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Summary: state-owned real property used for official purposes to a less than "considerable" extent not immune.

Immunity from execution – commercial and non-commercial purposes – official purposes – state immunity

FRANZ J. SEDEMAYER V. THE RUSSIAN FEDERATION.

Högsta Domstolen (Supreme Court of Sweden), Case No. Ö 170-10, July 1, 2011, NYTT JURIDISKT ARKIV 475 (2011)

In a decision on 1 July, 2011, the Swedish Supreme Court found that immunity was not a bar to execution in a piece of real property in Sweden, owned by the Russian Federation and partly, but not "to a considerable part", used for diplomatic and other official purposes.

Assets owned by Franz J. Sedelmayer, a German national, were confiscated by Russian authorities through various measures in 1994-1996.[1] Pursuant to Article 10 in the

[1] The Sedelmayer case is the stuff of a novel. See, for instance, *German businessman hurts Russia's reputation in the West*, Pravda.ru, 27 October, 2010, *at* <http://english.pravda.ru/world/europe/27-10-2010/115535-russia_business_reputation-0/>

bilateral investment agreement of 1989 between the Soviet Union and Germany (to which Russia had succeeded), an arbitral tribunal in Stockholm decided in 1998 that the Russian Federation should pay compensation to Sedelmayer amounting to USD 2.350.000.[2] Russia challenged the award before a Swedish district court and the Svea Court of Appeals but lost.[3] Sedelmayer then requested that the judgment of the district court, as far as concerns compensation for his considerable legal costs, be enforced through execution. In 2004 Sedelmayer requested execution in the real property Lidingö Kostern 5 and in the rents owed by the tenants of that property, but the succeeding year the enforcement authority determined that the property was immune and thus protected from execution. This decision was upheld by the Nacka District Court, while the Svea Court of Appeal found in 2009 to the contrary, that there was no obstacle to enforcement. The decision was appealed by the Russian Federation to the Swedish Supreme Court, which rendered its decision on 1 July, 2011.[4]

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[2] Franz Sedelmayer v The Russian Federation, Arbitration Institute of the Stockholm Chamber of Commerce, July 7, 1998, *at* <http://www.arbitrations.ru/userfiles/file/Case%20Law/Investment%20arbitration/Russia/Sedermayer/sedelmayer%20award.pdf>

[3] See the excerpts and commentary in Walid Ben Hamida, Stefan Kröll, Jörn Griebel & Domenico di Pietro, *Mr. Franz Sedelmayer v. The Russian Federation. I. Final Arbitral Award Rendered in 1998 in an ad hoc Arbitration in Stockholm, Sweden; II. Judgment by the Stockholm district Court Rendered on 18 December 2002; III. Decision by the Svea Court of Appeal Rendered on 15 June 2005,* STOCKHOLM INTERNATIONAL ARBITRATION REVIEW 37 (2005) *at* <http://www.sccinstitute.com/filearchive/2/21315/franz_sedelmayer_russian_federation.pdf>

[4] Sedelmayer v the Russian Federation, Högsta Domstolen (Supreme Court of Sweden), Ö 170-10, 1 July, 2011 *at* <http://www.hogstadomstolen.se/Avgoranden/2011/#ruling>. The

Sedelmayer's efforts to have the arbitral award enforced have further resulted in a number of cases in Germany, including a successful request for sequestration of a Russian building in Cologne, owned by a state-owned corporation.[5]

The real property unit in Sweden (in Lidingö, outside Stockholm) contains a multi-family building. Until the 1970s it had been the main office of the Russian trade mission in Stockholm (a part of the Russian Embassy), but was thereafter no longer notified as official premises of the Russian Embassy including its trade mission.[6] According to the

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case is also available at <https://lagen.nu/dom/nja/2011s475>, including decisions in the lower instances. An unofficial and fairly good but not perfect English translation can be found at <http://www.arbitrations.ru/files/articles/uploaded/Supreme_Court_of_Sweden_01072011.pdf>. All translations in this case note are mine.

