STATE IMMUNITY IN TURKISH LAW: AN ANALYSIS OF THE DOCTRINE OF STATE IMMUNITY IN THE LIGHT OF THE DECISIONS OF THE TURKISH COURT OF CASSATION

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İDİL BUSE KÖK

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_____

Prof.Dr. Meliha ALTUNIŞIK
Director

I certify that this thesis satisfies all the requirements as a thesis for the degree of Master of Science.

_____

Prof. Dr. Hüseyin BAĞCI
Head of Department

This is to certify that we have read this thesis and that in our opinion it is fully adequate, in scope and quality, as a thesis for the degree of Master of Science.

_____

Prof. Dr. Necati POLAT
Supervisor

Examining Committee Members

Assoc. Prof. Dr. Şule Güneş (METU, IR) _____

Prof. Dr. Necati Polat (METU, IR) _____

Assist. Prof. Dr. Ebru Çoban Öztürk (ÇANKAYA UNI, PSI) _____

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Name, Last Name: İdil Buse Kök

Signature:

ABSTRACT

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Kök, İdil Buse

M.S Program of International Relations Department

Supervisor: Prof.Dr. Necati Polat

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State immunity is a doctrine of international law, regulating a cluster of exceptions to the legal authority of the territorial state. According to the doctrine; acts, possessions and heads of a foreign state are not subject to the domestic justice system in an individual state. Traditionally, the doctrine builds on the concept of sovereignty, which is the regulating principle of the international normative order: since all sovereigns are equal, a sovereign cannot possibly be called to account before the authority of another sovereign. The inviolability of foreign state acts in this form is often referred to as "absolute immunity." In time the doctrine has been transformed into a more "restrictive" form, which leaves out commercial or private-law transactions of states (*iure gestionis*), granting immunity to the acts of foreign states in terms of sovereign or political acts only (*iure imperii*).

This study traces the transformation of the doctrine in the Turkish law from absolute to restrictive immunity through an examination of a number of relevant

verdicts made by the Turkish Court of Cassation with a view to provide an account of the doctrine as understood in Turkey presently.

Keywords: State immunity, absolute immunity, restrictive immunity, private-law transactions and sovereign or political acts of states, Turkish Court of Cassation decisions.

ÖZ

TÜRKİYE'DE DEVLETİN YARGI BAĞIŞIKLIĞI: YARGITAY KARARLARI IŞIĞINDA TÜRKİYE'DE YARGI BAĞIŞIKLIĞI DOKTRİNİNİN BİR ANALİZİ

Kök, İdil Buse

Yüksek Lisans, Uluslararası İlişkiler Departmanı

Tez Yöneticisi: Prof.Dr. Necati Polat

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Yargı bağışıklığı uluslararası hukuka ait bir doktrin olup, bir devletin başka bir devletin yasal mercilerinin önünde sahip olduğu bazı imtiyazları düzenlemektedir. Bu doktrine göre, yabancı devlete ait mülkler ile yabancı devletin başkanları, başka bir devletin yerel yargısına konu olamazlar. Geleneksel olarak bu doktrin egemenlik kavramı üzerine inşa edilmiştir. Egemenlik kavramına göre, tüm egemen devletlerin eşit olması nedeniyle, bir egemen devlet diğer bir egemen devletin mahkemeleri önünde yargılanamayacaktır. Yerel yargı merciileri önünde yabancı devletin tüm eylemlerinden muaf olması "mutlak yargı bağışıklığı" kuramı olarak adlandırılmaktadır. Zaman içinde ise, "mutlak yargı bağışıklığı" daha "sınırlı" bir bağışıklığa dönüşmüştür. "Sınırlı bağışıklık" kuramına göre egemen devletler başka bir egemen devletin yargı organları önünde egemenliğin tasarrufundan kaynaklanan veya teknik olarak siyasal nitelikli eylemleri ve işlemleri yargı bağışıklığı kazanırken, ticari veya özel hukuk kaynaklı eylemleri ve işlemleri ise yargı bağışıklığının dışında kalmaktadır.

Bu tezde, “yargı bağışıklığı” doktrinin Türkiye’deki görünümünü ve Türk hukukunun “mutlak yargı bağışıklığı” kuramından “sınırlı yargı bağışıklığı” kuramına geçişi Yargıtay kararları ışığında incelenecektir.

Anahtar Kelimeler: Yargı bağışıklığı, mutlak yargı bağışıklığı, sınırlı yargı bağışıklığı, devletlerin özel hukuk kaynaklı ve devletlerin egemenliğin kullanımından kaynaklanan ya da politik işlemleri, Yargıtay kararları.

To my mother Mine Kök and my father Mustafa Verşan Kök,

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CHAPTER 1

INTRODUCTION

The concept of sovereignty can be traced back to the sixteenth century, when Jean Bodin (1530-1596), the French political philosopher, first defined the theory of modern sovereignty. He began to define sovereignty by defining citizenship. For him, "citizenship means to be a subject to the authority of a state, and this is sovereignty."[1] Following that, he defines sovereignty as "supreme power over citizens and subjects, unrestrained by the laws. Majesty or sovereignty is the highest, the most absolute and perpetual power over the citizens and subjects in a Commonwealth"[2]. Pursuant to that definition, the sovereign is only bound by the law of God and the law of nature but it is not bound by domestic or international laws.

While the concept of modern sovereignty was being shaped through the ideas of philosophers of that period, the state immunity concept subsequently emerged as a doctrine of international law. The origins of the doctrine of sovereign immunity were also historically traceable to the times when the State was personified in a king, who, according to the existing law, could do no wrong. [3]

This matter was clearly expressed by Vattel, one of the philosophers of that period, in his work called "Law of Nations" as follows:

> If … [the] prince be come to negotiate or to treat about some public affair, he is doubtless entitled

[1] Jean Bodin, *Six Books of the Commonwealth*, trans. M.J Tooley, (Oxford: Alden Press, 1955), p.24.

[2] Bodin, p.24.

[3]Manuel R. Garcia-Mora, "The Doctrine of Sovereign Immunity of Foreign States and Its Recent Modifications", *Virginia Law Review,* Vol. 42, No: 3, 1956, p. 336.

> in a more eminent degree to enjoy all the rights of ambassadors. If he be come as a traveller, his dignity alone, and the regard due to the nation which he represents and governs, shelters him from all insult, gives him a claim to respect and attention of every kind, and exempts him from all the jurisdiction.[4]

The concept of sovereignty and the doctrine of state immunity are much correlated with each other as the "immunity" of the states comes from being a sovereign state.

State immunity is a right of a state in which the organs of the foreign state are accepted to be not responsible for their acts by the judicial organs of the domestic state. Not being responsible for the acts before the authority of other state is the main reason for being sovereign and the equality of all sovereigns as well.

According to the *par in parem non habet imperium* principle (an equal has no power over an equal), a maxim of the feudal system in the Middle Ages, a sovereign cannot be called to account before the authority of another sovereign for any of its acts. This form of immunity is referred to as "absolute immunity" theory. However, growing participation of states in commercial transactions in early 20th century revealed that the "absolute immunity" theory could not meet problems arising from the private acts of states. As the commercial transactions and private acts of states increased, the "absolute immunity" theory was replaced by more restrictive interpretations. According to the "restrictive immunity" theory, unlike the absolute immunity theory, immunity can be granted to the acts of foreign states in terms of sovereign or political acts *(iure imperii)* but not to the commercial or private-law transactions of states *(iure gestionis)*.

[4] Quated in Garcia-Mora, p.336.

The juridical evolution of the state immunity doctrine has totally been influenced by the juridical philosophy and development of this theory accrued by decision of courts.[5] The decision of Schooner Exchange v. McFaddon made by the US Supreme Court in 1812 is accepted as the main source of the doctrine of state immunity and the "absolute immunity" theory even today. According to Bankas, American courts were the first courts that expressed their opinions through their decisions about the doctrine of state immunity; and for him, it is indeed worth noting that Chief Justice Marshall's ruling in Schooner Exchange v. McFaddon case focused on the *iure imperii* and borrowed heavily from Vattel's juridical philosophy. [6] According to Chief Judge Marshall, sovereignty entailed equality, independence and dignity, and he also referred to these concepts in his opinion as follows:

> The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of these good offices which humanity dictates and it wants to require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers. This consent may in some instances be tested by common usage, and by common opinion, growing out of that usage.[7]

It can easily be said that the Schooner Exchange v. McFaddon decision is the most important decision of the doctrine of state immunity and the "absolute immunity" theory as well. Other courts also followed the decision of Chief Justice Marshall until World War I. After World War I, transformation took place in the

[5] Ernest K. Bankas, *The State Immunity Controversy in International Law: Private Suits against Sovereign States in Domestic Courts,* (Berlin: Springer, 2005), p.13.

[6] Bankas, p.13.

[7] The Schooner Exchange v. McFaddon, 11 U. S. 116 (1812)

doctrine of state immunity in some countries as a consequence of the increase of transactions among sovereign states. Then it spread to many countries in the world. The shift from "absolute immunity" theory to "restrictive immunity" theory will be examined in this thesis later.

While examining the transformation from "absolute immunity" to "restrictive immunity", some exemplary judicial cases will be given from the United States and the United Kingdom. Although there were lots of decisions about the doctrine of state immunity, the most important decisions and Acts (like the United States Foreign Sovereign Immunities Act 1976 and United Kingdom State Immunity Act 1978, European Convention on State Immunity 1972 and United Nations Convention on Jurisdictional Immunities of States and Their Property) are chosen in order to form a general frame.

The evolution of the doctrine of state immunity is the core of this thesis in order to understand the concept of "immunity" and the implementation of the related doctrine in Turkey. Following the evolution of the doctrine of state immunity, the situation in Turkey will be analysed in this thesis through a review of the decisions of the Court of Cassation and the Turkish International Private and Civil Procedure Law. The Turkish Court of Cassation adopted the "absolute immunity" theory until the ratification of the Turkish International Private and Civil Procedure Law numbered 2675, in 1982.

The main body of this thesis consists of six chapters including the introduction and the conclusion. Chapter two is divided into two parts. In the first part, a general framework about the doctrine of state immunity is presented with a particular focus on the concept of sovereignty. In part two, "absolute immunity" and "restrictive immunity" theories are briefly explained in the light of court decisions. While explaining "restrictive immunity" theory, the distinction between the private acts and sovereign or political acts of states is analysed. This chapter

aims to provide a background to understanding the doctrine of state immunity and its progress throughout years.

Chapter three consists of the distinctions between the act of state doctrine and the doctrine of state immunity. The reason of this distinction is to clarify the frame of both state immunity and the act of the state doctrines as these doctrines mostly overlap due to the mixed activities of the states.

Chapter four covers the United States Foreign Sovereign Immunities Act 1976, United Kingdom State Immunity Act 1978, European Convention on State Immunity 1972 and United Nations Convention on Jurisdictional Immunities of States and Their Property. The main aim of this chapter is to show that even if the doctrine of state immunity theory was developed by judicial decisions, there has to be a necessity to draw a line between the private acts and sovereign or political acts of states to constitute a harmony among court decisions. After states enacted specific laws for the doctrine of state immunity, international actors like the European Union and the United Nations decided to regulate rules pertaining to the doctrine of state immunity to constitute unity in the international area.

Chapter five scrutinizes the transformation of the state immunity doctrine in the Turkish law from absolute to restrictive immunity through relevant decisions of the Turkish Court of Cassation. It is discussed whether or not the relevant Turkish legislation is compatible with developments in international area regarding the doctrine of state immunity and does current legislation need any amendment?

CHAPTER TWO

STATE IMMUNITY DOCTRINE

The doctrine of state immunity of foreign States is a legal formula which aims to safeguard sovereignty, dignity and equality of States. According to the doctrine of state immunity, a foreign state cannot be brought before the courts of another State because of its acts and property without its express consent.[8] Until the beginning of the 20th century, general practice of the doctrine of state immunity was to grant immunity to all acts of foreign States. On the other hand, increase in commercial transactions and political changes throughout the world also affected the doctrine of state immunity, and it transmitted to a more restrictive form which only grants immunity to foreign States for their public acts.

The doctrine of state immunity principle involves the key features mentioned below:

1) It is the lack of authority of the courts to exercise jurisdiction over a foreign state. The doctrine of state immunity does not mean that the domestic state does not have an authority over a foreign state. Domestic state does have an authority but due to the doctrine of state immunity this authority is pending. Accordingly, immunity of a foreign state means to be immune from the authority of the domestic state.[9]

2) When the foreign state gives its express consent, the domestic courts can continue exercising their jurisdictions.

[8] Garcia-Mora, pp.335-336.

[9] Gündüz, p. 26.

3) The doctrine of state immunity is generally *ex officio* taken into consideration by the domestic courts.

> According to the Turkish International Private Law doctrine, a foreign State's immunity from jurisdiction must be recognized *ex officio*. However, even if the related principle must be recognized *ex officio*, it is certain that it cannot be claimed in every step of the case. If the court does not *ex officio* take into consideration the doctrine of state immunity and it is not claimed by the defendant party, it cannot be claimed after the judge starts to examine the merits of the case. Accordingly, by not claiming the state immunity principle, it is accepted that the foreign state gives up its state immunity right.[10]

After providing a brief explanation about the doctrine of state immunity, a general framework is drawn about the general aspects of the doctrine, which constitute the judicial basis of the doctrine of state immunity, absolute and restrictive immunity theories before scrutinizing the case law of the doctrine of state immunity in the light of the legal, political and economic changes.

