waiver" with the agent personally. Only the sending State may grant it.

Common mistake

Confusing the immunity **of the agent** with the immunity **of the sending State**. A locally recruited embassy employee challenging dismissal must address the employer State's immunity from jurisdiction, rather than Article 31 of the 1961 Convention - an area in which *Cudak* (2010) and *Sabeh El Leil* (2011) shifted the balance in the employee's favour. Choosing the correct defendant determines the applicable law.

ILLUSTRATIVE CASE · CONTRACT OF EMPLOYMENT

Locally recruited employee dismissed by an *embassy*

An anonymised scenario drawn from the published case law of the European Court of Human Rights.

Profile

A national or resident of the forum State, recruited locally by a foreign State's diplomatic mission for administrative or technical duties (accounting, secretarial work or reception), is dismissed after several years of service.

Mechanism

The employee applies to the employment court of the forum State within the time limit applicable to the claim (in France, twelve months from notification to challenge termination, subject in particular to the separate limitation periods for wage claims and actions for discrimination or harassment, Article L. 1471-1 of the Labour Code). The employer State invokes immunity from jurisdiction. The employee relies on the exception for contracts of employment and the right of access to a court.

Grounds invoked

The exception for contracts of employment as reflected in the 2004 Convention (adopted, not in force, widely regarded as codifying customary law). Article 6 ECHR. ECtHR, *Cudak v. Lithuania* (GC, 2010) and *Sabeh El Leil v. France* (GC, 2011).

Typical outcome

Where the employee's duties do not involve the exercise of governmental authority, upholding a blanket claim to immunity exposes the forum State to a finding of a violation of Article 6. The employment court examines the merits. The employer State retains arguments in respect of claims concerning recruitment, renewal of employment or reinstatement, functions involving governmental authority, the employee's nationality (a national of the employer State without permanent residence in the forum State) and, in dismissal cases, a risk to its security interests certified at the highest level of the employer State (Article 11(2) of the 2004 Convention). *See Cudak v. Lithuania (GC, 2010) and Sabeh El Leil v. France (GC, 2011).*

07

International organisations: a different form of immunity and its counterpart

Timing for the reader: before taking any action against or on behalf of an organisation · At stake: the alternative remedy as a decisive issue in litigation

The immunities of international organisations differ from State immunity in both rationale and source. Customary law protects the State on grounds of sovereign equality. A treaty - constituent instrument, general convention on privileges and immunities or headquarters agreement - protects the organisation on grounds of functional independence, shielding it from control by the courts of its member States, beginning with the host State. For the United Nations, the 1946 Convention on the Privileges and Immunities of the United Nations establishes immunity from jurisdiction for the Organisation, its property and its assets, except where expressly waived. In practice, this immunity is described as virtually absolute. It draws no distinction between sovereign acts and acts of a private-law character, since the text provides no basis for the restrictive doctrine discussed in step 02. Specialised agencies, regional organisations and technical organisations are each governed by their own instruments, and the level of protection varies. The practitioner's first task is to read the applicable instrument before drawing any analogy with States.

The counterpart to this extensive protection is the obligation, generally set out in the instruments themselves, to provide appropriate modes of settlement for private-law disputes to which the organisation is a party. These may include claims commissions, arbitration, internal procedures and administrative tribunals for employment disputes - international civil service disputes fall within the jurisdiction of bodies such as the organisations' administrative tribunals, including, for many institutions, the Administrative Tribunal of the International Labour Organization. The European Court of Human Rights built its leading case law on this counterpart. In *Waite and Kennedy v. Germany* (1999), it held that granting immunity from jurisdiction to an international organisation pursues a legitimate aim - ensuring that it can function properly without unilateral interference - and must then be assessed for proportionality. The availability to the applicants of reasonable alternative means of vindicating their rights was a material factor in that assessment. Whether a reasonable alternative remedy exists has become central to litigation. It gives an organisation its strongest ground for bringing proceedings to an end and an applicant the principal means of having a claim heard. It is not, however, an absolute requirement. In *Stichting Mothers of Srebrenica and Others v. the Netherlands* (2013 decision), the European Court accepted that the absence of an alternative remedy did not by itself require United Nations immunity to be set aside. The level of protection also depends on the forum. In

the United States, the Supreme Court held in *Jam v. International Finance Corp.* (2019) that organisations covered by the International Organizations Immunities Act enjoy only the restrictive immunity afforded to foreign States. This did not prevent the United States Court of Appeals for the District of Columbia Circuit, on remand, from upholding the IFC's immunity on 6 July 2021 because the action was based on conduct occurring outside the United States rather than commercial activity carried on there.

For a claimant - an employee, a contracting party or a victim - the strategy follows from this factor. First, pursue the organisation's internal remedies to exhaustion and document the steps taken. They may succeed in their own right, and proof of their inadequacy is in practice the strongest basis for any subsequent challenge to immunity before a domestic court. Observe each internal deadline. Before the ILO Administrative Tribunal, once the remedies provided for in the staff regulations have been exhausted, the ninety-day period runs from notification of the final decision or publication of a decision open to challenge that affects a whole class of officials. If the administration takes no decision on a claim within sixty days of being notified of it, the ninety days run from the expiry of that period. Referral of the claim to the competent body may preclude an implied rejection (Article VII(1) to (3) of the Statute). Second, where appropriate, establish in concrete terms and with supporting documents why the mechanism offered is not a reasonable alternative remedy - it may be non-existent, inaccessible, lacking in independence or structurally incapable of producing a decision. The courts have been reluctant to entertain this argument. Third, consider non-contentious avenues - an administrative claim, negotiation through the State of nationality or diplomatic protection under its own conditions - that may resolve the dispute without litigation. Conversely, for the defendant organisation, the soundness of the internal mechanism is the best safeguard of immunity. A credible and accessible administrative tribunal protects immunity more effectively than any number of written defences.

Finally, as regards the immunities of staff, the same instruments grant officials and experts predominantly functional immunities - limited to acts performed in an official capacity - closer to the consular regime than to the diplomatic one. The most senior officials may be accorded status comparable to diplomatic status. The power of waiver rests with the organisation. At the United Nations, the Secretary-General has the right and the duty to waive immunity where it would impede the course of justice and can be waived without prejudice to the interests of the Organisation (1946 Convention, sections 20 and 23). The Security Council decides in the case of the Secretary-General. Here again, the applicable instrument and the organisation's practice take precedence over general propositions.

