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and apply international rules in a horizontal legal system. Brazil, according to the Supreme Court, has made a normative choice to interpret and apply international law according to the prevalence of human rights. It remains to be seen, however, whether the Brazilian precedent will herald a new customary norm of relative immunity, or just one more breach of the status quo rules.

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Exequatur *of foreign judgments—public policy—9/11 terrorist attack—sovereign immunity—Foreign Sovereign Immunities Act—terrorism exception—tort exception—human rights*—jus cogens—*customary international law*

STERGIOPOULOS V. IRAN. Order No. 39391/2021. 105 Rivista di diritto internazionale 620 (2022). *At* http://www.italgiure.giustizia.it/sncass.
Corte Suprema di Cassazione della Repubblica Italiana (First Civil Section), December 10, 2021.

In *Angela Stergiopoulos v. Iran*, the Italian Supreme Court of Cassation held that state immunity does not bar *exequatur* proceedings against a foreign state when those proceedings seek the recognition and enforcement of a foreign judicial decision finding the state responsible for serious breaches of human rights.[1] Order 39391/2021 stems from the mass litigation by victims of the September 11 terrorist attack before the U.S. District Court for the Southern District of New York (SDNY). The Islamic Republic of Iran and a number of its instrumentalities were among the defendants, accused of facilitating the terrorists' travel to the United States and providing them safe haven after the attack.[2] After being awarded both compensatory and punitive damages by the SDNY,[3] the plaintiffs sought to recover by seizing Iranian assets in Europe. Courts in Luxembourg and the UK dismissed (or are likely to dismiss) such proceedings on state immunity grounds,[4] in keeping with the approach of the International

[1] Stergiopoulos v. Islamic Republic of Iran, Cass., Sez. I Civ., Ord. 10 dicembre 2021 n. 39391, 105 RIVISTA DI DIRITTO INTERNAZIONALE [RDI] 620 (2022) (It.), *at* https://www.italgiure.giustizia.it/xway/application/nif/clean/hc.dll?verbo=attach&db=snciv&id=./20211210/snciv@s10@a2021@n39391@tO.clean.pdf. For an early commentary and English excerpts, see INT'L L. DOMESTIC CTS. [ILDC] 3340 (reported by Mariangela La Manna). The quotations below refer to the Roman numerals used by the Court in the section of the Order laying down the reasons for the decision (*Ragioni della decisione*). Translations from the Italian are by the authors.

[2] An overview of the pertinent proceedings is available at https://iran911case.com. A detailed account of the allegations against Iran may be found in the Plaintiffs' First Memorandum in Support of Motion for Entry of Judgment, *at* https://iran911case.com/first-memo-of-law (*see especially* Section VI).

[3] On December 22, 2011, the District Court issued a default judgment finding Iran liable for all allegations brought against it. Havlish v. Bin Laden, No. 03 MDL 1570 (GBD) (SDNY 2011). The judgment on the quantification of damages was rendered on October 3, 2012. Havlish v. Bin Laden, No. 03 MDL 1570 (GBD)(FM) (SDNY 2012).

[4] *See* Stephanie Law, Vincent Richard, Edoardo Stoppioni & Martina Mantovani, *The Aftermath of the 9/11 Litigation: Enforcing the US* Havlish *Judgments in Europe* (MPILux Research Paper Series No. 1 2020), *at* https://www.mpi.lu/fileadmin/mpi/medien/research/WPS/MPILux_WP_2020_1__US-Havlish_MM_VR_SL_ES.pdf.

Court of Justice (ICJ) in *Jurisdictional Immunities*.[5] However, the Court in *Stergiopoulos* found that state immunity must give way in these circumstances. *Stergiopoulos* confirms the Italian courts' persisting inclination to champion a human rights limitation to state immunity in contrast to mainstream transnational case law. It also reveals several legal and policy risks arising out of that position. Yet the decision should be seen in the context of a new constellation of states prioritizing human rights enforcement over state immunity, including Brazil[6] and, at least in the Court's view, the United States (especially given the availability under U.S. law of proceedings against states sponsors of terrorism accused of certain egregious violations of human rights).

