

## WHY STATES SHOULD RATIFY THE UNITED NATIONS CONVENTION ON JURISDICTIONAL IMMUNITY\*

### Abstract

*In 2004 the United Nations General Assembly adopted the Convention on Jurisdictional Immunities of States and Their Property. Before the adoption of this Convention, there was no global treaty or convention in force regulating the subject of State immunity and as such reliance was largely placed on case laws for finding what the rules of customary international law was on the subject. The adoption of the Convention was therefore primarily borne out of the need to codify the existing rules of customary international law on State immunity with the overall aim of providing a uniform global platform on the subject of State immunity. The problem however was that since its adoption in 2004, the Convention was yet to garner up to thirty ratifications of members States of the United Nations to have the Convention come into force. The aim of this work was to examine the features of the United Nations Convention on Jurisdictional Immunities of States and Their Property. The objectives of work were to assess the level of acceptance of this Convention by States as a codification of rules of customary international law on State immunity and the extent the Convention had made inroad into national legislations. This research adopted doctrinal method by consulting the Convention itself, case laws and some domestic legislations on State immunity. The work also consulted secondary sources like relevant law text books, journal articles and online materials. It was found that a number of States had accepted the Convention as a codification of the rules of customary international law on State immunity. The researcher also found that some States had been applying the provisions of the Convention when confronted with the issue of State immunity. It was recommended that more States should make efforts to ratify the Convention so it could come into force. It was also recommended that States that were yet to have a domestic legislation on State immunity should do so on the terms of the provisions of the Convention.*

**Keywords:** United Nations Convention Jurisdictional Immunity, State Immunity, Ratification, International Commercial Arbitration

### 1. Introduction

During its 65<sup>th</sup> plenary meeting of 2<sup>nd</sup> December 2004, the United Nations General Assembly adopted the Convention on Jurisdictional Immunities of States and Their Property (the Convention). The background to this Convention is the United Nations Resolution 32/51 of 19<sup>th</sup> December 1977 whereby the United Nations recommended that the International Law Commission should take up the study of the law of jurisdictional immunities of States and their property with a view to the progressive development and codification of the law. The final draft was based on the report of the Ad Hoc Committee on Jurisdictional Immunities of States and Their property. By the provisions of Article 30, the Convention shall come into force 'on the thirtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accessions with the Secretary-General of the United Nations.' As this condition has not been met, the Convention has not come into force. The main purposes of the Convention are summarised as follows:

- i. To enhance the rule of law and legal certainty, particularly in the dealing of States with natural or juridical person; and
- ii. To contribute to the codification and development of international law and harmonization of practice on jurisdictional immunities of States.<sup>1</sup>

The purpose of the Convention is therefore to achieve a uniform global approach on State immunities through the codification of the rules of customary international law on the subject.

### 2. Conceptual Framework

#### Jurisdictional Immunity

The concept of 'Jurisdictional Immunity' is explained by Articles 5 and 6 (1) of the Convention. According to Article 5, 'A state enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention'. Article 6 (1) of the Convention provides that 'A State shall give effect to State immunity under article 5 by refraining from exercising jurisdiction in a

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<sup>1</sup> The Preamble to the United Nations Convention on Jurisdictional Immunities of States and Their Property (R/RES/59/38) 2004.

proceeding before its courts against another State...’ Jurisdictional immunity therefore constitutes a derogation from the host State’s jurisdiction. In other words, jurisdictional immunity operates as a bar or limitation to the exercise of authority by the host State on another State or sovereign. According to Fox, the plea of sovereign immunity constitutes a procedural bar to jurisdiction. Fox continued:

Based on the assumption that states are equal, the essence of the plea is to correct the lop-sided situation where one state by reason of its control of the legislation and courts of the legal system operating in its territory has an unfair advantage over a foreign state which appears as a litigant in these courts.<sup>2</sup>

### State

Article 2 (1) (b) of the Convention defines ‘State’ as follows:

- i. The State and its various organs of government;
- ii. 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;
- iii. Agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State;
- iv. Representatives of the State acting in that capacity.