Key takeaway

In proceedings against the UN and most organisations, immunity is treaty-based and extensive. The text affords no basis for the restrictive doctrine applicable to States - subject to the law of certain forums, such as the United States following *Jam v. IFC* (2019). The availability of a **reasonable alternative remedy (*Waite and Kennedy*, 1999) is a central consideration in litigation, although it is not an absolute requirement (*Mothers of Srebrenica*, 2013).** The outcome generally turns on the quality or proven inadequacy of internal mechanisms. A direct challenge to immunity rarely succeeds.

08

Immunities and international criminal courts: Article 27, Article 98 and the lesson of Al-Bashir

Timing for the reader: as soon as international proceedings are instituted or become likely · At stake: where immunities give way - and the limits of that principle

The fourth avenue identified in the *Arrest Warrant* judgment (step 04) is prosecution before international criminal courts. The Rome Statute of the International Criminal Court addresses this through two provisions whose interaction has given rise to some of the Court's most difficult litigation. Article 27 establishes the irrelevance of official capacity. The Statute applies equally to all persons. Official capacity as a head of State or government, a member of a government or a member of parliament does not exempt a person from criminal responsibility, and immunities attaching to official capacity do not bar the Court from exercising jurisdiction. Article 98, in the part governing cooperation, provides that the Court may not proceed with a request for surrender or assistance that would require the requested State to act inconsistently with its international obligations regarding the immunity of third States, unless it first obtains the cooperation of the third State concerned in waiving immunity. The question is how the two provisions operate together when the Court asks a State Party to arrest the incumbent leader of a State that is not party to the Statute.

The Al-Bashir case brought this question before the Appeals Chamber. Following Jordan's refusal to arrest the incumbent Sudanese president during a summit in 2017, the Appeals Chamber held in its 2019 judgment on the Jordan Referral that Jordan had failed to fulfil its cooperation obligations. It concluded that head of State immunity could not be invoked against the exercise of the Court's jurisdiction, relying in particular on the proposition - the formulation of which has been debated - that customary international law recognises no head of State immunity before an international court. The Security Council's referral of the situation in Darfur (resolution 1593 (2005)) also provided an independent basis for Sudan's obligation to cooperate. The

scope of this reasoning remains disputed in scholarship and State practice - especially its basis in customary law and its implications for relations between States Parties and third States in the absence of a Security Council referral. A prudent approach distinguishes several situations. Before the Court itself, official capacity affords no protection. In horizontal cooperation between States, several States continue to invoke the immunities of leaders of third States under Article 98. On 24 October 2024, however, Pre-Trial Chamber II found under Article 87(7) that Mongolia, a State Party, had breached its obligations by failing to arrest the incumbent head of a non-party State, in the absence of any Security Council referral. It rejected the argument based on immunity and Article 98, and referred the matter to the Assembly of States Parties. Leave to appeal was refused on 29 November 2024 and the request for reconsideration was dismissed on 18 March 2025. On 24 July 2025, Pre-Trial Chamber I adopted the same reasoning, which some scholars and States dispute, in finding that Hungary, a State Party, had failed to comply by not arresting the Prime Minister of Israel, a non-party State, in April 2025. The matter was referred to the Assembly of States Parties. This is the position of the Pre-Trial Chambers - in their view, the obligation to arrest binds every State Party. The Appeals Chamber has not ruled on the issue in the absence of a Security Council referral. Whether a State is a party must be determined as at the date of travel. Withdrawal from the Statute takes effect only one year after the Secretary-General of the United Nations receives notification, unless the notification specifies a later date. Cooperation obligations continue in relation to criminal investigations and proceedings already commenced in respect of which the State had a duty to cooperate (Article 127(1) on the effective date of withdrawal and Article 127(2) on continuing cooperation obligations). Hungary, which had notified its withdrawal on 2 June 2025, withdrew that notification on 29 May 2026 and remained a State Party as at 30 October 2026. Each situation - State Party, non-party State or Security Council referral - therefore requires its own risk assessment.

The practical consequences are specific. For counsel advising an incumbent or former senior office holder, the protection afforded by immunities before foreign national courts does not carry over to international criminal courts with jurisdiction. Travel assessments must take account of the States Parties to the Rome Statute and their cooperation obligations. The strategy must anticipate political developments - a referral, a waiver or a change of government in the State of origin can transform the position. For victims and States seeking a trial, proceedings before an international court offer the forum in which the immunity argument is weakest. They nevertheless require an established basis for jurisdiction, an admissible case and effective State cooperation - all of which take time and require an overall strategy in which national proceedings, particularly under treaties such as the Convention against Torture (step 05), retain their role.

Key point

Distinguish three settings. Before the **ICC**, official capacity is irrelevant (Article 27). Between **States**, immunities continue to be invoked under Article 98, but the Pre-Trial Chambers hold that they do not release a State Party from its obligation to execute the Court's request for arrest (findings concerning Mongolia, 2024, and Hungary, 2025). Some States dispute that position, and the Appeals Chamber has not determined the issue outside the context of a Security Council referral. Before **national courts**, *Arrest Warrant* (2002) protects the incumbent holders of the three offices. In Al-Bashir (2019), the Appeals Chamber also confirmed Jordan's failure to fulfil its obligation to arrest and surrender. Its reasoning on customary law expressly addresses the execution of a request by the requested State. In another case without a Security Council referral, Pre-Trial Chamber II found Tajikistan in non-compliance on 19 March 2026.

Before bringing proceedings against a State, allowing an enforcement deadline to expire, arranging sensitive travel or responding to an incident affecting a mission.

When to contact Hennebel Avocats

Before drafting or renegotiating waiver clauses in sovereign financial or contractual documentation, before making a formal claim to immunity on behalf of a State, before requesting a waiver, and as soon as a measure of constraint is taken or contemplated. Depending on the circumstances, the firm can advise directly or act as co-counsel with domestic litigation, arbitration or diplomatic law teams. Urgent matters may receive priority.