2.1 The Judicial Basis of the State Immunity Doctrine

There are various opinions regarding the judicial basis of the doctrine of state immunity. Judicial base of the doctrine of state immunity indicates the reasons why this doctrine exists in international law and the main reasons why a domestic state grants immunity to foreign states. These opinions vary depending on the state structures, changes in government relations and different practices of the doctrine of state immunity by different states. Some of the opinions regarding the judicial basis of the doctrine of state immunity given below are mentioned in

[10] Baki Kuru, *Medeni Usul Hukuku Ders Kitabı*, (Ankara: Yetkin Yayınları,1981), p.233.

Gündüz's work called "State Immunity of a Foreign State and International Law"[11]:

1) **The attitude of the state before its own courts affects the immunity of foreign states opinion:** During the periods in which the ruler was regarded equal to the state itself, the ruler could give its privileges (such as providing immunity) to the rulers of other states in order to provide the peace. Foreign rulers gained immunity in the territories of the domestic ruler accordingly.

2) **The immunity of states is affected from the immunity of the diplomatic representatives' opinion:** The defendants of this opinion tried to explain the immunity of states with the immunity of the diplomatic representatives. They stated that if the domestic state provides immunity to diplomatic representatives, it, *a fortiori,* has to provide the same immunity to the state which the diplomatic representatives hold.

3) **Ex-territoriality opinion:** According to this opinion, domestic state cannot apply its jurisdiction to some properties and people of foreign state in its territory. Because these are inseparable parts of the state which they represent and even if they locate in a domestic state verbally, they are not located in that state legally.

4) **Opinion which attributes immunity to sovereignty, independence and equality:** According to that opinion, a state cannot use its jurisdiction over another state as the states are legally sovereign, independent and equal. The basis of this opinion depends on the principle of the feudal systems called as "Par in Parem non Habet".

[11] Aslan Gündüz, *Yabancı Devletin Yargı Bağışıklığı ve Milletlerarası Hukuk*, (İstanbul: Tasvir Matbaası, 1983), pp.45-93.

5) **Opinion which derives immunity from the dignity of states:** According to that opinion, judging one state is incompatible with the dignity and respect of the state.

6) **Difficulty or impossibility of compulsory execution opinion:** According to that opinion, if there is not a possibility of compulsory execution, then it follows that there is not a possibility of giving a decision. Besides, the decisions which cannot be executed are also incompatible with the dignity of the courts.

7) **Comity of Nations (comitas gentium) opinion:** According to this concept, the state immunity principle is provided to the states in order to protect the peace and develop good relations, form good faith etc.

8) **Reciprocity opinion:** Immunity is provided to a state in as much as it is provided to other states.

9) **Opinion which explains the state immunity principle as an international practice:** According to that opinion, state immunity principle originates in international practice.

In the light of these opinions, the judicial basis of the state immunity doctrine can be described as follows: "In the beginning, the doctrine of state immunity was affected with the immunity of diplomatic representatives. It was settled with the difficulty of compulsory execution and other sociological necessities, especially with the truth that the international society is a sovereign society. Finally, it can be stated that with the doctrine of state immunity, states mutually limit their jurisdiction towards each other."[12]

[12] Gündüz, p.93.

2.2 The Absolute Immunity Theory:

In Bankas' view, in order to explain the doctrine of the state immunity, an inquiry has to be made into the historical sources and terms. *Superanus*, which refers to supreme power, can be accepted as the basis of the concept of sovereignty. Sovereignty is always accepted as the substantial character of the state. In relation with the ideas of the scholars, the principle of sovereignty was transformed, and this transformation naturally affected the doctrine of state immunity as these two concepts are linked to each other very strictly. For Hobbes, sovereignty is absolute, and absolute power creates perpetual peace. John Austin also agrees that the sovereignty is absolute. According to Vattel, an equal has no power over an equal; and for Bodin, the supreme power of the state refers to sovereignty. These scholars have developed the concept of absolute sovereignty rather than the doctrine of state immunity. However, these thoughts lead other scholars to constitute the concept of sovereign immunity depending on the rule of absolute sovereign in international law. [13]

The perception that state immunity is something to be addressed above physical level "as a theoretical derivation from local supreme power (superanus)" owes much to the ideas of Bodin, Hobbes and Vattel. It is a widely accepted idea that there is a positive relationship between sovereign power and the state, and this idea takes its roots from mentioned doctrine. It holds that a state can be recognized before international law only if sovereign power as well as legislation power as supported by obligatory powers promoted by it exists. A land can be treated as a state as long as it holds an equal status to the others, a certain number of people live there, it has got known borders and a sovereign power exercises an autonomous juridical community there. As has just been told, where a community

[13] Bankas, pp.2-8.

containing these factors exists, *equality* before international law is in question for that state. [14]

According to the "absolute immunity" theory defenders, the notions of sovereignty, independence and equality of states restrain the states to exercise their jurisdiction over other states.

Until the foreign states give their consent for jurisdiction, domestic courts cannot judge the foreign states before the domestic courts. According to "absolute immunity" theory, if one of the parties of the dispute is a foreign state, the judges of the domestic courts must grant immunity to foreign state without examining the merits of the case. Accordingly, a foreign state is inviolable for its acts regardless of the nature of the dispute.

"The theory of the absolute immunity of States *ratione personae* was erected into a judicial absolute by Chief Justice Marshall in the celebrated Schooner Exchange v. McFaddon case. By granting immunity to a public ship, the Court resorted to the conception of the immunity of the sovereign as follows"[15]:

It's stated in the Schooner Exchange v. McFaddon decision that US has an ultimate territorial jurisdiction, which seems to be the characteristics of any sovereign and incompetent to vest meta-territorial power. It is such a jurisdiction that it is likely to ignore foreign sovereigns and their sovereign rights to some extent. If a sovereign is not amendable to another under no circumstances and is not bound by highest level obligations in a way not to defame its own nation also by instituting himself or its sovereign rights into another's jurisdiction boundaries, it can be in a position to get into in a foreign territory only with an express license

[14] Bankas, p.9.

[15] Garcia-Mora, p.339.

or with implicitly knowing that his independent sovereign's immunity stands there for being offered to him.[16]

Another example of the "absolute immunity" theory is the *Underhill v. Hernandez* case, where the US Supreme Court in 1897 said "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country cannot sit in judgment on the acts of the government of another done within its own territory". In relevant decision, the Court emphasized the concepts of independence, sovereignty and territory as these were accepted as the main characteristics of a state.

In 1880, in *The Parlement Belge* case, the English Appellate Court took the same stand. There happened a collision in British territorial waters between a Belgian postal vessel and a British steam-tug and the Admiralty Division held that the Belgian ship, though it performed a public function, did not belong to "that category of public vessels, which are exempt from process of law and all private claims". [17] The English Appellate Court reversed the decision and it held that:

> As a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador or

[16] The Schooner Exchange v. Mcfaddon, 11 U. S. 116 (1812)

[17] Antonio Cassese, *International Law* (New York: Oxford University Press, 2005), p.99.

> property be within its territory and therefore, but for the common agreement, subject to its jurisdiction.[18]

After the World War II, the absolute immunity theory was under attack from many fronts. While Continental European States were leading the move in promoting the crystallization of restrictive immunity theory, the common law countries in the West took a more conservative view about the call for change until the Tate Letter was written and known to the world. [19]

In relation with changes in the world order, the "absolute immunity" theory was turned to "restrictive immunity" theory.

2.3 The Restrictive Immunity Theory:

Growing participation of the states in commercial transactions revealed that the "absolute immunity" theory could not meet the problems arising from the private acts of the states. Increase in commercial transactions and private acts of the states transmitted the "absolute immunity" theory in a more restrictive way.

The "restrictive immunity" theory currently sets out that the acts performed *iure gestionis*, which covers private or commercial transactions of states, are subject to foreign jurisdiction, on the other hand, *iure imperii* acts, which correspond to those performed by the foreign state in its capacity as a sovereign, are immune.[20] Even if the doctrine was transformed from absolute to restrictive, the indicative element of the related principle would still be the "sovereignty" concept. In 1918, a US Court of Appeals decided that the Kingdom of Romania's purchase of shoes

[18] The Parlement Belge (1879) 4 P D 129

[19] Bankas, p.319.

[20] Cassese, p.100.

for the army was immune from US jurisdiction[21]. "In contracting with a US Company for shoes and other equipment for Kingdom's armies was not engaged in business, but was exercising the highest sovereign function of protecting itself against its enemies."[22] In 2000, the Italian Court of Cassation held that Italian courts lacked jurisdiction because the military training of air forces had constituted an activity inherently public and "sovereign" act.[23] "It served to pursue a public goal which is essential and unfailing for states, that is, the state's defence of its sovereignty and territorial integrity also by force." [24]

Even if the restrictive immunity theory is admitted by the majority of the world countries, the classification of the acts of the foreign states still remains unsolved. In Cassese's view, for defining a foreign state's acts in the private capacity, two separate criteria are proposed. One of the criteria relies on the *nature*, and the other relies on the *function* of a certain act. Still, it has to be noted that these standards will lead us to definitely accurate results. One single action can be assessed totally differently from two different perspectives. To set an example, a foreign state buys materials for military use. In face of the first criterion, the action seems private in nature, which doesn't require immunity. Looked from the other side, which indicates the intention of acquiring them, immunity is deserved due to the public nature of the action. Such difficulty urged the states to define clearly what immunity is to them and thus what possible exceptions could be. National legislation witnessed those steps. [25]

[21] Cassese, p.101.

[22] Kingdom of Roumania v. Guaranty Trust Co. of N.Y, p.345.

[23] Cassese, p.101.

[24] Presidenza Consiglio dei ministri e Stati Uniti d'America v Federazione italiana lavoratori dei trasporti della provincia di Trento and Others, Judgment No. 530, 2000, p. 1159.

[25] Cassese, p.101.

When national legislations are examined, the term of "commercial transactions" is generally used to describe the private acts. However, this term brings out an important question: "What is a commercial transaction?" Lexical meaning of "commercial transactions" is as follows: commercial transactions, in law, are the core of the legal rules governing business dealings. Despite variations in details, all commercial transactions have one thing in common: they serve to transmit economic values such as materials, products and services from those who want to exchange them for another value, usually money, to those who need them and are willing to pay a counter value. It is the purpose of the relevant legal rules to regulate. [26]

After the growing participation of the states in commercial transactions, restrictive immunity theory found a larger application area in international law and in national court decisions. In 1981, Lord Wilberforce held in *I Congreso del Partido* (1981) 1 A.C. 244 -which is one of the significant cases of the doctrine of state immunity - that the restrictive theory

> arises from the willingness of States to enter into commercial transaction or other private law, transaction with individuals. It appears to have two main foundations: according to first one it is necessary in the interest of justice to individuals having transactions with States to allow them to bring such transactions before the courts; second is to require a State to answer a claim based on such transactions does not involve a challenge or inquiry into any act of sovereignty or governmental act of that State. It is, in accepted phrases, neither a threat to the dignity of that State nor any interference with its sovereign functions. [27]

[26] Commercial transaction. (2012). In Encyclopædia Britannica. Retrieved from http://www.britannica.com/EBchecked/topic/127986/commercial-transaction accessed on May 10, 2012.

[27] I Congresso del Partido [1983] AC 244

The following statement "to require a State to answer a claim based on such transactions does not involve a challenge or inquiry into any act of sovereignty or governmental act of that State. It is, in accepted phrases, neither a threat to the dignity of that State nor any interference with its sovereign functions" clearly shows the change of the perspective of the Courts about sovereignty notion which is parallel to the change of understanding the immunity doctrine.

After most of the states embraced the "restrictive immunity" theory, "commercial transactions" which are subject to foreign jurisdiction regularized in national legislation and also in international conventions.

Even if most of the states embraced the "restrictive immunity" theory, there are also dissenting opinions against the related theory. In Professor Lauterpacht's view, "restrictive immunity" is an unacceptable theory as the State always acts for the general purposes of the community and cannot act for private purposes. [28] Professor Lauterpacht stated that the idea that economic functions of a state including industrial management, purchasing and selling are definitely of "private-law nature", they are *iure gestionis,* and the state functions very much like a private entity has already lost its popularity. Although political and administrative functions of it are apparently withdrawn as in similar cases, the state is still functioning like a pubic body for the sake of fulfilling main aims of the community. What is said above cannot be restricted to socialist economies only, where the state necessarily functions as the manager of trading and industry? In this model, the state is to be in this way. In fact, the acts *iure gestionis* are acts *iure imperii.*[29]

[28] The Jurisdictional Immunity of Foreign Sovereigns," *The Yale Law Journal,* Vol.63, No:8, 1954, p. 1160.

[29] Quoted in The Jurisdictional Immunity of Foreign Sovereigns," *The Yale Law Journal,* Vol.63, No:8, 1954, p. 1160.

