

**STATE IMMUNITY CURRENT STATE OF  
LAW IN VIEW OF THE UN CONVENTION ON  
JURISDICTIONAL IMMUNITIES OF STATES AND  
THEIR PROPERTY**

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**RESUMO:** This articles aims at analysing the legal institute of State immunity of jurisdiction. A practice amongst the States of mutual recognition, having its base concept on the idea of sovereignty, which is the legitimate power conferred to States governed under the rules of law and recognized by international law in an equal basis.

*“Par in parem non habit imperium”, \_ between the peers there is no hierarchy\_, resulting then, equality amongst sovereignties. Nevertheless, the world developments lead towards more complex situations within the increasing commercial activities performed by the States and its agents, causing, consequently, a number of cases of obvious abuse over this customary rule of international law, which had grown old and thus, no longer fitting to the challenge of the new international reality.*

**SUMÁRIO:** 1 - State Immunity and its introductory considerations; 2 – Origins; 3 - State Immunity: absolute or restrictive?; 4 - State Immunity in the view of the United Nations Convention of 2004; 5 - Definitions of the United Nations Convention on Jurisdictional Immunities of States and Their Property; 6 - Criminal Proceedings and Human Rights; 7 - State Immunity and the Brazilian understanding; 8 - Conclusion.

**1. STATE IMMUNITY AND ITS INTRODUCTORY CONSIDERATIONS**

State Immunity is explained by the Latin expression “*Par in parem non habit imperium*”, meaning one cannot exercise jurisdiction or authority over another, once both are equals. As Prof. Rebecca Wallace well says, “no State may exercise jurisdiction over another State without its consent”<sup>1</sup>.

The jurisdiction of a State is absolute within its territory. Dixon states, “the territorial sovereign is the master of all things and every person present in state territory is subject to the jurisdiction of the local courts”<sup>2</sup>. However, the line governing jurisdiction when foreign states are involved is not easily defined.

The rule of International Law states that the State is entitled of certain immunities when relating to jurisdiction and it is well known as the principle of sovereign immunity.<sup>3</sup> If there is any violation to the immunities given to the foreign State, the host State may have committed an international law violation, and may be responsible for the consequences of the violation.<sup>4</sup>

Having said so, one should know that State Immunity is a complex subject matter therefore, it is necessary to, first of all, divide the concepts in order to achieve a better understanding over the picture now presented in this paper.

Immunity of State jurisdiction and immunity from execution are different institutions. The first is related to under which circumstances a State, its organisations or companies can be sued in foreign courts, while the latter is concerned with whether or not executing measures over state’s properties can be taken.

Important to note moreover is the difference between immunity and non-justiciability, they operate in different ways. When there is immunity that means that a National Court would have had jurisdiction over the object matter, that is because one of the parties is the State, it is the so called *ratio personae*, whereas when there is non-justiciability there is basically an

<sup>1</sup> WALLACE, Rebecca M.M. International Law (2005). Fifth Edition. Sweet & Maxwell Limited. London. p. 131.

<sup>2</sup> DIXON, Martin. Textbook on International Law (2007) Sixth Edition. Oxford University Press Inc., New York. p. 174.

<sup>3</sup> Ibid. p. 174

<sup>4</sup> Ibid. p. 175

subject matter which is not to the Court itself to judge naturally, it is the *ratio materiae*.<sup>5</sup>

Another difference of concept relates to diplomatic immunities that, differently from State immunity is already settled in two important Conventions, the Vienna Convention of 61 and 63 respectively. Which leads us towards the point exactly where the problems raises. As Foakes and Wilmshurst have said:

“The rules of State immunity are rules of customary international law; that is, they originate in the practice and custom of States. But the practice of States in giving immunity to States has not been consistent. The international community tried for many years to agree a treaty on the subject.”<sup>6</sup>

There are reasons for the disagreement amongst the Nations. Those are related, first of all, to the difference of approaches<sup>7</sup> that this legal institute, the immunity of States, has gained in the United Nations, for instance.<sup>8</sup>

Still, according the Foakes and Wilmshurst in their paper over the subject, an agreement was reached and the Convention adopted by the United Nations in December 2004<sup>9</sup>, though, for now, only four countries have signed it. A further analysis over this Convention will be given later on in this paper.

I will develop the origins of the immunity of jurisdiction of the States, stressing the basis for the legal institute, as well as the doctrines which shaped the practices amongst the States. A closer analysis over absolute approach and restrictive approach that has developed through the years will also be analysed.

<sup>5</sup> DIXON, Martin. Textbook on International Law (2005) Fifth Edition. Oxford University Press Inc., New York. p.165.

<sup>6</sup> FOAKES, Joanne & WILMSCHURST, Elizabeth. Briefing Paper on State Immunity: The United Nations Convention and its Effects. International Law Program (2005). Chatham House. p. 3.

<sup>7</sup> Two theories concern the practice of the immunities of jurisdictions of the States, those are the absolute approach and the restrictive one, I will be back to that subject later on in the paper.

<sup>8</sup> FOAKES, Joanne & WILMSCHURST, Elizabeth. Briefing Paper on State Immunity: The United Nations Convention and its Effects. International Law Program (2005). Chatham House. p. 3.

<sup>9</sup> Ibid. p.3.

Moreover, as appointed out by Foakes and Wilmshurst, some countries have already adopted their own domestic legislation concerning this topic and they may fear that the agreement created by the Convention may not be compatible with their internal laws. It is important to understand how the current law of the immunity of States functions, and the United Nations stance towards it.

I will then focus on the United Nations Convention itself and its implications in subjects such as commercial transactions to human rights considerations. Finally, I will analyse state immunity in Brazil to give perspective over a specific country and its jurisdictions.