Contact the firm

09
Challenging immunity: the claimant's strategy

Timing for the reader: before serving proceedings - the first procedural step determines the strategy · At stake: turning a claim on paper into actual recovery

Challenging immunity requires more than demonstrating that it produces an unjust result. Courts do not set aside a rule of international law because it deprives a claimant of access to the court that would ordinarily hear the claim, and *Germany v. Italy* (2012) foreclosed reliance on the gravity of the acts in civil proceedings. An effective strategy systematically identifies avenues by which the claim can proceed. Five approaches may be combined, in an order determined by deadlines, clauses already agreed and available assets.

First, characterise the act. Under the restrictive doctrine (step 02), characterisation is the principal issue in dispute. The claimant must establish, with supporting documents, the commercial or private-law nature of the disputed transaction. Relevant evidence includes contractual documentation comparable to that used by a private operator, the decision-making process, the consideration exchanged and conduct in the market. The claimant must also anticipate the defendant State's attempt to characterise the transaction as part of a public policy and prepare a response centred on the nature of the act. Some forums, including France, also consider its purpose. The Court of Cassation grants immunity only where the act "forms part, by its nature or purpose, of the exercise of sovereignty" by the State (Court of Cassation, First Civil Chamber, 12 July 2017, No. 15-29.334). In employment disputes, *Cudak* and *Sabeh El Leil* provide an established framework centred on the employee's actual duties.

Second, identify any waiver. Read the documents before engaging in a debate on custom. Loan agreements, bond issues, commercial contracts and bilateral treaties frequently contain waivers of immunity from jurisdiction and sometimes of immunity from execution. Agreements submitting disputes to arbitration have specific consequences for immunity from jurisdiction in proceedings for judicial review of an award or a declaration of enforceability. Participation on the merits may, under the law of the forum, amount to submission to jurisdiction. Under the regime described in Article 8 of the 2004 Convention, a reservation alone does not preserve the plea. An analysis of existing waivers - often overlooked - is best undertaken before developing any elaborate legal argument. It also informs the opposing position. A well-advised State knows precisely what it has signed and where.

Third, identify the assets. Since enforcement is the second contest (step 03), a diligent claimant investigates assets from the outset. This involves listing the debtor State's property in potential enforcement jurisdictions,

examining how each asset is used, identifying debts owed to the State by private third parties, and monitoring market transactions by the State and its instrumentalities. This analysis bears as much on the choice of forum as the rules of jurisdiction. A judgment obtained where there is nothing to attach has value only if it can be recognised and enforced in a State where attachable assets are located, or if it provides leverage in negotiations.

Fourth, consider alternative forums. Where a national court upholds immunity, the dispute may continue elsewhere. Possibilities include the defendant State's own courts - an underestimated avenue whose effectiveness depends on the local rule of law, arbitration where the documentation permits it (see the Praxis guide to investments in situations of conflict for investor-State disputes), and the internal mechanisms of international organisations (step 07). For private parties whose State of nationality agrees to espouse their claim, diplomatic protection is another avenue - the State takes up its national's claim at the inter-State level, subject to the established requirements of exhaustion of local remedies and nationality of claims. Each forum has its own deadlines, costs and effects. How to combine them is a strategic decision.

Fifth, consider leverage outside the courts. Litigation against a State also entails continuing negotiation. The prospect of an adverse characterisation, an authorised attachment of a sensitive asset or reputational exposure can carry more weight in settlement discussions than many written submissions. Discipline remains essential. Avoid public statements before completing the legal characterisation and any pressure that might be portrayed as an abuse of process. Coordinate positions across forums - an argument that succeeds in one jurisdiction may defeat a position taken in another.

ILLUSTRATIVE CASE · CLAIMANT'S STRATEGY

Investor seeking *assets available for attachment* following an arbitral award

An anonymised scenario drawn from the published practice of investment arbitration and enforcement litigation.

Profile	An investor holds a final arbitral award against a foreign State that remains unsatisfied. The State contests every attempt at recovery.
Mechanism	The award has been declared enforceable in several jurisdictions. Attachment is attempted against various assets, including mission accounts, central bank property, commercial receivables, shareholdings in companies and assets of State instrumentalities.
Grounds invoked	The distinction between jurisdiction and execution. The test of the use of the property under customary law, largely codified in the 2004 Convention (not in force). In France, Articles L. 111-1-1 to L. 111-1-3 CPCE (prior authorisation, express and specific waiver for diplomatic property). The scope of the waiver clauses in the investment documentation.
Typical outcome	In each jurisdiction, the creditor looks for commercial assets with the necessary connection, property earmarked to satisfy the claim and property in respect of which the State has consented to measures of constraint. In France, the court must authorise the measure, and an express and specific waiver is required for mission property. Separate rules govern central bank assets. For frozen funds, the creditor must check what prior authorisation the freezing regime requires. The case becomes a coordinated enforcement effort across multiple jurisdictions. *See the Praxis guide to investments in situations of conflict for the relationship with arbitration.*

Spotlight - Timing

In proceedings against a State, time can work for or against the claimant. Assets move, governments change and waivers are renegotiated. A claimant who acts in the right order - first characterisation, then protective measures where the law of the forum permits them (in France, prior judicial authorisation for State property, satisfaction of one of the conditions in Article L. 111-1-2 CPCE and of the requirements in Article L. 511-1 concerning the apparent basis of the claim and circumstances threatening recovery), followed by a declaration of enforceability and finally coordinated, simultaneous attachments - avoids alerting the other side to its strategy. Every unsuccessful, isolated attempt shows the debtor State where and how to protect itself.

10

Immunities and human rights: access to a court under Article 6

Timing for the reader: when developing the claim and subsequently when considering an application to Strasbourg · At stake: the interaction that has generated the most significant developments in modern immunity litigation

Every successful plea of immunity denies a claimant access to a court. Article 6 of the European Convention on Human Rights guarantees the right of access to a tribunal, making it the point at which immunity litigation has generated the richest debate. Article 6(1) must, however, be applicable. It protects access to a court called upon to determine a dispute over a civil right that is at least arguable under domestic law. It gives a victim no independent right to have a third party prosecuted. The Strasbourg Court's approach is consistent. The right of access to a court is not absolute. A restriction is permissible if it pursues a legitimate aim and remains proportionate. Granting immunity in accordance with international law pursues a legitimate aim - respect for the international obligations of the forum State, comity and good relations between States. The Court has consistently held that measures reflecting generally recognised rules of international law on immunity cannot, in principle, be regarded as a disproportionate restriction. As a general rule, therefore, Article 6 leaves intact the immunity required by customary law. Following a proportionality assessment, it may give rise to a finding of a violation where immunity exceeds what custom requires.

