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The concept of state immunity under international law: An overview

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Abstract
State immunity is the principle of international law that exempts a state from prosecution or suit for the violation of domestic laws of another state. Immunity does not confer solely in an individual per se, rather it attaches to an office, and the individual occupant of that office at any point in time enjoys the immunity attaching to that office. A state is immuned from all judicial processes of its courts and the courts of other states. This means that under the sovereign state immunity concept a foreign sovereign cannot be impleaded in the court of another state without its concepts. This rule is hinged on the international law maxim- par inparem non habet imperium meaning that equal have no power over an equal. It originated when the kings were considered to be the embodiment of state sovereignty. The principle of absolute immunity has now been abandoned in many jurisdictions to embrace the principle of restrictive immunity approach which does not attach immunity to the commercial acts of a sovereign. The courts of a country can only assume jurisdiction over a foreign sovereign or diplomat when that sovereign has waived the immunity. The waiver must be express, where a sovereign waives his immunity from jurisdiction of local courts, it does not affect the execution of judgement since it to settled in law that the waiver or immunity from jurisdiction does not amount to waiver of immunity from execution or attachment. If a sovereign immunity is violated may protest to other states and failure to remedy the violation may lead to an action in international court of justice. The aim of this work is to discuss in extensor the origin and extent of state immunity under the international law, the forms of state immunity, its waiver and exemptions in order to give a general overview to it and make recommendations.

Keywords: Immunity, Jurisdiction, Conventions, Judgement and Waiver

1. Introduction
In International Law, certain persons and institutions are immune, from the jurisdiction of foreign Municipal courts. The principal ones are sovereign states and foreign heads of state, diplomatic agents', consuls and International institutions, their officials and agents.

It is a basic principle of International Law that a sovereign state does not adjudicate on the conduct of a foreign state. This immunity extends to both criminal and civil liability. State immunity grew from the historical Immunity of the person of the Monarch. In *R v Bow Street metropolitan stipendiary Magistrate and others, exparte Pinochet Ugarte (Amnesty International and other intervening)(No.3)* [1], Lord Browne Wilkinson articulated the customary Law position as follows:

> *In any event, such personal immunity of the Head of state persists to the present day: the Head of State is entitled to the same immunity as the state itself. The diplomatic Representative of the foreign state in the forum state is also afforded the same immunity, in recognition of the state which he represents. This immunity enjoyed by a Head of State in Power and Ambassador in post is a complete immunity vested to the Person of the Head of State or Ambassador and rendering him Immune from all actions or prosecution whether or not they relate to matters done for the benefit of that State. Immunity is granted ratione personae.*

The Immunities ratione Personae or (personal Immunities) is predicated on the notion that; any activity of a Head of State or government, or diplomatic agents [2] must be immune from foreign Jurisdiction. This is to avoid foreign state from, either infringing Sovereign prerogatives of States, or interfering with the functions of a foreign state agent under the guise of dealing with an exclusively private act. Historically, this immunity stems from the time when Heads of States were seen as personifying the State or the State itself.

On the other hand, immunity ratione Materiae or (Limited Immunity) is very different, and is to be contrasted with Immunity ratione personae, which gave Complete Immunity to all activities, whether public or private. This immunity operates to prevent the official and governmental acts on one State from being called into question in proceedings before the courts of another and only incidentally confers Immunity on the individual. According to Lord Millet:

> *The Immunity is sometimes also justified by the need to prevent the serving Head of State or Diplomat, from being inhibited in the performance of his official duties by fear of the consequences after he has ceased to hold office. This last basis can hardly be prayed in aid to support the availability of the immunity in respect of criminal activities prohibited by International Law* [3]

Thus the question of immunity is at the same time a question of jurisdiction: Only when the court already has jurisdiction will it become meaningful to speak of immunity or exemption from it. For this reason, Sovereign Immunity is also referred to as 'Jurisdictional Immunity' or 'Immunity from Jurisdiction'. In other words "exterritoriality" and "extraterritoriality" were also used in the same sense.

2. Objectives of Study

This research work is aimed at analyzing the concepts of state immunity under international law with special focus on the extent of its application and forms of state immunity. The research will of necessity delve into cases of waiver of immunity to ascertain what amounts to it and also look into the exemptions and conditions in which state immunity can be bypassed or refused. Whenever immunity is applied the adverse party is always handicapped. Immunity is a complete defence to any action in court (both criminal and civil). Generally, this is to delineate the nature, scope, form and limit of the doctrine of state immunity under international law.

This work will equally look critically at the issue of whether every act of a head of state or his agent is immune or, if there are situations where the immunity will fail to avail the head of state or diplomatic agent as a defence. It's also within the objective of this work to look critically at the idea of state immunity, its essence and scope. This research work will look at the question of violation of immunity.

Finally, it would look at the issue of proof of immunity, burden and standard of proof and ingredient of proof of immunity in any action.

3. Research Methodology

To achieve an intellectual result in the course of this research, a doctrinal approach will be adopted. Both primary and secondary sources of material will be used. In this connection, the United States foreign sovereign immunity act 1976 and United Nations Convention on Jurisdictional immunities of states and Their Property serves as the primary source. The secondary sources include textbooks, internet sources, journals, essays and articles published on the subject matter together with the opinions of the courts in judicial decisions. This will no doubt give a holistic approach to the subject matter of discourse.

This research work evolves round the concept of sovereign immunity of states. It's also going to trace the origin of the concept and area of its application. It's also going to review the forms state immunity can take and the availability of plea of immunity to states in occasion of violation of human rights by the states.

In further analysis, this work delves into effect of waiver of state immunity by the state and legal implication of it in international law. The exemptions to state immunity are equally within the scope of this work followed by final recommendations and conclusion.

Generally, this research work will give an in-depth overview of the concept of state immunity under international law with apt conclusion and recommendation.

4. Statement of Problem

As earlier stated, the Diplomatic and privileges act 2004, confers a lot of powers on the Head of states and Diplomats in Nigeria.What is often missed in this concept (and this is very imperative) is the fact that diplomatic immunity is not for politicians and other officials to use for their personal gains or to prosecute a personal agenda, it is strictly meant to give such officials the latitude to perform their official duties without fear of persecution, blackmail, threats and the like. The import of this is amply imbedded and prescribed in The Vienna Convention on Diplomatic Relations of 1961 as well as The Vienna Convention on Consular Relations of 1963 of which more than one hundred and fifty (150) nations are signatories including Nigeria, the UK, US, Germany, Japan, Canada, Australia and much more.

However, it has been judicially noticed that the heads of state abuse these powers with impunity in the contemporary entity Nigeria. The court has held always that every power shall have limits or control. Where the courts find that the powers have been exercised oppressively or unreasonably or if there is a procedural defect in the exercise of the power, the act may be condemned as unlawful.A constitutive part of The Vienna Convention on Diplomatic Relations (1961) states categorically that those with any level of diplomatic immunity must obey the laws, regulations and customs of the host country. The fact that they hold such immunity does not give them the authority to violate the laws of their host country.

5. Concept of State Immunity

State Immunity is a principle of public International Law [4] that is often relied on by states to claim that the particular court or tribunal does not have jurisdiction over it or to prevent enforcement of an award or judgement against any of its assets [5]. In other words, it can create difficulties for a counter party seeking to enforce its contractual rights against a State, as such state Immunity should always be considered when dealing with States.

The concept of State Immunity is one hinged on equality of States. It therefore deals with the issues of a foreign Sovereign being impleaded in the local courts. This is often expressed by the maxim "*par in parem non habet imperium"* [6]

There used to be doctrine of absolute Immunity, which granted foreign sovereign absolute Immunity from the jurisdiction of local courts, irrespective of whether the transaction in which the Sovereign is involved, is an official transaction or his private transaction. The principles of International Law regarding jurisdictional Immunities of States, is derived mainly from the judicial practice of Individual nation [7]. This first articulation of the principle of state immunity was recognised by the United States Supreme Court in its famous 1812 judgement of the Schooner Exchange V McFaddon [8]. Chief Justice Marshall clearly enunciated the principle:" *that by the definition of sovereignty, a state has absolute and exclusive jurisdiction within its own territory but that it could also by implied or express consent waive jurisdiction.* One Sovereign being is in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its Sovereign rights within the Jurisdiction of another, can be supposed to enter a foreign territory only under an express license or in the confidence that the Immunities belonging to his Independent Sovereign nation, though not expressly stipulated, are reserved by Implication, and will be extended to him". Since then, the recognition of State Immunity became firmly established in the general practice of the United States and the majority of modern European States.

However, there has been a move away from the absolute Immunity doctrine to the doctrine of restrictive Immunity. By restrictive Immunity approach, there is now a distinction between the official act of the Sovereign and (act Jure Imperii) for which immunity should vest.

This restrictive approach has found judicial support in many cases including The Victory Transport V Commiseria General Transports [9]. It was held affirming the decision of the District

Court that applying the tate letter, the activity of the commisario General is more properly labelled on act jure gestionis than Jure Imperii and therefore not entitled to Immunity.