However, Bankas does not have a strict judgment like Professor Lauterpacht's view that States cannot act for private purposes and making a distinction between private and public acts does not solve the problem of granting immunity as it is not always easy to determine the acts of States clearly. In Bankas's view the private and public law is distinguished with an eye to separate the governmental and non-governmental acts but we don't find it a satisfactory evaluation. It can be feasible to do so in simple cases, but it wouldn't be the case for more complicated examples, which in turn could jeopardize the need of justice. It can be explained with the fact that activities of states are so diverse and interconnected that one can hardly distinguish them as commercial and governmental ones. On that basis, the decision whether or not to vest immunity cannot be left to such a distinction. [30]

2.4 Comparison of the Act of State Doctrine and the State Immunity Doctrine

Every state is fully responsible on its citizens and the acts occurred in its jurisdiction in connection with the rules of international law. As a result of that, domestic state's courts recognize the acts of foreign states and not argue the validity of these acts before its courts. There are two different approaches in civil and common law systems. According to civil law system, the acts of a foreign state is a conflict of law issue and a domestic state only recognize the acts of the foreign state until these acts would not against the public order and laws of the domestic state. However, according to common law the acts of foreign states are not negotiable before the courts of the domestic state and respected these acts even if they are contrary to the laws of the domestic state. This rule called as act of state doctrine in common law systems. The main difference in common and civil law systems is that the acts of a foreign state is recognized by the domestic state even if they are against the laws of the domestic state in common law

[30] Bankas, p.222.

whereas in civil law systems the acts of a foreign state only recognized if they are compatible with the laws of the domestic state. [31]

Act of state doctrine is also about the authority of domestic courts like the doctrine of state immunity However, Act of State doctrine should not be confused with the doctrine of state immunity; but it should not also be ignored that these two doctrines may also overlap and the main aim of the Act of State doctrine is to settle the disputes through diplomatic negotiations rather than intervention of the national courts. [32] Unlike the doctrine of state immunity, it is not a requirement that one of the parties has to be a state. Act of State doctrine can be applied to the disputes between two individuals.

One of the the leading case of the act of state doctrine is the *Banco Nacional de Cuba v. Sabbatino* case. A US commodity broker signed an agreement to buy sugar from a company (C.A.V) which is owned by American citizens however, located in Cuba. The US Congress made an amendment on the Sugar Act of 1948 and decreased the sugar quota which Cuba exported to the United States. As a reprisal the Cuban Committee of Ministers expropriated the goods, properties of American citizens in Cuba including the sugar company that the US commodity broker signed an agreement. A state enterprise which owned the sugar company signed another agreement with another US commodity broker and state enterprise assigned this agreement to Banco Nacional de Cuba. After that a ship which carried the sugar sailed to Casablanca and delivered the sugar to its owner. However, even if the Banco Nacional de Cuba submitted the required documents the US commodity broker did not pay the price of the sugar. Because a New York Court decided that the real owner of the company is C.A.V and decided that all the payments has to be received by a trustee (Sabbattino) appointed by the Court. Banco Nacional de Cuba filed a lawsuit against the US commodity broker and the

[31] Gündüz, pp.34-35

[32] Cassese, p.99.

trustee, Sabbattino.Banco Nacional de Cuba claimed that the Act of State doctrine has to be applied in this case, as, according to that doctrine; the propriety of decisions of other countries relating to their internal affairs would not be questioned in the US courts. However, Sabbatino claimed that the Act of State doctrine could not be applied in this case on the basis that the case is about the violation of international law; therefore, the Act of State doctrine should not be applied unless the Executive branch asks the court to do so, and Cuba brought the suit as a plaintiff and by bringing the suit it had given up its sovereign immunity. The District Court and the Court of Appeals found for Sabbattino stating that the Act of State doctrine could not be applied as the relevant foreign act was in violation of international law.[33] However, the Supreme Court reversed this decision and decided to apply the act of state doctrine. Accordingly, the Supreme Court did not examine the validity of nationalization of the US Company in Cuba decided by the Cuban Committee of Ministers. In this case, the Act of State doctrine was applied by the United States Supreme Court because it somehow was concerned with the political capacity of the executive, not intended to safeguard Cuban sovereignty and independence.

The *Banco Nacional de Cuba v. Sabbatino - 376 U.S. 398 (1964)* decision was reached unanimously. However, due to the confusion having arisen over the Act of State doctrine, the Congress expressed its displeasure about the decision by enacting a legislation which called the Second Hickenlooper Amendment, and this legislation requires US courts not to refuse on the grounds of act of State "to make a determination on the merits giving effect to the principles of international law" in cases involving claims to property expropriated by foreign States. [34]

[33] Banco Nacional de Cuba v. Sabbatino - 376 U.S. 398 (1964)

[34] Avaliable at http://actsofstatelaws.uslegal.com/the-act-of-state-doctrine-article/ accessed on May 20, 2012.

From the explanations above and the sample case, it can be concluded that the Act of State Doctrine takes the "proceeding of a state" as a starting point where the notion of state immunity takes "the title and personality of a state" as a starting point. In order to apply the Act of State doctrine, it is not a requirement that one of the defendants be a "state" as the related doctrine can also be applied disputes arising between two individuals. However, in order to apply state immunity principle, one of the parties must be a "state". The Act of State Doctrine neither provides immunity to one of the parties nor takes the competency of the court. The court continues making a decision about the merits of the case. In other words, the Act of State Doctrine gives superiority to foreign law and not negotiates the validity of the acts of the foreign states before the courts. However, the doctrine of state immunity grants immunity to the foreign state's public and/or private acts, and, if the Courts decide to grant immunity the case has been rejected without giving a decision about the merits of the case. [35]

[35] Gündüz, pp.34-41.

CHAPTER THREE

HISTORICAL DEVELOPMENT OF THE STATE IMMUNITY DOCTRINE

According to Caplan, the doctrine of state immunity emerged as a result of the tension between the two substantial norms of international law, which are sovereign equality and exclusive territorial jurisdiction. Later the doctrine has evolved and changed since the eighteenth century by progressing in two different periods.[36] The first period, which covers the eighteenth and nineteenth centuries, was called the absolute immunity period on the basis that the foreign states are regarded immune from all acts without making any distinction before the courts of domestic state. The second period took place in early twentieth century after the Western countries had started to apply the doctrine of state immunity in a more restrictive way due to the increase of the commercial transactions among the states. In this period, the acts of the states were categorized as *acta iure imperii* and *acta iure gestionis*. The *iure gestionis* acts of the foreign states cover the commercial or private-law transactions where the immunity would not be granted and the *iure imperii* acts of the foreign states cover the sovereign or political acts where the immunity would be granted by the domestic courts. As the doctrine evolved and showed variation in two different periods, according to the widespread view of the scholars, the doctrine also emerged from two main rationales. Pursuant to one rationale due to sovereign equality, state immunity is a fundamental state right. However, state immunity is only an exception to the principle of state jurisdiction according to other rationale. Nevertheless, these two rationales gave different inferences to the doctrine of state immunity and shaped it accordingly. The initial of the fundamental right rationale is the par in parem non

[36] Lee M. Caplan, State Immunity, Human Rights and Jus Cogens: A Critique of the Normative Hierarchy Theory, *The American Journal of International Law*, Vol. 97, No: 741, 2003, p.743.

habet imperium maxim, which is simply a specific application of the sovereign equality.[37]

Professor Sucharitkul, who defended the fundamental state right rationale, stated "It has become an established rule that between two equals, one cannot exercise sovereign will or power over the other, 'Par in parem non habet imperium."[38]. For Sucharitkul, the principle of state jurisdiction must give a way to the principle of sovereign equality to create a state's right of immunity. However, for Caplan, second rational largely influenced Justice Marshall's opinion in The Schooner Exchange, where he recognized "intercourse between nations and an interchange of those good offices which humanity dictates and its wants require foster mutual benefit."[39]

State immunity doctrine is actually a newer concept when compared with other main doctrines of international law and international relations. It is accepted that state immunity doctrine was recognized in the late eighteenth century and became an international law principle in the nineteenth century. State immunity developed as a doctrine of domestic courts, and the doctrine and agreements about state immunity emerged after the domestic court decisions.

The first time that the doctrine of state immunity became known, the concept of the state did not match with today's concept of state. At that time, the ruler and the state itself was regarded as one and same. The rule of "king can do wrong" in England explains this situation well. As the sovereignty was the source of law, exercising jurisdiction over another state accepted as superiority or hostile behaviour.

[37] Caplan, p.748.

[38] Quoted in Caplan, p.749.

[39] Caplan, p.749.

3.1 Historical Development of the State Immunity Doctrine in the light of the National Regulations of the United States of America and the United Kingdom

3.1.1 State Immunity Doctrine according to the U.S Court Decisions made before the enactment of the United States Foreign Sovereign Immunities Act (1976)

The doctrine of state immunity is embedded in the United States Constitution (amendment XI) protecting the states against suits from citizens of other states or foreign citizens, and the states of the United States have been held immune from suits by foreign states. [40] Amendment XI on the U.S Constitution stipulates "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

The most important decision of the state immunity doctrine is the **"The Schooner Exchange v. McFaddon"[41],** which was made by the U.S Supreme Court in 1812. This decision affects both the doctrine and the court practices.

As a naval ship of French origin was brought to Philadelphia for repairing after a storm, the plaintiffs alleged that they owned the ship in the past. They told that authentic title and origin of the vessel was the Schooner Exchange, and the USA, respectively; but it was taken over by French troops in 1810 as per Napoleon's rules. Upon this statement, chief prosecutor of the United States opened a lawsuit suggesting the Court to decline jurisdiction on the ground of sovereign immunity.

The Judge Marshall C.J. stated that;

[40] Garcia-Mora, p. 336.

[41] Avaliable at http://supreme.justia.com/us/11/116/case.html, accessed on December 15, 2011.

> the jurisdiction of the nation within its own territory is necessarily exclusive and absolute… One sovereign being in no respect amendable 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 station, though not expressly stipulated, are reserved by implication and will be extended to him.. But in all respects different is the situation of a public armed ship. She constitutes a part of the military force for her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. [42]

Following it, the Court found that the vessel in question was exempt from the United States jurisdiction.

The principles such as equality, independence and dignity of states proved beneficial for Marshall C.J. to verify the state immunity doctrine. The maxim *par in parem non habet imperium* (an equal has no authority over an equal) is also widely applied with the same effect. Marshall C.J presumes that the doctrine of the absolute jurisdiction of the territorial sovereign agrees immunity from jurisdiction in its courts, and mingles the two doctrines in this way. [43]

In Gündüz's view, Chief Marshall did not depend on the immunity of the foreign states in this case, but on the jurisdiction right of the domestic state. As the

[42] The Schooner Exchange v. Mcfaddon, 11 U. S. 116 (1812)

[43] D.J. Harris, p.309.

sovereign states are equal and sovereign, equality keeps away the sovereign states from judging each other. In addition to that, the sovereign states see diplomatic representatives as the symbol of the sovereignty of the states and grant immunity to the diplomatic representatives. According to Chief Marshall, if the diplomatic representatives have immunity, the battleships of the sovereign states also have immunity from the jurisdiction of domestic courts. Chief Marshall made a distinction between the battleship of the foreign states and private goods that were acquired in another country. Because of that distinction, Gündüz suggests that it can be argued whether the Schooner Exchange v. McFaddon decision is the basis of the doctrine of absolute immunity or not. [44] Dr. Badr also declared the same opinion as Gündüz saying "The Schooner Exchange can be rightly said to be the harbinger of the restrictive theory of immunity rather than, as commonly maintained the starting point of absolute theory."[45] However, in Bankas's view, Dr.Badr's statement is too dramatic and not representative of Marshall's thesis, and Dr. Badr got his inspiration from a passing argument offered by Sir Ian Sinclair in his general course in 1980. On that basis, Bankas has the opinion that the decision of Marshall revealed the doctrine of absolute immunity in US, and as Marshall accepted the doctrine of absolute immunity, he decided in favour of France and Marshall would never give birth to restrictive immunity with his decision. [46]

When the other decisions of the US Courts are examined (ex: The Brezzi Bros. Co. V.S.S Pesaro), it can be easily seen that the US Courts relied on the Schooner Exchange v. McFaddon and granted immunity to all foreign states even if the dispute had been caused by merchant ships until the Tate Letter in 1952.

[44] Gündüz, pp.221-241.

[45] Quoted in Bankas, p.20.

[46] Bankas, p.21.

In the light of the explanations given above, the Schooner Exchange v. McFaddon decision can be accepted as the basis of the theory of the absolute immunity whereas it can be accepted as the harbinger of the theory of the restrictive immunity as it argued the distinction between the goods of the foreign state related with its sovereignty and the private goods of the sovereign state.

3.1.2 The United States Foreign Sovereign Immunities Act (1976)

Before enacting the United States Foreign Sovereign Immunities Act, in 1952 the US State Department announced the adaptation of "restrictive immunity" theory with the Tate Letter and this rule attempts to make a distinction between public or sovereign and private or commercial activities of a foreign state and denies immunity to the latter.[47] Departing from it, it can be said that the main aim of the Tate Letter was to forbid granting immunity to whole acts of foreign states as immunity should not be granted to *"iure gestions"* acts of foreign states as the foreign states have sovereignty but should not be granted to *"iure imperii"* acts of states. However, the Tate Letter did not describe what the *"iure gestions"* or *"iure imperii"* acts of the state were and did not give a clear distinction between these acts. It is stated in the Tate Letter (1952) that;

> According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts of a state, but not with respect to private acts. The Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable people doing business with them to have their rights determined in the courts. For these reasons it will

[47] "The Jurisdictional Immunity of Foreign Sovereigns," *The Yale Law Journal*, Vol.63, No:8, 1954, p. 1160.

> hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.

The Tate Letter had a partial success as it helped the United States to transform its state immunity doctrine from absolute to restrictive immunity doctrine. However, the most important failure of the Tate Letter is that it did not define the distinction between the *iure imperii* acts of a state and *iure gestionis* acts of a state which is the most problematic part of the restrictive immunity doctrine.

