

The contribution of international courts and tribunals to the methodology of international law

OC - (ILA-14174) - BALANCING STATE IMMUNITY WITH IUS COGENS AND HUMAN RIGHTS IN THE CONTEXT OF INTERNATIONAL CASE LAW

Lourenço Vilhena De Freitas (Portugal)¹

1 - University of Lisbon Law School

Lourenço Vilhena de Freitas

CV

Lourenço Vilhena de Freitas

1. Professional career

1.1. University career

Tenured Associate Professor of Law (Public Law, Administrative, International, European and Constitutional Law) of the University of Lisbon Law School (FDUL), since 2019, and previously Assistant Professor since 2011. Teaching Assistant since 1996.

Phd 2011.

Regent or former Professor of: International Law Organizations, European Human Rights, European Law Litigation, Public Law Contracts, Administrative Procedure, Administrative Organizations, Public Governance, Urban and Town Planning.

Member of the Scientific Council of the Law School.

Participated in 80 jury of master thesis, and 2 phd jury. Currently supervised 1 phd thesis and 6 master thesis.

Coordinated or cos-coordinated 8 scientific conferences.

Former Invited Professor in several African Lusophone Universities (Agostinho Neto/Luanda, José Eduardo dos Santos/Huambo, Mindelo, Lubando, Cabinda, Guiné-Bissau).

Former Invited Professor at ISCSP (Political and Social Sciences Institute University of Lisbon, as regent of Administrative Law. Former Invited Associate Professor at ESAI and Teaching Assistant at Moderna Law School. Former invited Professor at Lusófona.

Former peer reviewer of the Lisbon Law Review.

1.2. As Lawyer

Lawyer, Equity Partner at Cuatrecasas, Gonçalves Pereira.

1.3. Other activities

Arbitrator, member of the List of Arbitrators of Arbitration Center of the Câmara de Comércio e Indústria de Lisboa, of CAAD (Administrative Law arbitration center), and of APMEP (Association of public procurement center).

Member of UN SCAD Roster.

1.4. Other previous activities

Advisor Secretary of State of the Presidency of the Council of Ministers, Advisor/acting Chef de Cabinet Secretary of State of Public Administration, Advisor Secretary of State for Tax. Former member of the advisory Center of the Tax Ministry.

2. Publications:

Published 31 books, chapter of books and papers and more 5 are about to be published.

2.1. Publication in International or European Law

In the field of the International or European Law, one can highlight:

- Os Contratos de Direito Público da União Europeia, No Quadro do Direito Administrativo Europeu, Vol. I, Direito Administrativo da União Europeia, Coimbra, 2012 and Os Contratos de Direito Público da União Europeia, No Quadro do Direito Administrativo Europeu, Vol. II, O Regime dos Contratos de Direito Administrativo da União Europeia, Coimbra, 2012 (European Commission Public Contracts, phd Thesis, II vol., published in Wolters Kluwer).
- A actividade administrativa da Autoridade Internacional dos Fundos Marinhos no Quadro do Direito Administrativo Loba, in La Gobernanza de los Mares y Océanos, 2012, org. Pueyo Losa, Wladimir Brito, Ponte Iglesias e Vale Pereira, Salamanca, 2012, pp. 91-108 (The activity of International Authority of the Sea Bed, its contracts and GAL).
- The judicial activism of the European Court of Justice, in Judicial Activism an Interdisciplinary approach to the American and European Experience, coord. Luis Pereira Coutinho, Massimo La Torre e Steven D. Smith, 2015.
- Comments on Administrative Self-Regulation (Innerecht) and GAL, E-publica, n.º 6, 2015.
- XVIII Congresso da FIDE sobre questões 13 e 14, respectivamente "Is your country subject to international obligations involving the protection of property or the protection of foreign investments? If so, please identify them" e "What position do the Courts in your country take on how to deal with conflicting obligations of European Union law and international law (including bilateral agreements with non-EU Member States)?"
- The Comparative Constitutional Foundations of Private-Public Arbitration in Portugal, with Fausto de Quadros, to be published in Oxford University Press in a book coord. by Prof. Stephan Schill.
- A Ordem de Malta (Order of Saint John/Malta), for the Luso-Braslian Encyclopedia (also awaiting publication).

