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**Effectiveness of human rights and state Immunity: improving the theoretical socio-legal background concerning human rights rise and protection.**

Candidate

Camila Vicenci Witt

Supervisor

Prof. Dr. Maria Cristina Reale
Effectiveness of human rights and state immunity: improving the theoretical socio-legal background concerning human rights rise and protection.

Camila Vicenci Witt

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To Thomas
ABSTRACT

This thesis shall study the relationship between effectiveness of human rights and state immunity from a socio-legal perspective. The first chapter will focus on international law as a legal system, addressing its origins, functions and characteristics. The second chapter will examine the framework of state immunity, analyzing its conceptual configuration, historical development and differentiating it from similar notions. In the third chapter, the construction of human rights will be addressed, starting by their historical affirmation, studying their implementation and examining the right to reparations. The fourth chapter will focus on challenging immunity to make human rights effective, and it will analyze the case law on the matter, as well as the most significant theoretical approaches to the subject. The fifth chapter will present two original contributions to the discussion: one deconstructing the foundations of state immunity and another one focusing on the victim’s perspective, to finally draw some conclusions and try to balance the primacy granted to the protection of Human Rights in the 21st Century with traditional norms and institutes of International Law, such as State Immunity.

Key-words: State Immunity – Human Rights – International Law – Socio-Legal Perspective
This thesis’ idea actually started in 2008 when, in my masters programme in Brazil, my former supervisor assigned me a seminar on state immunity in cases of violations of human rights before domestic courts. At that time, I knew very little about the subject, but realizing how people who suffered grotesque violations of their dignity, who were sometimes tortured, persecuted and who often lost their beloved ones could not, in the majority of the cases, obtain redress, left me with a profound feeling of injustice. Yes, I was naïve enough to believe, even after five years of Law School, that Law should be about justice, and I do not have words to thank my parents, Sandra and Marcio, for keeping what many call an “illusion” alive in me. My parents have always fought injustice in their own way, and they never ceased to be shocked by it. They have my eternal gratitude for teaching me that one should never see injustice as something normal, and that one should act upon it in its own way.

My parents have also supported me financially when I chose the academic life instead of getting “a real job”, and even when I finally started teaching at the university, travelling 6 hours each way every week, they were always proud, encouraging and supportive. Moreover, it was a relief to be able to talk to a mother that understands that inexorable need of hand-washing your jeans or the irresistible urge to re-organize your Tupperware supply that comes when you have to sit and write your thesis.

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Tous ces crimes d'Etat qu'on fait pour la couronne,
Le ciel nous en absout alors qu'il nous la donne,
Et dans le sacré rang où sa faveur l'a mis,
Le passé devient juste et l'avenir permis.
Qui peut y parvenir ne peut être coupable ;
Quoi qu'il ait fait ou fasse, il est inviolable :
Nous lui devons nos biens, nos jours sont en sa main,
Et jamais on n'a droit sur ceux du souverain

Cinna, act V, scene 2

Pierre Corneille
INTRODUCTION

C'est devenu une banalité de dire que le droit international est en pleine transformation. Non seulement ses emprises sur la vie des peuples se multiplient, mais les conceptions qui l’inspirent subissent un profond renouvellement... S’il n’y a point, à vrai dire, de solutions de continuité, il y a des phases d’évolution rapide, où le paysage ancien se désagrège sous les regards du spectateur, pour laisser apparaître l’ébauche d’un paysage nouveau, dont le temps précisera les contours et qui finira par régner sans partage. Que nous soyons dans une telle période, trop de signes l’attestent pour qu’il soit permis d’en douter. C’est ce qui fait aujourd’hui l’intérêt passionnant du droit international. C’est ce qui fait en même temps la difficulté de son étude.

Maurice Bourquin, Recueil des Cours, 1931

When Professor Victor Rosenblum wrote his annual message as the President of the Law and Society Association, in 1970, he quoted, approvingly, a letter he received from a college student. "In today’s world, the relationship between law and social change seems to me to be the overriding problem facing any person or group concerned with the relationship between law and society"—said the student. The same letter continued affirming that “the social-scientific investigation of the variables which produce varying degrees of legal effectiveness [...] seems to me to be essential to the understanding of the relationship between law and social change". The student concluded, with the praise of Mr. Rosenblum, saying that “such a theory should be useful to law makers as a guide in using law as an instrument of social policy [...] and in the evaluation of specific rules of law to determine how well they achieve their ends and how they might be modified to better achieve those ends”.

1 Professor Victor Rosenblum, approvingly quoting the words of a Reed College junior in his message as the President of the Law and Society Association, in 1970; in SARAT, 1985, p. 23.
Law and society are intrinsically related and, despite the fact that it is not possible to envisage social relations between different persons or groups of persons without a regulating legal order that establishes rights and duties to be respected (MENEZES, 2013), and while almost everyone concedes that law is to a reasonable extent a social product, legal literature often underestimates such interplay, and is often inclined to describe law as some kind of independent and meta-social life (FRIEDMAN, 1975), hence paying little attention to the social side of law. If the study of law “in general” tends to overlook the social phenomena, international law is no exception to that rule and, in a field traditionally dominated by the prominence of the state, it is indeed easy to forget that the nature of international law should also be determined by the existing international society (BRIERLY, 1979).

In its genesis, International law had an evident concern about the situation of the individuals vis-à-vis the power of states. A thriving example of this initial setup of international law can be found in the works of Francisco de Victoria, who advocated the rights ownership by the Latin-American natives, criticizing and their subjugation by Spain in the XVIth century. Victoria’s ideals of natural law - and the consequent belief in intrinsic rights of human beings – later inspired the Dutch jurist Hugo Grotius, responsible for the classic conception of international law and, seeking the peaceful coexistence of nations, imposed restrictions on the sovereign power and made it clear that natural law, ethics and reason should guide relations among states, hence recognizing the role of individuals as subjects of Natural Law in the rising field of international law.

Despite this initial overview - quite favorable to the individual - international law was later strongly influenced by a voluntarist approach that, placing the states as the only protagonists of international law, endowed them with unlimited sovereignty, and only limited externally by the presence of other equally sovereign states, which could only be bound by rules emanating from their will. Therefore, the principles and values once so dear to Natural Law were
relegated to the background scene, as well as individuals and their rights. As a result, the framework of international law that emerged from the Peace of Westphalia and that took more precise contours on the Congress of Vienna and at the advent of World War I was the legal minimum necessary to regulate the relations of cooperation and coexistence among states in a decentralized system based on independence and sovereignty and, consequently, with no supreme political authority (CARRILLO SALCEDO, 2005). Such configuration of the international society in the XIXth century explains the little or no attention that was given to the role of the individual in this international law system, which was structured to regulate relations between states, subjects of international law par excellence in this light.

The twentieth century witnessed, however, a slow and gradual change in this scenario, and the sovereign state, little by little, ceased to be the "iron cage" of individuals, which allowed them to only communicate “legally” with the outside through its narrow bars (POLITIS, 1927). Primarily because of the atrocities committed against individuals during the Second World War, the international community turned its attention to the need to protect human rights and, despite its long history, the process of recognition of rights inherent to human beings was materialized in the international legal level only in 1948, with the adoption of the Universal Declaration of human rights (CANÇADO TRINDADE, 2003), which placed human dignity as a value to be pursued and preserved by the community of nations, thus consolidating a universal ethics on universal values to be followed by states (PIOVESAN, 2007).

Hence, history has created the context for a change in the relationship of law to violence in global politics, as “the normative foundations of the international legal order have shifted from an emphasis on state security—that is, security as defined by borders, statehood, territory, and so on—to a focus on human security, the security of persons and peoples” (TEITEL, 2003, p. 04). In an unstable and insecure world, says Teitel, it is the law of humanity that reshapes the discourse of international relations. (2003)
Consecrated unquestionably as the supreme value of national and global order, the protection of human rights has begun to influence, more and more decisively, classical institutes of international law primarily designed only for states, changing and altering conceptions considered hitherto immutable in favor of individuals. This is precisely the case of the institute which will be analyzed in the present work, the "ancient and solid customary rule" of foreign state's immunity from jurisdiction (REZEK, 2005), which is now challenged with increasing frequency by the doctrine and jurisprudence, seeking its mitigation when the case in question is related to human rights violations. Sovereignty is no longer considered a self-evident foundation for international law, and this change is leading the move from the state-centric normative discourse of global politics—which had prevailed until recently—to a far-ranging, transnational discourse, constructed more along humanity law lines in which references to changed subjectivity have consequences (TEITEL, 2003, p. 10).

In this regard, Vincenzo Ferrari (1995) affirms that the universalization of rights consecrated the recognition of individuals as holders of human rights, irrespective of their affiliation to different forms of social organizations or their social status, a process that has recently led to consider human rights in a transnational sphere, beyond state sovereignty, meaning that every individual which has acquired, at least potentially, the right to complain against the state, becomes not only a citizen of a state, but a citizen of the world. However, this scenario also implies the dissemination of a group of human rights which can only be transnational, such as the right to obtain reparation by the acts perpetrated by one state in the courts of a second state, and the transnational aspect of these rights becomes even more complex in our post-modern society, whose homogenization is accelerating the dissemination of images that are pre-selected from the beginning, limiting true choices and human creativity (FERRARI, 1995).
It has also been pointed out that the persistence of human rights abuses, mass killings and double standards in human rights interventionism represent “an evidence that human rights have not triumphed, and that the international law of human rights is ineffective and that very little moral progress has been achieved” (LANDMAN, 2005, p. 551). Hence, the aim of this thesis is not only to elucidate the social and legal framework regarding the interplay between state immunity and Humans Rights, but also to offer a case law overview of the matter, as well as theoretical approaches to equate the protection of human rights and state immunity according to the values and objectives of the international society today and, in the end, present two original approaches.

In brief, we believe that “the human rights regime opens alternative trajectories for the articulation of international norms” (LEVY; SZNAIDER, 2006, p. 667) and, specifically on the subject of state immunity in cases of human rights violations, it represents a demand for recognition that is addressed to Justice, meaning, in the words of Garapon, “a symbolic act by public nature: the victims, as all the legal community, have the need to see the inviolability of each one’s place publically reaffirmed, the intangibility of the right to have rights, the permanence of an essential legal connection that escapes from the political power” (GARAPON, 2002, p. 190).

To address this issue, this thesis will initially examine the foundations of international law, its historical trajectory, the influences it received from the changes in the international society and its particular rationale, focusing on its decentralized and horizontal character and on the absence of a normative hierarchy, as well as on the emergence of an international norm and on the international responsibility of the state. Those foundations will set the base for the second chapter, which shall analyze the framework of state immunity, concentrating on its conceptual configuration, dully clarifying its relation with institutes such as jurisdiction and international competence, to later exam the historical evolution of state immunity, from its remote roots to its contemporary configuration, to finally proceed to an individualization from similar notions, such as the Act of state doctrine, the political question and the non-justiciability. The
third chapter studies the construction of human rights, departing from its historical affirmation – including its remote antecedents until nowadays- to investigate its implementation on the global and regional levels, also addressing the right to reparation as a human right, as well as the different kinds of reparations.

The three first chapters are designed to proportionate a solid conceptual structure that is necessary in order to question premises and propose new approaches on the subject of human rights and state immunity. Therefore, chapter four challenges immunity to make human rights effective by presenting the case law regarding state immunity and human rights and theoretical approaches on that sense, as well as establishing a relationship between them. After that, chapter five offers a different tactic, as it question the foundations of immunity so that international law may give human rights the primacy that international society has acknowledged them, and it also turns its attention to the possible contributions from victim’s perspectives to enhance the socio-legal background on the matter, to finally draw some conclusions on the subject.

We are, of course, aware of the obstacles of such investigation. First, the subject suffers from what Levy and Sznaider called “a key omission of sociological analysis” (2006, p. 664), as “by large sociologists have avoided the subject of human rights and not developed any general theory of social rights as institutions (TURNER, 1993, p. 489). But, precisely by the absence of any firm ground, the subject also “presents a formidable foundation to elaborate on the conceptual significance of human rights in general and its relationship with sovereignty, in particular” (LEVY;SZNAIDER, 2006, p. 664).

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2 In this regard, this thesis will focus on immunity from jurisdiction (adjudication), and will not address immunity from execution, as the two institutes are considered to be separate and independent in international law. As Feldstein explains, “la inmunidad de jurisdicción impide que un Estado sea llevado ante los tribunales de otro Estado igualmente soberano. En cambio, la inmunidad de ejecución obsta a que los órganos estatales ejecuten una sentencia que eventualmente se hubiere dictado contra un Estado extranjero” (2011, p.02).
Prosper Weil (1992) also warned against other difficulties by noting that, if we look closer, the theme of “change” is far from monolithic, as it reports to a multiple of approaches that cross and intersect. Indeed, the change of international law can be seen as the consequence or reflection, in terms of rules of law, of the change in the surrounding world, but it can also be designed as a factor, a lever, a motor of this change, as for some, international law changes (or should change) because the world is changing; for others, it changes (or should change) for the world to change (WEIL, 1992). Hence the eternal question, that Weil poses once more: “is society that transforms the law, or law that transforms society?” (WEIL, 1992, p. 27). As Austin Sarat states,

What is demanded is that law guide social relations in terms of articulated norms. What is expected is that law will make a difference, that the social order will be improved by legal decisions. Every gap must be filled and techniques must be developed for insuring the redress of legal inefficiency. Thus, a particular type of legal reasoning stimulates a demand for legal effectiveness research. (SARAT, 1985, p. 25)

This thesis will try to offer alternatives for a much desired change towards the effectiveness of Human rights in cases involving state immunity, and we hope it can make a difference someday, being the social order improved by legal decisions that take this research and its conclusions into consideration.
CHAPTER ONE: INTERNATIONAL LAW AS A SPECIFIC LEGAL SYSTEM

The subject chosen for this thesis presents some difficulties, since it addresses topics that are complex, and even more complex is their interaction. When talking about effectiveness of human rights norms before domestic courts and the case of state immunity, a multifaceted view is necessary: human rights norms and state immunity are a part of international law, but also a part of the municipal law of each state; domestic courts pertain to the institutional structure of the state, but they refer (and are influenced by) international law adjudicating on civil claims against human rights violations. The fact that international law has a unique configuration, with different subjects, procedures and composition than the ones seen in the domestic law systems, requires a preliminary examination of such specific features in order to further examine the relations between state immunity and human rights.

Every society, says Friedman, has the necessity of some sort of mechanism to settle disputes and to enforce essential norms, as every society also needs some means for changing norms and applying them to new situations and, in this sense, every group or society has law, even if they might lack a “legal system” in the sense of formal institutions that specialize in norms, dispute settlement and social control, such as courts, judges and lawyers (FRIEDMAN, 1975). Law is, therefore, an inherent tool of society, since it is not

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3 Finnemore and Sikkink (1998, p. 891) present an interesting and elucidative perspective on the subject: “There is general agreement on the definition of a norm as a standard of appropriate behavior for actors with a given identity, but a number of related conceptual issues still cause confusion and debate. First, whereas constructivists in political science talk a language of norms, sociologists talk a language of “institutions” to refer to these same behavioral rules. Thus, elsewhere in this issue March and Olsen define “institution” as “a relatively stable collection of practices and rules defining appropriate behavior for specific groups of actors in specific situations.” One difference between “norm” and “institution” (in the sociological sense) is aggregation: the norm definition isolates single standards of behavior, whereas institutions emphasize the way in which behavioral rules are structured together and interrelate (a “collection of practices and rules”). The danger in using the norm language is that it can obscure distinct and interrelated elements of social institutions. If not used carefully. For example, political scientists tend to slip into discussions of “sovereignty” or “slavery” as if they were norms, when in fact they are (or were) collections of norms and the mix of rules and practices that structure these institutions has varied significantly over time. Used carefully, however, norm language can help to steer scholars toward looking inside social institutions and considering the components of social institutions as well as the way these elements are renegotiated into new arrangements over time to create new patterns of politics.”
possible to imagine the configuration of social relations among different persons and peoples without some kind of legal order determining rights and duties that should be respected by the parties.

International law is not an exception to that rule, and here too society determines the nature, shape and content of the norms deemed to regulate the relations among the subjects involved in these social relations. International society, however, has a composition quite diverse from the one seen in our everyday lives and, consequently, international law reflects this diversity with a different configuration and logic that shall be examined next.

1.1 The Origins of international law

The exact moment of international law birth is not easy to precise, since it has been shaped together with the social groups development, beginning with the relations among primitive groups, tribes and ancient civilizations, gradually evolving to more complex societies, accompanying the decline translated in the feudal societies, the formation of kingdoms and, finally, the national states. Indeed, the vagueness and uncertainty of the expression “international law” directs to a multitude of answers to the question of when did it actually begin and, as Neff explains,

If by 'international law' is meant merely the ensemble of methods or devices which give an element of predictability to international relations, then origin may be placed virtually as far back as recorded history itself. If by 'international law is meant a more or

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4 Neff illustrates how such relations were already taking place in ancient societies: “For a vivid indication of how persons from even the most diverse cultures can relate to one another in a peaceful, predictable and mutually beneficial fashion, it is difficult to top description of 'silent trading' between the Carthaginians and an unnamed North African tribe in about the Sixth century BC. When the Carthaginians arrived in the tribe’s area by ship, they would unload a pile of goods from their vessels, leave them on the beach and then return to their boats and send a smoke signal the natives would to come and inspect the goods on their own, leave a pile of gold, and retire. Then the Carthaginians would return; and, if satisfied that the gold represented a fair Price, they would take it and depart- If not satisfied. they would again retire to their ships: and the natives would return to leave more gold. The process would continue until both sides were content, at which point the Carthaginians would sail away with their gold, without a word exchanged between the two groups” (NEFF, 2010, p. 04)
less comprehensive substantive code of conduct applying to nations, then the late classical period and Middle Ages was the time of its birth. If ‘international law’ is taken to mean a set of substantive principles applying to states as such, then the seventeenth century would be the starting time. If law is defined as the integration of the world at large into something like a single community under a rule of law, then the nineteenth century would be the earliest date (perhaps a trifle optimistically). If, finally, ‘international law’ is understood to mean enactments and judicial decisions of a World government, then its birth lies (if at all) somewhere in the future—and, in all the distant future at that (NEFF, 2010, p. 04).

As Friedman acknowledges, there is no “true” definition of law, since definitions flow from the aim of function of the definer, and the same thought can be applied to international law. However, most scholars do agree that, despite the existence of normative elements in the relations between different groups of people in the past, in the greek and mesopotamic civilizations, in ancient Rome, in the abundant and notorious contribution legal thinkers affiliated to natural law⁵, such as Francisco de Vitória, Francisco Suárez, Alberico Gentili, Hugo Grotius, Wolff and Vatel, and, later on, on the writings of the so called voluntarist⁶ authors, such as Hobbes, Hegel and Jellinek, international law was constituted as a normative legal system, thus consolidating its theoretical foundations and structuring itself as a legal

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⁵Regarding the concept of natural law, we believe that the definition brought by Brierly is quite elucidative: “par « naturel, » nous entendons simplement ce qui devrait être, conformément à une certaine fin que nous acceptons pour criterium, et par opposition à ce qui est [...] Les droits des États sont « naturels » parce que la condition d’existence des États à l’égard les uns des autres est tenue pour un « état de nature » ; et la conception d’un a état de nature » englobe toute une philosophie de la nature des États et du droit. Car l’état de nature est la condition pré-politique du genre humain, non pas en ce sens que les hommes aient nécessairement jamais réalisé cette condition dans l’histoire, mais en ce sens qu’ils la réaliseraient si nous pouvions les imaginer vivant une vie commune sans un état qui ordonne leurs vies. L’objet d’une conception comme celle-là est d’expliquer et de justifier la fondation des États, qu’elle représente comme des institutions que les hommes conviennent d’établir pour substituer la loi et l’ordre à l’anarchie incommode de leur condition naturelle” (BRIERLY, 1928, p. 470-471)

⁶According to Brierly, “par un paradoxe curieux, la théorie du consentement comme base du droit international est la théorie élue de l’école qui se nomme elle-même « positiviste » Un « positiviste, » par définition, reconnaît pour loi tout ce qui est « posé » comme loi par les États, et rien d’autre : et il fait profession de découvrir ce que les États ont « posé » comme loi en se référant uniquement à leurs usages, qu’il explique comme fondés sur leur consentement tacite, et à leurs traités, qui sont fondés sur leur consentement exprès. Mais en fait la pratique des États eux-mêmes n’est pas limitée de cette manière, car ils tiennent habituellement pour valides et obligatoires des principes qui ne dérivent d’aucune de ces sources. A peu près tous les arguments juridiques des diplomates, ou les procédures devant un tribunal international quelconque, traissent la recherche d’une règle de loi adéquate dans un champ d’exploration beaucoup plus large que ne l’admet la position positiviste.(1928, p. 477)
mechanism\textsuperscript{7}, in the time of the Peace of Westphalia\textsuperscript{8} (1648), which ended the 30 year war between catholic and protestant kingdoms.

By then, a conference system that aimed at elaborating normative documents is inaugurated, and it consecrates the equality and independence of the Christian and protestant kingdoms, and the Peace of Westphalia is then considered as starting moment of the constitution of the international society: the states recognized their mutual independence and the respect to the sovereignty and identity of other states, and established basic rules for their peaceful coexistence and cooperation (MENEZES, 2013). The so called “Westphalian order” or paradigm placed great importance to the figure of the state, that was, at that time, the only real subject of international law, endowed with full competences and being able to establish relations with other states, celebrate treaties, create and change norms and access international mechanisms to settle controversies.

\textsuperscript{7}The mid to late 19th century period then marks the beginning of modern ‘international law’ per se. The late medieval \textit{ius gentium} (15th and 16th centuries) referred mostly to the right of natural partnership and communication. It implied the notion of a ‘universal’ realm (\textit{res publica christiana}), where Christians could enjoy and be accountable to the same rights and duties. The shift to \textit{ius inter gentes} (16th and 17th centuries) marks the turn to more independent state-like entities, and implies the emergence of concerted agreements and treaties ‘between’ nations as to the laws of war, trade and communication. \textit{Ius inter gentes} develops more subjective rights for international actors, the concept of \textit{rayas} (divisions of the world), and the concept of terra nullius, i.e. vacant space crucial to early modern colonisations and their doctrinal justifications. Finally, the \textit{ius publicum europaeum} (17th and 18th centuries) is also referred to as the \textit{Droit Public de l'Europe} (DPE). It consists in a more technically, professionally and spatially demarcated framework for European relations. (PAL, 2012, p. 24)

\textsuperscript{8}As Tomuschat explains, “In 1648, through the peace treaties of Münster and Osnabrück, all the states of the German Empire, which until then had been struggling to emancipate themselves from the —ill-defined powers of the Emperor, received the right to act on the international level without requiring any consent for their dealings:

“each of the states of the Empire shall freely and for ever enjoy the Right of making Alliances among themselves, or with Foreigners, for the Preservation and Security of every one of them: provided nevertheless that these Alliances be neither against the Emperor nor the Empire, nor the public Peace ...”

As can be seen from this text, the rights of the individual states extended even to issues of security, the most delicate subject-matter in any public entity. As an almost natural consequence, the bonds of allegiance to the Emperor and the Empire vanished more and more. Thus, the provision, which originally had a fairly limited scope ratione personae, could become the blueprint for the development of the European system of inter-state relations in the following decades and centuries.” (TOMUSCHAT, 1999, p. 93)
Later on, other subjects were also recognized, but with more restrict prerogatives, such as the international organizations, whose legal personality derives from the will of the states that created it and whose competences are not as wide as the ones from the states, but rather specialized, that are described in their constitutive treaty. According to Dupuy,

International law was, until recently, almost exclusively an interstate law. Certainly there were, apart from states, some subjects of the droit des gens, but their small number did not allow their recognition. They were only exceptions to the principle of monopoly by the state as a subject of international law. The advent, in the late nineteenth century and again after the First World War, of international organizations, did not seem to profoundly affect the structure of international society. This was due, firstly, to quantitative considerations: these organizations were still scarce, with not enough weight in international relations, because of their fable competences and, secondly, to qualitative considerations resulting from the predisposition of doctrine and of rulers to see in international organizations a simple framework for interstate activities and deny them the quality of subject of the law of nations. Thus the League of Nations itself has not been granted a legal status comparable to that afforded to states. Such shallow analysis is also no longer possible. Since World War II, international organizations and non-governmental organizations are more than a thousand (DUPUY, 1960, p. 461)

Multinational corporations, Non-Governmental Organizations and individuals are considered to have a “fragmentary” legal personality in international law, manifested only in limited competences\(^9\), while other entities, such as belligerents, insurgents, regional blocs and movements of national liberation may act in the international society only in specific cases.

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\(^9\) Some NGOs can take part in the discussions carried out in international organizations, specially as observers, but with no right to vote; individuals may present claims in tribunals that recognize this possibility, such as the European Court of Human Rights and, along with the multinational corporations, they are the object of international norms.
1.2 The Functions of international law

The function of a legal system is, according to Friedman, to "distribute and maintain an allocation of values that society feels to be right" (1975, p. 17). But what does “international society” feels to be right?

As Prosper Weil notes (1983), international law is the aggregate of legal rules governing international relations, and is therefore a "normative order "and a" social organization factor, fully independent facets from one another. The content of this function of "social organization", ie the purpose of international law was, from its inception, to "ensure coexistence - in peace if possible; in war, if necessary - and the cooperation of basically diverse entities that make up a fundamentally pluralistic society"(WEIL, 1983, p. 418). This society that was
horizontal, as were its predecessors, and continued to exhibit, as the ones before it, a decentralization of the political power (WEIL, 1983).

Hence, the emergence of legal rules under international law intended to temper this condition of "an-archy", in the proper sense of the term, and was stimulated - as it always happened - by two needs: first, to allow these heterogeneous and equal states to live side by side and, as far as possible, to have peaceable relationships between them; second, to meet the common interests that did not take long to come above the diversity of the states (WEIL, 1983). These have always been the twin roots of international law, and these have always been its two essential functions: on the one hand, to reduce the anarchy through the development of norms of conduct, allowing orderly relations to be established between sovereign and equal states and, on the other hand, to serve the common goals of the international community (WEIL, 1983).

Coexistence and common goals: these two functions of classical international law - inherited from the jus inter gentes of the past - would find their expression in the dictum of the Lotus case10: “international law governs relations between independent states [...] to regulate relations between these coexisting independent communities or with the purpose of achieving common goals”(WEIL, 1983). This is possible, says Anzilotti (1929), only to the extent that the states that participate in the international society do not act in an arbitrary manner, but their conduct conform to rules that limit the freedom of action of each state and establish how they should proceed in their mutual relations. International law is, therefore, “a regulatory system of the society of states” (ANZILOTTI, 1929, p. 43)

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10 According to the Permanent Court of Justice, “international law governs relations between independent states. The rules of law binding upon states therefor emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of states cannot therefore be presumed". Available at <http://www.icj-cij.org/pci/serie_A/A_10/30_Lotus_Arret.pdf>
To these two core functions of international law, coexistence and cooperation, a third one, that presupposes and that precedes them, should be added: the territorial function, which ensures respect for each country's sovereignty within its borders (WEIL, 1992). According to the model that has been built in Europe in the late Middle Ages and has since then expanded worldwide, the international society is built around the concept of territory. The international landscape is characterized by the juxtaposition of territorial cells, each of which reports to a state which carries what is called, significantly, territorial sovereignty. (WEIL, 1992, p. 30)

1.3 The Lack of a Central Power Guaranteeing the Rule of Law

As explained by Carrillo Salcedo (1997), as international law is required to govern a fundamentally different society from that within the state, it therefore has specific functions adapted to the needs of that society: international law is applicable to relations among independent entities, and so has features which distinguish it from internal state law. In international law, the states are simultaneously “the creators and subjects of its norms; as sole authority on the laws they formulate, states themselves assess their meaning and scope. It is thus the individual states that interpret the obligations to which they - like their partners, the other states - are subject.” (CARRILLO SALCEDO, 1997, p. 583). There is not a central organ or power that dictates norms from above, as the legislative bodies within the states, and finally, it is the states themselves the ones who decide as to the legality of their own conduct or that of third parties towards them: “hence the fragmentary nature of international law, and its relativism, the consequence of the equal nature and poorly institutionalized structure of international society” (CARRILLO SALCEDO, 1997, p. 583). The international society is described as a horizontal and coordinated order, different from the vertical and subordinated order that is seen at the domestic
level: in theory, all states are equal, and there is no central power or authority to which they submit.

Figure 2: Configuration of the national legal order

Figure 3: Configuration of the international legal order

Therefore, for an obligation to be legally binding to sovereign states, they must have taken part in its development process, accepting it and, according to Carrillo Salcedo, “except for the principles of international law, which are inherent in the existence of the state and which it can’t escape if it wants to
keep its status as such [state], no legal rule is universal in scope "(1997, p. 584). The sovereignty of states means, therefore, not only their right to refuse to appear before a jurisdiction with which they disagree\textsuperscript{11} but also that most rules of international law are binding only on those subjects who have accepted them as such. Thus,

\begin{quote}
The relativism of international law may thus lead to a clash between the unilateral legal claims of states, as each state is free to assess the scope of the obligations it has assumed and is on an equal footing with every other state as regards the interpretation of its commitments. As Combacau has noted,\textquoteright international norms are relative because their scope varies according to states\textquoteright commitments: each state which has actively or passively subjected itself to the effects of those norms, is bound by them to every other state which has done the same. To be sure, the sovereign state must comply with international law, but it is up to each state to assess the requirements of that law in each situation and in each specific case (CARRILLO SALCEDO, 1997, p. 584).
\end{quote}

\section{1.4 No distinction between formal and material sources}

As Brownlie notes (2008), it is common that law authors distinguish between formal and material sources, the first being procedures and legal methods to create default rules that are binding on the recipient, while the latter provide evidence of the of existence rules that, when proved, have the status of legally binding rules of general application. In this sense, the doctrine explains that the real or material sources would be the true and fundamental ones, while formal or positive sources would provide a positive shape to the preexisting objective right, appearing in the guise of accepted rules and sanctioned by the government (ACCIOLY, NASCIMENTO E SILVA, CASELLA, 2010). Under the ambit of international law, "a real source would be the general principles of law and formal sources, custom and treaties. The content would be in the first category, and formal sources would be their respective manifestations" (ACCIOLY, NASCIMENTO AND SILVA, CASELLA, 2010, p. 141).

\textsuperscript{11} as in the case of voluntary submission of the arbitration courts, and the need for an expression of consent to be subject to the International Court of Justice
However, such distinction between formal and material sources, common to the national law systems, in which there is a constitutional apparatus of normative production that assign to the rules their appointed status, is inadequate to the scope of international relations. From the perspective of international law, the use of the term "formal source" would be "strange and misleading because the reader is led to think of the constitutional mechanisms of legal production that exist in the states" (BROWNLIE, 2008, p. 03), while, as it is well known, such a mechanism does not exist to create international law rules.

Verifying the diverse nature of international law, in which a superior legislative authority to subject all state bodies does not exist, it can be said that the first distinction on the basis of the sources is the inexistence of what is usually called "formal source" in international law, since the decisions of the International Court of Justice, the unanimous resolutions of the United Nations General Assembly and even multilateral treaties for the codification and development of international law rules lack the ability to be legally binding to all states (BROWNLIE, 2008). Thus, the traditional distinction between formal and material sources applicable to national law is difficult to sustain in terms of international law, and what matters in this sense is the variety of materials sources - decisions of the International Court of Justice, the General Assembly resolutions and multilateral treaties on normative production, for example - as evidence of the existence of a consensus among states on certain rules or practices (BROWNLIE, 2008).

1.5 Absence of a hierarchy among the sources of international law

In domestic law, if other sources of law subsist, they will necessarily be inserted or positioned in a subordinate position in relation to the law. Indeed, as explained Dinah Shelton (2006), legal systems generally establish a hierarchy
of norms based on the particular source from which the norms are derived, and in national legal systems, it is common for the fundamental values of society to gain constitutional status, thus taking precedence in case of conflict with administrative laws or regulations, while the latter must also comply with the law\(^{12}\). Still, the written law usually takes precedence over that unwritten or customary law, legal norms still prevail over non-legal rules (political or moral ones), and "legal reasoning applied in practice is therefore naturally hierarchical, establishing relationships and orders between normative statements and levels of authority" (SHELTON, 2006, p.291).

In international law, the unrestrained will of states is also reflected in the international legislative process, where there is no hierarchy among the main sources of international law, such as treaties and custom\(^{13}\). In this way, bilateral or multilateral rules created by a treaty are not superior to the general international customary law, with such standards at the same hierarchical level, enjoying the same status (CASSESE, 2005). As a result of this reality, the relationship between rules from different sources within the international law is governed by three principles that, in other jurisdictions, regulate relations between rules that derive from the same source, i.e., a later provision repealing the previous norm (\textit{lex posterior derogat priori}); a subsequent law of general character does not repeal a previous law of special character (\textit{lex posterior derogat priori generalis non speciali}) and a special law prevails over a general law (\textit{lex specialis derogat generali}) (CASSESE, 2005).

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\(^{12}\) When analyzing the question of hierarchy of norms from the point of view of the philosophy of law, it should be recalled that the French Revolution was responsible for exporting Rousseau’s idea of law as “expression of the general will”, meaning that only the law guarantees the establishment of norms, which must be identical for all (DUPUY, 2000). Thus, “the adoption of the law supposes organically centralization of regulatory capacity in the state legislature; a power which Montesquieu demonstrated, following Locke, that should remain distinct from the two other (executive and judicial) “(DUPUY, 2000, p.120), and finally, in the Western tradition, from which the conception international legal order derives from, the separation of powers completed the designation of the state as the primary holder of the normative power.

\(^{13}\) As will be seen below, the statute of the International Court of Justice calls certain sources of “ancillary” such as doctrine and jurisprudence.
Thus, international norms\textsuperscript{14} do not differ from each other because of their legal status, and their effects are based, ultimately, on the will and acceptance by states, since there is no central power to ensure respect for the norm or a hierarchical distinction between the elaboration mode of general rules or individual ones (CARRILLO SALCEDO, 1997). In addition, the various categories of norms may regulate any matter or subject of international law, meaning that two or more states may decide to derogate from the application of customary international law by means of a treaty between them, and similarly, an emerging customary norm can derogate the provisions of a treaty between two or more states (CASSESE, 2005). Finally, unlike what happens in national law, the process from which such norms emerge is not clear or regulated\textsuperscript{15}, as states want to remain free in their relationships (CASSESE, 2005). The sources of international law were listed in Article 38 of the Statute of the International Court of Justice, in a non-exhaustive list:

Article 38
1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;
   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case \textit{ex aequo et bono}, if the parties agree thereto.

\textsuperscript{14} In this sense, we adopt the position of Ulf Linderfalk: “As a basis Certainly, the proper definition of a legal norm is a matter of debate, but I will not here engage in this philosophical polemic any more than is absolutely necessary, considering the purpose at hand. Hence, I will confine myself to establishing two propositions generally practised in the analysis and systemization of international law. Arguably, participants of the international law discourse accept them as a matter of course: (1)A legal norm is not to be identified with the utterance or utterances by which we assume the norm to be expressed.[…] (2) In order fully to reconstruct the contents of a legal norm having a regulative character, we need to be able to state, first, the specific kind of conduct or state of affairs prescribed, prohibited, or permitted, and, secondly, each and every single condition on which the prescription, prohibition, or permission is to be dependent, including to whom it applies” (2007, p. 854-857)

\textsuperscript{15} Internally, this relationship is quite diverse, as Cassese explains, “there [in domestic orders], similar legal and constitutional precepts normally regulate the complex procedures for legislating: They define the subjects and bodies called upon to make law, the various stages of the law-making process and so on.” (CASSESE, 2005, p. 155)
Treaties or conventions are the most common means of creating international norms, and despite the terminological amplitude (treaty, convention, protocol, covenant, "act", etc.), their substance is the same, denoting the junction of the will of two or more subjects of international law in order to regulate their interests through international rules" (CASSESE, 2005). In particular, the Vienna Convention on the Law of Treaties, 1969, article 2.1 defines such a source as "an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or two or more related instruments, whatever their specific names."\(^{16}\)

In addition, the Permanent Court of International Justice ruled in 1926, in the case Certain German Interests in Upper Silesia, that "a treaty only creates rights among the states that are parties to it; in case of doubt, no rights may be made in favor of third countries" (PERMANENT COURT OF INTERNATIONAL JUSTICE, 1926, p. 29), that is, treaties cannot impose obligations or create rights for other states not parties without their consent.\(^{17}\)

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\(^{16}\) It is important to mention that the 1986 Vienna Convention on the Law of Treaties Between states and International Organizations broadened the scope of the term "treaty" in its article 2.1: Article 2. 1.For the purposes of the present Convention: (a) "treaty" means an international agreement governed by international law and concluded in written form: (i) between one or more states and one or more international organizations; or (ii) between international organizations, whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation;

\(^{17}\) This rule was later consecrated in the 1969 Vienna Convention on the Law of Treaties:
Article 34. GENERAL RULE REGARDING THIRD STATES A treaty does not create either obligations or rights for a third state without its consent.
Article 35. TREATIES PROVIDING FOR OBLIGATIONS FOR THIRD STATES An obligation arises for a third state from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third state expressly accepts that obligation in writing.
Article 36. TREATIES PROVIDING FOR RIGHTS FOR THIRD STATES 1. A right arises for a third state from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third state, or to a group of states to which it belongs, or to all states, and the third state assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides. 2. A state exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.
Article 37. REVOCATION OR MODIFICATION OF OBLIGATIONS OR RIGHTS OF THIRD STATES 1. When an obligation has arisen for a third state in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third state, unless it is established that they had otherwise agreed. 2. When a right has arisen for a third state in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third state.
The international custom, the second source named in the list of Article 38 of the Statute of the International Court of Justice, was defined by Kelsen (2010) as an unconscious and unintentional legislative process. In the case of customary norms, when the states participating in the law-making process, they do not act with the primary purpose of establishing international rules, because their main concern is to protect certain economic, social or political interests, and the gradual birth of a new international rule is a side effect of the conduct of states in international relations. The definition contained in Article 38 brings the two main elements for the configuration of a customary norm: it should reflect a general practice (usus, the objective aspect) accepted as law (opinio iuris et necessitatis the subjective aspect). The practice, according to Brownlie (2008), should be consistent, demonstrating a substantial uniformity. Furthermore, no specific time length is required, because some areas, such as the rules applying to airspace and the continental shelf, had a very fast maturation.

The third category of sources - the general principles of law recognized by civilized nations - is quite ambiguous, and there was no consensus on its meaning even within the committee of jurists who prepared the text of the

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18 Though often the terms "uses" and "custom" are used for the same purpose, their meanings are different because the "use" is a general practice that does not reflect a legal obligation, as the ceremonial greetings at sea and the practice except of diplomatic vehicles of bans on parking in certain places (Brownlie, 2008, p. 6).

19 It is important to note that Kelsen sees opinio iuris as a fiction, that is, as a way of trying to disguise the creative powers of the judge (Principles, p. 307).

20 The usual standard, according to Brownlie, can be seen in several ways, such as diplomatic correspondence, policy statements, press releases, opinions of official legal advisers, official manuals, decisions and executive practices, orders for naval forces, comments from governments on projects produced by the international law Commission, state legislation, national and international judicial decisions, recitals in treaties and other international instruments, the practice of international bodies and resolutions on legal issues at the United Nations General Assembly, etc. (Brownlie, 2008, p. 06-07, our translation)

21 Root and Phillimore considered the principles in terms of rules accepted by the national law of all civilized states, and Guggenheim supports the firm view that paragraph (c) should be applied in this light. However, the view expressed by Oppenheim is to be preferred, “the intention is to allow the Court to apply general principles of domestic law, particularly of private law, to the extent that they are applicable to relations between states” [...]. What happens is that international courts have employed elements of legal reasoning and analogies of private law to the right of nations a viable system to be applied in a court case. Therefore, it is impossible or at least difficult, that state practice to develop the rules of procedure and evidence that a court must apply. An international tribunal chooses, edits and adapts elements from more developed systems: the result is a new element of international law whose content is influenced historically and logically by domestic law" (Brownlie, 2008, p. 16-7)
Statute (BROWNLIE, 2008). Doctrine and jurisprudence were listed as auxiliary sources for the determination of norms of international law and, indeed, the judgments of international courts do not "make" the law, nor do they establish a system of stare decisis, but given the rudimentary nature of international law and the lack of a central legislature and a judicial institution with compulsory jurisdiction, in practice many decisions from renowned courts, such as the International Court of Justice, are of fundamental importance for determining the existence of customary rules or to define the scope, content and evolution of new concepts (CASSESE, 2005).

In addition to the sources listed in Article 38 of the Statute of the International Court of Justice, the doctrine and jurisprudence recognize the existence of other forms of manifestation of international law, such as unilateral acts and mandatory resolutions of international organizations. As to the former, it is important to note that not all unilateral acts give rise to binding rules determining specific and, indeed, most other unilateral acts produce legal effects which are already determined by customary law (CASSESE, 2005).

22 The statute also mentions the utilization of ex aequo et bono equity, if the parties so agree, an expression that means considerations of justice, reasonableness and politics sometimes necessary for the most sensitive application of certain rules (Brownlie, 2008). Strictly speaking, equity is not a source of law, but it may play a role in decision-making, supplementing the law or as part of legal reasoning (Brownlie, 2008).