## 2. ORIGINS

The origin of the State immunity lays on the independence (sovereignty), equality and non-interference of States<sup>10</sup> that at the beginning would be absolute. Understanding that, all those concepts meet its main roots in the core of sovereignty, hence a closer focus on the main concept of sovereignty, in order to reach the essence of the idea behind immunity of States is welcomed.

As expressed by Bobbio, sovereignty is “intimately connected to the political power: and sovereignty intends to be the legal rationalization of the power, in the sense of transformation of force into legitimate power, from the power of facts into legal one”<sup>11</sup>.

Therefore, this legitimated power expressed in the State in the external level finds in another legitimated power, the other State, an equal, hence, the impossibility of one subjugate the other to its territorial jurisdiction. Consequently, the plea of immunity can be used only to a defendant which is, as pointed out by Hazel Fox, “an independent and sovereign State under international law”<sup>12</sup>.

This leads us to the concept of jurisdiction and its international nature, which according to Fox “means the exercise of authority and power”<sup>13</sup> and

<sup>10</sup> SHAW, Malcolm N. *International Law*. Fifth Edition. (2003). Cambridge University Press. p.621.

<sup>11</sup> BOBBIO, Norberto, MATTEUCI, Nicola and PASQUINO, Gianfranco. *Dicionário de Política*, 7<sup>th</sup> Edition, (1995). Editora Universidade de Brasília. p. 1179. With my own translation.

<sup>12</sup> FOX, Hazel. *The law of State Immunity*. Oxford University Press. (2002). p. 17.

<sup>13</sup> *Ibid.*p.51.

hence, encompasses the idea behind the State immunity rationale and purposes.

In that sense, Marshall CJ in *The Schooner Exchange* case describes the international community as follows:

“The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereignties have consented to a relaxation in practices, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.”<sup>14</sup>

In the nineteenth century, international relations were not as complicated as today<sup>15</sup> and the concept of the absolute immunity blossomed during this period. A situation where the sovereign State used to be completely immune from others jurisdictions, regardless the matter under dispute. This situation, obviously, led to numberless circumstances where this concept was used abusively. Consequently, many States historically moved towards a more restrictive approach.

The rules shaping the State immunity of jurisdiction in a foreign State are rules of international customary law, which means that, they come from the constructions of the practices and the customs of the States courts. Nevertheless, in the year of 1972 a multilateral treaty was adopted concerning that subject matter, the European Convention on State Immunity, coming into force in 1976<sup>16</sup>. But still, only Austria, Belgium, Cyprus, Germany, Luxembourg, The Netherlands, Switzerland and the United Kingdom are parties.

Even though there are many aspects which are shared amongst the States all over the world, on the other side, what they do not agree prevents

<sup>14</sup> *The Schooner Exchange v. McFaddon* 11 US 116 (1812), 7 Cranch.116 at 136. In *The Law of State Immunity*. Hazel Fox. p. 25.

<sup>15</sup> SHAW, Malcolm N. *International Law*. Fifth Edition. (2003). Cambridge University Press. p.625.

<sup>16</sup> FOAKES, Joanne & WILMSCHURST, Elizabeth. *Briefing Paper on State Immunity: The United Nations Convention and its Effects*. International Law Program (2005). Chatham House. p. 4.

them to come to a common sense, and thus, to be under the same umbrella, so to speak. For that reason, the United Nations decided to bring this subject to light as a topic in the work programme of the International Law Commission (ILC).

After years of discussions, as said by Foakes and Wilmschurst in their paper:

“In 2003, the Ad Hoc Committee was reconvened under General Assembly resolution 58/74 with a mandate to formulate a preamble and final clauses, with a view to completing a convention. The Committee then succeeded in reaching agreement on a finalized version of the 1991 Draft Articles on Jurisdictional Immunities of States and their Property and it is this text, accompanied by a set of annexed understandings that was finally adopted by the UN General Assembly. The Convention provides that it shall enter into force after it has been signed and ratified by 30 states.”

Until the time of that research only four States have so far signed it, Austria, Morocco, Portugal and Belgium. Remaining uncertain whether or not this document will finally have some weight in the international arena, having governments all over the Globe singing it and ratifying it, and as a result, bring to light more legal predictability in that field of the international relations amongst the States and citizens.

### 3. STATE IMMUNITY: ABSOLUTE OR RESTRICTIVE?

If the States are independent and equals, it could not, in theory at least, submit the other before its courts, “*par in parem non habet imperium*”. In doing so, it would harm the other States’ sovereignty and its independence, the immunity, thus, would cover the whole state activity, with an absolute character.

In the words of Richard Gardiner, “the notion of sovereignty in an international context means absolute authority subject only to the rules of international law”, therefore, “the natural consequence of this concept would be that a States’ activities and assets could in no circumstances

be the subject of legal proceedings or any enforcement action in another State”<sup>17</sup>. This is the reasoning behind the doctrine of the absolute immunity.

An example of the absolute approach is found in the case of *The Parlement Belge*<sup>18</sup>, where the Court of Appeal had accorded immunity to an owned Belgium Government vessel due to the fact that the ship was being used for a considerably public purpose, despite the fact of being carrying passengers and merchandise in order to hire.

But the ultimate and extreme case involving an absolute approach, according to Shaw<sup>19</sup> was the case of *Porto Alexandre*<sup>20</sup>, where a Portuguese vessel against which a writ was issued in English Court due to the non-payment for services rendered by tugs near Liverpool, even though it was a governmental vessel, it was engaged in commercial private trading. The courts, however, followed the *Parlement Belge* principle and dismissed the case.