Even if the Tate Letter did not describe the *"iure gestions"* and *"iure imperii"* acts of the states, also not a law, the US Courts accepted being bound with this letter. The Ex Perte Peru and Hoffmann cases constitute reasons for this acceptance. With these two decisions, it was accepted by the Courts that the advice of the US State Department regarding the immunity principle was binding. Hence, the US Courts did not effectively adopt the restrictive immunity into their decisions because of the advices of the US State Department during the cases. Though, where the US State Department did not give any advice, the Courts were solving the cases by implementing the Tate Letter.[48]

Until 1976, the doctrine of state immunity was considered a political trouble rather than a question of law in US. By passing the "United States Foreign Sovereign Immunities Act 1976", the Courts were authorized to determine whether a "foreign state" is entitled to immunity or not. Hence, the advice of the US State Department became non-binding for the US Courts any longer.

The United States Foreign Sovereign Immunities Act accepted the restrictive immunity theory similar with the Tate Letter. An important aspect of the The

[48] Gündüz, 228.

United States Foreign Sovereign Immunities Act was to avert the advices of the US State Department and transfer issues related with state immunity from under the scope of the executive body to the judicial organ. Accordingly the decisions are given without the effects of political aspects. [49]

If the defendant could be taken as a "foreign state" according to the "United States Foreign Sovereign Immunities Act 1976", the defendant shall be immune to suit in any United States Courts. According to the § 1603 (a) (b) of "United States Foreign Sovereign Immunities Act 1976", the burden of proof lies on the "foreign state" and "foreign state" is described under this article.

If the defendant proves that it is a "foreign state" under the related act; the plaintiff must prove that the exceptions of the immunity apply to the defendant. The exceptions are listed in § 1605, 1605A, and 1607. The most important exceptions are when the Foreign State waives immunity (§ 1605(a)(1)) or agrees to submit a dispute to arbitration (§ 1605(a)(6)), engages in a commercial activity (§ 1605(a)(2)), commits a tort in the United States (such as a common traffic accident case) (§ 1605(a)(5)) or expropriates property in violation of international law (§ 1605(a)(3)). The "United States Foreign Sovereign Immunities Act 1976" also excludes immunity in cases involving certain counterclaims (§ 1607) and admiralty claims (§ 1605(b)).

3.1.3 State Immunity Doctrine according to the United Kingdom Court decisions made before the enactment of United Kingdom State Immunity Act (1978)

In 1880, the English Appellate Court made the *"Parlement Belge (1879) 4 PD 129"* decision inspired by "The Schooner Exchange v. McFaddon" decision of the U.S Supreme Court mentioned above, and this "Parlement Belge" decision

[49] Gündüz, p. 233.

became the case law of doctrine of state immunity in United Kingdom until the Trendex decision and the State Immunity Act dated 1978.

The Parlement Belge was a packet boat owned by the Belgian King. The packet boat crashed with a trailer named Daring. The owner of the Daring filed a lawsuit and requested compensation. Even if the Parlement Belge was a packet boat, it was conveying some sort of commercial commodity. Besides, there was a consensus between Belgium and the United Kingdom, both of which accepted the packet boats located in Dover Harbour as warships. Judge Phillimore considered the case and did not grant immunity to Belgium. During the case, Belgium King did not send any representatives to the Court.

However, the English Appellate Court reversed the decision of Judge Phillimore and pronounced what has been taken to be one of the classic statements of the absolute immunity theory:

> The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence and dignity of every other State, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador or property be within its territory and therefore, but for the common agreement, subject to its jurisdiction.[50]

Although The Parlement Belge clearly constitutes authority for the proposition that the immunity of warships also extends to other public ships engaged in public

[50] Parlement Belge (1879) 4 PD 129

activities, it is no authority in itself for the proposition that trading activities are public activities.[51]

The Parlement Belge decision affected the Court's views that the partial conveyance of commercial commodity on could not prevent granting immunity to the ships. However, there is an important question which was not answered in the Parlement Belge decision. What would happen if the ship was wholly used for commercial purposes? According to Gündüz, this question was answered forty years later by the Porto Alexandre decision.[52] Porto Alexandre was the ship of the Portuguese Government and was used for commercial purposes only. Porto Alexandre grounded and rescued by the English sailors. However, the Portuguese Government did not make any payment for their rescue services. The case was filed against Portuguese Government by the sailors. The Portuguese Government claimed immunity the English Appellate Court granted immunity to Porto Alexandre depending on the previous Parlement Belge decision.

Even if the "restrictive immunity" theory was gradually recognized by other countries (like United States), United Kingdom Courts could not change their views regarding the "absolute immunity" theory due to the "stare decisis" rule, which the judges are obliged to respect the precedents established by prior decisions.[53] "Stare decisis" rule means that the United Kingdom Courts are obliged the precedents which were established by prior decisions. Until 1975, the UK Court made their decisions in relation with the Parlement Belge decision and granted immunity to all foreign states even if their acts could be described as private acts. However, in 1977, upon making of the Trendtex Trading Corporation Ltd v. Central Bank of Nigeria decision, the UK Courts made a revolution in their

[51] I.M. Sinclair, p.257.

[52] Gündüz, p.206.

[53] Gündüz, p.210.

case law and stated that state immunity would not be granted to commercial transactions of the foreign states. [54]

In the Trendex decision the English Court of Appellate examined all the previous precedents, other changes occurred in international law during the last 50 years in state immunity doctrine, other States which are not have a common law system and European Convention and the Court changed the doctrine of state immunity to "restrictive" from "absolute".[55]

> Seeing this great cloud of witnesses, I would ask: is there not here sufficient evidence to show that the rule of international law has changed? What more is needed? Are we to wait until every other country save England recognises the change? Ought we not to act now? Whenever a change is made, some one some time has to make the first move. One country alone may start the process. Others may follow. At first a trickle, then a stream, last a flood. England should not be left behind on the bank. ". . . We must take the current when it serves, or lose our ventures. [56]

The above statement shows that the Court of Appellate was in the opinion that it took too much time for the United Kingdom to adopt the restrictive immunity theory when compared with the other States like Belgium, Holland, United States.

This decision is called revolutionary decisions by the scholars as it changed the doctrine of state immunity to "restrictive" from "absolute".

[54] I Congreso del Partido (1981) 1 A.C. 244

[55] Gündüz, p.213.

[56] Quoted in Gündüz, p.213.

The explanations above structured the history of the doctrine of state immunity in the United Kingdom. The United Kingdom, which has a common law system, changed the absolute immunity practice many years after most countries had applied the restrictive immunity. After constituting the frame of the doctrine of restrictive immunity with precedents, the United Kingdom enacted the United Kingdom State Immunity Act 1978, which will be discussed in details below.

3.1.4 The United Kingdom State Immunity Act (1978)

Before enacting the United Kingdom State Immunity Act 1978, the UK Courts started to apply restrictive immunity theory as a case law which demonstrated with some example cases above.

Though the court decisions made in relation with restrictive immunity theory until 1978 have been influential of the enactment of the UK State Immunity Act however, the enactment of the United States Foreign Sovereign Immunities Act has been even more influential on the basis that the US Act adopts both restrictive immunity and brings clarity about the immunity and this could have caused shifting of commercial business markets towards the United States, which accelerated enactment of the UK State Immunity Act . [57]

With the United Kingdom State Immunity Act, absolute immunity theory turned to restrictive immunity where a foreign state can be sued in English courts in some conditions.

One of the aims of enacting the Act was to consent to the current practices of other states and the 1972 European Convention, and specific complexities that could be contained in resulting text. Also on May 16, 1972 the United Kingdom signed the European Convention on State Immunity however, ratified it on July 3,

[57] Gündüz, p. 214.

1979 and entered into on October 4, 1979 after the enactment of the United Kingdom State Immunity Act. Sinclair commented that "the signature of the United Kingdom was also very important as it was a State which has long applied the absolute immunity rule, changed its legislation and took the legislative steps to limit the circumstances in which State immunity can be claimed".[58] The United Kingdom State Immunity Act , similar to the 1972 European Convention, is designed in a way to offer general immunity still with a list of exceptions according to the doctrine of restrictive immunity. In conclusion, the plaintiff is supposed to prove that the case falls within one of the listed exceptions. [59]

The Act, describes state immunity as a general rule with its very first article and after this article the Act separately defines the exceptions from immunity.

The exceptions are listed between the Articles 2 and 11 and the titles of these exceptions are the submission to jurisdiction, commercial transactions and contracts to be performed in United Kingdom, contracts of employment, personal injuries and damage to property, ownership, possession and use of property, patents, trade-marks etc., membership of bodies corporate etc., arbitrations, ships used for commercial purposes and value added tax, customs duties.

The most important Article of the Act is 3(3) where the commercial transaction is defined. According to the "United Kingdom State Immunity Act 1978" Article 3(3), "commercial transaction" means any contract for the supply of goods or services; any loan or any other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority;

[58] I.M. Sinclair, pp.283.

[59] D.J. Harris, p.322.

According to Article 3(3) (a) of the United Kingdom State Immunity Act 1978, in the event of a foreign state's concluding any contract for the supply of goods or services, the purpose or the nature of the related contract is not important. Accordingly, if a foreign state signs a contract for the needs of its army, this would not grant immunity to the foreign state because the nature of signing a contract is accepted as a private act.[60] In Gündüz's view, the United Kingdom State Immunity Act 1978 is more successful in comparison with the European Convention on State Immunity 1972 and United States Foreign Sovereign Immunities Act 1976 because these acts do not clearly define "commercial transaction" and leave the definition of "commercial transaction" to disposal of Judges.[61]

The United States of America and the United Kingdom shifted from absolute immunity to restrictive immunity theory officially upon the enactment of the US Foreign Sovereign Immunities Act and UK State Immunity Act, respectively. However, until that time this two States applied absolute immunity theory to all cases and provide immunity to the all acts of the foreign states without making any distinction. After the enactment of these Acts, the restrictive immunity became the main rule of the state immunity doctrine. After these Acts the Courts made their decision firstly by examining the acts of the foreign state in order to decide if it is a private or a public act.

[60] Gündüz, p.216.

[61] Gündüz, p.215.

3.2 Historical Development of the State Immunity Doctrine in the light of the International Conventions

3.2.1 The European Convention on State Immunity (1972)

The European Convention on State Immunity 1972[62] was opened for signature by the member States of the Council of Europe, in Basle, on 16 May 1972 and entered into force on June 11, 1976.

The Convention aims to establish common rules relating to the scope of the immunity of one Party from the jurisdiction of the courts of another Party. It specifies the cases in which a Party may not claim immunity before foreign courts. This applies when the Party in question accepts the jurisdiction of the court and in proceedings relating to work contracts, participation in a company or association, industrial, commercial or financial activities; rights over immovable property in the State where the court is situated; redress for injury to persons or damage to property. The Convention specifies the rules concerning the proceedings against a Party in a court of another Party and the effects of judgments that Parties agreed to give them.[63]

In the Preamble of this Convention it is specified that by signing the European Convention on State Immunity 1972, the member States of the Council of Europe hold the aim of the Council of Europe as achieving achieve a greater unity among the members, accounts that the international law is inclined to restrict the cases where a State may claim immunity before foreign courts, wish to identify in their mutual affairs commonly agreed rules about the scope of the immunity of one State from the jurisdiction before the courts of another State, and designed to reach conformity with judgments made against another State and lastly think that

[62] Avaliable at http://conventions.coe.int/Treaty/en/Treaties/Html/074.htm , accessed on October 13, 2011.

[63] http://conventions.coe.int/Treaty/en/Summaries/Html/074.htm, accessed on December 03, 2012.

the adoption of such rules may take ahead the harmonization efforts undertaken by the member States of the Council of Europe in the legal field.

As of December 03, 2012, eight states[64] signed and approved the European Convention on State Immunity Convention. Portugal was signed but not approved and Turkey is not a party of related Convention. Though Turkey is not a party to this convention, preamble of article 33 of the Law about the International Private and Civil Procedure Law numbered 2675 regarding state immunity prepared in conformity with the European Convention on State Immunity.

According to Article 15 of the European Convention on State Immunity 1972, a Contracting State shall be entitled to immunity from the jurisdiction of the courts of another Contracting State if the proceedings do not fall within Articles 1 to 14; the court shall decline to entertain such proceedings even if the State does not appear. Articles from 1 to14 list the situations which state immunity cannot be claimed by the foreign State in the domestic State.

In Sinclair's view, one year after the acceptance of the related Convention, this Convention was the first significant attempt made at governmental level to find a solution for the dissimilarities in State practice and ensure a union for the conditions under which immunity can be claimed. However, this does not mean that the Convention can be accepted as a general rule of international law regarding the doctrine state immunity. As there are not any other general rules regarding the cases which state immunity should be applied, this Convention may be accepted as an evidence for the limits within which state immunity can be claimed in Western European States. The rules of the Convention were prepared in relation with the rule of restrictive immunity which is the current trend in international law and which is about applying *erga omnes*. But the most important

[64] Austria, Belgium, Cyprus, Germany, Luxembourg, Netherlands, Switzerland and United Kingdom.

point is to guarantee that the rules of the Convention have to apply mutually *(inter partes).*[65] In addition, M. Sinclair also suggests that the backbone of the European Convention concerning the doctrine of state immunity is its attribute of regulating such problems as jurisdictional immunity, recognition and enforcement of judgments as ruled by local courts against foreign states. It is followed by the characteristic to settle down the distinction between twofold cases (in which immunity can be both claimed and waived). The Convention handles the principle that application cannot be bestowed to the court State against possessions of a Contracting State. It must be noted that all Contracting States undertake a liability under this case. The responsibility establishes that the verdicts made by a Contracting State has to be valid in another Contracting State as long as the case is related with the acts of the foreign state which cannot be given the immunity and as long as the verdict is not discarded or not to be taken for appeal or annulment. Another characteristic of the Convention is not an obligatory one, and mentioned in Article 24. Relevant article reads that in the event of the cases outside Articles 1 to 13 (non-immunity cases in other words), its courts have the right to do execution against another Contracting State in as much as its courts are authorized to do so in face of States that are not signing parties of the present Convention. Pronouncing of the above can breach the immunity from jurisdiction enjoyed by foreign States in connection with their acts they carried out in applying of sovereign authority (*acta iure imperii*) under no circumstances.[66]

Like other conventions made by the Council of Europe, this convention aims to establish common rules relating to the scope of the immunity of one Party from the jurisdiction of the courts of another Party. The convention is binding only for its parties and the purpose of the signing states is to reach a consensus about this matter. The Council of Europe Convention adopted the doctrine of restrictive immunity by taking into consideration the tendency regarding state immunity all

[65] I.M. Sinclair, pp.283.