In this chapter therefore, the author shall be making an in-depth analysis of the concept of State Immunity, the Essence and Scope of the State Immunity, as well as the various approaches to the concept.

5.1 Essence of State Immunity

States, Individual, International Organisations have through the years been accepted as possessing rights and liabilities in International Law. Certain protections are accorded to these subjects to enable them function properly. As well as States, other entities enjoy immunity beginning with Heads of State and including International Organisations as well as diplomatic personnel [10].

The question of Immunity of Heads of State and governments is concerned with the issue of whether a Head of State (which includes in this context Presidents, Chancellors of a State, Prime Ministers, Sovereign King or Prince and such other terms) can be arraigned before an International court or tribunal and before the courts of another State without his consent.

In Mighel V Sultan of Jehore [11], the court held "… the courts of this country have no Jurisdiction over an Independent Foreign Sovereign, unless he submits to the Jurisdiction. Such submission cannot take place until the Jurisdiction is invoked".

The essence of State Immunity therefore is hinged on the idea or principle of Sovereignty of States as well as equality and non-interference. Foreign Sovereign are exempted from the jurisdiction of Local courts. This Immunity or exemption is based on the following principles:

i) Equality of Sovereigns

Since all states are Sovereign; they are also equal, so the Heads of the state must be necessarily equal and no Head of State should be subjected to the proceedings in the courts of another State. (Par In parem Non Habet Imperium [9])

ii) Independence

When a State becomes independent, it becomes free from external dictation; the Head of State, personifying the State should be Independent both in deed and in thought.

iii) Dignity

It will be *intra dignatum (*for a Head of State to be subjected to civil or Criminal Proceedings in an International Tribunal. The risk of by chance being found responsible for an International act greatly outweighed the need to treat all men equal.

The functional purpose of Immunity is that a Head of State should not have to worry about Lawsuits in carrying out his official responsibilities [12]**.** Domestic Jurisdiction as a notion, attempts to define an area in which the actions of the Organs of government and administration are Supreme, free from International legal principles and interference. Indeed, most of the grounds for Jurisdiction can be related to the requirement under International Law, to respect the territorial integrity and political independence of other States.

Immunity from jurisdiction whether as regards the State itself or as regards its diplomatic representatives is grounded in this requirement [13]**.** Although this could be viewed as a limit to the host country's jurisdiction, since for example, Nigeria cannot exercise jurisdiction over foreign diplomats within its territory. However, this is an essential part of the recognition of the sovereignty of Foreign States as well as an aspect of the legal equality of all states earlier stated in this work. The equality of States is a necessary concomitant of the Sovereignty of States. As Chief Justice Marshall of the United States Supreme court observed in the case of *Schooner Exchange V Mc Faddon* [14], the exclusiveness and absoluteness of a State's Jurisdiction within its own territory does not seem to contemplate foreign Sovereigns and their rights as its objects.

To subject a Foreign Sovereign to a local jurisdiction would be in breach of their Sovereign equality as expressed in the Latin Maxim *Par in parem Non Habet Imperium* ("an equal has no authority over an equal").

The classic doctrine of Sovereign Immunity was succinctly exposed by Marshall, C.J thus:

> *"One sovereign being in no respect amenable to another, and being bound by obligations of the highest characters, not to degrade the dignity of his Nation by placing himself or its Sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express License or in the Confidence that the immunities belonging to his independent Sovereign nation, though not expressly stipulated, are reserved by implication and will be extended to him."*

This perfect equality and absolute Independence of sovereigns, and this common interest impelling them to mutual intercourse and an interchange of good offices with each other, have given rise to a class of cases in which every Sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation [15]**.**

Authorities are legion where the Courts of various nations have given their judicial nod to this concept of Sovereign State Immunity E.g. I'congresso Del Porticlo [16] Holland V Lampen-Wolfe [17].

5.2 History and Application of State Immunity

The concept of State Immunity from Jurisdiction originated at a time when Kings were considered to be the embodiment of a State's Sovereignty and when diplomatic envoys were considered to be 'rulers' personal representatives. The prevailing view was that because they were of equal standing, one Sovereign Monarch could not be subject to the jurisdiction of another Sovereign Monarch (*par in parem non habet imperium*). Moreover, just as a King would not be Subject to the Jurisdiction of another state while visiting the state, so too is monarchs representatives were granted Immunity [18].

This privilege is based on reciprocity and comity [19]. Overtime the idea of an identity between State and ruler faded away, but States continued to extend to other States an absolute Immunity from Jurisdiction to adjudicate, and Jurisdiction to enforce. Governments justified these broad Immunities by reference to the dignity, equality and independence of States. However, while recent developments have restricted traditional notion of Sovereign, the concept and policies underlying Sovereign Immunity remain Important in much transnational litigation [20].

As already stated [21], Sovereignty until comparatively recently

was regarded as appertaining to a particular individual in a State, and not as an abstract Manifestation of the existence and power of the State. The Sovereign was a definable person whom allegiance was due. As an integral part of this Mystique, the Sovereign could not be made Subject to the judicial process of his country [22].

Accordingly, it was only fitting that he could not be sued in foreign courts. The Idea of the personal Sovereign would undoubtedly have been undermined, had courts been able to exercise Jurisdiction over foreign Sovereign.

This personalization was gradually replaced by the abstract Concept of State Sovereignty, but the basic Mystique remained. In addition, the Independence and equality of States made it philosophically as well as practically difficult to permit Municipal courts of one country to manifest their power over foreign Sovereign States without their consent [23].

It had been submitted that the view so often expressed in textbooks and elsewhere; that the Immunity of foreign States and their property from the Jurisdiction of courts of foreign states follows from a clear principle of International Law, namely, the principle of equality and Independence of States need re-examination [24]. Reason being that it finds no support in classical International Law. Grotius does not refer to it. Vattee after admitting it with regard to a person of foreign Sovereign is silent with regard to the position of Sovereign States as such and that it is rooted to same extent, in the doctrine of the personal Immunity of the Heads of States.

It is with regard to these that the distinction between *acts Jure qestionis* first attained prominence in the 18th century in Germany in the relations of the numerous German States and principalities. Although in various decisions given in the 19th century on the subject, much reliance was placed on the classical decision of Chief Justice Marshall in *Schooner Exchange V Mc Faddon* [25].

In that case, Chief Justice Marshall declared that the Jurisdiction of a State within its own territory was exclusive and absolute, but did not encompass Foreign Sovereigns[10]. Prof H. Lauterpacht, in his article, however stated that it is doubtful whether that decision can accurately be quoted as an authority in favour of the rigid principle of Jurisdictional Immunity of Foreign States. As it is clear from the language of that decision that the governing principle there is not the immunity of the foreign States but the full Jurisdiction of the territorial States and that any immunity of the foreign States must be traced to waiver express of implied of its Jurisdiction on the part of the territorial State.

It was argued that the principles of Independence, logically requires that the Court of a State should recognise as valid, legislative acts of another State so far as these are not contrary to International Law, and its fundamental principles of Justice, so long as they do not require other States to enforce Foreign public or Fiscal Law, and so long as they are not intended to have extra territorial effect. Beyond this it does not go. Thus no legitimate claim of Sovereignty, Independence and equality is violated if the courts of a State assume Jurisdiction over a Foreign State with regard to contracts concluded or torts committed in the territory of the State assuming Jurisdiction. And that claiming otherwise will amount to denial of that principle [26].

Further, Prof. H. Lauterpacht [27] stated that a clear examination of the origin and of the development of the doctrine of Immunity of foreign States from Jurisdiction shows that it is perhaps not so much the principles of the independence and equality which have nurtured the soil in which that doctrine has flourished but factor of a different kind. This includes:

1) Consideration of dignity of the sovereign State and
2) The traditional claim transposed into the International arena of the Sovereign State to be above the Law and to claim before its own courts, a privileged position compared with that enjoyed by the subject.

During the debates preceding the adoption of the Virginian Convention in 1788, John Marshall stressed the element of indignity inflicted upon a State by making it a defendant in an action [28]. In the leading case of Chisholm V Georgia [29], the main argument for the Defendants State was that it was a degradation of Sovereignty in the States, to submit to the Supreme Judiciary of the United States. The US courts had gone to the length of relying on the argument of dignity in the matter of Immunity of foreign States from Location [30].

In England, "dignity", coupled with Independence played an important part as an explanation of the doctrine of Immunity of Foreign States [31]. In the Cristina *Lord Macmillan* invoked "dignity", equality and Independence of Foreign States as the foundation of their Immunity. Remarkably, there is a close similarity between the manner in which the "dignity of the Sovereign" was used as a Justification of Sovereign Immunity within the State and the way in which it was relied upon for Jurisdictional Immunity of foreign States [32].

However, Prof LauterPacht [33] finally and critically noted that, these strained emanation of the notion of dignity are, an archaic Survival and that they cannot continue as a rational basis of Immunity. He pointed out that it is probable that as in the United States, so also in the Great Britain the somewhat rigid application of the doctrine of absolute Immunity of Foreign government was not uninfluenced by the Immunity of the Crown, and that a sustainable explanation of that doctrine will be found in the traditional Immunity of the Sovereign State, from suits in its own courts.