The distinction emerges from a small group of judgments. In *Al-Adsani v. the United Kingdom* (2001), the Court held by a majority of one that granting immunity to Kuwait in a civil action concerning alleged torture did not violate Article 6, since there was no established rule of international law excluding State

immunity in civil proceedings for torture. *Jones and Others v. the United Kingdom* confirmed that conclusion in 2014, including for State officials, while noting the evolving nature of the law. In *Cudak* (2010) and *Sabeh El Leil* (2011), conversely, the Court found violations of Article 6. By granting immunity in employment disputes where customary law - as reflected in the 2004 Convention - did not require it, the forum States had disproportionately restricted access to a court. In *Oleynikov v. Russia* (2013), the Court held that the Russian courts' refusal to hear a claim concerning a loan to a North Korean trade representation was contrary to Article 6 because they had applied an absolute conception of immunity without analysing the nature of the transaction. By applying absolute immunity without examining the transaction's nature, the courts had disproportionately restricted access to a tribunal. Subsequent case law develops both lines of authority. *Naku v. Lithuania and Sweden* (2016) found a violation by the forum State in an embassy employment dispute and declared the complaint against the employer State inadmissible. In *J.C. and Others v. Belgium* (2021), the Court held that the immunity granted to the Holy See in the face of sexual abuse claims was compatible with Article 6, declining to substitute its assessment of the territorial tort exception for that of the domestic court.

This case law serves practitioners on both sides. For claimants, it provides a standard of review. Each domestic decision granting immunity can be tested. Did international law actually require the immunity granted? Did the court examine the nature of the act, the employee's duties and the existence of customary exceptions? A mechanical grant of immunity, unsupported by reasons addressing the restrictive doctrine, provides the basis for a substantial complaint before the European Court. The complaint must be raised in substance before the domestic courts and then lodged, on pain of inadmissibility, after exhaustion of domestic remedies and within four months of the final domestic decision (Article 35(1), as amended by Protocol No. 15, applicable since 1 February 2022). Record the date on which the applicant or counsel acquired sufficient knowledge of the decision, in principle the date of service where the decision must be served as a matter of course, and the date of dispatch of the complete application form required by Rule 47 of the Rules of Court - bearing in mind that Strasbourg affords redress for the Article 6 violation without determining the merits of the original dispute or entering judgment against the foreign State, which is a third party to the proceedings. For the defence - the forum State or an intervening foreign State - the same case law dictates the approach. Justify immunity on the basis of established custom and within its limits. Show that the case falls within a protected category (sovereign acts, armed forces, functions involving the exercise of governmental authority). Recall that *Waite and Kennedy* (1999) treats an alternative remedy as a factor in the assessment only in its own context - that of international organisations. The Court has not made State immunity subject to a general requirement that an alternative remedy be available.

This step returns to the issue raised in step 02. European human rights law imposes discipline on the application of the law of immunities without displacing it. It requires domestic courts to do precisely what this guide describes - characterise the act, ascertain customary law and give reasons - and there are consequences for a failure of rigour in either direction. Denial of immunity where customary law requires it engages the international responsibility of the forum State. Granting immunity beyond what custom requires

engages the State's responsibility under the Convention where it disproportionately restricts access to a court. Counsel who understands both requirements can develop every immunity case at both levels.

> *Key takeaway*
> Under the Strasbourg case law, **immunity consistent with customary law is in principle upheld** (*Al-Adsani*, 2001, and *Jones*, 2014). **A grant of immunity that exceeds customary law, without examination of the transaction or the functions at issue, does not withstand review** (*Cudak*, 2010, *Sabeh El Leil*, 2011, and *Oleynikov*, 2013). Article 6 ECHR provides a means of reviewing whether a domestic court applied customary law correctly - it creates no humanitarian exception to immunity.

II

Immunities in contracts and commercial litigation: drafting today for enforcement tomorrow

Timing for the reader: **during drafting, due diligence and restructuring** · At stake: the value of the clause depends on what can ultimately be attached

The greatest return on legal work concerning immunities comes before any dispute, at the drafting stage. Anyone contracting with a State, central bank, sovereign wealth fund, State-owned enterprise or mission - lender, supplier, landlord, investor or arranging bank - must treat immunity as a credit risk and the waiver clause as a form of security. The guiding principles follow from the preceding steps. First, draft the waiver in **two distinct parts**: a waiver of immunity from jurisdiction - submission to the chosen courts or to arbitration - and a separate, express waiver of immunity from execution. The former does not entail the latter. Second, draft the waiver of immunity from execution in **specific** terms. For diplomatic mission property, French law requires an express and specific waiver (Articles L. 111-1-1 to L. 111-1-3 CPCE). A clause intended to cover such property must identify it as a category. Even then, the drafter must recognise that the inviolability of mission premises (Article 22 of the 1961 Vienna Convention) remains a separate obstacle that a contractual waiver alone cannot be presumed to remove. Third, the clause should identify realistic **categories of assets** - commercial accounts, receivables and shareholdings - and enforcement jurisdictions with established practice, in preference to a sweeping declaration of worldwide waiver.

Choosing arbitration requires an informed decision. An arbitration clause gives the State's counterparty a neutral forum and an award that benefits from international recognition regimes. Under Article 17 of the

2004 Convention, where a State agrees in writing to submit to arbitration disputes relating to a commercial transaction with a foreign person, it cannot, unless the agreement provides otherwise, invoke immunity from jurisdiction in proceedings concerning the validity, interpretation or application of the arbitration agreement, the arbitration procedure, or the confirmation or setting aside of the award. Whether this extends to proceedings for a declaration of enforceability depends on the law of each forum. Arbitration nevertheless leaves immunity from execution intact. Once declared enforceable, the award encounters exactly the same obstacles concerning assets as a judgment (step 03, step 09). The drafting principle follows: consider the arbitration clause and the waiver of immunity from execution together, informed by an initial assessment of the sovereign counterparty's assets. The Praxis guide to investments in situations of conflict provides a fuller analysis of investor-State litigation and enforcement of investment awards.

