



## Sovereign Immunity and Its Development in International Law

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### ABSTRACT

Sovereign immunity, or crown immunity, is a legal doctrine by which the sovereign or state cannot commit a legal wrong and is immune from civil suit or criminal prosecution. In constitutional monarchies, the sovereign is the historical origin of the authority, which creates the courts. By this, the courts had no power to compel the sovereign to be bound by the courts, as they were created by the sovereign for the protection of his or her subjects. However, one has to not to be confused with the principle of public international law that the government of a state is normally not amenable before the courts of another state.

This research critically examines the doctrine of sovereign immunity, which is no longer reflects the world we live in, as it doesn't accurately reflect the reduced importance of governments compared to private actors. There is an argument that this doctrine should be eliminated.

### INTRODUCTION

Despite the controversial nature of sovereign immunity for states in the international law, this doctrine equally is so significant. This is because the international community is developing in terms of scheme and implementation. This means, development of human rights and the United Nations system have led to change the states' understanding to state immunity.

In addition, sovereign immunity has come from historical repetition and state practice when it was being practiced between states especially, between kings. The origin idea of this concept came from a belief that the king doesn't do mistake or the power that makes the law, which is state is infallible.<sup>(1)</sup> Therefore, the king or the state itself was being protected from prosecution before national courts and from the jurisdiction of other states too.<sup>(2)</sup>

Subsequently, in the 20<sup>th</sup> century the concept of sovereign immunity was developed during both international organizations, the League of Nations and the UN. Especially, with the development of international law and the approach in ruling countries. Later on, immunity for states and their officials has been recognised internationally as a customary international principle. This was in accordance to the principle of sovereign equality.<sup>(3)</sup> It was then applied in the modern diplomatic relations which was codified through a convention under the UN, to regulate relationships between states.<sup>(4)</sup>

Recently, due to the developments in the international law and international human rights, there is a new understanding for the sovereign immunity concept. This research critically discusses the possibility of applying sovereign immunity in the same meaning that was applied in the past. In addition, it presents logical arguments for the possible elimination this kind of immunity. The analysis will show that in today's world there is not a big difference between private actors and states in terms of prosecuting for wrong doings.

In the light of this, the research is divided into two main parts; the first part discusses the legal doctrine of immunity and sovereign immunity, while the second part examines sovereign immunity in criminal and civil procedures against state or its officials in light of international and human rights laws. To do this, the research evaluates the legal literature and the views of commentators on the current and the future of sovereign immunity. Finally, the concluding remarks are drawn.

## **I. General Concepts of Immunity and Sovereign Immunity**

Before going to detail, it is necessary to know, what does immunity and sovereign immunity mean? And what are the Justifications for the existence and practicing sovereign immunity.

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<sup>(1)</sup> E. K. Bankas, *The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts* (Springer 2005)P.13-14

<sup>(2)</sup> Ibid

<sup>(3)</sup> UN. G. A. *Report of the International Law Commission*, Official Records Sixtyth session Supplement No. 10 (A/63/10) (5 May-6 June and 7 July-8 August 2008) Para 274, 286 Available at: < [http://legal.un.org/ilc/d\\_ocumentation/english/reports/a\\_63\\_10.pdf](http://legal.un.org/ilc/d_ocumentation/english/reports/a_63_10.pdf) > [accessed 2 Sep 2017]

<sup>(4)</sup> UN. G. A. *Vienna Convention on Diplomatic Relations 1961*. Done at Vienna on 18 April 1961. Entered into force on 24 April 1964. Available at [http://legal.un.org/ilc/texts/instruments/english/conventions/9\\_1\\_1961.pdf](http://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf) > [accessed 3 Sep 2017]

### **i. The Development of the Concept of Immunity in International Law**

Immunity means exempt from responsibility before the law for wrongful acts. The idea came from the principle in customary international law <sup>(5)</sup> that has been practiced in the international community. Originally, it goes back to the historical practice that where existed between kings and heads of states or empires in the ancient eras. This is because of their representation to state's sovereignty as Louis fourteen of France says, "I am the state." <sup>(6)</sup> In addition, the belief of the king's blessing led people to think that king does not do any mistakes, so he should not be responsible for his acts inside the territory of the state. <sup>(7)</sup> This right of kings was included in both civilian and criminal acts.

Gradually, this idea was developed and applied between states based on the equity between Kings. Therefore, to respect this idea states did not have jurisdiction against each other's. <sup>(8)</sup> Furthermore, this improvement was continued and in the second half of 20<sup>th</sup> century, it was believed that the immunity of the states before foreign courts has come from the principle of sovereign equality. Therefore, no state could have jurisdiction over another. <sup>(9)</sup>

Consequently, at the end of 19<sup>th</sup> century even a great part of the 20<sup>th</sup> century, absolute immunity was common. This was without differences between governmental and Non-governmental or commercial acts. <sup>(10)</sup> In addition, within the modern international law the same idea was transferred to be applied in relation between states. This is to achieve a kind of stability and regulation to the international community. Therefore, the immunity became the principle of customary international law, and recently it has been recognised by the International Court of Justice (ICJ) <sup>11</sup> in the Arrest Warrant case. <sup>(12)</sup>

Furthermore, after establishing the United Nations (UN) in 1945, with exception of issues that affect international peace and security, it gave the right to the states to regulate immunity for their

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<sup>(5)</sup> G. M. Wong, *Essentials of Sports Law: Fourth Edition* (Praeger 2010) P.124-125

<sup>(6)</sup> P. Allott, *The Health of Nations: Society and Law beyond the State* (Cambridge University Press 2002)P.409

<sup>(7)</sup> Y. Simbeye, *Immunity And International Criminal Law* (Ashgate 2004)P. 93-94