Nevertheless, with the State increasing participation in commercial activities that were formally in the hands of the private sector, the other side of the rope was more and more habited by a non-State actor, putting States in a more favoured position. As a consequence, State Courts began adopting a modified concept, moving away from the absolute approach of immunity towards a restrictive one.<sup>21</sup>

The acts started then to be analysed in order to find out the real nature and purpose of the enterprise, instead of the nature of the actor (State). In that sense, “a distinction was drawn between the public acts of a State (government acts) *jure imperii*, and private acts (trading and commercial acts) *jure gestionis*”<sup>22</sup>.

Amongst many interpretations over this subject matter, Shaw points out the reasoning declared by the Court in *Victory Transport*<sup>23</sup> case, where it would not grant any immunity, as long as the activity under judgment would fall within one of the categories of political or public acts.<sup>24</sup> This

<sup>17</sup> GARDINER, Richard K. International Law. Pearson Education Limited. (2003). p. 143.

<sup>18</sup> See *The Parlement Belge* (1880) LR 5 PD 197.

<sup>19</sup> SHAW, Malcolm N. International Law. Fifth Edition. (2003). Cambridge University Press. p.626.

<sup>20</sup> *Porto Alexandre* case (1920) P. 30; 1 AD, p. 146.

<sup>21</sup> WALLACE, Rebecca M.M. International Law (2005). Fifth Edition. Sweet & Maxwell Limited. London. p. 131.

<sup>22</sup> Ibid. p. 131.

<sup>23</sup> *Victory Transport* 336 F.2d 354 (1964); 35 ILR, p.110.

<sup>24</sup> SHAW, Malcolm N. International Law. Fifth Edition. (2003). Cambridge University Press. p.631-

reasoning within time showed very strict to sort out the problems which rose in that field.

Thus followed a whole discussion over how to analyse and qualify an act, either of *jus imperii* or *jus gestionis*. This showed not to be the simplest of the tasks, nonetheless. Still following Shaw explanation over this topic, he points out that article 2 (1) b of the ILC Draft determines that the doctrine approach, which is the most adopted amongst the States nowadays, with exception of countries such as China, for instance, should focus upon the nature of the act other than its purpose.

However, according to article 2(2) ILC Draft:

“In determining whether a contract or transaction is a commercial transaction under paragraph 1(c), reference should be made primarily to **the nature** of the contract or transaction, but its **purpose** should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.”<sup>25</sup>

It is clear then, that the ILC Draft approach is using a combination of the two methods, nature and purpose in order to find out the real status of the activity and, hence, give the right reasoning to a possible content. But, as pointed out by Shaw<sup>26</sup>, it is primarily necessary to, first of all, look at the nature of the contract transaction, and in case is not purely a public one, go further by analysing its purpose, and consequently, have a safer judgment in whether is a sovereign act or not.

It is worthwhile noting that, despite an increasing number of countries whose adherence is with the restrictive doctrine \_ note then that it is not a consensus, still countries go for the absolute one\_ according to Gardiner, the biggest difference appears to be the modus how to analyse the matter in question, in other words, some National Courts analyse the act towards its nature, and some purely according its purpose.<sup>27</sup> I tend to agree with

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<sup>25</sup> United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004.

<sup>26</sup> SHAW, Malcolm N. International Law. Fifth Edition. (2003). Cambridge University Press. p.633.

<sup>27</sup> GARDINER, Richard K. International Law. Pearson Education Limited. (2003). p. 181.

Lord Wilberforce in the judgment of *I Congreso del Partido*<sup>28</sup> case where he stressed that in order to analyse whether the immunity should be granted, one must look primarily to the whole context of the act, hence, not just the purpose or the nature, but also, the context. A fourth test proposed is to see whether the act is of a private law, in other words, was it an act which could be performed by a private citizen<sup>29</sup>, and if yes, the Court most likely has a case of *jus gestionis*.

To sum up, those tests are differently taken by the different nations, in the sense that some focus on the nature of the act, some on the purpose and so on. The worthwhile noting here is that the rules of International law allows the States to adopt the restrictive approach basing its judgments on the distinction between acts of *jus imperii* and acts of *jus gestionis*.<sup>30</sup>

#### **4. STATE IMMUNITY IN THE VIEW OF THE UNITED NATIONS CONVENTION OF 2004**

As previously mentioned State immunity is the ability given to the sovereign State which prevents it to be sued in the Courts of another State. These rules used to cover all matters dealing with the State, but, as already explained, no longer. Nowadays there are an enormous amount of exceptions to this rules, basically when the State acts in the private field, when performs non-sovereign activities.

The new United Nations Convention deals with those rules and its exceptions, not covering, nonetheless, as pointed out by Foakes and Wilmschurst, criminal proceedings and civil actions for human rights abuses.<sup>31</sup> Important to note, moreover, is the fact that the details over the exceptions “vary considerably from one country to another”<sup>32</sup> and this aspect of the subject matter creates complications and lack of consensus, and due to this fact, the rules of immunity which one should rely are indeed uncertain.

<sup>28</sup> *I Congreso del Partido*, (1983) AC 244, 267;64 ILR, pp.307,318.

<sup>29</sup> DIXON, Martin. Textbook on International Law (2005) Fifth Edition. Oxford University Press Inc., New York. p.172.

<sup>30</sup> Ibid. p.173.

<sup>31</sup> FOAKES, Joanne & WILMSCHURST, Elizabeth. Briefing Paper on State Immunity: The United Nations Convention and its Effects. International Law Program (2005). Chatham House. P. 1.

<sup>32</sup> Ibid. p. 3.