[66] I.M. Sinclair, p.268.

over the world. Without prejudice to the fact that the states signing this convention however, adopting a narrower doctrine of restrictive immunity are allowed to maintain those systems, but they cannot exercise authority over acts of states that adopted the doctrine of a more restrictive immunity under state sovereignty, the reason of which is that the limit specified in the Convention corresponds to the maximum tolerance limit. [67]

For many years State immunity has occupied the attention of eminent jurists and the development of international relations and the increasing intervention of States in spheres belonging to private law have posed the problem still more acutely by increasing the number of disputes opposing individuals and foreign States. [68] Two different theories of the doctrine of state immunity cause difficulties in international relations. Accordingly the main advantage of this Convention is tried to solve these difficulties on the international level and constitute a harmony between the member states. Even if Turkey is not a member state and accordingly does not have a right to sign and ratify the related Convention, it was a guideline for Turkey while preparing the very first and extensive law on International Private and Civil Procedure and therefore the preparation of the article regarding the state immunity principle.

3.2.2 The United Nations Convention on Jurisdictional Immunities of States and Their Property

The United Nations Convention on Jurisdictional Immunities of States and Their Property[69] is the first modern multilateral instrument to articulate a comprehensive approach to issues of state or sovereign immunity from suits in foreign courts and

[67] Gündüz, 351.

[68] http://conventions.coe.int/Treaty/en/Reports/Html/074.htm, accessed on December 03, 2012.

[69] Avaliable at http://untreaty.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf , accessed on December 03, 2012.

it embraces the so-called restrictive theory of sovereign immunity under which governments are subject to essentially the same jurisdictional rules as private entities in respect of their commercial transactions.[70] According to Fox "this convention represents only a partial codification of state immunity, focused solely on immunity from civil jurisdiction and one, which by the need for diplomatic compromise, can be faulted for its lack of clarity, but as one step, one jigsaw piece in the subjection of the State to the rule of law it should be welcomed."[71]

The general rule of the convention is that a foreign state is entitled to immunity from the jurisdiction of the forum state and the forum state must refrain from exercising that jurisdiction in a proceeding before its courts, unless one of the stated exceptions to that immunity applies. [72]

The finalized text of the United Nations Convention on Jurisdictional Immunities of States and Their Property which was prepared by the UN Ad-Hoc Committee was published on February 27, 2003 and was opened to signature on January 17, 2005. The Ad-Hoc Committee was established by resolution 55/150 in 2000 and prior to submitting its final report the Ad-Hoc Committee held three important sessions, starting from the 4th February to 28th February 2003 and was immediately followed by a third session which was held from 1st to 5th of March 2004 and on 5th March 2004 the Ad-Hoc Committee finalized its report on the United Nations Draft Convention on Jurisdictional Immunities of States and Their Property and a set of annexed understandings.[73]

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[70] David Stewart, "The Un Convention on Jurisdictional Immunities of States and Their Property", *The American Journal of International Law*, Vol. 99, No: 1, 2005, p.194.

[71] Hazel Fox, "In Defence of State Immunity: Why the UN Convention on State Immunity is Important?", *International & Comparative Law Quarterly*, Vol 55, 2006, p. 403.

[72] Stewart, p. 197.

[73] Bankas, 301.

This Convention was open for signature by all States until 17 January 2007 and would have entered into force on the thirtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession according to Article 30. As of December 04, 2012 there are 28 signatories[74] to the Convention and 13 instruments of ratification [75] have been deposited. As the Convention would have entered into force on the thirtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession according to Article 30, the United Nations Convention on Jurisdictional Immunities of States and Their Property is not yet in force. Turkey neither signed nor ratified the related Convention.

In the Preamble of the Convention it is requested from the States Parties to the present convention considered that the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law and took into account the developments in State practice with regard to the jurisdictional immunities of States and their property and also believe that an international convention on the jurisdictional immunities of States and their property would enhance the rule of law and legal certainty, particularly in dealings of States with natural or juridical persons and would contribute to the codification and development of international law and the harmonization of practise in this area.

According to article 5 of the Convention titled as state immunity; a State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention. The modalities for giving effect to state immunity listed in Article 6 and according to

[74] Belgium, China, Czech Republic, Estonia, Finland, Iceland, India, Madagascar, Mexico, Morocco, Paraguay, Russian Federation, Senegal, Sierra Leone, Slovakia, Timor-Leste, United Kingdom of Great Britain and Northern Ireland

[75] Austria, France, Iran (Islamic Republic of), Japan, Kazakhstan, Lebanon, Norway, Portugal, Romania, Saudi Arabia, Spain, Sweden, Switzerland

that article a State shall give effect to State immunity under article 5 by refraining from exercising jurisdiction in a proceeding before its courts against another State and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected. A proceeding before a court of a State shall be considered to have been instituted against another State if that other State is named as a party to that proceeding or is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State.

In part III of the Convention the proceedings in which state immunity cannot be invoked is regulated and the titles of these part are commercial transactions, contracts of employment, personal injuries and damage to property, ownership, possessions and use of property, intellectual and industrial property, participation in companies or other collective bodies, ships owned or operated by a State and effect of an arbitration agreement.

The most important exemption is to immunity is "commercial transactions". The rule of commercial transaction is regulated in Article 10 like follows; If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from
that jurisdiction in a proceeding arising out of that commercial transaction.

The rule is regulated in Article 10 however, the definition of the "commercial transaction" is regulated in Article 2(1)(c) and according to the Convention "commercial transaction" means 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, including any obligation of guarantee or of indemnity in respect of any such loan or transaction or any other contract or transaction of a

commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

In determining whether a particular contract or transaction is a "commercial transaction" for these purposes, Article 2(2) provides that; reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.

In Stewart's view these two issues – the definition of "commercial transaction" and the criteria to be applied in determining the commercial character of a given transaction or activity – were major points of debate both during the deliberations of the International Law Commission and in the subsequent negotiation of the convention, because of the differing approaches reflected in various domestic legal systems. The formulations ultimately adopted in the Convention represent a compromise. [76]

The argument regarding the commercial transaction focused on the question that if the purpose or the nature of the commercial transaction would be taken into account by the courts while defining it. The United Nations Convention on Jurisdictional Immunities of States and Their Property, which is the latest regulation (even if not in force yet), structures the contracts for the supply of goods or services that are defined as commercial transactions which no immunity granted to. However, even if the Convention makes the distinction stating that in deciding whether something is a commercial transaction, the problems still prevail while deciding whether or not the act is a commercial transaction. On that basis regarding the state immunity and UN Convention, reference has to be made

[76] Stewart, p. 199.

primarily to the nature of the transaction, but the purpose of the transaction should also be taken into account together with the practice of the states.[77]

According to Bankas, some problems are likely to be occurred after the United Nations Convention on Jurisdictional Immunities of States and Their Property will enter into force. Would the Convention be considered as an authoritative expression of customary law? What will happen national legislations, would they accepted as dead-accurate or the United Kingdom, the United States or any other states which have a national legislation would have to make changes in their national laws to provide the conformity with the Convention. What will happen to states which are not ratify the Convention or withdraw their consent after becoming a party, would they be bound with the Convention?[78] Bankas continued that the present Convention could create problems because of the divergent views expressed and the unresponsive attitude [79]

The states which have their own legislation about the state immunity have the main concern about the Convention. To set an example the United Kingdom signed the Convention but ratified yet. There are some concerns if the United Kingdom should become a party to the Convention by signing and ratifying it. According to a briefing paper on state immunity topic;

> The United Kingdom already has its own legislation and the courts have a wide experience in interpreting and applying to these provisions. On that basis bringing the Convention might freeze the law and stop the development of state practise outside the Convention. One alternative is to leave it to lie on the table as a generally accepted picture of the current position under international law. This would allow further developments of the law in line with the needs of businesses, individuals and

[77] Joanne Foakes and Elizabeth Wilmshurst, "State Immunity: The United Nations Convention and Its Effects", *Chatham House International Law Programme ILP BP 05/01,* 2005, p.4.

[78] Bankas, p. 312.

[79] Bankas, p.314.

> governments. One way or another, it is important that there is wide discussion of the Convention and its likely effects, so that a decision on signature and ratification can be taken in full knowledge of all the different interests concerned.

After the United Nations Convention on Jurisdictional Immunities of States and Their Property will enter into force right after the thirtieth instrument of ratification, acceptance, approval or accession the practices of the Convention shows us the efficiency and benefits of it. Turkey neither signed nor ratified the related Convention. As there are several discussions about the results of the Convention after the ratification by thirty stated, Turkey may take a position to examine the discussions and results of the Convention and decide to sign and ratify after the outcomes.

CHAPTER FOUR

THE DOCTRINE OF STATE IMMUNITY IN TURKEY

4.1 Legal Regulation and Developments of State Immunity Doctrine in Turkey

Until the enactment of the International Private and Civil Procedure Law numbered 2675 in 1982 the absolute immunity theory was strictly accepted by the Turkish Court of Cassation due to principle of the equality of the states even if there was not any binding law regarding the absolute immunity theory.

In 1982, the International Private and Civil Procedure Law numbered 2675 was enacted and the justification of this law stated in Ministry of Justice's "International Private and Procedure Law Law Draft and Justice Commission Report" as follows;

> Both economic and social changes have inevitably brought developing of our international affairs, and particularly emigration movements that took place after 1950's have caused many problems, and thus the five-item Provisional Law have remained incapable of dealing with recent developments resulting in conflicting cases in relation with international conventions to which we are parties because only item four addresses conflict of laws and authority of Turkish courts. As a result of forcing conditions, present draft has been drawn up in order to rearrange rules regarding abovementioned matters. In drawing up of the same, legislations of not only foreign states but also the Hague Conference on Private International Law, International Commission on Civil Status, and conventions issued by organizations such as Council of Europe and United Nations with a wide international application area have been taken into consideration in order to set a conformable system by bearing in mind facts entailed by Turkey as well as international application.

In line with abovementioned reasons, International Private and Civil Procedure Law numbered 2675 containing principles of international private law for Turkey was adopted in 20.05.1982. One of the titles covered under this law is state immunity principle, which hasn't been addressed so far in any law in Turkey but only there were precedents of the Court of Cassation.

The state immunity principle was adopted with article 33 of the International Private and Civil Procedure Law numbered 2675 and the related article was as follows;

Article 33: Exemptions of the state immunity principle:

"State immunity cannot be recognized to the private acts of foreign states.

It is possible to make a notification to the diplomatic representative of the foreign state."

It is stated in the justification statement of the Article 33 titled State Immunity of Foreign States that state immunity cannot be recognized in cases excepted from initiatives of foreign states on the basis of its sovereignty rights, and in conflicts arising from its committing private legal acts and commercial affairs like a natural person. As a natural consequence of such a legal adjustment introduced conformity with contemporary legal approach, sentence two under the same article states that a notification can be made to that state's diplomatic representatives in this issue in order to allow filing a lawsuit against a foreign state. Under that article, judicial immunity of the state is regulated and the article is not connected with Vienna Convention on Consular Relations and Notification Law in as much as judicial immunity of the state is adjusted in neither convention nor Notification Law. That article of the draft is in conformity with the Council of Europe Convention in terms of judicial immunity of the state.

As seen above, justification statement of the article 33 regarding the immunity of a foreign state indicates that Turkey entirely adopts the theory of restrictive immunity and explicitly expresses that foreign states are entitled to state immunity in relation with initiatives they take based on their sovereignty rights only. Still, justification of the article 33 does not describe conflicts arising from initiatives taken by foreign states' based on their sovereignty rights and their committing private legal acts or commercial affairs like a natural person, which is expected to be filled out with judicial decisions.

In 2007 the International Private and Civil Procedure Law numbered 2675 was repealed and a new International Private and Civil Procedure Law numbered 5718 entered into force. In the latter International Private and Civil Procedure Law, "exemptions of the state immunity principle" was arranged in article 49. Even though the International Private and Civil Procedure Law was amended, the justification statement of the article 33 was preserved since the content of the related article regarding the doctrine of state immunity remained unchanged.

According to the International Private and Civil Procedure Law numbered 5718, state immunity cannot be applied to foreign states in private acts of the foreign states. However, the concept of "private act" is not clearly defined in that law. Accordingly, the responsibility falls to the Court to determine the "private act" concept depending on the concrete case.