23 In this sense, it is important to remember the differentiation in the degree of normativity in international law, which has been presented, inter alia, in the works of Weil (Towards Relative Normativity in International Law? American Journal of International Law 77 (1983): 413–442) and Baxter (“International Law in ‘Her Infinite Variety.’” International and Comparative Law Quarterly 29.4 (1980): 549–566), differentiating “soft law” from “hard law”. According to Teresa Fajandro, “The generic term soft law covers a wide range of instruments of different nature and functions that make it very difficult to contain it within a single formula. Its only common feature is that it is in written form, but the other characteristics are variable and negotiable and they constitute an “infinite variety.” So the term encompasses soft rules that are included in treaties, nonbinding or voluntary resolutions, recommendations, codes of conduct, and standards. A good definition of soft law is difficult to find since this term has been the subject of passionate debates between those denying the existence of such law and those who consider it as a new quasi source of international law, and those who study the concept frequently demand that authors embrace one position or the other. Briefly, it can be defined as “normative provisions contained in non-binding texts” (FAJANO, 2014, available at http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0040.xml#obo-9780199796953-0040-bibtitem-0008). “Hard law”, on the other hand, refers to internationally binding rules, such as dispositions of a treaty in force or customary international law.

24 As explained Cassese, “for instance, protest is a unilateral declaration designed to object to an act or action performed by another state; its purpose and legal effect is to show how that the protesting state does not recognize, accept or acquiesce in the act or action, or preserves the
Finally, with regard to the resolutions of international organizations, generally they are not binding on Member states but, as they relate to general rules of international law, their acceptance by a majority is proof or evidence of the views of governments, and such resolutions can serve as a basis for the development of law and the consolidation of customary rules. There are, however, certain resolutions of organs that, in accordance with the terms of the constituent treaty of particular organization, are binding on all Member states, such as the United Nations Security Council decisions (according to the Article 25 of the Charter, of the United Nations agree to accept and carry out Security Council decisions) when acting under Chapter VII of the Charter (action on the threats to the peace, breach of the peace and acts of aggression) (Cassese, 2005).

Therefore, nor a centralization of power guaranteeing the rule of law, neither a hierarchical distinction among the law-making processes are found in international law. Thus, given the equal distribution of formal sovereignty among states, we are faced with what Dupuy (2008) calls the triple phenomenon of differentiation or equivalence, taking this term in its literal value, "equal value, in this case, of legal value, among the compared terms, which leads us to acknowledge an absence of hierarchy among them" (Dupuy, 2008, p. 18). Such equivalence is given at three levels: a) equivalence of legal rules among themselves, "that neither its object nor the number of states contributing to their formation will hierarch" (Dupuy, 2008, p 18), b) equivalence of rules of norms edition and of the norms themselves, the legal effect is to bar the recognizing state from subsequently challenging what had been previously recognized; in other words, it produces estoppel. Renunciation is the willing unilateral abandonment of a right; this abandonment, although it may be explicit or tacit, must however be deliberate and clear; [...] Notification is the act by which a state makes other states cognizant of a certain action it has performed (for instance, in case of a naval blockade in time of war, customary law requires that the blockading state should notify neutral states of the blockade). Its effect is to preclude the other states from subsequently claiming that, not knowing the action notified, they were entitled to behave differently. Thus, the promise - unilateral declaration by which a state assumes an obligation to behave in a certain way, regardless of any reciprocal commitment by another state - is the only unilateral act that gives rise to international obligations in the proper sense, as verified by the International Court of Justice in the cases of the North Sea Continental Shelf and in the case of Nuclear Tests (Cassese, 2005). (Cassese, 2005, p. 184)
standards and c) equivalence of sources of international law, which results not only from the sovereignty of states, but especially from the fact that all international norms, to a greater or lesser extent, originate from the same source, the will of sovereign states to recognize the compulsory nature of a norm or because the states do so by virtue of a set of social constraints (DUPUY, 2008).

International law, then, is a specific system envisaged to regulate the relations of a horizontal, coordinated and decentralized society, producing norms that should express the functions of coexistence, cooperation and territorial sovereignty. In this legal system, as all norms emanate, in a way or another, from the will of the states, there is no hierarchical distinction between them. As every legal system, international law is formed by three kinds of phenomena: the social and legal forces that, by their pressure, “make” the law; the law “itself”, with its structures and rules; and the law impact on the behavior of the outside world and, as Friedman recalls, “where the law comes from and what it accomplishes - the first and the third terms - are essential to the social study of law (1975, p.02).

1.6 Emergence of an international norm

In the process described by Friedman, an important question is: how does one identify a norm of international law? And how to they come into existence in such a fragmentary scenario? How do they become “norms” to the point of conforming state behavior?

The “life cycle” of norms in international law occurs in 3 stages: norm emergence (when norm entrepreneurs seek to convince a critical mass of states to embrace new norms), norm acceptance (when norm “leaders” pressure other states into becoming “followers” of the norm to enhance its legitimation) and internalization (when norms gain a “taken for granted” quality”
and are no longer object of broad public discussion" (FINNAMORE; SIKKING, 1998).

The first step – norm emergence – is characterized by the active participation of agents that possess robust notions about right and necessary behavior in their community, and these norm entrepreneurs are fundamental for the norm emergence, as they call the attention to certain issues by constructing cognitive frames that provide an alternative perception regarding the appropriateness and the interest of a norm (FINNAMORE; SIKKING, 1998). One can use the prohibition of slavery as an example: from a common practice, slavery and slave traffic had they appropriateness and interest contested by certain norm entrepreneurs, who “framed” the interpretation of the “norm” permitting those practices in a different way, using both moral and economic arguments for persuasion: “the rhetoric work of these norm entrepreneurs is based on a particular way of framing an issue so that it resonates with public sensibilities” (LEVY; SZNAIDER, 2006, p. 666). In this sense, it should be noted that “new norms never enter a normative vacuum but instead emerge in a highly contested normative space where they must compete with other norms and perceptions of interest” (FINNAMORE; SIKKING, 1998, p. 897). Norm entrepreneurs make use of organizational platforms, such as networks of Non-Governmental Organizations (NGOs), intergovernmental organizations (IGOs) or international organizations, in order to promote their norms and try to secure the support of state actors by persuading them to endorse a certain norm in a process that is not completely in the realm of reason: though facts and
information may be assembled to support claims, affect, empathy, and principled or moral beliefs may also be deeply involved, because the final purpose is not to challenge the “truth” of something, but to challenge whether it is good, appropriate, and deserving of praise (FINNAMORE; SIKKING, 1998, p. 900).

If the persuasion process is successful, and a critical mass of states become norm leaders, a tipping or threshold point is reached, and more countries begin to adopt new norms more rapidly. At this second stage—acceptance or “norm cascade”—socialization plays a major role, as states influence each other into accepting the new norm. A group’s opinion controls its members by emulating heroes and leaders and, as commendation for behavior that conforms to group norms reinforces them, socialization brings members of a group into conformity (WALTZ, 1979).

Some members of the group may, of course, find this situation repressive and incline toward deviant behavior, but ridicule may bring deviants into line or cause them to leave the group and, either way, the group’s homogeneity is preserved (WALTZ, 1979). Hence, “by conforming to the actions of those around us, we fulfill a psychological need to be part of a group, and our propensity to act on the principle of social proof is a major mechanism in the support of norms” (AXELROD, 1986, p. 1105). According to Finnamore and Sikking (1998, p. 904), an analog to this exists at the level of the state: “state leaders conform to norms in order to avoid the disapproval aroused by norm violation and thus to enhance national esteem (and, as a result, their own self-esteem)”. This conclusion is particularly important, especially when considering that the need to belong to a group might even lead states to foster objectively wrong conducts:

The microfoundations of both the conformity and esteem arguments for individuals are psychological and rest on extensive research on the importance of self-esteem and

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25 IT is not simple to define how many states constitute the “critical mass”, as some states are also more critical to a norm’s adoption depending on their involvement with a specific issue.
conformity for individuals. The power of conformity to group norms is so strong in some experimental situations that individuals will make statements that are objectively wrong in order to avoid deviating from group judgments. In situations where, the objective reality is ambiguous, individuals are even more likely to turn to "social reality" to form and evaluate their beliefs (FINNAMORE; SIKKING, 1998, p. 904).

Finally, the last stage is internalization, when norms become so extensively accepted or institutionalized that they are adopted by actors and attain a “taken-for-granted” status, making conformance with the norm virtually mechanical and influencing policy makers also at national level (LEVY; SZNAIDER, 2006). In the measure that governments arrange and shape their national politics around these global models of appropriate behavior, more and more states share convergent political, social and legal structures that are harmonious with the international model (LEVY; SZNAIDER, 2006) and, as they are no longer considered controversial, the norms are no longer questioned, and the behavior prescribed by the norm is simply followed without further debate or discussion.

<table>
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<th>Stage 1</th>
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<td><strong>Motives</strong></td>
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<td><strong>Dominant mechanisms</strong></td>
<td>Persuasion</td>
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*Figure 5: Norm stages, from Finnamore and Sikking, 1998.*
So far, we examined how the international society is organized and how such configuration is reflected in the international legal system. We have also observed how an international norm comes to existence. But what happens when this norm is violated by a state?

1.7 International responsibility of the state

The international responsibility of a state for breaching a norm of international law was a subject essentially governed by customary law until 1928, when the Permanent Court of International Justice, in the decision regarding the Chorzow Factory case, formulated for the first time a general rule on the matter: any illegal act (ie violation of international law) attributable to a state, that adversely affects another state, gives rise to the international responsibility of the violator state, bringing as a result the obligation to repair the damage (OLÍVAR, 2006). In what regards the reparation, the Permanent Court stated that:

The essential principle contained in the actual notion of an illegal act – a principle that seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law (PERMANENT COURT OF INTERNATIONAL JUSTICE, 1928, p. 47)
The so-called "ancient regime" of international responsibility of the state, which was consecrated in the Chorzow Factory decision, identified the matter with the protection of foreigners, and its rules were rudimentary, as there was no specific treatment regarding the type of violation, no thorough study on the illicit act, and the analysis of its consequences as a rule were limited to the three classical forms of reparation, *restitutio in integrum*, satisfaction and compensation (CASSESE, 2008). The *restitution in integrum* calls for the re-establishment of the situation ex-ante and, in a narrow sense, calls for the return of the thing taken or the exact re-establishment of what has been lost, like the restoration of objects unlawfully seized or the release of persons unlawfully arrested or detained (SHELTON, 2005). Compensation is a monetary award intended to fully indemnify, in lieu of restitution, all pecuniary and non-pecuniary losses (SHELTON, 2005). Finally, satisfaction applies to every form of redress repairing non-pecuniary wrongs, including apologies or other acknowledgement of wrongdoing, prosecution of the individuals concerned, taking measures to prevent the recurrence of the act or performing symbolic acts of atonement (SHELTON, 2005). Specifically in the Chorzow Factory case, the Court gave primacy to the *restitutio in integrum*, which seeks to end all harmful consequences of the illicit act and take the situation to its status quo ante, and other forms of reparation, such as compensation where seen as possible substitutes for *restitutio in integrum* when this could not be implemented (CASSESE, 2008).
Moreover, the ancient regime was based on a bilateral relationship between the violator state and the state victim, meaning that the whole rationale of state responsibility in international law neglected the role of the individual (who could only suffer sanctions, for committing piracy or war crimes). The legal regime of international responsibility had a significant growth and improvement through the work of the International Law Commission of the United Nations, which, since the middle of last century addresses the subject, being responsible for separating international responsibility from the protection of the rights of the aliens, consolidating the distinction between primary rules (which determine substantive obligations for states) and secondary rules (establishing the conditions of the violation of the primary rule and its legal consequences) (CASSESE, 2008).

The Commission has also worked to clarify the circumstances for the configuration of an illicit act. Generally speaking, the ordinary regime of responsibility requires, for the configuration of a wrongful act, a subjective element, namely the attribution of conduct contrary to international law to a state, and three objective factors: the inconsistency of the conduct in particular with an obligation of international law, moral or material damages to another subject of international law and the absence of any circumstance excluding of unlawfulness (CASSESE, 2008).
As the responsibility is only in relation to another state, the secondary obligation of reparation, arising from the breach of the primary international obligation, will only be due to another state or states (and not to the individual that suffered the damage, for instance), and such conception of international responsibility has been guiding the works of the International Law Commission for almost half a century. The Draft articles on Responsibility of States for Internationally Wrongful Acts, from 2001, is the result of such rationale, and even if the text has not been approved as an international convention, is now considered the consecration of customary international law on the subject, focusing on the forms of reparation that are best suited to the interstate reality of international law (RAMOS, 2012).

In the next chapter, we are going to analyze how a specific norm of international law originated - the state immunity - by clarifying its concept and studying its historical evolution and the changes it suffered due to the changes in society itself to, later on, discuss how the outcomes of such norm impair the effectiveness of another category of norms in international law: the protection of human rights.
CHAPTER TWO: THE FRAMEWORK REGARDING STATE IMMUNITY

One cannot adventure himself in the study of a certain field without a previous definition of the terms and expressions that constitute or are related to the object of that investigation, said James Leslie Brierly in his course at the Hague Academy in 1928, and also Politis adverted about the serious drawbacks of a vicious terminology: “it is impossible, in the battle of ideas, to reach an agreement, to approach a solution, to achieve progress, if we do not manage to agree on the meaning and value of terms in the discussion” (POLITIS, 1925, p. 19). Moreover, the use of imprecise expressions, unclear phrases and words insinuating false or outdated ideas was considered dangerous by Politis: “the thought is hindered and sometimes it stops, unable to make the necessary effort to pierce the cloud that separates it from reality” (POLITIS, 1925, p. 19). Therefore, propelling coherent thinking upon a certain topic requires, first of all, an effort in order to define the terms under examination. Such affirmation is even truer when the goal is to question assumptions that led to the formation of a certain legal conception, and to propose a new perspective.

Hence, the following pages of this thesis shall be devoted to establishing a solid conceptual framework, clarifying the meaning, the scope and the relations among the terms that constitute the object of this analysis. Such explanation is a necessary step so that certain dogmas may be challenged, and that new ideas may be presented in a coherent manner. Examining the theoretical socio-legal background concerning state immunity and the effectiveness of Human rights requires that we address, firstly, what is the content of the so-called “immunity rule”, that prevents victims from human rights violations to obtain reparations before the courts of their country when the defendant is another state.
2.1 Conceptual Configuration

Etymologically speaking, immunity means exception from a duty, a service or an obligation (munus, in latin)\(^{26}\), and, in the words of Eligio Resta, “immunization indicates the absence of community; means deprivation of common action, just thanks to freedom, exemption from charge, duty, gift” (2002, p. 02). By logic, “immunity” refers to a determinate object, from which it constitutes an exception, and the concept of this object precedes the idea of immunity. State immunity, in this sense, refers to an exception from the jurisdictional powers of another state, and so, in order to provide a clear understanding about the role of state immunity, the initial action should be examining jurisdiction in itself.

2.1.1 Jurisdiction

The expression “jurisdiction” can certainly find a myriad of definitions among scholars. Acknowledging this semantic plurality, Enrico Liebman (2007) cited in his work the classic lessons of law masters to conceptualize jurisdiction, and has pointed to the existence of more than one definition of the same concept, recalling in particular two meanings that underlie long scientific debate on Italy: the one from Chiovenda, which defines jurisdiction as the acting of the concrete will of the law by the substitution of the activities of public bodies, be it by affirming the will of the law or by giving effect to it\(^{27}\); and the one of

\(^{26}\) “In senso storico, esenzione da oneri pubblici (lat. munera) o aggravi fiscali, secondo un istituto che risale al basso Impero e perdura durante l'alto medioevo: concedere l’i. a un ente ecclesiastico; godere dell'immunità. In partic., i.ecclesiastiche, il complesso dei privilegi, diversi nei vari tempi e nei vari stati, per i quali le persone e le cose ecclesiastiche e anche i luoghi sacri (rispettivam. i.personali, i. reali, i. locali) sono esenti da taluni gravami; per es., in Italia, l’impignorabilità, per quanto riguarda le cose, e l’esenzione dal servizio militare (finché questo è stato obbligatorio). http://www.treccani.it/vocabolario/immunita/

\(^{27}\) As Liebman points out, “ in questa definizione è scolpito il rapport tra la legge e la giurisdizione; e col concetto della sostituzione si rende evidente il fato che il giudice è chiamato a provvedere quado è mancata da parte di taluno l’osservanza di ciò che dispone la legge” (2007, p. 04)
Carnelutti, which defines jurisdiction as the fair composition of the dispute, understanding “dispute” as any conflict of interests regulated by law, and “fair” as the composition achieved by the operation of law. For Liebman himself, jurisdiction was “the activity of the state organs directed to the formulation and application of the concrete legal rule that, according to the actual valid law, disciplines a determinate legal situation” (2007, p. 04).

International law authors have a somehow different approach, and to Malcolm Shaw, “jurisdiction refers to the power of the state to affect people, property and circumstances, and reflects the basic principles of state sovereignty, equality among states and non-interference in domestic affairs” (1997, p. 453). Jurisdiction was also considered by Bevilacqua as one of the rights that the state reserves for itself when it enters to the international community, along with the imperium its territory, the right to keep or alter its political constitution according to its their needs and convenience and have its own legislation. Those two definitions are very helpful in understanding that jurisdiction has, in fact, a variety of manifestations, all of them with different implications, but it is always related with the state’s right of regulation, whether it is exercised by legislative, executive or judicial measures (MANN, 1964).

Therefore, when this regulation power is exercised by prescribing legal rules, one is talking about prescriptive or legislative jurisdiction (MANN, 1964), which is related with the geographical reach of a state’s laws (RYNGAERT, 2008). Prerogative jurisdiction, on the other hand, refers to the right of a state to apply its legal rules in a given case (MANN, 1964), and it may refer to adjudicative jurisdiction or to enforcement jurisdiction. Adjudicative jurisdiction is related to the power of the courts to claim jurisdiction over a situation, to subject

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28 According to Liebman, “questa definizione considera l’atuazzione del diritto come il mezo per raggiungere lo scopo ulteriore dela composizione del conflitto d’interessi, cercando così di cogliere la matéria a cui la legge viene applicata e il risultato pratico, in chiave sociológca, a cui conduce l’operazione” (2007, P. 04).

29 As Mann explains, “Thus it is obvious that a state, though entitled to exercise its prescriptive jurisdiction, is by no means necessarily entitled to enforce it: a state may subject its nationals to military service, but is precluded from sending its officers into neighboring states to bring its nationals within its boundaries. Moreover, the mere exercise of prescriptive jurisdiction, without any attempt at enforcement, will not normally have to pass the test of international law, so long as a state merely introduces a legal rule without taking or threatening steps to enforce it, foreign states and their nationals are not necessarily affected” (MANN, 1964, p. 13-14).
persons or things to the process of its tribunals, be it in civil or criminal claims, and it refers to the jurisdiction of the courts rather than to the reach of a state’s laws, meaning that a state may possess “legitimate prescriptive jurisdiction over a situation under international law, but may lack adjudicative jurisdiction over the situation, for instance, because the defendant has no contacts with the state” (RYNGAERT, 2008, p. 10). Finally, enforcement jurisdiction refers to the power of the state to enforce, compel compliance or to punish noncompliance with its laws and regulations, and while states have the right to prescribe laws regarding situations connected to its prescriptive jurisdiction, it is generally accepted that they cannot enforce their laws outside their territories (RYNGAERT, 2008).

Facing such a variety of meanings, it is important to clarify that, for the purposes of the present study, the term “jurisdiction”, if not otherwise mentioned, refers to the adjudicative jurisdiction, meaning the power or prerogative of courts to rule over a certain situation, the exercise of jurisdiction in which the magistrate materializes the intention of the legislature in concrete cases by the application of the law (MARINONI; ARENHART, 2005), the “a function of the state destined to the imperative resolution of conflicts and exercised by the acting of the will of the law in concrete cases” (DINAMARCO, 2004, p 309). As well stated by Bröhmer, “the question of adjudicatory jurisdiction in international law is thus whether the legal consequences of a given set of facts should be determined by the courts of the forum state” (p. 35, 1997).

Jurisdiction is hence considered to be an aspect or a consequence of sovereignty, meaning that the laws extend so far as, but no further than the sovereignty of the state which puts them into force, involving both the right to exercise it within the limits of the state’s sovereignty and the duty to recognize the same right of other states, abstaining from encroaching upon their sovereignty (MANN, 1984). According to Mann, in the present world sovereignty is undoubtedly territorial in character and, therefore, when evaluating the limits or the extent of jurisdiction, the starting point must necessarily be its territoriality.
“such as it was developed over the centuries and defined by the Huber-Storyan maxims: as a rule jurisdiction extends (and is limited) to everybody and everything within the sovereign’s territory and to his nationals wherever they may be” (MANN, 1984, p.20)

In fact, territoriality is the most basic ground for the exercise of jurisdiction, since it is naturally expected that the power of a state should apply to within its territory: nationals, foreigners, residents and visitors (HIGGINS, 1994). Thus, considering territoriality as a starting point concerning jurisdiction means that there must be some kind of territorial connection to the forum state so that it can assume jurisdiction over a particular claim, such as the presence of the defendant within the territory, his domicile or residency\(^{30}\) (BRÖHMER, 1997).

The territorial principle constitutes the most tangible evidence of a state’s legitimate interest in adjudicating over a certain subject matter. However, it is important to notice that the permissible principles of jurisdiction are entwined, expressing a link between the situation and the forum state that is not necessarily the territory, meaning that such connection can also be one of the other two elements composing the definition of state: its population or its sovereign authority (RYNGAERT, 2008).

In this sense, jurisdiction may also be exercised based upon the nationality principle, translated in both active and passive personality principles: in the first one, jurisdiction is asserted by the forum state for actions committed by one of its nationals in another state, and the second one means jurisdiction is exercised over acts committed against a national by foreigners outside the

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\(^{30}\) A sufficient territorial link can also be derived from the act or conduct in question, if the conduct took place within the territory of the forum (which does not necessarily mean that the defendant was also present in that territory as long as the conduct can be attributed to the defendant) or if conduct outside the territory of the state had a substantial and foreseeable effect within the forum state. The realization of personal injury or damage to property within the forum state constitutes such an effect (BRÖHMER, 1997, p. 37)
forum state’s territory (BRÖHMER, 1997). Also, it is important to mention the protective principle, that safeguards the state from acts perpetrated abroad which might impair its sovereignty or its right to political independence, such as the offense of treason31 (RYNGAERT, 2008). Finally, the controversial universality principle operates totally abstract from the territoriality, the personality or the protective principles, giving any state the right to assert jurisdiction over crimes of a certain nature (BRÖHMER, 1997), and shall be discussed in details further.

2.1.2 International Competence

Jurisdiction, as a state’s prerogative, enable the organs of the state to adjudicate on the conflicts presented before them when there is a genuine or legitimate link between the matter to be examined and the forum state, as the fact that a certain conduct took place in its territory, affecting its nationals or its sovereignty, for example. However, such power must be divided among the different state’s bodies in order to organize its functioning and optimize its exercise by determining which court is entitled to adjudicate in which matter, and also if it is of the interest of the state to judge certain claims.

Therefore, the share or portion of jurisdiction assigned to each organ of the state is called competence, and it is always a delimitation of the jurisdiction (MADRUGA FILHO, 2003) which is determined when the jurisdictional power passes from abstract to concrete in the presence of a conflict of interests. Thus, when the competence is established, it imposes a restriction on the adjudicative power of a given body, that can now only rule over certain matters, and not others. A specific court from a certain state may only adjudicate on civil matters, or in military ones, while another may rule on criminal offenses. Competence rules, usually established in the procedural codes of the states, may also

31 As Ryngaert explains, “As such acts may not be punishable in the state where they originate, protective jurisdiction by the state at which those acts are directed, appears warranted. For the operation of the protection principle, actual harm need not to have resulted from those acts. This distinguishes it from the objective territorial principle (or effects doctrine) (2008, p. 96)
determine criteria for the courts to adjudicate over certain claims, expressing the interest of the state over determined conflicts of interests. For these reasons, the analysis of the jurisdiction always precedes the inquiries about the competence of a court.

Nevertheless, jurisdiction and competence are quite often confused, or seen as the same institution, and this is even truer regarding international competence, or the limits of the courts to adjudicate over claims with a foreigner element. Theodoro Junior (2004) states, for example, that when the Brazilian Procedural Code refers to "international competence" is not only dealing with competence, but with its own jurisdiction, ie, defining the possibilities of action of its own national state power. The conclusion of the eminent jurist, supported by other authors\textsuperscript{32}, makes clear the ambiguity and uncertainty permeating the two concepts, especially when it comes to international competence. As Diego Fernandez Arroyo explains:

In some countries, the expression international competence (or international judicial competence) is preferred, following the old idea that the terms accompanying the word competence indicate the precise scope in which the judicial function of the state is exercised [..] or competence is divided according to other concepts such as territorial demarcation or the instance of activity of each judge or court. The international competence is, in this sense, a competence regarding the subject matter. In the countries of MERCOSUR, "international jurisdiction" is preferably used, reserving the term competence to the exercise of jurisdiction in domestic cases. However, there are many authors who make use of "jurisdiction" and "competence" interchangeably "(ARROYO, 2003, p. 138).

To clarify this possible confusion, it is paramount to bear in mind the concept of jurisdiction as an unlimited power within the territory of a state, and there it can be differentiated from international competence, which is a self-

\textsuperscript{32} For instance, Dinamarco: “Externamente, a jurisdição é limitada por certos fatores inerentes ao convívio entre Estados soberanos, que levam cada um destes a excluir a sua própria jurisdição em muitos casos. As regras da chamada competência internacional são limitativas da própria jurisdição, não meros critérios de distribuição do exercício da jurisdição entre os juízes do mesmo país (competência). Em relação às causas excluídas da competência do juiz nacional, a jurisdição do país não se exerce porque o poder estatal é insuficiente para chegar até elas. Por falta de competência internacional, o juiz nacional será carecedor de jurisdição. Não se trata de mera incompetência, como a locução poderia fazer crer. Tal é um sistema de limitações territoriais da própria jurisdição e não de seu exercício” (DINAMARCO, 2004, p. 333).
imposed limit by the state to its power to adjudicate on any claim that is brought before its judges (MADRUGA FILHO, 2003). The power that the state has to resolve conflicts is broad, but often it is not in the interest of the state to make use of all that capacity due to the existence of cases that, although would fit within the scope of its jurisdiction, are not as important for the purposes of judicial activity, or maybe they can be best solved by another jurisdiction (MADRUGA FILHO, 2003). Hence, there is a convenience for the state to delimit its own judicial activity. To Madruga (2003, p.86), “such convenience to limit jurisdiction is translated in rules of general (international) competence informing the courts about which causes can be submitted to its judgment”.

The initially unlimited power of a state to exercise jurisdiction over its territory finds, therefore, a barrier in the state’s interest in prosecuting certain causes, and not others. Among the many reasons that justify the limitations brought by the rules of competence, there is the impossibility or great difficulty to fulfill enforce decisions from national courts abroad, the little relevance of many conflicts in the state’s perspective and, finally, the political appropriateness of certain mutual respect standards in relation to other states (DINAMARCO, 2004). Furthermore, Theodoro Junior (2005) explains that the delimitation of competence takes into consideration the principles of effectiveness and submission: while the first means that the court has no jurisdiction to render a judgment which is not able to be enforced, the second means that, in limited cases, a person can voluntarily submit to the jurisdiction of a court that, in theory, could not adjudicate on the case and, once this is done, jurisdiction cannot be set aside.

It will therefore be the state’s interest that demarcates the extent and scope of the judicial exercise. Although the state enjoys over its territory in general and exclusive jurisdiction it will not always appropriate to use all this power (REZEK, 2005). Ergo, the state should look into the desirability to judge causes involving one or more international elements, and this evaluation will indicate the boundaries of jurisdiction.
Indeed, as Arroyo (2003) notices, for a long time it was possible to say that every state, by virtue of its independent and sovereign character, was absolutely free to determine in which cases its judges and courts should or could exercise jurisdiction. This affirmation, which is rooted in a territorial and nationalist conception, has also seems to look for support in what would be the lack of a principle of international law requiring states to self-limit the competence of their courts to cases with connection elements, among others or exclusively, with other jurisdictions (ARROYO, 2003). Although this conception of a materially universal jurisdiction over all cases does not correspond with reality or - to a large extent - to the needs of contemporary life (ARROYO, 2003).

Assuming, therefore, that a state initially has jurisdiction to adjudicate over a certain claim because the case is sufficiently linked to this country – for example, one of its nationals was tortured by officials of another state - and that such jurisdiction is not limited by competence rules, what could prevent a victim of human rights violations to look for compensation at the courts of his or her country against another state? For the vast majority of scholars and judges in international law, there is a rule, known as state immunity, which leads to such result.

2.1.3 Immunity

In legal terms, jurisdictional immunities refer to prerogatives granted to certain people or entities to be except from the jurisdiction of the forum state courts and, generally speaking, it refers to a “non-obligation” situation, an exception from a duty in which a subject is not submitted to the territorial jurisdiction of a state. More specifically, international law characterizes immunities as procedural rules that prevent the adjudication of a dispute in a particular forum without speaking to the merits of the claim or absolving any underlying responsibility (MCGREGOR, 2014).
Accordingly, immunity is seeing as designating a negative set of rules regarding situations in which a court may not hear a case, despite the fact that it actually would have jurisdiction to do so based on the presence of genuine links to the case, such as the territorial or the personality principles (BRÖHMER, 1997), and that it also has competence to do so. For this reason, after having established its jurisdiction over a particular case on the bases of solid connection criteria, and verifying if it has competence to adjudicate on that specific matter, the court should also check if the defendant in the case is a beneficiary of some kind of immunity, which shall lead to the court’s refraining from adjudicating despite the fact that, if it were not by the circumstance giving rise to immunity, it would usually be able to rule on the matter presented before it (BRÖHMER, 1997).

Specifically regarding state immunities Sucharitkul (1976), affirms they definable as a legal concept, since they can be expressed in terms of a legal relationship: just as a "right" is correlated to a corresponding "duty", "immunity" is correlated to a "no power". In this sense:

the proposition that a foreign state possesses jurisdictional immunity, or is immune from the jurisdiction of the local courts, can be restated correlatively: "The territorial state has or exercises no power, or jurisdiction over the foreign sovereign state." Immunity can therefore be viewed as a right which is positive in form, but negative in substance. It is negative since it denotes "no power" or "non-use of authority" by the correlative partner (SUCHARITKUL, 1976, p. 95)

2.1.4 Individualizing state Immunity

Although often confounded, there are distinct categories of immunities in international law, which are justified for different reasons and available to varying degrees and, with the exception of diplomatic immunity and the immunity of international organizations, most immunities are based in customary international law (MCGREGOR, 2014). Besides state immunity, there is also immunity ratione materiae ("subject-matter" immunity);
immunity *ratione personae* ("personal" immunity) of state officials, diplomatic immunity (regulated by treaty provisions) and the immunities of international organizations, often stipulated in multilateral or bilateral agreements (MCGREGOR, 2014). Individualizing state immunity is paramount to clarify the role and operation, and the first step in that process is to determine the scope of the term "state" in itself.

In this sense, the 2004 United Nations Convention on Jurisdictional Immunities of the states and their Property provides some guidelines, as article 1 (b) determines that "state" means

(i) the state and its various organs of government;
(ii) constituent units of a federal state or political subdivisions of the state, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity;
(iii) agencies or instrumentalities of the state or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the state;
(iv) representatives of the state acting in that capacity;

The international law Commission (1991), in its comments to the referred convention, acknowledged that the word "state" comprises fully sovereign and independent foreign states, as well as entities that are sometimes not really foreign and at other times not fully independent or only partially sovereign, such as the colonies and territories in the past. Furthermore, according to the Commission, "certainly the cloak of state immunity covers all foreign states regardless of their form of government, whether a kingdom, empire or republic, a federal union, a confederation of states or otherwise" (INTERNATIONAL LAW COMMISSION, 1991, v. II, p.15).

The first category included in the 2004 Convention concerns the state itself, taking action in its own name as well as via its different organs of government, regardless of their designation, such as the sovereign or head of
state, the head of government, the central government, various ministries and
departments of government, etc. (INTERNATIONAL LAW COMMISSION,
1991). The second category comprises the constituent units of a federal state or
its political subdivisions to the extent that they perform acts in the exercise of
sovereign authority, a determination depending upon the constitutional practice
or historical background every state (INTERNATIONAL LAW COMMISSION,
1991). The third group is composed by agencies and instrumentalities of the
state, but it is important to notice that immunity here is granted only to the
measure that they are entitled to perform acts in the exercise of the sovereign
authority of the state, beyond which they do not enjoy immunity (INTERNATIONAL LAW COMMISSION, 1991). Finally, the fourth group
comprehends all the natural persons who are authorized to represent the state
in all its expressions, as included in the previous categories, indicating that
sovereigns and heads of state in their public capacity would be comprised in
this category as well as in the first one, being in the broader sense organs of the
Government of the state (INTERNATIONAL LAW COMMISSION, 1991). Also in
this category are heads of Government, heads of ministerial departments,

33 More specifically, “a sovereign or a head of state, in his public capacity as a principal organ of
a state, is also entitled to immunity to the same extent as the state itself, on the ground that the
crown, the reigning monarch, the sovereign head of state or indeed a head of state may be
equated with the central Government” (INTERNATIONAL LAW COMMISSION, 1991, v. II, p. 15)

34 A state is generally represented by the Government in most, if not all, of its international
relations and transactions. Therefore a proceeding against the Government eo nomine is not
distinguishable from a direct action against the state. State practice has long recognized the
practical effect of a suit against a foreign Government as identical with a proceeding against the
state. Just as the state is represented by its Government, which is identified with it for most
practical purposes, the Government is often composed of state organs and departments or
ministries that act on its behalf. Such organs of state and departments of government can be,
and are often, constituted as separate legal entities within the internal legal system of the state.
Lacking as they do international legal personality as a sovereign entity, they could nevertheless
represent the state or act on behalf of the central Government of the state, which they in fact
constitute integral parts thereof. Such state organs or departments of government comprise the
various ministries of a Government, including the armed forces, the subordinate divisions or
departments within each ministry, such as embassies, special missions and consular posts and
offices, commissions, or councils which need not form part of any ministry but are themselves
autonomous state organs answerable to the central Government or to one of its departments, or
administered by the central Government. Other principal organs of the state such as the
legislature and the judiciary of a foreign state would be equally identifiable with the state itself if
an action were or could be instituted against them in respect of their public or official acts.

35 Thus, in the case of an agency or instrumentality or other entity which is entitled to perform
acts in the exercise of sovereign authority as well as acts of a private nature, immunity may be
invoked only in respect of the acts performed in the exercise of sovereign authority.
ambassadors, heads of mission, diplomatic agents and consular officers, in their representative capacity, meaning that immunities are accorded to their representative capacity *ratione materiae* (INTERNATIONAL LAW COMMISSION, 1991).

This last category is of particular importance, since it also addresses beneficiaries of several types of the so called personal immunities, which have received recognition under different principles of international law, and have chronologically predated the acceptance of the doctrine of immunities (SUCHARITKUL, 1976). These immunities are attributed basically to two types of agents of the state: the authorities of the central power (Heads of state, Heads of Government, Ministers of Foreign Relations, etc.), and the members of diplomatic service.

The immunities of the authorities of the central power have a customary character, and they benefit those agents who represent the state and that have the capacity to negotiate in its behalf, being responsible for the conduction of its foreign relations and politics. Also called Senior state officials, those agents are absolute immune from criminal proceedings in foreign courts, while the extent of their immunity from a foreign state’s civil and administrative jurisdiction is controversial: conduct performed in an official capacity attracts immunity and,

36 As Sir Arthur Watts explains, “The offices of Heads of state and Heads of the Governments of state[s] are notionally distinct. The former (typically King, Queen or President) is the constitutional and titular ruler of the state; the latter (typically Prime Minister) is the head of the executive branch of the state’s government. But the two roles may be combined (as with the office of President of the United states). The nature, powers, style and title of a state’s Head of Government are matters for the state to determine for itself. It is more difficult to identify precisely to whom the concept of ‘senior official’ applies, especially as ‘official’ may refer to holders of (political) offices or to non-political civil servants. The International Court of Justice (ICJ) has referred to ‘holders of high-ranking office’, and some treaties refer to persons ‘of high rank’. Clear examples of such persons are Ministers of Foreign Affairs ([Arrest Warrant Case [Democratic Republic of the Congo v Belgium] [2002] ICJ Rep 3 para. 51 [‘Arrest Warrant Case’]), Ministers of Defence ([Nuclear Tests Case [Australia v France] [Merits] [1974] ICJ Rep 253 paras 40–41 [‘Nuclear Tests Case’]; Nuclear Tests Cases), and possibly Ministers of Justice (Case concerning Armed Activities on the Territory of the Congo [Democratic Republic of the Congo v Rwanda] [Judgment] ICJ 3 February 2006 para. 48 [‘Armed Activities (Congo v Rwanda)’]; Armed Activities on the Territory of the Congo Cases). It is in principle a matter for each state to determine who is its Head of Government or the holder of some other senior official state position. But for other states, questions of international recognition may also have to be taken into account. (WATTS, 2011, p. 01)
regarding acts performed in private or commercial capacity, they are possibly entitled to at least the degree of immunity to which an ambassador is entitled under Art. 31 of the Vienna Convention on Diplomatic Relations (WATTS, 2011).

For acts performed in their official capacity, Senior state officials are accorded immunity *ratione materiae*, which are not affected by the change or termination of the official functions of the representatives concerned, and “no action will be successfully brought against a former representative of a foreign state in respect of an act performed by him in his official capacity” (INTERNATIONAL LAW COMMISSION, 1991, v. II, p. 19). Moreover, Senior state officials are entitled to immunities *ratione personae* regarding activities that are personal to them and not related to their official functions and, differently from immunities *ratione materiae*, which subsist after the end of the official functions, immunities *ratione personae* will no longer be operative once the public offices are terminated\(^\text{37}\) (INTERNATIONAL LAW COMMISSION, 1991). Therefore,

> All activities of the sovereigns and ambassadors which do not relate to their official functions are subject to review by the local jurisdiction, once the sovereigns or ambassadors have relinquished their posts. Indeed, even such immunities inure not to the personal benefit of sovereigns and ambassadors but to the benefit of the states they represent, to enable them to fulfil their representative functions or for the effective performance of their official duties (INTERNATIONAL LAW COMMISSION, 1991, v. II, p. 19-20)

Specifically regarding the diplomatic category, Van Alebeek notes that inviolability of diplomatic agents is one of the oldest rules of international law, as since ancient times, there was a consistent practice in the sense that the envoy was not to be maltreated or subjected to any form of arrest or detention (2011). More specifically, the immunity from the jurisdiction of the courts of the foreign

\(^{37}\) In this sense, the ICJ affirmed, in the Arrest Warrant Case, that “after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy allow the immunities accorded by international law in other states. Provided that it has jurisdiction under international law, a court of one state may try a former Minister for Foreign Affairs of another state in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity. (At para. 61.)
state in which the diplomat performs his or her functions can be traced back to the 16th\textsuperscript{38}, and the body of customary rules regarding diplomatic relations was finally codified in the 1961 Vienna Convention\textsuperscript{39}. In its article 31, the 1961 Vienna Convention on Diplomatic Relations states that a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state, and that he or she shall also enjoy immunity from its civil and administrative jurisdiction, except in very specific cases\textsuperscript{40}. Such immunity, however, can be waived by the sending state\textsuperscript{41}, and according to article 31.4, the immunity of a diplomatic agent from the jurisdiction of the receiving state does not exempt him from the jurisdiction of the sending state.

Also, according to article 39 of the 1961 Vienna Convention, the diplomat is entitled to immunity from the moment he or she enters the territory of the

\textsuperscript{38} As Van Alebeek clarifies, “as far as criminal jurisdiction is concerned, the immunity rule quickly acquired an absolute status. Although it was at times argued that immunity did not extend to crimes against the receiving state—such as treason—early state practice did not reflect this position[...]. The contours of the rule of immunity from civil jurisdiction were more controversial. Initially, there was considerable support for the position, put forward for example by Gentili, that ambassadors were not immune in respect of legal disputes concerning contracts entered into during the mission. It was not until the 18th century that diplomatic immunity from civil jurisdiction for acts not committed on behalf of the sending state became accepted as a rule of international law.” (2011, p. 01)

\textsuperscript{39} “At the end of the 19th and the beginning of the 20th century several attempts at codification of the international law of diplomatic immunity were undertaken. The Institut de Droit international issued its Règlement sur les immunités diplomatiques in 1895 and a resolution on ‘Les immunités diplomatiques’ in 1929; in 1928 the Sixth International Conference of American states adopted the Havana Convention on Diplomatic Officers and in 1932 the Harvard Research School published a Draft Convention on Diplomatic Privileges and Immunities. Diplomatic law was among the first 14 topics that the newly established international law Commission (ILC) selected for codification in 1949. The work of the ILC eventually resulted in the adoption of the Vienna Convention on Diplomatic Relations.” (VAN ALEBEEK, 2011, p. 01)

\textsuperscript{40} a) a real action relating to private immovable property situated in the territory of the receiving state, unless he holds it on behalf of the sending state for the purposes of the mission; b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending state; c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving state outside his official functions.

\textsuperscript{41} Article 32
1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under article 37 may be waived by the sending state.
2. Waiver must always be express.
3. The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counterclaim directly connected with the principal claim.
4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgement, for which a separate waiver shall be necessary
receiving state on proceeding to take up his post\textsuperscript{42}. When the functions come to an end, the immunities shall normally cease at the moment when the diplomat leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. Nonetheless, it is important to stress that, regarding acts performed by a diplomat in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

State immunity, on its turn, concerns the acts attributable to a foreign state and that are questioned before the municipal court of another state, and despite the fact that the formation and the development of this institution is somehow linked to many aspects of both the head of state and the diplomatic immunities, it possesses distinct characteristics and incidence. State immunity from jurisdiction has been considered “a general rule of customary international law solidly rooted in the current practice of states” (INTERNATIONAL LAW COMMISSION, 1980, Vol. II, p. 147), meaning that “whether in claiming immunity for themselves or according it to others, states generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other states to respect and give effect to that immunity” (INTERNATIONAL COURT OF JUSTICE, 2012, p.28).