[5] *See* Sedelmayer v 'Company for the Administration of Foreign Property' of the Russian Federation, Appeal judgment, Case no IX ZR 64/086, November 6, 2008, OXFORD REPORTS ON INTERNATIONAL LAW IN DOMESTIC COURTS, ILDC 1186 (DE 2008); Sedelmayer v Russian Federation, Appeal judgment, Case nos 3T 377/07 and 3T 405/07, January 16, 2008, OXFORD REPORTS ON INTERNATIONAL LAW IN DOMESTIC COURTS, ILDC 948 (DE 2008); Hilmar Raeschke-Kessler, *Mr. Franz Sedelmayer (Germany) v. the Russian Federation: Two Decisions by Germany's Supreme Court*, STOCKHOLM INTERNATIONAL ARBITRATION REVIEW 71 (2006) <http://www.sccinstitute.com/filearchive/2/21311/franz_sedelmayer_v_russian_federation.pdf>

[6] It was officially registered as the venue of the Soviet Trade Delegation in Stockholm up to the end of 1970s. Then the Embassy moved its trade mission (or parts of it) to another address. The Embassy notified the Swedish foreign ministry of the move, but did not

information on which the Court based its decision, the building had 48 apartments out of which 15 were leased to persons employed by the embassy or the trade mission while almost all of the other apartments were used in connection with Swedish-Russian scientific exchange or other government activities; according to the Russian Embassy, the tenants paid compensation only for actual costs.[7] In addition, two commercial companies, registered in Sweden, had their addresses at the property, and on the ground floor of the building there was an archive used both by the trade mission and the embassy and further a garage used for diplomatic vehicles.

As is usually the case where immunity for state property is at issue, the main question that the Court had to deal with was whether the property was of such a nature that it was protected by immunity. (Sedelmayer had also argued that immunity against execution had been waived by Russia, but that argument was not even considered by the Supreme Court.[8]) The Court briefly reviewed the international development towards restrictive immunity, including regarding enforcement (paras 7-9). No particular cases were mentioned, probably because most other cases dealing with enforcement have concerned bank accounts (see below). The Court thereafter briefly revisited its own practice, which had never covered

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explicitly state that the previous venue would no longer be used by the trade mission. One could therefore argue that the status of Lidingö Kostern 5 was not formally changed. Be that as it may, the Supreme Court proceeded from the assumption that the property was no longer notified as an office of the Russian trade mission (para 17).

[7] The issue of the burden of proof will be commented upon below.

[8] In the lower instances, Sedelmayer argued that Russia had waived its immunity, firstly by entering into the arbitration agreement and secondly by challenging the award in a Swedish Court of Law. No court accepted this as a sufficient basis to set immunity aside.

execution in real property (paras 10-11).[9] The Supreme Court then took the provision in Article 19 (c) of the UN Convention on Jurisdictional Immunities of States and Their Property as the starting point for its own reasoning. As is well-known, the Convention was adopted by the General Assembly in 2004.[10] For entry into force, 30 ratifications, etc, are required, and the Convention has so far been ratified by 13 states, including Sweden; Russia has signed but not ratified. Article 19 (c) reads:

> No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a Court of another State unless and except to the extent that:
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> ….
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> (c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes …

The Svea Court of Appeals had cited this provision, too, and found that it did not express international customary law.[11] The Supreme Court noted that the Convention was not in force, but did not state explicitly whether the provision fully reflects international customary

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[9] Two fairly recent decisions on judicial immunity, in 1999 and 2009, will be further commented upon below. Two rulings from 1942, on the sequestration of ships during the Second World War, were mentioned but found to be less relevant.

[10] United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted by the General Assembly. GA Res 59/38 (December 2, 2004). (A/59/49). The Convention was commented on in this journal in David P Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 AM. J. INT'L L. 194 (2005).