The Court of Cassation was seized of the case after the Court of Appeals of Rome refused *exequatur*[7] in light of Article 64(a) and (g) of the Italian Act on Private International Law (IAPIL).[8] Article 64(a) allows recognition and enforcement of a foreign judgment in Italy when the case could have been similarly adjudicated in accordance with Italian principles of jurisdictional competence (so-called "indirect jurisdiction test"). Article 64(g) bars the recognition of foreign decisions yielding effects contrary to Italian public policy. The Court of Appeals found that the SDNY decision at stake failed these tests, because it was handed down in a case in which jurisdiction was asserted under the terrorism exception to sovereign immunity of the U.S. Foreign Sovereign Immunities Act (FSIA) (para. IV).[9] In the Court of Appeals' view, it was highly problematic that the application of that exception was subject to the unilateral determination by the U.S. executive that a foreign state was a sponsor of terrorism (*id.*); this scheme resulted in discriminatory treatment of foreign states and an unjustifiable "presumption of liability" of states designated as sponsors of terrorism, all of which would be incompatible with Italian principles of due process and public policy (*id.*).

The Court of Cassation held the lower court's findings to be either immaterial or flawed. It recalled that the public policy clause under Article 64(g) has to do with the effects of a foreign judicial decision, not with how the foreign court arrived at that decision (para. V). In its view, a judgment awarding damages to the victims of a terrorist attack could not be considered as yielding effects contrary to the fundamental principles of the Italian legal order (*id.*). Had a defendant's essential procedural rights been breached in the foreign proceeding, IAPIL Article 64(b) and (c) would have precluded *exequatur* (*id.*). However, no claim under such provisions was made here.

The Court also considered the "indirect jurisdiction test" under Article 64(a) to be satisfied. In its opinion, the U.S. courts had adjudicated the lawsuit based on principles of jurisdictional competence recognized by Italian law, including both the law of state immunity and the Italian Code of Civil Procedure (paras. VII–XI). On immunities, the Court stressed that Italian case law and the FSIA converge on ruling out immunity for *jure gestionis* acts (i.e., private law transactions) and for "compensation claims arising from delicts" (para. VII). It then affirmed that state immunity for *jure imperii* acts (i.e., acts performed in the exercise of governmental authority) is a prerogative, not a full-blown right (*id.*). In particular, the Court found that the FSIA accords with the well-settled principle of Italian law that immunity

[5] Jurisdictional Immunities of the State (Ger. v. It.; Greece intervening), Judgment, 2012 ICJ Rep. 99 (Feb. 3).

[6] *See*, *e.g.*, Eduardo Cavalcanti de Mello Filho, Karla Christina Azeredo Venâncio da Costa and Others v. Federal Republic of Germany, *Judgment ARE 954858/RJ*, 117 AJIL 309–315 (2023).

[7] Stergiopoulos v. Islamic Republic of Iran, App. Roma, Ord. 11 dicembre 2020 (It.).

[8] Legge 31 maggio 1995, n. 218, Gazzetta Ufficiale [GU] (ser. gen.) n. 128, 3 giugno 1995.

[9] 28 USC §1605A.

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can be discarded when a state is accused of "*delicta imperii*, that is crimes committed in violation of international *jus cogens* norms and harming universal values transcending the interests of individual state communities" (*id.*).[10] In the Court's perspective, the territorial tort exception[11] and the terrorism exception under the FSIA reflect the same principle (*id.*). Accordingly, it stated that disposing of immunity of states bearing responsibility for the 9/11 terrorist attack would fall clearly within the scope of the human rights limitation to state immunity upheld by Italian courts. These findings by the Court are too sweeping. Most visibly, as recalled below, U.S. practice does not endorse a *general* human rights exception to sovereign immunity.

Be that as it may, the Court concluded that the law of state immunity as construed and applied in Italy would certainly have allowed Italian courts to assert jurisdiction in the case at hand (paras. IX, XI). To bolster this holding, it lingered on its earlier case law[12] to reiterate the view whereby

> State immunity . . . solely protects the [governmental] function, and not behaviors that fall outside the typical exercise of governmental authority; its recognition is conditional on an assessment that the State conduct complained of was not extraneous to a legitimate exercise of such authority, with a view to avoiding a disproportionate sacrifice of the competing right of access to justice. (Para. XI)