This “rule” was recently reaffirmed by the International Court of Justice in the 2012 judgment of the Jurisdictional Immunities Case\textsuperscript{43} (Germany v. Italy, Greece intervening) in which the court also concluded that “under customary international law as it presently stands, a state is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law (INTERNATIONAL COURT OF JUSTICE, 2012, p.44). Some aspects of this decision deserve to be further analysed, as they have a close relationship to the subject of this thesis. First of all, it is interesting to notice that the International Court of Justice, on one hand, reaffirms the right of the victim

\textsuperscript{42} or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.(art. 39)

\textsuperscript{43} This case before the ICJ is the outcome of national proceedings in the Ferrini case, to be further analysed in point 4.1.1.1
to a reparation (confirming its approach in other cases, such as Diallo\(^44\)), but makes it clear that “the duty to make reparation is a rule which exists independently of those rules which concern the means by which it is to be effected” (INTERNATIONAL COURT OF JUSTICE, 2012, paragraph 94). Furthermore, the court makes two fundamental distinctions, which have a profound impact on the law of state immunity: the distinction between immunity in criminal and in civil proceedings, and the procedural nature of state immunity v. the substantial nature of jus cogens norms.

In the first case, as Italy presented the Pinochet decision\(^45\) to strengthen the argument regarding the denial of immunity in cases of human rights’ violations, the court referred to proceedings against the Democratic Republic of the Congo (DRC) by the Republic of Guinea regarding violations of the rights of Ahmadou Sadio Diallo, a Guinean citizen, including serious violations of international law following the arrest, detention and expulsion of Mr. Diallo from the DRC. According to the ICJ, “In the light of the circumstances of the case, in particular the fundamental character of the human rights obligations breached and Guinea’s claim for reparation in the form of compensation, the Court is of the opinion that, in addition to a judicial finding of the violations, reparation due to Guinea for the injury suffered by Mr. Diallo must take the form of compensation” (INTERNATIONAL COURT OF JUSTICE, 2010, paragraph 161).

\(^44\) The case refers to proceedings against the Democratic Republic of the Congo (DRC) by the Republic of Guinea regarding violations of the rights of Ahmadou Sadio Diallo, a Guinean citizen, including serious violations of international law following the arrest, detention and expulsion of Mr. Diallo from the DRC. According to the ICJ, “In the light of the circumstances of the case, in particular the fundamental character of the human rights obligations breached and Guinea’s claim for reparation in the form of compensation, the Court is of the opinion that, in addition to a judicial finding of the violations, reparation due to Guinea for the injury suffered by Mr. Diallo must take the form of compensation” (INTERNATIONAL COURT OF JUSTICE, 2010, paragraph 161).

\(^45\) The facts of the Pinochet case are well-known: in September 1998, as the Chilean Senator Augusto Pinochet went to the UK for a health treatment, the magistrate Baltasar Garzón requested his extradition to Spain in order to respond to a series of charges related to the dictatorial regime established by him in Chile in 1973. Thus, on October 17, 1998, after the issuance of an international arrest warrant by Spain and a subsequent arrest warrant by a British magistrate (the latter based on the British Extradition Act of 1989), Pinochet was arrested in London. One day later, a second international arrest warrant was again issued in Spain (as well as a second arrest warrant for a British judge), complementing the first term and expanding the charges against the Chilean senator, encompassing the crimes of torture and association to commit torture, between the months of January 1988 and December 1992; hostage-taking and association for the hostage-taking, between the months of January 1982 and January 1992; and also Association for the murder commission, between the months of January 1976 and December 1992. Pinochet filed a writ of habeas corpus before the British High Court (Divisional Court of the Queen’s Bench Division), which annulled the arrest warrants on the grounds that a former head of state enjoyed immunity from prosecution in relation to the charges against him. The British prosecutors then appealed to the House of Lords, acting on behalf of the Spanish government and focusing their arguments on the "interpretation and appropriate scope of the immunity enjoyed by a former head of state in relation to the arrest and extradition procedures in the UK for crimes committed while he was in the exercise of its head of state function. Before the appeal was analysed, Spain expanded the list of crimes relating to the extradition request, including other charges of genocide, murder, torture and kidnapping, in Chile and other countries. The House of Lords, by a majority of three to two, initially decided that Pinochet was not immune from prosecution in UK courts for crimes committed in violation of international law. The UK Ministry of Internal Affairs authorized the magistrate to continue the extradition process, based on the British Extradition Act 1989, excluding only the genocide charges. This first decision of the House of Lords came to be, however, annulled on the grounds that the trial session had been improperly constituted (since one of the lords failed to reveal his connection with an Amnesty International branch). The House of Lords returned to review the case, and in March 1999 decided to only partially uphold the appeal, allowing extradition proceedings in
violations, which was dismissed by the International Court of Justice under the justification that, while the present case referred to civil proceedings, Pinochet was a criminal case, and its decision was based on a different set of rules, namely the UN Convention Against Torture\textsuperscript{46}, a reasoning that has also been adopted in Jones v. Saudi Arabia\textsuperscript{47}. In the second case, while Italy sustained that the violations perpetrated by Germany amounted to a violation of jus cogens norms, which would be hierarchically superior to the customary rule of state immunity, the International Court of Justice denied the existence of any conflict between the two sets of norms by affirming that state immunity is a rule of procedural nature, and it does not “bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.”\textsuperscript{48} (INTERNATIONAL COURT OF JUSTICE, 2012, paragraph 93). Therefore, individuals who suffered human rights violations by a foreign state are precluded from seeking redress at the courts of a certain forum state by virtue of the so called “rule” of state immunity.

However, considering international law as a normative system, aimed at regulating the conduct of a certain organized group – the international society -

\textsuperscript{46} As Lord Browne-Wilkinson said, in the Pinochet decision, “Finally, and to my mind decisively, if the implementation of a torture regime is a public function giving rise to immunity ratione materiae, this produces bizarre results. Immunity ratione materiae applies not only to ex-heads of state and ex-ambassadors but to all state officials who have been involved in carrying out the functions of the state. Such immunity is necessary in order to prevent state immunity being circumvented by prosecuting or suing the official who, for example, actually carried out the torture when a claim against the head of state would be precluded by the doctrine of immunity. If that applied to the present case, and if the implementation of the torture regime is to be treated as official business sufficient to found an immunity for the former head of state, it must also be official business sufficient to justify immunity for his inferiors who actually did the torturing. Under the Convention the international crime of torture can only be committed by an official or someone in an official capacity. They would all be entitled to immunity. It would follow that there can be no case outside Chile in which a successful prosecution for torture can be brought unless the State of Chile is prepared to waive its right to its officials immunity. Therefore the whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive and one of the main objectives of the Torture Convention--to provide a system under which there is no safe haven for torturers--will have been frustrated. In my judgment all these factors together demonstrate that the notion of continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention.”

\textsuperscript{47} See point 4.1.2.2.
and maximizing the common good and the values that such group embraces (HIGGINGS, 1994), it is paramount to question whether sustaining a rule that prevents human rights from being effective makes sense for such society nowadays. Moreover, it is necessary to examine whether the historical, social, jurisprudential and doctrinal construction of state immunity really leads to assuming it as a rule, rather than to an exception to jurisdiction.

2.2 Evolution of state immunity

The Institute of the foreign state immunity has undergone major changes over the past centuries, which were caused, to a large extent, by a transformation in the role played by states. The different character assumed by the state and its relation to the society in each historical period determined the consequent modification on how immunity was approached through the years, and how it came to be understood nowadays.

2.2.1 State Immunity's Remote Roots

According to sir Ian Sinclair, “the notion that a foreign state enjoys immunity from the jurisdiction of the courts of another state is not very easy to discern” (p. 121, 1980), and, in fact, its genesis is not effortlessly identified, nor does its historical evolution follow a well-defined route (BADR, 1984). However, as pointed out by Peter Trooboff (1986), there seems to be some degree of consensus in the sense that the doctrine of foreign state immunity lays its roots in the personal immunity enjoyed by Heads of state, which, in its turn, was
regarded as a by-product of the immunity enjoyed by ambassadors and diplomats before the courts of another sovereign\textsuperscript{49} (SINCLAIR, 1980).

The religious notions of the sanctity of the envoys, where the roots of diplomatic immunity lay, were quite present in the works of political and legal thinkers at the time of enormous growth in the diplomatic relations, the sixteenth and seventeenth centuries. The most notorious examples can be found in the works of Jean Bodin – to whom the person of the ambassador was sacred and inviolable - and of Balthazar Ayala - who considered the ambassador the personification of his sovereign (LANGHHOLTZ;SOUT, 2004). As a matter of fact as it was usual for ambassadors stationed in important positions to have some kind of intimate relationship with the sovereign he represented, and such proximity also fostered the notion that the ambassador was some sort of personification of his king, hence deserving similar privileges (LANGHHOLTZ;SOUT, 2004).

Little by little, those religious references where substituted during the Renaissance period by an international legal theory developed in more secular and rational lines, and jurists sought theories deduced also from human reason- and specially from the notion of sovereignty - rather just than dictums from religious inspiration (LANGHHOLTZ;SOUT, 2004). A more formal legal theory on the area of diplomatic immunities was presented by Alberico Gentili in his work \textit{De Legationibus libri tres} (1985), soon to be followed by François Hotman’s \textit{L’ambassadeur} (1603). (LANGHHOLTZ; SOUT, 2004).

\textsuperscript{49} Although the generally acknowledged rule that sovereigns were immune from each other’s authority and jurisdiction formed the basis, by extension, for the immunity of envoys of the sovereign, in practice the envoys may well have received more rigorously guarded immunity than their kings. Historically, sovereigns were not always immune. For example, during the Crusades, Richard I of England was captured and held to ransom by Leopold of Austria. During the Middle Ages, a king was only too aware that if he fell into alien hands, he might expect to be ransomed, mistreated, killed. At the same time, monarchs during this period began to recognize the importance of envoys as symbolic extensions of their own sovereign authority outside their borders. In one early collection of national law, the thirteenth-century Castilian compilation known as Las Siete Partidas, all envoys of foreign rulers were granted immunity, be they Christian, Moor or Jew (LANGHHOLTZ;STOUT, 2004, p. 248-249)
However, the analysis of the works of the classical writers on international law during its formative stage bears proof that, by that period, only the personal immunities of foreign sovereigns and ambassadors were addressed (BADR, 1984), and not the state immunity from jurisdiction. In this sense, the majority of scholars attributes the origin of state immunity to a certain passage or transposition of the immunity conferred upon the king and his diplomats to the new “entity” in the international panorama: the Nation-state.

Therefore, the phenomenon of the non-submission of the monarch and his ambassadors to the courts of another king transferred itself so that the state, an entity entitled with legal personality under international law, could enjoy such privileges. Madruga (2003) and Arroyo (2003) share that opinion, declaring that there was no “birth” of a new immunity, but simply the transition in its ownership: if before the immunity was only a personal attribute of the sovereign and his diplomats, now it can also be seen in the state, meaning that the change occurred not in the immunity institute per se, but in the external face of the sovereign.

Hence, the genesis of state immunity can be found in the ancestral practice of granting certain prerogatives to the person of the monarch and to those representing him, as the diplomats, since the sacred character of the king of his envoys meant that they could not be judged by the courts of another monarch. The emergence of the foreign state immunity from jurisdiction is not considered to be autonomous, but rather a transference of the application of Bartholo’s maxim “par in parem non habet imperium” to the sphere of the new protagonist entities in the international scenario, the states, which endowed with

50 Also, according to Lalive, « historiquement la notion s'explique par le fait que l'Etat s'identifiait à la personne même du souverain. La souveraineté et l'indépendance du chef de l'Etat étranger, du Prince, entraînaient, par voie de conséquence nécessaire, l'impossibilité d'attirer celui-ci devant les tribunaux étrangers. La pratique et la doctrine ont souvent hé la question à celle des immunités diplomatiques, qui sont plus anciennes » (1953, p. 213)

51 A imunidade de jurisdição foi estabelecida na época das monarquias absolutas, quando a pessoa do soberano se confundia e identificava com o Estado mesmo, critério que reinou pacificamente em todo o mundo e foi mantido em virtude do princípio de DIP par in parem non habet imperium, sustentando-se na igualdade e soberania própria dos Estados” (ARROYO, 2003, p. 143).
their own legal personality dissociated themselves more and more from the figure of their respective monarchs.

As pointed out by Gamal Badr (1984), the rules of state immunity developed mostly from the judicial practice the municipal courts from different individual nations since the nineteenth century, and doctrinal opinions as well as attempts of building an international legal framework for the subject came later on. Such historical construction shall be addressed from now on.

2.2.2 State Immunity Before Domestic Courts: First Developments

Until the beginning of the nineteenth century, there was a tendency to treat state immunity just as an application of the exemption enjoyed by sovereigns and their diplomats from the jurisdiction of local courts (SINCLAIR, 1980). Hence, state immunity was usually applied analogously to the immunity granted to the person of the monarch, in an absolute and unrestricted manner. In fact, according to Marasinghe (1991), the appearance of the absolute immunity theory before domestic courts may be seen during the early part of the 19th century, and its early formulation could be found in cases involving vessels belonging to foreign sovereigns.

In this sense, the United states Supreme Courts has been recognized for, in 1812, having made the first significant effort to trace the roots of foreign state immunity (TROOBOFF, 1986), and the judgment of The Schooner Exchange v. McFaddon case is often cited as the first judicial expression of the so called doctrine of absolute immunity (SINCLAIR, 1980). In the aforementioned case, Chief Justice Marshall dealt with a libel and a claim of title against a public armed vessel of the Government of France, the Exchange, which previously belonged to the libellants – McFaddon and Greetham - when it was captured by the French Navy and converted into a war ship52 (TROOBOFF,

52 The brief statement of the facts concerning the case reads at follows: “The schooner Exchange, owned by John M’Faddon and William Greetham, sailed from Baltimore, October 27, 1809, for St. Sebastians, in Spain. On the 30th of December, 1810, she was seized by the order
1986). The decision of Chief Justice Marshall favors the absolute immunity doctrine, hence excepting France from the jurisdiction of the American courts in the following terms:

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extraterritorial power, would not seem to contemplate foreign sovereigns, nor their sovereign rights, as its objects. One sovereign being in no respect amenable to another and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him. […], the Exchange, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United states is at peace, and having entered an American port, open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country (THE AMERICAN SOCIETY OF INTERNATIONAL LAW, 1909, p. 228-232).

It is important to notice that, in fact, “there were no 18th century authorities that Marshall CJ was able to find in support of his decision exempting all vessels of foreign sovereigns from local jurisdiction” (MARASINGHE, 1991, p. 669). Nevertheless, despite being unsupported by, and in fact against, all previous authorities (MARASINGHE, 1991), the decision concerning the Schooner Exchange became the legal precedent guiding the municipal courts not only from the United states of America, but also from many different countries, in the sense that they should grant absolute immunity to the foreign states before them. The importance and repercussion of the Schooner of Napoleon Bonaparte; and was then armed and commissioned as a public vessel of the French government, under the name of Balaou. On a voyage to the West Indies, she put into the port of Philadelphia, in July, 1811, and on the 24th of August was libelled by the original owners. As no claimant appeared, Mr. Dallas, the attorney of the United states for the district of Pennsylvania, filed (at the suggestion of the executive department of the United states, it is believed) a suggestion that inasmuch as there was peace between France and the United states, the public vessels of the former may enter into the ports and harbors of the latter and depart at will without seizure or detention in any way. The district judge dismissed the libel, on the ground that a public armed vessel of a foreign power, at peace with the United states, is not subject to the ordinary judicial tribunals of the country, so far as regards the question of title, by which the foreign sovereign claims to hold her. The libellants appealed to the circuit court, where the sentence was reversed -from the sentence of reversal, the district attorney appealed to this court” (THE AMERICAN SOCIETY OF INTERNATIONAL LAW, 1909, p. 227-228)
Exchange decision for international law- and especially to the field of immunities- is therefore undisputable53, and the absolute immunity paradigm lasted for a long period in both doctrine and case law.

Trooboff (1986) demonstrates the importance of the aforementioned case by noting that, more than a 100 years later, in the Berizzi Bros. Co. v. SS Pesaro case54, regarding an Italian government-owned merchant vessel which was operated by that government in the transport of goods to the United states, the American Supreme Court declared that the Schooner Exchange was still the

53 In this regard, Antenor Madruga sustains that “O direito das imunidades poderia não ter tido a mesma relevância se a Escuna Exchange houvesse sido confiscada não por Napoleão Bonaparte, mas, digamos, por D. João VI. Possivelmente, os Estados Unidos não se teriam empenhado tanto em promover a reforma na Suprema Corte do acórdão que restitua à McFaddon e William Greetham, cidadãos norte-americanos, a embarcação de sua propriedade, confiscada por tropas francesas em decorrência de violação ao embargo naval decretado contra a Inglaterra e seus aliados. Poderia ter sido completa a sorte que tiveram quando, menos de um ano depois do confisco, viajando da Europa às Índias sob bandeira, nome e comando franceses, a escuna Exchange, ou Balou nº5, como passou a ser chamada, precisou aportar em território dos Estados Unidos, devido a intempéries em alto mar, permitindo aos proprietários desapossados argüirem a jurisdição territorial de seu Estado. Provavelmente, o forte interesse diplomático dos Estados Unidos em não se atritarem com o soberano francês pesou na decisão, assumida, em corte por sua Procuradoria-Geral, de explorar a teoria jurídica que permitiria resolver o impasse. Esse interesse, expressamente disposto nas razões de recurso apresentadas neste caso pela Procuradoria-Geral dos Estados Unidos, que alertou: “if the courts of the United states should exercise such a jurisdiction it will amout to a judicial declaration of war”. Talvez, uma decisão contrária da Suprema Corte no caso Schooner Exchange v. McFaddon tivesse efetivamente levado a uma declaração de guerra pela França. Ou, mais provavelmente, não tivesse dado ensejo ao surgimento da teoria da imunidade absoluta” (2003, p. 156-157)

54 According to the statement of facts, “This was a libel in rem against the steamship Pesaro on a claim for damages arising out of a failure to deliver certain artificial silk accepted by her at a port in Italy for carriage to the port of New York. The usual process issued, on which the vessel was arrested, and subsequently she was released, a bond being given for her return, or the payment of the libelant's claim, if the court had jurisdiction and the claim was established. In the libel the vessel was described as a general ship engaged in the common carriage of merchandise for hire. The Italian ambassador to the United states appeared and on behalf of the Italian government specially set forth that the vessel at the time of her arrest was owned and possessed by that government, was operated by it in its service and interest, and therefore was immune from process of the courts of the United states. At the hearing it was stipulated that the vessel, when arrested, was owned, possessed, and controlled by the Italian government, was not connected with its naval or military forces, was employed in the carriage of merchandise for hire between Italian ports and ports in other countries including the port of New York, and was so employed in the service and interest of the whole Italian nation, as distinguished from any individual member thereof, private or official, and that the Italian government never had consented that the vessel be seized or proceeded against by judicial process. On the facts so appearing the court sustained the plea of immunity, and on that ground entered a decree dismissing the libel for want of jurisdiction. This direct appeal is from that decree and was taken before the Act of February 13, 1925 ( 43 Stat. 936), became effective. The single question presented for decision by us is whether a ship owned and possessed by a foreign government, and operated by it in the carriage of merchandise for hire, is immune from arrest under process based on a libel in rem by a private suitor in a federal District Court exercising admiralty jurisdiction” (UNITED STATES OF AMERICA, 1926, p.569-570)
precedent to be "applicable alike to all ships held and used by a government for a public purpose" (UNITED STATES SUPREME COURT, 1926, p. 574). As a consequence, the Supreme Court concluded that the general words of section 24, cl. 3, of the Judicial Code (which invested the District Courts with jurisdiction of all civil causes of admiralty and maritime jurisdiction) must be construed, in keeping with ruling of The Exchange case, “as not intended to include a libel in rem against a public ship, such as the Pesaro, of a friendly foreign government” (UNITED STATES OF AMERICA, 1926, p. 576) and, as a result the court below dismissed the libel for want of jurisdiction.

British case law was more hesitant in establishing a doctrine of absolute immunity (TROOBOFF, 1986). The Prins Frederik case55, in 1820, was the first of many cases before British courts, and by then the King’s Advocate and the Advocate for the Admiralty argued in favor of the ship’s immunity, sustaining that:

By then, Sir William Scott avoided a decision on the matter of the jurisdiction, and suggested that the claim for salvage should be object of arbitration (SINCLAIR, 1980). Other cases are also illustrative of the uncertainty regarding the extent of immunity from jurisdiction that courts should grant to foreign sovereigns, and by the half of the nineteenth century, English courts were deciding cases such as Duck of Brunswick v. King of Hanover and De Haber v. Queen of Portugal by using "a test that would allow immunity for actions or omissions of a sovereign in his public capacity as a representative of

55As Sir Ian Sinclair clarifies, “in 1820. In the case of The Prins Frederik, Sir William Scott (later Lord Stowell) had to determine whether the Court of Admiralty had jurisdiction to decide a claim for salvage against a public ship of war, armée en flute, belonging to the King of the Netherlands. The ship had, in the course of a voyage from Batavia to Texel, with a valuable cargo of spices and other goods on board, suffered damage off the Scillies and had been brought in to an English port by the master and crew of the British brig Howe who thereupon claimed as salvors.” (1980, p. 123)
the nation of which he is the head of” (TROOBOFF, 1986, p.257). Those cases were already dealing with a phenomenon that brought important social, commercial and political consequences: the engagement, by the states, in private activities that, beforehand, were performed almost exclusively by private persons.

In practical terms, the absolute doctrine of sovereign immunity brought no great problems until the turn of the nineteenth century, since in earlier times the sovereigns were mostly involved in wars and conquests, so commercial activity was left to individual merchants of the realm, and the sovereign’s interest in such activities was basically in taxing their revenues, in return for which he provided them with the armed protection of his naval power (MARASINGHE, 1991). Nevertheless, the colonial expansion, initially seen mostly as a way of extending the sovereign’s authority through this indirect exploitation of new overseas dependencies (MARASINGHE, 1991), was responsible, along with the growth in commercial transactions among nations that accompanied the Industrial Revolution, for a major change in the role performed by states in the international society, leading many states to become actively engaged in commercial transactions (TROOBOFF, 1986).

The Dutch East India Company, the British East India Company and the British South Africa Company are just a few examples of the colonial agencies established in order to exploit the commerce in the colonies (MARASINGHE, 1991), and through them the state has more and more assumed the control of various activities which were formerly left to private initiative (HARVARD INSTITUTE, 1932). Activities such as the operation of railways, telegraphs, radio and other enterprises were undertaken by the states, as well as the establishment of state monopolies, such as those of tobacco, salt, matches and other common articles of commerce, and they necessarily brought the state into commercial relationships with private individuals, resulting in numerous litigations which have been brought before the courts (HARVARD INSTITUTE, 1932).
Therefore, in the course of the nineteenth century, the states presented themselves also as large-scale commercial entrepreneurs, acting, for example, in the creation of market monopolies in specific areas, building and managing railways, shipping companies and postal services (BROWNLIE, 2008). Thus, besides the traditional acts of government, performed in the exercise of their sovereign prerogatives, states started to engage more and more in acts of a commercial nature, which are conducted on the basis of their private capacity as a legal entity, subject to private law (CASSESE, 2005). This new role of states in the international arena - that of a trader and negotiator, also involved in private transactions - led to the need to think in a different legal treatment for these entities acts, whose activities were longer limited to their eminently political and administrative powers related to the government.

Facing these questions, a different rationale was adopted by Judge Phillimore in the notorious Charkieh case, in 1873, regarding the collision of a vessel owned by the Khadive of Egypt against Batavier, a steamship from a Dutch company, in the waters of the Thames. As Sinclair notes (1980), the fact that the Charkieh had been chartered to a British subject and was engaged in a commercial venture led Judge Phillimore to state that:

no principle of international law, and no decided case, and no dictum of jurists of which I am aware, has gone so far as to authorize a sovereign prince to assume the character of a trader, when it is for his benefit; and when he incurs an obligation to a private subject to throw off, if I may so speak, his disguise, and appear as a sovereign, claiming for his own benefit, and to the injury of a private person, for the first time, all the attributes of his character (UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, 1973)

However, this path towards a more restrictive view of state immunity was not followed in the subsequent decisions of British courts. In 1880, the decision on the Parlement Belge case “provided the occasion for the first clear formulation of a rule of state immunity in English law, and extended it to all public property of a foreign state intended for public purposes” (FOX; WEBB, 2013, p. 135).
The Parlement Belge, property of the King of the Belgians, was a packet-boat operated by officers from the Royal Belgian Navy, working mostly as a mail packet, but that also carried merchandise, passengers and their luggage for hire, that collided against a tugboat in the Dover harbor, hence originating a legal claim (FOX; WEBB, 2013). Sir Robert Phillimore, in the Admiralty Court, with no appearance being entered by the defendant, held that the Parlement Belge was not entitled to immunity as a public war ship, and that the article VI of the 1876 Postal Convention between Great Britain and Belgium, that provided that mail packets in the terms of the Conventions should be treated as vessels of war, was not applicable, since the referred convention lacked parliamentary approval (FOX; WEBB, 2013).

However, the Attorney-General appealed, and the Court of Appeal reversed the previous decision holding that the Parlement Belge, regardless of the 1876 Convention, fit within the general rule of immunity from jurisdiction bestowed on public vessels, a privilege that was not lost even if the ship was being partially used for commercial reasons (FOX; WEBB, 2013). Therefore, the decision on the Parlement Belge case “for some 50 years was treated as authority in English law for an absolute doctrine of immunity, admitting no exception for commercial activities” (FOX; WEBB, 2013, p. 135).

The Porto Alexandre\textsuperscript{56} decision is considered to be a sign of the definitive acceptance by the English courts of the doctrine of absolute immunity, and it

\textsuperscript{56} As reported at the American Journal of international law, “The Porto Alexandre was an enemy ship of German origin which, after having been requisitioned by the Portuguese Government, had been condemned by their courts as prize. She was handed over to an office at Lisbon, and on September 13th last, while she was carrying a cargo shipped by and consigned to the Portuguese Import and Export Company (Limited), from Lisbon to Liverpool, she got into difficulties in the Crosby Channel, Kiver Mersey. Assistance was rendered by the steam tugs Nora, Expert, and Torfrida, the owners, masters, and crews of which, on September 16th, issued writs in rem, claiming salvage. The Porto Alexandre was then arrested, and an appearance under protest was entered on behalf of the ship and freight. Application was then made for the release of the vessel to the Liverpool District Registrar, who granted the application, but his order, on appeal, was set aside by the Vacation Judge, without prejudice to an application to be made to set aside the writ and all other proceedings. That application came before Mr. Justice Hill, who was informed by the Portuguese Charge d’ Affaires that the Porto Alexandre was a public vessel belonging to the Portuguese Government. The learned judge, after argument, came with reluctance to the conclusion that the writ and all other proceedings must be set aside, on the ground that the vessel, being the property of a sovereign state, was immune from arrest. The plaintiffs appealed, but the court, without calling on counsel for the respondents, dismissed the appeal.” http://archive.org/stream/jstor-2187856/2187856\_djvu.txt
regards a “German privately owned steamship that had been lawfully condemned in prize by a Portuguese court in 1917 and [...] at the time of the proceedings in England she was engaged wholly and exclusively in ordinary trading operations” (SINCLAIR, 1980, p. 126). The decision is noteworthy for many aspects, particularly for recognizing that there has been a change in the activities performed by states at that time, and that international society was seeing more and more Government vessels engaged in ordinary trading. Despite such realization, the Court was guided by the Parlement Belge and its consequences:

The question is, whether it is possible in the circumstances of this case to distinguish it from The Parlement Belge, which was a decision of this Court, and is binding upon us. I gather from the judgment of Hill J., and from what has been said by learned counsel, that this question is becoming one of growing importance. In the days when the early decisions were given, no doubt what were called Government vessels were confined almost entirely, if not exclusively, to vessels of war. But in modern times sovereigns and sovereign states have taken to owning ships, which may to a still greater extent be employed as ordinary trading vessels engaged in ordinary trading. That fact of itself indicates the growing importance of the particular question, if vessels so employed are free from arrest. The function of this Court in this particular case is to decide whether it is covered by The Parlement Belge. I think it is, and it is therefore not necessary or desirable that the Court should enter upon a discussion of the wider question at this stage, or consider the importance of other views that may be taken. There is very little difference between the material facts in The Parlement Belge and in the present case, and in my opinion The Parlement Belge is an authority which covers the present case. It is quite true that in many of the earlier cases the claim put forward, with regard to a particular ship, was that she was on public service and employed in the public service, and no doubt the statement so made was applicable to the particular case, and was made because it was applicable to the particular case, and the judgments were delivered in reference to the facts so stated. But in this case the Court is bound by the decision in The Parlement Belge and the appeal must be dismissed with costs (UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, 1920, p. 34-5).

The new roles performed by the state and its consequences regarding the legal relations with individuals were also object of discussion in the French courts. According to Dunbar, “the starting point in French jurisprudence is undoubtedly the celebrated decision in 1849 of the Cour de cassation in Le Gouvernement espagnol v. Lambège et Pujol” (1971, p. 205), and the case
perfectly illustrates the hurdles faced by individuals – shoemakers who sold their merchandise to the Spanish government- to recover what was dully owned to them by virtue of a contract with a sovereign state.

However, this was not the first time that the immunity issue has been brought before French courts: there were similar precedents from lower courts, and they were confirmed in this paradigmatic decision of the Cour de Cassation (DUNBAR, 1971), that reverted the decision in which the Cour of Pau held its jurisdiction if an affair involving Spain based on the provisions of article 14 of the French Civil Code authorizing suits in French courts against a foreigner who has contracted an obligation with a French national (RIESENFELD, 1986). On that account, the Cour de Cassation “had no hesitation in deciding that the court of appeal had violated that principle of the law of nations which consecrates the independence of states, had exceeded its authority and had wrongly applied Article 14 of the Civil Code” (DUNBAR, 1971, p. 208).

57 According to Riesenfeld (1986), these cases where: Balguerie c. Gouvernement Espagnol (1825), Blanchet c. République d’Haiti (1827), Temaux-Gandolphe c. République d’Haiti (1928) and Solon c. Gouvernement Egyptien (1847).
58 Dunbar provides an explanation of the facts regarding the case: “Lambège and Pujol, merchants of Bayonne, had supplied shoes to the Spanish Government in February 1837 through the agency of Pierre Collado, a merchant of San Sebastian, Spain. On 25 October the principal minister of the military treasury of Spain, wishing to provide for the payment of the shoes, drew a bill of exchange for 13,500 reals on the commissary of the province of Oviedo. This bill was to the order of Antoine de la Revilla, a military agent, who duly endorsed it on 28 October to the order of Fernandez, a store-keeper, who in turn endorsed it in favour of Collado. The latter, on 30 October, endorsed it to Lambège and Pujol. On maturity the bill was pressed to the commissary of the province of Oviedo, but he replied in writing on 7 May 1839 that he was unable to honour the bill because of instructions given by the Government on 15 November 1837 to the minister of military finances in San Sebastian. After further delay the bill was returned to Lambège and Pujol. On 29 February 1844 they obtained an attachment (saisie-arrêt) of all moneys owing to the Spanish Government by François Balasque, a merchant of Bayonne, against whom the Spanish minister of finances had obtained a judgment. On 7 March they gave notice of the attachment to the Spanish minister, representing Spain, and cited him before the court of Bayonne to have the validity of the attachment confirmed. On 30 July 1844 the court gave judgment to that effect against the minister, in default of appearance, for a sum in respect of capital, interest and legal expenses, and ordered Balasque to pay François Casaux, liquidator of the firm of Lambège and Pujol, so much of the sum which he owed to the Spanish Government as would satisfy the judgment, at the same time awarding costs against the Spanish minister of finances. Balasque declared that he owed 5,000 francs to the Spanish Government which he was ready to remit to the liquidator, Casaux. However, the Spanish minister of finances now intervened but to no avail for on 6 May 1845 the court of appeal at Pau upheld the judgment of the Bayonne court.” (DUNBAR, 1971, p. 204-205)
Further discussions in French case law cast some doubts about the application of state immunity, specifically regarding the “public” and “private” character of the defendants and of the activities involved in the claims. (SINCLAIR, 1980). The issue of state immunity came before the Cour de Cassation a second time in 1885, in the case Veuve Caratier-Terrasson v. Direction Générale des Chemins de fer d’Alsace-Lorraine, in which the defendant, a German railway company, had been condemned by a French court to pay the claimant regarding merchandise lost in transit and, in order to enforce this execution, the claimant had seized goods in the possession of a French railway company that belonged to the defendant (DUNBAR, 1971). The Cour de Cassation discussed whether the exploitation of a railway constituted an act of commerce justiciable by the French courts, and ended up deciding that the administration of this railway was under direct authority of the German Chancellery and, as its funds and rolling-stock belonged to the German state and had a public destination, they could not be seized, even when they were in the hands of a third party (DUNBAR, 1971).

In this regard, there was also an attempt, before the French courts, to make a distinction between the capacities of the corporate sovereign (État personne privée) and state itself (État puissance publique), and the first relevant case seems to be the 1912 decision from the Paris Cour d’Appel in the case Gamé-Humbert c. État Russe (SINCLAIR, 1980), concerning a claim for damages brought by a French citizen, Mr. Humbert, for physical injuries suffered in an accident with a railway wagon belonging to the South East Russian Railways (OLIVARES, 2003). However, in its decision, the court found that there was no point in distinguishing between the “public personality” of a state, that would escape from another country’s jurisdiction, and its “moral personality”, that would be subject to such jurisdiction regarding all acts of a state that would not have a political finality (OLIVARES, 2003).

59 According to Olivares, Mr. Humbert “first brought successfully a suit against the carrier, Mr. Portefaix, and the railway company, before the Civil Tribunal of the Seine, but the carrier was insolvent and the Russian company did not pay. Later on, he brought a suit against the Russian Government on the grounds that the railway company was a property of the Russian Government, but, on appeal, the 6th Chamber of the Court of Paris held that by virtue of the reciprocal independence of states, Mr. Humbert cannot cite the Russian state before a French tribunal” (2003, p. 63)
2.2.3 First Steps Towards a Relative Approach

The increasing establishment of private-nature relations, such as commercial transactions between individuals and the state, led to a consequent increase of litigation because of disputes arising out of these relationships. In the was majority of such cases, the immunity obstacle brought unfair results, since the concerned individuals were denied legal remedies for reasons completely out of the scope of their claims (BELSKY; MERVA; ARRIANZA, 1989). However, it is well-known that some countries followed a different course, adopting a more restrictive approach towards state immunity during the nineteenth and early twentieth centuries. The most notorious examples of such trend are represented by the case law of Belgium and Italy.

Belgium is considered "to have been at the vanguard of the jurisprudence making a distinction between the pertinence of allowing suits against foreign states in cases regarding acts in their private capacity in opposition to claims concerning acts taken in their public capacity (SINCLAIR, 1980). In 1903, the Belgian Cour de Cassation decided the leading case Compagnie du Chemin de fer liégeois-limbourgeois v. Etat néerlandais, in which the plaintiffs had sought to recover a sum of money said to be due to them under the terms of a 1866 contract regarding the enlargement of the Eindhoven railway station (DUNBAR, 1971). The court of first instance declared itself competent on the basis that the claim involved a civil law matter, but that decision was then reversed on appeal, as the court considered that the jurisprudence of various European states did not, in general, recognize any distinction between the acts of a state in its public capacity (jure imperii) and the ones concerning private activities (jure gestionis) (DUNBAR, 1971). When faced with the case, the Belgian Cour de Cassation observed that a state need not confine itself to a political role, and

To satisfy the needs of the community it can acquire and possess goods, contract, become a creditor and debtor; it can engage in commerce, reserve to itself monopolies and the direction of general utility services. In the management of that domain or of those services the state does not put in operation the "puissance publique" but acts like a private individual. A foreign state, just like an ordinary person or foreigner, is justiciable in Belgian tribunals without putting its
sovereignty in question when the matter concerns only the exercise or defense of a private right. No difference should be made between a dispute concerning the performance of a contract by the foreign state and one relating to immovable property which belongs to it within the jurisdiction. In reality, the competence of the court is derived not from the consent of the state but from the nature and character of the act in question. (DUNBAR, 1971, p. 211)

The denial, by the Cour de Cassation, of state immunity on the grounds that the actions involved had a private character, rather than a public one, was the landmark of what became known as “the Belgian doctrine”, consecrating a restrictive approach on the matter. Such tendency was confirmed by the subsequent jurisprudence, in cases such as Feldman c. État de Bahia, from 1907, in which the Court of Appeal of Brussels faced a claim brought by a private individual, against the state of Bahia (Brazil), for damages resulting from an alleged violation of a contract by an agent of the state authorized to negotiate a loan for the state of Bahia (OLIVARES, 2003). While the court acknowledged that it was incompetent to adjudicate on the legality or opportuneness of the authority given to the governor of Bahia to contract the loan, it found that the delegation of authority by the Governor of Bahia did not constitute an act of sovereignty or delegation of power per se, but only a mandate to make specific preliminary agreements, which could only give rise to civil rights, and did not in any way involve the sovereignty of Bahia (OLIVARES, 2003). Therefore, the court found that it was competent to address questions concerning the relations between the persons with a view to finding investors and discussing the conditions of the loan and, according to the court, “no law gave to a foreign state the right to decline the competence of Belgian courts in litigation arising from contracts of purely civil rights” (OLIVARES, 2003)

Italian courts shared the pioneer role with Belgium regarding the application of a restrictive approach towards state immunity. In 1882, the Corte di Cassazione di Torino, in the Morellet v. Governo Danese case, made the notorious distinction between the figure of the state as “ente politico” (political entity) and “corpo morale” (moral body), confining the attribution of immunity to the former (COMMISSION OF INTERNATIONAL LAW OF THE UNITED NATIONS, 1980). In its reasoning, the court affirmed that, since it was for the
state to provide for the administration of the public body and for the material interests of individual citizens, it follows that it must acquire and own property, make contracts, sue and be sued, i.e., the state must exercise civil rights similarly to other legal persons or private individuals (COMMISSION OF INTERNATIONAL LAW OF THE UNITED NATIONS, 1980).

The year of 1886 is marked by two very important decisions in the Italian jurisprudence. In the case *Typaldos, console di Grecia a Napoli c. Manicomio di Aversa*, the *Corte di Cassazione di Napoli* boldly contested the roots of the absolute immunity doctrine by stating that such a system, “which assumes prestige of authority by the jurisprudence, so far more often inclined to follow it, proceeds from an original misunderstanding, from which all the consequences contrary to the general principles of law” (GRADONI, 2012, p. 712-713).

In the same year, the *Corte di Cassazione di Firenze*, making a distinction between the state as “potere politico” (political power) and “persona civile” (civil person), fostered the idea that considering states as accountable players in the market would be beneficial not only for the interest of individuals, but mostly for other states: the restrictive approach would facilitate the exercise of economic activity of the state because it obviously be more trusted as a trading partner when it can be held accountable by the breach of its obligations (ALEBEEK, 2008). Therefore, the court considered that no immunity should be held regarding services rendered to the Bey of Tunis “when these high prerogatives are not involved, and the Government as a civil body descends into the sphere of contracts and transactions so as to acquire and assume obligations, just as a private person might do, then the independence of the state is immaterial, for in such a case it is a question solely of private acts and obligations to be governed by the rules of general laws” (FOX; WEBB, 2013, p. 152).

Finally, in 1887, the Court of Appeals of Lucca recognized the distinction between "atti d'impero" and "atti di gestione", in another case connected with the same Bey of Tunis (COMMISSION OF INTERNATIONAL LAW OF THE UNITED NATIONS, 1980). Thus emerges the distinction between acts of
government (*iure imperii*) and acts of management (*iure gestionis* or *privatorum*), which was consecrated, according to Cassese (2005), in the jurisprudence of the Italian and Belgian courts, that started refusing to grant jurisdictional immunity for acts performed by foreign states in their private capacity, inaugurating a new trend in international law.

This overview of the jurisprudence of some countries reveals that, until the First World War, jurisprudence was oscillating and, while many countries were applying the absolute doctrine of immunity, which is particularly true regarding common law countries, a different trend was represented by Italy and Belgium, whose courts were pioneers regarding the adoption of a restrictive approach towards state immunity, consecrating the difference between acts *jure imperii* and acts *jure gestionis* as the main criterium for their decisions.

2.2.4 Consolidating of the Relative Approach

The social panorama of the beginning of the twentieth century witnessed dramatic changes, and these transformations had a noteworthy repercussion in the approach of domestic courts around the world in the matter of state immunity. The advent of World War intensified the engagement of states in commercial activities, especially with the emergence on the world scene of the socialist and communist countries and their strong influence on the economy. Therefore, the Russian Revolution of 1918 was the landmark of the massive participation of states in trading activities, when the nationalization of the industries performed by the Bolsheviks resulted in the “means of production” becoming vested in the state and, as commercial activities started to be largely operated by a multitude of state agencies, the question whether such agencies could be impleaded in foreign courts began to loom large during the twenties and thirties (MARASINGHE, 1991).

Those state-owned agencies became more and more a familiar part of the merchant community, and when the monarchies of the Iberian Peninsula
were deposed, countries such as Spain and Portugal also adopted the Soviet model and also began trading through state agencies (BROHMER, 1997). The trend was followed by other nations, and “naturally enough, the question began to be asked whether the absolute view of sovereign immunity, which had been developed in such different circumstances, was still a reasonable one” (MARASINGHE, 1991, p. 665).