<sup>(8)</sup> See, supra note 3

<sup>(9)</sup> N. van Woudenberg, *State Immunity and Cultural Objects on Loan* (Brill 2012) P.50

<sup>(10)</sup> See, supra note 1. P.49

<sup>(11)</sup> *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, (ICJ), 14 February 2002.P. 2 available at : < <http://www.ilsa.org/jessup/jessup08/basicmats/icjcongo.pdf> > [accessed 3 Sep 2017]

<sup>(12)</sup> *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, (ICJ), 14 February 2002.P. 2 available at : < <http://www.ilsa.org/jessup/jessup08/basicmats/icjcongo.pdf> > [accessed 3 Sep 2017]

official persons inside their territory and according to their domestic law. This means conferring to the principle of territorial integrity, states have the right to decide freely within their territory without intervening from anyone.<sup>(13)</sup> taking this principle into account, states are free to give any kind of immunity in criminal and civil aspects to their officials within the state such as for the head of state, members of parliament and government official.

Internationally, the UN started to codify international law through establishing International Law Commission (ILC), which was finally prepared a convention to regulate the right and privileges of diplomats of states. The convention was opened for signature in 1961 and entered into force in 1964.<sup>(14)</sup> This was despite of another previous convention about Privileges and Immunities of the UN organs and officials in 1947.<sup>(15)</sup>

## **ii. Sovereign Immunity: Justifications and Developments**

The idea of sovereign immunity means not suing states or their agencies and actors for any wrongdoing before national courts as because they represent state sovereignty. On the bases of that, states were immunable from the jurisdiction of foreign courts according to the principles of independence and equality of states.<sup>(16)</sup> This idea was declared for the first time by Chief Justice John Marshall, in (*the Schooner Exchange v. M'Faddon*) case before the United States Supreme Court when he decided to immune French warship from suing before the US courts.<sup>(17)</sup>

### **The Justifications of Sovereign Immunity:**

- The principle of sovereign equality means states are equal to enjoy the rights under international law.<sup>(18)</sup>
- In principle and practice, it will be impossible for domestic courts to implement their decisions and provisions against foreign states particularly when the properties of foreign state are outside the authority of the court of states.<sup>(19)</sup>
- While state alleges immunity for itself before its own national courts because of the dignity of sovereignty which represents its nationals, so the same rule should be applied for foreign states because of the principle of sovereign equality of states.<sup>(20)</sup>

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<sup>(13)</sup> U.N. Charter 1945. Art. 2, para. 7.

<sup>(14)</sup> See, supra note 2

<sup>(15)</sup> UN. G. A. *The Convention on the Privileges and Immunities of the Specialized Agencies*, 21 November 1947 , available at: < <http://www.ifrc.org/docs/idrl/I295EN.pdf> > [accessed 4 Sep 2017]

<sup>(16)</sup> M. N. Shaw, *International Law* (Cambridge University Press 2008) P.698

<sup>(17)</sup> A. L. McCarthy. 'Commercial Activity Exception--Justice Demands Congress Define a Line in the Shifting Sands of Sovereign Immunity, The' (1993) 77 Marq.L.Rev. 893.P.894-895

<sup>(18)</sup> A. Kaczorowska, *Public International Law 4/e* (Taylor & Francis Group 2010) P.354

<sup>(19)</sup> Ibid

<sup>(20)</sup> Ibid



Historically, the states had absolute immunity which was covering all state's activities, public and private acts. Then, this became the principle of customary international law.<sup>(21)</sup> Although, the state's right of immunity came from state's sovereignty and it can be abandoned by the state itself under the law. However, this abandonment is possible to immune from jurisdiction and not from execution.<sup>(22)</sup> Moreover, limiting immunity again is a right of state, to give absolute immunity to foreign states before domestic courts or limiting it to restrictive immunity.<sup>(23)</sup>

Gradually, sovereign immunity developed and changed until some of the states granted immunity for foreign states just in activities that are done on behalf of the states or governmental acts, excluding private or commercial acts.<sup>(24)</sup> It means the immunity was changed from the absolute to restrictive immunity especially, since 19<sup>th</sup> century and in the first half of 20<sup>th</sup> century because of increasing the state's private acts in both economic and commercial activities.<sup>(25)</sup>

Subsequently, in the second half of 19<sup>th</sup> century the idea that in some situations states can be subject to the jurisdiction of a foreign state has prevailed. For instance, in 1950 in the Austrian case (*Dralle v. Republic of Czechoslovakia*) the supreme court declared that states had absolute immunity because, in the past, all commercial activities of states were linked to political activities.<sup>(26)</sup> But, this has been changed nowadays states are entering into the commercial activities at the same time they competing with their nationals and foreigners. Therefore, classic immunity, which was absolute immunity, is misplaced and no longer can be recognised under international law.<sup>(27)</sup>

Later on, the English- speaker countries who had granted absolute immunity for a long time for foreign states, then in 1952 the US waived it.<sup>(28)</sup> While the English courts still continued to apply absolute immunity, in 1978 the state immunity act was passed by British parliament which in section 3 refuses immunity for foreign states in their commercial or private acts.<sup>(29)</sup> This led a number of states to follow the same direction such as, Pakistan, Canada and South Africa. These countries passed their law on state sovereignty according to the restrictive theory of immunity.<sup>(30)</sup>

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<sup>(21)</sup> P. Malanczuk, *Akehurst's Modern Introduction to International Law* (Allen & Unwin 1997) P.119

<sup>(22)</sup> International Bar Association Subcommittee on, Legal Opinions and others, *Legal Opinions in International Transactions: Report of the Subcommittee on Legal Opinions of the Committee on Banking Law of the Section on Business Law of the International Bar Association* (New York 2003) P.211

<sup>(23)</sup> M. Dixon, *Textbook on International Law* (OUP Oxford 2007) P.184