Counterparty due diligence is the other aspect of the exercise. Contracting with a State "instrumentality" - an enterprise, agency or fund - raises two related questions. The first concerns immunity (can the entity claim the State's protection?). The second concerns assets (can the entity's property answer for the State's debts, and vice versa?). The answers vary with domestic law and the evidence of the entity's functional and financial independence. The documentation must therefore identify the debtor precisely, secure a guarantee from the State itself where the intention is to have recourse against the State, and obtain waivers from each signatory. Conversely, a well-advised State and its entities structure their presence abroad by strictly separating their assets and financial flows - the discipline in the use of accounts discussed in step 03 - and periodically review the waivers accumulated in their financial documentation, often a legacy of less cautious times.

What to gather

For drafting, an inventory of the sovereign counterparty's relevant assets and their locations, the law of the intended enforcement jurisdictions (in France, the CPCE regime introduced by Sapin II), and examples of waivers the State has accepted in its public documentation (particularly bond issues). For due diligence, the contracting entity's constituent documents and legal regime, the extent to which its assets are separate, available State guarantees and immunity clauses in earlier contracts.

What not to do

Relying on a waiver of "all immunity from jurisdiction and from execution" without specifying its scope or identifying categories of assets. It will fail in respect of diplomatic property. Although in France it permits attachment of other State property, subject to the special rules governing central bank assets (Court of Cassation, First Civil Chamber, 13 March 2024), it may leave the question of use wholly unresolved elsewhere. Contracting with a public entity without clarifying who is the debtor and who is the guarantor. Assuming that an arbitration clause settles the issue of enforcement. Discovering the Sapin II regime only at the attachment stage.

Common mistake

Drafting a waiver with the judge in mind and overlooking the enforcement officer. A clause that appears compelling at the jurisdictional stage may be ineffective at attachment. Specificity is decisive in France for mission property. For other State property, an express waiver may suffice without identifying the category of property, subject to prior judicial authorisation and the protections specific to the asset concerned.

12

Responding to an incident: the first hours

Timing for the reader: **immediately - positions harden quickly** · At stake: preventing an incident from becoming a precedent

Immunities come into focus through specific incidents: attachment of a mission account on a Friday evening, an official taken into custody, an impending search of protected premises or service of proceedings on a ministry. In those first hours, the quality of the initial response often determines the outcome because each party's first acts establish positions that are difficult to reverse. Three typical scenarios illustrate the practical response.

Attachment of a mission account or State property. For the State whose property has been attached, immediately check the basis of the measure - in France, the existence and terms of the prior judicial authorisation required by Articles L. 111-1-1 et seq. CPCE. The absence of authorisation, or action exceeding its scope, provides the first ground of challenge. Apply in summary proceedings to the enforcement judge of the Paris Judicial Court who granted authorisation to have the order set aside (Articles R. 111-1 and R.

111-6 CPCE, the latter specifying no time limit). In the case of a third-party debt attachment, proceedings challenging it must be brought by summons before that judge within one month of valid notice to the debtor, on pain of inadmissibility, subject to the rules on notification and extensions for distance (Articles 643, 647 and 687-2 of the Code of Civil Procedure). On pain of the same sanction, the enforcement officer (formerly the bailiff) who carried out the attachment must be notified of the challenge by registered letter with acknowledgement of receipt on the same day or, at the latest, the next working day. The third party holding the debt must be informed by ordinary letter. A copy of the summons must reach the enforcement judge's registry no later than the hearing date, failing which the summons lapses (Article R. 211-11 CPCE). These challenges rely on the presumption that mission accounts serve sovereign purposes and on the absence of an express and specific waiver. In parallel, a diplomatic protest supports the judicial challenge without replacing it or suspending its deadlines. Internal discipline is also necessary - avoid hasty transfers of funds that might be portrayed as deliberately engineering insolvency. For the attaching creditor, maintain the evidentiary case on use and document that the account does not serve the mission's functions - in France, partial commercial use is insufficient (Article L. 111-1-3 CPCE) - and prepare an alternative strategy against other assets. Lifting the attachment of a mission account does not end the enforcement effort (step 09). In France, the creditor must notify the debtor State of the third-party debt attachment within eight days of attachment, failing which it lapses (Article R. 211-3 CPCE), using the channel provided for in Article 684 of the Code of Civil Procedure. The creditor must enclose a copy of the application and the order (Article R. 111-5 CPCE). The date effective against the creditor is determined under Article 647-1 of the Code of Civil Procedure.

Arrest or summons of a protected official. The first and immediate task is to establish the person's exact status - a diplomatic agent whose appointment has been notified (inviolability under Article 29 of the 1961 Convention, limited, like immunity from jurisdiction, to official acts performed in the exercise of functions if the agent is a national or permanent resident of the receiving State, Article 38(1)), a member of the administrative and technical staff (inviolability and immunity from criminal jurisdiction, but immunity from civil and administrative jurisdiction limited to acts performed in the exercise of functions, provided the person is neither a national nor a permanent resident of the receiving State, Article 37(2)), a career consular officer (Article 41, subject to Article 71: detention pending trial for a grave crime pursuant to a decision of the competent judicial authority) or an honorary consular officer (Articles 58 and 63), an official of an international organisation (functional immunity under the applicable instrument), or a person without protected status. Second, have the status entered in the official record and supported by documentation from the mission, the State on whose behalf the official acts in question were performed (*Djibouti v. France*, paragraph 196), or the competent organisation. Third, verify that a detained foreign national was informed without delay of the right to have their consulate notified (Article 36 of the 1963 Convention). If a member of the consular staff is arrested, detained pending trial or subjected to criminal proceedings, the receiving State must promptly notify the head of post or, where the head of post is concerned, the sending State through diplomatic channels (Article 42). Conversely - for a receiving State dealing with an agent suspected of a serious offence - the lawful avenues are well established. It may request a waiver from the sending State (Article 32:

expressly and by the State alone) or declare the agent *persona non grata*, without having to give reasons (Article 9), followed by departure. Arrest of a diplomatic agent remains precluded (Article 29), however serious the suspicions, subject to Article 38 for nationals and permanent residents of the receiving State and to the possibility, recognised by the International Court of Justice (*United States Diplomatic and Consular Staff in Tehran*, 1980, paragraph 86), of briefly restraining a person to prevent an offence in progress.