Ian Sinclair (1980) recalls that Eleanor Allen, in 1933, was able to conclude, after researching the judicial practice many countries, that a growing number of courts was, by then, restricting the immunity to occasions in which the state has acted in its official capacity as a sovereign political entity and, therefore, the idea that such distinction was peculiar at that time to Belgium and Italy must be enlarged to include Switzerland, Egypt, Romania, France, Austria and Greece. However, one should take this assertion bearing in mind that, at that time, specially in the 1920s and the 1930s, “there was clearly no consensus of opinion as to whether international law recognized the doctrine of restrictive immunity” (SINCLAIR, 1980, p. 134). There was, nevertheless, increasing evidence that the distinction between acts *jure imperii* and acts *jure gestionis* was being applied many civil law countries, particularly in Western Europe (SINCLAIR, 1980), although it is hard to determine to which extent this was the predominant approach taken by the local courts, and the ambiguity of the French case law exemplifies this difficulty:

In 1926, after the Soviet Revolution, the French Cour de Cassation denied claims of immunity from an attachment of funds belonging to the Soviet commercial delegation. Another case in 1933 allowed an action against the Soviet commercial delegation for breach of the copyright for the memoirs of a noted Russian singer. A Soviet nationalized publishing house and government-owned distributor carried out the publication and subsequent sale through third parties in France. Both cases seemed to augur a distinction between the state acting as a public authority and the state acting as a trader. In view of earlier precedents that seemed to follow the absolute immunity principle, the French commentators struggled with rationalizing these later cases that involved the Soviet state’s commercial activities. At the same time, the commentators recognized the great practical problem for commercial dealings between French private persons and the Soviet state. In the event, the French courts reached inconsistent results in other cases involving the Soviet state and other foreign states. Only after the Second World War would the French courts reach a more

The fact is that, despite the frequent lack of consistence in the jurisprudence of most countries regarding state immunity, the courts of Switzerland were applying the restrictive theory since 1918\(^{60}\), the Austrian in 1919\(^{61}\), the Argentinean\(^{62}\) and French\(^{63}\) in 1924, the Egyptian\(^{64}\) in 1926, the Greek courts in 1928\(^{65}\), the Irish in 1941\(^{66}\) and the German courts in 1949\(^{67}\) (BYERS, 1999). In this period, courts in common law countries were applying absolute immunity, a reality explained by Michael Byers:

The difference between common law and civil law jurisdictions in terms of their willingness to incorporate the doctrine of restrictive state immunity into national law can be explained on at least three grounds. First, common law courts remained bound by the doctrine of crown immunity (“sovereign immunity” in the United states) long after civil law courts began to distinguish between immune and non-immune acts of their own sovereigns. Secondly, courts in common law systems felt bound by the doctrine of stare decisis not to abandon their earlier applications of absolute immunity. Thirdly, common law states had a less acute interest in the development of the doctrine of restrictive immunity than most civil law states. The common law states were either large, such as the United states, or part of the former British Empire—its internal cohesion and historic, political and commercial ties. By contrast, the smaller civil trading states of continental Europe, such as the Netherlands and Belgium, were dependent to a far greater extent on trade between fully sovereign states (BYERS, 1999, p. 113-114)

During the last century, the notion that states were entitled to absolute immunity was abandoned by the majority of countries, which adhered to the restrictive approach that has been for long consolidated in Italy and Belgium, as exemplified in 1952, when the United states issued the *Tate Letter*\(^ {68}\), by which

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\(^{60}\) Finanzministerium v. Dreyfus, 1918.

\(^{61}\) Österreichische-ungarische Bank v. Ungarische Regierung, 1919.

\(^{62}\) Cía Introductora de Buenos Aires v. Capitan del Vapor Cokato, 1924.

\(^{63}\) État roumain v. Société A. Pascalet, 1924.

\(^{64}\) Borg v. Caisse Nationale d’Esparge Française, 1925-6.

\(^{65}\) Soviet Republic Case, 1927-8.

\(^{66}\) The Ramava Case, 1941-2.

\(^{67}\) Das sowjetische Ministerium für Aussenhandel, 1949.

\(^{68}\) According to the Letter, “The Department [of state] has now reached the conclusion that such immunity should no longer be granted in certain types of cases. [...] A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign
the Department of state acknowledged that it shall follow the restrictive doctrine. While there has been some debate regarding which acts are considered “of empire” and which ones are “commercial”, the distinction has undoubtedly been accepted as the primordial criteria in deciding whether a state should or not be immune to the jurisdiction of another state’s court.

Indeed, the most relevant conclusion that be reached from this perspective of comparative jurisprudence one that is frequently ignored. According to Lalive, “a fact in any case clear: it is the absence of any rule of international law - conventional or customary - imposing a duty to recognize the jurisdictional immunity of a foreign state” (LALIVE, 1953, p. 252). Considering the evident oscillation in the jurisprudence of different countries, “it is wrongfully that too many courts, and several authors among the most famous, have stated that this immunity resulted from an international custom, whether it was based on the notions of sovereignty, of independence or equality, whether it results of a simple uniform practice of states” (LALIVE, 1953, p. 252). As it should be remembered that in the Lotus case, the Permanent Court of International Justice stated that it is difficult to discern any evidence of the existence of an international rule where national jurisprudence is divided (LALIVE, 1953).

However, attempts to codify the legal regime of state immunity have ignored such lack of uniformity and have placed immunity as a rule, subject to

immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (jure imperii) or a state, but not with respect to private acts (jure gestionis). [...] The granting of sovereign immunity to foreign governments in the courts of the United states is most inconsistent with the action of the Government of the United states in subjecting itself to suit in these same courts in both contract and tort and with its long established policy of not claiming immunity in foreign jurisdictions for its merchant vessels. Finally, 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 persons doing business with them to have their rights determined in the courts. For these reasons it will 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. It is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so. There have been indications that at least some Justices of the Supreme Court feel that in this matter courts should follow the branch of the Government charged with responsibility for the conduct of foreign relations. In order that your Department, which is charged with representing the interests of the Government before the courts, may be adequately informed it will be the Department's practice to advise you of all requests by foreign governments for the grant of immunity from suit and of the Department's action thereon.”
narrow exceptions. Both the 1972 European Convention on State Immunity and the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property depart from the assumption that there is an immunity “rule”, and even if these instruments are not in force, they still carry a message: a State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State, subject only to a few exceptions.

2.3 Similar Notions: Act of state, Political Question and Non Justiciability

Civil courts, says Davies, “have always been reluctant to sit in judgment on the acts of foreign sovereigns, particularly acts done within their own sovereign territory” (2001, p. 01). Such reluctance find its manifestation in a variety of distinct but closely related doctrines of private international law, all ultimately based on the idea, drawn from public international law, that sovereignty is territorial. (DAVIES, 2001). State immunity is, indeed, one of these approaches, and its analysis requires also the examination of other notions or doctrines that, despite being different, are somehow related to it. Therefore, the act of state doctrine, the political question and the non-justiciability concepts shall be examined from now on.

2.3.1 Act of state Doctrine

The Act of state is a doctrine that was judicially created with the purpose of foreclosing U.S.A. courts from questioning the legality of public acts of foreign sovereigns which were performed within their own territorial limits (ZAIZEFF; KUNZ, 1985), hence allowing the courts to abstain from deciding a case

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69 The so-called Basel convention was ratified only by 8 states, and it did not enter into force. The text can be found here: http://conventions.coe.int/Treaty/en/Treaties/Html/074.htm
70 The UN convention is not into force. It has been ratified by 18 states, but it requires 30 parties to enter into force. The text can be found here: https://treaties.un.org/doc/source/RecentTexts/English_3_13.pdf
involving an international operation on the grounds that one of the parties is a foreign state. Although neither courts nor commentators have been able to reach an agreement regarding the scope of the doctrine or its application, it has been often identified as a variation of judicial prudence or deference, comity or judicial restraint (BAZYLER, 1986). As Michael Zander explains,

Municipal courts are naturally reluctant to declare the acts of a foreign sovereign state to be invalid. It is considered discourteous, a hindrance to the smooth development of diplomatic relations, a breach of comity, a possible embarrassment to the executive. Anglo-American courts deal with the problem by invoking the act of state doctrine. This enables the court to avoid the issue by holding itself incompetent to inquire into the validity of the foreign act which as a result is treated automatically as valid (ZANDER, 1964, p. 588)

An act of state entails the creation and the publication of the sovereign’s will, its physical imposition upon persons or property and a judicial confirmation, and is usually an act in which the state establishes its interest as so, and not in activities with a private nature (BOGAARD, 1965). Examples of acts englobed by the Act of state doctrine include executive and legislative measures implementing governmental decisions regarding major issues of policy, such as property ownership, expropriations, taxes, regulations concerning business enterprise and the distribution of goods in the economy (BOGAARD, 1965).

The act of state doctrine was first affirmed in the jurisprudence of the U.S.A Supreme Court in the Underhill v Hernandez case, in which an

71 However, sound criticism is expressed by Bazyler: “part of the confusion about the act of state doctrine may stem from the simple fact that the term “act of state” is a misnomer: virtually any governmental action can be characterized as an act of state. Almost every international transaction today has some link to a foreign govern- Of course, the courts have recognized the impropriety of such a result and have attempted to limit their use of the doctrine to situations in which the foreign sovereign’s involvement is significant. The problem, however, is that courts have been unable to agree on how much involvement is necessary to trigger the doctrine’s application. […]Faced with the difficulty of trying to determine the extent of foreign governmental activity necessary to constitute an “act of state,” most courts have focused primarily on whether adjudicating the controversy might interfere with the foreign policy of the United states […]The problem with this criterion, however, is that virtually every court decision involving an international transaction has the potential of interfering with the foreign policy interests of the United states” (BAZYLER, 1986, p. 365-367)

72 Hernandez was in command of a revolutionary army in Venezuela when an engagement took place with the government forces which resulted in the defeat of the latter, and the occupation
American citizen brought a suit in the United States against a Venezuelan general for damages caused in Venezuela. In a famous passage of the decision, Chief Justice Fuller affirmed that

> Every sovereign state is bound to respect the independence of every other sovereign state and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed by sovereign powers as between themselves (UNITED STATES OF AMERICA, 1897, p. 252)

Hence, an "act of state" is considered to be an application of the right to govern, and the act of state doctrine is regarded as a foreign sovereign's recognition of that right (BOGAARD, 1965). It rests on the assumption that these cases can be better addressed by the executive branch, whose efforts could be frustrated by a judicial interference, and that besides the absence of clear international standards for evaluating political actions, such cases may bring difficult conflict of law questions, such as the determination of the legality of a foreign state's act (BRÖHMER, 1997). However, the doctrine is not regarded as an international obligation or a constitutional mandate, but rather
as a self-imposed judicial restraint that is supposed to avoid embarrassing the executive in the conduction of foreign relations⁷⁵ (BOGAARD, 1965).

Moreover, in the Banco Nacional de Cuba v. Sabbatino case, the U.S.A. Supreme Court decided that acts of foreign states must be treated as valid even if they are contrary to international law and if they offend the American notions of public policy (ZANDER, 1964). According to the Supreme Court, “the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government […] even if the complaint alleges that the taking violates customary international law” (UNITED STATES OF AMERICA, 1964).

Nevertheless, as pointed out by Michael Bazyler, there is a great deal of confusion about the act of state doctrine and its practical aspects, as “the courts have been unable to determine its scope or to construct a consistent scheme for its application” (1986, p. 365). As a result of the courts’ failure to articulate a coherent criterion for determining which governmental activities are considered acts of state, some courts approached the doctrine in a mechanical way, ceasing to decide on a case-by-case basis which activities qualify as an act of state and considering, instead, that any foreign governmental involvement in an international transaction could automatically trigger the application of the doctrine, unless the case falls within some recognized exception (BAZYLER, 1986).

does not prescribe use of the doctrine, neither does it forbid application of the rule even if it is claimed that the act of state in question violated international law. The traditional view of international law is that it establishes substantive principles for determining whether one country has wronged another. Because of its peculiar nation-to-nation character the usual method for an individual to seek relief is to exhaust local remedies and then repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or before an international tribunal. Although it is, of course, true that United states courts apply international law as a part of our own in appropriate circumstances, the public law of nations can hardly dictate to a country which is in theory wronged how to treat that wrong within its domestic borders.”

⁷⁵ According to Harlan, “The dangers of such adjudication are present regardless of whether the state Department has, as it did in this case, asserted that the relevant act violated international law. If the Executive Branch has undertaken negotiations with an expropriating country, but has refrained from claims of violation of the law of nations, a determination to that effect by a court might be regarded as a serious insult, while a finding of compliance with international law would greatly strengthen the bargaining hand of the other state with consequent detriment to American interests.”
The evident drawback with this method is that “the courts, including the Supreme Court, have not agreed on which exceptions to the doctrine should be recognized” (BAZYLER, 1986, p. 368). There are, nevertheless, some more recognized exceptions to the act of state doctrine. The first one, known as the “Bernstein” exception, concerns judicial deference to the executive branch once it has declared that a judicial decision will not cause detriment to U.S.A foreign relations, and it was applied by the courts to uphold Nazi decrees discriminating against the property of Jews (FOX; WEBB, 2013). The second exception was brought right after the Sabbatino case, as the Second Hickenlooper Amendment declared that the act of state doctrine shall not apply to cases regarding expropriations in violation of international law. Also, the doctrine does not apply to commercial activities nor if the state figuring in the claim is a party to a treaty with the U.S.A that forbids expropriation without compensation (FOX; WEBB, 2013).

The act of state doctrine is considered to be closely related to state immunity (BRÖHMER, 1997) and the issues involved in both institutes might overlap (MOK, 1996). Nevertheless, the act of state doctrine does not address the jurisdiction of the court, but rather focuses in its capacity to render a decision on the merits, operating as an issue preclusion device (BRÖHMER, 1997) that can be seen in terms of justiciability and that regards the appropriateness of the subject matter for judicial resolution (MOK, 1996). Furthermore, while state immunity is seen by many as deeply rooted in international law, the act of state doctrine is a self-restraint domestic approach in the United States, which takes sensitive points of its foreign policy into consideration.

76 after a letter by Mr. Tate (then the Acting Legal Adviser of the state Department) stating that it was the policy of the executive to release the courts from restraints in the exercise of their jurisdiction upon the validity of the acts of the Nazi officials
2.3.2 The Political Question

In the U.S.A, the political question doctrine determines that certain cases are non-justiciable, as they are not a ‘case or controversy’ as defined in art 3 of the country’s Constitution, and its initial articulations date back at the turn of the 19th century, when the Supreme Court maintained that policy considerations in foreign relations make certain issues unsuitable for judicial hearing, meaning that and questions of a political nature, or questions falling to the executive, are not to be decided in court (SIM, 2009). The political question doctrine, therefore, signifies the imposition of a constitutional limitation on the judicial power of federal courts in cases regarding matters that should rather be assigned to the legislative or executive powers, and in Baker v Carr, the Supreme Court affirmed that the doctrine’s role in the separation of powers, setting out some factors that command the dismissal of the suit in case one of them is inextricable from the case at bar (FOX; WEBB, 2013).

1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or
2) a lack of judicially discoverable and manageable standards for resolving it; or
3) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or
4) the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due [to] coordinate branches of government; or
5) an unusual need for unquestioning adherence to a political decision already made; or
6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question (UNITED STATES OF AMERICA, 1962, p. 217)

As pointed out by Cameron Sim (2009), although sometimes the application of the doctrine may occur with regard to questions involving foreign states, judicial restraint in private international law is not the political question doctrine’s raison d’être, and numerous cases “have no bearing on nor have any relation to transactions involving foreign states, or to the extent that they do, this has often been in respect of attempts to alter the foreign policy of the US Government” (SIM, 2009, p. 15).
However, it is important to acknowledge that the political question doctrine is still a deference of the courts to the executive branch, and whereas immunity’s “unpopular ground of refusing jurisdiction at the request of a foreign state is avoided, the application of the political question may permit the more direct political influence of the home government to determine the outcome of the proceedings” (FOX; WEBB, 2013, p. 57). Therefore, “instead of the presence of a foreign state imposing a moratorium or state of neutrality upon the court, the court itself may become the advance detector for the executive of the vital interests of the country” (FOX; WEBB, 2013, p. 57).

Unlike immunity, the US act of state serves as both a sword and a shield. The US courts allow the use of act of state as a weapon of attack, as the basis for a substantive remedy. Whilst the political question doctrine is a judicial bar that requires abstention, act of state, as Born notes, may confer a positive cause of action (FOX; WEBB, 2013, p. 55)

2.3.3 Non-Justiciability

In the United Kingdom, the doctrine of non-justiciability is the related to the U.S.A. act of state doctrine, but separated from both it and the state immunity (DAVIES, 2001). The non-justiciability doctrine dictates that English

77 In the first place we can segregate that version of “act of state” which concerns action by an officer of the Crown taken outside this country against foreigners otherwise than under colour of legal right: the classic example of this is provided by Buron v. Denman (1848) 2 Exch. 167. The action taken by officers of Her Majesty’s Government, by means of H.M.S. Yarnton, and in bringing pressure to bear upon the Ruler of U.A.Q., might fall into this category. They are not directly attacked in these proceedings, but it is part of Occidental’s case that they were unlawful. However, the question whether these actions can be described as “acts of state” within ["931] this doctrine does not lie at the heart of the dispute and I do not propose to pursue it.A second version of “act of state” consists of those cases which are concerned with the applicability of foreign municipal legislation within its own territory, and with the examinability of such legislation – often, but not invariably, arising in cases of confiscation of property. Mr. Littman gave us a valuable analysis of such cases as Carr v. Fracis Times & Co. [1902] A.C. 176; Aksionaimyoe Obschestvo A. M. Luther v. James Sagor & Co. [1921] 3 K.B. 532 and Princess Paley Olga v. Weisz [1929] 1 K.B. 718, suggesting that these are cases within the area of the conflict of laws, concerned essentially with the choice of the proper law to be applied.
courts will refrain from inquiring into the validity of acts performed in the sovereign capacity of foreign states (WEIL, 2014), thus preventing courts from dealing with sensitive issues in international relations (DAVIES, 2001).

A case involving private individuals may turn upon matters that are challenged by sovereign states, such as jurisdiction over territory to which the private dispute relates (DAVIES, 2001), and the non-justiciability doctrine was articulated by the House of Lords in one of those disputes. In Buttes Gas and Oil Co v Hammer, the House of Lords rules that a court may refrain from adjudication in cases concerning foreign states on either of two reasons: “that there are ‘no judicial or manageable standards’ by which a court can judge those issues; or because adjudication of such issues would cause ‘embarrassment’ to the forum’s executive” (SIM, 2009, p. 209).

Nevertheless, further developments showed that when those manageable standards have been found in international law, the English courts could then interpret the principle of non-justiciability in a more flexible manner (FOX; WEBB, 2013). Hence, in the presence of a UN Security Council resolution condemning the invasion of Kuwait by Iraq as an illegal use of force, the courts had a different approach in Kuwait Airways Corp v Iraqi Airways Co, regarding an Iraqi decree expropriating Kuwaiti airplanes, as

The House of Lords refused to recognize the Iraqi decree expropriating the planes and stated that “in appropriate circumstances it is legitimate for an English court to have regard to the content of international law deciding whether to recognize a foreign law”. The Lords held that English public policy would not permit enforcement or recognition of foreign law which constituted “a gross violation of established rules of international law of fundamental importance”, supported by the “universal consensus on the illegality of Iraq’s aggression”. Lord Wilberforce’s principle was reinterpreted: “Judicial restraint must be exercised. But restraint is what is needed, not an abstention. And there is no need for restraint on the grounds of public policy where it is plain beyond dispute that a clearly established norm has been violated” (FOX; WEBB, 2013, p. 59)

The important point to be acknowledged is that, while state immunity is considered to be a customary rule of international law, the Act of state doctrine,
the Political Question doctrine and the Non-Justiciability doctrine are not regarded as part of international law, but as domestic approaches in certain countries. Moreover, they are self-imposed limitations used by the courts to avoid rendering a decision in a certain subject. Despite the fact that they might have something in common with state immunity regarding the final result they achieve, they remain as different institutes.

After analyzing how state immunity came to be considered a rule of international law, acquiring a “taken-for-granted” status that placed it beyond debate, it is time to examine how human rights came into play, what is the rationale behind them and what was their historic trajectory.
CHAPTER 3: THE CONSTRUCTION OF HUMAN RIGHTS

“Human Rights as a philosophical concept refers to the reasonable demands for personal security and basic well-being that all individuals can make on the resto of humanity by virtue of their being members of the species Homo Sapiens” – says Ellen Messer (1993, p. 221), and they demand certain minimum standards of behavior by governments. But what these rights are, and who is protected under them, has varied according to historical and social context and political interests. According to Peres Luño (1995), the existing definitions of human rights can be grouped in three main streams. The first group corresponds to the so-called tautological definitions, which usually do not bring any specific component attached to the concept of human rights that would enable to characterize them in a particular manner. Jack Donelly’s perspective, to whom “Human rights are, literally, the rights that one has simply because one is a human being” (2003, p. 10), illustrates this first category.

The second group comprises the formal definitions of human rights, that do not specify the differentiated content of those rights, but rather focuses on its special legal regime (PERES LUÑO, 1995). In this sense, Buergenthal affirms that “human rights are defined as the rights of individuals and groups that are recognized as such in international treaties and declaration[s] as well by customary international law” (2011, p. 01) and Robert Kolb says that “the term human rights law encompasses all fundamental freedoms and all basic social, economic and cultural rights recognized to each individual independently of nationality.” (2011, p. 01).

The third category includes the teleological or finalistic definitions, which conceptualize human rights by their objective, goal or intention (PERES LUÑO, 1995). Such approach is well exemplified by Gregorio Peces-Barba Martínez, to whom human rights

*Are the faculties that the Law attributes to people and to social groups, an expression of their needs regarding life, freedom,
equality, political or social participation, or to any other fundamental aspect that affects the wholesome development of the people in a community of free men, demanding the respect or the action from the other men, from the social groups and from the state, with guarantees of the public powers to reestablish their exercise in case of a violation or to accomplish their realization (PECES-BARBA MARTÍNEZ, 1987, p. 14-15).

Regardless of the definition adopted, the magnitude of human rights cannot be underestimated: “ours is the age of rights. human rights is the idea of our time, the only political-moral idea that has received universal acceptance”, says Henkin (1993, p. 09). human rights characteristically pursue to question or to modify existing institutions, practices or norms, as well as being seen as a standard for political legitimacy (to the extent that a government protects human rights, it is considered legitimate) and, also as important, human rights authorize and empower citizens to claim their rights and to require that these standards are accomplished, since they are not simply aspirations or suggestions, but rights-based demands for change (DONNELY, 2003).

The affirmation of human rights, according to Bobbio, is a phenomenon that manifests itself both universally and positively (1992). The universal aspect is revealed when one considers that “the recipients of the principles contained therein [in human rights] are not just citizens of this or that state, but all men” (BOBBIO, 1992, p. 30), while the positive aspect uncovers when it "sets in motion a process in whose end human rights must be not only proclaimed or just ideally recognized, but effectively protected, even against the state that has breached them" (BOBBIO, 1992, p. 30).Thus, this chapter shall focus on the construction of human rights, addressing their historical affirmation, their foundations and their implementation.
3.1 Historical affirmation of human rights

According to Micheline Ishay, “Human rights are seen as the result of a cumulative historical process that takes on a life of its own, sui generis, beyond the speeches and writings of progressive thinkers, beyond the documents and main events that compose a particular epoch” (2008, p. 02). Indeed, the enlivening thought behind human rights is the moral obligation not to harm strangers, and perhaps the moral obligation to assist them if they are in need (POSNER, 2014). Through history, the majority of human groups, such as families, tribes and states, impose those obligations on their members, but despite the fact that quite often the duty to not hurt another member and to help when he or her is in need has been limited to the borders of the group, there basic moral structures always coexisted with the acknowledgment of the common humanity of strangers, hence recognizing that their well-being is entitled to some degree of consideration (POSNER, 2014), and

Perhaps some level of empathy for other human beings generally- not just members of the family or tribe or nation- is built into our biological makeup, or is learned by ordinary people as a matter of course. Tribes attack each other, but they also trade with each other, and intermarry, and these interactions would have made possible a sense we owe obligations to others by virtue of their humanity (POSNER, 2014, p. 10)

3.1.1 Remote Antecedents

Although the discourse on human rights is a rather recent phenomenon, the thoughts and ideas underpinning it can be traced back to a long time ago, since most of ancient religions possessed codes of practice that may be interpreted as implying certain rights, even if those were largely stratified (O’BYRNE, 2002). In fact, as Paul Lauren notes,

All the major religions of the world seek in one or another to speak to the issue of human responsibility to others. Despite their many differences, complex contradictions, internal paradoxes, cultural variations, and susceptibility to conflicting interpretation, reinterpretation, and argumentation, all of the great religious traditions share a universal dissatisfaction with
the world as it is and a determination to make it as it ought to be. They do this by addressing the value and the dignity of human life, and, consequently, the duties toward those who suffer. Each seeks to help us transcend our own self-centeredness and consider the needs of others by behaving toward them as we would have them behave toward this. This is approached through various revelations, narratives, poetry, edicts, laws, and commandments, and stories or parables dealing with right and wrong, moral responsibility, ethical principles of justice, compassion, the essential worth of the human person, and the kinship and common humanity of all (LAUREN, 2011, p. 06)

The ancient texts of Hinduism, the world’s oldest living religious tradition, highlighted the sacred character of life, discussed the virtues of tolerance and compassion and the importance of obedience to duty (dharma), justice and moral action (karma) and the good behavior towards others (sadachara), since believers should fulfill their life journeys by embracing moral responsibilities for people beyond the self, especially for those who suffer from pain, sickness or hunger (LAUREN, 2011). Judaism also preaches the sacredness of life, and the responsibilities of men towards each other, whether friend or enemy, free or slave, man or woman, rich or poor, and the instructions in Leviticus say: “you shall not oppress. You shall do no injustice. You shall love your neighbor as yourself” (LAUREN, 2011).

Buddhism provided the earliest defenses of ecosystem (ISHAY, 2008), teaching about universal human relationships, the interconnectedness of lives and the need for compassion and empathy (LAUREN 2011), and Confucianism, while promoting mass education (ISHAY, 2008), taught that “within the four seas, all men are brothers”, also warning about despotic governments that ruled by force of explored people (LAUREN, 2011). Christianity preached about responsibility and compassion towards others, the value of all human beings in the eyes of God, including the oppressed, women, children, outcasts and outsiders, and the parable of the good Samaritan illustrates the duty to assist those in need (LAUREN, 2011). Moreover, despite being often associated with violence and terrorism nowadays, Islam is actually founded on the pillars of justice, sanctity of life, personal safety, freedom, mercy, compassion and
respect to all human beings, preaching the equality among races and religious tolerance and announcing that those who “attach themselves to our commonwealth shall be protected from all insults and vexations; they shall have an equal right to our own people…and shall practice their religion as freely as the Muslims” (LAUREN, 2011).

Religious beliefs, therefore, have provided a fundamental contribution for the construction of human rights as we came to understand them. Nevertheless, it is in the but it is the ideas of philosophers and thinkers that the contours of human rights start to be more discernible, even though it is not simple to find one clear precursor among the sages of that time, since numerous elements of thought devised in the writings of such commentators (O’BYRNE, 2002).

In Ancient Greece, Sophocles’ plays, such as Antigone, emphasized the individual’s right to resist state oppression, Plato made a systematic attempt to protect the citizens and non-citizens of ancient Greece in his grand scheme of justice, and his student, discussed virtue, justice and rights for individuals in the contemporary Greek society (PATNAIK, 2004). The Greek and Roman Stoics advocated for egalitarian principles and for a universal community of world citizens, and Cicero laid the philosophical foundations of natural law by promoting universal principles that transcended local civil laws (O’BYRNE, 2002). Afterwards, religious universalists like Thomas Aquinas and others constructed their religious arguments on the fundamental value of human dignity and universality of natural law, but such writings, nevertheless, had only implicit references to human rights thinking (PATNAIK, 2004).

In fact, for a long time most of the philosophical and religious writings focused on universal moral responsibilities and duties rather then what came to be known as legal rights (LAUREN, 2011) and, in the historical period between the fall of the Roman Empire and the end of the Early Middle Ages, there were no significant innovations in the field of human rights, mostly because the
territorial and power disputes created an instability scenario that was not the most fertile ground for theorizing about human dignity. The Early Middle Ages did not provide a noteworthy contribution to the debate on human rights, since it was a period of economic ruralisation and consequent decay of trade: the population had gathered in feuds and submitted to the discretion of the feudal lords, which were increasingly supported by the local government, in a fragmented power scenario and a highly stratified society. Unfortunately, the strengthening of the Catholic Church was responsible for another setback with regard to protection of human rights. On one hand Christianity played an important role in upholding human rights, establishing a rupture with the social model present in the Roman Empire, consecrating the principles of equality and fraternity and to some extent, equating the social strata (LEAL, 2000); on the other hand, the Inquisition institutionalized the practice of torture, sanctioning innumerable and atrocious violations of human dignity.

However, “modifications of theories and then the transformations of theory into policy, as we shall see constantly, have always been tied to particular political, economic, social, scientific and intellectual upheavals throughout history (LANDMAN, 2011, p. 30) and, from the X century on, a time of relative peace and absence of epidemics led to a considerable population growth, and the feudal structure proved insufficient to meet the population’s needs. The rebirth of urban centers provided an opportunity for the emergence of capitalism based on the right to property, and for a model of social relationship marked by a degree of more decentralized political discussion, especially among the institutionalized powers and citizens (LEAL, 2000).

3.1.2 From the X VIth Century to the First World War

The power of the feudal lords was gradually replaced by that of the sovereigns, who were hitherto considered noblemen of higher status that started to claim for themselves the power that once was fragmented in the
hands of clergy and nobility. It was precisely against the abuse of such power - now concentrated in the hands of the king - that the nobility in Europe rebelled against, originating three documents considered as the first ones to recognize the existence of human rights: the Declaration of the Courts of León, in 1188, from the Iberian Peninsula, the Magna Carta, from 1215, in England (COMPARATO, 2007), and the Magnus Lagaboters Landslov, issued by King Magnus of Norway in 1275. The most well-known of them, the Magna Carta, was a document prepared by the English bishops and barons to be signed by King John, marking the beginning of state power limitation. However, it specifically addressed the guarantees and the rights of nobility, and did not cover the prerogatives of the rest of the people. The Magna Charta was "the most remote direct antecedent of the Declarations of Rights. This document, a legal and political one, is regarded as the great totem of fundamental rights protection" (GORCZEVSKI, 2005, p. 42).

Although contributions to the discourse of human rights were made during the following centuries – the Renaissance opened new paths for personal expression and freedom, the religious reform emphasized personal spiritual emancipation and freedom of religious belief, etc – the significant change in the way natural law was perceived, also entailing natural rights, occurred only in the XVIIth century, as the scientific revolution and the Age of Enlightenment took place (LAUREN, 2011): while the first expanded knowledge of physics, mathematics and biology to previously unimagined levels, the second challenged the ideas and dogmas of the past, specially the ones regarding power, government and the rights of individuals.

A more plausible explanation for the development of theories of human rights in the Enlightenment is that Enlightenment thinkers believed that they needed to systematize moral thinking so as to defend themselves from the claim that secularization bred immorality. Seeking to throw off the influence of religion and irrational tradition, they needed to show that morality would persist in their absence, and they did so by locating the source of morality in human nature. If morality is a matter of human nature, then it is shared by all human beings. It was a short step from there to the idea of human rights. (POSNER, 2014, p. 10)
Indeed, in the first centuries of the elaboration of the philosophical doctrines that have formed the contemporary perception of the state, its mandate and human rights, two approaches can be discerned: the protection of human beings by the denial of human rights and the protection of human beings by the recognition of human rights (TOMUSCHAT, 2008). The first doctrine tried to produce peace and protect the citizens (without making use of advanced human rights language) by denying them the assistance of any rights in their relationships regarding the ruler, whose duty was considered to be avoiding armed conflicts between different societal groups (TOMUSCHAT, 2008). Although such concept might seem strange, it reflects the general notion of a well-ordered state of the res publica if everyone faithfully discharges of their duties, a conception that places too much trust in the person of the ruler, implying that he or she will always do the best for the subjects, who find no institutional support within the state apparatus in case the sovereign is morally corrupt or simply disregards the protection of the citizens (TOMUSCHAT, 2008).

Such conception is illustrated by the work of Jean Bodin, who asserted the royal authority of the King of France by endowing him with a unchallengeable sovereignty: “because there are none on earth, after God, greater than sovereign princes, whom God establishes as His lieutenants to command the rest of mankind”, says Bodin, “we may respect and revere their majesty in all due obedience, speak and think of them with all due honour. He who contemns his sovereign prince, contemns God whose image he is” (BODIN, 1576, Chap. X). Moreover, there was no right of resistance that the individuals could invoke, as the sovereign was not even bound by his own laws, and only obliged to respect God’s commands, natural law and general principles of law:

Edicts and ordinances therefore do not bind the ruler except in so far as they embody the principles of natural justice; that ceasing, the obligation ceases. But subjects are bound till the ruler has expressly abrogated the law, for it is a law both divine and natural that we should obey the edicts and ordinances of him whom God has set in authority over us, providing his edicts are not contrary to God’s law. For just as the rear-vassal owes an oath of fealty in respect of and against all others, saving his
sovereign prince, so the subject owes allegiance to his sovereign prince in respect of and against all others, saving the majesty of God, who is lord of all the princes of this world. (BODIN, 1576, Chap. X)

While Bodin focused on the independence of the kings of France in relation to external powers, Thomas Hobbes emphasized the rights of the sovereign over all members of the political community. As men live in a state of constant war against each other in the absence of a public authority, only a superior power – the Leviathan can establish peace and security, but, in order to do so, he must be exempted to all legal obligations, being subject only to the commands of God and the laws of nature (TOMUSCHAT, 2008): “The office of the sovereign […] consists in the end for which he was trusted with the sovereign power, namely the procurement of the safety of the people, to which he is obliged by the law of nature, and to render an account thereof to God, the Author of that law, and to none but Him” (HOBBES, 1651, Chap. XXX). As the state's will was the only source of law, Hobbes rejected Grotius's notion of a “necessary” law of nations, stating that the natural law applicable to states did not constitute "law" in the sense of a legal and moral precept, but that it was

78 I put for a general inclination of all mankind a perpetual and restless desire of Power after power, that ceases only in Death. And the cause of this is not always that a man hopes for a more intensive delight than he has already attained to. (HOBBES, 1651, Chap. XI)

Whatsoever therefore is consequent to a time of War, where every man is Enemy to every man; the same is consequent to the time, wherein men live without other security, than what their own strength, and their own invention shall furnish them with all. In such condition, there is no place for Industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continual fear, and danger of violent death; And the life of man solitary, poor, nasty, brutish, and short. (HOBBES, 1651, Chap. XIII)

79 For by Art is created that great Leviathan called a Common-Wealth or state, (in latin Civitas) which is but an Artificial Man; though of greater stature and strength than the Naturall, for whose protection and defence it was intended; and in which the Soveraignty is an Artificiall Soul, as giving life and motion to the whole body; The Magistrates, and other Officers of Judicature and Execution, artificiall Joynets; Reward and Punishment(by which fastned to the seate of the Soveraignty, every joynt and member is moved to performe his duty) are the Nerves, that do the same in the Body Naturall; The Wealth and Riches of all the particular members, are the Strength; Salus Populi (the peoples safety) its Businesse; Counsellors, by whom all things needfull for it to know, are suggested unto it, are the Memory; Equity and Lawes, an artificiall Reason and Will; Concord, Health; Sedition, Sickness; and Civil war, Death.Lastly, the Pacts and Covenants, by which the parts of this Body Politique were at first made, set together, and united, resemble that Fiat, or the Let us make man, pronounced by God in the Creation. (HOBBES, 1651, INTRODUCTION)
only a natural right to self-preservation and, as a result the state does not submit to any higher law than to that of the safety of the kingdom (BELSKY; MERVA; ROHT-ARRIANZA, 1989).

John Locke, on the other hand, represents the second approach mentioned above: the protection of human beings by the recognition of human rights. Indeed, his teachings are described as "extremely pervasive in the evolution of human rights (WRONKA, 1998, p. 65), and his primary argument was that there are certain rights which are self-evident, existing even before mankind entered into civil society, in the state of nature (WRONKA, 1998). Therefore, rights such as life, liberty and property cannot be divested from the human being, and the polity is founded by consent among its members precisely to secure these natural rights (TOMUSCHAT, 2008). The end of law, says Locke, "is not to abolish or restrain, but to preserve and enlarge freedom. For in all the states of created beings, capable of laws, where there is no law there is no freedom" (LOCKE, 1689, Ch. VI)

Locke sustains that the people set up a government as a "fiduciary trust" that should be responsive to the needs of people in order to safeguard these inalienable rights and, if unresponsive to people's needs, they had the right to a revolution (WRONKA, 1998). The way was then opened for fundamental rights that the individual can oppose to illegitimate requests of the state (TOMUSCHAT, 2008):

> Whosoever therefore the legislative shall transgress this fundamental rule of society; and either by ambition, fear, folly or corruption, endeavour to grasp themselves, or put into the hands of any other, an absolute power over the lives, liberties, and estates of the people; by this breach of trust they forfeit the power the people had put into their hands for quite contrary ends, and it devolves to the people, who have a right to resume

80 The state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions (LOCKE, 1689, Ch. II)
their original liberty, and, by the establishment of a new legislative, (such as they shall think fit) provide for their own safety and security, which is the end for which they are in society (LOCKE, 1689, Ch. XIX)

Also in England, in 1689 William of Orange signed one of the most important documents of the modern period, the Act Declaring the Rights and Freedoms of the Person and adjusting the Succession of the Crown, also known as the Bill of Rights. The Bill of Rights determined that kings would continue to rule, but their power would be limited by the Parliament, hence determining the end of the absolute monarchy and instituting a constitutional one. Some personal freedoms were also consecrated in the document\textsuperscript{81}, but they did not benefit indiscriminately all subjects of the king, focusing on the first two estates of the realm: the clergy and the nobility (COMPARATO, 2007). Nevertheless, due to its more general and abstract formulation, if compared to

\begin{footnotesize}
\textsuperscript{81} The Bill of Rights declared, inter alia:
“That the pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal;
That the pretended power of dispensing with laws or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal;
That the commission for erecting the late Court of Commissioners for Ecclesiastical Causes, and all other commissions and courts of like nature, are illegal and pernicious;
That levying money for or to the use of the Crown by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal;
That it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal;
That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against law;
That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law;
That election of members of Parliament ought to be free;
That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament;
That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;
That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders;
That all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void;
And that for redress of all grievances, and for the amending, strengthening and preserving of the laws, Parliaments ought to be held frequently.
And they do claim, demand and insist upon all and singular the premises as their undoubted rights and liberties, and that no declarations, judgments, doings or proceedings to the prejudice of the people in any of the said premises ought in any wise to be drawn hereafter into consequence or example; to which demand of their rights they are particularly encouraged by the declaration of his Highness the prince of Orange as being the only means for obtaining a full redress and remedy therein”
\end{footnotesize}
the Magna Carta, the Bill of Rights became quite an useful instrument to the rich bourgeoisie, “and one might even say that without this new bill of civil and political freedoms, industrial capitalism of the following centuries would hardly have prospered” (COMPARATO, 2007, p. 49).

Legal rights were, therefore, well understood at the time: a legal right allowed a person to do something; if someone else tried to stop him, then the first person could seek aid from the government. Enlightenment thinkers argued that just as people had rights against other people’s interference with their property and lives, they also had rights against government’s interference with their property and lives (POSNER, 2014, p. 10). What exactly these rights were and how one could vindicate them were more complex questions, but there was agreement that such rights existed, and that these rights were human rights. By virtue of a person’s humanity, the government may not do certain things to him, like take his property without compensation, force him to quarter soldiers, or torture and kill him or his family. (POSNER, 2014, p. 10)

During the course of the 18th century, the idea of the “Rights of Man” provided motivation and legitimacy to the fights against traditional political systems which, at that time, sustained that some human beings were created with rights to rule over the others and, indeed, the concept of rights was at the heart of the post-revolutionary states in France and America: there, it was considered to be self-evident that all men were created equal, and that the new society was to be based on liberty, equality and fraternity, truths that were later embedded into national constitutions (HIRSCH, 2003). In July 1776, the Declaration of Independence of the United states became the first document to express what would be the modern recognized human rights\(^\text{82}\). The

\(^{82}\) This statement is the culmination of a process that starts a little earlier, on January 12, 1776, when the state of Virginia declared its independence from England to approve the Declaration of the Good People of Virginia, drafted by George Mason and inspired by strong Enlightenment ideas. In its text, the Declaration states that “When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the
Enlightenment ideals regarding the rights of man culminated in the French Declaration of the Rights of Man and of the Citizen, in 1789. For its undeniable importance, the articles of the Declaration are transcribed below:

1. Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good.

2. The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression.

3. The principle of all sovereignty resides essentially in the nation. No body nor individual may exercise any authority which does not proceed directly from the nation.

4. Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law.

5. Law can only prohibit such actions as are hurtful to society. Nothing may be prevented which is not forbidden by law, and no one may be forced to do anything not provided for by law.

6. Law is the expression of the general will. Every citizen has a right to participate personally, or through his representative, in its foundation. It must be the same for all, whether it protects or punishes. All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents.

7. No person shall be accused, arrested, or imprisoned except in the cases and according to the forms prescribed by law. Any one soliciting, transmitting, executing, or causing to be executed, any arbitrary order, shall be punished. But any citizen summoned or arrested in virtue of the law shall submit without delay, as resistance constitutes an offense.

