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The jurisdictional immunity of international organizations before the brazilian Supreme Federal Court*

Bárbara Tuyama Sollero**

1 Introduction

An overview of judgments delivered by the Brazilian Supreme Federal Court concerning the jurisdictional immunities of international organizations (IOs) indicates that most cases refer to labour disputes involving the United Nations (UN) or one of its programmes[1]. Therefore, it is rather suitable that the judgment of the Extraordinary Appeal 1.034.840 in the *Cristiano Paes de Castro v. United Nations and Brazil* case, which set the Supreme Court's binding precedent regarding the immunity of international organizations, concerned a labour dispute brought against the United Nations Development Programme (UNDP)[2].

2 The Cristiano Paes de Castro v. United Nations and Brazil case

Mr. Cristiano Paes de Castro, a Brazilian national, was hired by the UNDP as an independent contractor. After his last contract expired, Mr. Paes de Castro sought judicial recognition of his status as a permanent employee and the payment of labour debts. The plaintiff filed suit against Brazil (Federal Union) as well, arguing that notwithstanding the contracts were concluded with the UNDP, the services were rendered in the premises of the Brazilian Ministry of Foreign Relations and to said Ministry as well. In any event, Brazil was bound by the 1964 Revised Standard Agreement ('Standard Agreement') to defend the United Nations and its Specialized Agencies against claims that might be brought up against them by third parties and therefore answered the complaint also on behalf of the UNDP, arguing its immunity recognized by treaty.

During the proceedings, the plaintiff argued that the Brazilian Constitution of 1988 brought an end to the immunity of international organizations regarding labour disputes, by establishing, in Article 114, the Labour Justice's competence to hear and try actions arising from labour relations, comprising entities of public international law. Because in Brazil international agreements are incorporated ranking below constitutional norms, the UN's immunity needed to be rejected. He contended that the Decree 27.784/50,

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** Master's degree candidate in Law at the Federal University of Minas Gerais (Universidade Federal de Minas Gerais/ UFMG). Member of Attorney General's Office (Advocacia-Geral da União/AGU).
E-mail: barbara.sollero@gmail.com

[1] See Supreme Federal Court: ACI 9703. *Isabel Fatima de Andrade v. International Civil Aviation Organization,* (1989); AI 468.498. *José Orlando da Silva v. Organization of American States* (2004); RE 488.746. *United Nations and other v. Rosane Dorneles Vasconcelos* (2018); AI 625.963. *United Nations v. Alzira Alves Duarte Vaz* (2016); CC 7930. 5th *Federal Court of Rio Grande do Sul v. Superior Labour Court* (2015)

[2] UNITED NATIONS. *Os objetivos de desenvolvimento sustentável no Brasil.* Available in: https://nacoesunidas.org/agencia/pnud/ Access at: 23 jul. 2021.

which had incorporated the jurisdictional immunity of the UN in the Brazilian law, was not received by the current constitutional order.

The jurisdictional immunity was upheld by both the trial and appeal courts. The trial court observed that the 1988 Constitution had simply shifted the competence to hear and try labour disputes comprising entities of public international law from the Federal Justice to the Labour Justice, maintaining, however, the framework of immunities. However, the Superior Labour Court reversed the appeal court's judgment, holding that, according to the its case law, the immunity from suit accorded to international organisms is restricted to acts *iure imperii*, among which acts connected to labour relations are not included.

Brazil filed an extraordinary appeal to the Supreme Court arguing that the immunity enjoyed by the UNDP was based on a treaty internalized in the domestic order, and since Brazil is bound by those conventional rules, disregarding such obligation would be tantamount to the denunciation of those treaties and would result in the breach of an international obligation. Therefore, the modification observed in customary international law regarding foreign State immunity, which no longer applies to disputes arising out of contracts and relations of purely private law, could not affect the immunity accorded to the United Nations and its agencies.