Search, service of proceedings or request for waiver. Where a search of mission premises is imminent and the premises have acquired that status, Article 22 of the 1961 Convention provides a clear rule - no entry without the consent of the head of mission, and no attachment or measure of execution against the premises or their contents. Applying it requires composure: record what is happening, protest immediately, refer the matter to the central authorities and document each act. Where proceedings are served on a State, verify the validity of service. In France, service is effected through the public prosecutor's office and diplomatic channels unless an EU regulation or treaty provides otherwise (Article 684 of the Code of Civil Procedure). Do not allow time limits to run in reliance on immunity - enter an appearance to raise it in the first written submissions, before any defence on the merits. Finally, a decision on a request to waive immunity is as much political as legal. For a diplomat and the beneficiaries covered by Article 37 of the 1961 Convention, the decision belongs to the sending State. Waiver must be express, and execution of a civil or administrative judgment requires a separate waiver (Article 32). For other representatives, check the regime applicable to their status. For UN officials and experts, the Secretary-General must waive immunity if, in the Secretary-General's opinion, it would impede the course of justice and waiver would not prejudice the interests of the Organisation. The Security Council decides in the case of the Secretary-General (1946 Convention, sections 20 and 23).

What to gather - in the first hours

A complete copy of the disputed instrument (record of attachment, judicial authorisation, warrant or summons). Proof of protected status (notification, identity card, diplomatic list or applicable instrument). The history of the use of the asset or account concerned. Any waiver clauses on which a party might rely. A precise, hour-by-hour chronology of the incident identifying every authority involved. The diplomatic channels available (note verbale, summons or protest).

What not to do

Allowing a protected official in police custody to address the substance "to clarify matters". Depending on the law of the forum, those statements may remain on the record after the official's status is recognised. Moving attached funds or changing the use of an account after the incident. Protesting publicly before completing the legal assessment. An excessive statement may be used against the party seeking release of the attachment. Appearing on the merits in reliance on a mere reservation of State immunity. Accepting a waiver from the diplomatic agent personally or exceeding the scope of a partial waiver. Article 32 requires an express waiver from the sending State, the terms of which are evidenced by a note verbale. Execution of a civil or administrative judgment requires a separate waiver (Article 32(4)).

Caution

In an immunity incident, every act in the first hours has a dual effect - procedural and diplomatic. A legally sound argument advanced in an unnecessarily forceful manner may cost more in relations between the States concerned than it gains in the proceedings. The response requires coordination among lawyers, the mission, the ministry of foreign affairs and - for private parties - local counsel where the incident occurs.

Key takeaway

Three priorities in an incident: **establish the status** before addressing the merits, **use the appropriate channel** (enforcement judge, note verbale or formal claim by the State), and **avoid committing to a position** - no statements on the merits, movement of assets or public communications - until the legal assessment is complete. Positions taken in the first hours may be litigated for years.

ELEVEN MISTAKES TO AVOID

Mistakes that *compromise the defence* - or the challenge

Errors of method carry a high price in immunity litigation. The mistakes listed here arise less from ignorance of the fundamental principles than from confusing the regimes, taking steps in the wrong order and acting precipitately during an incident. They concern both the party invoking immunity and the party challenging it.

01 Confusing immunity from jurisdiction with immunity from execution and discovering at the attachment stage that the waiver obtained does not cover the property concerned. The distinction shapes the law, the drafting of clauses and the litigation strategy.

02 Relying on the gravity of the acts to defeat State immunity in civil proceedings. *Germany v. Italy* (ICJ, 2012) precludes this under current customary law. By suggesting that counsel is arguing for what the law ought to be, the argument undermines the credibility of the substantial grounds in the case.

03 Invoking the 2004 Convention as a treaty in force. It has been adopted but had not entered into force as at 30 October 2026. It may be relied on, article by article, as a widely accepted reflection of customary law. The opposing party remains free to challenge the customary status of a specific provision.

04 Appearing to address the merits on the assumption that an express reservation will preserve the plea of immunity. Depending on the law of the forum, such participation may amount to submission to jurisdiction. If the State intends to invoke immunity first, it must confine its initial appearance to that objection.

05 Assuming that personal immunity can extend from the three recognised offices to any minister or senior official. *Arrest Warrant* (2002) protects a narrow group. Any extension must be established, and *Djibouti v. France* (2008, paragraph 196) calls on a State invoking immunity for its other organs to notify the forum of the official acts concerned. Silence alone does not constitute waiver.

06 Citing *Pinochet (No. 3)* as having abolished functional immunity for all international crimes, or dismissing it as a peculiarity of British law. The decision opened a specific avenue - torture within the framework of the 1984 Convention - and its broader implications remain contested, as the debate over Article 6 of the draft articles adopted by the ILC in 2026 illustrates.

07 Confusing the diplomatic and consular regimes. The inviolability conferred by Article 29 of the 1961 Convention has no full equivalent in Article 41 of the 1963 Convention. Substituting one for the other leads to incorrect advice in either direction - overstating protection or endorsing an arrest open to challenge.

08 Challenging an international organisation's immunity directly without first identifying, pursuing within the relevant time limits and documenting the internal remedies available to the claimant. Since *Waite and Kennedy* (1999), litigation has turned on whether the alternative remedy is reasonable. Without this groundwork, an Article 6 complaint has little prospect of success - and even a documented absence of an alternative remedy does not in itself displace immunity (*Mothers of Srebrenica*, 2013).

09 Attaching first and considering the consequences afterwards. An isolated, poorly targeted enforcement attempt fails, reveals the creditor's strategy to the debtor State and gives it time to rearrange its assets. Attachments should be prepared discreetly and carried out together.

10 Allowing a protected official to address the merits before establishing their status, or negotiating a waiver with the official personally. The authority competent to waive immunity depends on the status concerned. For a diplomat, the waiver must come expressly from the sending State. For an international civil servant, check the organisation's governing instrument. Depending on the law of the forum, statements made "to clarify matters" may remain on the record after the person's status is recognised.

11 Overlooking the two levels of modern litigation. A disproportionate grant of immunity may infringe access to a court in a dispute over a civil right. A victim who has raised that complaint in substance may apply to Strasbourg under the conditions laid down in Article 35 (*Cudak*, *Sabeh El Leil*, *Oleynikov*). Denial of immunity where it is due may engage the international responsibility of the forum State. The foreign State, however, cannot in that capacity use the individual application procedure under Article 34 to defend its own immunity.