The entire concept of State Immunity whether of the Foreign State or of territorial State, is a survival of the period when the Sovereign, if he did Justice to the subject, did so as a matter not of duty but of grace. It is an inheritance, not as indirect as it may appear of the principle that the personal Sovereign and subsequently that the State is Legibus Solutus [34].

6. Scope of State Immunity

The scope of State Immunity covers both civil and criminal liabilities of a Foreign Sovereign until recently; the Immunity also covers both the official and private acts of the Foreign Sovereign. However, the current trend is that *acts Jure Imperri* (i.e governmental acts) attract Immunity, while *acts Jure gestions* (i.e commercial acts) do not. Foreign Sovereigns are now subjected to Local Jurisdiction for all their commercial activities. We shall discuss all these Seriatim.

6.1 Civil Immunity

The Immunity of Heads of States from legal process in civil law does not meet with much controversy. Apart from Customary International Law granting Immunity for public acts and denying Immunity for private acts of a Head of State, conventional International Law exists on the Immunity of Head of State.

The State Immunity act (1978) of the United Kingdom applies the restrictive Immunity approach to Heads of States as it does

to States. The Act gave some conditions under which a Head of State is not immune to include:

I. Proceeding in respect of which it has submitted to the Jurisdiction of the courts of the United Kingdom.
II. Proceeding relating to commercial transactions to which he has entered to
III. Proceeding relating to contract of employment between a Head of State and an individual where the contract is wholly or partly performed there in the United Kingdom.
IV. Proceeding in respect of death or personal injury or damage to or loss of tangible property caused by an act or omission in the United Kingdom.
V. Proceeding relating to any interest of the Head of State or his possession or use of immoveable property in the United Kingdom, or any obligation of a Head of State arising out of his interest in, or his possession or use of any such property.
VI. Proceedings relating to liability value added tax, any duty or customs or exercise or any agricultural levy or rates in respect of any premise occupied by it for commercial purposes.
VII. Proceeding as regards to an action in rem against a ship belonging to him or an action in personal for enforcing a claim in connection with such a ship [35].

The Immunities and privileges granted by the diplomatic privileges Act 1964 also apply to a Head of State, his family and private servants as well as the Head of a diplomatic Mission.

No penalty by way of committal or fine shall be imposed in respect of any failure or refusal by or on behalf of a Head of State to disclose or produce any document or other information for the purpose of proceedings to which he is a party.

6.2 Criminal Immunity

The recognition that individuals may be held criminally responsible for offences against International Law, goes back at least to principles stated in the charter of the International Military Tribunal of Nuremberg. This was re-echoed by the general Assembly of the United Nations in 1946, when directing the International Law commission to treat as a matter of primary importance plans for their formulation. The commission in 1950 set out the following principle and commentary in its paragraph [36].

> "*The fact that a person who committed an act which constitutes a crime under International Law, acted as Head of State or responsible Government official does not relieve him from responsibility under International Law"*

This principle is based on article 7 of the charter of the Nuremberg Tribunal. According to the character and the judgement, the fact that an individual acted as Head of State, or responsible government official did not relieve him from International responsibility. In addition, the 1954 International Law commission Draft code of offences against the Peace and Security of Mankind, provided in Article III:

> *"The fact that a person acted as head of State or as the responsible government official does not relieve him of responsibility for committing any of the offences defined in the code".*

Because of the internationalization of human right and the legion of conventions on human rights, there has arisen a debate on whether or not a Head of State and former Heads of State should enjoy Immunity for International crime. The debate took a new dimension with the rejection of Immunity for general Pinochet [37] in his capacity as Head of State, and the arrest of and trial of Slobodan Milosevil a serving head of State.

In Pinochet (N0.3), the ex-Head of State of Chile had been detained in London pending an extradition request from Spain. It was alleged that he had authorized acts of torture while in office against some Spanish nationals. Senator Pinochet claimed Immunity as an ex Head of State. One issue was whether he could be immune in respect of acts that might be regarded as crimes of Universal Jurisdiction under customary International Law, and which in any events attracted universal Jurisdiction under the torture convention. The House of Lords held that there could be no immunity. In fact, Lord Brownille-Wikinson and Hulton expressed their sentiment in the following words: "How can it be for International Law purposes, an official function to do something which Law itself prohibits and criminalizes [38]". It was pointed out that Senator Pinochet's' alleged tortures were not carried out by him in his private capacity, for his private gratification. For many years States have adopted the principle of Individual Criminal responsibility; whether the perpetrator of the crime may be or the rank or function he occupies.

There are some relevant treaties and conventions in this regard.

1) The treaty of Versailles of June 28 1919
2) The charter of the International Military Tribunal of Nuremberg
3) The convention for the prevention and punishment of the crime of Genocide 1949
4) The Geneva Conventions 1949 etc.

Another way through which a Head of State can become responsible for his criminal actions is through the doctrine of Superior responsibility. This is a well-established rule of International custom and conventional Law with respect to persons' in position of Superior authority. Justifying the doctrine, Rodney Dixon wrote;

> "*Indeed these persons who possess the most extensive powers to plan and order the political, military and Seemity policies and operations and to most effectively curb the excesses of such actions by and large"*

Under the Statute of the International Criminal Court in addition to other grounds of criminal responsibility; a Military commander or person effectively acting as a Military commander shall be criminally responsible for crimes within the jurisdiction of the court, committed by forces under his or her effective command and control or effective authority and control as the case maybe, as a result of his or her failure to exercise control properly over such force where;

i) The military commander or person either knew or owing to the circumstance at the time, should have known that the forces were committing or about to commit such a crime; and
ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigations and prosecution.

International attitude towards State Immunity vary. In general,

there are two approaches: the absolute doctrine and the restrictive doctrine.

6.3 Absolute Immunity

Initially, the first and only approach, the absolute doctrine still applies in some Jurisdictions, notably China and Hong Kong. Under this doctrine, any proceeding against foreign States are inadmissible unless the State expressly agrees to waive Immunity. This simply means that no sovereign State could be impleaded in the court of another without its consent. States based on this rule to enjoy absolute immunity in all their acts, be they public or private. Absolute Immunity thus refers to the privileges and exemptions, granted by one state through its judicial machinery to another, against whom it is sought to entertain proceeding, attachments of property or the execution of judgements.

The relatively uncomplicated role of the sovereign and of the government in the 18th and 19th century, logically gave rise to the concept of absolute Immunity whereby the Sovereign was completely immune from foreign Jurisdiction in all cases regardless of circumstances. However the unparallel growth in the activities of the State, especially with regard to commercial matters, has led to problems in most countries to a modification of the above rule. Furthermore, commercial activities like any other individual and the growth of the activities of the state in commercial matters, the concept of absolute immunity has been called to question: the base of the question is that granting Absolute Immunity to state will give them advantage over private enterprises that engage in commercial contract with that State.

Accordingly many states began to give their support for the restrictive Immunity approach, which shall be discussed later. Immunity was available as regards governmental (acts *Jure Imperii)* but not for commercial acts which are termed (*Jure gestionis)*.

The classical case of the doctrine of absolute Immunity is the case of *Schooner Exchange V Mc Faddon* where Marshall, CJ delivering the judgement of the United States Supreme court held; that the vessel of war of a foreign State with which the United States was at peace and which the government of the United states allowed to enter its harbours, was exempted from the jurisdiction of its courts.

Also in the case of Parlement Belge [39] which followed the decision in the *Schooner Exchange*, the English court of appeal held that a ship owned by the Belgian King and flying the Belgian flag which was used principally to transport mail, but also conveyed passengers and their luggage between Ostend and Dover was entitled to Immunity from Jurisdiction even though it was engaged in commercial activity. The House of Lords affirmed the absolute Immunity rules in Campania Naviera Vascongado V Cristina [40]. All the five Law Lords agreed that as the vessel was in de facto possession and control of the Spanish Government where the writ was issued, the writ impleaded a foreign Sovereign State and must be set aside.

Some of the other cases where the absolute Immunity rule were applied include the Krajina V Tass agency [41], where the court of appeal held that the agency was a state Organ of the USSR and was thus entitled to Immunity from local Jurisdiction; and Baccus SRC V Servico Naciennnal Del Trigo [42]. Where the court held that the defendants, although a separate legal person were in effect a department of State of Spanish government. How the entity was constituted was regarded as an internal matter and it was held entitled to immunity from Suit.

It could be observed from the fact of the above cases, that some of them involved pure commercial transactions and yet the courts were prepared to uphold the absolute Immunity of the State involved in order to avoid impleading a Foreign Sovereign.