## 3. Theoretical Framework

### Theory of Absolute Immunity

According to the absolute immunity theory, a State cannot be subject to the judicial process of another State and under no circumstances will this be derogated from. This is hinged on the principle of independence and equality of States and as such, the notion under customary international law is that an equal cannot have authority over his equal (*par in parem, non habet imperium*). According to Shaw, the principle of independence and equality of States made it ‘philosophically as well as practically difficult to permit municipal courts of a country to manifest their power over a foreign sovereign State without their consent’.<sup>3</sup>

### Theory of Restrictive Immunity

Restrictive immunity theory, on the other hand, asserts that the immunity of a state can be lifted for its commercial transactions. Thus, a distinction is drawn between sovereign acts of a State (*acta jure imperii*) and commercial acts of a State (*acta jure gestionis*). While the immunity of a state can be lifted for its commercial transactions, this is not so for the sovereign acts of a State. From the perspective of Lim, *et al*, ‘Reliance may be placed on the ‘restrictive immunity’ theory of foreign State immunity... by which a foreign State which acts like a merchant is treated as one, rather than a sovereign’.<sup>4</sup>

## 4. Essential Features of the United Nations Convention on Jurisdictional Immunities of States and Their Property

The central feature of the Convention is the codification of the relative immunity doctrine by the incorporation of instances where the immunity of a state can be lifted in regards to its commercial transactions. First, the Convention made a re-statement of the general principle of customary international law under Article 5 by providing that ‘A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention’.

**4. 1. The principles of relative immunity theory** are incorporated in the Convention as exceptions to this general principle. These exceptions will now be discussed.

### Consent

By the provisions of Article 7 of the Convention, when a State has expressly consented to the exercise of jurisdiction by the court of another State, it can no longer invoke immunity. Consent by a State to the exercise of jurisdiction by the court of another State can take the form of international agreement, a written contract, a declaration before the court, or a written communication in a specific proceeding.<sup>5</sup>

### Participation in a Proceeding before the Court of another State

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<sup>2</sup> H. Fox, ‘Sovereign Immunity and Arbitration’ in J.D.M. Lew (ed), *Contemporary Problems in International Arbitration* (Springer- Science + Business Media B.V. 1987) 323

<sup>3</sup> M. N. Shaw, *International Law* (7<sup>th</sup> edn, Cambridge University Press 2014) 507

<sup>4</sup> C.L Lim, J.H. and M. Paparinskis, *International Investment Law and Arbitration, Commentary, Awards and Other Materials* (2<sup>nd</sup> ed, Cambridge: Cambridge University Press 2021) 557

<sup>5</sup> United Nations Convention on Jurisdictional Immunities of States and Their Property, Article 7 (1) (c)

Under Article 8 (1) of the Convention, a State cannot invoke immunity from the jurisdiction of the court of another State where the State has by itself instituted the proceedings; or where the State has intervened in the proceedings or taken any other step relating to the merit.

#### **Commercial Transactions**

By virtue of the provisions of Article 10 of the Convention, where a State has engaged in a commercial transaction with a foreign natural or juridical person, it can no longer invoke immunity from jurisdiction in respect of proceedings arising out of that commercial transaction.

#### **Contracts of Employment**

Article 11 of the Convention provides that a State cannot enjoy immunity in a proceeding relating to contract of employment between the State and an individual for work performed or to be performed in the territory of that other State.

#### **Personal Injuries and Damage to Property**

Article 12 of the Convention precludes the invocation of immunity by a State in proceedings relating to claim for pecuniary compensation for death, personal injuries, damage or loss of property caused by the act of that State.

#### **Ownership, Possession and Use of Property**

Also, under Article 13 of the Convention, a State cannot invoke immunity in proceedings relating to ownership, possession or use of property arising from the obligation of the State thereto.

#### **Intellectual and Industrial Property**

A State also cannot claim immunity for claims relating to intellectual and property for the determination of the right of the State or alleged infringement in respect thereto, going by Article 14 of the Convention.

#### **Participation in Companies or Other Bodies**

Under Article 15 of the Convention, a State cannot claim immunity in respect of proceedings relating to its participation in a company or other collective body.

#### **State Owned or Operated Ship**

Also, under Article 16 of the Convention, a State cannot claim immunity in respect of a proceeding relating to its ship.

#### **Arbitration Agreement**

Article 17 of the Convention provides that a State cannot invoke immunity following its agreement with a foreign natural or juridical person to submit their differences relating to a commercial transaction to arbitration if such relates to the validity, interpretation or application of the arbitration agreement; the arbitration procedure; or the confirmation or the setting aside of the award unless otherwise agreed.