The United Nations Convention and Their Properties of 2004 deal, therefore, with the limits of the use of the institute of immunity by the States. In other words, brings the general rule overall accepted that the State has immunity of jurisdiction in certain circumstances but, jurisprudence has changed this theory and hence immunity of jurisdiction has been limited and in many cases denied.<sup>33</sup>

Exceptions to immunity are related to commercial transactions, employment contract, personal injuries, damage to property, ownership, possession and use of property, intellectual and industrial property, participation in companies or other collective bodies, shows owned or operated by a State, and arbitration agreements dealt in Part III, articles 10-17 of the UN Convention on Jurisdictional Immunities of States and their Properties. Below, I will focus on each exception to provide clarification about how the State is limited in its right to have immunity from the jurisdiction of a foreign court.

#### 4.1) COMMERCIAL TRANSACTIONS

According to the Convention, a State cannot claim immunity of jurisdiction which arises from commercial enterprises, unless this transaction has been made between States or the contracting parties had agreed previously otherwise.

Important in the sense is the definition of what is a commercial transaction. The Convention “commercial transaction” means: “(i) any commercial contract or transaction for the sale of goods or supply of services; (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction; (iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.”<sup>34</sup>

According to Foakes and Wilmschurst the major problem arises around the “commercial character of the transaction”<sup>35</sup> meaning, causing the

<sup>33</sup> Ibid.p.3.

<sup>34</sup> United Nation Convention on Jurisdictional Immunities of States and Their Property. 2004. Article 2, (c).

<sup>35</sup> FOAKES, Joanne & WILMSCHURST, Elizabeth. Briefing Paper on State Immunity: The United Nations Convention and its Effects. International Law Program (2005). Chatham House. p 4.

difficulties to reach an agreement amongst the nations over the Convention. Should the criteria to define the commercial transaction be focused on the nature or on the purpose of it is the question which comes over this point.

If a country buys cement, it is clear a commercial transaction, but what if buys it in order to build barracks for the army? Then the cement purpose could be seen as a sovereign act of the State. The paragraph 2 of the same article clarifies that the commercial transaction should be analysed primarily according to its nature and then, the purpose should be taken into account in order to define the real aspect of the transaction.

In the case *Trendtex Trading Corp. v Central Bank of Nigeria* (1977)<sup>36</sup> a private contractor supplied the Nigeria Defence Ministry with a big amount of cement, happens that with the change of the government it was decided that the cement was no longer required and for that reason, the government refused to pay it. The proceedings were brought by the private company in the UK courts which the Nigeria government claimed State immunity. The argument was dismissed by the court and the action allowed to proceed. The purpose was considered by the Court of Appeal immaterial and for that reason, “it was enough that the transaction itself was of a commercial type, such as a contract for the supply of goods or services”<sup>37</sup>.

I intend to agree with the point of view that the act itself must be analysed from both perspectives, nevertheless, unless at the one side of the rope there is a private company dealing a commercial transaction with a State, which shall be defined and viewed by the courts as a commercial activity.

#### 4.2) CONTRACTS OF EMPLOYMENT

In general, a State is forbidden to claim immunity in cases relating to employment contracts. On the other hand, it is necessary to go further into the subject matter in order to find out the specificities on this general rule.

Again the idea of restricted immunity concerning to employment contract lays in the fact that whenever the State performs an act as a private individual while contracting with individuals under their national legal system, for example when a Brazilian Embassy in the UK contracts an English gardener,

<sup>36</sup> *Trendtex Trading Corp. v Central Bank of Nigeria* (1977) 1 QB 529, (1977) 1 ALL ER 881.

<sup>37</sup> DIXON, Martin. *Textbook on International Law* (2007) Sixth Edition. Oxford University Press Inc., New York. p. 180.

the cited gardener is not acting in the interest of the foreigner public service. Hence there is no point in talking about immunity of jurisdiction.

Nonetheless, this exception does not apply to employment contracts performed with nationals of the employing State, unless, this employees live permanently in the State which the contract was taken. The other exception to that exception concerns the staff enjoying diplomatic immunity<sup>38</sup>. Or simply employees which were hired to perform tasks in the exercise of the governmental authority.

Happens, though, there is little consistency between States, and some courts apply state immunity when related to labour issues, while others do not.

#### **4.3) PERSONAL INJURY AND DAMAGE TO PROPERTY**

Immunity is disallowed in cases where an individual suffers injury or death and has the right for compensatory claims against the State. According to Foakes and Wilmschurst, this specifically “covers actions which a State has committed in the exercise of its sovereign authority as well as private activities”<sup>39</sup>.

Nevertheless, acts that have occurred abroad are not covered. For example, the case of Mr. Al Adsani<sup>40</sup> who brought a claim to the UK Courts against the Kuwait Government in order to be compensated for being tortured in the cited State. The Court of Appeal held that the process could not proceed due to the fact that indeed the Government of Kuwait was immune in this case.

#### **4.4) OWNERSHIP, POSSESSION AND USE OF PROPERTY**

Article 12, Part III of the UN Convention on State immunity dealing with the proceedings in which the State immunity cannot be invoked relates to immovable properties, meaning that whenever a claim raises

<sup>38</sup> Nowadays there are two conventions with generalised acceptance amongst the States which relates to this kind of immunities, the Vienna Convention of Diplomatic Relations of 1961 and Consular of 1963.

<sup>39</sup> FOAKES, Joanne & WILMSCHURST, Elizabeth. Briefing Paper on State Immunity: The United Nations Convention and its Effects. International Law Program (2005). Chatham House. p 6.