6.4 Restrictive Immunity

Due to the increasing involvement of states in World Trade activities, led to the development of a more restrictive approach to State Immunity, where a distinction is drawn between acts of a foreign sovereign nature (*act jure imperii*) and acts of a commercial nature (*acts Jure gestionis*). Under the restrictive approach, Immunity is only available in respect of acts resulting from the exercise of a Sovereign power. As such, States may not claim immunity in respect of commercial activities or over commercial assets. Immunity from Jurisdiction is usually available in the case of Jure Imperii but usually denied in the case of Jure gestionis. A number of States in fact started adopting the restrictive approach to Immunity at early stage. The Supreme Court of Austria in 1950 concluded that in the light of the increased activity of states in the commercial field, the classic doctrine of absolute Immunity had lost its meaning and was no longer a rule of International law [43].

The Austrian Supreme court said in that case:

[3]

> *"Classic doctrine of Immunity arose at a time, when all commercial activities of State in foreign countries were connected with their political activities… Whereas today States engage in commercial activities and… Enter most competitions with their own nationals and with foreigners. Consequently, the classic doctrine … has lost its meaning and should be replaced by a doctrine restricting the Immunity of States.) "*

In 1952 the United States announced its official support for the restrictive theory through the letter of acting legal adviser. *Jack B Tate*, to the department of Justice on May 19, 1952 (The Tate Letter) wherein he intimated. Interalia as follows:

> *"…The department feels that the wide spread and increasing practice, on the part of government of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in courts. For these reasons it will hereafter be by the department's policy to follow the restrictive theory of Sovereign Immunity in the consideration of requests for a grant of Sovereign Immunity* [44]."

In 1958, Lord Denning expressed the desirability of embracing the restrictive Immunity approach in the case of Rahimtoola V Nizamof Hyderabad [45] he said

In all civilised countries there has been a progressive tendency towards making the sovereign liable to be sued in his own court; notably in England by the Crown proceedings Act 1947

Foreign Sovereigns should not be in any different position. There is no reason why we should grant to the department or Agencies of Foreign governments an Immunity where we do not grant our own, provided always that the matter in dispute arises without the jurisdiction of our courts and in properly cognizable by them"

In seeking to distinguish between acts Jure gestionis and act

jure imperii, the court have resorted to the "purpose of the act" and "the nature of the acts" tests, The purpose of the act test suggest that an act which is done for governmental purposes should be classified as jure imperii or jure gestionis.

If a foreign government act in another state was an industrial, commercial, financial or other business activity, in which private persons may engage in that other state when the act is jure gestionis. This text exerts a dominant influence on contemporary judicial attitude.

The restrictive immunity approach was upheld by the English court of appeal in the case of Trendex Trading Corporation V Central Bank of Nigeria (1977) 2 WLR 356. The approach was also followed by the Nigerian court of appeal. In the cases of Kramer Italo Ltd v. Government of the kingdom of Belgium & Anor and African Re insurance corporation v Aim consultants Ltd.

However, Awogu J.C.A. Said obiter in the Kramer Italo case"... It must however be borne in mind that the doctrine of restrictive Immunity is a recent development which one must be cautious in applying, particularly when the doctrine has no statutory backing". It must however be understood that the Restrictive Immunity Doctrine is not an affront on the Immunity of State, rather it is an avenue to ensure that private commercial activities between states and private entrepreneurs are carried out under a level playing ground without giving the state undue advantage to the detriment of the private investors.

6.5 Applicable Laws (Conventions).

The first attempt at providing a legislative solution to the issue of Immunity was in 1926. The effort gave birth to what is known as THE Brussels convention on the unification of certain rules relating to immunity of state owned vessel. Later, the council of Europe adopted the convention on state immunity and additional protocols, Basel (this bracket is not part of the work basel is a state in Switzerland, Europe) on 16th may 1972.

The first major national legislative initiative on this subject is the United States' foreign sovereign immunities act, 1976 (FSIA). In 1979, Britain also passed the State Immunity Act pursuant to the adoption of the European convention on state immunity, 1972.

The United Nations International Law Commission Draft Articles on Jurisdictional Immunity of States and their property also came in as an attempt to achieve a compromise between the Absolute and Restrictive Doctrine of Immunity. There is also the Canadian State Immunity act 1982 on the issue.

6.6 Forms of State Immunity

State Immunity under International Law arises in two forms which include: (1) Immunity from jurisdiction and (2) Immunity from execution.

7. Immunity from Jurisdiction

The principle of jurisdictional immunity asserts that in particular situations a court is prevented from exercising jurisdiction over a foreign State. Much has been said about the origin and application of Jurisdictional Immunity of State in the last chapter.

However, it would be apt to note that the traditional view of the jurisdictional immunity of state was set out by Chief Justice Marshall of the United States in Schooner Exchange V McFaddon (Supra) [46]. The case concerned a ship, the exchange, whose ownership was claimed by the French Government and by a number of US nationals. The US Attorney General argued that the Court should refuse Jurisdiction on the ground of Sovereign Immunity. Chief Justice Marshall stated that:

> *"The full and absolute territorial Jurisdiction being alike the attribute of every Sovereign being incapable of conferring extra territorial power would not seem to contemplate Foreign Sovereign nor their Sovereign rights as its objects. One Sovereign being is in no respect amenable to another: and being bound by obligation of the highest character not to degrade the dignity of his nation by placing himself or its Sovereign rights within the Jurisdiction of another can be supposed to enter a foreign territory only under an express license, or in the confidence that the Immunities belonging to his independent Sovereign Nation…are reserved by implication and will be extended"* [47].

State Immunity from Jurisdiction can also be linked to the prohibition in International Law on one State interfering in the internal affairs of another [48]. In Buck V A.G.I [49], the Court of Appeal was called upon to discuss the validity of certain provisions of the constitution of Sierra Leone and refused on the basis that it lacked Jurisdiction. In the course of his judgement, Diplock L.J stated:

> *As a member of the family of nations, the government of the United Kingdom observes the rule of the comity… one of those rules is that it does not purport to exercise Jurisdiction over the internal affairs of any other independent State, or to apply measures of coercion to it or the property, except in accordance with the rule of Public International Law* [50]

As extensive explanation has been given to jurisdictional Immunity of State earlier [51], emphasis will now turn to Immunity from execution.

7.1 Immunity from Execution

Immunity from Execution is to be distinguished from Immunity from Jurisdiction, particularly since it involves the question of actual seizure of assets appertaining to a Foreign State. As such it poses a considerable challenge to relations, between States and accordingly States have proved to restrict Immunity from enforcement Judgement in Contra distinction to the situation concerning Jurisdictional Immunity [52].

But in Europe initially, the emerging doctrine on execution against the property of Foreign States appears to follow closely the Law on Jurisdiction. *Acts Jure Gestions* are proper subjects for Jurisdiction; acts Jure Imperii are not properly used in private, commercial activities is subject to execution; that used in public government activities is not [53]

While this is not the only basis used in reaching decisions on enforceability, it is a predominant rationale. In Myrtoon Steamship Co V. Agent de Tresor [54]. The Court of Appeal of Paris denied enforcement Immunity to French Government itself. An agency of France had chartered a Greek ship under a contract providing for arbitration. When a dispute arose, Myrtoon appointed its arbitration but the French State defaulted. Predictably, Myrtoon's arbitrator, then rendered an award in its favour, which it sought to enforce in France. The French government claimed Immunity on the ground that the

Charter involved a public act. In denying the claim, the Court looked on the consent to arbitrate in the contract as compelling Evidence of the French Government's Election to submit the matter to private Law.This, the Court essentially found a waiver by the French State and used the agreement to determine the nature of activity involved.

However Article 23 of the European Convention on State Immunity, 1972 prohibits any measures of execution or preventive Measures against the property of a contracting State in the absence of written consent in any particular state. But, the Convention provides for a system of mutual enforcement of final judgement rendered in accordance with its provisions [55] and an additional protocol provides for proceedings to be taken before the European Tribunal of State Immunity consisting basically of members of the European Court of Human Rights.

By Article 18 of the International Law Commission (ILC) Draft Articles on Jurisdictional Immunities, no measures of constraint may be taken against the property of a State unless that State has Expressly consented by International agreement, or by an arbitration agreement or written contract or by a declaration before the court or by a written communication after a dispute between the parties had arisen. In addition, the State must have allocated property for the satisfaction of the claim in question or the property is specifically in use by the State for other than government non-commercial purposes and is in the territory of the State of the forum and has a connection claim concerned or with the agency or instrumentality against which the proceeding was directed.

Section 13 (2) (6) of the UK State Immunity Act provides, for instance, that the property of a State should not be subject to any process for the enforcement of a judgement or arbitration award or, in an action in rem, for its arrest, detention or sale: such Immunity may be waived by written consent but not by merely submitting to the Jurisdiction of the Court [56] while there is no Immunity from execution in respect of property which is for the time being in use or for intended use for commercial purposes [57].

It is particularly to be noted that this later stipulation is not to apply to a State's Central Bank or other monetary institutions [58]. Thus a Trendex type of situation could not arise again in the same form. It is also interesting that the corresponding provision in the US Foreign Sovereign Immunities Act of 1976 is more restrictive with regard to Immunity from Execution [59]. Thus, for example there would be no immunity with regard to property taken in violation of International Law.