#### **4.2. State Immunity from Measures of Constraints**

Article 18 of the Convention deals with pre-judgment measures of constraint. It bars any kind of pre-judgment measures such as attachment or arrest of the property of a State in any proceeding before a court of another State except where the former State has consented to it by international agreement, by an arbitration agreement or in a written contract, or by a declaration before a dispute between the parties has arisen, or where the State has allocated or earmarked property for the satisfaction of the claim which is the object for the proceedings. On post-judgment measures of constraint, Article 19 of the Convention provides that no post-judgment measures of constraint such as attachment, arrest or execution against the property of State may be taken in a proceeding before a court of another State except to the extent that the State has expressly consented by international agreement; or by an arbitration agreement or in a written contract; or by a declaration before the court or by a written communication after a dispute between the parties has arisen, or where the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or where 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 and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed. There is, however, a category of properties of a State which should not be regarded as being in use or intended use by the State other than government non-commercial purposes and they are as follows: property of military character or used or intended for use in the performance of military functions; property of the central bank or other monetary authority of the State; property forming part of the cultural

heritage of the State or part of its archives and not placed or intended to be placed for sale; and property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale.<sup>6</sup>

### **5. Why the United Nations Convention on Jurisdictional Immunities of States and Their Property is needed**

It has to be noted that the United Nations Convention on Jurisdictional Immunity of States and Their Property is not the first international treaty on State immunity. The Council of Europe had in 1972 adopted the European Convention on State Immunity which indeed is the first multilateral treaty on State immunity. The European Convention on State Immunity is only in force in Austria, Belgium, Cyprus, Germany, Luxembourg, Netherlands, (for the European Netherlands), Switzerland and the United Kingdom of Great Britain and Northern Ireland<sup>7</sup>. Furthermore, the United States, the United Kingdom, South Africa, Singapore, Australia and Pakistan had enacted domestic legislations on State immunity even before the adoption of the United Nations Convention.<sup>8</sup> The terms of the European Convention, the United Nations Convention and the listed domestic legislations are largely similar as their common feature is the adoption of the restrictive immunity theory. The salient feature is the provision of exceptions whereby the immunity of a foreign State can be lifted in the court of another State in respect of its commercial transactions and other related matters.

The main thrust of the United Nations Convention on Jurisdictional Immunity of States and Their Property is therefore to provide the platform for a uniform global approach on State immunities through the codification of the rules of customary international law on the subject. However, despite the immense utility of this Convention, States have been slow in ratifying it and as such the Convention has not come into force. At the moment, twenty eight States have signed the Convention while only twenty three States have so far ratified. The States that have signed the Convention are Austria, Belgium, China, Czech Republic, Denmark, Estonia, Finland, France, Iceland, India, Iran, Japan, Lebanon, Madagascar, Mexico, Morocco, Norway, Paraguay, Portugal, Romania, Russia, Senegal, Sierra Leone, Slovakia, Sweden, Switzerland, Timor-Leste and the United Kingdom of Great Britain and Northern Ireland. On the other hand, the States that have ratified the Convention are Austria, Benin, Czech Republic, Equatorial Guinea, Finland, France, Iran, Iraq, Italy, Japan, Kazakhstan, Latvia, Lebanon, Liechtenstein, Mexico, Norway, Portugal, Romania, Saudi Arabia, Slovakia, Spain, Sweden, and Switzerland.<sup>9</sup>

Even though the Convention is yet to come into force, it has nevertheless been positively received by a good number of countries as representing the codification of the rules of customary international law on State immunity. In *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs*,<sup>10</sup> the United Kingdom's Supreme Court per Lord Sumption Stated that even though the United Nations Convention on Jurisdictional Immunities of States and Their Property is yet to come into force, 'so far as it seeks to codify existing customary international law, it is evidence of what (the) law is'.

Some other countries have also used the provisions of the Convention in formulating their own rules on State immunity. A good example is France. France is one of the last countries in western Europe to embrace restrictive immunity approach. France has however shaped their state immunity law on the platform of the Convention which it has also accepted as representing the rules of customary international law on the subject of State immunity. Since 2016, France has enacted a few legislations dealing with certain issues on State immunity, namely, the Law on Transparency, Anti-Corruption and Modernization of Economic Life otherwise known as 'Loi Sapin 2' or in English as Sapin 2 Law<sup>11</sup>, the French Civil Enforcement Proceedings Code 'CEPC' (specifically articles L.111-1-1 to L.111-1-3) and the French Monetary and Financial Code (article 153-1). 'Sapin 2' sets the conditions for State immunity from execution. Resort is still had to the French courts for areas not covered by the 'Sapin 2' Law. Under article L. 111-1-2 of the CEPC, conservatory or enforcement measures cannot be granted against a State unless the State has expressly consented to the enforcement of such a measure; the State has allocated or earmarked property for the satisfaction of the claim that is the object of those proceedings; or a ruling or an arbitral award has been rendered against a State, and the property in question is specifically used or intended to be used by the State for purposes unrelated to non-commercial public service

