

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

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### **1. The historical context in which the instrument was adopted**

The United Nations Convention on Jurisdictional Immunities of States and Their Property (hereinafter the Convention) originated as a project to harmonise and clarify the law on State immunity. It enshrines the restrictive doctrine of immunity, which is a distinction between acts performed in the exercise of sovereign power or *acta de jure imperii* (immune) and acts of a commercial or private law nature or *acta de jure gestionis* (non-immune).

The Convention follows the 1972 European Convention on State Immunity and domestic legislation of States like the United States (1976 Foreign Sovereign Immunities Act) and the United Kingdom (1978 State Immunity Act), by stating a general rule that States and their property benefit from immunity from jurisdiction of the courts of another State, and then setting out the exceptions to this rule, including waiver. Like those instruments, the Convention is restricted to immunity from the civil (not criminal) jurisdiction of foreign courts.

The Convention was adopted without a vote by the United Nations General Assembly on 2 December 2004 (resolution 59/38). As of April 2019, the Convention has 22 parties of the required 30 parties to enter into force under its Article 30. It has nonetheless proved to be influential on the development of the law of State immunity, and certain of its provisions are regarded as codifying customary international law (see below).

### **2. Significant developments in the negotiating history**

The Convention was the culmination of years of work by the International Law Commission (ILC), the Sixth Committee of the General Assembly, and the Ad Hoc Committee on Jurisdictional Immunities of States and their Property established by General Assembly resolution 55/150 of 12 December 2000. Negotiations were difficult at times, but the decades of work on the Convention have been recognized by judges and academic commentators as evidence of where international consensus exists, and where it remains elusive, on certain issues.

The work on the Convention originated in the ILC in the late 1970s. In 1977, the General Assembly included the topic “Jurisdictional immunities of States and their property” in the ILC’s programme of work, and Sompong Sucharitkul (Thailand) was appointed as Special Rapporteur for the topic. In 1986, a draft text was adopted by the ILC on first reading. In 1987, Motoo Ogiso (Japan) took over as Special Rapporteur. In 1991, the revised Draft Articles on Jurisdictional Immunities of States and Their Property were adopted by the ILC on second reading and submitted to the General Assembly, with the recommendation that an international conference be convened to examine the ILC Draft Articles and to conclude a convention. It had a mixed reception. Outstanding substantive issues and the question of convening a conference to adopt the Convention were referred to an open-ended Working Group of the Sixth Committee, established by the General Assembly. In 1994, the General Assembly approved in principle the idea of convening a conference (resolution 49/61), but discussions also continued in the open-ended Working Group of the Sixth Committee.

The five substantive issues on which States were divided in the 1990s were:

- (i) How to define the concept of a State for the purposes of immunity;

- (ii) What the criteria are for determining the commercial character of a contract or transaction;
- (iii) The concept of a State enterprise or other entity in relation to commercial transactions;
- (iv) The nature and extent of an exception to State immunity for contracts of employment; and
- (v) The nature and extent of measures of constraint that can be taken against State property.

These issues were debated in the Working Group of the Sixth Committee, chaired by Carlos Calero-Rodriguez (Brazil) and subsequently by Gerhard Hafner (Austria).

In 1999, the topic was referred back to the ILC, which established a Working Group on Jurisdictional Immunities of States and Their Property that was also chaired by Gerhard Hafner and provided comments on the outstanding issues. The discussions, in light of the ILC's comments, led to two more issues for consideration by the Sixth Committee:

- (vi) What form the outcome of the ILC's work should take (e.g., convention, model law, guidelines); and
- (vii) Whether there is an exception to State immunity for violation of *jus cogens* norms.

It was considered that the question of an exception to immunity for violations of *jus cogens* norms was not ripe enough for codification. To further the work done, consolidate areas of agreement and resolve outstanding issues, the General Assembly decided in 2000 to establish the Ad Hoc Committee on Jurisdictional Immunities of States and their Property (resolution 55/150). In 2002, the Ad Hoc Committee reached compromise solutions on the outstanding issues and published a revised text. In 2003, the Ad Hoc Committee, working in informal consultative groups coordinated by Chusei Yamada (Japan) and Michael Bliss (Australia), resolved the outstanding issues. In 2004, the Ad Hoc Committee finalized the text. On the recommendation of the Sixth Committee, the General Assembly adopted this text as the Convention (resolution 59/38). After decades of work, the delicate balance to achieve consensus had been achieved through the interaction between the ILC, the Sixth Committee and the Ad Hoc Committee. It was not considered necessary to convene a treaty-making conference.

### 3. A summary of key provisions

The starting point of the Convention is 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." The rest of the Convention can be seen as a means of defining the meaning of, and exceptions to, this principle.

The Convention is divided into five parts. In Part I (Introduction), article 2 sets out the use of terms, including the meaning of the terms "court", "State", "commercial transaction", and the controversial interpretative provision in article 2(2) refers to both the nature *and* purpose of a "commercial transaction". Article 3 clarifies that the Convention is without prejudice to the privileges and immunities enjoyed by diplomatic and other missions and persons connected with them, the privileges and immunities of heads of State *ratione personae*, and the immunities enjoyed by a State with respect to aircraft or space objects owned or operated by a State. Article 4 provides for the non-retroactivity of the Convention.

Part II (General Principles) sets out the rules relating to express waiver, participation in court proceedings by the foreign State, and counterclaims. The Convention follows the widespread practice of treating separately immunity from adjudication (Part III) and immunity from enforcement (Part IV).

Part III contains eight types of proceedings in which State immunity cannot be invoked. These exceptions are modeled on – but not identical to – the 1972 European Convention on

State Immunity, the United States Foreign Sovereign Immunities Act and the United Kingdom State Immunity Act. The exceptions include: commercial transactions; employment contracts; personal injuries and damage to property; ownership, possession and use of property; intellectual and industrial property; participation in companies or other collective bodies; ships in commercial use; and arbitration agreements.

Part IV deals with immunity from measures of constraint in connection with proceedings before a court. It contains separate rules on pre-judgment (article 18) and post-judgment (article 19) measures of constraint. Article 21 lists five categories of State property immune from attachment, arrest, or execution.

Part V (Miscellaneous Provisions) addresses service of process (article 22), default judgment (article 23), failure to comply with a court order, and in particular, the exemption of a State from imposition of fine, penalty or security for costs (article 24). Part VI (Final Clauses) contains the standard provisions relating to signature (article 28), ratification (article 29), entry into force (article 30), denunciation (article 31), depositary and notifications (article 32), and authentic texts (article 33). Article 25 specifies that the annex, containing the understandings with respect to certain provisions of the Convention, is an integral part of the Convention. Article 26 states that nothing in the Convention shall affect the rights and obligations of States Parties under existing international agreements.

Article 27 contains a compromissory clause providing for settlement of disputes concerning the interpretation or application of the Convention by arbitration or referral to the International Court of Justice, along with an opting-out procedure at the time of signature, ratification or accession.

#### **4. The influence of the instrument on subsequent legal developments, including treaties and jurisprudence**

Fifteen years after its adoption, the Convention is still eight ratifications short of the thirty needed for entry into force. States parties are mainly from western Europe and parts of eastern Europe and the Middle East. But the relatively low number of parties belies its influence as evidence of State practice and *opinio juris* on the law of State immunity. Certain of its provisions have been held by international and national courts to reflect customary international law. Even where a court may doubt the Convention's customary status, reference to the Convention has become routine in proceedings involving issues of immunity.

The Convention's provisions have been enacted as national legislation by States including Japan, Spain and Sweden. States may also enact provisions only in part, such as the 2016 French law that draws on the Convention's Part IV provisions on enforcement measures. Russia, a signatory to the Convention, has a 2015 law that adopts the restrictive doctrine of immunity in a manner similar to the Convention.

However, China, also a signatory, has rejected the presumption that signing the Convention endorses the restrictive doctrine. The Office of the Commissioner of the Ministry for Foreign Affairs has explained in the context of litigation (*Democratic Republic of the Congo and Others v. FG Hemisphere Associates LLC* [2011] HKCFA 43):

China signed the Convention on 14 September 2005, to express China's support of the ... coordination efforts made by the international community. However, until now China has not yet ratified the Convention, and the Convention itself has not yet entered into force. Therefore, the Convention has no binding force on China, and moreover it cannot be the basis of assessing China's principled position on relevant issues.

After signature of the Convention, the position of China in maintaining absolute immunity has not been changed, and has never applied or recognized the so-called principle or theory of "restrictive immunity."

The United Kingdom, another signatory but not party, has not made any attempt to modify its legislation on State immunity, but the courts have paid careful attention to the Convention. The general approach has been to examine the Convention on a provision-by-provision basis (including the *travaux préparatoires*) to assess whether it reflects customary international law. In 2006, Lord Bingham in *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia and another (Secretary of State for Constitutional Affairs and another intervening)* [2006] UKHL 26 (*Jones v. Saudi Arabia*) cited the Convention as evidence that there is no exception to State immunity from civil proceedings for violations of *jus cogens* norms such as torture. He observed that, “[d]espite its embryonic status, this Convention is the most authoritative statement available on the current international understanding of the limits of state immunity in civil cases, and the absence of a torture or *jus cogens* exception is wholly inimical to the claimants’ contention” (para. 26). Lord Hoffmann also found the Convention relevant, noting that “[i]t is the result of many years work by the International Law Commission and codifies the law of state immunity” (para. 47).

The New Zealand High Court, following *Jones v. Saudi Arabia*, observed that “the absence of a torture or *jus cogens* exception to state immunity in the United Nations Immunities Convention 2004 speaks powerfully against the plaintiffs’ argument. This Convention is a very recent expression of the consensus of nations on this topic” (*Fang and Others v. Jiang and Others*, 21 December 2006, para. 65).

In 2017, the United Kingdom Supreme Court in *Belhaj and another v. Straw and others; Rahmatullah (No.1) v. Ministry of Defence and another* [2017] UKSC 3 referred to the words “interests or activities” in article 6(2)(b) of the Convention. The question was whether these words extended the basis for the indirect impleading of a State beyond a State’s property and rights and, if so, whether this represented the “current consensus of nations” (para. 195 per Lord Sumption). Lord Mance observed that in *Jones v. Saudi Arabia* the question had been about the existence of an exception to immunity from civil proceedings for torture, which was “a fundamental question which the Convention, however embryonic, could be expected to cover” (para. 25). However, “[t]o attach equivalent relevance to the use in a Convention with no binding international status of the ambiguous terminology of article 6(2)(b) is to take Lord Bingham’s words out of context” (*ibid*). After analysing the *travaux* of article 6, the Court concluded that the concept of “interests” could not be carried so far as to cover “reputational or like disadvantage” to a State and indirect impleading needed some specifically legal effect on the State (paras. 26, 29 and 195).

In *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for Foreign and Commonwealth Affairs*, [2017] UKSC 62, the United Kingdom Supreme Court considered the employment contract exception to immunity, which is worded differently in the UK Statute Immunity Act and the Convention. Lord Sumption observed, “[i]t is therefore necessary to distinguish between those provisions of the Convention which were essentially declaratory and those which were legislative in the sense that they sought to resolve differences rather than to recognise existing consensus” (para 32). He cautioned at “even where it is declaratory, it can never be definitive, if only in order to allow for the future development of state practice” (para 39). He found that Article 11 of the Convention did not yet represent customary international law (para 72).

In another case, the Judicial Committee of the Privy Council considered whether the Convention contained an “autonomous international concept of property” that could be applied to a case originating in Jersey: *Boru Hatlari Ile Petrol Taşima AŞ and others v Tepe Insaat Sanayii AS*, [2018] UKPC 31, para 17. After detailed submissions on the *travaux*, the Privy Council concluded that such a concept of property could not be deduced from the drafting negotiations (paras 24-27) and it applied a notion of “property” by reference to the relevant domestic law (para 17).

The Dutch Supreme Court has applied the three exceptions to immunity of a foreign State’s assets listed in article 19 of the Convention, even though the Netherlands has neither signed nor ratified the Convention: *Netherlands v. Servaas*, 14 October 2016, Hoge Raad.

The European Court of Human Rights (ECtHR) has been more willing to embrace the Convention as an expression of customary international law, in particular article 11 on the employment contract exception to State immunity. The ECtHR has held that the Convention (or its specific provisions) reflect customary international law applicable to any State that:

- (i) Has not objected to the Convention's adoption: *Cudak v. Lithuania*, Application no. 15869/02 (ECtHR Grand Chamber, 23 March 2010), paras. 66-67; *Naku v. Lithuania and Sweden*, Application no. 26126/07 (ECtHR Fourth Section, 8 November 2016), para. 60;
- (ii) Has not objected to the adoption of a specific rule in the ILC Draft Articles: *Wallishauser v. Austria*, Application no. 156/04 (ECtHR First Section, 17 July 2012), para. 69;
- (iii) Signed the Convention: *Oleynikov v. Russia*, Application no. 36703/04 (ECtHR First Section, 14 March 2013), para. 67; or
- (iv) Was in the process of ratifying the Convention: *Sabeh El Leil v. France*, Application no. 34869/05 (ECtHR Grand Chamber, 29 June 2011), para. 58.

According to the ECtHR, a State's participation in the negotiation or adoption of the Convention makes it "possible to affirm that [a draft article] applies to the respondent state under customary international law" (*Cudak*, para. 67). In the *Oleykinov* judgment, the Court held that Russia appeared to have accepted restrictive immunity as a principle of customary international law, even prior to its signature of the Convention (paras. 67-68).

The International Court of Justice, in *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, Judgment, ICJ Reports 2012, p. 99, took a more circumspect approach to the Convention as a reflection of customary international law. The ILC work, negotiations, signing, ratification and application of the Convention may constitute evidence of State practice and *opinio juris* (para. 55):

In the present context, State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention. *Opinio juris* in this context is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgment, by States granting immunity, that international law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States.

The International Court of Justice considered articles 12 (personal injuries and damage to property) and 19 (immunity from post-judgment measures of constraint) of the Convention, while carefully noting the provisions of the Convention are "relevant only in so far as their provisions and the process of their adoption and implementation shed light on the content of customary international law" (para. 66).

The Convention's influence is not dependent on entry into force. International and national courts have been treating it as a useful, but not always definitive, starting point for their analysis of the law on State immunity. The belief that the Convention would have a harmonising effect on law and practice (preambular para. 3 of the Convention) is thus more realistic than the slow rate of ratifications suggests.

## Related Materials

### A. Legal Instruments

#### *International*

[European Convention on State Immunity](#), Basel, 16 May 1972, *European Treaty Series*, No. 074.

[United Nations Convention on Jurisdictional Immunities of States and Their Property](#), New York, 2 December 2004.

#### *National*

United States of America, Foreign Sovereign Immunities Act, *United States Code*, Chap. 97 (1976).

United Kingdom, State Immunity Act (1978).

Russian Federation, Federal Law No. 297-FZ of 3 November 2015 on the Jurisdictional Immunity of a Foreign State and the Property of a Foreign State in the Russian Federation.

France, Law No. 2016-1691 of 9 December 2016.

[United Kingdom, State Immunity Act](#) (1978).

### B. Documents

International Law Commission, [Draft Articles on Jurisdictional Immunities of States and Their Property](#) (1991).

[General Assembly resolution 49/61 of 9 December 1994](#) (Convention on jurisdictional immunities of States and their property).

[General Assembly resolution 55/150 of 12 December 2000](#) (Convention on jurisdictional immunities of States and their property).

[General Assembly resolution 59/38 of 2 December 2004](#) (United Nations Convention on Jurisdictional Immunities of States and Their Property).

### C. Jurisprudence

#### *International*

European Court of Human Rights, [Cudak v. Lithuania, Application no. 15869/02](#) (Grand Chamber, 23 March 2010).

European Court of Human Rights, [Sabeh El Leil v. France, Application no. 34869/05](#) (Grand Chamber, 29 June 2011).

International Court of Justice, [Jurisdictional Immunities of the State \(Germany v. Italy: Greece intervening\), Judgment of 3 February 2012](#), ICJ Reports 2012, p. 99.

European Court of Human Rights, [Wallishauser v. Austria, Application no. 156/04](#) (First Section, 17 July 2012).

European Court of Human Rights, [\*Oleynikov v. Russia, Application no. 36703/04\*](#) (First Section, 14 March 2013).

European Court of Human Rights, [\*Naku v. Lithuania and Sweden, Application no. 26126/07\*](#) (Fourth Section, 8 November 2016).

### ***National***

New Zealand High Court, [\*Fang and Others v. Jiang and Others\*](#), 21 December 2006.

Hong Kong Court of Final Appeal, [\*Democratic Republic of the Congo and Others v. FG Hemisphere Associates LLC\*](#), [2011] HKCFA 43.

United Kingdom House of Lords, [\*Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia and another \(Secretary of State for Constitutional Affairs and another intervening\)\*](#), [2006] UKHL 26.

Supreme Court of the Netherlands (Hoge Raad), *Netherlands v. Servaas*, 14 October 2016.

United Kingdom Supreme Court, [\*Belhaj and another v. Straw and others; Rahmatullah \(No.1\) v. Ministry of Defence and another\*](#), [2017] UKSC 3.

United Kingdom Supreme Court, [\*Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for Foreign and Commonwealth Affairs\*](#), [2017] UKSC 62.

United Kingdom Privy Council, [\*Boru Hatlari Ile Petrol Taşima AŞ and others v Tepe Insaat Sanayii AS\*](#), [2018] UKPC 31.

### **D. Doctrine**

H. Fox and P. Webb, *The Law of State Immunity*, 3rd revised edition, Oxford University Press, Oxford, 2015, Chapter 9 in particular.

D.P. Stewart, “The UN Convention on Jurisdictional Immunities of States and their Property”, *American Journal of International Law*, vol. 99, 2005, p. 194.

R. O’Keefe and C. Tams (eds.), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary*, Oxford University Press, Oxford, 2013.

G. Hafner and U. Köhler, “The United Nations Convention on Jurisdictional Immunities of States and Their Property”, *Netherlands Yearbook of International Law*, vol. XXXV, 2004, pp. 3-49.

G. Hafner, M.G. Kohen and S. Breau (eds.), *State Practice Regarding State Immunities/La Pratique des Etats concernant les Immunités des Etats*, Martinus Nijhoff, Leiden/Boston, 2006.