8. The law shall provide for such punishments only as are strictly and obviously necessary, and no one shall suffer punishment except it be legally inflicted in virtue of a law passed and promulgated before the commission of the offense.
9. As all persons are held innocent until they shall have been declared guilty, if arrest shall be deemed indispensable, all harshness not essential to the securing of the prisoner’s person shall be severely repressed by law.

10. No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law.

11. The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law.

12. The security of the rights of man and of the citizen requires public military forces. These forces are, therefore, established for the good of all and not for the personal advantage of those to whom they shall be intrusted.

13. A common contribution is essential for the maintenance of the public forces and for the cost of administration. This should be equitably distributed among all the citizens in proportion to their means.

14. All the citizens have a right to decide, either personally or by their representatives, as to the necessity of the public contribution; to grant this freely; to know to what uses it is put; and to fix the proportion, the mode of assessment and of collection and the duration of the taxes.

15. Society has the right to require of every public agent an account of his administration.

16. A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all.

17. Since property is an inviolable and sacred right, no one shall be deprived thereof except where public necessity, legally determined, shall clearly demand it, and then only on condition that the owner shall have been previously and equitably indemnified.

In fact, all those episodes were the eruption of a social change that had important legal impacts and, as Lauren (2011) explains, the power of visions of human rights prior to the XIXth century could be seen largely in inspiration, in their ability to create and then nurture an ideal of compassion and respect for others simply because they were human brothers and sisters, but their capacity to influence actual behavior, however, was largely confined to specific individuals, locales, regions, or on a very small number of cases, groups nations. Traditional practices, prejudices, vested interests, and capabilities developed over the centuries “all served to obstruct human rights and to confine them to exclusive domestic jurisdiction, far removed from consideration as a legitimate issue for serious International action” (LAUREN, 2011, p. 58). Finally, “the seeds of visions sought in the past, often forced to lie dormant for generations nevertheless slowly began to germinate as appeals to the
conscience on behalf of rights began to fall on more fertile soil” (LAUREN, 2011, p. 58).

All the achievements regarding the recognition of fundamental freedoms had to be consolidated at national level\(^3\) before a concept of international protection of human rights could emerge, but even in the XIXth century some steps were taken in the direction of an international regime, and one of the most compelling examples is the 1815 Declaration on the Abolition of Slave Trade, adopted during the Peace Conference in Vienna (TOMUSCHAT, 2008). Despite the critics pointing out that the ban served the economic interests of England at the time, and that slavery per se persisted as an abominable practice for many decades to come (Brazil, the last country to abolish slavery, only did so in 1888), it is important to acknowledge that the Declaration “constituted a first international instrument prohibiting a practice that was profoundly at variance with the concept of human dignity” (TOMUSCHAT, 2008, p. 14), and could be seen as the embryo of the principle of equality and the prohibition of racial discrimination.

Another noteworthy step in the XIXth century was the development of Humanitarian Law\(^4\), which comprises a set of customary laws and practices

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\(^3\)As Hirsch notes, “these rights were guaranteed to citizens by national states, hence tied to a national state that could guarantee and enforce them and to the concept of citizenship: the nation was defined by the state and citizenship was enjoyed by all inhabitants of the territory, says Hirsch, but there was always the danger that this relationship could be reversed, and an ethnically defined ‘nation’ could take control of the state and exclude those whom it defined as not belonging” (HIRSCH, 2003).

\(^4\) Humanitarian Law developed as Jean Dunant, after witnessing the desolation of the Battle of Solferino, decides to organize an international conference in Geneva, in 1863, and the first normative document of international character which regulated the law of war and the right of people in the conflict was the Geneva Convention of 1864, which gave rise to the International Committee of the Red Cross, in 1880. As Hirsch explains, “Historically, the development of international humanitarian law and international human rights law has been distinct. Humanitarian law aimed at setting limits to what was legitimate in war- This body of law was concerned with the treatment of civilians, prisoners of war and the wounded, and with the types of weapons and tactics that were to be considered legitimate. International human rights law, first codified in the Universal Declaration of human rights (1948), was concerned With defending human beings against the arbitrary actions of their states. Humanitarian law originally related to armed conflict, while the law of human rights related particularly to peacetime since it allowed governments to derogate in the event of war or other national emergency (HIRSCH, 2003, p. 06)
used in wartime, aiming to alleviate the suffering of the soldiers, the sick, the injured and the populations affected by such conflicts (COMPARATO, 2007). The Geneva Convention, in 1864, served as the primary source, together with customary law, to international humanitarian law, and it focuses on the victims of war, while the Hague conventions contain provisions regarding the conduct of hostilities (TOMUSCHAT, 2008).

The development of international humanitarian law and international human rights law has been distinct – “Humanitarian law originally related to armed conflict, while the law of human rights related particularly to peacetime since it allowed governments to derogate in the event of war or other national emergency” (HIRSCH, 2003, p. 06). However, it is important to notice that Humanitarian law was then the first expression that there are limits to the autonomy and the freedom of the states, even if its scope was limited to armed conflict (PIOVESAN, 2007). However, as Tomuschat notes,

Outside the sphere of humanitarian law, during the nineteenth century human rights does not yet exist as a separate chapter of international law. In some treaties concluded after the liberation of the Balkans from Turkish domination, religious freedom and the principle of non-discrimination on religious grounds were explicitly guaranteed […]. Summing up the situation as it existed until the outbreak of World War I, one may say that during the nineteenth century the first treaties came into being which directly took care of the individual, but […] human rights in general were considered as falling within the domestic jurisdiction of states(TOMUSCHAT, 2008, p. 16)

In the beginning on the XXth century, the Mexican and the Russian revolutions added yet another perspective to human rights, seeking the protection of workers against exploitation and economic injustice. Social concerns were incorporated to the discussion of human rights, and the idea that the state should also provide the material means for equality starts to gain strength. If the liberties consecrated in the Enlightenment revolutions required an abstention from the state, these revolutions demand a positive action in order to materialize the freedoms recognized in the first human rights declarations. These historical approaches will inspire Karel Vasak’s theory regarding generations of human rights, that will be addressed further on.
3.1.3 Between the two World Wars

The advent of the XXth century brought significant changes. The new century “unleashed bursting discovery, change, development, creativity, energy, and visions to the world” (LAUREN, 2011, p. 79), as all those factors shaped the way the world was perceived. The developments in the transportation industry, with railroads, steam ships and airplanes connecting countries, made it possible for human beings to surpass the national borders and to interact with dramatically different ethnic or cultural groups, taking interest in what was happening in the distant corners of the world. The improvements in the communications systems made it easier for news from abroad to reach the average citizen, who could more and more identify himself with the struggles of his brothers and sisters from distant lands, and soon the inter-relatedness of world politics became evident, as events that have taken place in one country would deeply influence the society of another: the revolutions in Russia, Mexico, Turkey and China were followed not only by the people fighting them, but by millions of people around the globe.

This interconnectedness became evident when alliances eroded and the First World War broke out, in 1914. This unparalleled event made use of technology to maximize devastation, and as it resulted in the death of more than 15 million people, and another 20 million of wounded, the need to safeguard human rights at the international level could no longer be ignored. Such acknowledgement led to the foundation of the League of Nations, the first organization whose goal was to ensure international peace and security, preventing war as the greatest threat to human life and integrity, and although its Covenant did not explicitly mention the protection of human rights, it established a mandate system in which the mandated territories should enjoy freedom of conscience and religion, and the administering powers would ‘endeavor to secure and maintain fair and humane conditions of labour for men, women, and children’ (art. 23.a) (TOMUSCHAT, 2008). Also, the League of Nations Covenant established economic and military sanctions to be imposed by the international community against states that violate their obligations.
Thus, the notion of an absolute sovereignty of states, that from then started to incorporate in its concept the commitments and international obligations regarding to human rights, was redefined (PIOVESAN, 2007).

Immediately after the First World War, in 1919, the International Labour Organization was created as part of the peace agreements, and one of its aims was to regulate the condition of workers throughout the world (CASSESE, 2008). As Cassese notes, “states were encouraged not only to draft and accept international conventions (on equal remuneration on the employment of women and minors; on night shifts; on freedom of association, and so on), but to fulfill these new obligations as well” (CASSESE, 2008, p. 172). While there was no direct reference to the individual in its constitution, the mandate entrusted to ILO made clear that it was no less than reasonable for an international organization to fight for the improvement of the living conditions of human beings who continue, in fact, subject to the sovereign power of the state, which meant a derogation from the former principle of exclusiveness of jurisdiction of the territorial state (TOMUSCHAT, 2008).

Despite such achievements, before World War II, international law was basically the patron of state sovereignty, enunciating and consecrating the essential rules for national self-determination, a juridical inter-state mechanism that reinforced state sovereignty whilst it sought to civilize warfare between states (LEVY;SZNAIDER, 2006). In this context, the international moral-legal system strongly supported the idea, going back to the Peace of Westphalia of 1648, that state sovereignty meant that governments mostly had a free hand to treat their populations however they wanted. This idea had been invoked by governments for centuries, and was based on the hard-won, pragmatic truth that when countries reserve the right to intervene in each other’s affairs in order to protect subject populations, warfare is a common outcome (LAUREN, 2011).
3.1.4 The Second World War

However, many factors contributed to a change of perspective. The great economic crisis of 1929 had repercussions all over the globe, when poverty, misery and desperation helped to strengthen fascist and Nazi regimes. As tensions started to escalate once more, the lack of coordination among the states party to the League of Nations became evident, and the organization could do but little to prevent the advent of another war. The Second World War was marked by the massacre of numerous ethnic and religious groups, representing the grossest violation of human rights so far. With memories of the atrocities of the Second World War and Nazi extermination camps omnipresent, the postwar period represents a crucial historic juncture for a renewed articulation of human rights and, at least in principle, a more conditional approach to sovereignty and partial discreditation of nationalism in the European context (LEVY; SZNAIDER, 2006). The failure of the League of Nations to protect ethnic minorities, and the “unprecedented genocidal scope of the Holocaust, played a crucial role in the articulation of the new international regulatory measures during the 1940’s” (LEVY; SZNAIDER, 2006, p. 670).

85 The horrors and the significance of the Second World War are well known. According to Lauren, “It is difficult to imagine that a war of this magnitude, lasting for so long, spreading across the globe, and causing the deaths of perhaps Sixty million human beings could ever possibly create, at the same time, new and unanticipated opportunities for the advancement of international human rights. But it did. World War II was a test not only of weapons and warriors, but of values and ideas. Its horrors exposed, as nothing else had ever been able to do, the ultimate consequences of allowing nations to hide behind the shield of national sovereignty. It forced People as never before to examine themselves, their past, and their values in a mirror, and to begin the process of redefining the meaning of “security,” “peace,” “justice,” and “human rights.” It also provided confirmation of the adage that “war is the great equalizer,” for by requiring the total mobilization of all resources, the war brought about the emergence—and sometimes even the liberation—of many victims heretofore subjected to race, gender, or class discrimination as Well as smaller nations and colonial populations. They had been excluded in the past, but now were enabled to be heard. Moreover, by becoming a “people’s war,” this struggle compelled governments to enunciate the principles and aims for which they were fighting and to bring them into the mainstream of political discussion. This elaborate process, with its many interconnecting variables forged in the intense crucible of war, became a crusade that set into motion what would become a veritable revolution in international human rights” (LAUREN, 2011, p. 152)
3.1.5 The Post War Period

Therefore, the second and most significant movement regarding the internationalization of human rights took place after the Second World War, as the international community felt the need to create effective mechanisms for the protection of fundamental rights. It is from this point that the protection of human rights is no longer considered an exclusively domestic issue, but assumes international preeminence, meaning that if a national institution fails in its obligations concerning the protection of human rights, the state can be held accountable for such failure. This is the moment in which the principle of state sovereignty is no longer considered absolute, but is from then on limited by the respect of human rights (PIOVESAN, 2007).

The foundation of the United Nations in the postwar period represented a landmark in international law: the United Nations Charter not only made explicit mention the duty of the member states to promote human rights, but is also consecrated such promotion as one of the organization’s pillars. The UN Charter is the first universal treaty recognizing inherent rights belonging to all human beings, hence imposing a duty on states to safeguard human dignity and basic rights to all persons under their jurisdiction.

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86 As Alfred Verdross explains, « La plus grande différence entre les buts de la Société des Nations et ceux de l'Organisation des N. U. consiste dans le fait que le Pacte de la S. D. N. avait uniquement en vue les relations internationales, celles des Etats entre eux, tandis que la Charte des N. U. s'intéresse aussi au traitement des individus par leurs Etats respectifs. En cette matière, la Charte est fondée sur l'idée qu'un Etat qui n'accorde pas un certain minimum de droits à ses propres ressortissants, sera toujours tenté de leur insuffler une idéologie agressive pour diriger ainsi le mécontentement de ses sujets vers les Etats étrangers. Par conséquent, la Charte reconnaît que la protection des droits de l'homme n'est pas seulement désirable au point de vue de l'humanité, mais même nécessaire pour le maintien de la paix internationale. Même pour les pays vivant sous un régime international de tutelle la Charte demande aux autorités compétentes d'encourager le respect des droits de l'homme et des libertés fondamentales pour tous, sans distinction de race, de sexe, de langue ou de religion » (VERDROSS, 1953, p. 24)
3.2 Human Rights, the Global and the Regional

However, the UN Charter did not fulfil all the hopes for a new world at the center of which human rights would be placed, a task that was left for the Universal Declaration of human rights\(^{87}\), approved by the UN General Assembly in 1948, defining the rights of every human being independently of race, colour, sex or any other condition, hence inaugurating a new chapter in the history of human rights (TOMUSHCAT, 2008). Despite its political importance, the Universal Declaration of human rights is not a legally binding, which prompted the elaboration of treaties that would place the protection and promotion of human rights as a legal obligation to its signatories, subject to the regime of international responsibility in case of breach\(^{88}\).

*Human Rights consecrated in the Universal Declaration*

1. We Are All Born Free and Equal
2. Don’t Discriminate
3. The Right to Life
4. No Slavery
5. No Torture
6. You Have Rights No Matter Where You Go
7. We’re All Equal Before the Law
8. Your Human Rights Are Protected by Law
9. No Unfair Detainment
10. The Right to Trial
11. We’re Always Innocent Till Proven Guilty
12. The Right to Privacy
13. Freedom to Move
14. The Right to Seek a Safe Place to Live
15. Right to a Nationality
16. Marriage and Family
17. The Right to Your Own Things
18. Freedom of Thought
19. Freedom of Expression
20. The Right to Public Assembly
21. The Right to Democracy
22. Social Security
23. Workers’ Rights
24. The Right to Play
25. Food and Shelter for All
26. The Right to Education
27. Copyright
28. A Fair and Free World
29. Responsibility
30. No One Can Take Away Your Human Rights

Source: https://maatsdefenders.wordpress.com/2014/04/01/act-japan-graphic-novels-for-change/

\(^{87}\) As Pal explains, “After the failures of late 19th century liberal idealism, and its 1919 League of Nations to prevent the Second World War, the post-1945 order had to change its course. The UN Charter aimed to strike a balance between two aims, the need for politics to be reined in by legally objective rules, and the need to account for the more subjective reality of a new political world. This world was characterised by an increasing number of states, but also by non-European rights and peoples pushing for more individualist principles of legitimacy. […] Moreover, the Charter was swiftly followed in 1948 by the Universal Declaration of Human Rights. Through these measures, the road was explicitly opened to contest the classic ‘Westphalian’ concept of sovereignty as basis to IL. However, the Charter also upheld the first aim of legal objectivity by reasserting the principle of sovereign independence and jurisdictional integrity (Art. 2)(PAL, 2012, p. 16)

\(^{88}\) According to Verdross, « le caractère non-obligatoire de la Déclaration résulte enfin du fait que la Commission préparatoire décida d’accomplir sa tâche par étapes, en élabrant d’abord la recommandation de l’Assemblée sur les droits de l’homme, pour arrêter ensuite les termes d’un projet de Convention sur la même matière »(VERDROSS, 1953, p. 25)
3.2.1 The Global System of Human Rights

The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, from 1966, were elaborated in order to turn human rights into “hard law”, and these 2 general instruments were accompanied by more specific treaties: the Convention on the Elimination of All Forms of Racial Discrimination (1965), the Convention on the Elimination of All Forms of Discrimination against Women (1979), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), the Convention on the Rights of the Child (1989), the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), the Convention on the Rights of Persons with Disabilities (2006) and the Convention for the Protection of All Persons from Enforced Disappearance (2006). Each of these treaties has established a committee of experts to monitor implementation of the treaty provisions by its states parties, and some of the treaties are supplemented by optional protocols dealing with specific concerns. Together, the two Covenants and these conventions form the core element for the legal protection of human rights at world level (TOMUSCHAT, 2008). The UN also created a Commission on Human Rights, succeeded by the Human Rights Council in 2006 to address gross and systematic violations of human rights.

The historical affirmation of human rights is, therefore, marked by constant mutation and renovation (COMPARATO, 2007), which led Karel Vasak to classify human rights in three different generations in 1979, associated to the components of French Revolution’s motto: liberté, égalité et fraternité. According to Vasak, the first generation corresponds to freedom rights, consecrated in the liberal revolutions of the XVIIIth century, and they demand an abstention, a negative behavior from the state in order to protect the individual’s autonomy, being known as civil and political rights and including the right to freedom, equality before the law and property, for instance. The second
generation of human rights-based on equality-demand an active participation of the state, that should provide material conditions for their realization, and include the so called social and economic rights, such as the right to education, housing, health and social security, consecrated for the first time in the Mexican Constitution of 1917 and on the Constitution of Weimar, from 1919. Finally, the third generation of human rights corresponds to solidarity rights, including the right to development, to peace and to the environment.

3.2.2 Regional Systems of Human Rights

Parallel to the so called global system of human rights, originated from the activity of the United Nations, other documents protecting human rights also appeared on regional level. The European system of human rights protection is a direct consequence of the memory of the Second World War (CANÇADO TRINDADE, 2003), and it was created within the Council of Europe89, seeking to develop common democratic principles to the European states. The European system of human rights comes up in order to establish a minimum standard for the protection of individuals with a view to the issue of internationalization of human rights, and its main legal document, the European Convention on human rights, was signed in Rome on November 4th, 1950.

The European Convention on human rights consecrates, in essence, a series of civil and political rights, and its intention was to institutionalize a commitment of the states parties not to adopt measures of domestic law contrary to the standards set in the Convention, which is the most significant

89 The Council of Europe was set up in May 5, 1949, in London, by the signing of its constitutive treaty by ten European states. The creation of the Council of Europe took place in a context of restructuring the continent, between the periods of the post-War and early Cold War. The Council of Europe, based in Strasbourg (France), now covers virtually the entire European continent, comprising 47 members. Among its objectives are: the protection of human rights, democracy and the rule of Rights; promoting awareness and encouraging the development of cultural identity and European diversity; find common solutions to the challenges of European society; and the consolidation of democratic stability in Europe by supporting political, legislative and constitutional reform. For the pursuit of these objectives the development of a legal framework was necessary, the European Convention on human rights, the legislative improvement occurred over the years.
European catalog of rights. However, in its origin, the Convention has not exhausted the list of rights and instruments required for effective protection of human rights on the European continent, so its role has been expanded gradually, based on substantive Protocols to the Convention in order to improve the efficiency of its protection mechanisms, including also economic, social and cultural rights (CANÇADO TRINDADE, 2003).

Protocol 11 was responsible for implementing profound changes, resulting in an institutional improvement in the European system. The Protocol amended the European Convention, abolished the European Commission and the Committee of Ministers withdrew from the judicial function, leaving the latter authority solely the function of supervising the execution of the Court's judgments. The Protocol also established a new European Court of human rights, in which the number of judges of the Court went on to match the number of members of the Council of Europe, acting on a permanent basis, and it became sole court of the European Convention (CANÇADO TRINDADE, 2003).

The new mechanism of the European system of human rights protection comes in order to give greater efficiency to the functions of the Court,
focusing on assignments previously destined for the Commission and the Committee. The great evolution of the European system was the possibility of direct and unrestricted access to individuals, non-governmental organizations and group of individuals to the European Court of human rights, with power to initiate proceedings directly before it. The conditions of admissibility, which before were ascertained first by the Commission, are now verified by the Court itself.

Already in 1948, the Organization of American states adopted the American Declaration on the Rights and Duties of Man, tailored to fill in the gaps regarding human rights protection in the OAS Charter. However, as it was adopted only as a declaration, the document lacked legal binding force, and in the years to come the OAS tried to establish the framework for its human rights system by the creation of Commission of human rights, in 1959, and finally, in 1969, by the adoption of the American Convention on the Rights of Man, which also established a human rights Court in Costa Rica. Victims of human rights violations by a state member to the inter-american system and that has accepted the jurisdiction of the Court may present petitions, which are first addressed to the Commission and, in case it recognizes a violation and the state responsible refuses to provide reparations, the Commission may refer the case to the Court. The individuals do not have direct access to the Court, as they are represented by the Commission.
The American Convention is the basic instrument of the inter-American human rights system, and it consecrates a number of civil and political rights such as the right to life, personal liberty and the prohibition of slavery, and the right to assembly and freedom of thought and expression. Currently, the inter-American system of human rights is divided into two subsystems, which act jointly: the first subsystem consists of the activities of the Organization of American states (OAS) in implementing the principles of its Charter in relation to its members, in addition to the implementation of these rights in the American Declaration of Rights and Duties, while the second one consists of the American Convention on human rights and its procedures.

The African system was also inspired by the principles established in the Universal Declaration of human rights of 1948, but it also highlights the

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90 However, the economic, social and cultural rights were neglected in the text of the Convention, being grouped in a single article (Article 26), which conditions the promotion of these rights to the availability of each state’s resources (PRONER, 2002). In 1988, the OAS General Assembly adopted an additional protocol to the Convention on the protection of economic, social and cultural rights, called Pact of San Salvador, which entered increased the list of rights protected by the American Convention.
continent’s regarding the decolonization process by emphasizing the right to self-determination, the search for respect for cultural diversity and also the need to address gross and systematic violations of human rights perpetrated on the continent (PIOVESAN, 2012). The African Charter on Human and Peoples’ Rights (Banjul Charter), from 1981, was adopted within the Organization of African Unity, which was replaced in 2002 by the African Union (AU).

The Banjul Charter pays special attention to the historical traditions and values of African civilization, the process of liberation of Africa, the struggle for independence, the dignity of the African people, the fight against colonialism and neo-colonialism, and the eradication of all forms of discrimination. The Banjul Charter created a unique body that was the African Commission on Human and Peoples' Rights, having the competence to promote and protect human rights. Only in 1998 was edited a Protocol to the African Charter, which entered into force in 2004, creating the African Court of Human and Peoples’ Rights, which has advisory and contentious jurisdiction. Compared to European and inter-American systems, the African system is still in its incipient and it is in constant process of transformation.

African System of Human Rights- Commission -
According to Flávia Piovesan, the regional systems are of paramount importance, as they a) secure a regional consensus on the need to adopt minimum standards of human rights protection (the treaties are not the “maximum ceiling” of protection, but the “minimum floor” to ensure human dignity, constituting the “irreducible ethical minimum”; b) celebrate the relationship between the grammar of rights and the grammar of duties, i.e. international law imposes legal duties to the states (positive and / or negative benefits), to respect, protect and fulfill human rights; c) establish protection agencies of the rights guaranteed (e.g. committees, commissions and courts); and d) establish monitoring mechanisms aimed at implementing the internationally guaranteed rights (e.g. reports, communications between states and individual petitions).
3.3 The right to a reparation as a human right

Since the end of World War II several regional and international human rights documents were produced and adopted, providing the victims with the right of seeking reparations for damages incurred due to their basic rights violations. Even so, frequently, these documents approached the reparations right in a way somewhat indirect, often aiming on exercising this right internally, meaning that the specific mention of reparation and its many modalities was much more the exception than the rule (PIOVESAN, 2012).

The Universal Declaration of Human Rights sought to be a document of human rights consecration by the congregation of different values and world visions in a single statement, thus representing a shared and plural consciousness of the required fundamental rights to ensure a dignified existence to the human being (RAMOS, 2012). Despite not being a treaty per se, the Declaration is considered customary International Law, thus influencing the practical and theoretical human rights development since its very approval. The Declaration’s importance is even greater due to the fact that the conventions to compose the bill would only be created 18 years later and, for this reason, for a long time the Declaration became the main international reference in the field of human rights protection and guarantee.

In the specific case of the right to reparations, the Universal Declaration adopted an indirect formula and, according to Article 8, “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”. In other words, the guarantee given by the Declaration of "an effective remedy" must be implemented by the national judicial organs and there is no specific mention of the forms and modalities of reparations mentioned before, such as satisfaction or compensation. This may be explained by the fact that back then reparations for human rights violations were not a common practice, or even a widespread
idea among the many countries and delegates responsible for that instrument adoption.

At first glance, the human rights justiciability assurance seemed to be a sufficient way of reparation to remedy the damage caused by the infringement. This was also the formula adopted by the International Covenant on Civil and Political Rights of 1966, with some slight alterations, stating that the states Parties have an obligation of ensuring the effective remedy to any person whose rights or freedoms are violated, apart of whether the violation has been committed by persons acting in an official capacity or not. Furthermore, the Covenant also stipulates that the appeal filed by any person shall be tried by a competent authority provided for the legal system of the State, which should also ensure compliance with a decision coming from such resource. Although it maintained the same formula of the Declaration, the covenant goes a step further in its Article 9, by providing for the possibility of reparations for victims of arbitrary or illegal arrests and victims of a condemnatory sentence that is proved to be null by the existence of judicial error.

The mentioned innovation brought by the Covenant on Civil and Political Rights is still subject to the states’ national legal system, since they must implement the norm and ensure compliance, but the significant progress compared to the Universal Declaration previous layout was of fundamental importance for right consecration of victims seeking reparations for damages (SHELTON, 2005). The International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, does not have a specific provision of an effective remedy or right to compensation, which can be explained by the resistance that several countries have shown to this document and the implementation of the rights it guaranteed. Nevertheless it is

91 Article 2(3)(a)(b), International Covenant on Civil and Political Rights.
92 Article 9(5), 14(6), International Covenant on Civil and Political Rights.
possible, recommended and often necessary to exercise judicial resources to pursue the realization of such rights.

Several human rights conventions subsequent to the International Bill of Human Rights also addressed the matter of the effective remedy and possibility, albeit often indirectly, for the victims to seek reparations after having their rights violated. From these conventions, one that stands out is the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 for being one of the first international conventions of global reach to expressly consecrate the right to reparations, as is denoted from the Article 14 of the Convention:

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

Thus, in addition to providing effective remedies to victims and require practical measures of the State to eradicate the practice of torture within its national territory, the Convention Against Torture progresses and explicitly provides a repair mechanism to the victims. Although it can only be applied nationwide, it is more specific and appropriate than a simple reference to effective appeals or procedural remedies (SHELTON, 2005).

In 1989, the Convention on the Rights of the Child determined that States have the obligation to take all necessary measures to promote the physical and psychological recovery and the social reintegration of child victims of any form of neglect, exploitation, abuse, torture and other forms of cruel, inhuman or
degrading treatment or punishments, as well as child victims of armed conflict. In addition, the Convention on the Elimination of Forms of Racial Discrimination of 21 November 1965 also explicitly mentions the possibility for victims to exercise in national courts their right to adequate and fair reparations for any damage suffered as a result of an act or conduct of discrimination.

In the specific context of regional human rights instruments, special attention should be given to the American Convention on Human Rights from 1969, as the instruments of Europe and Africa have only insufficient or indirect references to the victim’s right to seek reparations.

Regarding the European Convention on Human Rights, its article 13 address the right to an effective remedy in occasion of a violation. Article 5.5 mentions the right of a victim of unlawful arrest or detention to have compensation, and Article 41 states that if due to the State party domestic law the reparation to the victim can only be done partially, the European Court will assign a fair compensation to the injured party if necessary, being an intermediate mechanism between the exclusivity of the State of providing reparations and the possibility of an international tribunal directly benefit the victims.

In what concerns the African Charter on Human and Peoples’ Rights, 1981 besides having a very generic mention of a right to the individual to appeal to national courts, this document provides a right to adequate compensation

94 Art. 6, UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination.
95 Art. 13: Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity
96 Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.
97 If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.
only in case spoliation of natural resources, an initiative somewhat limited in the field of victims reparation rights.

The American Convention on Human Rights of 1969 is the most significant instrument at regional level regarding the right to reparation, since its Article 63 provides that, once the violation of a right or freedom expressed in the Convention is determined, the ACHR safeguards the full exercise of the violated right or freedom, and the Court may decide for the reparation of the consequences of the measure or situation which set the violation of human rights, as well as the indemnity payment to the victim.

The innovative character of this arrangement can be explained by at least three reasons. First, the guarantee of full exercise of the violated rights or freedom is given by the Inter-American Court of Human Rights, an international tribunal, and should be followed by national courts of the victim’s state, meaning that such safeguard is no longer exclusively in the hands of the state. Second, the American Convention manages to repair the consequences added to a compensation to the victim, differentiating reparation forms and still indicating the possibility of combining these forms where appropriate. Finally, the Convention recognizes not only the victims’ right to reparations, but a duty of the state to fulfill them, derived from the breach of the international obligation assumed by each country.

Therefore, it can be affirmed that international law recognizes a norm regarding the right to reparation for victims of human rights violations, which would be no more than the logic consequence of the acknowledgement of the violation. Furthermore, an important step towards the recognition of a right to remedies was given with the adoption, by the General Assembly of the United Nations, of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law.

98 Art. 21.2: In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
and Serious Violations of International Humanitarian Law, in 2005. The
document is not legally binding per se, but it provides a framework for states to
implement the right to remedy in cases of human rights violations. Its extensive
session IX specifically addresses the reparation.

According to the document, reparation should be proportional to the
gravity of the violations and the harm suffered, and states shall provide
reparation to victims for acts or omissions which can be attributed to the it and
constitute gross violations of international human rights law or serious violations
of international humanitarian law. The same disposition urges the states to
endeavour to establish national programmes for reparation and other
assistance to victims in the event that the parties liable for the harm suffered are
unable or unwilling to meet their obligations, and also to enforce domestic
judgements for reparation against individuals or entities liable for the harm
suffered, as well as to endeavour to enforce valid foreign legal judgements for
reparation in accordance with domestic law and international legal obligations.

To achieve that end, states should provide under their domestic laws
effective mechanisms for the enforcement of reparation judgements. Therefore,
the next topic shall address what forms of reparation are available in
international law.

### 3.4 Forms of reparation

In chapter one, we have briefly mentioned the subject of reparations as a
consequence of a breach of an international norm. As said before, the three
classical forms of reparation include *restitution in integrum* (re-establishment of
the situation ex-ante), compensation (a monetary award intended to fully
indemnify, in lieu of restitution, all pecuniary and non-pecuniary losses), and
satisfaction, which refers to every form of redress repairing non-pecuniary
wrongs, including apologies or other acknowledgement of wrongdoing, prosecution of the individuals concerned, taking measures to prevent the recurrence of the act or performing symbolic acts of atonement, etc. These and other reparation forms will be explained below.

3.4.1 Restitutio in integrum

As Dinah Shelton explains, “restitutio in integrum in Roman law originated as a remedy granted by the praetor to re-establish a prior situation” and that “the theory of restitution is to restore what the defendant has unlawfully taken, avoiding unjust gains” (2005, p. 298). Restitution is not meant to be a punitive remedy, as its basic purpose is to take from the wrongdoer that to which the victim is entitled and restore it to the victim, and it is the preferred remedy for breaches of international law (SHELTON, 2005) as the Articles on State Responsibility state that compensation and satisfaction only become relevant to the extent that restitution does not suffice to provide full reparation (BUYSE, 2008). Also, this was the same approach followed by the PCIJ in the Chorzów Factory case, in which it held that there was a duty on the wrongdoing state in the case at hand to “restore the undertaking and, if this be not possible, to pay its value at the time of its indemnification, which value is designed to take the place of restitution which has become impossible” (BUYSE, 2008).

Furthermore, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law also state that “Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property”.
However, in state practice, restitution is a rather rare remedy, and compensation is sought much more often due to practical difficulties:

legal restitution may engender clashes or divergences between international and national law which can in turn diminish or annihilate the effect of international judicial decisions in national legal systems. The payment of cash as compensation may in those cases be easier. Secondly, the passage of time since the enactment of the wrong may make restitution rather difficult or even impossible. One could think of a new inhabitant of an illegally taken home. With each subsequent generation, restitution of the house to the original inhabitant or his heirs will become more difficult in a practical sense and more unjustifiable in a moral sense. Finally, restitution may not be adequate reparation for the damage done. Medical care does not by itself serve as restitution for torture. These disadvantages [...] explain why restitution is not often used in international dispute settlement. [...] Even if practice thus does not unequivocally confirm the primacy of restitution, neither does it exclude it in principle. In fact, all the disadvantages mentioned are of a practical nature. (BUYSE, 2008, p. 04-05)

Specifically in human rights cases, most restitution claims are related to illegal deprivations of land, art, and other personal property, arbitrary detention, and wrongful termination of employment, but in latest years, human rights claims involving restitution have also focused on assets looted during the Second World War, ancestral lands of indigenous peoples, property confiscated by communist governments in Central and Eastern Europe, and displacement as a consequence of armed conflict (SHELTON, 2005).

However, for the reality of human rights violations, restitution is not always possible: property can be rebuilt or reintegrated, laws can be revoked, but how can someone be fully restituted in the death of a relative or in spending moments or years of agony being tortured or deprived of liberty? As Judge Sergio García Ramírez pointed out:

When there is a concern that a crime or an unlawful act will be committed, preventive measures should be taken to avert harm or eliminate danger. However, the crime or unlawful act – whether it is committed or remains at some point of the implementation process – implies an irreversible alteration that no restitutio can ignore or suppress. This is clearly seen should a person die, but it also occurs in others circumstances; thus, in the case of deprivation of freedom, this is usually referred to as an eminently reparable measure. In such a case, it is feasible to give the individual back his enjoyment of freedom, but not to return his lost freedom or, in other words, allow him to return to a time before the moment in which the loss occurred. To do this would be
much more than legal remedy: it would be a miracle (INTER-

In this sense, “restitution only represents a reference point, an ideal
target, in both meanings of the word: an idea and an unattainable goal” (INTER-
AMERICAN COURT OF HUMAN RIGHTS, 2000). In reality, its only conceivable aim in many human rights cases is not so much “to totally restore the situation that existed before the violation – modified forever in time, space, characteristics, absolute continuity – but to establish a new situation that is as similar as possible to the preceding one” (INTER-AMERICAN COURT OF HUMAN RIGHTS, 2000).

The time spent in concentration camps cannot be returned. Family members who died in massacres cannot be brought back. The damage done by persecution and torture cannot be undone. All these wrongs must be made right by other means of reparation, which are going to be addressed below: in this way, says Judge Sergio García Ramírez, “the victim’s legal rights are regained, at least partially, and he is placed in a very similar position to the one he had before. However, what he has lost is lost forever” (INTER-AMERICAN COURT OF HUMAN RIGHTS, 2000).

3.4.2 Compensation

According to Wittich, “compensation means to make an appropriate and counterbalancing payment to somebody for some sort of loss or detriment […], and it means the payment of damages as a remedy for making good the damage caused by a previous violation of an international obligation” (2011, p.01). Therefore, compensation is a monetary amount which is granted to victims as indemnization for their losses, including pecuniary and non-pecuniary damages. Quantifying human suffering is not an easy task, but compensatory damages seek to provide for past and future physical and mental suffering, medical expenses, loss of earnings and earning capacity, incidental expenses
(travel, nursing care, etc.), property injury loss and permanent disability and disfigurement (SHELTON, 2005). The Basic Principles also determine that “compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as: (a) Physical or mental harm; (b) Lost opportunities, including employment, education and social benefits; (c) Material damages and loss of earnings, including loss of earning potential; (d) Moral damage; (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services”

Compensations are vastly used in international law and in the human rights context, being the most common form of reparation. Indeed, the regional systems of human rights protection often make use of compensation. The European Convention of Human Rights provides, in its article 41, that “If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party”. The European Court has awarded pecuniary damages for injury to real or personal property and loss of profits, fines and costs incurred in domestic proceedings linked to the violation, loss of past and future earnings and pension rights, loss of business opportunities and medical expenses; non pecuniary damages include psychological harm, distress, frustration, inconvenience, humiliation, anxiety, loss of reputation, sense of injustice and loss of relationship (SHELTON, 2005).

On its turn, the Inter-American convention states, in its article 63(1), that the Court “shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party”. An interesting feature of this court’s jurisprudence includes the concept
of “damage to the project of life”\textsuperscript{99}, which takes into consideration the damage to personal projects of self-realization due to human rights violations, such as imprisonment and psychological harm.

As for the African system, Buyse clarifies that, “in spite of an absence of express authority in the African Charter on Human and Peoples’ Rights or in its own rules of procedure, it has been developing a practice of providing remedies, including declaratory relief, compensation and restitution” (2008, p. 08), and “the Protocol establishing a Court to the Charter system, does stipulate in Article 27 that if “the Court finds that there has been violation of a human or peoples’ rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.” (BUYSE, 2008, p. 08).

3.4.3 Satisfaction

The third classical form of reparation is satisfaction, and its aim is to provide a remedy of non-monetary nature, but rather a moral or symbolic provision. These measures are of great importance in the human rights context, as the mere acknowledgment of the wrongful action and an official apology from the violator state may help the victims to overcome the consequences of the violations\textsuperscript{100}. According to the Basic Principles, satisfaction should include, where applicable, any or all of the following:

(a) Effective measures aimed at the cessation of continuing violations;
(b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim’s relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;
(c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed

\textsuperscript{99} Loayza Tamayo Vs. Perú, 1997.
\textsuperscript{100} The drastic consequences of the denial of the victim status will be mentioned in chapter 5.
wish of the victims, or the cultural practices of the families and communities;
(d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
(e) Public apology, including acknowledgement of the facts and acceptance of responsibility;
(f) Judicial and administrative sanctions against persons liable for the violations;
(g) Commemorations and tributes to the victims;
(h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

Satisfaction, therefore, may vary from the simple assumption of responsibility and formal apology to the construction of monuments in memory of the victims. In this sense, the jurisprudence of the Inter-American Court of Human Rights has made vast use of satisfaction measures in an attempt to provide better and more satisfying reparations. One good example refers to the case "19 mercadores vs. Colombia ", which concerns the arrest, disappearance and execution of 19 merchants by a paramilitary group acting under the command of the Colombian army. The Court, after declaring that Colombia had violated several provisions of the American Convention, has determined that the State Colombia should take a series of measures, such as the investigation of the crimes in question and the prosecution of those responsible, the search of the remains of the death and its delivery to the families, the construction of a monument to the victims, conducting a public act of recognition of its international responsibility in relation to crimes committed, the free provision of medical and psychological treatment to the families of victims and payment of damages due to the material and moral damages suffered by the victims and their families (ANDRADE, 2006).

Thus, the construction of memorials honoring the victims, along with other measures such as public liability acknowledgments and apologies by the defendant State, among others, are also ways to provide reparation to the victims. These forms of satisfaction are further recommended when treating generalized character of violations because they increase the guarantees of non-repetition of these violations and demonstrate the commitment of the defendant State towards Human Rights.
3.4.4 Guarantees of non-repetition

According to Shelton (2005), it is not easy to draw the line between satisfaction and guarantees of non-repetition, but these last measures usually refer to the duties of investigation and prosecution of those responsible for the violations, as well as legal reforms, either implementing necessary laws or revoking laws that violate human rights standards. The Basic Principles mention that **guarantees of non-repetition** should include, where applicable, any or all of the following measures, which will also contribute to prevention:

(a) Ensuring effective civilian control of military and security forces;
(b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
(c) Strengthening the independence of the judiciary;
(d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;
(e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;
(f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
(g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;
(h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

The case Ximenes Lopes v Brazil, for example, illustrates how a country decided to provide these some of these guarantees even before the trial in the Inter-American court. After a brutal episode that lead to the death of a mentally disabled patient in a public hospital, Brazil took many steps to remedy: it renamed the medical institution after the victim, and also held special conferences around the country in order to raise awareness for the non-repetition of harmful events such as this, and to keep alive the memory of the victim. The country also adopted a series of measures to improve the conditions
of psychiatric care in the various institutions of the Unified Health System (SUS), including the implementation of a general reform in the psychiatry sectors.

3.4.5 Lump sum agreements

Reparations may also be provided in the framework of an international agreement, called lump sum agreement, which is prepared by diplomatic negotiations between governments to settle outstanding claims by the payment of a given sum without resorting to international adjudication and, in the majority of the cases, without any assumption of responsibility for the wrongful act\(^1\) (GRAY, 1990). By this kind of agreement, the state receiving the lump sum is responsible for distributing the fund among the claimants in accordance to its domestic procedures (GRAY, 1990), and this distribution is usually done by a special commission or board.

The usage of lump sum agreements goes back to the 18\(^{th}\) and 19\(^{th}\) century, when the United States and Great Britain settled a part of the claims regarding the American Revolution, but they became popular as a dispute resolution method after the Second World War, specially in the settlement of claims based on international wrongs in the context of armed conflicts, as an unprecedented amount of international claims arise after the massive and mass violations of international law during World War II (BANK; FOLTZ, 2011). Therefore, most of the claims addressed by lump sum agreements have been property claims (nationalization) with the exception of lost profits and loss of good will, but lump sum agreements concerning claims arising out of World War II also covered personal injuries, in particular regarding Nazi-persecution (BANK; FOLTZ, 2011). The most important eligibility criterion for compensation is the

\(^{101}\) In 1990, Gray counted more than 130 lump sum agreements made after the Second World war, and in only six of them – all involving Japan – there was an express admission of responsibility.
nationality of the receiving state, but territorial criterion may also be present in the agreement\textsuperscript{102}.