<sup>(24)</sup> See Supra note 20

<sup>(25)</sup> T. Hillier, *Sourcebook on Public International Law* (Taylor & Francis Group 1998) P.289

<sup>(26)</sup> See supra note 24

<sup>(27)</sup> R. Van Alebeek, *The Immunities of States and Their Officials In International Criminal Law And International Human Rights Law* (Oxford University Press 2008)P.16-17 .Also see supra note. 24

<sup>(28)</sup> See Supra note 20

<sup>(29)</sup> F. A. Mann. 'The State Immunity Act 1978' (1979) 50(1) British Yearbook of International Law 43. P.49-58

<sup>(30)</sup> See supra note 20

Finally, restrictive immunity was incorporated in many international instruments such as the European Convention on State Immunity 1972,<sup>(31)</sup> the Montreal Draft Convention on State Immunity 1982<sup>(32)</sup> and in the draft articles of Jurisdictional Immunity of States by the (ILC).<sup>(33)</sup> It should be noted that, today, there are still some states that practice absolute immunity. But, restrictive immunity is common and most pursued by states<sup>(34)</sup>. In fact, it has been codified in the UN Convention on Jurisdictional Immunity of States and their Property in 2004 which was opened for signature in 2005.<sup>(35)</sup>

## **II. Sovereign Immunity and its Future in the Criminal and Civil Proceedings against the State or its Officials**

Practically, sovereign immunity is applied in two forms. Firstly, in criminal proceedings against state's officials. Secondly, in proceeding against states in the civil dispute cases that are related to state or its actors.

### **i. Sovereign Immunity In Criminal Proceedings under the Principles of International and Human Rights Laws**

Internationally, the rule of state immunity reflects the principles of international law, that has been given as a right and privilege to the states according to the principles of independence and equality of states.<sup>(36)</sup> Then historically, state immunity was developed and its application was transferred from absolute immunity to restrictive immunity.<sup>(37)</sup> It means immunity is enjoyed by officials of states just for the acts on behalf of state. At this point, a question is appeared again that within the restrictive immunity, could states enjoy immunity even in their acts that violate human rights? The human right advocates argue that immunity is no longer exists if there is a violation of certain norms of human rights.<sup>(38)</sup>

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<sup>(31)</sup> *The European Convention on State Immunity*, May 16, 1972, Europe. TS No. 74, 11 ILM470 (1972) (entered into force June 11, 1976) Art 7,12,26, available at : < [http://www.wipo.int/edocs/trtdocs/en/ce-csi/1/trt\\_c\\_e\\_csi1.pdf](http://www.wipo.int/edocs/trtdocs/en/ce-csi/1/trt_c_e_csi1.pdf) > [accessed 4 Sep 2017]

<sup>(32)</sup> International Law Association: *Draft Convention On State Immunity* (1983) 22(2) International Legal Materials 287. P.288-291

<sup>(33)</sup> B. Hess. '*International Law Commission's Draft Convention on the Jurisdictional Immunities of States and Their Property, The*' (1993) 4 Eur.J.Int'l L. 269. P.272-274

<sup>(34)</sup> See Supra note 20

<sup>(35)</sup> UN. G. A. *United Nations Convention on Jurisdictional Immunities of States and Their Property*, 2 December 2004, A/RES/59/38, available at : < [http://legal.un.org/ilc/texts/instruments/english/conventions/4\\_1\\_2004.pdf](http://legal.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf) > [accessed 8 Sep 2017]

<sup>(36)</sup> See supra note 26. P.65

<sup>(37)</sup> B. Conforti and F. Francioni, *Enforcing International Human Rights in Domestic Courts* (Brill Academic Pub 1997)P. 408-409

<sup>(38)</sup> See Supra note 26 P.10



Another argument is that serious breaches of Human Rights Law (HRL) and International Humanitarian Law (IHL) can no longer be credited to the state, but must be measured outside the authority of the state.<sup>(39)</sup> Furthermore, the important factor is that state immunity is going to be changed and limited<sup>(40)</sup> because of its contradiction with other principles under international law and human rights. These principles has obliged states to comply with them such as the obligation to protect human rights.<sup>(41)</sup>

In the light of this, under international criminal justice and since the International Military Tribunals (IMT) of Nuremberg and Tokyo after World War II, the immunity has been refused.<sup>(42)</sup> This means that state's officials, who have personal or functional immunity as a part of state immunity, have individual responsibility. Therefore, they do not enjoy immunity from serious violations of human rights and international crimes, namely Genocide, crimes against humanity and war crimes.<sup>(43)</sup> The argument for this is because these violations are not part of the state's acts, the state will be acquitted. Therefore, the perpetrator will not enjoy immunity in respect of its position in the state. Hence, he or she will, individually, be responsible.<sup>(44)</sup>

The above mentioned rule were confirmed once again by the ad hoc international criminal tribunals for the former Yugoslavia (ICTY)<sup>(45)</sup> Rwanda (ICTR)<sup>(46)</sup> and Sierra Leone.<sup>(47)</sup> Likewise, the International Criminal Court (ICC)<sup>(48)</sup> as a permanent court, has also refused immunity for officials of states.