What to expect from an initial discussion with Hennebel Avocats

The initial discussion with the firm is confidential and entails a commitment only to assessing the situation. It takes place by encrypted videoconference or in person, depending on the circumstances of the case. Signal and Threema are available. Sensitive documents can be submitted securely.

The discussion covers three matters. First, the immunities at issue (who is protected, under which regime and against which proceedings - or, for a claimant, where the weakness in the opposing party's position lies). Second, the contractual, procedural and diplomatic chronology of the case, including a review of waivers and a preliminary inventory of relevant assets. Third, the outlines of a strategy - a plea of immunity, release of

an attachment, a coordinated enforcement effort, alternative forums or diplomatic channels. Following this initial discussion, the firm may, depending on the circumstances, provide a written legal assessment setting out the available options, their sequence and the scope of a possible engagement. The terms are specified before the assessment is prepared.

The initial discussion is covered by legal professional privilege, subject to the conditions and limits prescribed by law, irrespective of whether the matter proceeds further.

In genuinely urgent situations - an ongoing attachment of protected property, an official taken into custody, an imminent search or a procedural deadline about to expire - enquiries may receive priority (Crisis Room · Praesidium). Where appropriate, a team can coordinate the legal response, diplomatic channels and local counsel where the incident occurs.

ANNEX - AUTHORITIES CITED

Table of authorities cited in this guide

Instruments and decisions on which this guide draws, cited throughout the text. Exact reference · subject · practical takeaway. The law is stated as at 21 November 2026.

REFERENCE	SUBJECT	PRACTICAL TAKEAWAY
United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004	State immunity from jurisdiction and from execution - adopted, **not in force as at 30 October 2026**	Reference framework for customary law: restrictive doctrine, specified exceptions and rules governing measures of constraint
Vienna Convention on Diplomatic Relations, 1961 (Articles 22, 29, 31, 32, 37, 38, 39)	Inviolability of premises and agents, immunities, waiver and duration	Treaty provisions directly applicable to diplomatic incidents, civil exceptions under Article 31 and residual immunity under Article 39

Vienna Convention on Consular Relations, 1963 (Articles 36, 41, 43)	Consular communication, limited inviolability and functional immunity	Consular regime distinct from the diplomatic regime. For every foreign detainee, check that the person was informed of their consular rights
Convention on the Privileges and Immunities of the United Nations, 1946	Immunities of the UN, its property and its personnel	Model for the extensive treaty-based immunity of organisations, subject to express waiver
Rome Statute, Articles 27, 87(7), 98 and 127	Irrelevance of official capacity, immunities and cooperation	Relationship between the absence of immunity before the ICC and claims to immunity in inter-State cooperation, which the Pre-Trial Chambers hold cannot displace the obligation to arrest (Mongolia, 2024, and Hungary, 2025)
ICJ, *Arrest Warrant of 11 April 2000* (DRC v. Belgium), 14 February 2002	Immunity *ratione personae* of an incumbent minister for foreign affairs	Full protection of the incumbent holders of the three offices before foreign criminal courts. Four remaining avenues for criminal justice
ICJ, *Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France), 2008	Immunities of the head of State and other State organs	Distinction between invitation and compulsion. A State claiming functional immunity for an official is expected to notify the forum of the official acts concerned (paragraph 196).
ICJ, *Jurisdictional Immunities of the State* (Germany v. Italy), 3 February 2012	State immunity, acts of armed forces and peremptory norms	Procedural nature of immunity. Rejection in civil proceedings of an exception based on the gravity of the violations

Italian Constitutional Court, judgment No. 238/2014	Refusal to give domestic effect to the rule of immunity identified in 2012	Tension between a domestic constitutional order and international law - evidence of fragility in the consensus, without a change in international law
House of Lords, *Pinochet (No. 3)*, **1999**	Functional immunity of a former head of State and torture	Immunity denied within the framework of the 1984 Convention. Differing grounds and contested scope
ICC, Appeals Chamber, Judgment in the Jordan Referral re Al-Bashir Appeal, 2019	Head of State immunity and cooperation with the Court	Immunity cannot be invoked before the Court. The scope of the reasoning for cooperation outside the context of a referral remains contested
ECtHR, *Waite and Kennedy v. Germany-* **, 1999**	Immunity of international organisations and Article 6	The availability of a reasonable alternative remedy is a material factor and has become central to litigation against organisations
ECtHR, *Al-Adsani v. the United Kingdom*, **2001**	State immunity, torture and civil proceedings	Immunity consistent with international law does not disproportionately restrict access to a court
ECtHR, *Cudak v. Lithuania* **(GC), 2010**	Contract of employment of a locally recruited embassy employee	Violation of Article 6 where the immunity granted exceeds customary law - assessment based on actual duties
ECtHR, *Sabeh El Leil v. France* **(GC), 2011**	Dismissal of an embassy accountant	Confirmation and refinement of the approach in *Cudak*. Domestic courts must give reasons for their decisions
ECtHR, *Oleynikov v. Russia*, **2013**	Application of absolute immunity without examination	Applying absolute immunity without examining the nature of the transaction violated Article 6

ECtHR, *Jones and Others v. the United Kingdom*, 2014	Immunity of the State and its officials, torture and civil proceedings	Civil immunity upheld under existing customary law, with recognition that the law is evolving
France, Articles L. 111-1-1 to L. 111-1-3 CPCE ("Sapin II" Act, 2016), R. 111-1 to R. 111-6, R. 511-6, R. 511-7 and R. 211-11 CPCE	Measures of constraint against property of foreign States	Prior authorisation by the enforcement judge of the Paris Judicial Court, who has exclusive jurisdiction. Express and specific waiver for diplomatic property. Express waiver sufficient for other property, subject to the central bank regime. Appeal against refusal of the application within fifteen days. Challenge to a third-party debt attachment within one month of notification, on pain of inadmissibility
ILC, draft articles on immunity of State officials from foreign criminal jurisdiction, adopted on second reading on 15 May 2026	Codification and progressive development	Article 6 concerns crimes for which immunity ratione materiae does not apply - the most contested provision, to be cited as evidence of a trend rather than as a statement of the law in force
ICJ, *Questions of Jurisdictional Immunities of the State and Measures of Constraint* (Germany v. Italy), proceedings instituted on 29 April 2022	Follow-up to the 2012 judgment in light of Italian case law	Proceedings suspended since 17 December 2024 at Germany's request (position as at 30 October 2026)
ECtHR, *Stichting Mothers of Srebrenica and Others v. the Netherlands* (dec.), 2013	UN immunity and Article 6	The absence of an alternative remedy does not in itself displace UN immunity