Lump sum agreements may, indeed, provide compensation for victims of human rights violations, specially in contexts of general and mass violations, such as wars, and it is important to acknowledge that “the various compensation measures implemented by Germany constitute the most significant and most far-reaching atonement program ever established” (D'ARGENT, 2011, p. 08). However, in reality, many of these agreements offer a meagre amount: some of the lump sum agreements concluded by Germany with some of the States invaded during World War II and covering personal injuries resulted in individual payments of some 450 € for any period spent in a Nazi concentration camp (BANK; FOLTZ, 2011). Other lump sum agreements covered less than 40% of the damage and loss of property. Together with the non-assumption of responsibility, this provides little help or sense of justice to the victims. Moreover, by entering into a lump sum agreement the claimant State frequently waives any individual claims of its nationals previously existing under international law, which also collides with growing support in international literature and domestic courts for an individual right for compensation in the case of violation of human rights or of humanitarian law\textsuperscript{103} (BANK; FOLTZ, 2011).

\textsuperscript{102} As Bank and Foltz explain, “In State practice, claimants usually had to prove claimant State nationality. Only exceptionally, eligibility includes a territorial criterion instead of the nationality requirement, for instance ‘[w]ar victims in the Belgian areas subject to German internal legislation during the war of 1940–1945’ (Art. 1 (1) Additional Agreement to the Treaty between the Kingdom of Belgium and the Federal Republic of Germany concerning the Compensation of War Victims (signed 5 December 1973, entered into force 1 October 1974) 954 UNTS 470). As in contrast to traditional international law requiring continuous nationality of the claimant from the time at which the claim is accrued to the date of State espousal or final settlement for a State to present a claim on behalf of individuals, more recent agreements did not insist on the continuity rule” (BANK; FOLTZ, 2011, p. 03).

\textsuperscript{103} See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (ICJ Advisory Opinion) Velásquez Rodríguez v Honduras (Interamerican Court of Human Rights) and The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted and proclaimed by the UN General Assembly with Resolution 60/147 (16 December 2005).
In conclusion, notwithstanding the abundance of human rights instruments in international law nowadays, the central element to the concept of protection of individuals is the extent of State activity vis-à-vis individual, as the relationship between state and individual provides the key basis for the protection of individuals and their rights (PATNAIK, 2004). In fact, not only the state has to agree to the jurisdiction of a human rights tribunal in order to be prosecuted before such court, but also, those courts require that the victims exhaust local remedies before addressing the international level.

Moreover, the general legal regime of the international responsibility of the state was designed to function on an inter-state level. All those difficulties are an obstacle to the right to obtain reparation, and they are usually placed in the way on someone who is already in a fragile position – the victim of human rights violations. Under this context, the domestic courts of states are still the primary resource for victims of human rights violations to obtain compensations. However, when the perpetrator of the violation is another state, victims are often deprived from their right to redress because of state immunity.

It is important, however, to emphasize that there are different alternatives in terms of reparation, and some of them might be less financially burdensome to the states and more satisfying for the victims, such as a wide range of satisfaction measures. This should be taken into account, as domestic courts could deny immunity for the states while providing less costly but more meaningful reparations to the victims.

The next chapter will focus on the relationship between state immunity and human rights violations. First, we shall analyze the case law of selected countries in order to assess how domestic courts around the world are dealing with this issue, to then examine some of the existing theoretical formulations on the matter.
CHAPTER 4: CHALLENGING IMMUNITY TO MAKE HUMAN RIGHTS EFFECTIVE

In the previous chapters, we have settled the foundations to examine the interplay between state immunity and human rights. First, we looked at international law as a legal system; after that, we analyzed the rationale and the historic evolution of state immunity; in the subsequent chapter, we addressed human rights, their historic evolution and the recognition of a right to redress in case of human rights violations. All this trajectory conduces to the following chapter, in which we address what happens when human rights victims seek redress before domestic courts, but cannot obtain it on the grounds of state immunity. What happens to a victim of the Nazi regime that wants to obtain compensation from Germany for its sufferings in Italy? What happens when a British national is tortured by officials from the Kuwaiti government and is looking for reparations back in the courts of his country?

As seen previously, although practice regarding state immunity has been far from uniform, the majority of doctrine affirms that is has been granted for a long time in a similar way to the immunity once granted to the person of the sovereign, ie, absolute and virtually unrestricted, meaning that the acts performed by a state could not, therefore, be subjected to the appreciation of the domestic courts of other countries. Thus, the so-called “rule of immunity” was purely based on status, being it sufficient for the defendant to prove its condition of state or government for immunity to be granted. However, the “absolute character” of such “rule” started to be more and more questioned, as changes occurred in the role of the state also led to a shift in the conception of jurisdictional immunity. In the course of the nineteenth century, states were also large-scale commercial entrepreneurs (Brownlie, 2008) and, aside from the traditional acts of government, executed in their sovereign prerogatives, states increasingly practiced acts of commercial nature, which were carried out based on their private capacity as legal entities under private law (Cassese, 2005).
This new role of states in the international arena then led to the need for a different legal treatment for the acts practiced by these entities. Thus emerges the distinction between acts of *jure imperii* and acts of *jure gestionis* or *privatorum*, which was first registered, according to Cassese (2005), in the jurisprudence of the Italian and Belgian courts, which started to refuse the granting of sovereign immunity for acts committed by foreign states in their private capacity, inaugurating a new trend in international law.

As the social dynamics and the interactions of states and society determined a relative approach towards state immunity in the past, new legal trends also arise on the horizon today, alongside the traditional views, with emphasis being placed increasingly on the individual within the context of the international scenario. In this sense, there are many who argue for a new transition based on human dignity and protection of human rights, which would enable a breakthrough in the theory of state immunity that would be coherent with the importance given by Law to the protection of these values, giving effectiveness to the norms that now protect these core principles. The refusal to grant immunity to states concerning human rights violators before the domestic courts of the forum state is a tendency that is gaining momentum and which counts with several arguments to justify it, and is also manifesting itself in national courts decisions with ever increasing frequency. Thus, this new approach in the field of state immunity is our next object of study, addressing the case law on the matter.

### 4.1 Case Law regarding state immunity in cases of violation of human rights

The cases selected deal with different realities, and were the result of different social processes. The first category of cases involves individuals seeking compensation for the atrocities perpetrated by the Nazi regime during the Second World War, and an examination of the treatment of Nazi victims over time demonstrates that public sympathy and respect for the survivors of
Nazi abuses are a recent phenomena, since right after the Second World War victimization was, instead, frequently associated with blame and shame, and victims encountered ambiguous reactions that oscillated between contempt, the demeaning result of Nazi propaganda, and glorification of the victims’ sacrifices (REGOLA, 2005). In fact, as Regola explains,

Under the conditions of war and military rhetoric, undeserved suffering was furthermore associated with weakness and passivity. Even the pervasive use in the immediate postwar years of a discourse instilled with religious terms, such as ‘sacrifice’ and ‘martyrdom’, was ambivalent in its impact. Such rhetoric transfigured victimization and even insinuated that the victims had visited the affliction upon themselves with their behavior and conduct, however noble their motives had been. (REGOLA, 2005, p. 01-02)

However, this panorama started to change when, in 1950, the Federal Republic of Germany assumed its responsibility for the violations committed by the Nazi regime, and recognized its obligations in relation to the survivors. Later years, hence, witnessed the consolidation of victimhood as an officially acknowledged legal status that entailed specific rights and entitlements to financial compensations and that, for such reason, it became a much desired good (REGOLA, 2005). In this sense, for the survivors of state sponsored violence, victimhood “represented more than the mere vindication of their undeserved affliction. To a great extent it came to stand for moral authority as the trademark of innocence and a highly valued form of symbolic capital, to use the terminology of the French sociologist Pierre Bourdieu” (REGOLA, 2005, p. 02).

Although there were compensation programs and schemes for victims of the Nazi regime, a great number of them did not receive redress because they did not fulfill some specific requirements, such as a certain nationality, or simply because they were not informed about the programs at that time, and despite German lawmakers’ will to close the redress cycle by voting for a compensation bill in 1965 that was deemed to be the last one in that sense, that goal was not reached. Indeed, from the 90’s and on, individuals that were excluded from redress started to look for the domestic courts of other states in order to obtain
reparations from Germany, a litigation phenomenon that may be explained by different factors.

First, as explained by Jack Donelly (2003), human rights have become a hegemonic political discourse, the settled norms of contemporary international society, and political legitimacy is more and more judged and expressed in terms of human rights, both nationally and internationally, and even where people do not have a specially sophisticated sense of what a commitment to human rights means, they respond to the idea that they are entitled to certain protections and opportunities. Second, while Germany left the Second World War with a shattered economy, this situation started to change since the 1950’s, and Germany's economic growth and development became more apparent after the reunification and, in this sense, many victims probably understood that as evidence of the presence of resources for compensation: while going into court to seek for an indemnization against a broken and bankrupt country does not look like a payable effort, the broadly broadcasted “German economic miracle” was a different scenario. Finally, despite such economic abundance, Gattini affirms that the increase in litigation cases regarding Germany can be explained by the attitude of the former conservative German government, which sustained that all possible claims related to the Second World War had unquestionably lapsed by the combined application of the 1953 London Agreement on German External Debt and the 1990 Moscow Treaty on the Final Settlement with Regard to Germany (GATTINI, 2005).

This conjunction of political, economic and social factors helps to explain why domestic courts started to face, more and more often, individual claims against Germany for human rights violations, even if the facts giving rise to such claims occurred a certain while ago. As for the second category of claims, it concerns “individual” violations, meaning people who suffered human rights violations not in a general context, such as the Nazi regime, but in specific situations, mostly related to abuse by the authorities of another country. This cases are also influenced by the hegemonic discourse of human rights, and
they are usually directed against a country that was under a repressive rule. The cases selected are grouped according to the existence or not of a specific legislation, on the forum country, regarding state immunity

4.1.1 Decisions concerning states WITHOUT specific legislation on the matter

4.1.1.1 Italy

a) Ferrini v. Federal Republic of Germany (decision of 2004)

In 1998, Ferrini, an Italian citizen, fills a plea against Germany before the Tribunale di Arezzo seeking compensation for economic and immaterial damages suffered between 1944 and 1945, when he claims to have been seized by German troops in Italian territory and taken to the concentration camp of Kahla, where he was forced to work at a weapons factory for the benefit of the Nazi regime (IOVANE, 2005). The Tribunale di Arezzo rejected the claim alleging Germany’s immunity from legal proceedings. Ferrini appealed to the Corte di Firenze, which upheld the 1st degree decision. Ferrini’s case came to the Court of Cassation which, in an unprecedented decision in the country, reversed the previous decisions and removed Germany’s sovereign immunity based on international law and on the need to protect human rights.

In Ferrini’s decision the Corte di Cassazione recognized that the protection of human rights constitutes a norm of jus cogens104 and therefore must prevail

104 It is not within the scope of this thesis to discuss jus cogens norms per se, specially because the author has a very critical perspective regarding the plethoric discourse regarding jus cogens norms in international law nowadays. However, an explanation is still necessary. Jus cogens norms made their first official appearance in the 1969 Vienna Convention on the Law of Treaties, which, in its article 53, states the following:
“Article 53: Treaties conflicting with a peremptory norm of general international law (jus cogens) A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”
over the rule of state immunity, and that this rule, also present in the Italian Constitution in its article. 10, is not absolute, which means that its application depends on the nature of the object of the dispute. The court also addressed the issue of whether the violations alleged by Ferrini occurred because of military operations, which would, in theory, enjoy the prerogative of immunity, and said, in this regard, that the severity of the crimes and its transcendence characterize them today as international crimes. Moreover, the Court affirms that the reason behind the granting of immunity to a state does not persist when the state in question violates universal values such as human rights.

A noteworthy aspect of the decision is its assertion that the rules of international law cannot be seen in isolation due to the system’s interdependence. Thus, the Court of Cassation stated that the prevalence of jus cogens norms guides and orientates the system as a whole and, in consequence, it reflects on other principles and international standards, including state immunity and this systematic view will be a great addition to the theory of normative hierarchy.

Among the many arguments used by the Court of Cassation, it is important to mention the use of universal jurisdiction to establish domestic courts’ jurisdiction in cases of serious human rights violations, therefore withdrawing the state’s sovereign immunity in civil claims (Focarelli, 2005). Bianchi (2005) clearly explains the Court’s reasoning arguing that, when the Court based its decision on Article 40 of the Draft Articles on Responsibility of state from the international law Commission, and in international and comparative jurisprudence, it took a step forward on the notion of international crimes, affirming that they ruin the very foundations of international coexistence and defining those breaches as grave violations against human rights’ norms, which are non-derogable and that have priority over other international rules, including

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From the law of treaties, jus cogens soon became popular in other fields of international law, that attribute a superior quality to these norms. Although there is no clear agreement regarding the content or the identification of jus cogens norms, the prohibition of genocide, slavery, torture and piracy are often seen as examples of such.
the ones of sovereign immunity. Based on these arguments, the Court held that there could be no doubt about the applicability of universal jurisdiction in Ferrini despite the fact that it was a civil claim. (BIANCHI, 2005). Applauded by human rights defenders worldwide, the Ferrini decision is, without doubt, a major milestone in the conflict between state’s immunity from adjudication and the pursuit of redress for victims of serious human rights violations. However, the judgment delivered by the Italian Court of Cassation, was much criticized by the lack of clarity in its reasoning and by having applied the principle of universal jurisdiction beyond the limits set by doctrine and jurisprudence nowadays.105.

b) Giovanni Maitelli v. Federal Republic of Germany (decision of 2008)

The Maitelli case was among one of the fourteen rulings of the Italian Court of Cassation that, seating in plenary, affirmed that states accused of international crimes do not enjoy immunity from civil jurisdiction in other states courts under customary international law (FOCARELLI, 2009, p. 123). All those cases regarded international crimes (deportation and forced labor) committed by Germany during World War II against Italian citizens. In its reasoning, the court affirms that the customary principle of foreign state jurisdictional immunity coexists, in the international legal order, with the other parallel principle whereby international crimes threaten humanity as a whole and undermine the very foundations of the coexistence of peoples (FOCARELLI, 2009, p. 124).

105 The ambiguity on the actual rule of decision for the Ferrini judgment turns out to be even greater if one looks at the Court’s references to the tort exception, emphasizing that, in any event, the tort having occurred in the forum state, Italian courts would have jurisdiction under the corresponding customary law exception to state immunity. On closer scrutiny, the judgment seems to purport that the jurisdiction of Italian courts against the foreign state can be established on both grounds, with the tort exception argument playing an ancillary role in relation to the main consideration that international crimes give rise to universal civil jurisdiction against foreign states. In this context, it is interesting to note that the Court underscores that the traditional distinction between acts jure imperii and acts jure gestionis is no longer suitable to be used as the general criterion to determine when immunity is to be granted. (BIANCHI, 2005, p. 246).
Once again, the Italian Court uses the systematic approach, affirming that priority should be given to ranking rules such as the respect for the inviolable rights of the person. Also, it seems to adopt Jürgen Bröhmer (1997) arguments when it states that “it would be "incongruous" if civil jurisdiction, which in the international legal order already extends to foreign states for breach of contract, were "excluded in such far more serious violations as those constituting crimes against humanity and that also mark the breaking point of tolerable exercise of sovereignty" (FOCARELLI, 2009, p. 125)

4.1.1.2 Greece

a) Prefecture of Voiotia and others v. Germany (decision of 2000)

On June 10, 1944, German troops invaded the village of Distomo, in the Greek district of Voiotia, in retaliation to an attack perpetrated by Greek partisans on the same day. The German attack the Distomo, whose inhabitants lacked any form of involvement with the Greek resistance, culminated in the brutal murder of 218 residents, mostly elderly, women and children, and the complete destruction of their property. In November 1995, the city of Voiotia, along with other individuals - survivors, victims and their descendants, filed an action for redress against Germany before the Court of 1st Instance of Leivadia. In the lawsuit, the authors sought compensation for material and immaterial damages suffered as a result of the killings of their family members and the destruction of their property. The demand was referred to the Ministry of Foreign Affairs of Germany, who rejected and sent it back to the Greek embassy, saying the action undermined the German sovereignty.

To build the argument of violation of peremptory norms of international law, the court begins by stating that, according to art. 43 of the Regulations annexed to the Hague Convention of 1907 on the Laws and Customs of War on Land,
the foreign territory of the occupying state must comply both with the laws of the occupied territory and the rules of international law on warfare, including the art. Regulation 46 of the Hague Convention, which requires compliance with certain rights and family honor, as well as their lives and their properties. In the Court's view, seem to be jus cogens norms that have been flouted by the German occupying forces in the Distomo massacre.

As a consequence, the Court states that the violation peremptory norms by Germany means, in practice, that the state cannot invoke its immunity from jurisdiction, and that it has implicitly waived that prerogative by committing the violations alleged by the victims. According to the Court, this exception stems from the decision of the Nuremberg International Military Tribunal, which established the inapplicability of the right to immunity for acts that are prohibited by international law (GAVOUNELI, 1997).

a) When a state is in breach of jus cogens rules, it cannot expect bona fide that it will be granted immunity privileges. Therefore it is assumed that it tacitly waives the privilege (constructive waiver through the operation of international law)

b) The acts of a state that violate jus cogens norms do not have the character of sovereign acts. In such cases it is considered that the accused state did not act within the ambit of its capacity as a sovereign.

c) Acts contrary to jus cogens norms are null and void, and cannot constitute a source of legal rights or privileges, such as the claim to immunity, according to the general principle of law ex injuria jus non oritur.

d) The recognition of immunity by a national court for an act that is contrary to jus cogens would be tantamount to collaboration by that national court in an act that is strongly condemned by the international community.

e) The invocation of immunity for illegal acts that were perpetrated in violation of a rule of jus cogens would constitute an abuse of that right.

f) Since the principle of territorial sovereignty is superior to the principle of state immunity, a state that violates the former principle by illegally occupying foreign territory cannot invoke the principle of sovereign immunity for acts committed during that illegal occupation. (BATENKAS, 1998, p. 766 and 767)
b) Margellos v. Federal Republic of Germany (decision of 2002)

This case also involved claims for compensation for acts committed by German forces in the Greek village of Lidoriki in 1944, in circumstances similar to the ones in Distomo. In 2001, the Hellenic Supreme Court (Areios Pagos) referred that case to a Special Supreme Court, an organ that, according to Article 100 of the Constitution of Greece, has jurisdiction in relation to “the settlement of controversies regarding the determination of generally recognized rules of international law”. The court then had to decide if the rules on state immunity covered the human rights violations present in the case, and it ruled in 2002 that in the present state of development of international law, Germany was entitled to state immunity, holding that the territorial tort principle was not applicable to the acts of the armed forces of a state in the conduct of armed conflict, “irrespective of whether the actions at issue violated jus cogens (GREECE, 2002).

However, it is important to notice that such decision was taken on a very narrow majority, and while 6 judges were in favour of upholding Germany’s immunity, the other five (Rizos, Kroustalakis, Simopoulos, Prassos and Gyftakis) were against it. The dissenting took notice of the 1991 Resolution from the international law Institute named “Contemporary Problems Concerning the Immunity of states in Relation to Questions of Jurisdiction and Enforcement”, that states that “the organs of the forum state are competent in respect of proceedings concerning the death of, or personal injury to, a person, or loss of or damage to tangible property, which are attributable to activities of a foreign state and its agents within the national jurisdiction of the forum state”. Furthermore, the minority affirmed that according to Article 11 of the European Convention on state Immunity, 1972, immunity cannot be requested by a contracting state which is in breach of its obligations under international law where it has committed crimes on the territory of the state of the forum (GREECE, 2002).
4.1.1.3 Brazil

a) Salomon Frydman v. Federal Republic of Germany (decision of 2008)

The present case is a redress claim against Germany of a Brazilian national who was born in France in 1931 and, being Jewish, suffered all kinds of persecution, humiliation and beatings by the Nazi regime: he saw his parents being arrested and beaten by the Gestapo, and he received the same treatment himself. His family was forced to leave his apartment without permission to take personal belongings, they starved due to the expropriation of their property and he was deprived of any opportunity to study. The first instance court ruled that the claim should be extinct without further examination on the merits, stating the composition of the dispute would not be the responsibility of the Brazilian authority.

Frydman appealed from this decision to the Brazilian Superior Court of Justice, that initially tried to establish if the court had jurisdiction to entertain the claim according to the Brazilian Code of Procedure. Despite the fact that such connection was not clear, the Court pointed out constitutional provisions to justify the state's interest in analyzing the cause, such as the principle of human dignity (art. 1, inc. III of the Federal Constitution) and its corollaries, such as the pursuit of a free, just and solidary society (art. 3, inc. I of the Constitution), the eradication of poverty and marginalization, with the reduction of regional and social inequalities (art. 3, inc. III), etc., and also the provisions of art. 4 of the Constitution stating that Brazil is guided, in its international relations, by the principles of prevalence of human rights, self-determination and the repudiation of terrorism and racism, among others. According to the Court, this means that Brazil is committed at international level, to take all possible measures to repudiate acts as those discussed in the case sub judice. Then the Court specifically addresses the issue of the jurisdictional immunity of the foreign
state, affirming that, in order to solve this matter, the Federal Republic of Germany should be consulted to determine if it was willing to waive its immunity or not.

b) Josélia Marques v. Federal Republic of Germany (decision of 2008)

The present case concerns the action of punitive damages filed by Josélia Marques da Silva against the Federal Republic of Germany, due to the sinking in 1943 of a fishing vessel by a German submarine off the coast of Cabo Frio resulting in the death of her uncle and grandfather. The German submarine was shot down by the Brazilian Navy, and the crew was sent to the United states, where they confessed to the sinking of Changri-lá vessel, in which Josélia’s relatives worked. The Maritime Court, however, dismissed the case in 1944, citing lack of evidence.

The process was reopened in 2001 by request of the Navy Attorney, who said he learned of documents that would prove that the fishing boat Changri-lá was in fact shot down by the German submarine. The process, however, was dismissed in first degree, and the judge reasoned his decision a previous trial of an identical suit, establishing the incidence of prescription and the impossibility of submitting a sovereign country to pay compensation due to acts of war.

In the appeal, the plaintiff asserted the nullity of the first-degree sentence based on failure to state reasons and the fact that it was extra petita. Furthermore, the plaintiff claimed that there was no express statement from the defendant concerning its immunity from jurisdiction, and that it may not be deduced that it was implied. Finally, the plaintiff argued that, even if there was such a statement, it could not be taken into account in the present case, because the acts perpetrated by the defendant in the territory of the forum-state
violate the human rights and, since the plaintiff is poor, she could not sue Germany abroad, which would leave her without redress.

The case got to the Brazilian Superior Court, and one of the Minister outlines the matters to be addressed, stating that "the crux of the controversy concerns therefore the existence or inexistence of jurisdictional immunity when the act is perpetrated within the Brazilian territory and refers to human rights, thus generating civil liability "(BRAZIL, 2008, p. 13).

After analyzing the international case law on the matter, as well as other countries statutes on state immunity, Minister Salomão highlights the existence of an intense discussion at the highest spheres of international law about the conflict between the institute of immunity and the fundamental values the international community, such as human rights' violations. Thus, as a result of this debate, the international scenario sees the emergence of a new restrictive trend for immunity - even for the so called acta iure imperii - a phenomenon that causes significant changes at the customary law on the issue. The magistrate's conclusion is that "immunity from jurisdiction, although it is an instrument for the maintenance of good relations between states, sometimes ends up hindering the achievement of the primary objectives of the community of nations, namely, the promotion and protection human rights "(BRAZIL, 2008, p. 21).

Minister Salomão also affirms that immunity, as a construction of international customary law, must be rejected by domestic courts when it conflicts with jus cogens norms, because the latter have a higher hierarchy. The Minister closes his vote affirming that "international custom in the area is no longer bound to the dichotomy between acta iure imperii and acta iure gestionis, reaching new paradigms about the scope of jurisdictional immunity and ultimately, the function of sovereignty in this new international environment "(BRAZIL, 2008, p. 31).
Unfortunately, the final decision on the case was based on the rapporteur's vote, only determined the return of the suit for the lower courts so that Germany could manifest, if it so desired, its wish to waive its immunity from jurisdiction.

4.1.2 Decisions concerning states WITH specific legislation on the matter

4.1.2.1 United States of America

a) Siderman de Blake v. Argentina (Decision of 1992)

In 1976, shortly after the military government seized power in Argentina, Jose Siderman, a Jew, was taken from his home by government agents and tortured for 7 days on account of his religion. Upon his release, Siderman was warned that he and his family should leave the country under pain of death. Thus, Siderman went to the U.S. where his daughter, an American citizen, was living, and he sold part of his property to pay for the trip. The military regime altered Siderman’s property register claiming that he conducted a fraudulent sale to enable his escape from the country. Argentina then has requested by letter rogatory the help of the Superior Court of Los Angeles to hold Siderman, and the Court, unaware of the reasons for the Argentine government, responded to the request. Siderman was arrested in Italy because of an extradition request made by the Argentine government, until finally an Italian Court of Appeal stated that the extradition request was based on political persecution. Finally, in 1982, Siderman, now a U.S. citizen, filed an application against the Republic of Argentina for his material losses and for the acts of torture perpetrated against him.

As for the human rights violations, The Sidermans contend that “when a foreign state's act violates jus cogens – such as the prohibition of torture- the
state is not entitled to sovereign immunity with respect to that act, an argument that starts from the principle that jus cogens norms enjoy the highest status within international law, thus "prevail over and invalidate other rules of international law in conflict with them". In this regard, despite affirming that “the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of jus cogens”, the Court concludes that “if violations of jus cogens committed outside the United states are to be exceptions to immunity, Congress must make them so. The fact that there has been a violation of jus cogens does not confer jurisdiction under the FSIA”.

Looking for exceptions to the immunity rule brought by the FSIA, the Sidermans rely on its section 1604, that provides that the rule of immunity is subject to existing international agreements to which the United states is a party at the time of enactment of, and argue that Argentina's immunity under the FSIA is "subject to" the Universal Declaration of human rights, G.A. Res. 217A(III), U.N. Doc. A/810 (1948), and the United Nations Charter. The Court, however, concludes that General Assembly resolutions are not an “international agreement” within the meaning of section 1604.

Finally, according to section 1605 (a) (1) of the FSIA, a “foreign state shall not be immune from the jurisdiction of courts of the United states or of the states in any case in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.” The Sidermans sustained that Argentina, by using the U.S. courts to start malicious criminal proceedings against them, has implicitly waived its immunity, an argument that was accepted by the court, that conclude “that the Sidermans have presented evidence sufficient to support a finding that Argentina has implicitly waived its sovereign immunity with respect to their claims for torture. The evidence indicates that Argentina deliberately involved United states courts in its efforts to persecute Jose Siderman. If Argentina has
engaged our courts in the very course of activity for which the Sidermans seek redress, it has waived its immunity as to that redress.”


In the present case, Hugo Princz, an American Jew, sought compensation for the atrocities committed by the Nazi authorities, including false imprisonment, assault, negligent and intentional infliction of emotional distress, as well as the quantum owed by his forced labor at the IG And Messerschmidt Farben factories. The district court claimed to have jurisdiction to hear the case, which led the German government to appeal to the higher court seeking a declaration that the lower court lacked jurisdiction, under the argument that the FSIA was the only basis for subjecting a sovereign state to the U.S. courts and that the case in question does not fall within any of the exceptions of the statute. Alternatively, Germany argued that the FSIA does not apply retroactively, and that, by the law prevailing at the time of the acts, the German government would enjoy absolute immunity.

The Court of Appeals, when faced with the need to establish the law applicable to the case - whether the FSIA or the existing law before the statute - dodges the question, saying: We do not have to decide whether the FSIA applies to pre-1952 events, however, in order to resolve this case. […] even if the FSIA does apply here, none of the statutory exceptions to foreign sovereign immunity applies. On the other hand, if the FSIA does not apply to Mr. Princz’s claims, and even if Germany is not immune from suit under the pre-FSIA law that would apply […] a federal district court does not have jurisdiction over Mr. Princz’s claims because they arise in tort and quasi contract. (UNITED STATES OF AMERICA, 1992, p. 8)
In addressing the question of the implied waiver and the subsequent configuration of an exception to sovereign immunity envisaged in Article 1605 (a) (1) the Court of Appeal adopts a conservative position, dismissing such a possibility based on the judicial precedent of case Siderman v Blake. Argentina, in which the court determines that "the fact that there has been violation of jus cogens does not confer jurisdiction under the FSIA" (UNITED STATES OF AMERICA, 1992, p.10).

Even after affirming that “Indeed, it is doubtful that any state has ever violated jus cogens norms on a scale rivaling that of the Third Reich” (UNITED STATES OF AMERICA, 1992, p. 13), the court concludes that “an implied waiver depends upon the foreign government's having at some point indicated its amenability to suit. Mr. Princz does not maintain, however, that either the present government of Germany or the predecessor government of the Third Reich actually indicated, even implicitly, a willingness to waive immunity for actions arising out of the Nazi atrocities. We have no warrant, therefore, for holding that the violation of jus cogens norms by the Third Reich constitutes an implied waiver of sovereign immunity under the FSIA.” (UNITED STATES OF AMERICA, 1992, p. 14).

Despite the Court's unfavorable decision on Princz v. Germany, the case became notorious due to a dissenting vote by Judge Wald, in which she sustains the applicability of the implied waiver theory to the present case. Wald states that Germany's treatment of Princz violated jus cogens norms, and that by engaging in such conduct, Germany implicitly waived its immunity from suit within the meaning of Sec. 1605(a)(1) of the FSIA. (UNITED STATES OF AMERICA, 1992, p. 19).
4.1.2.2 United Kingdom of Great Britain and Northern Ireland

a) Al–Adsani v. Kuwait (Decision of 1996)

In the present case, Al-Adsani claimed damages against the Government of Kuwait for injury to his physical and mental health on two different occasions. First, he was taken at gun point in a government car to the state security prison and was there subjected to very considerable physical ill-treatment and forced to sign a form of admission regarding a private dispute with a member of the ruling family of Kuwait. After that, he was once again taken at gun point and he was first immersed in a swimming pool which is said to have contained various corpses, and he was then placed in a cell together with a mattress which had been impregnated with petrol and which was then set alight. When recovering from the injuries at a hospital in England, Al-Adsani received many phone calls threatening his life.

The Government of Kuwait applied for a declaration of its immunity under s.1(1) of the 1978 Sovereign Immunities Act, and the court held that Kuwait was entitled to state immunity from a claim for damages for torture because the Act was a comprehensive code and, although international law prohibited torture, no express or implied exception to immunity existed in cases of torture.

Lord Ward affirmed that "unfortunately, the Act is as plain as plain can be. A foreign state enjoys no immunity for acts causing personal injury committed in the United Kingdom and if that is expressly provided for the conclusion is impossible to escape that state immunity is afforded in respect of acts of torture committed outside this jurisdiction". In the same sense, Lord Stuart-Smith stated "At common law a sovereign state could not be sued at all against its will in the courts of this country. The 1978 Act, by the exceptions therein set out, makes substantial inroads into this principle. It is inconceivable,
it seems to me, that the draftsman, who must have been well aware of the various international agreements about torture, intended section 1 to be subject to an overriding qualification."

b) Jones v. Saudi Arabia (Decision of 2003)

In the present case, three British citizens and one British/Canadian dual national were falsely accused of involvement in a bombing campaign in Riyadh, Saudi Arabia in 2001 and 2002. Ron Jones was rushed to hospital after being injured by a bomb attack and taken away by the Saudi secret police from the hospital to be kept in solitary confinement, and he was shackled, repeatedly beaten on the soles of the feet and hung from a bracket for 67 days. Alexander Mitchell, William Sampson and Leslie Walker also suffered similar violations from the Saudi Arabian police, and were also forced to make false televised confessions assuming the responsibility for the bombing. They had undergone a secret trial in which Dr. Mitchell and Dr. Sampson were sentenced to death and Mr. Walker to serve 18 years in prison. After much protesting and 900 days in prison, they were released on an order of clemency.

Mr. Jones returned to the United Kingdom and brought a civil suit for damages against the state of Saudi Arabia and Lieutenant Colonel Abdul-Aziz in the courts of England and Wales, and his case was conjoined with the cases of Dr. Mitchell, Dr. Sampson and Mr. Walker (they brought a claim for damages against two policemen, the deputy governor of the prison where they were held, and the Minister of the Interior).

After having the claim dismissed on the grounds of the state immunity granted according to the Sovereign Immunities Act from 1978, Jones appealed to the House of Lords, which had to decide if it had jurisdiction to entertain Mr
Jones’s claim based on torture against the Kingdom; and secondly, whether it has jurisdiction to entertain the claims based on torture against Colonel Abdul Aziz in the first action and against the four defendants in the second. On 3 April 2006, the House of Lords upheld both the immunity of the state and the state officials, affirming that it could not be denying access to the court when it had no access to give, since immunity was a procedural rule applicable to the case, that was not under any of the SIA exceptions.

In its reasoning, the House of Lords sustained that “there is no evidence that states have recognized or given effect to an international law obligation to exercise universal jurisdiction over claims arising from alleged breaches of peremptory norms of international law, nor is there any consensus of judicial and learned opinion that they should”. This is significant, since these are sources of international law. But this lack of evidence is not neutral: since the rule on immunity is well-understood and established, and no relevant exception is generally accepted, the rule prevails. (paragraph 27).

In addressing specifically the conflict between the violation of a jus cogens norm (the prohibition of torture) and state immunity, the House of Lords affirmed that “The jus cogens is the prohibition on torture. But the United Kingdom, in according state immunity to the Kingdom, is not proposing to torture anyone. Nor is the Kingdom, in claiming immunity, justifying the use of torture. It is objecting in limine to the jurisdiction of the English court to decide whether it used torture or not. As Hazel Fox has said (The Law of state Immunity (2002), 525): “state immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a jus cogens norm but merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive content in the procedural plea of state immunity upon which a jus cogens mandate can bite” To produce a conflict with state immunity, it is therefore necessary to show that the prohibition on torture has generated an ancillary procedural rule which, by
way of exception to state immunity, entitles or perhaps requires states to
assume civil jurisdiction over other states in cases in which torture is alleged.
Such a rule may be desirable and, since international law changes, may
have developed. But, contrary to the assertion of the minority in Al-
Adsani, it is not entailed by the prohibition of torture". (paragraphs 44 and
45, highlighted).

Furthermore, the House of Lords stressed the difference between immunity
in criminal proceedings, expressively referring to the Pinochet case, and
immunity in civil proceedings, such as Jones v. Saudi Arabia. According to Lord
Bingham of Cornhill, “I would not question the correctness of the decision
reached by the majority in Pinochet (No 3). But the case was categorically
different from the present, since it concerned criminal proceedings falling
squarely within the universal criminal jurisdiction mandated by the Torture
Convention and did not fall within Part 1 of the 1978 Act. (…) The Torture
Convention was the mainspring of the decision, and certain members of the
House expressly accepted that the grant of immunity in civil proceedings was
unaffected” (paragraph 19).

4.1.2.3 Argentina

a) Coronel v. United Kingdom (Decision of 1999)

In this case Oscar Coronel, former crew members from the General
Belgrano cruiser and relatives of the crew members that died during the
Falklands conflict sued the United Kingdom in order to obtain full compensation
for damages suffered as a result of the sinking of that battleship. According to
the plaintiffs, the defendant violated human rights norms, especially the
American Convention on human rights.
Claimants invoked Article 2, paragraph "e" of statute 24. 488, which affirms that foreign states cannot invoke immunity from jurisdiction where they may be sued for damages arising from torts or crimes committed in the country. According to plaintiffs, the sinking of the cruiser General Belgrano by the UK "did not respond to any military justification, but to the British intent of radicalizing the conflict and preventing the progress of the peace plan that, at the time, was carried out the by the president of the Republic of Peru" According to the plaintiffs, "[t]he United Kingdom set an exclusion zone to meet military needs and the sinking of the vessel, in waters far from that area and within few hundred miles from the coast of Argentina, is demonstrative the wrongfulness of its conduct, which affected the principle of alterum non laedere and conventional and customary international rules limiting war and its operations."

The first instance judge decided to grant the request to the application and order the issuance of letter to the Ministry of Foreign Affairs to require the diplomatic representative of the foreign state to agree with the trial, in accordance to Article 24, paragraph 1, of Decree-Law 1285/58, because he did not envisage any of the exceptions provided for in statute 24. 488. The decision was appealed and the Court of Appeals in Civil and Commercial Federal's confirmed it, and then the plaintiffs filled an extraordinary appeal.

The Attorney General's Office, in its opinion, after reviewing the evolution of the principle of jurisdictional immunity of states and of the jurisprudence of the Court, as well as the parliamentary history of the statute, argued that, according to statute 24.488, "immunity from jurisdiction remains the principle and its absence the exception." He also stated that, in the present case, the facts occurred in the context of an armed conflict, so they could not be considered acts jure gestionis, but acts jure imperii, which cannot be adjudicated by Argentinian courts. The Supreme Court agreed with the opinion of the Attorney
General and therefore formally declared admissible the appeal and upheld the judgment

b) Norberto Ceresole v. Venezuela (Decision of 2000)

In the present case, the plaintiff filled a suit for damages caused by the illegal acts committed by intelligence agents of the Venezuelan state while Ceresole was in the country for professional reasons. According to the plaintiff, he was kidnapped, threatened, abused and beaten by such agents, then deported without having access to his belongings. The first instance court required Venezuela to manifest its agreement to the trial, which was denied, which led the court to sustain Venezuela’s jurisdictional immunity affirming the facts in the case were acta iure imperii, excluding the exceptions provided in statute 24.488.

This ruling was upheld by the higher court, and the plaintiff, in his extraordinary appeal, maintained that Article 118 of the Constitution was directly operating and should prevail over statute 24.488, also sustaining that his claim derived from crimes committed by Venezuelan agents which could not be considered either acta iure imperii or acta iure gestionis.

The Supreme Court upheld the original ruling and endorsed the arguments from the Attorney General’s Office in the sense that the actions of the Venezuelan agents occurred within the territory of Venezuela and could not be included among the exceptions enshrined in Article 2 of statute 24.488, since it refers to acts committed in the Argentinean territory. The Supreme Court also mentioned that acta iure imperii were still covered by jurisdictional immunity, and that article 118 of the Argentinean Constitution cannot be applied to the case because it refers to criminal cases, not civil claims.
As it could be observed, in countries with specific legislation on the matter of state immunity, domestic courts are actually limited in the protection of human rights. Since these laws assume that immunity is a “rule” and its absence the exception, claimants must prove that the violations they suffered fall within one of those narrow exceptions, which is very difficult to be done. Meanwhile, in countries without specific legislation on the matter, international law is usually integrated into domestic law by constitutional provisions, so claimants frequently resort to international conventions and declarations protecting human rights, which have, in these countries, a better chance of being accepted as a valid argument before the domestic courts. However, those courts also tend to rely on the acta iure imperii and acta iure gestionis distinction to evaluate the admissibility of the claims and, unable to categorize them as a commercial activity, judges often grant immunity for defendant states “by default”. Moreover, it seems that domestic courts of countries which experienced a context of general human rights violations, such as the atrocities perpetrated by the Nazi regime in Italy and Greece, are more likely to deliver rulings overcoming the shield of immunity and granting reparations for the victims.

4.2 Theoretical Approaches Challenging State Immunity

The subject of state immunity in cases regarding violations of human rights has also received important contributions from the doctrine. Using different arguments, some authors seek to defend approaches that would allow victims to “overcome” the obstacle of state immunity before domestic courts. These theories shall be examined next.

4.2.1 The Implied Waiver Theory

The fundamental basis of the implied waiver theory assumes that, by violating peremptory norms of international law, the violator state implicitly
waives its sovereign immunity, thus enabling it be prosecuted before national
courts of another state in cases regarding gross human rights violations. Such
theory gained its first theoretical contours in 1989, in an article written by
Belsky, Merva and Roht-Arrianza.

According to Gaudreau (2005), this theory was originally drafted as a
proposal of an evolutionary interpretation of Article 1605 (a) (1) of the Foreign
Sovereign Immunities Act of 1976, the United states' statute regulating the
granting of immunity in U.S. domestic courts. Such statute brings the granting
of immunity as a rule, but it provides for certain exceptions. One of these
exceptions is enshrined in the aforementioned article, which provides that a
foreign state shall not be immune from the jurisdiction of the courts of the United
States when that state has waived its immunity either explicitly or implicitly.

The conceptual vagueness of the term "implicit waiver" gave rise to
interpretations of its content, ie, what actions it should encompass. Thus, in
1989, Belsky, Merva and Roht-Arrianza proposed that the violation of
peremptory norms of international law should fall under the implicit waiver
hypothesis brought by Article 1605 (a) (1) of the FSIA and, as a consequence,
U.S. domestic courts should not grant immunity to the violator state. The
authors argue that the existence of a system of rules that states cannot violate
jus cogens norms, also known as peremptory or imperative norms of
international law- implies that when a state acts contrary to that rule, this act
cannot be recognized as a sovereign one and, as a result, the state no more
has the right to invoke the defense of sovereign immunity for this act. Also, the
recognition of a some norms as peremptory means that states are implicitly
consenting to waive immunity when they violate one of these norms (Belsky,
Merva; Roht Arrianza, 1989).