[11] Sedelmayer v the Russian Federation, Svea Court of Appeals, November 11, 2009, p 5. The decision is available at <https://lagen.nu/dom/nja/2011s475>.

law. The Court found, however, that the provision "must be held to express the principle, which is nowadays accepted by many states, that execution may be made at least in some property belonging to a state, namely in property which is used for other than government non-commercial purposes. (see Article 19 (c))"[12] That does not, however, mean that all non-commercial property is immune. In a critical passage, the Court said:

> 14. … [T]he expression ["in use by the State for other than government non-commercial purposes"] must be held to entail that immunity against enforcement can be claimed at least as concerns property that is used for the official functions of a state. The expression should not, however, be considered to mean that there is immunity against enforcement merely for the reason that the property in question is owned by the state and used by it for non-commercial purposes.

This interpretation might seem surprising, since the convention appeared to provide that "government non-commercial purposes" is exactly what makes a property immune. However, the Court did not subscribe to a simple dichotomy between what is commercial and what is non-commercial. In doctrine and court practice, different dichotomies have been invoked to distinguish between property that is considered to be immune and property that is not: *de jure imperii/de jure gestionis*; sovereign/not sovereign; official/not official, public law/private law, etc.[13] As mentioned, at the suggestion of the International Law Commission, the UN

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[12] For a similar view, see August Reinisch, *European Court Practice Concerning State Immunity from Enforcement Measures*, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW 803, 835 (2006). See, however, Ernest K Bankas, *The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts* 346 (2005).

[13] See HAZEL FOX, THE LAW OF STATE IMMUNITY 272 et seq (2004). See in particular p 276, where Fox finds that commercial and private law are the two most common tests to determine

Convention refers to commercial/non-commercial, as is the case in several domestic statutes, including the influential U.S. and British statutes. The Swedish Supreme Court, though, does not fully adopt that dyad. In para 16, the Court distinguished between on the one hand "official purposes and purposes that are closely connected to official activities (such as to provide residence for personnel covered by diplomatic immunity)" and on the other hand "commercial or otherwise private-law activities" (para 8) and "purposes which are a precondition for or a consequence of a commercial or otherwise private law nature". As I will show below, the distinction between commercial and *other* forms of private law use is crucial, because the Court holds that *non*-commercial private law use does not render a property immune.

How were the different uses categorized? While the Court clearly separated diplomatic immunity and inviolability on the one hand from state immunity on the other, and further noted that the borders of state immunity and diplomatic immunity do not coincide (para 15), the concept of diplomatic immunity nevertheless played an important role in its categorization of the different uses. In para 14, the Court briefly referred to (but did not quote) Article 21 of the Convention, which provides that "property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State" "shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes". The Supreme Court further noted that the Vienna Convention on diplomatic relations protects the physical integrity of diplomatic premises and living quarters (para 15). Diplomatic functions are clearly official and therefore constitute such use that makes a property immune (see paras

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non-immunity. Crawford notes the difference between civil law and common law approaches. James Crawford, *Execution of Judgments and Foreign Sovereign Immunity*, 75 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 820, 855 (1981).

15 and 16). In para 21, where the Court applied the law to the case at hand, it again noted that the physical integrity of the archive, the storage of diplomatic vehicles and the apartments for employees of the embassy were all protected by the Vienna Convention. As is clearly implied by paras 22 and 23, this fact as such was sufficient to qualify that particular use of the building as "official".

What about the other apartments, used by visitors on official missions and by visiting students and scholars, but not covered by the Vienna Convention? Since these tenants, who were not employed by the Embassy, were nevertheless connected to Russian government activities (such as bilateral scientific exchange), and since the rents were calculated on a non-profit basis, these leases, while of a private law character, were non-commercial (para 22). However, this non-commercial character did not in and of itself make the property immune. It is only official and similar use that makes property immune.[14] With regard to visiting scientists and students, the Court noted specifically that these visits were based on a bilateral agreement between the Russian Federation and Sweden, but that the provision of the apartments as such is based on agreements between these persons and Russia, and "not so closely connected to the fulfillment of the [bilateral] agreement" that the use was considered official (para 22).[15] In order for immunity to apply, it is necessary that "the purpose of the possession of the property is of a qualified nature, such as when the