The principle that existence of Immunity from Jurisdiction does not automatically entail Immunity from execution has been reaffirmed on a number of occasions.

In 1977, the West German Federal Constitutions court in Philippine Embassy case [60] noted that

> "*Claims against a general current bank account of the Embassy of a Foreign State which Exists in the State and the purpose of which is to cover the Embassy's cost And expense are not subject to forced execution by the State of the forum"*

Also, this was referred to approvingly by Lord Diplock in *Alcom Ltd V. Republic of Colombia* [61] a case which similarly involved the attachment of a bank account of a diplomatic Mission. The House of Lords unanimously accepted that the general rule in International Law was not overturned in the State Immunity Act and held that such a bank account would not fall within the Section 13(4) exemption relating to commercial purposes unless it could be shown by the person seeking to attach the balance that the bank account was earmarked by the foreign State solely … for being drawn onto settle liabilities incurred in commercial transactions.

It is not worthy to state that similar provision on State Immunity from execution is provided in South Africa Foreign Immunity Act 198 [62], Pakistan State Immunity Ordinance 1981, and the Singapore State Immunity Act 1979 [63].

7.2 State Immunity and Violation of Human Rights by States

With the increasing attention devoted to the relationship between International Human Rights Law and domestic system, the question has arisen as to whether the application of Sovereign Immunity in Civil suits against Foreign State for violation of Human Rights Law has been affected. To date, State practise suggests that the answer to this is negative.

In *Saudi Arabia V Nelson* [64], the US Supreme Court noted that the only basis for Jurisdiction over a foreign State was the Foreign Sovereign Immunities Act 1976 and unless a matter fell within one of the exceptions, the plea of Immunity would succeed. It was held that although the wrongful arrest, Imprisonment and torture by the Saudi government of Nelson would amount to abuse of the power of its police by that government, 'a foreign State exercise of the power of its police has long been understood for the purposes of the restrictive theory as peculiarly Sovereign.

However, the US Foreign Sovereign Immunities Act was amended in 1996 by the Anti-terrorism and Effective Death penalty Act which created an exception to Immunity with regard to States designated by the Department of State as terrorist states, which committed a terrorist act or provided material support and resources to an individual or entity which committed such an act which resulted in the death or personal injury of a US citizen [65].

In *Bouzari V Iran* [66], the superior Court of Justice of Ontario Canada noted, in the light of the Canadian State Immunity Act 1982, that regardless of the State's ultimate purpose, exercises of police Law enforcement and security powers are inherently exercises of government authority and sovereignty and concluded that an international custom existed to the effect that there was an ongoing rule providing State Immunity for acts of torture committed outside the forum State.

The English Court of Appeal in *Al-Adsani V Government of Kuwait* [67] held that the State Immunity Act provided for Immunity for States apart from specific listed exceptions, and there was no room for for implied exceptions to the general rule even where the violation of a norm of *Jus Cogens*, such as the prohibition of torture was involved.

The European Court of Human Rights in *Al-Adsani V UK* [68] analysed this issue that is whether State Immunity could exist with regard to civil proceedings for torture in the light of *Article 6 of the European convention.* The Court noted that it could not discern in the relevant materials before it, "any firm basis for concluding that as a matter of International Law, a State no longer enjoys Immunity from civil suit in the courts another State where acts of torture are alleged and held that Immunity this still applied in such cases [69].

In the case of criminal proceedings, the situations is rather different, part 1 of the State Immunity Act does not apply to criminal proceedings, although part III (concerning certain

Status Issues) does [70]. Ibid, Para.66.

8. Exceptions to Immunity of States

Federal sovereign immunity is never without an exception. After World War II, many exceptions evolved in order to remove unfair commercial advantages provided to foreign nations through their immunity. This principle is known as restrictive immunity because courts now limit use of foreign sovereign immunity. The exceptions were originally codified in 1976 through the enactment of FSIA, though many revisions and amendments expanded that list.

The exceptions to state immunity are themselves based upon customary international law. The pattern of the U.K state immunity act 1978 is to provide general immunity [71] Subject to a list of exceptions [72] which accord (meaning: agree or tally) with the doctrine of restrictive immunity. As a result, the burden is upon the plaintiff to prove that the case fall within one of the listed exceptions [73].

These are some of the exceptions to the general rule of immunity which are set out in the Convention; if any of these exceptions apply in a case, a state will not be able to claim immunity in a foreign court. The most commonly invoked exceptions are waiver of immunity, commercial transactions, expropriations, non-commercial torts, arbitration, and state-sponsored terrorism. Some of these exceptions are addressed briefly in this part, and citations are provided to facilitate further research as needed [74].

It is emphasizing that "[a]t the threshold of every action in a District Court against a foreign state... the court must satisfy itself that one of these exceptions apply [75]."

Submission to the Jurisdiction of the English courts

The state immunity act 1978 [76] includes 10 provisions which create exception to rule of immunity established by the first section. Sec 2(1) provides that. From the above provision, submission may come about in four different ways.

(1) By prior written agreement,
(2) Submission may occur after the dispute giving rise to the proceedings has arisen. Here no formality would be required.
(3) Once there is a dispute even an oral statement accepting jurisdiction will be sufficient, a submission in proceeding actually pending does not seem to be required. If the state has intervened or taken any step in the proceeding, then it is deemed to have submitted.
(4) The fourth case is the obvious one in which the state itself has instituted the proceedings. In such event the state is exposed to a counter claim which arises out of the legal relationship or facts of the claim [77].

A state will not be immune from adjudication where it has either expressly agreed that the English courts have jurisdiction (i.e. the contract incorporates a jurisdiction clause or agreement is reached once a dispute has arisen), or the state itself starts proceedings or takes a step in any proceedings commenced in the English courts. 7 States rarely submit to the jurisdiction of other courts and so, in practice, express jurisdiction clauses are used. This can either be a stand-alone jurisdiction clause (the parties agree that the English courts have jurisdiction), or as part of a waiver of immunity clause. The added advantage of this exception is that the state is also prevented from arguing that the English courts do not have jurisdiction under general jurisdiction rules.

Waiver of Immunity

Waiver of Immunity connotes the willing submission of a foreign Sovereign or Sovereign representative to the Jurisdiction of the Courts in another State. Immunity belongs to the state and not to the Individual beneficiary, therefore it is only the state and not to the Individual beneficiary, hence it is only the State that has the capacity to waive the Immunity. In a Memorandum entitled: Department of State guidance for Law enforcement officers with regard to personal rights and Immunities of foreign Diplomatic and consular personnel, the point was made that waiver of Immunity does not belong to the Individual concerned, but is for the benefit of the sending state.

The issue of waiver is provided for in Article 32 of the Vienna Convention on diplomatic Immunities.

Section 1605(a)(1) provides an exception to immunity when the foreign state has waived its immunity "either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver [78]."*,* Like other exceptions, this provision operates to limit the statutory grant of federal question jurisdiction [79].

1) Explicit waivers

Explicit waivers are typically found in contractual provisions, although they could arise from independent statements (for example, by a duly authorized governmental official). They are normally construed narrowly by U.S. courts in favour of the sovereign [80]. In some situations, treaty provisions may also qualify, although the U.S. Supreme Court cautioned in *Argentine Republic v. Amerada Hess Shipping Corp*. that federal courts should not lightly imply a waiver based upon ambiguous treaty language [81].

2) Implied waivers

As a rule, courts are even more reluctant to find implied waivers, requiring strong evidence of the foreign state's intent [82]. As noted in *re Republic of the Philippines*, [83] implied waivers have traditionally been found only when:

(1) A foreign state has agreed to arbitration in another country [84],
(2) A foreign state has agreed that a contract is governed by the law of another foreign country, [85] or
(3) A foreign state has filed a responsive pleading in a case without raising the defence of sovereign immunity [86].

By comparison, a clause providing that "[t]he Courts in India and USA [sic] only shall have jurisdiction in respect of [sic] all matters of dispute about the [bonds]" has been held insufficient to waive immunity [87].

Allegations of implicit waiver by foreign government conduct in violation of the norms of international law (including acts alleged to be contrary to *jus cogens*, such as torture or genocide) have not been successful [88].

Waiver of immunity clauses

The easiest and most efficient way of dealing with state immunity is to seek an express waiver of that immunity. The following key considerations must be kept in mind when drafting waiver of immunity clauses:

(a) The waiver clause should be included in all transaction documents that involve state parties.
(b) The clause should be agreed by all states or state entities likely to be part of the transaction or which hold assets

relevant to the transaction.

(c) The clause has to be an express and clear waiver of both immunity from suit and immunity from enforcement: merely specifying the applicable law or waiving the state's immunity without express agreement to submit to the relevant courts is unlikely to be sufficient.
(d) The clause should state that it applies to interim measures (such as injunctions or orders for specific performance) as well as to final judgments and/or arbitral awards.
(e) The clause should extend to all of the state's assets or any separate entity's assets. Ideally, the waiver should be sufficiently general to cover all assets, even those which might be transferred from the state involved to other state entities. If not possible, the clause should at least specify the type of assets to which the waiver will apply.
(f) The clause has to have been agreed by a person who has the required authority of the state: check that they have authority to waive immunity.
(g) The waiver provisions should include express confirmation that the entity is not acting in a sovereign capacity: this will avoid issues when dealing with separate entities in particular.
(h) Check the enforceability of the waiver clause in all jurisdictions where you are likely to seek the enforcement of any judgment or award. For example, a reference to the United States Foreign Sovereign Immunities Act should be included in the waiver if proceedings in the US are likely.