<sup>40</sup> Al Adsani v Government of Kuwait and Others, 21 January 1994 CA, 100 ILR 465; 103 ILR 420; CA 12 March 1996, 107 ILR 536.

concerning land or buildings, for instance, the State where the immovable properties belong is the State whose jurisdiction is entitled, not being able the foreigner State to ask for immunity.

In the same path, the State is prevented to invoke immunity whenever rights of succession or donation arising from immovable properties are claimed under a national jurisdiction. Important to stress, nevertheless, is the fact that, in agreement between both States, immunity can be invoked, but, they must agree on that particular issue.<sup>41</sup>

#### **4.5) INTELLECTUAL AND INDUSTRIAL PROPERTY**

As pointed out in article 14, whatever right whose nature is of intellectual property, such as “patent, industrial design, trade name or business name, trademark, copyright or any other form of intellectual or industrial property which enjoys a measure of legal protection”<sup>42</sup>, prevents the Foreigner State to invoke immunity of jurisdiction.

The rights of a third person relating to rights of those nature, above mentioned, which might suffer an infringement by a Foreigner State in the third person domestic forum, must in its domestic jurisdiction remain, meaning that state immunity is not available.

#### **4.6) PARTICIPATION IN COMPANIES OR OTHER COLLECTIVE BODIES**

Immunity of jurisdiction shall not be invoked whenever there is a claim which issue relates to the “participation of a State in companies or other bodies incorporated or constituted under the law of the State where proceedings are brought”<sup>43</sup>.

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<sup>41</sup> FOAKES, Joanne & WILMSCHURST, Elizabeth. Briefing Paper on State Immunity: The United Nations Convention and its Effects. International Law Program (2005). Chatham House. p 7.

<sup>42</sup> United Nations Convention on Jurisdictional Immunity of States and their Property.

<sup>43</sup> FOAKES, Joanne & WILMSCHURST, Elizabeth. Briefing Paper on State Immunity: The United Nations Convention and its Effects. International Law Program (2005). Chatham House. p 7.

#### 4.7) SHIPS OWNED OR OPERATED BY A STATE

In the article 16 one can have an example of the United Nations Convention adoption of the restrictive theory, meaning that a State are prevented to invoke immunity in cases involving its ships whenever those ships are being used for commercial purposes. Stressing, moreover, that this provision does not apply to warships, or naval auxiliaries or whatever other vessels owned and/or operated by the State which most likely will be used for *jus imperii*.

#### 4.8) EFFECT OF AN ARBITRATION AGREEMENT

The State and its foreigner partner (natural or juridical person) operating a commercial enterprise have the right to agree, in the form of a writing clause in their contract, the submission to arbitration in cause of a breach or differences, which means that the State has no rights to invoke, under this circumstances, immunity of jurisdiction.

#### 4.9) ENFORCEMENT

The legal proceedings against the State represent one step that is quite diverse from the enforcement of the results of these proceedings. The United Nations Convention herein studied makes that distinction when says in article 18 that “no pre-judgment measures of constraint, such as attachment or arrest, against property of a State be taken in connection with a proceeding before a court of another State”<sup>44</sup>, unless the State gives a consent on it, or through an international agreement might signed, or by an arbitration clause, for example.

Moreover, in article 19 it is established the same norms but, to measures post-judgment, in other words, the *strict sensus* enforcement. Thus, as appointed by Foakes and Wilmschurst in their paper, immunity when it comes to the enforcement has no distinction of theories, “remains almost absolute”<sup>45</sup>.

<sup>44</sup> United Nations Convention on Jurisdictional Immunity of States and their Property.

<sup>45</sup> FOAKES, Joanne & WILMSCHURST, Elizabeth. Briefing Paper on State Immunity: The United Nations Convention and its Effects. International Law Program (2005). Chatham House. p 7.

There must be consent from the State in order to execute it, moreover for the execution be possible “it is necessary not only to demonstrate that the activity or transaction concerned was *jure gestionis*, but also not destined to accomplish public functions (*jure imperii*) of the foreign State”<sup>46</sup>, as pointed out by Shaw. The rationale behind it is that, in the occurrence of a sale of a States’ asset, and hence, executing the previous legal proceedings against that State, it can result in a drastic action against the States functions and cause, therefore, serious damages to its ability to perform its duties.

The other situations where the enforcement can be achieved are pointed out by the United Nations Convention. It was mentioned already the expressly agreement of the State, the other situations are as following, by international agreement, or by an arbitration clause in a written contract. All those circumstances lead to the possibility of enforcement.

##### **5. DEFINITIONS OF THE UNITED NATIONS CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY**

To understand the definitions used in the bidding document, in that case, the Convention, is very important when it comes to a consensus, and hence, the possibility to reach an agreement amongst the majority of States, and following that, to create compromise and predictability in the international field.

According to Foakes and Wilmschurst in their brief paper, States function through many ways, such as agencies, individuals and organs. Thus, to know who’s entitled to operate through the State is important in order to see the ones which may raise the plea of immunity<sup>47</sup>.

Following that path, then, the Convention draws in article 2 a definition of State in a broad way, including not just the State but “its various organs of government”<sup>48</sup>, “constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity”<sup>49</sup>.

<sup>46</sup> SHAW, Malcolm N. International Law. Fifth Edition. (2003). Cambridge University Press. p.665.

<sup>47</sup> FOAKES, Joanne & WILMSCHURST, Elizabeth. Briefing Paper on State Immunity: The United Nations Convention and its Effects. International Law Program (2005). Chatham House. p 7.

<sup>48</sup> United Nations Convention on Jurisdictional Immunities of States and Their Property.

<sup>49</sup> Ibid.