The Court apparently took for granted that the exercise of jurisdiction by the SDNY was in line with the Italian Code of Civil Procedure's rules on jurisdictional competence for purposes of satisfying the "indirect jurisdiction test" (*id.*). This seems to cut directly against the Court's earlier decisions in *Flatow* and *Eisenfeld*,[13] rejecting *exequatur* claims regarding another U.S. judgment against Iran for its involvement in terrorist attacks in the Gaza Strip and Jerusalem (again relying on the FSIA's terrorism exception). Surprisingly, given the similarities among the cases, *Stergiopoulos* did not even mention the *Flatow* and *Eisenfeld* precedents. As recalled further on, the most plausible explanation for the Court's different conclusion here is that the wrongful acts at issue in *Stergiopoulos* had a clear territorial nexus with the United States (the attack on the Twin Towers),[14] whereas the crimes in *Flatow* and *Eisenfeld* occurred entirely outside U.S. territory.[15]

[10] *See especially*, Simoncioni v. Repubblica Federale di Germania, Corte cost., 22 ottobre 2014, n. 238, ILDC 2237 (It.) (reported by Riccardo Pavoni at 109 AJIL 400 (2015)).

[11] 28 USC §1605(a)(5).

[12] *See e.g.*, Repubblica Federale di Germania v. Prefettura di Beozia, Cass., Sez. Un. Civ., 29 maggio 2008, n. 14199 (It.) (dealing with the *exequatur* of a Greek judgment against Germany); Repubblica Federale di Germania v. Mantelli, Cass., Sez. Un. Civ., 29 maggio 2008, n. 14201, ILDC 1037 (It.) (reported by Carlo Focarelli at 103 AJIL 122 (2009)). Quite surprisingly, the Court made no mention of the judgment that ushered in the doctrine of a *jus cogens* limitation to state immunity, namely Ferrini v. Repubblica Federale di Germania, Cass., Sez. Un. Civ., 11 marzo 2004, n. 5044 (reported by Andrea Bianchi at 99 AJIL 242 (2005)) (It.).

[13] Flatow v. Islamic Republic of Iran, Cass., Sez. Un. Civ., 20 ottobre 2015, n. 21946, 99 RDI 293 (2016) (It.) (reported by Thomas Weatherall at 110 AJIL 540 (2016)); Eisenfeld v. Islamic Republic of Iran, Cass., Sez. Un. Civ., 28 ottobre 2015, n. 21947 (It.).

[14] *See* Italian Code of Civil Procedure, Art. 20, *available at* https://www.altalex.com/documents/news/2014/12/16/disposizioni-generali-degli-organi-giudiziari. Under this provision, the United States could rightfully be considered the *locus commissi delicti* (i.e., the place where the tort was committed). Therefore, U.S. courts were entitled to exercise jurisdiction on the lawsuit at hand.

[15] *Flatow*, *supra* note 13, para. 6.5. The Court in *Flatow* also stressed that the Italian legal order does not contemplate a principle of universal civil jurisdiction for compensation claims arising from international crimes. *Id.*, para. 6.6.

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In the present case, the Court of Cassation concluded by vacating the underlying decision and remanding to the lower court, for it to rule on the residual issues that had not been adjudicated below (para. XII).[16]

* * * *

Italian jurisprudence has long championed a human rights limitation to state immunity. The main question of international law at stake in *Stergiopoulos* concerns the nature, scope, and prospects of that limitation. The Order comes on top of a wealth of Italian decisions asserting jurisdiction over foreign states accused of gross violations of human rights (usually Germany for crimes committed in World War II). Over the past decade, the main drama in this regard has been the conflict between the Italian Constitutional Court and the ICJ. In Judgment No. 238/2014, the Constitutional Court held that the customary norm on state immunity for *jure imperii* acts is contrary to the Italian Constitution insofar as it shields state conduct amounting to serious breaches of fundamental rights from judicial scrutiny, and cannot thus be applied by Italian judges under such circumstances.[17] That holding famously contradicted the 2012 decision by the ICJ in *Jurisdictional Immunities*,[18] which the Constitutional Court also found incompatible with the Italian Constitution.[19] The Constitutional Court viewed its judgment as contributing to "a desirable—and desired by many—evolution of [customary] international law"[20] on state immunity. *Stergiopoulos* relies on that jurisprudence and upholds its applicability to the recognition and enforcement of foreign judgments delivered against states that have been held liable for egregious violations of human rights. Moreover, by underscoring the similarities between Italian case law and the FSIA, the Court of Cassation is apparently seeking to demonstrate that the practice supporting (at least some form of) a human rights limitation to state immunity is broader than the critics are ready to concede. Prompting the evolution of the customary law of state immunity in the face of a contrary decision by the ICJ remains an "uphill battle,"[21] if that is indeed what the Court is up to. But at least the beginning of a trend is evident in transnational jurisprudence, including in Brazil,[22] South Korea,[23] and Ukraine.[24]