[14] See also para 22: "The other use of the property was for purposes under private law that were of non-commercial, but also non-official nature. …"

[15] The Agreement can be found in the treaty collection of the Swedish Government, *Sveriges Överenskommelser med främmande makter*, SÖ 1994:51. Article 4 provides that costs for visits shall be borne by the visiting party. Perhaps the conclusion would have been different if the bilateral agreement had provided that the Russian Federation should provide apartments for the scientists and students.

property is use for the state's exercise of sovereignty and similar acts of official nature or when the property is of such a nature as is mentioned in Article 21…"(para 14). I will comment on this distinction below.

Having thus characterized the various uses of the building, the Court went on to determine whether the property as a whole could be subject to enforcement. The Court therefore balanced the different uses. In one scale there was commercial and non-commercial private law use and use connected to such activities, and in the other there was the official use and uses which were related to the official use (16, 23). Where, then, was the point of balance?

The Court had before it legal opinions from three Swedish international law professors. The Supreme Court cited neither of them, but the Svea Court of Appeals referred to those of Professors Said Mahmoudi and Ove Bring.[16] For Mahmoudi, the property is immune from execution only if it is exclusively used for non-commercial purposes. For Bring it suffices if it is used mainly for non-commercial purposes. The Court of Appeals chose Bring's line in this case, while the Supreme Court adopted a different standard. It accepted immunity if there is a "considerable" official use (para 23), which does not have to be "predominant"[17] (cf para 15). In this operation, the Court did not make a simple mathematical operation, but rather considered whether the use was overall of "such a qualified nature that the property should be protected from execution" (see para 16). Perhaps that operation might have yielded a different result if the premises and apartments that were used for official purposes had been used for *very* qualified official purposes. This approach might appear a bit

[16] Sedelmayer v the Russian Federation, Svea Court of Appeals, November 11, 2009, p 5, *supra* note 11.

[17] The Swedish word used in the judgment, "*övervägande",* means "more than not" or, in mathematical terms, more than 50%.

relaxed, in particular in relation to the learned opinions just cited. However, one must bear in mind that the Court found that some non-commercial uses do not entail immunity. Since the building was only to a rather limited extent, and not "to a considerable part" used for such qualified and official use, the overall conclusion was that the property was not immune (para 23).

The Court equally found the claims for rent executable: "A claim for rent arises from a private law transaction and it is, as such, typically a commercial asset" (para 24).[18]

In reaching its conclusion, the Court had to deal with a couple of other issues, which I will now turn to. This first one is the temporal aspect. Article 19 (c) uses the terms "in use or *intended* for use" (emphasis added), which implies that not only present but also future use is relevant. Before the Supreme Court, the Russian Federation claimed that it was its intention to use the whole building from 1 July, 2010 only for persons with diplomatic immunity (para 19). The Supreme Court, however, determined that the relevant point in time was the application for execution by Sedelmayer (para 20), in 2004.[19] The Court therefore did

[18] This applied only to those tenants who were registered by Swedish authorities. According to the Swedish law on civil registry, *Folkbokföringslag* (1991:481), Sec 5, members of a diplomatic mission should not be registered.

The reasoning in this regard was very brief in the Supreme Court's decision. The Svea Court of Appeal laid out the text a bit more, and noted that while commercial income can no longer be separated from other assets, a claim is separable. Sedelmayer v the Russian Federation, Svea Court of Appeals, November 11, 2009, p 8, *supra* note 11.

[19] This is in line with modern practice. See International Law Commission, *Draft Articles on Jurisdictional Immunities of States and Their Property, with Commentaries*, p 58, at <

not consider the Russian declaration about intended use. This does not necessarily mean that the Court disregarded the criterion of intended use; since the case had been pending at least since 2004, by the time the Supreme Court gave its decision, the Russian Federation had had seven years to effectuate any plans that it might have had.