4.1.1 The decisions of the Court of Cassation before the enactment of the International Private and Civil Procedure Law dated 1982

1) In 1947, in which the absolute immunity theory was strictly accepted, the Court of Cassation for the 4th Circuit (Docket No: 1947/390, Decree No: 1947/1076[80]) made a decision indicating "the independence of the state's principle". According

[80] Gündüz, p. 297.

to the applicable decision, the Court of Cassation stated that independence of the states does not let the states to judge other states, and on that basis, Turkish Courts could not examine the case which has been filed against the English Treasury.

2) In 1950, by means of the decision (Docket No: 1950/5402 and Decree No: 1950/5064[81]), the Court of Cassation made the same decision as above; however, the reason was different then. The Court decided that the India had a state immunity as the trial of a foreign state depends on the consent of the related State even if the case is about private law. According to the mentioned decision, the plaintiff was filed the related case against India and in personally of the Ambassador of India due to the infringement of a contract. The Court of Cassation granted immunity to India by stating that it is in the consent of the foreign states to be judged in another state except in cases about real estates. In Gündüz's view, as the infringement of a contract was a private act, this case would be concluded differently if it occurred after the International Private and Civil Procedure Law entered into force. [82]

3) Another case took place in 1955 which again rose from the private law conflict rejected by the Court of Cassation in face of the principle of state immunity. According to the related decision (Docket No: 1955/5402, Decree No: 1955/4151[83]); the Ambassador of Chili has rented a premise in order to use as an embassy building but then decided to release the building. The plaintiff was filed an action of debt claiming that the Ambassador of Chili did not pay the rent and also damaged the building. The First Instance Court decided for the rejection of the case due to the state immunity principle. The plaintiff appealed the related rejection decision. However, the Court of Cassation has approved the decision of

[81] Gündüz, p.298.

[82] Gündüz, p.299.

[83] Gündüz, p.299.

the First Instance Court stating that both foreign states and ambassadors could not be judged in local courts by also relying on state immunity principle.

4) When the cases related to labour law, it can be easily stated in the light of the following Court of Cassation decision that absolute immunity principle was accepted by the Court of Cassation even if the First Instance Court decided in favour of the plaintiff. According to the related decision dated 1964 (Docket No: 1964/3816 and Decree No: 1964/3751[84]), the plaintiff was filed an action of debt caused by employment relationship against the personnel directorate of American Air Forces. The First Instance Court decided in favour of the plaintiff party. The defendant went to the appeal before the Court of Cassation. The Court of Cassation first found out that the case was actually filed against the United States of America. In the second phase, it ruled that foreign states could not be judged in local courts by referring to the state immunity principle within the framework of the law of nations. Then, the decision of the First Instance Court, which had been in favour of the plaintiff party earlier, was annulled in favour of the defendant party by the Court of Cassation."

5) There is an important decision of the Court of Cassation dated 1968. The decision is important as the Court of Cassation provided immunity to the United States of America without examining the nature of the conflict/agreement. The plaintiff was filed an action of debt against the United States of America depending on the employment relationship. The Court of Cassation stated in its decision (Docket No: 1968/630, Decree No: 1968/92[85]) that a foreign state can only be judged by an another state if;

1) there is an explicit agreement between the related states;

[84] Gündüz, p.299.

[85] Gündüz, 300.

2) the foreign state gives an explicit consent to be judged by the local court.
3) the two article above cannot be implemented and then the problem has to be solved by the principles of Law of Nations.

According to the general principles of Law of Nations it is inadmissible to accept the jurisdiction of one state to another sovereign state except the case is about real estates. Due to all these reasons, the case has been rejected by the Court of Cassation.

The Court of Cassation decided to implement state immunity principle without examining the content of the agreement between the plaintiff and the United States of America. However, in other countries in which the same kind of conflict arose, they made different decisions like. For instance, in X. v. den Staat (1920) case, Austria Court examined the essentials of the case which arose because of a work agreement regarding the built of an embassy building of a foreign state. Italian Court declined the immunity claim by the USA in a case arising from a contract on building of drainage system in the USA military station in Leghorn of Italy in 1963. Moreover, according to the United Kingdom State Immunity Act 1978 and European Convention on State Immunity 1972, immunity which was not provided to the foreign states caused an obligation which has to be done in the state of the jurisdiction.[86]

6) In 1978, a plaintiff filed a case against the Ambassador of Albania for determining of the rent, as a result, the First Instance Court decided in favour of the plaintiff. However, the Court of Cassation for the 3rd Circuit (Docket No: 1978/6090, Decree No: 1978/6279 Decision Date: 23.10.1978[87]) decided for the

[86] Gündüz, pp.297-300.

[87] Gündüz, 301.

rejection of the case by applying to procedural grounds which hold that a jurisdiction of a state cannot be used against another state.

7) The plaintiff filed the case in 1974 by claiming that a driver who had been employed by the Consulate of Bulgaria caused harm in a traffic accident. The Court of Cassation for the 4th Circuit (Docket No: 1979/6137, Decree No: 1979/1787 Decision Date: 08.04.1979[88]) decided that the case was filed against the state of Bulgaria rather than the Consulate or the driver. For that reason, the Court of Cassation came to a conclusion that it was impossible to judge the foreign state before the Turkish Courts due to the "absolute immunity" doctrine.

8) The plaintiff, who was a cook in the USA Military Office Club, filed an action of debt arising from the employment relationship. The Court of Cassation for the 9th Circuit (Docket No: 1964/7501, Decree No: 1964/8902 Decision Date: 10.12.1964[89]) firstly determined that the USA Military Office Club was an organ of the United States of America. Accordingly, the defendant became the United States of America rather than the USA Military Office Club. Due to that reason and the jurisprudence of the Law of Nation, foreign states could not be judged in local courts on the basis of the absolute immunity principle.

4.1.2 The decisions of the Court of Cassation after the enactment of the International Private and Civil Procedure Law in 1982

Below-mentioned decisions were made by the Court of Cassation following the enactment of the International Private and Civil Procedure Law and the acceptance of "restrictive immunity" doctrine.

[88] Gündüz, 301.

[89] Gündüz, 300.

1) The case was filed by the plaintiffs against USSR and Ministry of Defence requesting a destitute of support compensation due to the collision of USSR battleship and Turkish battleship which is owned by the Ministry of Defence in Turkish territorial waters.

The First Instance Court stated that the plaintiffs have no right to file a lawsuit against USSR before the Turkish Court and because of that reason the Court rejected the case depending on the absence of jurisdiction. The plaintiffs appealed the decision of the First Instance Court and the Court of Cassation for the 4th Circuit (Docket No: 1987/7309 and Decree No: 1987/7373 dated 12.10.1987[90]) made following decision**;**

Firstly, the Court of Cassation came to the conclusion that the dispute is over the Law of Nations. On that basis, in order to resolve the related dispute the principles, concepts and historical development of the Law of Nations has to be reviewed. State immunity, which refers to improbability of a state's being sued before the courts of another state, is a principle built upon the "equality of the states" principle. However, in the course of the time, the absolute immunity theory was replaced by the restrictive immunity theory due to the private acts of the states.

The Court of Cassation made a point that the battleships are the symbols of the sovereignty as they are bearing the flag of the sovereign state. Bearing this in mind, state immunity has to grant to the battleships. Besides, according to the Comparative Law, any dispute arising from the purchase of weapons for the army is accepted as a sovereignty act and subjected to the state immunity. Hence, the French Court of Cassation (1933) accepted the immunity of the Government of Afghanistan in a dispute arose due to the purchase of supplies for the Armed

[90] Aslan Gündüz, *Milletlerarası Hukuk Temel Belgeler-Örnek Kararlar,* (İstanbul: Beta Basım, 2003), pp.588-590.

Forces of Afghanistan. The French Court of Cassation relied on the ground that even if purchase and sale is a commercial transaction, the Government of Afghanistan itself did not attempt any commercial activity.

According to article 33/1 of the International Private and Civil Procedure Law (with the no.2675), "State immunity cannot be recognized to the private acts of foreign states. It is possible to make a notification to the diplomatic representative of the foreign state." The meaning of "private acts" in the related article covers the acts which were done without using the right of sovereignty of the state (governmental acts). For example; disputes arose from trade relations or engaged in legal activities like natural and legal person. Otherwise, it is not possible to consider governmental acts of the foreign state within the scope of the related article.

Due to all these reasons, the Court of Cassation decided that is not possible to resolve the dispute about International Private Law by applying the principles of Civil Law and decided for the rejection of the asking for revision request of the plaintiffs.

However, there were two dissenting opinions. The two judges who declared their dissenting opinions emphasized "private act" notion referring to Article 33 of the International Private and Civil Procedure Law. According to the judges, plaintiffs requested compensation due to collision. As "collision" was a private law norm and the case occurred in Turkish territorial seas, the provisions of the "collision" in Turkish Commercial Law had to be applied to the relevant case rather than the provisions of the Turkish International Private and Civil Procedure Law. Due to all these reasons and the explicit provision of the International Private and Civil Procedure Law, the judges were in the opinion that "immunity" could not be granted to USSR in this case.

2) In another decision of the Court of Cassation 13th Circuit (Docket No: 1989/3896 and Decree No: 1987/6648 dated 16.11.1989[91]); the plaintiff requested a specific amount for the outstanding phone bills and misuse of the two flats which rented by the American Consulate. It is understood from the file that the rental contract was signed between the plaintiff and the American Consulate. As the American Consulate represents the United States of America, the tenancy was between the plaintiff and the United States of America. According to article 33/1 of the International Private and Civil Procedure Law (with the no.2675), "State immunity cannot be recognized to the private acts of foreign states". Rental contract is a private law issue and the plaintiff requested misuse compensation and outstanding bills which arose from the infraction of the defendant. As the dispute is about private law, it is not possible to apply the principle of state immunity to the defendant.

Due to all these reasons, the case was annulled in relation with the interest of the plaintiff.

3)The plaintiff filed a case before the First Instance Court against the Iraq Arab Republic claiming that his tanker, which was sailing on the Persian Gulf after fuelling his tanker in Persia, was attacked by the war crafts of Iraq. Because of this attack, three sailors were dead and the tanker was damaged. As a consequence, the plaintiff claimed pecuniary and non-pecuniary damages from Iraq to cover the related damages. The First Instance Court rejected the plaintiff's case deciding that the Turkish Courts could not judge the Iraq as the damages occurred during the war between Iraq and Persia. The plaintiff party appealed the decision of the First Instance Court in the Court of Cassation.

[91] Avaliable at http://www.kazanci.com/cgi-bin/highlt/ibb/highlight.cgi?file=ibb/files/13hd-1989-3896.htm&query=%221989/3896%22#fm, accessed on April 25, 2011.

The Court Cassation 4th Circuit briefly explained in its decision (Docket No: 1985/5190 and Decree No: 1986/2436 dated 17.03.1986[92]) the evolution of the Turkish doctrine of state immunity and stages of "absolute immunity" and "restrictive immunity". After enacting of the Turkish International Private and Civil Procedure Law, only private acts of the foreign states are subjected to the domestic jurisdiction. The Court of Cassation came to the conclusion that the act of the Iraq Republic could not count as a private act.

4) The First Instance Court and Court of Cassation Decision: The plaintiff filed mentioned lawsuit against Lebanese Embassy requesting the release of the defendant from the tenement. The First Instance Court decided for the rejection of the case stating that the tenement was used as a place of residence for Embassy and thus the tenement has to be taken within the principle of state immunity. The Court of Cassation decided for annulment of the decision of the First Instance Court on the basis of article 33/1 of the International Private and Civil Procedure Law (with the no.2675) and sent the file to the First Instance Court for the second reading. However, the First Instance Court insisted on rejection. Then, the case was appealed and Assembly of Civil Chambers (Docket No: 1991/6-299, Decree No: 1991/406 dated 18.09.1991[93]) held that;

The case is about the request of release of the tenant. In mentioned case, it is very important not to confuse the immunity of diplomatic representatives with private acts of the foreign states. Today all judicial systems immunize the governmental acts of foreign states from local judge. From both Vienna Agreement (Turkey is also a contracting party) and other binary agreements perspective, immunity is about diplomatic representatives not the lawsuits against the states which they represent.

[92] Aysel Çelikel, *Milletlerarası Özel Hukuk*, (İstanbul: Beta Basım, 2000), p.567.

[93] Avaliable at http://www.kazanci.com/cgi-bin/highlt/ibb/highlight.cgi?file=ibb/files/hgk-1991-6-299.htm&query=%221991/6-299%22#fm, accessed on April 25, 2011.

Bearing all these reasons in mind, the resistance decision of the First Instance Court was annulled by the Assembly of Civil Chambers, and oppositions of the plaintiff party were accepted instead.

According to Nomer, the Assembly of Civil Chambers took the first step and accepted that the
eviction actions and actions ex locate are the private acts of the foreign states, and no immunity will be granted to foreign states in such actions. [94]

5) In another decision of the Court of Cassation 10th Circuit (Docket No: 1993/5620 and Decree No: 1993/10875 dated 14.10.1993[95]), the plaintiff party demanded that it be determined that he worked in the Denmark Embassy between the dates 1.1.1944 and 30.09.1984. However, the First Instance Court decided for rejection of the case due to the state immunity principle.

According to article 31/1 of the Vienna Agreement, of which both Turkey and Denmark are contracting parties, diplomatic agents are immunized from the local judges. Differently, in that case, the Denmark Embassy is the representative of Denmark Royalty in Turkey. In other words, it represents the Denmark Royalty. On that basis, the responsibility of the Embassy is equivalent to the responsibility of the Denmark Royalty. In this sense, the plaintiff, contrary to the article 31/1 of the Vienna Agreement, worked for the Denmark Royalty (foreign state) rather than the agent of the Denmark Royalty and thus it is impossible to apply the related article in that case. Moreover, article 33/1 of the International Private and Civil Procedure Law (with the no.2675) stipulates "State immunity cannot be recognized to the private acts of foreign states".