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<sup>(39)</sup> C. Tomuschat, *'International Law of State Immunity and Its Development by National Institutions, The'* (2011) 44 Vand.J.Transnat'l L. 1105. P.1121

<sup>(40)</sup> See Supra note 20

<sup>(41)</sup> J. Crawford and V. Lowe, *British Year Book of International Law 2008* (Oxford University Press 2010) P.388

<sup>(42)</sup> UN.Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), 8 August 1945, Art. 7 available at: < <http://avalon.law.yale.edu/imt/imtconst.asp> > [accessed 9 Sep 2017] and UN.Charter of the International Military Tribunal for the Far East (1946) Art. 6, available at: < [http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3\\_1946%20Tokyo%20Charter.pdf](http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3_1946%20Tokyo%20Charter.pdf) > [accessed 9 Sep 2017]

<sup>(43)</sup> D. Chamlongrasdr, *Foreign State Immunity and Arbitration* (Cameron May 2007) P.169-171

<sup>(44)</sup> See supra note 38. P. 1122

<sup>(45)</sup> UN.S.C. Statute of the International Criminal Tribunal for the former Yugoslavia. Resolution 827, 25 May 1993. Art. 7 (2). Available at: < [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf) > accessed [16 Dec 2012] > [accessed 12 Sep 2017]

<sup>(46)</sup> UN. S. C. Establishing the International Tribunal for Rwanda (with Annexed Statute) Resolution 955, S.C. res. 955, 49 U.N. SCOR at \_\_, U.N. Doc. S/RES/955 (1994). Article 6 (2). Available at: < [http://hrlibrary.um\\_n.edu/peace/docs/scres955.html](http://hrlibrary.um_n.edu/peace/docs/scres955.html) > [accessed 14 Sep 2017]

<sup>(47)</sup> UN.S.C. Statute of the Special Court of Sierra Leone, Resolution 1315 (2000) of 14 August 2000. Article 6, paragraph 2, Available at: < <http://www.rscsl.org/Documents/Establishment/S-Res-1315-2000.pdf> > [accessed 15 Sep 2017]

<sup>(48)</sup> UN.G.A. Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6. Art.27. Available at: < <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf> > [accessed 18 Sep 2017]

On the one hand, the rejection of immunity in international crimes has become the principle of customary international law and has been confirmed in a several cases namely, (*Prosecutor v. Slobodan Milosevic*),<sup>(49)</sup> (*prosecutor v. Radovan Karadzic*)<sup>(50)</sup> and (*Prosecutor v. Radislave Krstic*).<sup>(51)</sup>

On the other hand, although the application of this rejection has been implemented before international courts and tribunals, it is still in conflict with the rule of immunity from prosecution of international crimes before domestic courts.<sup>(52)</sup> This is the case in particular, for official persons of state who have personal immunity which is given to the head of states and prime minister or other high-ranking officials.<sup>(53)</sup> This is because of state's obligation to the principle of customary international law which immunizes high ranking officials of foreign states before domestic courts.<sup>(54)</sup> This issue is now has brought debate and discussion among the international community.<sup>(55)</sup> Especially, the case when the national courts always state that immunity is not applied in international crime cases.

Moreover, they argue that official immunity is applied to state's act that consistent with the law. Additionally, violation of human rights or international crimes can never be counted as state's act, or they are accounted as a violation of the norm of *Jus Cogens* which prevails over immunity<sup>(56)</sup> This was stated by the Greek court of cassation in the case of *Prefecture of Voiotia v. Federal Republic of Germany*.<sup>(57)</sup>

As a result, the conflict could be seen through different decisions from national and international courts<sup>(58)</sup> such as, the decision of the House of Lords on 24th March 1999 on *Pinochet case* which rejected immunity to Pinochet for the torture crimes which he had committed against citizens when he was the president of Chile.<sup>(59)</sup> Also, the recent opinion of ICJ in the case of Arrest

<sup>(49)</sup> *Prosecutor v. Slobodan Milosevic (Trial Judgement)*, IT-99-37-PT, (ICTY), 8 November 2001. Para. 26-34, available at: < [http://www.icty.org/x/cases/slobodan\\_milosevic/tdec/en/1110873516829.htm](http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/1110873516829.htm) > [accessed 20 Sep 2017]

<sup>(50)</sup> *Prosecutor v. Radovan Karadzic (Trial Judgement)*, IT-95-5/18-PT, (ICTY), 17 Dec 2008. Para. 17,18,25, available at: < <http://www.icty.org/x/cases/karadzic/tdec/en/081217.pdf> > [accessed 22 Sep 2017]

<sup>(51)</sup> *Prosecutor v. Radislave. Krstic (Appeals Chamber )*, IT-98-33-A, (ICTY), 1 Jul 2003. Para.26-27. Available at: < <http://www.icty.org/x/cases/krstic/acdec/en/030701.htm> > [accessed 24 Sep 2017]

<sup>(52)</sup> Pasquale De Sena and Francesca De Vittor. 'State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case' (2005) 16(1) European Journal of International Law 89. P.91-92

<sup>(53)</sup> J. - Dugard, D. D. L. - Bethlehem and M. - Du Plessis, '- International Law: A South African Perspective' (- Juta ) P.252

<sup>(54)</sup> See Supra note 36

<sup>(55)</sup> P. Capps, M. D. Evans and S. V. Konstadinidis, *Asserting Jurisdiction: International and European Legal Approaches* (Hart Pub 2003) P.185

<sup>(56)</sup> See Supra note 52.P.253

<sup>(57)</sup> M. Gavouneli and I. Bantekas. '*Prefecture of Voiotia v. Federal Republic of Germany. Case No. 11/2000*' (2001) Am J Int Law 198. P.201-203

<sup>(58)</sup> See Supra note 54

<sup>(59)</sup> Hazel Fox, Colin Warbrick and Dominic McGoldrick. '*The Pinochet Case No.3*' (1999) 48(3) The International and Comparative Law Quarterly 687.P.687



Warrant (*D. R. Congo v. Belgium*)<sup>(60)</sup> which based on the principle of customary international law. This case emphasizes on the right of the state's high-ranking officials to enjoy immunity before domestic courts.

Finally, it is important to note that immunity is applicable before domestic courts just for high-ranking officials. This is the case even in international crimes as confirmed above by the ICJ opinion. However, this does not mean the end of responsibility. In fact, the perpetrators still are responsible without enjoying immunity before international courts and tribunals. This is especially, if the violation was over international crimes or an infringement of core human right norms. Therefore, this could be considered as another development in international law against or to limit sovereign immunity.