Entitled as well to claim immunity is the State representatives while performing sovereign acts and government companies while acting in the exercise of sovereign authority. Important to stress that, those companies must be fully owned by the State or at least, majority shareholder.<sup>50</sup>

The Convention defines commercial transactions as well by saying that, it is whatever activity or transaction which involves the sale of goods and/or supply of services as long as, the nature and purpose of the contract is *jus gestionis*, or activities which could be performed by individuals and not just States. Other those acts defined as commercial ones relates to contracts of loans or whatever other activity of financial nature, “including any obligation of guarantee or of indemnity in respect of any such loan or transaction”<sup>51</sup>.

These are the two primary definitions. There are other important existing definitions as well, however, they will not be discussed in this paper.

## 6. CRIMINAL PROCEEDINGS AND HUMAN RIGHTS

The Convention does not cover criminal proceedings, meaning that an individual claiming against the State for crimes such as torture, for instance, is not able to bring this claim against the foreigner State in its jurisdiction.

Nevertheless, this is not a clear picture, in Pinochet<sup>52</sup> case the reality was different, he was indeed considered by the Highest Court in England not immune from the prosecution against him under the basis that if a head of State had practiced acts of torture (defined according to the UN Torture Convention of 1984) he could not claim for immunity of jurisdiction<sup>53</sup>.

The reasoning on that relates to the fact that an individual is not able to claim for immunity, as well as the State itself, if his acts are prohibited by international Convention, in case the State and the previous authority connected to this State is a contracting party of that specific Convention<sup>54</sup>. Or as pointed out by Dixon:

<sup>50</sup> FOAKES, Joanne & WILMSCHURST, Elizabeth. Briefing Paper on State Immunity: The United Nations Convention and its Effects. International Law Program (2005). Chatham House. p 7.

<sup>51</sup> United Nations Convention on Jurisdictional Immunities of States and Their Property.

<sup>52</sup> (2000) 1 AC 147; 119 ILR.

<sup>53</sup> Important to stress, nonetheless, that the argumentation to be fully denied of the immunity had additional reasons then those here exposed.

<sup>54</sup> WALLACE, Rebecca M.M. International Law (2005). Fifth Edition. Sweet & Maxwell Limited.

“International law did not require that states grant immunity for international crimes, and indeed may require that immunity be denied, this is a tentative conclusion, but wholly justified given that states are subject to international law even though they are not subject to the national law of another state”<sup>55</sup>

It seems, on the other hand that, the UK, for instance, has been having different approaches, while deciding about *Al-Adsani*<sup>56</sup> v Government of Kuwait 107 ILR 536, the Court granted the Government of Kuwait immunity of jurisdiction, even though the argumentations of acts of torture against Mr. Al-Adsani, according to the State Immunity Act of 1978, the State whose claim is being pursued can only be prevented from immunity if the alleged injuries had occurred in the UK, which could not be proved by the applicant. It seems yet, that immunity is a strong institute in international law.

Concerning the human rights possible claims the Conventions simply does not make any statement, leaving space for controversy and diversity concerning this matter in the different Courts. Even though the increasing concern towards human rights, the current state of law is that state immunity are not in conflict with the human rights provisions.

But still, this is not a clear picture of how the international scenario would react in case of serious breaches concerning human rights obligations. For instance, the US Foreign Sovereign Immunity Act 1976, which was amended in 1996, regulates over an exception to immunity relating to States appointed by the Department of State of that country as a terrorist one. Thus, this appointed State having committed a terrorist act which result in an American civilian death would not be able to claim for immunity of jurisdiction<sup>57</sup>.

Many are the arguments against and pro the fact that State immunity be of precedence over human rights rules. The bigger argument in favour of the human rights precedence is that those rules should be higher evaluated

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London. p. 142.

<sup>55</sup> DIXON, Martin. *Textbook on International Law* (2005) Fifth Edition. Oxford University Press Inc., New York. p.174.

<sup>56</sup> *Al Adsani v Government of Kuwait and Others*, 21 January 1994 CA, 100 ILR 465; 103 ILR 420; CA 12 March 1996, 107 ILR 536.

<sup>57</sup> SHAW, Malcolm N. *International Law*. Fifth Edition. (2003). Cambridge University Press. p.638.

over sovereign interests once these rules are of *jus cogens* and would help to put an end of breaches of States on serious human rights and therefore, allow individual to sue those alleged States.<sup>58</sup>

On the other hand, as an argument to favour the prevalence of the immunity of jurisdiction lays in the fact that, there are many other ways to pursue the rights of the individual instead of claims between States, the reasoning why is as pointed by Foakes and Wilmschurst, a way of a country to analyse an abuse of that sort may not be at the same path as the other country, therefore, “civil actions for a state agents’ atrocities should be brought in the courts of that state, nor in a foreign court”.<sup>59</sup>

Moreover, some proceedings belong exclusively to the Sovereign power, such as the criminal proceedings, contrary from the civil ones which can be pursued by normal individuals according to its own private interest. At last, the argument which says that the distance of the forum where the case will be judged and the place where the facts actually happened makes it harder to reach evidences and witnesses play a consistent role.<sup>60</sup>

In summary, the debate between immunity of States and human rights rules continues. Future development will help to shape a clearer picture, and bring better consistency and predictability to the field.