[16] Namely, the (possible) legal consequences of the failure by the plaintiffs to fully serve their Third Amended Complaint on Iran and the compatibility of punitive damages with Italian public policy.

[17] *Simoncioni*, *supra* note 10, paras. 3.3, 3.4.

[18] *Jurisdictional Immunities*, *supra* note 5.

[19] *Simoncioni*, *supra* note 10, para. 4.1.

[20] *Id.*, para. 3.3.

[21] Pierfrancesco Rossi, *Italian Courts and the Evolution of the Law of State Immunity: A Reassessment of Judgment No. 238/2014*, QUESTIONS OF INT'L L. [QIL] 41, 45 (2022) (Zoom-in 94).

[22] Karla Christina Azeredo Venâncio da Costa e Outro v. República Federal da Alemanha, ARE 954858/RJ (Supremo Tribunal Federal Aug. 23, 2021, published Sept. 24, 2021) (Braz.) (affirming, also in light of Italian case law, that wrongful acts by foreign states in violation of human rights do not enjoy immunity from jurisdiction). Following a challenge by the federal public prosecutor, the Brazilian Supreme Court rectified its holding and clarified that state immunity is to be denied only when the human rights breach at stake occurred within the national territory. Karla Christina Azeredo Venâncio da Costa e Outro v. República Federal da Alemanha, ARE 954858/RJ (Supremo Tribunal Federal May 23, 2022) (Braz.). *See also* Cavalcanti de Mello Filho, *supra* note 6.

[23] Hee Nam Yoo and Others v. Japan, Case No. 2016 Ga-Hap 505092 (Seoul Central District Court Jan. 8, 2021) (Kor.) (denying immunity to Japan in a damages action brought by victims of the system of military sexual slavery operated by Imperial Japan especially during World War II).

[24] *See* Ielyzaveta Badanova, *Jurisdictional Immunities v Grave Crimes: Reflections on New Developments from Ukraine*, EJIL:*TALK!* (Sept. 8, 2022), *at* https://www.ejiltalk.org/jurisdictional-immunities-v-grave-crimes-

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How might Italian courts push this trend forward with a view to generating a new customary international law norm? One viable strategy would be to narrow more explicitly the contours of the human rights limitation to state immunity, by clarifying that it applies solely to serious human rights violations that are suffered in the forum state's territory and/or by that state's nationals.[25] These qualifications would arguably alleviate the policy concerns arising from an otherwise unconditional human rights limitation, particularly by defusing the risk of a destabilizing flow of human rights cases against foreign states before domestic courts.[26] They would also bring this limitation closer to the territorial tort exception to sovereign immunity. Customary international law more clearly allows discarding state immunity on the basis of that exception, even for *jure imperii* acts.

But similarity does not mean equivalence. According to the predominant understanding of the tort exception, it applies only when the foreign state's harmful conduct takes place in whole or in part in the territory of the forum state.[27] By contrast, the Italian courts may be inclined to espouse an expanded exception—or an evolutionary interpretation thereof—in cases concerning serious breaches of human rights. To the extent this may be regarded as an iteration of the tort exception, that version would deem sufficient that only the harmful *event* (as distinguished from the conduct causing it) occurs in the forum's territory, or otherwise would make room for litigating transnational torts without a clear-cut territorial nexus against foreign states, such as on the basis of victim nationality.