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<sup>6</sup>*Ibid* Article 21

<sup>7</sup> <https://treaties.un.org>, accessed on 2<sup>nd</sup> August 2023

<sup>8</sup> The United States' Foreign Sovereign Immunities Act 1976; the United Kingdom's State Immunities Act 1978; South Africa's Foreign States Immunities Act 1981; Singapore's State Immunity Act 1979, Australia's Foreign States Immunities Act 1985; Pakistan's State Immunity Ordinance 1981

<sup>9</sup> <https://treaties.un.org>, accessed on 31<sup>st</sup> August 2023

<sup>10</sup>(2017) UK SC 62 @ para 39

<sup>11</sup> Law on Transparency, Anti-Corruption and Modernization of Economic Life, Law No. 2016-1691

and is linked to the entity against which the proceedings are initiated. These provisions represent the domestication of Articles 18 and 19 of the United Nations Convention on Jurisdictional Immunity of States and Their Property by France, a Convention it has also ratified.

The most resistant countries to the relative immunity theory are countries emerging from the background of socialism which historically adopted the absolute theory. This is because under the socialist set-up, States maintain monopoly over trade and commerce and as such they view relative immunity theory whereby the immunity of State may be lifted for its commercial transactions as an interference with this monopoly. However, these States have shown a willingness to change direction towards the relative immunity theory. A good example is the publication of a draft legislation by the lawmakers in the People's Republic of China in December 2022 with provisions that have essentially adopted the restrictive immunity approach<sup>12</sup> This draft law modelled after the United Nations Convention on Jurisdictional Immunity of States and Their Property, if it is eventually passed, will confirm China, the largest economy emerging from a socialist background, as a restrictive immunity State.

Similarly, the Russian Federation, the successor State to the defunct Soviet Union has transited from absolute immunity approach to relative immunity approach. It needs to be emphasized that Soviet Union was the bastion of socialism when it existed and absolute immunity of States was unquestionable under the Soviet Union. The defining moment for Russia came with the decision in the case of *Oleynikov v Russia*<sup>13</sup>. In this case, the European Court of Human Rights confirmed the principle that grant of immunity to foreign States or foreign State officials in excess of the requirements of public international law violates the right of access to court enshrined in Article 6(1) of the European Convention on Human Rights. The court also ruled that the United Nations Convention on Jurisdictional Immunities of States and Their Property applied under customary international law, even if the State in question has not ratified the Convention, provided it has not opposed to it either. In this situation, Russia has signed the Convention even though it has not ratified it. After this judgment, Russia enacted a legislation formally adopting the restrictive immunity theory.<sup>14</sup>

## 6. Conclusion and Recommendations

In the course of this work, the essential features of the United Nations Convention on Jurisdictional of States and Their Properties were discussed. The general purpose of the Convention, as stated, is to provide for the codification of the rules of customary international law on the sovereign immunity on the basis of restrictive immunity approach. It was found in the course of this work that a good number of States have accepted the provisions of the Convention as a codification of the rules of customary international law on State immunity and have endeavoured to make their own rules on State immunity in tune with the said provisions. The work, however, found that Convention despite its growing acceptance even by States with a socialist background is yet to come into force because it has not garnered the requisite thirty ratifications. Consequently, it is recommended that States should make efforts to ratify the Convention so as to bring it into force. This will ensure a global uniformity on the subject of State immunity. It is further recommended that States that have yet to enact a legislation on State or sovereign immunity should do so using the Convention as a template. This can serve as an advance domestication of the Convention.

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<sup>12</sup>J. Coyle, 'China's Draft Law on Foreign State Immunity – Part II', *Views and News in Private International Law*, April 27, 2003, <<http://conflictoflaws.net>> accessed on 28 June 2023

<sup>13</sup> ECHR 079 (2013) 14.03.2013

<sup>14</sup> Russian Federal Law of the Russian Federation of November 3, 2015 No. 297-FZ