2.2. Other relevant publications

Also relevant are:

- Poder de Modificação Unilateral, Lisboa, Lisboa, 2007, Master thesis published.
- Direito Administrativo da Energia – Introdução, Lisboa, 2013 (book on Administrative Energy Law).
- Direito dos Contratos Públicos e Administrativos, Lisboa, 2014 (Lições ao Mestrado) (book on Public Law Contracts)
- Direito do Procedimento Administrativo e das Formas de Actuação Administrativas, Lisboa, 2016 (Lições ao Curso de Mestrado) (book on Public Procedure and Administrative Action)
- Direito Administrativo das Privatizações, in Tratado de Direito Administrativo Especial coord. Paulo Otero e Pedro Gonçalves, Coimbra, 2017 (Privatization Administrative Law, Chapter of the VII volume of the Treaty of Special Administrative Law coord. Paulo Otero and Pedro Gonçalves).

3. Conferences participations

Participated in 70 conferences, 12 international conferences, namely:

- Luso-Spanish Conference of Professors of International Law, June 2012, regarding the Contracts entered into by the Sea Bed Authority in the Area.
- Conference Union International des Avocats, May 2013, regarding Streamlining the procedures in the new European procurement directives.
- International Conference on Judicial Activism, in ICJP, May 2014, regarding The European Court of Justice and the limits to judicial activism: differences between the limits to activism in the light of the principles and constitution of the European Union and in the context of a constitutional state.
- Luso-Angolan Conference on Arbitration, co-organizer with Fausto de Quadros, Prof. Doutor Carlos Feijó e Dr. João Tiago Silveira.

- IX Luso-Spanish Conference of Administrative Law Professors, Salamanca, 7 e 8 de Novembro, portuguese rapportuer.
- International Conference in Cabo Verde about lusophone public procurement, 19 November 2014.
- International Conference in Universidade do Lubango, 2014, intervention regarding municipalities.
- Organisor Lisbon Conference on Energy Law and participation regarding capacity markets, November 2015.
- II International Conference about lusophone Public Procurement in Luanda, nos dias 16, 17 and 18 of November, about public-private partnerships regime,
- Conference in London regarding The new tendencies of the energy law and infrastructres regime in Portugal, organized by Gide, Lorete Noel, Cuatrecasas Gonçalves Pereira, Gleiz Lutz and Chiomenti, January 2017
- Conference on BREXIT – Challenge or end of EU Constitutional Law? Moderator in the theme The Future of EU Policies after Brexit,– European Monetary Union being rapporteur: Jean-Victor Louis and commentator: Stefan Griller, June 2017.
- 29.º International Congress on Energy Law org. by Dutch Energy Law Association, Universidade of Groningen and Scandinavian Institute for Maritime Law The Hague, January 2018, regarding hydric concessions in Portugal.

Abstract

ABSTRACT

Lourenço Vilhena de Freitas

Balancing state immunity with *ius cogens* and human rights in the context of international case law

The paper aims to analyze the developments concerning state immunity in the case law of both ICJ and ECHR (and also some national jurisdictions).

It focus on the tension between the traditional view of state immunity of sovereign acts and human rights and breach of *ius cogens*.

It will analyse: i) the relevance of the Greek (Distomos, though differently in Margellos) and Italian cases (where state immunity was questioned due to breach of mentioned *ius cogens*/human rights) and Pinochet case ii) the restrictive trend of the scope of state immunity due to the “crime exception” theory (also in light of the contributions of the ILCSR on “Immunity of State officials from foreign criminal jurisdiction” and of the working groups within the ILC and of the Sixth Committee of the GA).

The main focus will be on the relevance of balancing principles: immunity vs. *ius cogens*/human rights. ICJ rejected this balancing reasoning (raised by Italy) in the ICJ Case Germany vs. Italy; Greece (2012), due to the very nature of the state immunity (avoiding trial); and also several states upheld a similar view. Nevertheless, a balancing restrictive approach of Sate Immunity can create in the near future a precedent of customary basis and is based upon the Al-Adsani and Jones ECHR cases (where immunity was upheld, but instead the relevance of balancing immunity with other principles of International Law - “proportionate restriction” – was accepted).

Palavras-chave : Immunity, iuscogens, state