Sample clause: the 2012 Model Form Joint Operating Agreement of the Association of International Petroleum Negotiators

Several sample clauses can be found in case law or in model clauses proposed by international organisations. For example, *the 2012 Model Form Joint Operating Agreement of the Association of International Petroleum Negotiators* includes the following sample clause.

Any Party that now or hereafter has a right to claim sovereign immunity for itself or any of its assets hereby waives any such immunity from either jurisdiction or enforcement to the fullest extent permitted by the laws of any applicable jurisdiction.

This waiver includes immunity from

(i) any expert determination, mediation, or arbitration proceeding commenced pursuant to this Agreement;
(ii) any judicial, administrative, or other proceedings to aid the expert determination, mediation, or arbitration commenced pursuant to this Agreement; and
(iii) any effort to confirm, enforce, or execute any decision, settlement, award, judgment, service of process, execution order, or attachment (including pre-judgment attachment) that results from an expert determination, mediation, arbitration, or any judicial or administrative proceedings commenced pursuant to this Agreement.

Each Party acknowledges that its rights and obligations subject to this Agreement are of a commercial and not a governmental nature**.**

Commercial Transactions

The denial of immunity is independent of the nature of the act from which the claim arises. If the transaction or activity into which a state enters or in which, for instance the breach of contract arising from an act done in the exercise of sovereign authority. All that matters is the character of the transaction or activity carried on by the state as opposed to the facts on which the defence is founded [89].

The US Foreign Sovereign Immunity Act 1978 [90] defines '*commercial activity'* as a regular course of commercial conduct or a particular commercial transaction or act. It is also noted that the commercial character of an activity is to be determined by reference to the nature of the activity rather than its purpose.

The issuance of foreign governmental treasury notes has been held to constitute commercial activity, but one which once validly statute barred by passage of time cannot be revived or altered.

In *Callejo v bancomer* [91], a case in which a Mexican bank refused to redeem a certificate of deposit. The district court dismissed the action on the ground that the bank was an instrumentality of the Mexican government and thus benefited from sovereign immunity. The US Supreme Court in *republic of Argentina v Weltover Inc*, held that the act of issuing government bonds was a commercial activity and the unilateral rescheduling of payment of these bonds also constituted a commercial activity. The court noting that the term "Commercial" was largely unidentified in the legislation took the view that its definition related to the meaning it had under the restrictive theory of sovereign immunity and particularly as discussed in *Alfred Dunhill v Republic of Cuba* [92] where it was stated a foreign state engaging in commercial activities was exercising only those powers that can be exercised by private person.

It is interesting to note the approach adopted in the International Law Commission (ILC) Draft on Jurisdictional Immunities [93]. Article 10 provides for no immunity where a state engages in a commercial transaction with a foreign natural or judicial person (but not another state) in a situation where by virtue of the rules of private international law a dispute comes before the courts of another state.

A large quantity of cement was supplied by a private contractor in the UK to the Nigerian Defence Ministry. Following a change of regime, the Nigerian government decided it no longer required the cement and refused to pay for it. The supplier brought proceedings against Nigeria in the UK courts. Nigeria's claim of state immunity was eventually dismissed and the action allowed proceeding [94].

A state cannot claim immunity from the jurisdiction of another state in legal proceedings which arise from a commercial transaction. This rule does not apply to commercial transactions between states or where the parties to the transaction have explicitly agreed otherwise. At the heart of this major exception to state immunity is the question of what is a 'commercial transaction'. The term as defined in the Convention includes any commercial contract or transaction for the sale of goods or supply of services, any contract for a loan or other transaction of a financial nature and 'any other contract or transaction of a commercial, industrial, trading, or professional nature, but not including a contract of employment'. The term '*transaction*' is much wider than '*contract*' and is capable of covering a broader range of activities. But it is the commercial character of a transaction that is likely to be in issue and it was this that caused most difficulty in reaching agreement among states on the text of the Convention.

The main question is whether the criteria defining a commercial transaction should relate to the nature of the

transaction or its purpose. If a state orders boots for its armed forces, the nature of the transaction is commercial, but its purpose (to kit out its army) is a sovereign state activity. The Convention's solution is that contracts for the supply of goods or services are defined as commercial transactions (for which there is no immunity); but then the Convention states that in deciding whether something is a commercial transaction reference should be made primarily to the nature of the transaction, but its purpose should also be taken into account if the parties have so agreed or if, in the practice of the state where legal proceedings are brought, purpose is relevant in determining the non-commercial character of the transaction.

The Convention test for determining the commercial or non-commercial character of a particular transaction is a compromise between competing views. Its meaning is not very clear, and it could encourage differences in approach from one country to another. The reference to 'practice' could be interpreted as much wider than 'law' and could allow administrative practice or preference to decide the immune or non-immune nature of the transaction.

Contracts of Employment

The immunity act 1978 [95] provides that a state is not immune in respect of proceedings relating to a contract of employment between the state and individual where the contract was made or where the work is to be performed wholly or in part thereof.

An Irish national formerly employed as an administrative assistant at the American Embassy in London sought re-employment with the Embassy by applying for two vacant posts. Both applications were unsuccessful and she brought a claim against the United States before a UK employment tribunal alleging sex discrimination. The US government's claim of immunity was allowed [96].

An Austrian national working at the United States Embassy in Vienna in its Information Service was dismissed on unspecified security grounds and began proceedings before the Austrian courts claiming severance pay but not reinstatement. The Austrian Supreme Court held that the United States did not have immunity [97].

Employment contracts are treated as a separate exception to immunity under the Convention and are not included within the term 'commercial transaction'. Unless otherwise agreed between the states concerned, a state is not entitled to immunity in proceedings which relate to a contract of employment between the state and an individual for work performed in the state where the proceedings are started. At first sight this might seem like quite a large exception to state immunity but there are many exceptions to the exception. First, the exception does not apply to employees who are nationals of the employing state unless they are permanently resident in the state where proceedings take place. Secondly, the Convention excludes from this exception proceedings relating to the recruitment, renewal of employment or reinstatement of an individual. Thirdly, the exception does not apply where the employee is a diplomatic agent, a consular officer or any other person enjoying diplomatic immunity. Fourthly, the exception does not apply where legal proceedings would interfere with the security interests of the employer state. Finally, it does not apply where the employee has been 'recruited to perform particular functions in the exercise of governmental authority'. In all these cases, therefore, the state will have immunity if a disgruntled employee or job applicant wants to bring legal proceedings.

Exceptions to Employment Exception

The exclusion of proceedings relating to recruitment, renewal of employment or reinstatement is significant. In practice, it is likely to limit the exception to cases involving dismissal, termination of employment, and claims for unpaid wages. The exclusion of diplomats, consular officers and those enjoying diplomatic immunity from the exception to immunity is well established under international law. But it does provide a contrast with the State Immunity Act. This sets out a wider exclusion and refers simply to 'members of the staff at a diplomatic mission', which would include not only diplomatic officers but also lower-grade administrative, technical and domestic staff, not all of whom are entitled to diplomatic immunities. It is unclear how national courts will interpret the reference to security interests. Will they be content to accept the assertion of the employer state that legal proceedings will interfere with its security interests? The annex to the Convention sets out an understanding that the term 'security interests' is intended to address 'matters of national security and the security of diplomatic missions and consular posts'. The exception relating to people performing functions in the exercise of governmental authority could cover a very broad range of employees in the public sector. In some countries the public sector is very large and may include post office workers, railway workers, teachers and many others.

Other Exception to Immunity.

A state does not enjoy immunity in legal proceedings connected with immovable property (land or buildings) in the state where legal proceedings are brought, or relating to other kinds of property where the rights arose from succession or gift. Additional exceptions relate to legal proceedings concerning a state's intellectual or industrial property rights or any alleged infringement by that state of rights protected in the other state; participation by a state in companies or other bodies incorporated or constituted under the law of the state where proceedings are brought; and the operation of commercial ships. All are well recognized exceptions to state immunity although, in all cases, immunity will be retained if the states concerned agree.

Enforcement of judgments

It is one thing to bring proceedings against a foreign state and get a judgment against that state but quite another to get that judgment enforced. The Convention makes a very clear distinction between a state's immunity from legal proceedings and its immunity from measures enforcing any judgment obtained as a result. On the former, it sets out the significant exceptions which are discussed in this work. On the latter immunity remains almost absolute. The difference in approach is based on the recognition that the seizure and sale of a state's assets in order to satisfy a judgment against it constitutes a particularly dramatic interference with its interests and could damage its ability to function properly.