## 7. STATE IMMUNITY AND THE BRAZILIAN UNDERSTANDING

As mentioned, the rules of *par in parem non habet in judicium* used to be customary law between nations. This meant that a State was not under the jurisdiction of a foreign court without the permission of that state. However, this theory of absolute immunity has slowly been eroding, especially in the case of commercial and international financial activities. According to Francisco Rezek<sup>61</sup>, Brazil took longer until it could realize the importance of changing its position from absolute theory of immunity to its restrictive. Although the social constraints brought by this kind of legal position in special demanding of ex employees from Embassies pursuing

<sup>58</sup> FOAKES, Joanne & WILMSCHURST, Elizabeth. Briefing Paper on State Immunity: The United Nations Convention and its Effects. International Law Program (2005). Chatham House. p 9.

<sup>59</sup> Ibid. p. 9.

<sup>60</sup> Ibid.p.9.

<sup>61</sup>Francisco Rezek. Study published in the juridical magazine of the University of Brasília, Brazil. See <http://www.fd.unb.br/revista/2/parte3.PDF>.

mainly labour rights protected by the national law. A position sustained not only by its Supreme Court, but also by the Executive power.

Nevertheless, the movement which took place in USA and England with its respective State Immunity Acts of 1978 and the first Foreign Sovereign Immunities Act of 1976, split its influence internationally, and also in the Brazilian Supreme Court.

Following that path, in 1989 the Supreme Court of Brazil brought its own national paradigm by breaking the rule of absolute immunity with unanimity votes in the Genny<sup>62</sup> case which concerned a claim brought in 1976 by Mrs. Genny whose husband had worked for years for the German Embassy without having its labour rights secured, preventing him from a retirement system. The German embassy claimed for immunity in order to have the case dismissed.

The case made history, as it was the first time that absolute immunity of jurisdiction was broken within the Brazilian system. As Francisco Rezek, of one of the Ministers<sup>63</sup>, analysed in his vote:

“Independent of the fact that there is still a number of States which adopts the absolute doctrine of immunity of jurisdiction or the limited approach \_ which prevails in the west Europe\_, one thing is certain: we can no longer say that there is a solid customary rule of international law, from the moment that countries such as United States and England, among others, deny it. Therefore, the unique fundament we could rely on, once the two Vienna Conventions cannot support us while dealing with immunity of States and in our traditional jurisprudence the dogma is old in front of the facts, once, we can no longer invoke it.”<sup>64</sup>

Since then, the Brazilian jurisprudence sets towards a restrictive approach of the State immunity. A scenario drawn by the Supreme Court and not the legislative, once the country has no Immunity Act, and still, has not signed the United Nations Convention on Jurisdictional Immunities of States and

<sup>62</sup> Civil Appeal 9.696-SP (RTJ 133/159), Genny de Oliveira vs. Germany.

<sup>63</sup> Terminology used by the judges of the Federal Supreme Court in Brazil.

<sup>64</sup> Vote of Francisco Rezek. Civil Appeal 9.696-SP (RTJ 133/167), Genny de Oliveira vs. Germany. My translation.

Their Property, which makes it very hard to understand the reason why. Why the authorities of the country choose to not sign it and ratify, and hence, give the Brazilian scenario a bit more of legal predictability.

## 8. CONCLUSION

The legal institute of State immunity of jurisdiction is, as previously analyzed, granted to the sovereign State in order to safeguard itself from being sued in another States Court without its consent. A practice amongst the States of mutual recognition, and it is based on the basic concept of the sovereignty, which is the legitimate power conferred to States governed under the rules of law and recognized by international law in an equal basis.

“*Par in parem non habit imperium*” is the principle that makes the base which immunity of jurisdiction raises, meaning that between the peers there is no hierarchy, resulting then, equality amongst sovereignties. This is a scenario where the absolute immunity for acts performed by the States of all natures and purposes prevail without any limits.

Nevertheless, the worlds scenario started to become more complex than used to be in the begging of the XX century, within the increasing commercial activities performed by the States and its agents, causing, consequently, a number of cases of obvious abuse over this customary rule of international law which had become old to face the new reality.

This situation led to a break of paradigm and what was once taken as absolute, or a situation where the immunity of jurisdiction used to be granted no matter what the act was performed by the State, gave place in the main Courts of the international scenario, the theory of restrictive immunity.

The absolute immunity of jurisdiction which has in the *Schooner Exchange v. McFaddon*<sup>65</sup> case its main explanation, referring to a private ship owned by two American citizens had been seized by Napoleon Bonaparte and turned into a war ship with the name of “Balaou” had to port in Philadelphia two years later in order to make some repairs due to a tempest. The owners then, made a claim to try to have the ship back.

Marshall in the Supreme Court held that the States function on the equal basis, meaning that a sovereignty cannot come above the other and

<sup>65</sup> The Schooner Exchange v. McFaddon 11 US 116 (1812), 7 Cranch.116 at 136.

therefore, France had absolute immunity of jurisdiction resulting from this reasoning. Hence, the dismissal of the case in the US courts on the grounds that there would be a difference in the property of the individual that happens to be the “Prince” of the State and the military force which sustains the Authority, meaning that the ship was not for the Prince, but for the State which he represents.<sup>66</sup>

The theory of restrictive immunity, as abovementioned, was a response from the abuses caused by the previous absolute approach, as well as the needs of the new times of intensive commerce amongst States and individuals. A very illustrative case is the *Trendtex Trading Corporation Ltd v. Central Bank of Nigeria*<sup>67</sup>, relating to a claim raised due to the fact that the government of Nigeria, after having bought an enormous amount of cement had refused to pay while it had already been in its ports. Nigeria claimed immunity but the Court of Appeal in United Kingdom took a restrictive approach once it was considered to be related to acts of commerce in its nature, thus in balance with justice.<sup>68</sup>

The reasoning of this case leads us to the core of the matter between the two theories, or the nature and or purpose of the act performed. As pointed out by Shaw, “with the acceptance of the restrictive theory, it becomes crucial to analyse the distinction between those acts that will benefit from immunity and those that will not”<sup>69</sup>.