Another controversial issue on which the Court pronounced itself is the burden of proof. Russia had argued that it was for the claimant to show that the property was not of such a nature that immunity could be invoked. This argument was based on the locution "it has been established" in Article 19 (c), which suggests that it is for the applicant in an enforcement matter, not the respondent, to prove the status of the property. The legal opinions from Professors Bring and Mahmoudi argued that this particular feature of Article 19 was not in accordance with international customary law, and that it is for anyone who pleas immunity to show that the property in question is so qualified.[20] The Court did not actually reverse the burden of proof in Russia's favor, but did provide some relief in this regard. The Court would likely have been satisfied to grant the Russian plea if the property had been notified as the office of the trade mission (para 20). However, the lack of such notification, and the information invoked by Sedelmayer, put the burden of proof on the Russian side.[21] Nevertheless, the Court found that *"*[t]he demand for respect for state

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http://untreaty.un.org/ilc/texts/instruments/english/commentaries/4_1_1991.pdf> [hereinafter ILC Commentaries].

[20] The opinions are on file with the author.

[21] Compare Section 13(5) of the British State Immunity Act of 1978, which provides that a certificate from the head of mission "shall be accepted as sufficient evidence of that fact unless the contrary is proved." Cited from Andrew Dickinson, Rae Lindsay & James P. Loonam, STATE IMMUNITY: SELECTED MATERIALS AND COMMENTARY 390 (2004). See also *op.cit* at 395, where the commentator concludes that this puts the burden of proof on the

immunity for property used for sovereign acts as well as for the fact that a state cannot be forced to provide information that it does not wish to provide may entail that the usual rules of burden of proof in an execution matter cannot be fully upheld" (para 16). This finding builds on considerations similar to those of the German *Bundesverfassungsgericht* (Constitutional Court) in Philippine Embassy Bank Account Case, while courts in some other countries have been bolder.[22] The Supreme Court relied on evidence provided by both sides, but it accepted the Russian Federation's claim that four of the tenants were diplomats, although Sedelmayer had claimed that none of them was notified to the Swedish authorities under the Vienna Convention, and it further accepted the Russian information that the rent only covered actual costs, despite that not being admitted by Sedelmayer and despite lack of any corroborating evidence.

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The case provides an illustration of the difficulties in obtaining enforcement of arbitral awards, not least against Russia. Russia has consistently refused to implement the arbitral award for Sedelmayer, and immediately after the decision by the Supreme Court, the Swedish chargé d'affaires in Moscow was summoned to the Russian Ministry for Foreign Affairs, to receive the message that the Russian Federation was "surprised" at the decision, which was "illegal".[23]

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judgment creditor. For criticism, see Dimitri Zdobnõh & René Värk, *State Immunity from Execution: In Search of a Remedy*, 4 ACTA SOCIETATIS MARTENSIS 161, 174-175 (2009).

[22] HAZEL FOX, THE LAW OF STATE IMMUNITY 407-408 (2004).

[23] *Sverige uppkallat till ryska UD*, SVENSKA DAGBLADET, July 7, 2011, *at* <http://www.svd.se/nyheter/inrikes/sverige-uppkallat-till-ryska-ud_6301620.svd>

My comments will focus on the import of this case for the law of state immunity. Before turning to the general aspects, I note that the Supreme Court's decision was quite important for Swedish practice. Swedish Courts have generally been quite late in fully adopting the doctrine of restricted immunity.[24] As noted in this journal in 2001, the Swedish Supreme Court accepted a plea of immunity from the Republic of Iceland concerning a law-suit from the Swedish local authority (municipality) of Västerås in a case from 1999.[25] Västerås had provided training for Icelandic flight technicians under a contract with Iceland, but Iceland failed to pay the costs. There was an umbrella treaty between Sweden and Iceland concerning mutual provision of free upper-secondary education between the two countries, but this quite specialized training did not fit comfortably under that treaty. Nevertheless, even though the Supreme Court claimed that it applied the restrictive doctrine (see para 10 of the 2011 decision), it found that Iceland was immune. Even though the contract was of a private law nature, the Court emphasized that the subject of the agreement was of public nature. Further, as late as 2004 and 2005, two lower Courts accepted pleas of immunity for services provided to embassies in Stockholm (legal advice and real estate brokerage).[26]