[94] Hüseyin Pazarcı, *Uluslararası Hukuk,* (Ankara : Turhan Kitabevi, 2006), p. 159.

[95]Nuray Ekşi, *Kanunlar İhtilafı Kurallarına Milletlerarası Usul Hukukuna,Vatandaşlık ve Yabancılar Hukukuna İlişkin Seçilmiş Mahkeme Kararları*, (İstanbul : Beta Basım, 2009), p. 82.

Due to all these reasons, as the First Instance Court did not examine the case from the perspective of the above-mentioned principles and concepts, it was decided to annul the rejection decision of the First Instance Court.

6) In the decision of the 13th Civil Chamber of Court of Cassation dated 2001/8947 E, 2001/11405 K. and 05.12.2001[96]; the plaintiff, in reference to the agreement with defendant Turkish Republic of Northern Cyprus Consulate General, stated that medicine for Northern Cypriot citizens treated in Turkey were supplied by its chemist's. However, a 21.324.000.000 TL still remaining unpaid by the Consulate General after the payment of a certain amount The plaintiff requested interest and denial compensation up to 40 % be decided.

The defendant requested the rejection rejecting of the lawsuit by stating that Turkish Republic of Northern Cyprus Consulate General is entitled to state immunity as a foreign state and thus a lawsuit cannot be filed against them.

The Court of First Instance made decision for rejecting the case due to wrong hostility as the lawsuit is supposed to be opened against Turkish Republic of Northern Cyprus and the Consulate General was not allowed by the aforementioned state, and accordingly the decision was appealed by parties. The Court of Cassation stated that;

a) On the basis of writings in the file, evidences justifying the decision as well as entailing reasons in conformity with laws and particularly lack of inappropriateness of recognition of the evidences, the Court of Cassation rejected the defendant's objection to the appeal.

b) Within the scope of the defendant's objections to appeals, firstly the Court of Cassation stated that Consulate General of any foreign state in Turkey is the

[96] Ekşi, pp. 83-84.

representative of that state and it is represented by the Consulate General in Turkey. Accordingly, Ambassadors of the foreign states in Turkey shall carry out private transactions and contracts on behalf of the state they represent aside from their personal affairs, and the Ambassadors are directly responsible for such agreements on behalf of the the foreign state it represents. Due to the agreements made under the scope of private law, a lawsuit can be filed against a Consulate General on behalf of the foreign state it represents. Now that Consulate General of Turkish Republic of Northern Cyprus is the representative of its own state in Turkey, the Court of Cassation stated that a lawsuit can be opened against that Consulate General. Moreover, according to article 33 of the International Private and Civil Procedure Law numbered 2675, it was decided that state immunity shall not be recognized to the foreign state in the event of legal disputes arising from private law affairs with the foreign state and state immunity is not applicable in this case because the contract which is alleged by the plaintiff is a private transaction. Also, because the petitioner, in his lawsuit, refers to the foreign state represented by the Turkish Republic of Northern Cyprus Consulate General, the Court of Cassation decided for reversing of the judgement of the First Instance Court in favour of the appealing plaintiff.

7) In another decision of the Court of Cassation 10th Circuit (Docket No: 2002/2431, Decree No: 2002/11163 dated 10.10.2002[97]), the plaintiff filed a case against the Technical Communication Bureau of United States of America requesting damages for pain and suffering due to the unfair act. However, the First Instance Court decided for rejection of the case due to the state immunity principle.

State immunity, which means that a state cannot be sued before the courts of another state, is based upon the "equality of states" principal. However, in the

[97] Avaliable at http://www.kazanci.com/cgi-bin/highlt/ibb/highlight.cgi?file=ibb/files/4hd-2002-2431.htm&query=%222002/2431%22#fm, accessed on April 25, 2011.

course of the time, the absolute immunity theory was replaced by the restrictive immunity theory due to the private acts of the states.

In the light of these, it is not possible to apply the state immunity principles to private law acts of the foreign states. When the case is examined, it is seen that there was an attack on personal rights of the plaintiff party and thus the dispute relies on private law provisions. As it is not possible to apply the state immunity principle to private law conflicts, the decision of the First Instance Court needs annulling.

8) The plaintiff filed the case against the Embassy of the United States of America requesting a specific amount of rent debt and misuse compensation. The First Instance Court rejected the case in reference to wrong hostility and the plaintiff went for an appeal.

The defendant claimed that embassies do not have a legal personality as the case had been filed against the Embassy of United States of America. In addition, according to the Vienna Agreement, foreign missions have immunities and diplomatic agents are also immune from the local judgment. Moreover, the plaintiff filed the case against the Embassy of the United States of America rather than the state itself.

According to the decision of the Court of Cassation for the 6th Circuit (Docket No: 2009/10643, Decree No: 2009/10361 given in 2009[98]), the rental contract between the plaintiff and the USA is considered as a private act by the Court of Appeal instead of the reverse decision of the First Instance Court. It is stated in the related decision that the plaintiff filed the case against the Embassy of the United States of America requesting a specific amount of rent debt and misuse compensation. The First Instance Court rejected the case due to wrong hostility and the plaintiff

[98] Avaliable at http://www.kazanci.com/cgi-bin/highlt/ibb/highlight.cgi?file=ibb/files/6hd-2009-10643.htm&query=%222009/10643%22#fm, accessed on April 25, 2011.

went for an appeal. The defendant claimed that the case had been filed against the Embassy of United States of America but embassies do not have a legal personality. In addition to that, according to the Vienna Agreement foreign missions have immunities and diplomatic agents are also immune from the local judgment. Moreover, the plaintiff filed the case against the Embassy of the United States of America rather than the state itself. The Court of Cassation mentioned that when the rental contract is examined, it can be seen that it was signed by the purchasing agent who has all the power and responsibility of the United States of America to sign the related contract. Moreover, the rental was used for the people who worked for the diplomatic mission. According to the content of the rental contract and intended use of it, it is obvious that there is a private law relation between the parties. According to article 33/1 of the International Private and Civil Procedure Law (with the no.2675) as well as article 49 of the International Private and Civil Procedure Law (with the no.5718), which entered into force during the judgment, "State immunity cannot be recognized to the private acts of foreign states. It is possible to make a notification to the diplomatic representative of the foreign state." Due to all these reasons, the Court of Cassation decided for annulment of the First Instance Court decision."

9) In another decision of the Court of Cassation for the 4th Circuit (Docket No: 2010/6451 and Decree No: 2010/7394 dated 2010[99]), following verdict decision was made**;** the plaintiff filed the related case against both the driver of the Embassy of the Federal Republic of Germany and the Embassy of the Federal Republic of Germany requesting for covering of the damage caused by the driver in a traffic accident. The First Instance Court stated that the defendants have a diplomatic immunity as per the Vienna Agreement and thus decided for the abatement of proceeding for both defendants. The plaintiff then appealed the decision in the Court of Cassation. At first, the Court of Cassation stated that the

[99] Avaliable at http://www.kazanci.com/cgi-bin/highlt/ibb/highlight.cgi?file=ibb/files/4hd-2010-6451.htm&query=%222010/6451%22#fm accessed on April 25, 2011.

decision of the First Instance Court is valid only for the driver, not for the Embassy of the Federal Republic of Germany. Accordingly, the Court of Cassation approved this part of the First Instance Court decision. However, the other defendant, the Embassy of the Federal Republic of Germany, is not a diplomatic representative; rather, it is the representative of the Federal Republic of Germany itself. In this case, the Embassy of the Federal Republic of Germany holds responsibility equal to the Federal Republic of Germany. The Court of Cassation also mentioned that the Vienna Agreement is only valid for the diplomatic representatives and it does not cover the cases which filed against the States. Moreover, according to article 33/1 of the International Private and Civil Procedure Law (with the no.2675), "State immunity cannot be recognized to the private acts of foreign states. It is possible to make a notification to the diplomatic representative of the foreign state. Due to all these reasons, it is decided for annulment of one part of the decision of the First Instance Court which is about the Embassy of Federal Republic of Germany."

4.2 Evaluation of the decisions of the Turkish Court of Cassation

The Court of Cassation applied the absolute immunity principle until 1982 as a main principle; however, in any period no other state applied absolute immunity as a "principle" as it was not mainly accepted as a basic rule of international law. [100] In Gündüz's view, the result of the above mentioned cases is that the Court of Cassation provided state immunity in all cases which filed against foreign states and even if there is not an exact decision, the Court of Cassation would also provide immunity to foreign public institutions which have a separate legal personality from the foreign state. [101]

[100] Nomer and Şanlı, p.377.

[101] Gündüz (1984), p.301.

Nomer's view summarizes the Court of Cassation's attitude before 1982 quite well. Nomer says "Taking into consideration its decisions, Turkish Court of Cassation seems to insist on the absolute immunity theory with its most strict version and to be ignorant of contemporary approach." [102]

As a consequence of such an attitude, lawsuits filed until 1982 against foreign states were rejected regardless of the subject matter of the lawsuits, resulting in recognizing full and definite to foreign states then even in cases undoubtedly related with the Law of Obligations such as traffic accident, immovable rent, and work (piece of art) contract.[103]

The decisions of the Court of Cassation show that the Court of Cassation strictly accepted the absolute immunity theory even if there was not a valid code, regulation etc. which regulated the doctrine of state immunity until 1982. It can be implied that the Court of Cassation made these decisions in order to be compatible with the decision made by the legal authorities of other countries. However, as the practice shifted from absolute immunity theory to the restrictive immunity theory during the twentieth century, the Court of Cassation had to examine these practices. After their examination, the Court of Cassation were able to change its decisions and made decisions relative to the restrictive immunity theory as there was not any binding law until 1982.

Examining decisions of the Court of Cassation made after the law enacted in 1982, it can be seen that the Court of Cassation did not recognize judicial immunity due to the foreign state's actions resulting from private law. As a result of abovementioned decisions, the Court of Cassation can be said to have regarded as actions arising from private law, the rental agreements, plea for determining of

[102] Quoted in Yılmaz Altuğ, *Devletler Hususi Hukukunda Yargı Yetkisi,* (İstanbul : Sermet Matbaası, 1979), p. 109.

[103] Rona Aybay, "Yargıtay İçtihatlarına göre Yabancı Devletin Yargı Bağışıklığı", *TBB Dergisi*, No:72, 2007, p. 110.

working as an insured worker, libel suit due to attack on personal rights, and claim for damages arising from traffic accidents. However, in another decision of the 4th Civil Chamber under the Court of Cassation dated 1987/7309 E., 1987/7373 K. and 12.10.1987, it was decided that the legal dispute arising from crashing of a warship belonging to a foreign state with one belonging to Turkish State within Turkish inland waters cannot be noted as a private law dispute arising from a foreign state's committing actions like a natural person; likewise, in decision of the 11th Civil Chamber of the Court of Cassation dated 1986/5126 E, 1986/5942 K, and 12.11.1986, the damage caused by a warship owned by a foreign state crashing in Turkish inland water is not regarded as a private law affair. Departing from the justification that warships are entitled to absolute immunity, the decision is criticized as damage caused by a state in a crashing arises from a private law affair and crashing in the sea is subject to private law provisions and thus it is not applicable to exercise legal authority. [104] Also in abovementioned decision dated 1985/5190 E,1986/2436 K. and 17.03.1986, the lawsuit opened as a result of damage incurred by the oil tanker attacked by the aircrafts of Iraq in the Persian Gulf and death of three seamen, the plaintiff's demand for appeals was rejected on the ground that, considering nature of the material case, Iraq state cannot be judged as the damage caused by a war craft belonging to one of the states engaged in war onto the citizen of a third party does not arise in relation with private lawrules ; rather, it is an initiative of sovereignty and there is judicial immunity.

Though the law enacted in 1982 does not give detail which acts arise from private law affairs and which acts arise from sovereignty initiatives, as seen in these decisions, even in cases where actions of warships fall under private law, they cannot be judged by Turkish courts because they are independence representatives of the state whose flag they carry, and it can be said that case law is formed by the Court of Cassation claiming that they are entitled to state immunity. From Rona Aybay's point of view, it would be more appropriate to interpret that the state

[104] Aysel Çelikel, *Milletlerarası Özel Hukuk*, (İstanbul : Beta Basım), 2009, p. 567.

immunity would be granted to foreign warships as they are carrying the flags of the foreign state rather than interpreting that state immunity always granted to warships. As per article 33 addressing judicial immunity under the Law entered into force in 1982 (article 49 in the latter law), because legal responsibility arising from crashing taking place in Turkish inland waters is a liability arising from wrongful act and thus of private law rules, a foreign state has to be judged before the Turkish courts due to damaged caused by foreign state ships allocated for public service or foreign state warships, making it impossible for those states to claim judicial immunity. [105] Based on all these justifications, it is obvious that the decisions made by the Court of Cassation on this issue even after entering into force of the law regarding this matter are not appropriate.

Even though Turkey has taken quite long time to adopt the theory of restrictive immunity in comparison with developments related with state immunity in other countries, it can be said that Turkish legislation has enacted the restrictive immunity theory, , and made decisions in harmony with restrictive immunity applicable actions of the foreign state arising from private law and sovereignty leaving aside the Court of Cassation's attitude before enacting of the law in accordance with the provision in the law, and created a notable case law on this matter.