The 9/11 litigation against Iran provided the Court of Cassation with an opportunity to clarify the scope of Italian immunities jurisprudence along these lines.[28] The U.S. proceedings concerned impugned Iranian acts that were wholly performed abroad, but which resulted in gross human rights breaches against U.S. nationals on U.S. soil. This is precisely the factual situation to which an expanded tort exception would apply. Instead of going that route, the Court insisted on a separate, "pure" human rights limitation—a new claimed limitation to the customary rules of state immunity, requiring a showing of altogether new state practice and *opinio juris* to support, rather than an attempted evolution of the status quo categories which may have been an easier lift. Apparently, the Court gave relevance to the occurrence of the harmful event in U.S. territory solely for the purposes of asserting jurisdiction over the *exequatur* claim under the IAPIL and the Italian Code of Civil Procedure.

reflections-on-new-developments-from-ukraine (discussing the recent case law by the Supreme Court of Ukraine denying Russia's immunity for unlawful acts of war).

[25] Riccardo Pavoni, Germany versus Italy *Reloaded: Whither a Human Rights Limitation to State Immunity?*, QIL 19, 27 (2022) (Zoom-in 94).

[26] *See*, *e.g.*, Andrea Bianchi, *On Certainty*, EJIL: *Talk!* (Feb. 16, 2012), *at* https://www.ejiltalk.org/on-certainty.

[27] *See* United Nations Convention on Jurisdictional Immunities of States and Their Property, GA Res. 59/38, Annex, Art. 12 (Dec. 2, 2004, not yet in force) (requiring the *presence of the tortfeasor* in the territory of the forum state at the time of the act or omission). It is precisely for this reason that the Tribunal of Luxembourg held that the tort exception could not justify the granting of *exequatur* to the same U.S. judgment at stake in *Stergiopoulos*, that is, none of the acts ascribed to Iran by plaintiffs in relation to the 9/11 terrorist attack took place in the U.S. territory. Tribunal d'arrondissement du Luxembourg, para. 2.1.2.2.2.3, 27 mars 2019, *at* https://justice.public.lu/dam-assets/fr/actualites/2019/Jgt20190327-exequatur-anonyme.pdf.

[28] This clarification would have been all the more significant given that Italian case law on state immunity is again under attack before the ICJ, where Germany is complaining of Italy's systematic failure to implement the 2012 ICJ decision. *See* Questions of Jurisdictional Immunities of the State and Measures of Constraint Against State-Owned Property (Ger. v. It.), Application Instituting Proceedings and Request for Provisional Measures (Apr. 29, 2022), *at* https://www.icj-cij.org/public/files/case-related/183/183-20220429-APP-01-00-EN.pdf.

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Other aspects of the Court's reasoning weaken the authority of this Order within the "human rights versus state immunity" debate. In particular, the Court mistakenly assumed that Italian case law effectively converged with the exceptions to sovereign immunity envisaged by the FSIA (para. VII). In reality, the U.S. Supreme Court has consistently resisted expanding the scope of FSIA exceptions to hew toward the demands of human rights. In interpreting the FSIA, the U.S. Supreme Court has been leery of opening the door to a *de facto* general human rights derogation from sovereign immunity.[29] For instance, it recently unanimously construed a *renvoi* to international law in the FSIA's expropriation exception[30] narrowly "as referencing the international law of expropriation rather than of human rights."[31] In so doing it explicitly noted "international law's preservation of sovereign immunity for violations of human rights law,"[32] citing the ICJ judgment in *Jurisdictional Immunities* in support.[33] This is in stark contrast to the approach blazed by Italian case law. The Court of Cassation seems to assume away this divergence.

However, if it is true that the FSIA does not contemplate a *general* human rights exception to sovereign immunity, it is also true that *specific* elements of U.S. legislative and judicial practice provide arguments in favor of Italian jurisprudence. Over the years, the FSIA's terrorism exception has stirred an impressive number of damages awards relating to *extraterritorial* gross human rights violations, such as hostage taking and extrajudicial killing. Albeit confined to human rights breaches occasioned by state sponsored terrorism, this case law points in the same direction headed by Italian courts. This explains why in *Stergiopoulos* the Italian judiciary proved ready to uphold the enforceability of a U.S. judgment arising from the terrorism exception, whereas other jurisdictions had refrained from doing so. Another key aspect of U.S. immunity practice that may well catch the attention of Italian courts in the coming years concerns precisely the FSIA's expropriation exception. This exception is "unique"[34] worldwide and clearly applies to *jure imperii* acts of foreign states, including wartime criminal takings by their armed forces.[35]

It is also significant that this Order involves an *exequatur* claim, which creates novel problems. *Exequatur* proceedings in Italy do not entail a thorough review of the merits of the foreign decision. This is entirely reasonable in view of the need to ensure the free circulation of judgments. Yet such openness can become a double-edged sword in the enforcement of foreign decisions denying state immunity in relation to human rights violations. These judgments usually deal with highly sensitive cases. It may well happen that they were handed down in proceedings against foreign states that had been influenced by the local executive or legislature in pursuance of purely political goals. Without critical reflection, the Italian

[29] Saudi Arabia v. Nelson, 507 U.S. 349 (1993) (Mar. 23, 1993) (dealing with the commercial-activity exception codified at USC § 1605(a)(2)).

[30] USC § 1605(a)(3) (referring to "property taken in violation of international law").

[31] Federal Republic of Germany v. Philipp, 141 S.Ct. 703, 712 (Feb. 3, 2021).

[32] *Id.* at 713–14.

[33] *Id.*

[34] *Id.*

[35] *See e.g.*, Republic of Austria v. Altmann, 541 U.S. 677 (June 7, 2004). An intriguing issue concerns how the Italian courts would react to an *exequatur* claim concerning a judicial decision delivered under the FSIA's expropriation exception, given that the cases adjudicated under that exception normally involve crimes entirely perpetrated outside U.S. territory (i.e., the situation at stake in *Flatow* and *Eisenfeld*, *supra* note 13).

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approach to *exequatur* might amount to a mere rubber stamp for questionable foreign judicial practices.

This issue had been raised by the Court of Appeals of Rome, which questioned the overall fairness of the proceedings before the SDNY in light of the unilateral designation of Iran as a sponsor of terrorism by the U.S. executive—and thus the consistency of these proceedings with Italy's (procedural) public policy. The Court of Cassation overturned this finding on the ground that the lower tribunal had misconstrued the public policy clause under IAPIL Article 64(g). Yet the Court highlighted the possibility of denouncing fair trial violations for the purposes of denying *exequatur* by relying on IAPIL Article 64(b) and (c), which bar the recognition and enforcement of foreign judgments rendered in violation of the essential rights of defense.[36] Time will tell whether this will prove a sufficient bulwark in order to police use of the Italian forum to enforce potentially bogus judgments by foreign courts.

Arguably, such policing is not needed with regard to the U.S. executive's involvement in the application of the terrorism exception. The designation of a state as a sponsor of terrorism does not prevent that state from challenging the plaintiffs' allegations regarding the wrongful acts at stake. However, a too liberal approach to *exequatur* may lead to perverse results in other situations (such as an *exequatur* claim filed in Italy with a view to enforcing a judgment arising out of bogus proceedings entertained against the U.S. in a hostile country).[37] A scrupulous application of the "essential rights of defense" clauses of the IAPIL will therefore be crucial in future litigation so that Italy does not become a convenient forum for abuses of process and political clashes between foreign countries.

The *Stergiopoulos* decision extends the Italian jurisprudence lifting state immunity for human rights breaches to *exequatur* proceedings. Doing so has invited the challenge of articulating the fair trial concerns raised by these kinds of proceedings. Generally, the decision should be seen in the context of a growing number of domestic courts which have recently similarly rejected the ICJ's position in *Jurisdictional Immunities*. That practice in other jurisdictions is likely to encourage the Italian judiciary to continue carrying its own position forward. The decision also arguably demonstrates a partial convergence of the Italian and U.S. approaches to state immunity and human rights—a convergence that the Court might have overstated but that nevertheless exists. Insofar as national courts wish to continue to push back against the ICJ in this vein, they should consistently seek to justify their findings on the basis of international law—especially, as argued here, in reliance on an evolutionary interpretation of the tort exception to state immunity, something that the Court in *Stergiopoulos* failed to do.

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[36] IAPIL, *supra* note 8, Art. 64(b)–(c).

[37] *See* LAWS LIFTING SOVEREIGN IMMUNITY IN SELECTED COUNTRIES (The Law Library of Congress, May 2016), *at* https://tile.loc.gov/storage-services/service/ll/llglrd/2016591730/2016591730.pdf (reviewing legislation in Cuba, Iran, Libya, Russia, Sudan, and Syria).