Before judgment, no enforcement measures can be taken against the property of a state in the courts of another state unless the state has explicitly agreed. If a claimant fears that the state will try to avoid the consequences of any adverse judgment by moving its assets out of the country, there is not much he can do about it. After judgment, no enforcement

measures can be taken unless the state has explicitly agreed or the property which is the subject of the enforcement is 'specifically in use or intended for use by the state for other than government non-commercial purposes'. In addition, the property must be in the territory of the state where legal proceedings have been instituted and must have a 'connection with the entity against which the proceeding was directed'. An understanding in the annex to the Convention indicates that the 'connection' in this context is to be understood as broader than ownership or possession. The Convention lists some specific categories of property which are not to be considered as in use for 'other than government non-commercial purposes'; these include embassy bank accounts, property of a military character or property used in the performance of military functions and property of a central bank or other state monetary authority. However, the list is clearly not intended to be complete.

Violation of Immunity

There are however situations where these immunities have been violated. Whenever there is violation of immunity, the state whose immunity is violated usually protests to the other state through a diplomatic channel. if the diplomatic protest fails to yield any meaningful result, they may take the matter to the International Court for adjudication.

Illustration: In 1979, the United States embassy in Iran was taken over several hundred demonstrators. Archives and documents were seized and fifty diplomatic and consular staff were held hostage. In 1980, the international court declared that under the 1961convention, (and the 1963 convention on consular relations). Iran was placed under the most categorical obligations as a receiving state to take appropriate steps to ensure the protection of the United States embassy and consulate, their staff, their archives, their means of communication and the free movement of the members of their staff [98].

In 1999, china agreed to pay 2.876m dollars to the United States to settle claims arising out of rioting and attacks on the US embassy in baying, the residence of the US consul in Chengdu and the consulate in Guangzhu [99]

Again, in March 2000, diplomatic baggage destined for the British High Commission in Harare was detailed and opened by the Zimbabwean authorities. The UK Government protested vigorously and announced the withdrawal of its High Commissioner for consultation.

There are also situations where a state could be justified for violating the immunity of another. For example in 1973 the Iraq ambassador was called to the Pakistan ministry of foreign affairs and told them that arms were being brought into Pakistan under diplomatic immunity and that there was evidence that they were being stored at the embassy of Iraq. The ambassador refused permission for a search. The armed policemen entered the place and huge consignments of arms were found to be in crates. The Pakistan government then sent strong protest to the Iraq government, declared the Iraq ambassador and other staff persona non grata and recalled its own ambassador.

Again on July 5, 1984 following the kidnap of a former Nigerian minister, Umaru Dikko in the uk, the British authorities opened a diplomatic crate destined for Nigeria and found Umaru Dikko inside.

Another case of justification occurred on April 17, 1984. A peaceful demonstration took place outside the Libyan embassy in London. Shots were fired that resulted in the death of a police woman. After a siege, the Libyans inside left and the building was searched in the presence of such Arabian diplomat, weapons and other forensic evidence were found.

Proof of Immunity

It is trite law that he who asserts proves. Therefore it is the duty of the party claiming immunity to satisfy the court that it actually enjoys such immunity.

The court of appeal in *Maclaine Watson v Depart of trade and industry* [100] held that wherever a claim of immunity is made the court must deal with it as a preliminary issue and on the normal test of a balance of probabilities.

However the party claiming immunity discharges that onus of proof, the burden then shifts to the other party to prove that such immunity does not exist or that an exception to immunity applies in that case.

9. Conclusion

Historically the principle of State immunity as originally applied by courts was intended to protect the political activities of States as a sovereign entity. However, that has created inconveniences and injustices during the time when the State extended its activities into commercial, industrial and similar spheres because both States and private individuals become involved in international trade. Like private individuals, States also buy and sell good and manage or charter ships or commission works.

Consequently, this had an impact on the approach taken by the courts. They had to move away from the absolute to the restrictive doctrine of immunity because of the growing participation in business matters by the Government.

The first step taken by the courts was in relation to an action in rem in the *Phillipine Admiral case*. The next step was taken in the *Trendtex case* and it was obvious that legislation was necessary for purposes of clarifying the issue of State immunity. Thus, the UK passed the State Immunity Act 1978 to clearly show its position in relation to State Immunity followed by Australia and other Commonwealth countries.

However, in Nigeria it is apparent that there is no specific locally enacted legislation or case law on state immunity to clearly show its position. While the existing laws of Nigeria may assist in determining the extent to which the State, its officials or agencies can be sued or be held liable, non-of them addresses the doctrine of state immunity. For example, the Crown Proceeding Act 1947 UK covers areas where proceedings by and against the Crown can be made but it provides no help for determining what is Nigeria position on state immunity. This is because the Act is outdated since it does not reflect the current Common Law position on State Immunity. Even with the common law, what it does is provide the law on state immunity but it does not determine the kind of immunity approach that Nigeria should take.

Therefore, as a means to get around this problem it is suggested that Nigeria should have its own enacted legislation that deals with State Immunity. With that, the law regarding immunity in Nigeria can be clearly established in order to determine the situations where the independent State of Nigeria can either be immune or not. Otherwise a similar problem faced by Papua regarding the Sandline issue where it had to pay millions of dollars because its position on state immunity was not defined

properly might be repeated.

In cases where Nigeria is involved in a transaction with a foreign State or individual the rule of immunity can be well established once Nigeria has an Act of its own. This is important because Nigeria needs to maintain its independence, equality, and dignity both domestically and internationally. By having an Act, the presumption of immunity and the exceptions to it can be well defined.

Also, a clear distinction can be made between government departments and official who can claim immunity in the same way, as the state and state owned or state-managed enterprise that may be treated as private corporations.

These distinctions can clearly be made once Nigeria has an Act of its own because it would make it easier to determine the responsibilities and obligations of Nigeria domestically and internationally.

State immunity is a concept that concerns a State, its governmental officers and agencies. The basic issue that this concept addresses is whether a state is immune from judicial processes of its own courts and courts of other nations.

Traditionally, courts had no power to rule on any matter that a State is a party to because of the absolute rule of state immunity. This approach was later restricted when the issue of state immunity arose in the Trendtex case.

Afterwards, the restrictive approach became well- founded in common law. Thus, today only acts of sovereign nature (i.e. juri imperi) are subject to immunity while acts of commercial nature (i.e. jure gestionis) are not.

In Nigeria, there are no available case law or enacted legislation to show its position on state immunity. Although there are existing legislation in Nigeria that determine areas where the State, its officials or agencies can be sued, none of them draw the line between the common law approach and Nigeria's position on state immunity.

Frankly, it is necessary for Nigeria to have a State Immunity Act in order to reflect its legal position on state immunity both domestically and internationally. Until there is a reform the contention that this research holds is 'there is a state immunity vacuum in Nigeria and its position remain unsettled'.

10. Recommendations

These are this writer's contention on why state immunity should be retained by States.

Firstly, immunity is genuine because it signifies the principles of independence, equality and dignity of States that have been embedded in international law. It is from these principles that the maxim "*par in parem non habet imperium"* is derived. That is, "all sovereigns [are] considered equal and independent." Therefore, in order to safeguard the independence, equality, and dignity of States it is important that immunity should be upheld in order to clearly outline what are the responsibilities and obligations of States internationally?

Secondly, the rule of sovereign immunity is a principle of international law. It is well established as part of a customary rule of international law. Thus, making it valid and binding. The validity of immunity as part of customary international law is derived from two elements;

a) material element and
b) Psychological element.

The material element refers to acts and practices of States and the psychological element refers to the subjective conviction held by States that the behaviour in question is compulsory and not discretionary.

Therefore, since immunity is a well-founded principle under international law this gives it the force to be valid and binding upon States. Thus, a clear distinction can be made regarding when a State can be held responsible or liable.

Finally, with the increase of State activities in the economic circles it has influenced the rule of immunity to be well established unlike in the past where there were difficulties because of the application of immunity without restriction. It may not be wholly justified if the state enjoyed immunity in all circumstances because that would be unfair to its trading partners.

However, given the current trend where countries have restricted the possibility of immunity for a foreign State in their jurisdiction either by way of legislation or court decisions, there is justification that it has now become well founded. This gives an added impetus for clearly determining State responsibility and international liability because the principle of state immunity has become well defined because of the restrictive approach.