United States Supreme Court, *Jam v. International Finance Corp.*, 2019	Immunity of organisations under United States law	Immunity aligned with the restrictive immunity of foreign States (IOIA). The IFC's immunity was nevertheless upheld on remand (federal Court of Appeals, 6 July 2021)
France, Article L. 153-1 of the Monetary and Financial Code	Property of foreign central banks	Exempt from attachment in principle, unless the enforcement judge grants authorisation on the basis of an enforceable instrument in respect of assets held for the bank's own account and allocated to a principal activity governed by private law
ICJ, *United States Diplomatic and Consular Staff in Tehran* (United States v. Iran), 1980	Inviolability of the diplomatic agent	Brief restraint permitted to prevent an offence in progress (paragraph 86). Arrest otherwise precluded
ICJ, *Immunities and Criminal Proceedings* (Equatorial Guinea v. France), 11 December 2020	Status of mission premises	A unilateral designation by the sending State cannot prevail over a timely, non-arbitrary and non-discriminatory objection by the receiving State
ICC, Pre-Trial Chamber II, finding of non-compliance by Mongolia (Article 87(7) of the Rome Statute), 24 October 2024	Cooperation and the immunity of the incumbent head of a non-party State	Finding of non-compliance and referral to the Assembly of States Parties. Leave to appeal refused (29 November 2024), reconsideration denied (18 March 2025). Reasoning contested by scholars and some States

Court of Cassation, Plenary Assembly, 25 July 2025, No. 24-84.071 (*Mayaleh*)	Functional immunity before the French criminal courts	Functional immunity cannot be invoked against prosecution for genocide, crimes against humanity or war crimes, subject to international conventions, particularly those on diplomatic and consular relations. Torture and enforced disappearance are outside the scope of the ruling
Court of Cassation, Plenary Assembly, 25 July 2025, No. 24-84.393 (*Bachar al-Assad*)	Personal immunity of an incumbent head of State before the French criminal courts	No exception for crimes against humanity or war crimes. The 2023 warrant was declared void, without prejudice to a warrant issued after the person ceased to hold office
Court of Cassation, First Civil Chamber, 13 March 2024, No. 21-17.599	Waiver of immunity from execution	Express waiver suffices for property other than mission property, subject to the specific rules governing central bank property (Article L. 153-1 CMF). Strict interpretation of Article L. 111-1-3 CPCE
Court of Cassation, First Civil Chamber, 12 July 2017, No. 15-29.334	Test for immunity from jurisdiction under French law	Immunity confined to acts that form part, "by their nature or purpose", of the exercise of sovereignty
ECtHR, *Naku v. Lithuania and Sweden*, 8 November 2016	Embassy employment dispute and Article 6	Violation by the forum State. Complaint against the employer State inadmissible
ECtHR, *J.C. and Others v. Belgium*, 12 October 2021	Immunity of the Holy See in sexual abuse claims	No violation of Article 6. Assessment of the territorial tort exception left to the domestic court
United Kingdom Supreme Court, *Basfar v Wong*, [2022] UKSC 20, 6 July 2022	Commercial activity exception (Article 31(1)(c), 1961 Convention)	Alleged exploitation of a domestic worker for profit, capable of constituting commercial activity if proved (three votes to two)

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984	Definition of torture and obligation to prosecute or extradite	Legal basis for *Pinochet (No. 3)* and domestic prosecutions
European Convention on Human Rights, Article 6(1) and Article 35(1) (as amended by Protocol No. 15)	Right of access to a tribunal and time limit for applying to the Court	Proportionality review of immunities granted by domestic courts. Application within four months of the final domestic decision, after exhaustion of domestic remedies
Security Council resolution 1593 (2005)	Referral of the situation in Darfur to the ICC	Independent basis for Sudan's obligation to cooperate in the Al-Bashir case
ICC, Pre-Trial Chamber I, finding of non-compliance by Hungary (Article 87(7) of the Rome Statute), 24 July 2025	Cooperation and the immunity of the incumbent head of government of a non-party State	Finding of non-compliance (failure to arrest in April 2025) and referral to the Assembly of States Parties. The notification of withdrawal of 2 June 2025 was itself withdrawn on 29 May 2026, and Hungary remained a State Party as at 30 October 2026
Court of Cassation, Criminal Chamber, 2 September 2020, No. 18-84.682	Personal immunity of an incumbent foreign head of State and torture	The offence of torture and acts of barbarity falls outside the exceptions to the immunity of an incumbent head of State

France, Code of Criminal Procedure, Articles 689-1, 689-2 and 689-11	Extraterritorial jurisdiction of the French criminal courts	Under Articles 689-1 and 689-2, torture may be prosecuted if the alleged perpetrator is present in France. For genocide, crimes against humanity and war crimes, Article 689-11 requires habitual residence in France and reserves the power to prosecute to the national counter-terrorism public prosecutor. The prosecutor verifies that no prosecution is pending before the International Criminal Court, that no other competent international court has requested surrender, and that no other State has requested extradition.
France, Criminal Code, Articles 113-6 and 113-7	Active and passive personality jurisdiction	French criminal law applies to any serious crime committed abroad by a French national or against a victim who was a French national at the time of the offence. Separate conditions apply to lesser offences (Articles 113-6, second paragraph, and 113-8)
Court of Cassation, Criminal Chamber, 13 January 2021, No. 20-80.511	Functional immunity of foreign State officials and torture	The offence of torture and acts of barbarity, however grave, falls outside the exceptions to immunity from jurisdiction (recalled by the Plenary Assembly, 25 July 2025, No. 24-84.071)

Main sources

This guide draws on the following instruments, decisions and public documents, cited throughout the text without footnotes - full scholarly references are provided in the Pacta collection.

- United Nations Convention on Jurisdictional Immunities of States and Their Property (2004) - adopted by the General Assembly, not in force as at 30 October 2026, and widely regarded as largely codifying customary law.
- Vienna Convention on Diplomatic Relations (1961) and Vienna Convention on Consular Relations (1963).
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- International Law Commission: draft articles on immunity of State officials from foreign criminal jurisdiction, adopted on second reading on 15 May 2026.

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