1605. General exceptions to the jurisdictional immunity of a foreign state (a) A foreign state
shall not be immune from the jurisdiction of courts of the United states or of the states in any
case –
(1) in which the foreign state has waived its immunity either explicitly or by implication,
notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;
Thus, the fundamental premise of this theory is the idea is that jus cogens has been so widely recognized as vital to the functioning of the community of nations that every nation implicitly renounces to its traditional sovereign immunity when it violates such fundamental values, and this happens by the simple act of being a state or a subject of international law (Lauterpacht 1999). The importance of jus cogens in international law would thus have the power to relativize the concept of state sovereignty as hitherto known for the sake of the supreme values of the community of nations. The conclusion of the authors is, therefore, that the coexistence between states requires a concept of sovereignty that puts a limit on the absolute sovereign power (which includes both rights and duties) and, as rules of jus cogens represent the fundamental obligations in the international context, they are essential components of the definition of sovereignty in modern law (Belsky, Merva; Roht Arrianza, 1989).

The implicit renunciation of the theory gained particular notoriety in the case Princz v. Germany. Although the court decision was unfavorable to the author, the dissenting opinion of Judge Patricia Wald had great repercussion in defending the denial of sovereign immunity based on the theory now studied, giving prominence to the hypothesis.

In her vote, judge Wald concluded that the torments inflicted on Princz by the Third Reich configured violations of peremptory norms of international law, which set maximum values of the community of nations, and then examines the relationship of these standards with the institute of sovereign immunity. According to the magistrate, the non-derogable character of jus cogens is due to an agreement around certain fundamental principles which are essential to the survival of the international community. Thus, for the maintenance of international order, States must give up any right that means violating these standards. As a logical consequence of this conclusion - that States must refrain from actions contrary to the norms of jus cogens to preserve international order - Wald affirms the existence of limitations on the exercise of certain state powers, especially the immunity of jurisdiction. The effects of the
prevalence of peremptory norms of international law are reflected therefore in other institutions, including sovereign immunity, which is no longer absolute and unlimited, but subject to the parameters dictated by the maximum values of the community of nations, embodied in the rules of jus cogens. So, after acknowledging the paradigm shift caused by jus cogens norms in international law - and especially in the institute of foreign State immunity from jurisdiction - it is up to the judge to determine the enforceability of such provisions under the North American domestic law. Therefore, the magistrate refers to the decision Paquete Habana, which already in 1900 consolidated the understanding that international law is an integral part of American law. According to Wald, "the only way to reconcile the presumption of sovereign immunity in FSIA with international law is to interpret Article 1605 (a) (1) of the Statute as encompassing the principle that a foreign state implicitly waives its right to sovereign immunity before the US courts when it violates norms of jus cogens" (UNITED STATES OF AMERICA, 1992, p. 27). The judge also highlights that there is nothing in the legislative history of art. 1605 (a) (1) FSIA excludes the possibility of concluding that a State renounces implicitly to its sovereign immunity when it violates one of the few standards universally accepted as jus cogens, and that interpretation, therefore, is compatible with both the American case law with the legislative history which led to the adoption of the FSIA. Wald concludes saying:

Due to Germany's unequivocal refusal to enter into any settlement with Princz, this appeal is his last resort. Contrary to my colleagues, who would deny Princz the opportunity even to present his claims in federal court, I would affirm the district court's order denying Germany's motion to dismiss on grounds of foreign sovereign immunity. I believe that Germany's treatment of Princz violated jus cogens norms of the law of nations, and that by engaging in such conduct, Germany implicitly waived its immunity from suit within the meaning of § 1605(a)(l) of the FSIA. Accordingly, in my view, the federal courts have jurisdiction to entertain Princz's claims (UNITED STATES OF AMERICA, 1992, p. 30)

However, despite having its origins in a statutory provision of a Common Law country, it is before the courts of Greece, a country of Roman-Germanic legal tradition and with no specific legislation regarding jurisdiction of immunity, that the theory of implied waiver reaches its jurisprudential consecration. In the paradigmatic series of decisions in the case Prefecture of Voiotia and Others v Federal Republic of Germany, also known as Distomo case, the Greek national
courts accepted the argument that the violation of jus cogens norms entails the implied waiver of state immunity. Finally, it is important to mentioned that, since Argentina actively pursued the Sidermans in American Courts, this is also a case of implicit waiver that was recognized by the Court.

4.2.2 The Normative Hierarchy Theory

In 1994, Mathias Reimann published the article “A human rights Exception to Sovereign Immunity: Some Thoughts On Princz v. Federal Republic of Germany”, in which he outlines the guidelines of a doctrine that seeks recognition of the prevalence of human rights against the immunity of a foreign state. Reimann finds that the international scenario increasingly recognizes the importance of protecting and promoting human rights, which requires the adoption of a different stance on the issue, especially in cases where human rights clash with the jurisdictional immunity of a foreign state. According to the author, it is time to deny immunity to foreign states for torture, genocide or slavery (at least when they are suit by Americans in American courts) and that this denial would be consistent with two greatest developments in international law since the Second World War: the restriction of sovereign immunity and the expansion of human rights protection (Reimann 1994).

Due to the great distinction given to human rights in our times, with their importance illustrated through countless conventions, resolutions and treaties, Reimann conclude that these standards acquired a different status in the international legal plane. Thus, the relevance of human rights would promote their protection to a higher normative category higher, ie, instead of having the character of mere a customary international norm, certain human rights would be so substantial that would attain the status of jus cogens.
Therefore, the theory of normative hierarchy that proclaims, "at the international level, the fundamental human rights provisions are arguably superior to the law of sovereign immunity because the first are jus cogens while the last is not just a non-peremptory norm." (Reimann 1994. P. 407) As a result, the jurisdictional immunity of a foreign state – a customary international norm - would always cede when in conflict with human rights considered to be peremptory norms of international law.

Reimann argues that this normative superiority of human rights should be reflected in an amendment to the FSIA contemplating a human rights’ exception to foreign states’ immunity before U.S. courts, because such matter could only be regulated by this statute, which brings immunity as a rule. This proposed amendment had been tabled in the U.S. Congress in 1994 and was rejected. The wording of the bill stipulated that immunity would be denied in actions in which someone seeks redress against a foreign state for personal injury or death of a U.S. citizen abroad when the damage is caused by torture or summary execution of this citizen or foreigner by this foreign state or any officer or employee of the foreign state acting within the scope of his office or employment. (REIMANN, 1994).

Therefore, based on the hierarchical superiority of jus cogens - and here, of human rights as so considered - Reimann states the need to change U.S. laws on the subject, so that it contemplates an exception to immunity based on human rights. The author goes a step further by stating that the granting of immunity to foreign state violator of human rights in national courts means in practice, a violation of the principle of access to justice. As a result, the author states that in such cases, the grant of immunity is of exceptional character, and not rule, which entails a change in the attitude of the courts, because if the denial of justice is what should be considered in exceptional cases involving human rights: "is the granting of immunity, not his refusal, which requires specific justification. [...] In summary, immunity in cases of human rights should be granted only if there are compelling reasons." (REIMANN 1994, p 419).
It is important to note, however, that the theory of normative hierarchy does not have, in the author's view, an immediate and unconditional applicability. It works more like a justification for states to regulate the matter, and thus does not imply a necessary duty not to grant immunity to a foreign state by the national courts, as in all cases there should be an examination, by the state court, about their interest in prosecuting the case.

Thus, through the theory of legal hierarchy, Reimann proposes an adaptation of immunity from jurisdiction of the foreign state to the dictates of contemporary international law, which stands for protection of human rights above all. This priority is reflected in the recognition of some of these rights as norms of jus cogens, for they possess an inalienable character and should prevail, before the national courts, over the customary rule of sovereign immunity. This process does not occur, however, automatically or indefinitely, as the author argues for the need to legally regulate, as well as an evaluation, by the state court, about its interest in judging the cause.

The normative hierarchy theory has probably been the most used by victims of serious violations of human rights to plead their rights before national or regional forums. Often, this argument does not appear clearly, but composed with the other ones, which leads to frequent confusion between theories. It is not difficult to see it associated with the theories of implicit waiver and universal jurisdiction, for example. Indeed, this was one of the arguments used when the Al-Adsani case reached the European Court of Human Rights, although not accepted.

In Civil Law countries, the normative hierarchy theory also finds space, but its utilization is not made through statutory provisions, such as in Common Law countries, but by the incorporation of international law into domestic legal systems order. Thus, countries such as Italy and Greece have considered the
immunity of States and the rules of jus cogens as rules of international law directly incorporated into domestic law through Constitutional provisions and, when these two sets of rules are, the courts of these countries have rejected the application of State immunity as a violation of jus cogens norms (REDRESS ORGANIZATION, 2005, p. 31)

The cases Ferrini (Italy) and Prefecture of Voiotia (Greece) illustrate this panorama. In Ferrini, the Court of Cassation recognized that the protection of human rights is a jus cogens norm and therefore must prevail over state immunity. Furthermore, it is important to mention the assertion that the rules of international law cannot be seen in isolation, but rather in a systemic manner. Thus, the Court of Cassation stated that the prevalence of norms of jus cogens orientates the system as a whole, influencing other principles and international rules, including state immunity, a reasoning that was somehow repeated later on the Maitelli case.

As for Greece, although the normative hierarchy theory appears in some passages of Prefecture of Voiotia v. Germany, it is in Kalogeropolou et al v. Germany and Greece, when the victims took the case to the European Court of Human Rights, that the argument appears more clearly. However, the argument did not prosper before the Court.

Mentions to the normative hierarchy theory can also be seen in the Josélia Marques case, in Brazil, as explained above.

4.2.3 Universal Jurisdiction

The idea that a state could exercise jurisdiction beyond the limits set by its territorial boundaries in certain specific cases led to the delineation of the so-called theory of universal jurisdiction. Donovan and Roberts explain the origin of
the theory of universal jurisdiction by asserting that "the exercise of universal jurisdiction took place initially on crimes considered severe, such as piracy, because they occur outside the territorial limits of the state and therefore were extremely difficult to process using traditional foundations of jurisdiction" (DONOVAN; ROBERTS, 2006, p 146.). The pursuit of these criminals and their judgment, therefore, depended on the states exercising their judicial function beyond the traditional perimeter, placing the genesis of the universal jurisdiction in the area of criminal law.

Thus, to punish crimes that occurred away from the usual range of state justice, it was necessary to establish a liaison between the offense and the court that would adjudicate on it, and this link was different from the traditional criteria of territoriality or personality. For a violation of extraordinary character, a principle that also bolted from ordinariness was needed. Hence, Brohmer (1997) clarifies the operation of universal jurisdiction in his work, stating that it is totally oblivious of the principles of territoriality, granting to any state the right to assert its jurisdiction over certain international crimes such as crimes directed against international public policy.

The historical evolution of this principle led to its use for the processing of other crimes, especially those that, for their demeaning character, urged the community of states to take action. Accordingly, in our times "universal jurisdiction has been founded on the completely heinous character of certain crimes, such as genocide and torture, which are universally condemned, and in which all states have an interest in suppressing even in the absence of traditional connection criteria." (DONOVAN; ROBERTS, 2006, p 143.) Karagiannakis (1997) complements this explanation stating that, in the case of exercise of extraterritorial jurisdiction based on the principle of universality - that does not require a direct and substantial connection with the forum state – that happens based on the interest of each state to combat egregious offenses that are universally condemned by all states, constituting a very controversial principle of international law, with relevant issues concerning its application.
Universal jurisdiction has, however, gained a wider spectrum of application and, accordingly, began to outline its use to hold responsible, as well as individuals, also states that violate human rights. The reasoning behind this transformation has the following point of view: given the existence of crimes that, by their heinous nature, the entire international community has interest in punishing, the exercise of universal jurisdiction should not be restricted to the possibility of condemning only individuals but also the states responsible for these serious violations. Therefore, according to Donovan and Roberts (2006), while the universal criminal jurisdiction remains poorly exercised, although well accepted, plaintiffs and members of the academia have increasingly relied on the concept of universal jurisdiction to consider the possibility of civil remedies to serve an independent or supplementary way to force compliance with the rules of international law that proscribe defined categories of heinous behavior.

Therefore, the immediate consequence of the application of the theory of universal jurisdiction to justify processing states before national courts would obviously be the denial of sovereign immunity to them, reinforcing the application of international law - and in particular the observance of human rights - through reparations granted to individuals as a way of countermeasures in relation to violations. This thought is sustained by Moll (2003), who states that in these cases the inapplicability of state immunity is accompanied by the recognition of a type of universal jurisdiction over violators of basic human rights, which operates regardless of the nationality of the victim or the place where the violation took place. According to the author, since the state is free to establish the ways in which it analyzes the international responsibility of another state for violations of human rights - for there is nothing in principle that prevents the choice of the domestic judicial system as such - the forum court could then use this as a basis for a unilateral mechanism of countermeasures, regardless of which state the countermeasure is issued again and, as a result, such a system would support the use of domestic jurisdiction for claims regarding violations of human rights that are fundamental for any foreign state, then configuring an hypothesis where there would be no place for immunity.
The applicability of the theory of universal jurisdiction to prosecute states violating human rights received an important contribution from Cançado Trindade, who defends the position of the individual as a subject of international human rights law. The recognition of the legal personality of the individual in the field of human rights logically demands, according Cançado Trindade, the need to respect this condition, which is embodied in erga omnes obligations to safeguard these rights. Thus, "all this doctrinal developments point towards the consecration of erga omnes obligations of protection, ie, relating to the protection of humans beings due to the international community as a whole" (CANÇADO TRINDADE, 2003, p. 417).

The position occupied by the individual today gives birth to a series of obligations for states, which must ensure the protection of human beings and the rights attached thereto. The universal justice would, in this way, go one step further, establishing, through the recognition of erga omnes obligations to human rights as jus cogens, the possibility of adjudication exercise by any state against the offending state.

The jurisprudential consolidation of universal jurisdiction took place in the notorious Ferrini case. Among the various arguments used by the Court of Cassation, it is important to mention the one regarding universal jurisdiction as a mechanism to establish the jurisdiction of domestic courts in cases of serious human rights violations, putting state immunity aside (FOCARELLI, 2005). On the other hand, the theory was mentioned by the plaintiffs, without success, in Al-Adsani v. Kuwait and Jones v. Saudi Arabia.

4.2.4 Option and Risk Calculability Theory

The theory proposed by Jürgen Brohmer distinguishes itself from the others by its complexity and by the proposition of more objective criteria and
justifications to address the issue of state immunity versus human rights violations. Thus, after conducting a critical analysis of most theories in vogue, Jürgen Brohmer will propose in his work, "reconciling human rights and state immunity" (Brohmer 1997, p. 189). To perform this task, the Australian author presents two essential criteria to discern immune and non-immune acts: the criterion of "Option" and the "Risk Calculability". These criteria will be explained below.

To explain how the application of option element occurs in the context of human rights violations, Brohmer initially notes that, under the exceptions to immunity accepted in our times, such as acts jure gestionis, the state makes a choice, ie it chooses to whether or not celebrate a contract or transaction with an individual. Similarly, the state also has alternatives in the field of human rights: killing, torturing, unlawfully arresting someone or refraining from doing so (Brohmer, 1997). However, as the author warns, in the latter case the state does not really have a choice because the states must refrain from violating fundamental human rights, since the sovereignty of states does not include the right to, by example, subject an individual to torture or kill people arbitrarily. Thus, according to the author, in the context of human rights violations, "the choice is predetermined by international law or, as one might say, is more a fact than a legal option. However, the state completely retains the power to influence its fate: no violation, no accountability" (Brohmer, 1997, p 199.)

According to Brohmer, the counter argument that the privilege of immunity is guaranteed by the very fact that international law has been violated does not apply to the case because of the mistaken assumption that the local courts are bound to be prevented from applying international law or to determine the responsibility of another state. The author notes, however, that the violations in question will always be also violations of national laws of the forum state, and "it is impossible to explain why the sovereignty of a state would be in greater danger if it had violated international law besides the local law as opposed to a mere violation of national law " (Brohmer, 1997, p. 200).
The second relevant aspect regarding the option element is found, according Brohmer, in the territorial connection requirements, expressed in various international conventions and statutes, with which the author disagrees. To explain his point of view, he addresses the topic questioning whether the protection of the sovereignty of a state requires that the existing jurisdiction of the courts of the forum state in relation to a claim against another state could only be exercised in the presence of special territorial connections. For the author, the answer is no, because once it is accepted that states may exercise jurisdiction over other states, it does not matter what particular state assumes jurisdiction, but that the state can not be held liable for the same conduct in more than one forum, a problem that can arise in both concepts of immunity (Brohmer, 1997).

Jürgen Brohmer concludes the analysis of the option element stating that violations of fundamental human rights have as a characteristic the fact that the offending state has full control over its actions, ie, under no circumstances a state is required to perpetrate such illegalities, and performing such acts an is option, therefore subject to accountability.

The second criterion used to distinguish immune and non-immune acts is based on the predictability and calculability of the potential risks of accountability of the violator state. The author explains the approach stating that "immunity can be denied if the state gets in a position where it can adequately manage the potential risks of accountability so that the ability to perform its functions (functional sovereignty) is not impaired" (Brohmer, 1997, p. 201).

To illustrate his point of view, Brohmer uses the example of the insurance used by states to cover possible losses on individuals arising from situations difficult to predict or from the state’s own failures. Thus, the "risk" of responsibility by a state’s commercial transactions with individuals can be
measured in some way and covered by insurance. However, the situation is different in civil claims: only negligent conduct poses a risk that can be calculated in advance and properly covered with insurance, as the risk of liability arising out of driving. Further, it is important to note that not all torts can be insured because this does not cover intentional behaviors, which makes the risk's pre-determination practically impossible in this context.

Thus, the calculability of risk accountability for human rights violations is difficult but, according to Brohmer, "the impossibility of precisely pre-calculate the risks of liability is offset by the fact that the state has full control of its conduct" (Brohmer 1997, p. 201). Thus, while the risk can reasonably be calculated in cases of commercial transactions, the conduct of the state is not completely controllable, because circumstances may force it to enter into risky negotiations. As for human rights violations, the situation is reversed, because although the risk cannot be calculated accurately, "it is inconceivable that a state can be compelled to commit an offense in violation of international human rights" (Brohmer, 1997, p. 202).

As a consequence of this scenario, the quantum of a state's risk responsibility for the commission of a tort is very similar to the risk faced by virtue of commercial transactions. The denial of immunity to violator states would not mean, therefore, a greater increase in risk of liability of the state due to the business exemption. To refute the argument that the total risk of liability (ie, the sum of the risk arising from commercial transactions increased of the risk arising from violations of human rights) would be excessive in terms of sovereignty, Brohmer replies that we should question why the possibility of litigation for human rights should be sacrificed in favor of commercial litigation, since, while individuals may choose to establish or no trade relations with states, they are unable to choose whether not they are victimized by the states in relation to the violation of their fundamental human rights.
Brohmer’s initial conclusion is that the criteria of the option element and risk calculability serve as guidance for distinguishing between immune and non-immune acts. According to the author, if the keynote of immunity lies in the preservation of state sovereignty, the application of such guidelines would be completely compatible with this objective because "in principle, there is no evidence for the assumption that the exercise of jurisdiction in such cases interferes with the sovereignty of states more intensely than the exceptions to immunity already do" (Brohmer, 1997, p. 204).

4.2.5 Mutual Benefit Theory

According to Caplan, author this theory, the genesis of the foreign state's sovereign immunity doctrine lays on the tension between two important rules of international law: the sovereign equality and the exclusive territorial jurisdiction (Caplan, 2003 p. 735). According to the author, this conflict is already evident in the case Schooner Exchange, when the judge Marshall expresses this duality by asserting on the one hand, that "the jurisdiction of a nation within its territory is necessarily exclusive and absolute" and also that "the world is composed of distinct nations, each endowed with equal rights and equal independence" (AMERICAN SOCIETY OF INTERNATIONAL LAW, 1909, p. 136).

Thus, this from this theoretical conflict between the exclusive territorial jurisdiction and the sovereign equality of States will emerge the doctrine of the foreign State immunity from jurisdiction, whose rationale, according to Caplan (2003), comes from two distinct theories, one of which affirms that state immunity is a fundamental right of the state under the principle of sovereign equality, and the other considers state immunity as evolving from an exception to the principle of state jurisdiction (when the forum state suspends its right to jurisdiction as a practical courtesy to facilitate relations between states). Obviously, these two theories are diametrically opposed, and the adoption of
one or the other carries entirely different implications for the nature and operation of the doctrine of foreign state immunity.

Caplan says that, despite modern international law having “ruled out”, on a large scale the notion of classic inherent state rights, the reasoning based on a "fundamental right" – which affirms that the primacy of the principle of sovereign equality over the principle of territorial jurisdiction confers to the states the right to immunity - has shown an amazing resilience. Obviously, adopting such perspective places almost insurmountable obstacles for human rights litigation, but Caplan believes that the immunity justification based on "fundamental rights" results from a misinterpretation of the par in parem maxim: sovereign equality does not mean that all states are equal under any circumstances, but that they enjoy an equal capacity to have rights. In this sense, it is easy to see that the capacity of a state to have rights will be restricted when entering into direct conflict with the scope of another state’s authority as, for example, the jurisdiction of this state on its people, property and events in occurred in its territory. Thus, the same principle of sovereign equality, that entitles the foreign state to govern its own territory, now excludes the exercise of authority over the territory of another state, in which case, according to the author, a state’s capacity to have rights reaches its lowest point. Thus, Caplan asserts that States do not enjoy "fundamental rights" of unrestricted or unlimited nature, but rather a capacity to exercise them within the international limits set by international law:

This is not to say that foreign states should be refused immunity privileges in all circumstances but that an entitlement to immunity is not intrinsic to statehood. Thus, foreign state immunity is a privilege, not a right, and, accordingly, the maxim par in parem non habet imperium is a distortion of the principle of sovereign equality. Neither the maxim nor its purported progenitor, the principle of sovereign equality, persuasively supports the conclusion that one state cannot exercise jurisdiction over another, and the “fundamental right” rationale is fatally flawed for assuming so(CAPLAN, 2003, p. 753)
The misconception of considering immunity from jurisdiction as a fundamental law of the State - and not as an exception to the territorial jurisdiction of the forum State - also led to the adoption of several international and regional conventions, as well as national laws, that attempt to regulate the matter by placing immunity as a rule, subject to few exceptions, such as the Foreign Sovereign Immunities Act, the European Convention on State Immunity and the Draft Articles on Jurisdictional Immunities of States and Their Property.

For Caplan, the answer to the conflict between state immunity and human rights violations lies in the initial recognition that, in fact, it is the forum state’s exclusive jurisdiction over its territory that defines if the foreign state may or may not enjoy immunity from national courts. The mere condition of Statehood does not grant a right to immunity from jurisdiction, because the rule, in reality, is the jurisdictional monopoly of the forum State.

Such jurisdiction, however, is limited to the presence of connection elements to justifying its exercise in a reasonable manner. The theory suggests that the granting of immunity is the consequence of an agreement that results in the collective benefit of the States involved, which allows the efficient exercise of their public duties, ensuring that international relations are conducted properly:

One way to identify the scope of the international rule of state immunity is to conceptualize state immunity as arising out of an agreement forged between the forum state and any foreign state with which it seeks to develop transnational intercourse. This approach is consistent with the more persuasive rationale for state immunity, i.e., that immunity protections result from the forum state’s waiver of its right of adjudicatory jurisdiction. (CAPLAN, 2003, p. 770)

Therefore, the conduct of a foreign state that does not conform with the development of beneficial interstate relations falls outside the state immunity “agreement” and thus is not immune by virtue of international custom. The most
obvious example excludes foreign state conduct that does significant harm to the vital interests of the forum state, such as the commission of human rights abuses against the forum state’s nationals. (CAPLAN, 2003).

Caplan’s theory has the merit of considering immunity as an exception, subject to the principle of exclusive jurisdiction of the forum state, but it also places too much emphasis on what is beneficial to the states, and not to the individuals.

The table below summarizes the relationship between the cases analyzed and the theories examined, pointing out which arguments were considered in each case, and marking in green the claims that were successful before domestic courts:

<table>
<thead>
<tr>
<th>Case</th>
<th>Theory</th>
<th>Implied waiver</th>
<th>Normative Hierarchy</th>
<th>Universal Jurisdiction</th>
<th>Option and Risk Calculability</th>
<th>Mutual Benefit</th>
<th>Not Applicable</th>
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<tr>
<td>Ferrini v. Federal Republic of Germany</td>
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<td>Giovanni Maitelli v. Federal Republic of Germany</td>
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<td>Margellos v. Federal Republic of Germany</td>
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<td>Salomon Frydman v. Federal Republic of Germany</td>
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<td>Josélia Marques v. Federal Republic of Germany</td>
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<td>Siderman de Blake v. Argentina</td>
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<td>Princz v. Federal Republic of Germany</td>
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<td>Jones v. Saudi Arabia</td>
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<td>Coronel v. United Kingdom</td>
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<td>Norberto Ceresole v. Venezuela</td>
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It can be seen that the three successful cases basically made use of similar theories – the implied waiver and the normative hierarchy – and that the use of more than one set of arguments also seems to be an interesting litigation strategy. However, it is not clear to which degree one theory is more successful than the other, as the results obtained by victims are different even within the same country, and with the use of similar arguments. In this sense, Professor Ferrari notes that “legal theories do not exist for their own sake, but for the sake of concrete actions to be taken by somebody” (2005, p. 497), and these theories might be the start of a process that brings awareness to the unfairness of the situations of victims deprived of legal redress because of state immunity.

Indeed, once rules are socially expressed, they are “no more than messages that circulate in a social environment […]: they may be interpreted differently, are understood or misunderstood, and may be used in view of a variety of individual and social projects. They affect social expectations and thus orient (and sometimes disorient) social behaviour. They qualify or disqualify actions, thus working as powerful tools of legitimization” (FERRARI, 2005, p.497). Whose power is the rule of state immunity legitimizing? Whose interests? Which principles? It seems clear that the rule serves to perpetuate a state-centric approach that has little or no place to the victims, and that no matter how articulated and coherent the arguments in favour of the victims might be, the result of their quest for justice still lays in the hands of judges that might simply not be ready to question old concepts.

After examining the theoretical contributions that seek to overcome the state immunity obstacle in cases regarding human rights violations, we shall now venture to make our own contribution for this discussion, based on two different approaches: the first one seeks to challenge state immunity by de-
constructing its legal foundations, and the second, inspired by the ideas different social contributions, places its focus on a victim’s perspective.
CHAPTER 5: TENTATIVE CONTRIBUTIONS FOR AN ENHANCED EFFECTIVITY OF HUMAN RIGHTS

While the previous chapters presented the panorama of state immunity in cases regarding human rights violations, the following chapter will focus in proposing two new approaches, thus seeking to enhance the socio-legal debate on the matter. Initially, we will try to question the so-called “rule” of state immunity by addressing its legal foundations, aiming at exposing their fragility. The second approach, in its turn, will concentrate on a more sociological perspective, by looking for contributions from victimology in order to enhance the socio-legal background on the matter, as well as by analyzing the importance of the reparation for the victims and, on a broader perspective, for the legal system as a whole.

5.1 Why not questioning the foundations of state immunity?

Throughout the research for this thesis, it became clear that state immunity is considered an untouchable rule by the majority of judges or courts that are supposed to analyse cases involving this institute. But what state immunity could be legally deconstructed? What if there was a way to prove that there is more than one legal interpretation? That is our challenge in this part of this thesis, and in order to question the functioning and the rationale of immunities in international law it is necessary to look for the foundations of such legal institute. Sovereignty, Independence, Equality and Dignity of states have been pointed out as the substantive foundations of state immunity in international law as evidenced in the usages and practice of states (TROOBOFF, 1986), so that “these notions seem to coalesce and together they constitute a firm international legal basis for sovereign immunity” (SUCHARITKUL, 1976, p. 117). In the next pages, we shall examine these
notions as foundations for a rule of state immunity, and also cast some doubts about the soundness of such foundations.

5.1.1 Sovereignty

According to Jürgen Bröhmer, “all the different reasons and justifications given for the doctrine of immunity can be traced back to the principal concept of sovereignty” (1997, p.11), which attests for the importance of addressing the topic. Politis (1925) describes sovereignty as the most supreme, the fullest and the most complete power imaginable and, historically, it was conceived primarily as an expression of inner power in a political community to translate the relationships between superiors and inferiors, between the leader and his subjects. Then, in the sixteenth century, it was transferred from the internal order to be also applied to the international sphere, and the state, absolute master in its domains, was considered to be externally invested with such full power as well (POLITIS, 1925).

Such conception influenced the emerging international law in a time when its development was connected to the struggle against the attempts of global hegemony, and the idea of sovereignty, in the sense of supreme, absolute and uncontrollable power, has since then grown easily in domestic public law: internally, the king had all the power, under the condition to, externally, respect the power of the other kings. Also the term "sovereign" has become synonym of king, monarch, absolute ruler. It was later applied to the state itself when, from the late eighteenth century, political power passed from the monarch to the people, and then to the nation, hence becoming impersonal. Under this perspective, the state could not suffer, in international life, other restrictions than those of its will, as its sovereignty was considered absolute. POLITIS, 1925, p. 12-13)

Sovereignty is the result of the historical struggle of two opposing forces: the world governance and the territorial government (MADRUGA FILHO, 2003).
The sovereign power enjoys, under its domains, supreme authority and control, being able to act regardless of the consent of any other power. However, a restriction to such absolute power is found in the principle of territoriality, for if they are considered the supreme force in their territories, out of their domains sovereigns shall face others like themselves, which are also considered to be the absolute power in their grounds. This plurality of powers, each deemed to be unlimited within its sphere of action, will result in the need for coordination on the international level, as well as in the respect for the limits of each sovereign power. Such duty, in international law, is materialized in the obligation of non-intervention in the affairs of other states (MADRUGA FILHO, 2003), being considered one of the foundations of immunity.

Therefore, the multiplicity of territorial governments requires the delimitation of the influence that each can have over the other, as well as the specification of the extent to which one power should have its attributes recognized before the realm of foreign governments. Hence, Bröhmer (1997) sustains that the very concept of state immunity developed during the emergence of territorial entities claiming power over all subjects located on its physical space, meaning that the concepts of sovereignty and immunity were linked since their genesis. Moreover, according to Sucharitkul,

As the term suggests, either "state" or "Sovereign" immunity is derived from the principle of sovereignty. The concept of territory is essential to the notion of the state, meaning independent sovereign state. Contact between two states may result in the clash between two fundamental principles of international law, namely the principle of territoriality or territorial sovereignty, and the principle of the state or national sovereignty. As a consequence, a concurrence of jurisdictions may emerge over the same location or dimension. It has become an established rule that between two equals, one cannot exercise sovereign will or power over the other (SUCHARITKUL, 1976, p. 117)

The concept of sovereignty has two principal aspects, one describing the relationship between states as primary subjects of international law and the relationship between the states and the international law itself, and the other regarding the ability of states as organized entities to fulfil their purposes,
guaranteeing peace and a minimum of social security for its citizens (BROHMER, 1997). As Bröhmer (1997) explains, jurisdictional immunity is seen as a necessary correlative to protect the concept of sovereignty, because subjecting a state to the courts of another is often thought to violate not only the external aspect of sovereignty, but also its internal aspect due to the alleged potential to jeopardize a state’s ability to function, as being held liable in many cases could lead the state to bankruptcy. There are, therefore, more than intangible notions behind the immunity rationale, but also economical economic questions:

Abandoning the immunity defense altogether could lead to incalculable liability risks which could hardly be avoided because in order to achieve its basic purposes and objectives, a state today is bound to be globally active and domestic acts or omissions may have international effects […]. This economic argument is one major considerations behind the immunity concept and actually reflects the concept of sovereignty (BRÖHMER, 1997, p.11)

There are also direct political implications regarding immunity and its relation to the international peace of justice, since the refusal of immunity by a domestic court to a foreign state could, in some cases, be caused by the misuse of a court for political goals (BRÖHMER, 1997). That is why Cassese (2005) lists, among the powers and duties inherent to sovereignty, the right of state immunity before the domestic courts of other countries for acts performed in the exercise of their sovereign capacity\(^{107}\). Immunity is considered a duty to be respected by the forum state and a right of alien state not to be subjected to trial in the courts of another country.

\(^{107}\) According to Cassese, sovereignty means that a state may not carry out any of the following acts:

1) Impose its will on, or interfere with, or coerce a foreign state official;
2) Interfere with foreign armed forces lawfully stationed on its territory (unless authorized by treaty rules or ad hoc consent);
3) Perform coercive acts on board a foreign military or public ship or aircraft (for instance, it may not enforce the law there);
4) Submit to the jurisdiction of its courts foreign states for acts performed in their sovereign capacity (doctrine of the sovereign immunity of states);
5) Submit to the jurisdiction of its courts foreign state agents for acts performed in their official capacity” (CASSESE, 2005, p. 98)
However, one should start challenging the assumption that a state’s sovereignty could actually be impaired by providing reparations for victims of human rights violations. First of all, as shall be discussed further, there is a variety of reparations in international law, including symbolic or moral reparations and, in many cases, those are actually more effective in the eyes of the victims, who are seeking not only for a financial compensation, but for the recognition of the facts that victimized them. Second, providing that the financial compensations are reasonable, they would hardly be a burden on the foreign state’s economy and, if by any chance, a state systematically violates the human rights of foreigners in a way that it finds itself facing so many claims that they could actually bring a financial damage, then the successive responsabilization of the foreign state could actually prevent that future violations continue to occur.

5.1.2 Independence

The Peace of Westphalia was responsible for establishing the bases of international law “under the triumph of the particular independences, condemning the spirit of universal domination” (POLITIS, 1925, p. 12), and the struggle against domination continues to be in the core of the principle of independence and, therefore, of international law. Thus, “independence implies

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108 The terms “sovereignty” and “Independence” are often used as synonyms, as explains Politis: «la plupart des auteurs du XIXème siècle distinguent la souveraineté de l'indépendance. Ils voient, dans l'une, le droit de commandement et, dans l'autre, le droit d'autonomie. La première, notion agressive, signifie la libération de tout con-trôle dans les relations extérieures; la seconde, notion défensive, n'a en vue que la liberté de l'Etat dans ses affaires domestiques. D'autres estiment qu'une simplification s'impose : une seule expression suffit, l'autre doit disparaître. Pour les uns, c'est la souveraineté. Pour les autres, c'est l'indépendance. La tendance générale, aujourd'hui, est de tenir les deux expressions pour synonymes. Dans la pratique diplomatique, elles sont employées indifféremment l'une pour l'autre. Il en est de même dans les sentences arbitrales et les décisions judiciaires internationales, avec cette nuance que l'on préfère le terme indépendance au terme souveraineté» (POLITIS, 1925, p. 13). However, as explains Stefan Talmom (1998), sovereignty is a legal right and entails a sense of permanence, while independence is often associated with a condition: states such as Cambodia and Vietnam only achieved their independence long after their sovereign establishment, and the Baltic states lost their independence when incorporated to the Soviet Union, but continued to be sovereign states.
that states have exclusive rights to determine their own policy and decide the most appropriate way to manage it publicly" (MASSICCI, 2007, p.49).

Independence requires that the essence, substance and the exercise of the public governmental functions of states be safeguarded (BRÖHMER, 1997), since the stability and the good relations within the international community would obviously be threatened if the states were to commit acts of interference in other countries as they please, a situation that would lead to an inexorable return to the circumstances of the past, in which only the force determined the international scenario. The recognition of the independence of states guaranteed certain equality and harmony in the world stage, ensuring that each country had, at least in theory, the possibility of determining their own course without interference from other state in their affairs. According to Brownlie (2008), that constitutes precisely the foundation of state immunity: the non-interference in internal affairs of other states, namely the principle of independence.

Respect to this principle provides that states should not intervene in the acts, business, government and other expressions of another state, and, therefore, they should refrain from subjecting those acts to the discretion of their judiciary system. Hence, jurisdictional immunity derives from the assumption that one cannot interfere with public acts of foreign states on the grounds of respect for their independence, as well as from the idea that domestic courts should not interfere in the conduct of foreign policy, both from domestic or foreign governmental authorities under the principle of separation of powers (CASSESE, 2005).

Thus, considering that the institution of the foreign state immunity has the power to prevent a country from being held accountable before the courts of another state, one can clearly acknowledge the reasoning on the principle of independence, as the judgment by the courts of another country would, in this way, signify an unwelcomed interference. Immunity is considered, then, to be strictly linked to this substantive value- the power of nations to conduct their affairs without exterior interference- and its operation is deemed necessary to
conform the conduct of states and their bodies to the independence of states in their international relations (MASSICCI, 2007 p. 55). The words of Chief Justice Marshall in the Schooner Exchange case (1812) are regarded as the classic formulation of this rationale:

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 those good offices which humanity dictates and its wants 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 perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation (AMERICAN SOCIETY OF INTERNATIONAL LAW, 1909, p. 229)

The Cour de Cassation in France has recognized the principle in similar terms in Le Gouvernement espagnol c. Cassaux (1849), considering that, since the mutual independence of states a one of the most universally recognized principles of international law, it follows that a government cannot be subject, by virtue of the obligations it contracts, to the jurisdiction of a foreign state. Moreover, Sucharitkul affirms that a further explanation of the doctrine of sovereign immunity is reflected in the classic dictum of Brett LJ. in The Parlement Belge (1880):

As 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 property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction (SUCHARITKUL, 1976, p. 118)
Though quite consolidated – both in doctrine and jurisprudence - as one of the basic principles of the foreign state immunity from jurisdiction, independence should not indiscriminately support the granting of immunity. The argument based on independence should apply only to cases in which the actual performance of state prerogatives could be compromised if the foreign country would submit to the judgment of another state courts, which does not always occur. Thus, as well exposed by Brohmer (1997), the principle of independence demands the protection of the substance and the exercise of governmental public functions of states, but it is necessary, for this principle to support immunity, to prove that restricting immunity in a specific case would actually interfere in the exercise of such functions, and only in this case the principle of independence could serve as a basis for maintaining the immunity of states.

5.1.3 Equality

The inequality of peoples, says Boutros Boutros-Ghali, “coincides with the very history of mankind, and together they get lost in the mists of time. It is one of the surest marks of the facts of civilization or culture” (1960, p. 09). Notwithstanding this factual observation, equality of states is considered to be the necessary concomitant of the principle of sovereignty, and it remains, despite the multiple and blatant inequalities amongst states — in size of territory or population, economic prosperity or military strength, industrial development or cultural advancement — as one of the most familiar and recurrently echoed principles of International law (ANAND, 1986).

As Anand (1986) acknowledges, equality is customarily accepted, along with sovereignty and independence, as an intrinsic and unimpeachable characteristic of the state, an "absolute" and "unquestionable" principle upon which international law is based. According to the author,
the Holy Roman Empire, and the chaos resulting from the disintegration of Christendom because of the struggle between the Pope and the Emperor, there emerged nation-states without any authority over them. Among different independent states which dared to call themselves sovereign, there could be no relationship except that of equality. [...] Thus, the principle of equality before the law was proclaimed between states before it was admitted by municipal law in respect of individuals, and at a time when the triumph of absolutism gave the sovereigns little incentive to grant to their subjects that liberty and equality which they asserted for themselves (ANAND, 1986, p. 52-53).

Accioly, Nascimento and Casella (2009) classify equality as a right of the state, and its main consequence is that no country can claim jurisdiction over the other, meaning that the forum state courts have no jurisdiction or competence regarding another nation. This principle is crystallized in the Latin maxim *par in parem non habet imperium*, stating that it is impossible for a state to be tried by a subject of international law in the same hierarchic position, and has been recognized, for instance, in the words of Lord Wilberforce in the I Congresso del Partido case:

> The basis on which one state is considered to be immune from the territorial jurisdiction of the courts of another state is that of the “par in parem non habet imperium”, which effectively means that the sovereign of governmental acts of one State are not matters on which the courts of other states will adjudicate (UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, 1983, p. 262)

According to Massicci (2007, p. 49), underpinning sovereign immunity on the basis of the principle of equality is “a very powerful justification, which seeks the respect of states as subjects of international law, providing legal certainty as it creates a minimum of predictability in the allocation of jurisdictional power between states”. The influence of the principle of equality on the institution of state immunity becomes clear when one considers the possibility of a state to manifest its acquiescence to being prosecuted before the courts of another country. Therefore, according to Brownlie (2008), the consent given reaffirms the status of equality and that the hierarchical parity of states allows one to voluntarily submit itself to the jurisdiction of another.

The ancient principle of the par in parem, constantly cited in the writings
and decisions regarding state immunity, seems to have been accepted without discussion or questioning, as if it constituted an axiom (LALIVE, 1953). However, François Lalive brightly exposes another conception, presenting, on the contrary, the idea of the judgment by peers. In which sense would the principle of equality be offended by a judgment, delivered by another state (a peer) following all the necessary formalities, about the acts of a foreign state (LALIVE, 1953)?

5.1.4 Dignity

Finally, it is important to analyze the role played by the principle of dignity in the institution of the foreign state immunity from jurisdiction. In fact, the historical evolution of immunity is inextricably linked to the principle of dignity that, by establishing the recognition of a high distinction to the foreign state leaders, to their diplomatic agents and other representatives, led them to be the beneficiaries of jurisdictional immunities, a privilege later extended to the nation as state entity.