[24] For a full review of Swedish court practice, see the Governmental report IMMUNITET FÖR STATER OCH DERAS EGENDOM, STATENS OFFENTLIGA UTREDNINGAR, SOU 2008:2, 75-116 (2008) [hereinafter SOU 2008:2]. See also Said Mahmoudi, *State Immunity: A Swedish Perspective*, in a forthcoming Liber Amicorum. (Author's note: The name and subject of the volume withheld.)

[25] Said Mahmoudi, *Case Note: Local Authority of Västerås v. Republic of Iceland*, 95 AMERICAN JOURNAL OF INTERNATIONAL LAW 192 (2001).

[26] SOU 2008:2, *supra* note 24, 94, 96.

It was only in 2009 that the Supreme Court unequivocally embraced the doctrine of restrictive immunity.[27] In this case the Court did not accept a plea of immunity from the Kingdom of Belgium regarding a dispute concerning costs for the renovation of premises in which the Belgian embassy had been located. The Court emphasized the nature of the underlying transaction (a lease) rather than its purpose (to provide premises for an embassy). In an *obiter dictum*, the Court stated that it is generally agreed that it is possible to enforce judgments on payment at least with respect to certain state property.

The Sedelmayer case concerns a different issue, but it nevertheless confirms the impression that Swedish Courts are now in line with the tendency that has prevailed in many other Western countries for decades. As noted above, the Sedelmayer case even brings the Supreme Court into the vanguard, by being a rare case on enforcement in real estate.[28]

Most other enforcement cases, like the celebrated Philippine Embassy Case, have concerned bank accounts. Such cases are, by nature, different from real estate for at least two reasons. First of all, financial assets can be used for any purpose, while that is not always the case for real estate; the location and construction of a building at least suggests some uses as more likely than others. Secondly, the use of a piece of real estate can be established more easily (though not necessarily very easily), while for bank accounts, use can usually be ascertained only through account statements. As mentioned above, some national

[27] Bostadsrättsföreningen Villagatan 13 v the Kingdom of Belgium, Högsta Domstolen (Supreme Court of Sweden) Ö 2753-07, NYTT JURIDISKT ARKIV 905 (2009), December 30, 2009.

[28] For a couple of other examples from countries without statutes on state immunity, see August Reinisch, *European Court Practice Concerning State Immunity from Enforcement Measures*, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW 803, 835-836 (2006).

courts appear to have been understandably reluctant to demand that states display such evidence.

The Sedelmayer case challenges the established dichotomy commercial/not commercial. According to the Court, there may be private law acts which are not commercial, such as rental on a self-cost basis. Most (if not all) of the lease contracts fell under this category. This appears to define "commercial" as "act undertaken for the purpose of profit"; the International Law Commission did not define "commercial", but at least one of its members thought of the term this way.[29] According the Court, the only category of usage which unequivocally speaks in favor of immunity is official usage and related usage. However, even official usage may be take place under the form of a private law contract, and the Court never inquired into the nature of the lease by the Russian Federation as a landlord to those tenants who were employed by the Russian embassy including its trade mission. I suggest that it was immaterial to the Supreme Court whether the diplomats who rented apartments at Kostern did so under the terms of a private law contract or not. What mattered was the connection between these officers and a vital state function, namely diplomatic representation. Hence, what matters is the purpose of the usage, and not whether that usage is under a private-law form or not. Under this view, one could argue that the Court should have considered whether those 14 apartments that were used by temporary visitors "on official missions" (para 19) could have fallen under this category. Perhaps the Court should have taken a cue from Article 11 (a) of the UN Convention, which provides for state immunity in matters concerning employment contracts not only regarding diplomatic staff but also regarding persons performing "particular functions in the exercise of governmental authority". Another candidate for cross-reading is Article 16, where the term "other than

[29] ILC Commentaries, *supra* note 19, 19.

government non-commercial purposes" was also used.[30] Had the Court considered read Article 19 (c) in this contextual light, it might, perhaps, have widened the scope of application of the term "official use" slightly.[31]

While the Supreme Court's determination of what is official use can be discussed, the Court was surely right in demanding that a substantial part of the property should be for official use. Otherwise a state would be free to invest in real property abroad and then shield its assets by housing one or two officials in each house.