## ii. Sovereign immunity in Civil Proceedings

Civil proceeding against states covers all disputes that happening because of state or its agencies acts in dealing with individual or private actors. Therefore, if any dispute like this occurs, do the state or its actors have right to enjoy immunity before foreign domestic courts?

To address this question, it requires distinguishing between two types of acts:

Firstly, the acts on behalf of the state or governmental acts which are immune before national courts of other states.<sup>(61)</sup> This is according to the internationally recognised sovereignty and personality of the state.<sup>(62)</sup> It means even states have right to control all actions within their territory but there is an acceptance rule from international community to respect foreign state's sovereignty<sup>(63)</sup> As well, this is applicable in both countries who applies absolute and restrictive immunity by a condition of the foreign state act consistent with international law. For example, the UK courts are applying this principle.<sup>(64)</sup> This is, likewise, the opinion of ICJ in the case of (*Germany/Italy, Greece Intervening*)<sup>(65)</sup>

Secondly, the commercial or private acts that are done by states or their actors with the ordinary person or private actors. On the one hand, these kinds of acts are immune just in the

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<sup>(60)</sup> See supra note 11

<sup>(61)</sup> M. Kohen, R. Kolb and D. L. Tehindrazanarivelo, *Perspectives of International Law in the 21st century / Perspectives du droit international au 21e siècle: Liber Amicorum Professor Christian Dominicé in Honour of his 80th Birthday* (Brill 2011)P.130

<sup>(62)</sup> Ibid

<sup>(63)</sup> M. Fowler and J. M. Bunk, *Law, Power, and the Sovereign State: The Evolution and Application of the Concept of Sovereignty* (University Press 1995) P.12-14.

<sup>(64)</sup> See supra not 22. P.175

<sup>(65)</sup> *Jurisdictional Immunities of the State case (Germany/Italy, Greece Intervening)* (ICJ), 3 February 2012.Para .107-108. Available at: < <http://www.icj-cij.org/files/case-related/143/143-20120203-JUD-01-00-EN.pdf> > [accessed 27 Sep 2017]

countries that grant absolute immunity such as countries in South America, Russia and China.<sup>(66)</sup> On the other hand, in the countries who practice restrictive immunity such as the US and the UK,<sup>(67)</sup> foreign states do not have immunity in commercial and private acts. It means states are dealt equally as private actors in their private or commercial acts with private actors.

Although, applying restrictive immunity is another development to reduce state immunity,<sup>(68)</sup> its application confuses because it is not easy for domestic courts to distinguish between the state's commercial or private and non-private acts.<sup>(69)</sup> Although, this issue could be solved if the purpose of the commerce act was to achieve a governmental or state's benefit, considers as sovereign act will be immune, otherwise the considers as private act and the immunity will not be granted.<sup>(70)</sup> In addition, this has not been an established rule by domestic courts yet.

Consequently, there are different views in different cases before domestic courts on this issue. For example, in the case of (*Trendtex Trading Corporation v. Central Bank of Nigeria*),<sup>(71)</sup> the Court of Appeal stated that the purpose of the act was not important to decide whether the state's act was public or private, or it was enough if just the act itself was commercial act. Furthermore, the same idea was repeated by the House of Lords in the case of (*Kuwait Airways Corp v. Iraqi Airways Co*)<sup>(72)</sup>

On the other side of the token, in the US case of (*Victory Transport Inc. v. Comisaria General*)<sup>(73)</sup> mentioned that the purpose of the act is not enough in order to the state's actions become a public acts and it argues that all sovereign acts of state have a public purpose in some quality because there is no private needs for the states themselves.<sup>(74)</sup> Therefore, basing on this idea all state's acts are considered as public acts and this will be against restrictive immunity.

### iii. Future of Sovereign Immunity and Arguments to Eliminate It

In previous sections, it was shown that development in international criminal justice, human rights and state's private acting has had a role in reducing sovereign immunity. At the same time, both were unable to reduce immunity completely while even now immunity is applicable before

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<sup>(66)</sup> See Supra note 20.

<sup>(67)</sup> See Supra note 26 and 27

<sup>(68)</sup> See supra note 22. P.180

<sup>(69)</sup> Ibid

<sup>(70)</sup> Ibid

<sup>(71)</sup> *Trendtex Trading Corporation v. Central Bank of Nigeria*, United Kingdom, Court of Appeal, Civil Division, 13 January 1977, 64 1LR 111, 134-135.

<sup>(72)</sup> *Kuwait Airways Corp v. Iraqi Airways Co* [1995] 1 W.L.R. 1147; [1995] 3 All E.R. 694; [1995] 2 Lloyd's Rep. 317; [1995] C.L.C. 1065; [1996] I.L.Pr. 339; (1995) 92(28) L.S.G. 28; (1995) 139 S.J.L.B. 176; Times, July 25, 1995; Independent, August 15, 1995

<sup>(73)</sup> *Victory Transport Inc. v. Comisaria General* (1964) 336(No. 338, Docket 28636) F.2d 354

<sup>(74)</sup> Ibid

domestic courts for high-ranking officials who commit international crimes, and restrictive immunity has a problem in distinguishing between state's public and private acts.<sup>(75)</sup> Therefore, to solve all these contradictions and issues in immunity under international law, also to grant individual and human rights, in the near future immunity should be eliminated. This is because of its inconsistent with many principles under international and human rights laws. This is include the right to access to the court in any dispute, this right usually is granted to individuals within the constitutions of countries. It has been recognised by many international instruments of human rights such as Arts 6(1) of the European Convention of Human Rights.<sup>(76)</sup> Accordingly, individuals have right to access to the court even if the litigant was the state. For instance, in the case of (*Ringeisen v. Austria*), the European Court of Human Rights (ECHR) stated that Article 6 paragraph 1 applicable even for the disputes between states and individuals and its argument was that the article came as an absolute text, so covers all disputes.<sup>(77)</sup>

In addition, granting immunity to states is against the rule of law under the UN and human rights reports, which they state the governments and individuals should be accountable and equal before the law.<sup>(78)</sup> Moreover, it is against national interests<sup>(79)</sup> for instance, China has granted absolute immunity to foreign states. This is covered by the claim of its damaged individuals to sue foreign states even in commercial acts. At the same time, China, as a state, itself does not have the same right before the foreign domestic courts that apply restrictive immunity.<sup>(80)</sup> For example, this happened for China in the (*Jackson case*), (*Morris case*) and (*Hongkong Aircraft case*) in these cases the claims of China to enjoy immunity were refused by domestic courts.<sup>(81)</sup> Furthermore, this will be against national interests.

## CONCLUSION

This research has argued that state immunity which came from the historical practice from the King's practice. Then, it was transferred from personalisation to the modern international law to practice between states as the principle of customary international law in the concept that domestic courts do not have jurisdiction over foreign states. This was based on the principle of sovereign equality. Subsequently, because of the contradiction with the other principles under international

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<sup>(75)</sup> See supra note 1. P.228

<sup>(76)</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, Entry into force: 3 September 1953 available at: < [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf) > [accessed 29 Sep 2017]

<sup>(77)</sup> ECtHR 16.7.1971 (*Ringeisen v. Austria*) (App no 2614/65) (1971) Para.94 available at: < <http://www.worldlii.org/eu/cases/ECHR/1971/2.html> > [accessed 2 Oct 2017]

<sup>(78)</sup> M. Noel. 'Can We Expect Fair Trials At The International Criminal Tribunal For Rwanda?' (2011) P.3

<sup>(79)</sup> Dahai QI. 'State Immunity, China and Its Shifting Position' (2008) 7(2) Chinese Journal of International Law 307. P.330

<sup>(80)</sup> Ibid

<sup>(81)</sup> Ibid

law and human rights, the efforts to limit the state immunity was started. This was tracked into two directions:

Firstly, in criminal procedures against the state or its officials in international crimes. This was developed under international criminal justice, and during international special tribunals of Nuremberg, Tokyo, ICTY, ICTR, Sierra Leone, and Cambodia. The ICC, as permanent international criminal court, also followed the trend. These tribunals have emphasized on two principles: Non-impunity and individual responsibility. These principles refuse granting immunity because of the official position in the state for perpetrators of international crimes such as, crimes against humanity and war crimes, and they decided individual responsibility for perpetrators of international crimes.

Secondly, the civil procedures against states or their officials in civil cases. Historically, domestic courts were granting absolute immunity for foreign states. Later on, because of increasing the state's private acts and dealing with the traders and private actors, states in the second half of the 20th century started to grant restrictive immunity. This is done in order to distinguish between state's public and private acts, and granting immunity just for public acts. This was with not determining the body or place for damaged individuals from state acts to be accessed if the state enjoys immunity.

Finally, because of the failing efforts in both criminal and civil procedures, directions in such the first one could not apply the refuse of immunity for the state's high-ranking officials before domestic courts, and the second does not have a clear mechanism to distinguish between the state's public and private acts. Therefore, the best solution is not just trying to reduce immunity, or it is the elimination of state immunity. This is because of its principally inconsistent with many other principles such as the right of individuals to be equal before the law and the right aggrieved to access to the court for getting the rights.

## REFERENCES:

### International Instruments and Reports:

- Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950 , ETS 5, Entry into force: 3 September 1953 available at: < [http://www.echr.coe.int/ Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/ Documents/Convention_ENG.pdf) > [accessed 29 Sep 2017]
- *European Convention on State Immunity*, May 16, 1972, Europ. TS No. 74, 11 ILM 470 (1972) (entered into force June 11, 1976) available at : < <http://www.wipo.int/ ed ocs/trt docs/en/ce-csi 1/trt c e csi1 .pdf> > [accessed 4 Sep 2017]
- International Law Association: *Draft Convention On State Immunity* (1983) 22(2) International Legal Materials 287.

- UN. *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement")*, 8 August 1945, available at : < [http://avalon.law.yale.edu/ imt/imt co ns t.asp](http://avalon.law.yale.edu/imt/imt_co ns t.asp) > [accessed 9 Sep 2017]
- UN. *Charter of the International Military Tribunal for the Far East (1946)* available at: < [http://www.un.org/en/genocid\\_e prevention/ documents /atroc ity-crimes/Doc. 3 1946 %20Tokyo%2 0 Charter.pdf](http://www.un.org/en/genocid_e prevention/ documents /atroc ity-crimes/Doc. 3 1946 %20Tokyo%2 0 Charter.pdf) > [accessed 9 Sep 2017]
- UN.S.C. *Statute of the International Criminal Tribunal for the former Yugoslavia* .R esolution 827, 25 May 1993. Available at: < [http://w ww.icty.org /x/file/ Legal% 20L ibrary/Statute/statute\\_sept09\\_en.pdf](http://w ww.icty.org /x/file/ Legal% 20L ibrary/Statute/statute_sept09_en.pdf) > [accessed 12 Sep 2017]
- UN. S.C. *Resolution 955 Establishing the International Tribunal for Rwanda (with An nexed Statute)* S.C. Res. 955, 49 U.N. SCOR at \_\_, U.N. Doc. S/RES/955 (1994). Av ai lable at:< <http://hrlibrary.um n.edu /peace/docs/scres955.html> > [accessed 14 Sep 2017]
- UN.S.C. *Statute of the Special Court of Sierra Leone*. Resolution 1315 (2000) of 14 August 2000. Available at: < <http:// www .rscsl.org/Documents/ Est abl ishment/S-Res-1315-2000.pdf> > [accessed 15 Sep 2017]
- UN.G.A. *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, Available at: < <https://www.icc-cpi.int/NR /rd o nlyres /A DD16852-AEE9-4757-ABE7-9CDC 7CFO 2886/2 83503/Ro meStatutEng 1 .pdf> > [accessed 18 Sep 2017]
- UN.G. A. *Report of the International Law Commission*, Official Records Sixty-third session Supplement No. 10 (A/63/10) (5 May-6 June and 7 July-8 August 2008) Available at: < <http://legal.un.org/ilc/d ocume ntation/english/reports/a 63 10.pdf> > [accessed 2 Sep 2017]
- UN. G. A. *Vienna Convention on Diplomatic Relations*. 1961. Done at Vienna on 18 April 1961. Entered into force on 24 April 1964. Available at < <http://legal.un. org/ilc /t ext s/ins truments/english/conventions/9 1 1961.pdf> > [accessed 3 Sep 2017]
- UN. G A. *The Convention on the Privileges and Immunities of the Specialized Agen ci es*, 21 November 1947, available at: < <http://www.ifrc.org/docs/idrl/I295EN.pdf> > [a c cessed 4 Sep 2017]
- UN. G. A. *United Nations Convention on Jurisdictional Immunities of States and Their Property*, 2 December 2004, A/RES/59/38, available at: < <http://legal .un. or g /ilc/t exts/instruments/english/conventi ons/4 1 2004. pdf> > [accessed 8 Sep 2017]
- UN. International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp. IV.E.1, Art. 7, available at: <<http:// untreaty.un.org/l lc//texts/instrument s/engli sh/ draft% 20articles /9 6 2001.pdf> > [accessed 4 Oct 2017]



## Cases

- *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, (ICJ), 14 February 2002. Available at : < <http://www.ilsa.org/jessup/jessup08/basicmats/icjcongo.pdf> > [accessed 3 Sep 2017]
- ECtHR 16.7.1971 (*Ringeisen v. Austria*) (App no 2614/65) (1971) Para.94 available at: < <http://www.worldlii.org/eu/cases/ECHR/1971/2.html> > [accessed 2 Oct 2017]
- *Jurisdictional Immunities of the State case (Germany/Italy, Greece Intervening)* (ICJ), 3 February 2012. Available at: < <http://www.icj-cij.org/files/case-related/143/143-20120203-JUD-01-00-EN.pdf> > [accessed 27 Sep 2017]
- *Kuwait Airways Corp v. Iraqi Airways Co* [1995] 1 W.L.R. 1147; [1995] 3 All E.R. 694; [1995] 2 Lloyd's Rep. 317; [1995] C.L.C. 1065; [1996] I.L.Pr. 339; (1995) 92(28) L.S.G. 28; (1995) 139 S.J.L.B. 176; Times, July 25, 1995; Independent, August 15, 1995
- *Prosecutor v. Radislav Krstic (Appeals Chamber)*, IT-98-33-A, (ICTY), 1 Jul 2003 Available at: < <http://www.icty.org/x/cases/krstic/acdec/en/030701.htm> > [accessed 24 Sep 2017]
- *Prosecutor v. Radovan Karadzic (Trial Judgement)*, IT-95-5/18-PT, (ICTY), 17 Dec 2008 available at: < <http://www.icty.org/x/cases/karadzic/tdec/en/081217.pdf> > [accessed 22 Sep 2017]
- *Prosecutor v. Slobodan Milosevic (Trial Judgement)*, IT-99-37-PT, (ICTY), 8 November 2001 available at: < [http://www.icty.org/x/cases/slobodan\\_milosevic/tdec/en/1110873516829.htm](http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/1110873516829.htm) > [accessed 20 Sep 2017]
- *Trendtex Trading Corporation v. Central Bank of Nigeria*, United Kingdom, Court of Appeal, Civil Division, 13 January 1977, 64 ILR 111 (1984)
- *Victory Transport Inc. v. Comisaria General* (1964) 336(No. 338, Docket 28636) F.2d 354.
- *Pefecture of Voiotla v. Federal Republic of Germany*. Case No. 11/2000. Areios Pagos (Hellenic Supreme Court), May 4, 2000.

## Lectures

- Lady Fox, *State Immunity: The Absolute and Restrictive Doctrines and New Challenges*, Lecture, UN. Doc., International law, Legal Resources and Training, AVL, Lecture Series 2008. Available at: < [http://untreaty.un.org/cod/avl/ls/Fox\\_H\\_S.html](http://untreaty.un.org/cod/avl/ls/Fox_H_S.html) > [accessed 20 Sep 2017]

## Books and Journal articles

- Allott P, *The Health of Nations: Society and Law beyond the State* (Cambridge University Press 2002).





- Bankas EK, *The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts* (Springer 2005).
- Capps P, Evans MD and Konstadinidis SV, *Asserting Jurisdiction: International and European Legal Approaches* (Hart Pub 2003).
- Chamlongrasdr D, *Foreign State Immunity and Arbitration* (Cameron May 2007).
- Conforti B and Francioni F, *Enforcing International Human Rights in Domestic Courts* (Brill Academic Pub 1997).
- Crawford J and Lowe V, *British Year Book of International Law 2008* (Oxford University Press 2010).
- De Sena P and De Vittor F, 'State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case' (2005) 16(1) *European Journal of International Law* 89.
- Dixon M, *Textbook on International Law* (OUP Oxford 2007)
- Dugard J, - Bethlehem DDL and - Du Plessis M, '- *International Law: A South African Perspective*' (- Juta ).
- DU PLESSIS ,M. , 'The African Guide to International Criminal Justice: purpose and overview' African Guide to International Criminal Justice 1. Available at: < [http://kms1.isn.ethz.ch/serviceengine/Files/ISN/106287/publicationdocument\\_singledocument/e824b2acc7cc-46a3-9917-6148ef5020ec/en/FULL.pdf#page=9](http://kms1.isn.ethz.ch/serviceengine/Files/ISN/106287/publicationdocument_singledocument/e824b2acc7cc-46a3-9917-6148ef5020ec/en/FULL.pdf#page=9) > accessed on [22 Sep 2017].
- Fowler M and Bunk JM, *Law, Power, and the Sovereign State: The Evolution and Application of the Concept of Sovereignty* (University Press 1995).
- Fox H, Warbrick C and McGoldrick D, 'The Pinochet Case No.3' (1999) 48(3) *The International and Comparative Law Quarterly* 687.
- Gavouneli M and Bantekas I, 'Prefecture of Voiotia v. Federal Republic of Germany. Case No. 11/2000' (2001) *Am J Int Law* 198.
- Hess B, 'International Law Commission's Draft Convention on the Jurisdictional Immunities of States and Their Property, The' (1993) 4 *Eur.J.Int'l L.* 269.
- Hillier T, *Sourcebook on Public International Law* (Taylor & Francis Group 1998).
- International Bar Association Subcommittee on,Legal Opinions and others, *Legal Opinions in International Transactions: Report of the Subcommittee on Legal Opinions of the Committee on Banking Law of the Section on Business Law of the International Bar Association* (New York 2003).
- Kaczorowska A, *Public International Law 4/e* (Taylor & Francis Group 2010).



- Kohen M, Kolb R and Tehindrazanarivelo DL, *Perspectives of International Law in the 21st century / Perspectives du droit international au 21e siècle: Liber Amicorum Professor Christian Dominicé in Honour of his 80th Birthday* (Brill 2011).
- Malanczuk P, *Akehurst's Modern Introduction to International Law* (Allen & Unwin 1997).
- Mann FA, 'The State Immunity Act 1978' (1979) 50(1) British Yearbook of International Law 43.
- McCarthy AL, 'Commercial Activity Exception--Justice Demands Congress Define a Line in the Shifting Sands of Sovereign Immunity, The' (1993) 77 Marq.L.Rev. 893.
- Noel M, 'Can We Expect Fair Trials At The International Criminal Tribunal For Rwanda?' (2011).
- Qi D, 'State Immunity, China and Its Shifting Position' (2008) 7(2) Chinese Journal of International Law 307.
- Shaw MN, *International Law* (Cambridge University Press 2008).
- Simbeye Y, *Immunity And International Criminal Law* (Ashgate 2004).
- Tomuschat C, 'International Law of State Immunity and Its Development by National Institutions, The' (2011) 44 Vand.J.Transnat'l L. 1105.
- Van Alebeek R, *The Immunities of States and Their Officials In International Criminal Law And International Human Rights Law* (Oxford University Press 2008).
- Van Woudenberg N, *State Immunity and Cultural Objects on Loan* (Brill 2012).
- Wong GM, *Essentials of Sports Law: Fourth Edition* (Praeger 2010).

## پوخته

پاریزبهندی سه روهری یان پاریزبه ندی لوتکهیی ریازیکی یاسایی دهلی ناگونجی دهوله تیکی خاوه ن سه روهری یان دهولهت هه لهی یاسایی بکات وه پاریزراو ده بی له دزی داوای شارستانی یان به دوا داجوونی تاوانی . له پاشایه تی دهستوری دا سه روهری بنه چهی میژوویی ده سه لاته که دادگاگان پیک ده هینی. وه له و روانگه یه وه، که واته دادگاگان ده سه لاتی یابه ند کردنی سه روهریان نیه به رامبه ر دادگاگان که خودی سه روهری دادگاگانی داناوه بو پاراستنی هاو لاتیانی، وه نه وه جیگای سه رسو پمان نیه به تایبته که له یاسای نیوده وله تی بنه مایه که هه یه دهلی حکومه تی هه رده وله تیک شیاوی لپرسیینه وه نیه له به رده م دادگاگانی وولاتانی تر دا . نه م تو یژینه وه یه ره خنه ده گری له پاریزبه ندی سه روهری و چونکه ره نگدانه وهی جیهانی نه ورؤ نیه که تپدا ده ژین، به ووردی ره نگدانه وهی نه و دؤخه نو ییه نیه که له نه مرؤدا گرنگی حنومه ته کان که متر بوته وه له به رامبه ر نه کتره نیوده وله تیه تایبه به ته کان وه نارگومینت هه یه که دهلی پیویسته بنه مای پاریزبه ندی سه روهری نه مینیت.

## الملخص

الحصانة السيادية، أو الحصانة التاجية، هي عقيدة قانونية بان لا يمكن للدولة ذات السيادة أو الدولة أن ترتكب خطأ قانوني وتكون محصنة ضد الدعوى المدنية أو الملاحقة الجنائية . في الملكيات الدستورية ، السيادة هي الأصل التاريخي للسلطة التي تخلق المحاكم . ومن هذا المنطلق، لا تتمتع المحاكم بسلطة إجبار السيادة على الالتزام بالمحاكم، كما أنشأها السیادي لحماية رعاياها . مع ذلك ، ينبغي عدم ارباك مع مبدأ القانون الدولي العام الذي مفاده أن حكومة دولة ما غير قابلة للمحاسبة عادة أمام محاكم دولة أخرى.

يدرس هذا البحث بشكل نقدي مذهب الحصانة السيادية، الذي لم يعد يعكس العالم الذي نعيش فيه، حيث أنه لا يعكس بدقة انخفاض أهمية الحكومات اليوم مقارنة بالجهات الفاعلة الخاصة . هناك حجة مفادها أنه ينبغي القضاء على هذا المبدأ.