3 The final judgment of the Cristiano Paes de Castro v. UN and Brazil case (RE 1.034.840)

3.1 The ruling and its importance

On 01 June 2017, the Supreme Federal Court granted the extraordinary appeal 1.034.840, holding that the international organism cannot be sued in court unless immunity is expressly waived. The judgment was based on the precedent set by the Court in 2014 when it jointly ruled on two extraordinary appeals (RE 578.543[3] and RE 597.368[4]) concerning both the same leading case of *João Batista Pereira Ormond v. UN and Brazil*. The reaffirmation of the court's traditional case law was nonetheless relevant because, despite that precedent set in 2014, decisions from some bodies of the Labour Justice had been applying to IOs the restrictive theory of foreign state immunity and considering employment disputes private activities outside the scope of the immunity. In fact, until 2016 the Superior Labour Court was deliberating the revision and cancellation of its Precedent OJ 416-SBDI-1, which provides for absolute immunity to IOs[5].

Moreover, in the judgment of the *Cristiano Paes de Castro v. UN and Brazil* case, the general repercussion system was applied, resulting in a decision binding on the lower courts. Under this system, the Supreme Federal Court settled the following thesis: The international body that has guaranteed immunity from jurisdiction in a treaty signed by Brazil and internalized in the Brazilian legal order cannot be sued in court, except in the case of an express waiver of this immunity. Therefore, although this judgment is by no means innovative, since it reaffirmed the Court's case law and did not address new contentions or developed new views, it is relevant in that it formulated a binding thesis on the lower courts and unequivocally expanded its conclusions to other organizations, not limited to those of the United Nations system.

3.2 The reasoning: the conventional foundation of the international obligation to uphold immunity

The Supreme Federal Court observed that the jurisdictional immunity is not a necessary feature of the

[3] BRAZIL. Supreme Federal Court (Plenary). Recurso Extraordinário. *RE 578.543/MT*. Direito internacional público. Direito constitucional. Imunidade de jurisdição [...]. Rapporteur: Ellen Gracie, May 15, 2013. Available in: https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=630068 Access at: 23 jul. 2021.

[4] BRAZIL. Supreme Federal Court (Plenary). Recurso Extraordinário. *RE* 597.368/MT. Direito internacional público. Direito constitucional. Imunidade de jurisdição [...]. Rapporteur: Ellen Gracie, May 15, 2013. Available in: https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=630069 Access at: 23 jul. 2021.

[5] Precedent 416- SBDI-1 reads as follow: Immunity of jurisdiction. International organization or organism. (DEJT Released on February 14, 15 and 16, 2012) (maintained in accordance with judgment in case TST-E-RR-61600-41.2003.5.23.0005 by the Full Court on 23 May 2016): International organizations or organisms enjoy absolute immunity from jurisdiction when protected by international rule incorporated in the Brazilian legal order, and the rule of customary law regarding the nature of the acts performed does not apply to them. Exceptionally, Brazilian jurisdiction shall prevail in the event of an express waiver of the jurisdictional immunity clause.

IOs. However, in the case of the United Nations and its Specialized Agencies, the 1946 Convention and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies granted immunity from suit among other benefits and were domesticated, respectively, by the Decrees 27.784/1950 and 52.288/1963. Therefore, the Court sided with the approach that does not envisage a customary norm or general principle by which international organizations are to be accorded immunity as a logical necessity for the fulfilment of its purposes[6].

Justice Edson Fachin delivered a partially dissenting opinion since he was not convinced that the basis for the organizational immunity should be restricted to the international agreements. He understood that, in the light of the functional necessity theory, the immunity from suit was a logical outcome of the recognition of international personality. Therefore, he felt that it remained unclear what grounds led the Court to change its view in favour of an exclusive treaty foundation for immunity and considered necessary further discussion in the presential plenary or, secondarily, the adoption of a precedent regarding only the United Nations and its agencies.

Being the immunity of the UN established in a treaty, the judgment reinforced the responsibility that would ensue from the breach of that obligation, which could ultimately exclude Brazil from the United Nations. Additionally, it was highlighted that the contracts entered into by the UN/UNDP were of a special nature, regulated by the Standard Agreement, which provided for arbitration for the solution of eventual disputes.

3.3 Issues avoided in the judgment

Although the parties disputed the applicability of the doctrine of restrictive State immunity to the IOs, the judgment did not make any express reference to this controversy. In the Supreme Court's view, the conventions internalized in the domestic order provided a sufficient basis for immunity[7]. Moreover, despite the observation that the UN made available to its employees an alternative mode of resolution of disputes, the Supreme Court avoided the discussion concerning the right of access to court under Article 5, XXXV of the Brazilian Constitution. Therefore, no inquiry into the effectiveness or the impartiality of the remedy offered by the United Nations was made.

This abridgment of the *ratio decidendi* - ambiguous as to whether the availability of an alternative mode of settlement of disputes is a condition for the fruition of the immunity - gives rise to yet another issue: since the general repercussion regime is designed to unify the interpretation of a given norm under the authority of the Supreme Court, its by-product is the formulation of a summary of the precedent, known as thesis. The thesis formulated in this judgment, however, is far-reaching and fit to embrace any international organization that, by a treaty internalized in the domestic order, was accorded immunity from suit. No reference was made in the thesis to the existence of alternative means to secure redress in the event of a dispute, a mechanism however available in this leading case, but that might be absent before other organizations.

In 1999, in the judgments of *Waite and Kennedy v. Germany* and of *Beer and Reagan v. Germany*, the European Court of Human Rights (ECtHR) held that the observance by the German courts of the jurisdictional immunity of the European Space Agency did not violate the right of access to court, enshrined in Article 6 of the European Convention on Human Rights (ECHR), which was not absolute. The limitation imposed by the immunity was considered compatible with the Convention and did not impair the right of access to court because it pursued a legitimate aim and the means employed were proportionate to the aim sought, since an alterna-

[6] On the existence of a general rule of international law vesting international organizations with privileges and immunities necessary for the fulfilment of their purposes, see HIGGINS Rosalyn. International law and avoidance, containment and resolution of disputes: general course on public international law. *In: COLLECTED Courses of the Hague Academy of International Law*. Hague: The Hague Academy of International Law, 1991. Available in: http://dx.doi.org/10.1163/1875-8096_pplrdc_A9780792324720_01 Access at: 23 jul. 2021.; And the analysis presented by Okeke. OKEKE, Edward C. *Jurisdictional immunities of States and International Organizations*. Oxford: Oxford University Press, 2018. p. 253-256.

[7] Fernando Lusa Bordin argues that it is possible to apply to international organizations, by analogy, the rules of State immunity, being the starting point "that an OI enjoys the same level of immunity as the individual States on behalf of which it acts." BORDIN, 2018 *apud* BUSCEMI, Martina; REGHIZZI, Zeno Crespi; RAGNI, Chiara. Immunities of organizations under international law: reflections in light of Jam v International Finance Corporation. *QIL*, n. 72, p. 1-3, 2020. Available in: http://www.qil-qdi.org/litigating-jurisdiction-before-the-ecthr-between-patterns-of-change-and-acts-of-resistance/ Access at: 23 jul. 2021. p. 28.

tive dispute mechanism was available to the employees[8]. In 2013, in the judgment of the *Stichting Mothers of Srebrenica* case, the ECtHR held that in *Waite and Kennedy and Beer and Regan* the availability of alternative means to settle the dispute was considered a material factor in determining if immunity was compatible with Article 6, but the absence of such mechanism did not, *ipso facto*, constitute a violation of the ECHR[9]. In any event, the *Waite and Kennedy* rationale became very influential, and some European domestic jurisdictions rejected the claim of immunity because of the failure of the organization to provide alternative and adequate means to set disputes[10].

The literality of the thesis might warrant the view that, for the Brazilian Supreme Court, the stance adopted by the European Court of Justice in *Waite and Kennedy,* is not applicable, but a clear-cut ruling on this matter would be preferable to this conjecture and more suitable to a judgment of a binding precedent.

In Brazil, the constitutional guarantee of access to a judicial remedy is a much celebrated and frequently invoked right, and one would expect that a heated debate would ensue regarding whether the international obligation to observe the jurisdictional immunity would breach the constitution. In *Pistelli v. European University Institute* (2005), the Supreme Court of Cassation of Italy considered that the treaty provisions conferring immunity to the European University Institute did not infringe the Constitution but noted that an alternative remedy to a judicial proceeding was available[11]. Two years later, in *Drago v. International Plant Genetic Resources Institute (IPGRI)* (2007), immunity from suit was denied because of the failure of the organization to provide an independent and impartial alternative remedy, and it was underscored that the treaties and national norms of implementation must be in conformity with the Italian constitution and should not prevail over the principles of the constitutional legal order of the host State[12]. In this later case, the remedy available did not satisfy requirements of independence and impartiality set in the Headquarters Agreement, rendering it incompatible with the Constitution.

Before the trial and the appeal courts, Mr. Paes de Castro had contended that the claim of immunity raised on behalf of the UN breached his right to a judicial remedy. The contention, however, made no reference to the corresponding human right of access to a fair trial and focused on the primacy of the constitutional fundamental right. The Superior Labour Court, in turn, granted the appeal solely on the basis of its precedents. This, coupled with the fact that the appellee's brief to the Supreme Court only raised admissibility issues, apparently allowed the Supreme Court to render a more concise judgment, without delving into these far more controversial discussions which were nonetheless addressed in other precedents, namely, the *João Batista Pereira Ormond v. UN and Brazil* and the *Genny de Oliveira v. Embassy of the German Democratic Republic* cases. A similar approach rooted on the domestic statutes and avoiding the issue of the right of access to justice was recently observed in the United States Supreme Court in *Jam v. International Finance Coorporation*[13].

3.4 The clarification offered by previous precedents.

It is worth mentioning that the judgment of the extraordinary appeal 1.034.840 was delivered only three years after the leading case concerning João Batista Pereira Ormond was concluded. Conceivably, because

[8] EUROPEAN COURT OF HUMAN RIGHTS. *Case of Waite and Kennedy v. Germany (Application No. 26083/94)*. Strasbourg, 1999. p. 59-74.

[9] EUROPEAN COURT OF HUMAN RIGHTS. *Case of Stichting Mothers of Srebrenica and Others v. the Netherlands (Application. No. 65542/12)*. Strasbourg, 2013. p. 163-165.

[10] See *African Development Bank v. X,* Court of Cassation. Appeal Judgment 04-41012, (2005 -France); *Drago v. International Plant Genetic Resources Institute,* Supreme Court of Cassation. Appeal Judgment No. 3718, (2007 - Italy); *General Secretariat of the ACP Group v. Lutchmaya,* Court of Cassation. Appeal Judgment No. C 03 0328 F (2009 - Belgium); *Western European Union v. Siedler* Court of Cassation. Appeal Judgment No. S04 0129 F (2009 - Belgium).

[11] *Pistelli v. European University Institute,* Supreme Court of Cassation, Appeal Judgment No. 20995 (28 October 2005), Guida al diritto 40 (3/2006); ILDC 297 (IT 2005), translation provided in the International Law in Domestic Courts database. Reported by Massimo Iovane: OXFORD PUBLIC INTERNATIONAL LAW. *Oxford Reports on International Law in Domestic Courts*. Available in: https://opil.ouplaw.com/page/212 Access at: 23 jul. 2021.

[12] *Drago v. International Plant Genetic Resources Institute (IPGRI)*, Supreme Court of Cassation, Final Appeal Judgment No. 3718 (19 February 2007), Giustizia Civile Massimario 2007, 2; ILDC 827 (IT 2007), translation provided in the International Law in Domestic Courts database, reported by Alessandro Chechi: OXFORD PUBLIC INTERNATIONAL LAW. *Oxford Reports on International Law in Domestic Courts*. Available in: https://opil.ouplaw.com/page/212 Access at: 23 jul. 2021.

[13] *Jam et al v International Finance Corporation*, US Supreme Court (27 February 2019) No 17-1011.

the Supreme Federal Court maintained its stance on the subject matter and made express reference to that previous judgment, the reasoning was quite succinct. Such explicit reaffirmation of the Court's case law makes it even more important to seek in previous precedents the solution for the contentions raised during the litigation that were not addressed in this later judgment.

The *João Batista Pereira Ormond* case demonstrates in more depth the Supreme Court's view on these issues and was, in turn, largely based on the previous *Genny de Oliveira v. Embassy of the German Democratic Republic* case, however making the necessary distinctions between foreign State immunity and organizational immunity.

In 1989, in the judgment of the *Genny de Oliveira* case, for the first time the Brazilian Supreme Court adopted against a foreign State the restrictive immunity. This award didactically explored the evolution that the foreign State immunity experienced and the fact that its sole basis was the customary international law, which had evolved from absolute to restrictive immunity. However, several litigants and the Labour Justice itself saw fit to apply that ruling to international organizations.

The opinion delivered by Justice Francisco Rezek, followed unanimously by the Court, held that the customary norm according to foreign States absolute immunity ceased to exist due to the emergence of the position that there should be exceptions to the privilege. Regarding the argument that Article 114 of the Constitution had abrogated the immunity from suit on labour disputes, the opinion underscored that that change had not excluded the possibility that such competence remained unexercised if vis-à-vis an immunity rule in force. Finally, it rebutted the contention that the right of access to the Judiciary had done away with the immunity. It was observed that in two previous cases the Supreme Court had held that this guarantee is set out under the presumption that the defendant can be subject to the Brazilian jurisdiction, since the constituting-making power may not make promises at the expense of sovereignties not bound to the Brazilian sovereign authority.

Therefore, the *Genny de Oliveira* case clarifies the Supreme Court's view in three crucial issues. First: Article 114 of the Constitution is not a rule establishing jurisdiction, but a rule of competence. Therefore, the existence of jurisdiction is a precondition for the exercise of competence. In the case of non-justiciability, the norm of competence is simply not applicable, but not violated. The non-exercise of competence arises from the sovereign decision of the State to refrain from subordinating certain subjects of international law to its jurisdictional power. Second: the reason why the Court denied the immunity asserted by the German Democratic Republic was the erosion of the basis for foreign State absolute immunity, a reasoning inapplicable to IOs that have secured immunity in a written norm. Finally, the argument of breach of the right of access to court was reject because such right presupposes that the case is justiciable, and that Brazil had not voluntarily yielded its sovereign power of jurisdiction in favour of certain subjects of international law.

In the *João Batista Pereira Ormond* judgments, the Supreme Court clearly declared that the precedents on the jurisdictional immunity of IOs have no bearing with the sovereign immunity. Moreover, in 2014 the Court adopted a harsher language that openly stated that many rulings from different courts invoking the *Genny de Oliveira case* had mistakenly declared that the Supreme Federal Court applied to both States and international organizations the same solution. The judgment underscored that the adoption of the restrictive doctrine could not have undermined the respect that Brazil owes to all international agreements and treaties regularly celebrated. This precedent was also much more eloquent regarding the argument of breach of the right of access to courts. It weighed that the UNDP contracts stipulates that disputes will be resolved by an arbitration body composed of one representative of the executing national agency and another from the UNDP.

Therefore, the combined reading of the Supreme Courts judgments on the cases concerning *Cristiano Paes de Castro* (2017) and *João Batista Pereira Ormond* (2014) illustrates the constant and now set understanding of the Supreme Federal Court on the issue of jurisdictional immunity of IOs, the binding conclusions being: immunity accorded to an international organization by international agreements, as long as duly internalized in the domestic order, is to be respected, except in the case of an express waiver.

Other solid legal reasonings present in the case law, albeit without express binding force are: the doctrine of restrictive foreign State immunity is observed in Brazil but is not applicable to international organizations, whose immunity must be established in an internatio-

nal norm incorporated in the domestic order; the 1946 Convention, which vested the United Nations with immunity from suit, has the force of ordinary laws and is applicable to employment disputes; Article 114 of the Constitution stipulates only the competence of the Labour Justice, but this competence may remain unexercised if an immunity rule in force is invoked; the constitutional right of access to court does not exclude the immunity properly granted, since this right is conferred assuming that Brazil can exercise jurisdiction over the defendant.

Regarding the availability of adequate alternative means for the resolution of disputes, although the Court did rule on this issue in a general manner, limiting the discussion to the reality of the UN, the opinions voiced during the oral debates, as well as the outstanding importance given to the conventional basis suggest that it should not be considered a condition for the enjoyment of the immunity.

4 The developments of the judgment of The *Cristiano Paes de Catro* case before the Labour Justice

In Brazilian procedure law, the legal consequences of a ruling rendered by the Supreme Court in the regime of general repercussion are considerable[14]: the President or Vice-President of the lower court shall decline to hear an appeal filed against a judgment that is in accordance with the thesis adopted by the Supreme Federal Court or shall remand the case to the judging body to carry out a retraction judgment if the appealed judgment diverges from the thesis adopted by the Supreme Court. Those consequences, aimed at standardizing the subsequent decisions, should suffice to settle the matter.

Indeed, after the judgment of the *Cristiano Paes de Castro* case, several rulings were given by the Superior Labour Court, declining to hear appeals that contested the immunity of the UN[15]. Additionally, the Superior Labour Court tried actions for relief from judgment, vacating unappealable judgments that had submitted the United Nations to Brazilian jurisdiction, indicating that, for the time being, the issue of organizational immunity is settled.

However, a recent development before the Superior Labour Court suggests that a different controversy might have risen. The Court applied the conclusions of the thesis to a case of sovereign immunity. Despite quoting the precedent, which expressly referred to organizational immunity, the decision considered that the case under appeal concerned a situation akin to that precedent. In the Superior Labour Court's view, the thesis set by the Supreme Court was also applicable to foreign States, inasmuch as they, just like international organizations, possessed international public legal personality. The judgment became final on June 18th, 2020, with the potential of blurring the clarity that the RE 1.034.840 sought to achieve when it distinguished the basis on which State and organizational immunity are accorded. At worse, it might re-open the discussion on the scope of the foreign State immunity, well settled in the Brazilian case law since 1989.

5 Concluding remarks

The judgment of the extraordinary appeal on the *Cristiano Paes de Castro v. United Nations and Brazil* case is unequivocally relevant because of the recognition of general repercussion and consequent binding effect of the thesis set, being that the international body that has been granted immunity from jurisdiction in a treaty internalized in the Brazilian legal order cannot be sued in court, except in the case of an express waiver. This ruling should offer legal certainty within this framework but alone is not sufficient to quell some lingering arguments that are typically raised in immunity disputes, such as the right to institute judicial proceedings to pro-

[14] In Brazilian procedure law, the extraordinary appeal is filed before the President or Vice-President of the court that has rendered the appealed judgment for a previous ruling on its admissibility. Brazilian Code of Civil Procedure, Articles 1029 and 1030. BRAZIL. *Lei n. 13.105, de 16 de março de 2015*. Código de Processo Civil. Available in:http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm Access at: 23 jul. 2021.

[15] See Superior Labour Court (Mandatory review/Appeal on action for relief from judgment) *Brazil and United Nations United/ Nations Development Programme (UNDP) v. Juraci de Ozeda Ala Filho,* (2018) RO-22300-77.2009.5.23.0000; Superior Labour Court (Appeal judgment) *Brazil and United Nations/United Nations Development Programme (UNDP) v. Cláudia Maria Serrador Capella,* (2019) RR-10141-35.2004.5.10.0002; Superior Labour Court (Mandatory review/Appeal on action for relief from judgment) *Brazil and United Nations/ United Nations Educational, Scientific and Cultural Organization (UNESCO) v. Rolane Elias Silva,* (2019) ReeNec e RO-4064-06.2010.5.10.0000.

tect one's right or the requirement of existence of an alternative mechanism for the solution of disputes as a condition for the fruition of the benefit. Recourse to other precedents in which those questions were dealt with becomes then necessary for a complete understanding of the Supreme Court's caselaw. In the light of the fact that divergence of precedents before the lower courts stemmed from inconsistent interpretations of former Supreme Court's precedents on immunity, regard should have been given to the elaboration of a judgment thorough, didactic, and shielded from misinterpretation. By enunciating less than it had done before, albeit keeping consistency with the previous precedents, the Court missed the opportunity to construe a more complete biding precedent which would underscore the difference in foundation and treatment to be given to foreign State and organizational jurisdictional immunity, a still surprisingly enduring source of conflict.

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