The act performed being of nature and purpose sovereign, or those acts which could only be performed by the State are classified as *jus imperii*, on the other hand, those acts of non-sovereign, or which could be performed by whatever individual in a private civil activity, is defined as *jus gestionis*.

As a conclusion it is understood that the doctrine of restrictive immunity demands that whenever the State claims for immunity of jurisdiction, it shall have it only related to certain acts performed and not all of them. Which means that while exercising acts of *jus imperii*, or in the use of sovereign power it shall have a special treatment as a special entity. On the

<sup>66</sup> *The Schooner Exchange v. McFaddon* 11 US 116 (1812), 7 Cranch.116 at 136.

<sup>67</sup> *Trendtex Trading Copr. V Central Bank of Nigeria* (1977) 2 WLR 356; 64 ILR,p.122..

<sup>68</sup> *Ibid.* 2 WLR p. 357.

<sup>69</sup> SHAW, Malcolm N. *International Law*. Fifth Edition. (2003). Cambridge University Press. p.631.

other hand, performing acts which could be performed by any individual (*jus gestionis*), it shall be treated as a normal litigant in front of the Courts.

Nowadays the restrictive theory took precedence after being adopted by the major players of the economic field such as United States and UK, and in 1952 the government of US in the Tate Letter declared that due to the fact of a raising number of cases where governments become involved with commercial acts, this government believed in the necessity to change its view of absolute theory towards the restrictive one in its Courts.<sup>70</sup>

And later on came the US Foreign Sovereign Immunities Act 1976, providing “in section 1605 for the grounds upon which a State may be subject in the jurisdiction (as general exceptions to the jurisdictional immunity of a foreign State)”<sup>71</sup>. London, fearing to loose its position of capital of finance and commerce of the world, passed its own act, the State Immunity Act 1978, which “similarly provides for a general rule of immunity from the jurisdiction of the Courts with a range of exceptions thereto”<sup>72</sup>.

In that sense, the United Nations Convention on jurisdictional immunities of States and their property took the same approach and enumerated the situations where the State shall not have the possibility to claim immunity of jurisdiction, as it follows: commercial acts, contracts of employment, personal injuries and damage to property, ownership or possession and use of property, intellectual and industrial property, participation in companies or other collective bodies, ship owned or operated by a State and at last, an agreement between the parties on arbitration.

Nevertheless, the number of States which has signed and ratified this Convention is still very little in order to know whether a consensus was reached or not. In fact it appears to not have a consensus yet since still may questions can be raised such as whether the Conventions’ provisions relating to commercial acts are compatible with those of the national courts of the countries which had already move towards the restrictive theory.<sup>73</sup> Though, it seems that the provisions are broad sufficiently in order to allow the UK or US Courts, for instance, to enter.

<sup>70</sup> SHAW, Malcolm N. International Law. Fifth Edition. (2003). Cambridge University Press. p.628.

<sup>71</sup> Ibid. p. 630-631.

<sup>72</sup> Ibid. p. 631.

<sup>73</sup> FOAKES, Joanne & WILMSCHURST, Elizabeth. Briefing Paper on State Immunity: The United Nations Convention and its Effects. International Law Program (2005). Chatham House. p. 8.

Thus, having the Convention being drawn in a wide range its provisions on that matter, I would risk a reasoning that the national Courts would be allowed to have a pragmatic perspective over its particularities, as well, and hence, not be stuck due to the fact of having signed and ratified this Convention.

At last, but not least, there is the issue related to the human rights and crimes such as torture and other crimes against humankind. The Convention does not contemplate individuals the possibility to break the immunity of State in claims of that sort, despite the fact that the international instruments to reach this claims is quite developed, such as the International Criminal Courts and the ad hoc tribunals, as an example, the ones for the crimes committed in the former Yugoslavia and Rwanda, but, still, related to heads of States.

Meaning that, in the level of the national courts, States are granted the immunity of jurisdiction. Albeit, in Pinochet case, as mentioned previously the highest Court of UK could find a gap due to the existence of one of the crimes in United Kingdoms' legal commitments, and that was the 1984 United Nations Torture Convention. It leaved then, the possibility to not dismiss the case on the grounds of State immunity.

Many are the arguments pro and against, such as that human rights should take precedence over State immunity once it speaks for higher values. The arguments in favour of immunity of jurisdiction says that the national courts should take into account only breaches of its own once the evidences in loco would be easier to be reached, or arguments such as the political ones, putting individual affairs of one country against another State.<sup>74</sup>

It is of my opinion that those are utilitarian arguments that shall not cover the value behind of those issues, which is the more and more importance of the individual in face of the State. The precedence of the States matters is a complicated issue with many perspectives, too complicated to be covered here, and shall not have its importance denied. On the other hand, the nowadays times claim for a growing process which puts the individual under the light.

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<sup>74</sup> FOAKES, Joanne & WILMSCHURST, Elizabeth. Briefing Paper on State Immunity: The United Nations Convention and its Effects. International Law Program (2005). Chatham House. p.9.

And in relation to immunity it is of a greater path that a certain consensus has been reached on the ground of restrictive approach, and hence, the limitations to the States “hunger” into whatever affairs it might get involved, bringing furthermore, justice and stability in the commerce field.

The economic as well as the social fields shall grown better when matters of that sort gets a more clear and predictable shape amongst the Courts all over the world. And for that reason, the Convention, which is not a finished work in that field once there are still a lot to be fixed and arranged, should be signed and ratified more and more by the Governments with the understanding that the individual and its affairs shall not be neglected, for their own good.

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