In this sense, sir Ian Sinclair recalls the lessons of Vattel, who held that, when the sovereign goes to a foreign state not for the purpose of negotiating on public matters, but simply as a traveller, “it is his dignity alone and what is due to the state which he represents and which he governs which entitles him to respect and honours and to exemption from the local jurisdiction” (1980, p. 121)

Hence, the ancient concept of the dignity of the sovereigns serves as a justification to the granting of immunity, and “the theory of dignity rests on the view that the forced submission of one sovereign to the jurisdiction of another would constitute an affront to the dignity of the submitting sovereign and an embarrassment to the political relations of the state asserting jurisdiction” (MARASINGHE, 1991, p. 666). In case law, the Schooner Exchange decision consecrated dignity as a foundation of state immunity, Chief Justice Marshall affirms that
One sovereign being in no respect amenable to another and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him (AMERICAN SOCIETY OF INTERNATIONAL LAW, 1909, p. 229)

Despite its ancient roots, dignity has been acclaimed as a foundation for state immunity

If the dignity and sovereignty of states justify their immunity from jurisdiction, the disallowance of measures that threaten the very existence and survival of a state, especially a weaker, smaller and poorer state in the long process of national development, is a matter of life and death for an independent sovereign state. Immunity is consistent not only with the dignity of a state, but also with the very concept of independent statehood. Without such immunity chaos might ensue, since states are now obliged to keep certain funds and assets abroad and to own properties in foreign lands for various representational and governmental functions in addition to their international trade or commercial activities (UNITED NATIONS INTERNATIONAL LAW COMMISSION, 1985, v. II, p. 31)

The matter of dignity as the basis for the immunity is especially questionable in cases involving the quest of individuals to reparations for human rights violations perpetrated by foreign states. How to logically admit that dignity may serve as a means of safeguarding the impunity of conducts as unworthy as genocide, racial persecution and torture? In this regard, Brohmer, questions: if dignity is considered a moral and ethical concept and therefore an attribute of human beings, how can one think that the so-called "dignity" of a state responsible for violations human rights should prevail over the dignity of the victimized individual (Brohmer, 1997)? In our opinion, dignity cannot function as a reasonable justification to confer immunity to states responsible for violating precisely - in ways often atrocious and shocking - the dignity of human beings, either due to their ethnicity, belief, political participation, etc.

It is possible, therefore, to question the very foundations of state immunity in order to favor human rights litigation. Indeed, the once “solid
customary rule of state immunity” (REZEK, 2005) seems to stand over very fragile ground, making it possible to challenge its application.

After focusing on the law, on legal theories and legal instruments, it is time to change our approach, as we shall now present our second contribution for the socio-legal debate regarding human rights and state immunity: one that focuses on the individuals or, more specifically, the victims.

5.2 Social contributions for the enhancing the debate on human rights and state immunity

Upon the start of the development of this thesis’ subject – state immunity in cases of human rights violations – it was surprising to see how little attention was given to the role of the victims of such atrocious violations. The “human” perspective of human rights violations was seldom addressed, as the debate focused on a traditional “state” perspective: sovereignty, hierarchy of norms and international obligation are words that make little or no sense in the reality of those who actually suffered a violation. If law and society go together, the “social” side of this equation was being somehow neglected, from an international law perspective. How, then, it would be possible to integrate a victim’s perspective into the subject? Would it be possible to enhance the discussion presented in this thesis by resorting to other approaches?

It is interesting to notice that, while human rights have for a long time been the object of investigation by disciplines such as philosophy of law, international law, constitutional law, criminal law, etc., they have been widely overlooked by sociology of law, and even its founding fathers – Ehlich, Weber, Gurvitch – did not consider it a specific subject of the discipline in their times (IAGULLI, 2013), a situation that Renato Treves attributed to two fundamental reasons: first, human rights are a product of the XVIIth century Enlightenment,
while sociology and sociology of law arise from the XIXth century positivism, a period in which Comte and others have been more focused on duties rather than in rights; and in second place, sociology has habitually been attracted to objective law, which reflects society’s image, while subjective law – and its reference to the individual – were considered as not belonging to sociology’s range of competencies (TREVES, 1989 apud IAGULLI, 2013). Moreover, the nature of international law is in itself so factual that it transforms its followers – whether they want it or not – into sociologists of law ad honorem, and no field of law demonstrates so clearly how law is born from social action and how it resolves itself in social action (FERRARI, 1995). Therefore, as one cannot venture oneself on the field of international law “without confronting the facts, the phenomena, and their classification, and maybe this leads sociologists of law to withdrawing from a soil in which lawyers operate, to some extent, with their own weapons” (FERRARI, 1995, p. 139).

However, there is plenty of space to cast some light into the human rights field by resorting to a more sociological approach. As Vincenzo Ferrari explains, while the jurist plays a theoretical and practical, role, which is both descriptive and prescriptive, the sociologist of law, by contrast, plays a role that is only theoretical and descriptive (2004). Differently from the positive jurist, the sociologist of law is not in fact called to indicate to any proper way forward, but rather called upon to establish correlations between phenomena, to describe the sequence of events, to give a theoretical explanation: in short, to inform other jurists and politicians, who can use these insights information to make decisions (FERRARI, 2004). We believe that we have provided many arguments for the denial of state immunity in cases of violations of human rights from a legal point of view, and that now it is time to enrich this debate with social contributions. In this regard, victimology might help us to understand not only the current state of affairs, but also offer a more far-reaching perspective and powerful arguments, specially regarding human rights. In this sense, Robert Elias notes that victimology also offers much for studying human rights:
International human rights encompasses a large and far greater scope of issues (and rights) than victimology. But victimology has much greater depth. Victimology offers human rights a series of theories and methodologies by which to organize and pursue our understanding of oppression, its shapes, sources, impact, and remedies. As we will see, for example, we have progressed only very modestly in assessing the financial, physical, psychological, and human costs of oppression. We know little about effective rights enforcement mechanisms and their impact on human rights victims. We have little information about the problems and needs of victims of oppression and how to provide effective relief (ELIAS, 1986, p. 199).

Elias also affirms that “obviously, victimology does not have all the answers, but can offer much to systematically analyze and understand victims and, ironically, could provide even more answers by adopting a broader human rights perspective” (ELIAS, 1986, p. 199). For these and other reasons, says the author, “the interchange between victimology and human rights would be mutually beneficial” (ELIAS, 1986, p. 199). Agreeing with Robert Elias, this final chapter will try to collect contributions from victimology in order to enhance the theoretical background regarding state immunity and violations of human rights.

5.2.1 Victims and victimology: what can we learn from them?

Despite the fact that more and more victims seem to be a concern in the political agenda, and that much is said and done in the name of taking a better account of the victim, it is important to remember that the concept of victim, as well as the nature of the victimization and its measurement, are hotly contested issues (WALKLATE, 2007). As Paul Rock points out, “criminology is a minor discipline with few practitioners and many gaps, and it is not remarkable that the victim should also have been overlooked for a while” (2007, p. 58). Moreover, there is still much to be understood regarding victims of different kinds and from different parts of the world: little is known about justice systems in Asia or Latin America, or about facts that take place in remote areas, or involving unusual subjects, such as elderly people, children or ethnic groups (ROCK, 2007). In this scenario, it has been frequently asserted that the victim was the ‘forgotten
party’ of the justice system whose centrality to the workings of the system was underestimated, ignored and undervalued (WALKLATE, 2007, p. 29).

However, victims gradually became more and more the focus of media attention. That coverage, says Walklate, ranges “from victims of natural disasters to victims of terrorist attacks, to more mundane and routine, though nonetheless harmful events, such as burglary, rape and murder” (2007, p. 19). Yet, remembers the author, “in the midst of such media coverage and political preoccupations, real and harmful things do happen to people” (WALKLATE, 2007, p. 19). This affirmation has a deep relationship with the object of this thesis, as behind all possible legal justifications, it is still people – and their suffering- we are talking about. But how have these people- the victims- been seen in the past and in the present? And how could they be seen in the future?

Victims have had different roles in the legal, academic and political debate throughout time and the period between the eighth to the seventeenth centuries witnessed multiple interlinked transitions in the role, rights and status of the victims and, by the conclusion of this period, the state had secured its right to selectively avoid victims and to intervene directly in some parts of the legal process (KEARON; GODFREY, 2007). Hence, in this time, a change occurred, as the commission of an offence was not considered as a direct act against the victim anymore, but as an act against “society” in general (a threat to the monarch, to peace, etc.), meaning a consequent shift from e perception of the victim as direct recipient of compensation towards a more abstract idea of a debt to “society” (KEARON; GODFREY, 2007). Furthermore, authors mention industrialization and urbanization as factors contributing to the decline in the importance of the victim, and also indicate other circumstances, such as the emergence of the ‘new’ police in England and Wales early in the nineteenth century, which contributed to the downfall of the ‘associations’, also taking over victim’s role in the prosecution process (MAWBY; WALKLATE, 1994, p. 59).
Moreover, the victim was no longer in the role of essential investigator of proceedings, but rather was limited to the role of potential witness in cases investigated by the state and, finally, this period was also marked by a “shift away from informal and semi-formal strategies for dealing with victimisation to an increasingly state-centred and bureaucratised response in which the victim’s desire for restitution was increasingly policed, restricted and marginalised.” (KEARON; GODFREY, 2007, p.37-38). This information helps us to understand that the victims had their role more and more limited by the state in the pursuit of reparations, and still to this day, in the case of victims of human rights violations committed by states, this reality is almost impossible to overcome.

As a consequence of these earlier developments, during a significant part of the twentieth century, the victim was either ignored in criminological debates or depicted as a marginal and passive figure in the justice system (KEARON; GODFREY, 2007). Therefore, despite the victims’ undoubted functional importance to the operation of the process, “by 1945 there was no real sense in which victims of crime had a voice in the political or the policy arenas” and is interesting to note that the initial ideas which gave the motivation to the development of victimology arose in the late 1940s (MAWBY; WALKLATE, 1994).

In fact, the subject only started to receive due attention after the devastation and desolation scenario of a war, as “the millions of victims created by the Second World War and the Nazi Holocaust provided some impetus to the project of victimology in the early years of its infancy in the 1940s” (WHYTE, 2007, p. 465). Academics begun to focus on victims during the war and in its immediate aftermath. Mendelsohn, for instance, devised the term ‘victimology’ in 1940, also instituting an analytical approach to the categories of victimization that are produced by political decisions, by the use of technology, by accidents and by crime (WHYTE, 2007). It is important to notice that Mendelsohn and others devised a broad-based victimology that took into account not only crime victims, but all victims; yet, notes Elias, “the struggle to maintain this broader
perspective (beyond crime victims) has been a difficult one” (ELIAS, 1986, p. 18). By 1948 Von Hentig had published *The Criminal and his Victim*, in which he defined 13 psychological and sociological classes of victim. The works of von Hentig and Ellenberger provided a landmark for victimological studies, but both authors restricted their studies to “crime” victims, and accentuated the victim-offender relationship, “thus not only constricting the field but, ironically, also providing early evidence that might as easily blame victims as support them” (ELIAS, 1986, p. 18).

In this sense, the main foundational idea of those first scholars was victim-precipitation, which followed the political and analytic position of the sub-discipline afterwards (ROCK, 2007). The idea of victim-precipitation was advocated first by Mendelsohn, and it refers “to the criminally provocative, collusive or causal impact of the victim in a dyadic relation variously called the ‘penal couple’ (Mendelsohn 1963: 241); the ‘reciprocal action between perpetrator and victim’ (Von Hentig 1940:303); the ‘duet theory of crime’ (Von Hentig 1948: 397); a ‘situated transaction’ (Luckenbill 1977); ‘the functional responsibility for crime’ (Schafer 1968: 55), or, simply, ‘the victim–offender relationship’ (Wolfgang 1957: 1)” (ROCK, 2007, p. 60-61).

Therefore, while the beginning of victimology share the same momentum as the international expansion of human rights, adopting a broad concept of victim, in general, the academic production regarding victims of a crime during 1960s and 1970s was considered to be conventional and conservative, and the victim’s experience and position continued to be seen as secondary in relation to the emphasis given on the offender and the offence (KEARON; GODFREY, 2007). Perhaps this focus on the victim as “part” and somehow “responsible” for the victimization episode, so present in the victim precipitation studies, might have helped to inhibit any major attempts of human rights victims to seek for compensation during that period, specially against a foreign state. This might help us to understand why litigation against States is a recent.

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109 Please note that the concept of victim shall be analyzed further on this chapter.
phenomenon, as other developments had to take place to encourage victims to pursue compensation,

In this sense, the idea of helping crime victims, or the origin of the so-called modern crime-victims movement, is attributed to Margery Fry, whose interest in the subject did not arise from the demands of victims or a knowledge of what victims might need, but rather from a personal interest in social anthropology, including tribal practices regarding compensation (WEED, 1995). Fry notes comments upon the early customs of restitution and on the later developments of criminal law, noting that, in tribal societies, the first aim was to compensate the aggrieved party, and that the idea of punishment came later (WEED, 1995). Fry’s ideas about a compensation program for victims outlived the scholar, and inspired the Criminal Injuries Compensation Act, in New Zealand, and, in 1964, Britain passed a similar act, creating the Criminal Injuries Compensation Board (WEED, 1995).

Indeed, Fry’s ideas met a ground made fertile by a series of factors, such as the recent memory of the Second World War victims and the realizations of the welfare state. This last one is of special importance regarding victim’s compensations, as it spread the idea of the government providing benefits for those in need: once the government was already helping people with housing, education, health and employment, it was more acceptable to bring forth the notion that victims too may deserve some kind of benefit. In this sense, Walklate explains that:

Victim-oriented developments In England and Wales in the early 1960s were marked, in policy terms, by a consolidation of the achievements of the welfare states in the post Second World War era […]. Much of the early victimological research was conducted by emigré lawyers and criminologists in the United States. These commentators took the Holocaust as their problematic and the World Society of Victimology, in its early life, shared in the intellectual origins of understanding and giving voice to the impact of the events that led up to the Second World War. Indeed the overlap between the academic and the humanist, as Fattah (1991) would say, has remained within the world of victimology and one that continues to give it a particular character and vibrancy (WALKLATE, 2007, p. 21).
Therefore, Fry’s ideas in the field of victimology bear great importance when talking about state immunity in cases of human rights violations, as compensating the aggrieved party is seen as fundamental to restore the balance in society. Fry has put the victims’ needs in first place, and that lesson could benefit immensely the case of those who, in the pursuit of justice, face the shield of immunity.

The aforementioned period was also influenced by the so-called “second-wave feminism”, which appeared in the 1960s and 1970s to “protest against injustices inflicted on women and girls; to locate those injustices in the structure and functioning of a patriarchal order” (ROCK, 2007, p. 62). What came to be known as Feminist criminology had a radical nuance, as its origins are closely related to the dissent against the conventions of radical criminology: “women, it was said, were raped, abused and assaulted, and their neglect by male criminologists constituted not only a political and sexist affront but an analytic and empirical gap” (ROCK, 2007, p. 61-62).

By no coincidence, radical victimology developed during the 1970s and 1980s, determined to challenge traditional classifications of victimisation by analyzing, for instance, domestic violence, the victimisation of ethnic minorities, victims of corporate and state criminality and other crimes of the powerful, and also by distancing itself from the analysis of criminal statistics towards more qualitative sources, looking for an epistemologically and methodologically informed position (KEARON; GODFREY, 2007). Therefore, in the 1980s and early 1990s, the victims’ movement has finally flourished with a wave of new attention, rights, and programs (ELIAS, 1993, p. 52).

Throughout the 1980s and 1990s, a growing number of specific interest groups emerged, including organisations campaigning for the registration of sex offenders, incest survivor groups, relatives of murdered and missing children, relatives of victims of drunk driving, and those concerned with combating racism, homophobia and discrimination generally. While such groups were generally unconnected and pursued their own specific agendas, the net effect of their
Today, as Elias notes, “the international human rights movement both encompasses and expands the victimization emphasized by the feminist, anticorporate and antiracist movements” (1993, p. 60). So far, victimology’s contributions a) reminded us of the real human suffering behind facts that will later on be analysed from a legal point of view; b) helped us to understand the shift in the role of the victim vis-à-vis the state, and its marginalization in the legal process c) provided a background for understanding the victimization experience, despite the possible drawbacks of the victim-precipitation studies regarding victims’ pursuit for compensations; d) brought forward the idea of helping and compensating victims e) expanded the boarders of its study to incorporate different perspectives, focuses and actors, which were embraced by the international human rights movement. The benefits from the interchange of perspectives between human rights and victimology is vast, and as Doak explains:

Human rights and victimology have, until recently, tended to view both types of victims through discrete lenses. There has been relatively little exchange of ideas between the disciplines, and both have tended to adopt distinct terminologies and modes of analysis. However, shifting disciplinary parameters of both human rights and victimology have presented a new opportunity to formulate a unified concept of victims’ rights. Human rights discourse has been transformed in order to take into account the ongoing international fluctuations in loci of power, the growing role of non-state actors and the corresponding increase in opportunities afforded to individuals to utilise formal complaints mechanisms. New procedural and substantive rights have thus emerged for victims of human rights abuses. Once central to the discipline, the vertical / horizontal divide has become increasingly blurred, and the scope of human rights protection has expanded considerably. In the same way, the study of victimology has undergone a significant change, moving away from the typologies and stereo-type of earlier days, towards a more integrated and holistic discourse taking into account the numerous relationships in the criminal justice system between victims, offenders and the State, as well as the underlying importance of human rights and due process for all stakeholders (DOAK, 2008, p. 30).

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efforts was to high light the plight of weaker and more vulnerable members of society on many different levels under contemporary legal and political frameworks (DOAK, 2008, p. 08)
Victimology can certainly enhance our understanding and provide a different perspective, focusing on the human side of a legal dilemma. Moreover, as will be discussed next, victimology can also help us to understand more about the central figures in this work, the victims: who are they, what is their role and what makes an ideal victim.

5.2.2. The victim- or who are we talking about?

Defining who is a victim is not a simple task and, from a starting point, Doak acknowledges that, “in contrast to the narrow conceptions of victimhood used to control access to criminal injuries compensation, the concept of the ‘victim’ tends to be much broader and more inclusive within international human rights instruments” (DOAK, 2008, p. 23). The analysis of international documents may help in this task, and the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power brings the following definitions:

**Victims of Crime**

1. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

B. **Victims of abuse of power**

18. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.

A similar definition is brought by the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International
Humanitarian Law\textsuperscript{111}. In a more sociological perspective, Garapon (2002) explains that the idea of victim comes from the religious vocabulary of sacrifice: it refers to a being – animal or human- killed ritually to pay homage to a god. It symbolizes then the total passivity, the definitive victory over the body of the other, that was even deprived of combat.

The figure of the hero, as well as the one of the defeated, is related to the combat, and hence to action. The absolute victim incarnates a new being in the world or, more precisely, a non-being. The apparition of the victim is inseparable from a historically unprecedented experience that is the negation of all human bond. If the combatant occupies a place, the one of the adversary, the victim has no place at all, not even amidst the “patrie humaine”. “To have a place is, in reality, to see the recognition of the possibility to make rights count, even if they were extremely reduced” (GARAPON, 2002, p. 129).

The victim does not chose to fight: she is dragged into a situation of violence against her will. When two people fight each other, they are engaged in a joint action whose modalities they accepted, they are linked at least by the mutual will to combat each other, as they look for a truth criterion: the fight designates the best. (GARAPON). The victim, au contraire, is characterized by the involuntary, the impossibility control over his fate, the inability to act, including to escape or surrender, two possible outcomes of combat (GARAPON, 2002) The victims live under the threat of agonizing death in any place and any moment: be it day or night, at home or in the streets; the family home, the most intimate place, is chosen to commit the kidnappings followed by disappearances in order to make the world indifferent and hostile. “A victim is the one to whom is given no choice but to be taken to slaughtering”

\textsuperscript{111} For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.
(GARAPON, 2002, p. 129). In this sense, victimhood may also be associated collectively:

Persons, individually or collectively, can be considered as an integrated system of several dimensions, such as the physical, intra-psychic, interpersonal, familial, social, communal, religious, ethnic, cultural, spiritual, material, economic, political, national and international dimensions. When harm is done to this integrated system of several dimensions, the individual or group of individual becomes a victim. Harm occurs when there is a negative outcome resulting of the comparison of two conditions of the integrated system of several dimension of the individual or the group of individuals. (VAN BOVEN, 1999, p.202-203).

The victim is dehumanized, as no interest is paid to her abandonment, desolation or even death, as she undergoes the complete experience of non-belonging to the world (GARAPON, 2002). State immunity, then, signifies a double denial and a double victimization: a human right is violated, and then the right to redress is refused on the grounds of state immunity; no interest is paid to the first or to the second violation, and the victim is once again dehumanized.

However, not all victims, despite of their suffering, are seen as such. In this sense, Niels Christie theorized about what makes someone a victim, or, to be more precise, who is an “ideal victim”? Christie acknowledges that being a victim is not an objective phenomenon, but one that can be investigated both at personality level and at the social system level\textsuperscript{112}, and he focuses on the second one to clarify the figure of the “ideal victim”: “a person or a category of individuals who — when hit by crime – most readily are given the complete and legitimate status of being a victim” (CHRISTIE, 1986, p. 18).

For the author, the term “ideal victim” is a kind of public status of the same type and level of abstraction as that for example of a “hero” or a “traitor”: they are difficult to count, but easy to exemplify, and Christie illustrates his idea

\textsuperscript{112} “some might have personalities that make them experience themselves as victims in most life situations while others tend to define life according to other dimensions [...] At the level of social systems, some systems might be of the type where a lot of victimization is seen as taking place, while others are seen as being without victims. (CHRISTIE, 1986, p. 18)
with the figure of “the little old lady on her way home in the middle of the day after having cared for her sick sister” (CHRISTIE, 2007, p. 18), who would embody all elements of an ideal victim. And what makes someone an ideal victim? According to Christie:

(1) The victim is weak. Sick, old or very young people are particularly well suited as ideal victims.
(2) The victim was carrying out a respectable project – caring for her sister.
(3) She was where she could not possibly be blamed for being—in the street during the daytime.
(4) The offender was big and bad.
(5) The offender was unknown and in no personal relationship to her. (CHRISTIE, 1986, p. 19)

Hence, Christie’s breakthrough was to show that there are victims and victims, and while the old lady on her way home in the middle of the day after having cared for her sick sister will most likely be immediately covered with the cape of victimhood, the young man hanging around in a bar, hit on the head by an acquaintance who took his money, would have a hard time trying to get the status of an ideal victim: “He was strong. – He was not carrying out any respectable project. – He could and should have protected himself by not being there. – He was as big as the offender. – And he was close to the offender” (CHRISTIE, 1986, p. 19).

In this sense, an interesting insight is provided by Robert Elias, when referring to “ideal victims”: “even these victims are often treated paternalistically as helpless and frail and thus robbed of any sense of power and self-reliance. They are designated, although not permanently, as the “innocent” victims we all want to protect; they may also be “safe” victims, who can help limit the movement—an apparent exercise in social control” (ELIAS 1993, p. 46). Therefore, for different public policy reasons, the State will often seek to distinguish between ‘deserving’ and ‘undeserving’ individuals to ensure that only

113 A contrasting example of a far from ideal victim would be a young man hanging around in a bar, hit on the head by an acquaintance who took his money. His head might be more severely hurt than that of the old lady, his money more dear to him. Nonetheless, he could not compete with her for getting the status as an ideal victim. – He was strong. – He was not carrying out any respectable project. – He could and should have protected himself by not being there. – He was as big as the offender. – And he was close to the offender. (CHRISTIE, 1986, p. 19)
the most worthy of them will be able to benefit from the increasing number of rights that are being made available to victims (DOAK, 2008, p. 21). As Doak explains:

Such constructions are commonly reflected in official policy in such a way so as to reinforce the State’s preferred definitions of social harms and problems and to strengthen existing power structures. As a result of this State-sanctioned exclusion, many types of victims remain unacknowledged within the criminal justice system, and the “ideal” or “official” conception of the victim fails to reflect the experiences of the majority of individuals who have suffered injury or loss as the result of crime. Furthermore, since the State is responsible for delineating the parameters of the criminal law, it is also possible that many individuals who have suffered harm or loss as a result of another’s conduct are incapable of receiving the acknowledgement and possible benefits that ‘victim’ status carries if there has been no breach of domestic law (DOAK, 2008, p, 22).

It seems that, in the case of victims of human rights violations perpetrated by a state, their exclusion is somehow sanctioned by the “community of states” as a way of trying to protect their individual interests. These victims are not “ideal” or “official” also because their suffering puts the bad behavior of states on the spotlight: they are not safe victims, as they expose too much the state as an offender. Furthermore, Schwobel-Patel (2015) has tried to transpose Christie’s definition of an ideal victim to the field of international law and, according to the author, in this scenario an ideal victim would have three attributes: (1) The victim is vulnerable and weak, (2) the victim is dependent, and (3) the victim is grotesque.

Vulnerability and weakness, says Schwobel- Patel, are usually attributed to women and children, as their symbolic image is often used to justify interventions of all sorts (2015). Indeed, women and children are seen as fragile, and it is easier, in the complex contexts of international conflicts, to isolate those two as “harmless”. It is important to bear in mind, however, that they need to “look” vulnerable too, and in many places women who fought against dictatorships are still seen as “trouble makers”, and children who are forced to work for drug dealers or to fight in wars do not benefit from much
kindness. This is closely linked to dependency, also an essential feature for victimhood, and it relates to the victim’s relationship to other important interests: as long as the victim is considered to be dependent on assistance, they do not pose a threat, but if a victim demonstrates any activity that goes beyond establishing their identity as an ideal victim (fighting the aggressor, resisting invasions or even migrating), they soon lose their ‘ideal’ status, if not their victim status altogether (SCHWOBEL-PATEL, 2015).

Finally, the author affirms that an ideal victim in the international sphere, meaning a victim of conflict or of international crime, often presents some visual attributes that mark them as victims, such as the color of their skin, mutilations, an amputated limb, etc.: “this bodily manifestation of victimhood can be referred to as ‘grotesque’. It is this in particular which prompts empathy in the ‘civilised’ world yet also creates distance; a feature which distinguishes ‘us’ from ‘them’” (SCHWOBEL-PATEL, 2015). The ideal victim of the international sphere, concludes the author, “matches the typical fundraising images of international NGOs – a black (or at least non-white) child who displays the scars of poverty and conflict” (SCHWOBEL-PATEL, 2015).

Perhaps Christie and Schwobel-Patel have provided an explanation for why it is so difficult for the victims we talk about in this thesis to be recognized as such: they are not “the old lady”, or the miserable children we see in NGO fundraising campaigns: despite the gravity of the violations they suffered, they are too much like “us”, and even the relatives of the victims of the massacres in Greece do not embody the fragility of the victims themselves. Perhaps they were men; perhaps they were fighting some kind of oppression (but still fighting); perhaps they had some money and could move somewhere else; perhaps, despite all that happened to them, they survived. And perhaps that makes them no ideal in our eyes anymore.
Furthermore, Christie mentions a sixth condition to the configuration of the “ideal victim”: the victim can also be ideal if he or she is powerful enough to make their case known and successfully demand the status of an ideal victim, or, instead, that they do not face resistance by so strong counter-powers that they cannot be heard (CHRISTIE, 1986, p. 20). Making themselves be heard, and tearing down state immunity, then, might be the only chance our victims here could ever have.

State immunity, as all legal fictions, became scandalous when human suffering is at stake, when procedural exigencies are assimilated to useless and sometimes outrageous formalities (GARAPON, 2002). Immunity becomes impunity, referring to the omnipotence of the political power that goes just to the point of denying reality, which generates a particular sentiment of injustice in the victims. Impunity “un-executes” the crime. (GARAPON, 2002). The experience of “un-execution” of a crime induces devastating effects in the victim: it threatens with madness as it deprives the victim from the mediation of reality. The victim may even doubt the reality of what he or she has lived. The victims and their descendants continue to be tortured by the denial not just of their sufferings, but also of the crime that caused them. Impunity hence prolongs the effects of the violation to infinite. (GARAPON, 2002, p. 205). In this regard, Robert Elias mentions the psychological impact of many individual symptoms of oppression, specially among survivors of Nazi Germany and other captives:

These and other studies, some done by victimologists, have revealed the wide array of emotional reactions, including guilt, fear, rage, horror, dread, revenge, mourning, lost or intensified identity, empathy, and ambivalence. As with crime victims, victims of oppression often blame themselves for their suffering, even when they clearly bear no responsibility (ELIAS, 1986, p. 217).

Hence, victimology can help us to understand the degree of devastation inflicted on victims, and specially on those who cannot obtain

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114 In french, “déréalise”
justice. This, we hope, may encourage broader initiatives in favor of victims, including the denial of state immunity for human rights violations.

5.2.3 The need for justice in a victim’s perspective

Justice is a condition for peace: it puts an end to the impunity that nourishes the sentiment of revenge, the desire for reprisals (GARAPON, 2002). In cases of human rights violations, state immunity represents a denial of justice and, consequently, of peace and of recognition. State immunity deprives the victim from the process and, without the process, the cathartic effect of the judgement cannot be produced (GARAPON, 2002).

If the sense of victimhood is characterized by total passivity, the victims seek in the justice a place to find their combativeness, to be on the stage in order to tell their stories and to be consecrated as victims. The trial does not simply provide a forum for the suffering of survivors: it constitutes these painful beings into victims and, by recognizing them as such, they are paradoxically this freed from their lower condition: “victimhood is not a factual situation but a position that needs to be legally recognized” (GARAPON, 2002, p. 164).

Therefore, overcoming state immunity in cases of human rights violations is a necessary step towards justice to the past and towards a commitment to justice in the future, as historical memories of past failures to prevent human rights abuses “have become a primary mechanism through which the institutionalization of human rights idioms and their legal inscription during the last two decades have transformed sovereignty” (LEVY; SZNAIDER, 2006, p. 667). Judgments carry an undeniable ritualistic power through which memories of past human rights abuses would subsequently serve as a continuous reaffirmation of these individual rights (LEVY; SZNAIDER, 2006). Hence,
Public recognition transforms knowledge in official truth, it increases it in relation to history by making it authority. If History is on the side of knowledge, memory and justice are on the side of acknowledgement. The work of Justice consists not that much in permitting the knowledge of facts (which is done by historians) but rather in recognizing them – stating them publicly, admitting them not only as an historical reality, but also as faults. In assuming them as such, the public recognition reactivates a legal community with the victims. (GARAPON, 2002, p. 215)

This “juridification” of human rights violations is way more than a legal process, but should be treated as socially embedded, meaning producing act (LEY; SZNAIDER, 2006). Judgements are “transformative opportunities, where memories of grave injustices are addressed in rituals of restitution and renewal” (LEY; SZNAIDER, 2006, p. 662), and socially necessary to prevent future violations. Overcoming state immunity, hence, is socially and legally necessary for any society who seeks justice and peace. As Elias explains:

The denial of human rights imposes both tangible and intangible costs for individuals, groups, and sometimes entire peoples. Unlike with criminal victimization, where states and corporations may be victimized (along with individuals), here states and corporations do the victimizing. As with criminal victimization, however, governments, and especially corporations, can gain much from oppression. They achieve political and economic control, promote personal and ideological goals, and reap significant profits, while bearing few losses or sacrifices. In any case, as with criminal victimization, individuals must bear oppression’s financial and property costs. Yet, from oppression, victims may have to carry those costs permanently, for life. (ELIAS, 1986, p. 216)

Contributions from social fields can help us to understand not only why things are, but also enhance the legal perspective of how things could be. State immunity is an institute from international law, a field that, despite its developments, still places states as central actors. However, behind states, there are people: people who have been tortured, who lost their families or who were forced to work in factories, as contemporary slaves. Victimology helps us understand the position of victims nowadays, and also why some victims are more “ideal” than others, while sociology of law casts some light on the importance of justice for victims. The greatest lesson, however, is that it is time
to find ways to bring victim’s perspectives to the debate when victim’s rights are at stake:

what would we say about a movement that apparently forgot to invite most of its professed beneficiaries? What if we discovered, for example, in the victims’ “movement,” that victims were, politically, all dressed up but had no place to go? What kind of movement would it be? Would it really be a movement at all? Reviewing recent victim policy makes these questions all too appropriate. The movement to redress the victim’s plight has been much ballyhooed, but we must consider more closely what the movement and its resulting policies represent politically and what they actually achieve (ELIAS, 1993, p.26).

There can be countless theories in favor and against state immunity in cases of violations of human rights, but perhaps this battle is not to be won with pure legal arguments. Putting the victims in the spotlight might be a way to overcome legal fictions as state immunity with the reality of mankind.
CONCLUSION

Ninety years ago, in his course at the Hague Academy of international law, Politis called the attention for the formation of a new legal doctrine which completely renewed the concepts of public law and, consequently, those of international law by professing that the state is a pure abstraction: like any group, the state is not an end in itself, but a means, a simple process of relations between the human beings that compose it (POLITIS, 1925). Behind the vain fiction of the state, said Politis, there is only one real personality, that of the individual, and if the state is a pure abstraction, the international community, as it has been understood so far as the reunion of states, is still greater abstraction: in reality, it has basically the same human structure of internal political communities, simply composed of individuals grouped into national societies (POLITIS, 1925).

Politis wisely concluded that the state, as any group, is an aggregate of human beings, and should not be seen as an end in itself, but as a means to cooperation among those people being part of these different groups or states. However, in this thesis I realized that this precious lesson seem to have been forgotten, as the materialization of human rights is often rendered ineffective due to the application, by domestic courts, of state immunity, in a way to safeguard the interests of the “state” vis-à-vis the “individual”. Therefore, as the results of the study conducted in this thesis, it was concluded that:

1. International law is the set of legal rules governing international relations; it is both a "normative order "and a" social organization factor", whose purpose was, from its inception, to ensure the coexistence and the cooperation of essentially diverse entities that make up a fundamentally pluralistic society. In the international society, states are at the same time the creators and the subjects of norms, in a horizontal and decentralized
structure with no supreme authority to enforce the law. International law, therefore is a direct product of international society, but this also means that it should accompany the changes in this society. The monopoly of international subjectivity once owned by the state is more and more challenged by the emergence of the individual and the consecration of human rights as supreme values of the international society. However, when a traditional institute benefiting states – such as jurisdictional immunity - is confronted with human rights, the latter are usually rendered ineffective.

2. Immunity, Jurisdiction and Competence are completely separate institutes, but they are often object of confusion and imprecision. The exercise of jurisdiction is the corollary of sovereignty, which the state exerts in its domains through conflict resolution, which happens in compliance with the law. Therefore, jurisdiction confers effectiveness to the legal order of a country by saying what and how law is applicable to a specific case. As a consequence, that the jurisdiction is, in theory, unlimited in the realm of the state, being limited only by the interest and convenience of the country. The measure of jurisdiction, ie, its distribution among government agencies, with a view to the jurisdictional exercise, is what is called competence. Immunity, in its turn, is a procedural obstacle to the jurisdictional exercise and, as a result, a domestic court that HAS jurisdiction and competence to hear a case cannot do it, because the subject is immune to jurisdiction.

3. State immunity has a long and non-linear development: some attribute it to the personal immunity of the royal envoys due to their role in the maintenance of international relations in the past, while others believe it derives from the absolute immunity once attributed to the monarch himself as a representative of God. The first court rulings on the matter support those theories, and domestic courts used to apply state immunity in cases regarding individuals as a rule. However, the significant changes operated in the international society also led to a change in the application of the rule
of state immunity, and the consequent differentiation between acta iure imperii (to which absolute immunity was still applicable) and acta iure gestionis (to which immunity was relativized). Today, we discuss if the primacy given to human rights by international law would not be able to once again push forward the frontier of state immunity, which would be discarded when the demand was related to violations of these rights.

4. Human rights are the result of a long and non-linear historical and social process that started with the ancient religions and their lessons of responsibility to others, enriched by philosophical writings focused on universal moral responsibilities and duties rather than what came to be known as legal rights. The development of human rights was not remarkable between the fall of the Roman Empire and the decay of feudalism, but the XVIth century provided a more fruitful environment, landmarked by the Enlightenment, culminating in the “Age of Declarations” and the positivation of human rights on national levels. On the international sphere, human rights were still protected in a fragmentary way, with attention given to specific fields, such as Humanitarian Law and the protection of minorities. However, human rights will be placed as the focus of international society only after World War II, with the creation of the United Nations and the proliferation of legal instruments on the matter.

5. On a global level, human rights were addressed by different United Nations organs and agencies, establishing a human rights Council and a solid treaty system. On a regional level, the European, the Inter-American and the African systems have played different roles in ensuring the state-parties to their treaties comply with human rights norms. Moreover, the right to reparation can also be considered as a human right in itself, and there are different kinds of reparations, including some that might be less costly and more effective to victims. Despite such legal framework, when victims of human rights violations go to domestic courts seeking compensation for
damages caused by another state, they are usually confronted with state immunity, with deprived these category of rights of their effectiveness.

6. In this sense, the approaches differ in countries with and without specific legislation on the subject. In the first ones, the judge is necessarily tied to the status of devices, possessing little or no freedom to decide the case, and the issue is treated as a problem of national law. In countries without legislation on the matter, courts frequently resort to international law, often integrated into national law by constitutional provisions, and their level of discretion is much higher.

7. Moreover, there are some theories that seek to justify the denial of state immunity for cases regarding human rights violations. The theory of implied waiver is an evolutionary interpretation of Article 1605 (a) (1) of the Foreign Sovereign Immunities Act of 1976 (US). According its sponsors, violations of jus cogens norms (and, here, human rights as such) would amount to an implied waiver of the immunity that the foreign state would normally be entitled to, hence operating in an exceptional basis. The criticism of this theory lies in the fact that it assumes a waiver from the foreign state – a manifestation of will- in situations in which it actually does not occur. The theory of normative hierarchy uses a systematic overview of the international legal order in which the rules of jus cogens (and human rights so considered) would be at the top of a normative pyramid, thus derogating rules of a lesser status that would collide against them, including state immunity, a customary norm. This theory is criticized for assigning functions to jus cogens norms that go beyond those laid down in the Vienna Convention on the Law of Treaties of 1969, both materially and chronologically. The theory of universal jurisdiction was initially formulated in criminal matters, to punish piracy crimes, and its supporters proclaim that, given the highly reprehensible nature of human rights violations, and since all humanity has an interest in repressing them, any state would possess jurisdiction to prosecute such offenses, thus pushing state immunity away.
Its application, however, is quite controversial, and its transposition from criminal to civil law, as well as the possibility of misusing legal power for political reasons, raise some concerns. The theory option and risk calculability is quite complex, and it initially assumes that the state always has the option to NOT violate human rights (unlike other accountability situations, such as in commercial transactions, in which the state would be "forced" to act in a harmful way), but on the other hand, unlike most private activities, the risk of state accountability cannot be calculated in human rights violations. The application of this theory is be mitigated by the nature of the violations, for its author argues that only violations of individual and personal character - not those that occurred in widespread character, such as war or ethnic cleansing - would be likely to held the aggressor state accountable without compromising its functional sovereignty. The most obvious criticism of this theory lies in its artificial differentiation between individual or general violations, since both entail similar consequences for individuals. The mutual benefit theory assumes that immunity is the result of the clash between the principle of the territorial jurisdiction of state and the sovereign equality of states, each entailing a different conception of sovereign immunity. Immunity would be seen today mistakenly as a "fundamental right" of the state when it is actually an exception to the principle of exclusive territorial jurisdiction, and not the rule; this theory has the advantage of favoring human rights litigation by placing the forum state jurisdiction as a rule, but is also focus solely on the state's perspective.

8. Furthermore, it is also possible to question the configuration of state immunity as a “rule” of international law. In one hand, the collective benefit theory assumes that immunity is the result of the clash between the principle of the territorial jurisdiction of state and the sovereign equality of states, each entailing a different conception of sovereign immunity. Immunity would be seen today mistakenly as a “fundamental right” of the state when it is actually an exception to the principle of exclusive territorial jurisdiction, and not the rule. The sovereign equality of states means, in
fact, that they have an equal ability or potential to enjoy certain rights, ie
“statehood” in itself does not generate an entitlement to sovereign immunity,

9. On the other hand, it is also possible to challenge the foundations of state
immunity, specially if one takes into consideration the social changes
occurred in the international society in the past century. Sovereignty,
independence, equality and dignity can be interpreted in conformity with the
values of international society today, hence providing a more favorable
scenario for human rights litigation.

10. There is great value in adding social perspectives to this debate.
Victimology may provide tools to understand, for instance, the role of the
victim vis-à-vis the state, the victimization experience, the pursuit for
compensations, etc., as well as explaining why some victims are considered
as such, while others remain voiceless. It is also possible to place attention
on the victim’s perspective and on the symbolic and cathartic importance of
the judicial process. Allowing victims to seek for redress against violations
perpetrated by a foreign state is a necessary step towards justice, peace
and the affirmation of human rights.

Human rights are, as a rule, still rendered ineffective by the application of
the so-called “rule” of state Immunity by the vast majority of domestic courts.
However, the values of international society today to not seem to support the
perpetuation of this scenario, and there are solid legal arguments to justify the
withdraw of state immunity in cases regarding human rights violations. In fact,
the force to create new law or to change the old one flows out from attitudes
and feelings, which end up setting up a demand on a group or individual basis
(FRIEDMAN, 1975). Demands come from a belief or desire that something can
or should be done to enhance an interest, and the very basic proposition about
the nature of the legal system is that these demands determine its content
(FRIEDMAN, 1975). Therefore, “law is not a strong independent force but
responds to outside pressure in such a way as to reflect the wishes and powers of those social forces which are exerting the pressure” (FRIEDMAN, 1975, p. 04). It is our personal hope that the demands of the international society determine a dramatic change in the nature of a legal system that, paradoxically, worships human rights but renders them ineffective with state immunity.

On a last note, we acknowledge with “academic joy” that, on October 2014\textsuperscript{115}, the Italian Constitutional Court, in a reply regarding the effects of the International Court of Justice’s decision on the case Jurisdictional Immunities in the Italian legal system, has declared that the traditional rule on state immunity for war crimes and crimes against humanity is without legal effect in the Italian legal order, since art 10, para 1, of the Italian Constitution cannot be construed as allowing customary rules conflicting with fundamental legal values to be applied by Italian courts. In the Court’s perspective, immunity is not intended to contemplate behaviors that do not represent the typical exercise of governmental powers, but are explicitly considered and qualified unlawful, since they are in breach of inviolable rights. It is our most sincere wish that the Italian position on the matter becomes the “rule”, and not the exception.

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