11. References

1. 2 All E.R. 97, House of Lords, 1999.
2. International Law provides for exceptions to immunities of diplomatic agents for private acts (See Article 31, para. 1, of the Vienna Convention of Diplomatic Relations, 1961).
3. *Hatch v. Baez, 7 Hun 596.* In this case, the former President of St. Domingo was held protected by state immunity from civil suit in respect of acts done when President.
4. R. Nowosielski, 'State Immunity and the Right of Access to Court. The Natoniewski Case before the Polish Courts'. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2173035>
5. D Gaukrodger. Foreign State Immunity and Foreign Government Controlled Investors', OECD Working Papers on International Investment, 2010/2, OECD Publishing. doi: 10.1787/5km91p0ksqs7-en
6. S Knuchel. State Immunity and the Promise of Jus Cogens'. Northwestern University School of Law Volume 9, Number 2 (Spring 2011) Northwestern Journal of International Human Rights.
7. FJ Nicholson. Sucharitkul: State Immunities and Trading Activities, 2 B.C.L. Rev. 459 (1961), http://lawdigitalcommons.bc.edu/bclr/vol2/iss2/42
8. *The Schooner Exchange v. McFaddon and Others*, 11 U.S. 116 (1812).
9. 35 ILR 110
10. Elizabeth Anna Oji. The immunity of heads of state in international law. UNIZIK Law Journal Vol.4 No1
11. Queen's Bench, 1893, 149.
12. Nwogugu EI, Concept of state immunity in international law. Lecture Note, Anambra State university, uli
13. Malcom Shaw, International law 4th edition pub
14. Supra
15. Okere BO. Bases of state immunity, Lecture Note Faculty of Law UNEC
16. Appeal cases, 1938, p.244
17. (2000) 1 Weekly Law Report p.1573
18. Jeffrey L. Dunoff, International law – Norms, Actors, process: A problem Oriented Approach; Aspen publishers inc. New York, 2002 p.383

19. UO Umozuruike. Introduction to International law. 3rd edition Spectrum Books Ltd., 2005.
20. Dunoff JL. International law Op.cit p.384
21. Ibid para 1
22. Malcom N Shaw. International law; 5th edition. Cambridge University Press, 2003.
23. Shaw MN. Op Cit p.622
24. Prof lauterpacht H. Problems of jurisdictional immunity of foreign states, Year book of International law 1951, Oxford University press p.228
25. 7 Ranch's Report, 1812, 116.
26. Prof. Lauterpacht H
27. Ibid p.230
28. See Eliot Debates 2nd edition, 1836 p.555
29. 2 Dall, 419,423 p.793
30. See French republic V Board of supervisors of Jefferson County, 1923; 200 kv-18.
31. See the Parlement Belges case. LR5 P.D. 197, 207 Infra, 1882.
32. 1938, AC 485, @ p.498
33. United States V Lee. 106 Us.196, at p.248. The court justifies the doctrine of immunity on grounds of sovereignty dignity, 1882.
34. Meaning. Not bound by the law.
35. United Kingdom State Immunity Act, 1978.
36. Lord Hutton quoted this @p.258 in Pinochet (No.3)
37. Appeal cases p.147 House of Lords, 2000.
38. Ibid @pp 205-6.
39. Supra
40. 1880, 5 PD 197
41. 1938, Appeal cases 485
42. 1949, 2 All England report 274
43. Dralle V. Republic of Czechslovakia (1950) 17 international law report (ILR) p.155
44. See note 9 page 11
45. 1958, Appeal Cases 379.
46. A Locus classicus on principle of Jurisdictional Immunity of State
47. Ibid.pg.116
48. Tim Hiller Source book on International Law, Supra pg.288
49. 1965, (#745)
50. Ibid pg 748
51. See chapter 1 of this project work
52. Shaw MN. International Law, op ut p.662
53. See, comment on Sovereign Immunity from Judicial Enforcement. Colombia Journal of Transnational Law. 1973; 12:1.
54. 24 ILR 205(C. of Appeals of Paris 1957).
55. Article 20
56. See report of the International Law Commission, 1991. P.134
57. See Section 13 (3), see also Section 3 of the Australian Foreign State Immunity Act 1985
58. See Sec 13 (4)
59. See Section 16 (10)
60. See UN materials pp.300-1; 65ILR P.164
61. 1984, 2ALL ER 6;74ILR P.180
62. See Section 14
63. See Section 14,92.See Section 15
64. 123 LED 2d47, 61 (1993); 100 LLR, Pp. 544,553.
65. See M.N SHAW, International Law, Supra, p.638
66. 124 I.L.R, pp.427-435
67. 1996, 1 I.L.R. 104;107 ILR p.536
68. Judgement of 21st November, 2001
69. Ibid, para.66 I.L.R. P.35
70. See Ex parte Pinochet (No.3) (2004) I AC 147:119 I.L.R P.135
71. Section 1(1)
72. SS. 2-11 of the act
73. harris DJ. Cases and material on international law, supra p.322
74. While the "Immovable property" exception in § 1605(a)(4) is infrequently invoked, it was recently interpreted by the U.S. Supreme Court to include an action to establish the validity of a tax lien. See *Permanent Mission of India to the United Nations v. City of New York, 551 U.S. 193 (2007).*
75. *Verlinden BVv. Central Bank of Nigeria,* 461 U.S. 480, 483 (1983)
76. See section 4(1)
77. See Tim hillier, *sourcebook on public international law*, op cit p.294
78. 28 U.S.C. § 1605(a)(1) (2010)
79. See *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934, 942 n.4 (D.C. Cir. 2008) (citing Caleb Nelson, Sovereign Immunity as a Doctrine of Personal Jurisdiction, 115 Harv. L. Rev. 1559 (2002).
80. See *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1162 (D.C. Cir. 2002) ("A foreign sovereign will not be found to have waived its immunity unless it has clearly and unambiguously done so."); *Capital Ventures Int'l v. Republic of Argentina*, 552 F.3d 289, 293–94 (2d Cir. 2009) (accepting as a waiver a contractual provision that "[t]o the extent that the Republic has or hereafter may acquire any immunity (sovereign or otherwise) from jurisdiction of any court or from any legal process . . ., the Republic hereby irrevocably waives such immunity in respect of its obligations under the Bonds to the extent it is permitted to do so under applicable law").
81. 488 U.S. 428, 442 (1989). See also *Carpenter v. Republic of Chile*, 610 F.3d 776, 779 (2d Cir. 2010) (waiver by treaty must be "clear and unambiguous" and treaty adherence did not qualify).
82. Cf. *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012); Fir Tree Capital Opportunity Master Fund, LP v. Anglo Irish Bank Ltd., No. 11 Civ. 0955 (PGG), 2011 WL 6187077, at *14 (S.D.N.Y. Nov. 28, 2011).
83. 309 F.3d 1143, 1151 (9th Cir. 2002).
84. See Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. Cubic Def. Sys., Inc., 236 F. Supp. 2d 1140, 1151 (S.D. Cal. 2002); but see S & Davis Int'l, Inc. v. Republic of Yemen, 218 F.3d 1292 (11th Cir. 2000). Waivers resulting in agreements to arbitrate are addressed in § 1605(a)(6), discussed below in Part V.E
85. See *World Wide Demil, L.L.C. v. Nammo*, A.S., 51 F. App'x 403, 405 (4th Cir. 2002); *Phoenix Consulting, Inc. v. Republic of Angola*, 35 F. Supp. 2d 14, 19 (D.D.C. 1999)
86. See Haven v. Polska, 215 F.3d 727, 731–32 (7th Cir. 2000); Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc., 179 F.3d 1279, 1291–92 (11th Cir. 1999); Universal Trading & Inv. Co. v. Bureau for Representing Ukrainian Interests, 898 F. Supp. 2d 301, 310–11 (D. Mass. 2012),

aff'd, 727 F.3d 10 (1st Cir. 2013).

87. *Poddar v. State Bank of India, 235 F.R.D. 592, 597 (S.D.N.Y. 2006).*
88. See Matar v. Dichter, 563 F.3d 9, 14 (2d Cir. 2009) ("there is no general jus cogens exception to FSIA immunity"); Belhas v. Ya'alon, 515 F.3d 1279, 128689 (D.C. Cir. 2008) (to same effect); Joo v. Japan, 332 F.3d 679, 686 (D.C. Cir. 2004) ("[A] sovereign cannot realistically be said to manifest its intent to subject itself to suit inside the United States when it violates a jus cogens norm outside the United States."), vacated on other grounds by *Joo v. Japan*, 542 U.S. 901 (2004)); *Doe I v. State* of Israel, 400 F. Supp. 2d 86, 105 (D.D.C. 2005) ("Jus cogens violations, without more, do not constitute an implied waiver of FSIA immunity.") Cf. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 719 (9th Cir. 1992) ("if violations of jus cogens committed outside the United States are to be exceptions to immunity, Congress must make them so. The fact that there has been a violation of jus cogens does not confer jurisdiction under the FSIA").
89. The decision of *Robert Goff j* in *I congresso del partido* (1998) 1All Er 1169
90. Sec 1603(d) of FSIA
91. 764 F d 1101 (1985)
92. 425 us 682 (1976) 66 ILR p.212
93. Nothing
94. *Trendtex Trading Corp. v Central Bank of Nigeria* (1977) 1 QB 529
95. See sec 4(1)
96. *Fogarty v United Kingdom ECHR Application 37112/97 (2001) 34 EHRR 302*
97. *eidenschmidt v United States of America (Case No 9 Ob A 116/92) Austria Supreme Court*
98. International court of justice (1980) ICJ report page 3
99. DJ harris, cases and materials 6th Edition
100. Weekly law reports (1988) 3WLR 1033