The case was also relevant from the point of view of the relation between domestic law and international law. In distinction to many common law countries,[32] there has been no domestic legislation on the issue in Swedish law and state immunity has been applied as contained in international customary law.[33] However, a statute was passed by the Swedish

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[30] ILC Commentaries, *supra* note 19, 58. Cf also the commentary to Article 16, at 50-53.

[31] The distinction between official and non-official is, of course, arbitrary. For a book-length critique of this distinction, see Ernest K. Bankas, *The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts* (2005).

[32] Prior to the adoption of the UN Convention, domestic statutes on state immunity were enacted in the common law jurisdictions of Australia, Canada, Malaysia, Pakistan, Singapore, South Africa, the United Kingdom and the United States. HAZEL FOX, THE LAW OF STATE IMMUNITY 407-408 (2004. In addition, Argentina enacted a law on the subject in 1995; Andrew Dickinson, Rae Lindsay & James P. Loonam, STATE IMMUNITY: SELECTED MATERIALS AND COMMENTARY 461 (2004).

[33] *Cf* Sedelmayer v the Russian Federation, Svea Court of Appeals, *supra* note 11, at 2: "It is for a court to apply the international principles of immunity …."

Parliament in 2009 and will enter into force when the Convention has done so.[34] Since the 2011 decision is not necessarily fully congruent with Article 19 (c) of the Convention, this may reduce the precedential value of the decision.

There are both advantages and disadvantages of introducing legislation.[35] With no domestic legislation in force, the burden is heavier on Courts to properly assess the current state of international law. On the other hand, the state obligation to respect state immunity is an international obligation, and as long as there is no generally agreed convention to implement, it might be improper to freeze development by introducing legislation, unless the legislator takes it upon herself to continuously review and assess developments in international law.[36] The new Swedish law simply incorporates the UN Convention and states that it should have the force of law in Sweden, and thus replace the application of international customary law.[37] This is a simple and effective way of dealing with the issue. However, it does not resolve the problem that not all states are bound by the convention and

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[34] Lag (2009:1514) om immunitet för stater och deras egendom. Before that law was introduced, an expert report was written in which legislation and court practice in Sweden and several other countries was reviewed. SOU 2008:2, supra note 24.

[35] See the Government Bill, IMMUNITET FÖR STATER OCH DERAS EGENDOM, Proposition 2008/09:204, 96-97 and 100-109, at < http://www.riksdagen.se/Webbnav/index.aspx?nid=37&dok_id=GW03204> [hereinafter the Bill]

[36] For a brief discussion on early court practice regarding the relation between general international law and the U.S. Foreign Sovereign Immunities Act, see James Crawford, *Execution of Judgments and Foreign Sovereign Immunity*, 75 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 820, 845-847 (1981).

[37] The Bill, *supra* note 35, 108.

that it may not fully reflect international customary law. Further, international customary law may develop, even between the parties, and thus trump the convention under the lex posterior maxim. Courts facing this situation should try to deal with this through creative interpretation.[38]

[38] It is often held that the only parameter that limits domestic freedom of action in this field is the law of state immunity, meaning that a state is free to apply the absolute doctrine of immunity. See, e.g., James Crawford, *Execution of Judgments and Foreign Sovereign Immunity*, 75 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 820, 855-856 (1981). However, to do so might entail a violation of the right to access to justice. *Cf* Al-Adsani v. United Kingdom, European Court of Human Rights, App. No. 35763/97, paras. 9–13 (Nov. 21, 2001), available at <http://www.echr.coe.int/eng/judgments.htm>.