According to Aybay, case law established by the Court of Cassation after the enactment of the International Private and Civil Procedure Law is proper with the decisions given in relation with the restrictive immunity theory in international area and they should be followed up unless there emerge crucial reasons making it mandatory to leave such case laws. [106]

[105] Nomer and Şanlı, p. 376.

[106] Aybay, p. 120.

When examining the two important national adjustments about state immunity drawn up by the United States and United Kingdom which still in force, they adopted the theory of restrictive immunity and they preferred to put forth, at least to a certain extent, actions of a foreign state arising from private law and sovereignty, which is the most controversial issue about state immunity, and to guide courts by legal operation in this matter. In these acts of United States and United Kingdom regarding state immunity, unlike the Europe Convention, they accepted judicial immunity as the general principle and then listed exceptions of the immunity. Likewise, the European Convention on State Immunity and United Nations Convention on Jurisdictional Immunities of States and Their Property stipulate that immunity shall be applied to cases which are not listed after listing exhaustively the circumstances where judicial immunity cannot be recognized by making a distinction in terms of the foreign state's actions.

Bearing in mind the importance of the doctrine of state immunity, Turkey should address this subject more extensively in the light of both national legislations and international conventions mentioned above.

CHAPTER FIVE

CONCLUSION

In international law, the doctrine of state immunity means lack of authority of the domestic courts to exercise jurisdiction over a foreign state. Lack of authority does not mean that the foreign states are above the domestic states, but it means, due to the international norms and sovereignty principle, foreign states are immune before the domestic courts. It can also be said that the state immunity which is the doctrine of international law is a case impediment and restrains the domestic courts to exercise their authority.

State immunity is a right of a state in which the organs of the foreign state are accepted to be not responsible for their acts by the judicial organs of the domestic state. Not being responsible for the acts before the Courts of domestic states is the main reason for being sovereign and the equality of all sovereigns as well. The essential part of the doctrine of state immunity is that the defendant party has to be a state or a body of a state or state organ.

State immunity principle is actually a newer concept when compared with other main principles of international law and international relations. While the concept of modern sovereignty was being shaped through the ideas of philosophers, the state immunity principle subsequently emerged as a doctrine of international law. The origins of the doctrine of sovereign immunity were also historically traceable to the times when the State was personified in a king, who, according to the existing law, could do no wrong. [107]

[107]Manuel R. Garcia-Mora, "The Doctrine of Sovereign Immunity of Foreign States and Its Recent Modifications", *Virginia Law Review,* Vol. 42, No: 3, 1956, p. 336.

According to the *par in parem non habet imperium* principle (an equal has no power over an equal), a maxim of the feudal system in the Middle Ages, a sovereign cannot be called to account before the authority of another sovereign for any of its acts. This form of immunity is referred to as "absolute immunity" theory. However, growing participation of states in commercial transactions in early 20th century revealed that the "absolute immunity" theory could not meet problems arising from the private acts of states. As the commercial transactions and private acts of states increased, the "absolute immunity" theory was replaced by more restrictive interpretations. According to the "restrictive immunity" theory, unlike the absolute immunity theory, immunity can be granted to the acts of foreign states in terms of sovereign or political acts *(iure imperii)* but not to the commercial or private-law transactions of states *(iure gestionis).*

At the beginning of emerge period of this doctrine, the absolute immunity theory was abandoned by most of the states. The states which accepted the restrictive immunity theory reached a consensus on that the foreign states can only be called to account before the authority of another sovereign for their commercial or private-law transactions of states (*iure gestionis*), whereas the foreign states are immune to the acts of foreign states only, in terms of sovereign or political acts (*iure imperii*). Nevertheless, these states do not have a consensus on the definitions of commercial or private-law transactions of states and sovereign or political acts. On that basis, every state makes its decisions in conformity with its laws (lex fori), its understanding of sovereignty concept and precedent cases. According to Gündüz, the foreign state is not bound up with definition of immunity of the domestic state, and the foreign state always opposes the decision of the domestic state. If the foreign state believes its rightness, it can always bring the case before the international courts.

The juridical evolution of the state immunity principle has totally been influenced by the juridical philosophy and development of this theory accrued by decision of

courts.[108] The United States and United Kingdom examples are given in this thesis as they reveal the shift in doctrine regarding state immunity most clearly through the decisions given by their Courts and enacted Act regarding the state immunity. Despite the lack of initial written laws in both countries, they adopted the absolute immunity theory, which was the dominant view then, and created case law. Therefore, courts of the both states decided that the foreign states cannot be judged as they are sovereign states both. However, as states got into deeper commercial activities, the view that foreign states cannot be immune from all actions started to become predominant and the courts created new case laws in accordance with this view and the decisions of the Courts followed by the enactment of Acts which these states adopted the restrictive immunity theory.

The most important decision of the state immunity doctrine is the "The Schooner Exchange v. McFaddon"[109], which was made by the U.S Supreme Court in 1812. This decision affects both the doctrine and the court practices. With this decision, the US Court decided to grant immunity to the foreign state depending on equality, independence and dignity of states. When the decisions made by the US Court after the The most important decision of the state immunity doctrine is the "The Schooner Exchange v. McFaddon" examined, it can be easily seen that the US Courts relied on the Schooner Exchange v. McFaddon and granted immunity to all foreign states even if the dispute had been caused by merchant ships until the Tate Letter in 1952. The Tate Letter was one of the first and important attempts in United States to describe the restrictive immunity theory. This rule attempts to make a distinction between public or sovereign and private or commercial activities of a foreign state. The main aim of the Tate Letter was to forbid granting immunity to whole acts of foreign states as immunity should not be granted to *"iure gestions"* acts of foreign states as the foreign states have

[108] Ernest K. Bankas, *The State Immunity Controversy in International Law: Private Suits against Sovereign States in Domestic Courts*, (Berlin: Springer, 2005), p.13.

[109] Avaliable at http://supreme.justia.com/us/11/116/case.html, accessed on December 15, 2011.

sovereignty but should not be granted to *"iure imperii"* acts of states. However, the Tate Letter did not describe what the *"iure gestions"* or *"iure imperii"* acts of the state were and did not give a clear distinction between these acts. In 1976 the United States enacted the Foreign Sovereign Immunities Act and officially accepted the restrictive immunity theory.

In 1880, the English Appellate Court made the "Parlement Belge" decision inspired by "The Schooner Exchange v. McFaddon" decision of the U.S Supreme Court, and this "Parlement Belge" decision which is given depending on the absolute immunity theory became the case law of doctrine of state immunity in United Kingdom. Even if the restrictive immunity theory was gradually recognized by other countries, United Kingdom Courts could not change their views regarding the absolute immunity theory as the judges are obliged to respect the precedents established by prior decisions.[110] Until 1975, the UK Courts made their decisions in relation with the Parlement Belge decision and granted immunity to all foreign states even if their acts could be described as private acts. However, in 1977, upon making of the Trendtex Trading Corporation Ltd v. Central Bank of Nigeria decision, the UK Courts made a revolution in their case law and stated that state immunity would not be granted to commercial transactions of the foreign states. In 1978 the United Kingdom enacted the the United Kingdom State Immunity Act and absolute immunity rule turned to restrictive immunity where a foreign state can be sued in English courts in some conditions which are described in the related act.

As the doctrine of state immunity became an important topic between the states due to the increased commercial activities and the practises of the states changed, the importance of this doctrine also increased in the international area. One of the most significant attempts to constitute a harmony for state immunity doctrine was the European Convention on State Immunity dated 1972. The Convention aims to

[110] Gündüz, p.210.

establish common rules relating to the scope of the immunity of one Party from the jurisdiction of the courts of another Party This applies when the Party in question accepts the jurisdiction of the court and in proceedings relating to work contracts, participation in a company or association, industrial, commercial or financial activities; rights over immovable property in the State where the court is situated; redress for injury to persons or damage to property. The Convention specifies the rules concerning the proceedings against a Party in a court of another Party and the effects of judgments that Parties agreed to give them. According to Article 15 of the European Convention on State Immunity 1972, a Contracting State shall be entitled to immunity from the jurisdiction of the courts of another Contracting State if the proceedings do not fall within Articles 1 to 14; the court shall decline to entertain such proceedings even if the State does not appear. Articles from 1 to14 list the situations which state immunity cannot be claimed by the foreign State in the domestic State.

The United Nations Convention on Jurisdictional Immunities of States and Their Property[111] is the first modern multilateral instrument to articulate a comprehensive approach to issues of state or sovereign immunity from suits in foreign courts and it embraces the so-called restrictive theory of sovereign immunity under which governments are subject to essentially the same jurisdictional rules as private entities in respect of their commercial transactions.[112]

As the Convention would have entered into force on the thirtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession according to Article 30, the United Nations Convention on

[111] Avaliable at http://untreaty.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf , accessed on December 03, 2012.

[112] David Stewart, "The Un Convention on Jurisdictional Immunities of States and Their Property", *The American Journal of International Law*, Vol. 99, No: 1, 2005, p.194.

Jurisdictional Immunities of States and Their Property is not yet in force. The states which have their own legislation about the state immunity have the main concern about the Convention. There are concerns if the United Kingdom should become a party to the Convention by signing and ratifying it as United Kingdom has its own legislation, the State Immunity Act, and if there will be any conflicting between the Convention and national legislation. Turkey neither signed nor ratified the related Convention. As there are several discussions about the results of the Convention after the ratification by thirty stated, Turkey may take a position to examine the discussions and results of the Convention and decide to sign and ratify after the outcomes.

The decisions of the Court of Cassation given in this thesis show that the Court of Cassation strictly accepted the absolute immunity theory even if there was not a valid code, regulation etc. which regulated the doctrine of state immunity until 1982. It can be implied that the Court of Cassation made these decisions in order to be compatible with the decision made by the legal authorities of other countries. However, as the practice shifted from absolute immunity theory to the restrictive immunity theory during the twentieth century, the Court of Cassation had to examine these practices. After their examination, the Court of Cassation were able to change its decisions and made decisions relative to the restrictive immunity theory as there was not any binding law until 1982.

In 1982, Turkey finally adopted the doctrine of "restrictive immunity" with article 33 of the International Private and Civil Procedure Law with the no.2675. Article 33 of the International Private and Civil Procedure Law with the no.2675 was as follows;

Article 33: Exemptions of the state immunity principle:
"State immunity cannot be recognized to the private acts of foreign states.

It is possible to make a notification to the diplomatic representative of the foreign state."

It is stated in the preamble of the Article 33 titled State Immunity of Foreign States that state immunity cannot be recognized in cases excepted from initiatives of foreign states on the basis of its sovereignty rights, and in conflicts arising from its committing private legal acts and commercial affairs like a natural person.

That article of the draft is in conformity with the Europe Convention on State Immunity in terms of judicial immunity of the state. As Turkey is not a member of European Union, the Europe Convention on State Immunity could not be signed by Turkey. As the related Convention has an importance regarding the doctrine of state immunity as it was the first significant attempt to constitute a harmony between member states in which conditions can state immunity be granted to a foreign state or not, Turkey took this Convention as a guideline while preparing the article 33 of the International Private and Civil Procedure Law with the no.2675.

In 2007 the International Private and Civil Procedure Law with the no.2675 was repealed and a new International Private and Civil Procedure Law with the no.5718 entered into force. Only the number of the article has changed. In the latter International Private and Civil Procedure Law, exemptions of the state immunity principle were arranged with the Article 49. Even though the International Private and Civil Procedure Law was amended, the preamble of the article 33 was preserved since the content of the related article regarding the doctrine of state immunity remained unchanged.

Even though Turkey has taken quite long time to adopt the theory of restrictive immunity in comparison with developments related with state immunity in other countries, it can be said that Turkish legislation has enacted the restrictive

immunity theory, , and made decisions in harmony with restrictive immunity applicable actions of the foreign state arising from private law and sovereignty leaving aside the Court of Cassation's attitude before enacting of the law in accordance with the provision in the law, and created a notable case law on this matter.

The thesis concludes that for consistency between the decisions of both the First Instance Courts and Court of Cassation, the legislator can revise the Article 49 of the International Private and Civil Procedure Law with the no.5718 in the light of the European Convention on State Immunity and the United Nations Convention on Jurisdictional Immunities of States and Their Property in order to enhance the content of article 49 and can draw a more significant frame about the doctrine state immunity by specifying the rules more detailed. However, this content cannot be in a very strict way which can lead executive body to restrict the judicial body's independence while deciding about the state immunity doctrine.

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Yargıtay Kararları Dergisi

APPENDIX

TEZ FOTOKOPİSİ İZİN FORMU

ENSTİTÜ

Fen Bilimleri Enstitüsü	
Sosyal Bilimler Enstitüsü	X
Uygulamalı Matematik Enstitüsü	
Enformatik Enstitüsü	
Deniz Bilimleri Enstitüsü	

YAZARIN

Soyadı : Kök
Adı : İdil Buse
Bölümü: Uluslararası İlişkiler

TEZİN ADI (İngilizce) : State Immunity in Turkish Law: An Analysis of the Doctrine of State Immunity in the Light of the Decisions of the Turkish Court of Cassation

TEZİN TÜRÜ : Yüksek Lisans [X] Doktora [ ]

1. Tezimin tamamından kaynak gösterilmek şartıyla fotokopi alınabilir. [ ]
2. Tezimin içindekiler sayfası, özet, indeks sayfalarından ve/veya bir bölümünden kaynak gösterilmek şartıyla fotokopi alınabilir. [ ]
3. Tezimden bir (1) yıl süreyle fotokopi alınamaz. [X]

TEZİN KÜTÜPHANEYE TESLİM TARİHİ: