The Curious Case of Changri-La and Jurisdictional Immunities

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On September 24, 2021, the Brazilian *Supreme Tribunal Federal* (STF) delivered the much-awaited ruling in the ***"Changri-la" case***. The case is based on and named after the fishing boat sunk off the coast of Rio de Janeiro by a German submarine during the Second World War, in 1943. A lawsuit was filed by five heirs of one of the victims against Germany for damages.

With a narrow majority of six votes to five, the STF affirmed that Brazilian judges can exercise their jurisdiction over the conduct of Germany, enunciating the principle of law according to which "the unlawful acts committed by foreign states in violation of the rights humans do not enjoy immunity from jurisdiction" (**p. 30** – translation by the author). The judges have **rooted their argument** in the Brazilian Constitution, whose Art. 4(II), expressly provides for the prevalence of human rights as a fundamental principle on which the international relations of the Brazilian State are based.

After examining these considerations, this piece then returns to discuss the absolute nature and possible exceptions or limitations to the **customary rule** on the **immunity of the foreign State** from the civil jurisdiction of the State where international offences had been committed during the Second World War. To analyse this concept, this piece will discuss the tensions between constitutionalist dualism and internationalist monism.

This contribution aims to offer a critical analysis of the content of the STF ruling, building on previous publications on State Immunity (see **here** and **here**). Some peculiar aspects of this case will be highlighted, with particular reference to the qualification of attribution of the conduct to Germany and the relationship between human rights and the immunity law. Lastly, an attempt will be made to place this jurisprudential precedent in the debate on the dynamic evolution of the law on State immunity, with particular regard to the criticalities and innovative potential of the decision in question.

The Sinking of the "Changri-La" and related Legal Events

In June 1943, a fishing boat named "Changri-la" was **sunk** in Brazilian territorial waters of Rio de Janeiro by the German submarine U-199. All ten people on board died in the attack. Shortly thereafter, the submarine in question was identified and torpedoed by a US military ship, which then rescued the German crew members as prisoners of war.

In 2001, based on the information from the United States, the Brazilian *Tribunal Marìtimo* ("the Tribunal") was able to **fully conduct** a factual assessment of the incident, while a first proceeding had been closed in 1944 due to lack of evidence. According to Art. 16(a) of **Law No. 2.180/54**, the Tribunal had the competence to

ascertain the facts regarding navigation accidents involving merchant marine vessels, including fishing vessels. Furthermore, the Tribunal also considered suggesting the government in favour of adopting reparations of a pecuniary or symbolic nature (**Article 16(g)**). In the present case, the Tribunal decreed that the sinking of the fishing boat would qualify as an intentional act of war by Germany and proposed to the Brazilian government to grant "an honorary and pecuniary reward" to the families of the victims (**p. 46**). Following this proposal, in 2004, with a public ceremony, the names of the ten crew members of the fishing boat "Changri-la" were included in the World War II memorial, *Panteão dos Heróis de Guerra* in Rio de Janeiro (**p. 35-36**).

Nonetheless, in 2007, five heirs of one of the sinking victims, Vieira de Aguiar, filed a compensatory action against Germany before the 28th Federal Court of Rio de Janeiro (**para. F5**). In a diplomatic note dated March 23, 2007, Germany invoked its judicial immunity, specifying that the conduct in question had to qualify as *acta iure imperii* and that the attempt to notify the summons to court at the German embassy **constituted a violation** of Art. 22 of Vienna Convention on Diplomatic Relations, 1969.

After a long series of petitions, interlocutory rulings and rejections, the applicants' position was finally accepted by the STF with the judgment in question. The STF, therefore, quashed the second-degree decision which had recognized the absolute immunity of Germany, remitting the settlement of the damage suffered by the victims to the Court of Appeal.

The Decision of the Brazilian Federal Supreme Court

The judgement, drafted by Justice Fachin, is divided into four main points:

1. Immunity from the jurisdiction of foreign states in Brazilian law(pp. 1-4);
2. Withinthe analysis of the present case: Illegality of the conduct and violation of human rights(pp. 4-8);
3. Immunity from State jurisdiction by unlawful acts involving the violation of human rights(pp. 9-24);
4. Exclusion of state immunity for violation of human rights(pp. 24-30).

The text of the judgement is accompanied by the three separate/dissenting opinions (*voto-vogal*) of judges Mendes, Marco Aurelio and De Moraes, who **affirm** the absolute nature of the jurisdictional immunity of States for acts *iure imperii*, among which acts of war must be included.

Before proceeding, however, it is necessary to examine STF's application of the judgement given by the International Court of Justice (ICJ) in ***Germany v. Italy***. First of all, the STF refers to the arguments of the Attorney General (*Procuradoria-Geral da Repùblica*) who, in turn, had made extensive reference to the writings of a part of internationalist doctrine concerning the jurisdictional immunity of States (See **here**, **here**, and **pp. 21-22** of the judgement). According to the Attorney General, the conservative and formalist approach followed by the ICJ had not given due consideration to the consequences of its

decision on the rights of the victims. The ICJ also ignored the "progressive decline of the [law on] immunity which derives from the limitation of state sovereignty in the face of the emergence of the individual's international subjectivity" (**p. 22**).

Moreover, the problem of the authoritative force of the ICJ judgement is solved by proposing a strictly literal interpretation of the Statute of the Court, because, under Article 59, the judgements have binding effect only between the States in court and are limited to the question submitted to the Court (p. 22). As is evident, this reading does not take into account the consideration of ICJ decisions as sources of international law (See **here**). In any case, to highlight the difference between the question brought to the attention of the ICJ in the case *Germany v. Italy* and the present case, the STF points out that Italy had received compensation from Germany "by way of a global solution", deriving from the 1963 bilateral agreement. On the other hand, no form of reparation has ever been offered by Germany for offences committed in the territorial sea of Brazil (p. 23).

Finally, the Brazilian judges, citing broad passages of the **dissenting opinion** by Judge Cançado Trindade in ***Germany v. Italy***, formulate the following high-sounding statement of principle: "a crime is a crime" (p. 30). Therefore, according to the STF, the distinction between *acta iure imperii* and *iure gestionis* is not relevant in the present case. In conclusion, the STF establishes that the sinking of the "Changri-la" is a crime, committed in violation of human rights. Since Brazilian constitutional law expressly recognizes the prevalence of human rights as a general principle governing international relations, judicial immunity must yield to any conduct of the foreign state that violates human rights (p. 30).

The judgement is complex since the argument of the STF proceeds erratically and is often characterized by strong statements of principle, but not always supported by equally solid arguments. Furthermore, as will emerge later, the categories of international law are not always used rigorously, and the jurisprudential precedents cited are sometimes inconsistent with the conclusions reached by the Court.

The Difficult Qualification of the International Offence

One of the most controversial aspects of the ruling in question concerns the classification of the sinking of the fishing boat "Changri-la" as an international offence. For the Brazilian judges, this conduct constitutes a violation of various international obligations, however significantly *heterogeneous* between them.

According to the STF, the attack on the fishing boat by the German armed forces constitutes a violation of the law of armed conflicts and in particular of the principle of distinction between combatants and civilians (judgment, pp. 7-8). In a somewhat convoluted way, the Brazilian judges analyze some sources of international law regarding armed conflicts that would codify this principle. This selection, however, does not appear to be entirely relevant to the present case. In fact, the SFT first refers to **Article 46** of the Hague Regulations of 1907, which requires respect for the honour and rights of the family, the life of individuals and private property. However, it must be remembered that this

provision concerns the regulation of land warfare in cases of military occupation. Therefore, it is disputable that it can be applied to the episode of maritime war that is the subject of this judgment.

The **Hague Convention of 1907** appears more relevant regarding certain restrictions on the right of capture in naval warfare. Although it is not explicitly mentioned by the STF, it is useful to remember that Article 3 of that Convention effectively protects fishing boats from capture and in any case from use for military purposes (See **here**). At this point, the STF could have deepened its reasoning on the existence of a broader rule of a customary nature on the prohibition of the killing of civilians at sea, as well as on its validity at the time of the facts (See **here**, para. 75 ff).

Instead, the Brazilian judges move to the field of international criminal law and passed to examine Article 6(b) of the Statute of the International Military Tribunal of Nuremberg of 1945, which qualifies the killing of *persons at sea*. However, it does not seem negligible that the provision in question entered into force after the contested facts; this above all in consideration of the fact that the Brazilian judges completely neglect to argue the intertemporal validity of the Nuremberg principles (See **here** and **here**).

Lastly, the STF also qualifies the German conduct as a violation of human rights and in particular of Article 6 of the International Covenant on Civil and Political Rights of 1966. Again, the issues of *intertemporal law* are considered irrelevant by the STF.

Therefore, the Brazilian judges operate a singular mix between the sphere of violations of the law of armed conflicts, war crimes and violations of human rights. This overlap pervades the entire judgement and makes it particularly complex to fully understand the logical-juridical argument. Indeed, the STF repeatedly states that the conduct in question is to be qualified as a crime ("a crime is a crime", p. 30); however, the Brazilian judges also ruled that the acts of the foreign state constitute violations of human rights, against which the immunity of Germany must yield (p. 27).

The Exclusion of Immunity in the Event of Human Rights Violations: A "Zone of Indifference"

The fourth point of the judgement focuses precisely on the issue of violations of human rights and its reading leaves even more perplexing as to what is the obligation (or obligations) whose violation is highlighted in the present case. In this section, the STF deals with the victim's right to truth and access to justice.

In particular, the STF states that denying victims the right to the truth or requiring them to turn to German courts would create anomie, a non-law, a "state of exception", that is, a "zone of indifference to the law within the own right" (pp. 24-25). The origin of this argumentative point must be identified in the thought of the philosopher Giorgio Agamben, widely quoted in the judgement (**State of exception, Turin**, 2003, pp. 33-34):

"[i]n truth the state of exception is neither external nor internal to the legal system and the problem of its definition concerns precisely a threshold, or a zone of indifference in which inside and outside are not excluded, but are indeterminate. The suspension of the law does not mean its abolition and the area of anomie that it establishes is not (or, at least it does not pretend to be) without relation to the legal order"

This "zone of indifference", determined by the lack of jurisdiction due to the immunity of States, would not be admissible in Brazilian law when human rights violations are at stake. And, in the present case – continues the STF – the right to life, the right to truth and the right to access to justice must prevail over the rule of state immunity under Art. 4(II), of the Brazilian Constitution, as will be better illustrated in the following paragraphs.

The STF, therefore, refers to a series of human rights violations, but it is not clear whether these violations have already occurred as a result of the German conduct or would occur if Germany were granted immunity from jurisdiction.

The Possible Contribution of the Judgement in the evolution of the Law on Immunity

Having highlighted some of the main critical issues in the arguments of the Brazilian judges, we will now focus on how the judgement in question can be placed in the broader panorama of the dynamic evolution of the customary rule on the immunity of States which, according to some internal courts, would be an act, precisely due to the effect of a constitutionally oriented interpretation of the aforementioned norm. The STF states that the question of the nature and possible limits of the immunity rule "is still on the agenda of international law" (p. 17).

A similar concept can be found, for example, in ***OOO et al. v State of Japan*** of January 2021 – cited by the Brazilian judges – with which the Seoul District Court ordered Japan to pay a substantial compensation in favour of the victims of crimes of sexual slavery perpetrated by the Japanese army during the Second World War (for some reflections on this judgement, see **here**). According to the South Korean judges, "the doctrine of state immunity is not permanent nor static" (section 3 (C), n. 3.3). Also, in this case, the limit to the application of the rule on the immunity of States is identified in a constitutional provision, i.e., the right of access to justice provided for by Article 27 of the **Korean Constitution**.

Although the STF fails to mention it, the well-known judgement in **238/2014** of the Italian Constitutional Court must be recalled, which by applying the controversial theory of counter-limits, did not give entry into the Italian legal system to the customary norm on immunity from civil jurisdiction for *acta iure imperii* which consist of war crimes and crimes against humanity, harmful to the inviolable rights of the person. As is known, according to the Italian Constitutional Court, if no other form of judicial reparation of the violated fundamental rights is envisaged, the customary rule is in contrast with the fundamental principle of the judicial protection of fundamental rights ensured by the Italian Constitution in Articles. 2 and 24 (on the judgement and its implications, see **here**, **here**, **here** and **here**).

It should be noted here, however, that the reasoning developed by the STF seems to want to push this practice, already isolated and criticized by many, towards an even more avant-garde approach. The judges stated that, under the aforementioned art. 4, paragraph II of the Brazilian Constitution, the customary norm on the immunity of States from foreign jurisdiction finds a wide limit in case of violations of human rights.

Furthermore, the STF does not consider the relevance of the existence of alternative remedies available to victims, or access to the judge in other jurisdictions (See **here**). Indeed, the Brazilian judges fail to analyze the argument put forward by the applicants regarding their inability to bring the same compensation action against Germany before the German courts due to their precarious economic situation (See **here**, para. F5). Furthermore, the STF only deals *incidenter tantum* the question of the non-existence of post-war agreements between Brazil and Germany, thus depriving one's reasoning of greater argumentative force (for an in-depth analysis on the subject, see **here**).

The STF seems to want to find the basis of its reasons in the arguments already expressed by other national courts (such as in the cases *Ferrini*, *Distomo*, *Comfort Women*) but ends up proposing one substantially new argument for international law, that the customary rule on state immunity should yield in all cases of human rights violations. Ultimately, such a hypothesis derives only from the application of Brazilian constitutional law, and not from a (real or presumed) dynamic evolution of international law on the matter. In this case, too the STF makes a statement of principle when it maintains that the Brazilian Constitution codifies an "*explicit normative option" in favour of a new paradigm of international relations in which "no longer the sovereignty of states, but human beings are predominant*" (p. 28).

Conclusion: A difficult balance between Ambitions and Concrete Risks

According to the Brazilian judges, the rule on the jurisdictional immunity of states would find an extensive exception in the case of failure to respect human rights and no longer only in the event of serious violations of these rights or violations of binding law. As highlighted, this reconstruction is at the forefront concerning national jurisdictions regarding possible limitations to the rule on State immunity.

Given the critical issues identified so far, it does not appear easy to assess the impact that this judgement may have in terms of the progressive development of international law in the matter of immunity of the foreign state. The longing of Brazilian judges for the affirmation of a new normative paradigm of international relations, based on respect for human rights, appears to lack the support that more rigorous use of the categories of international law could have provided.

Finally, the risks of such a "flight forward" appear quite evident. Think of the potential negative consequences of this ruling, both in terms of direct repercussions on diplomatic relations between Brazil and Germany and for the maintenance of international order. Furthermore, it does not appear unlikely that Germany will attempt to bring the matter to

the ICJ. If Brazil agrees, such a dispute could provide the Court with the opportunity to re-propose the interpretation of the rule on State immunity already affirmed in *Germany v. Italy*.

In making this difficult balance between the potential and risks of downsizing immunity in a perspective of the protection of human rights, much will depend on the reaction of States and on the contribution of doctrine which, in the opinion of the writer, should not be limited to looking with excessive formalism and conservatism the aspiration of the Brazilian judges towards the affirmation of a new normative paradigm of international relations.

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