



THE ALLEGED POSSIBILITY OF STATE IMMUNITY WAIVER FOR BREACH OF *JUS  
COGENS* HUMAN RIGHTS RULES BY ACTS *JURE IMPERII*

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## Executive Summary

This thesis will consider the doctrine of state immunity for acts *jure imperii* and its application in situations where grave human rights breaches have taken place. In the wake of new international law developments on this issue I will reassess the existing understanding of the doctrine of state immunity and will look into a possibility to restrict a foreign state's immunity unilaterally by a forum state. Additionally I will consider some alternative ways for victims to obtain remedy in situation where it is impossible to bar the perpetrator from enjoying its sovereign immunity.

The research mainly focuses on the analysis of a case law of international and domestic tribunals. Recent International Court of Justice decision on the *Jurisdictional Immunities* case has devaluated a number of approaches to the issue at stake. Arguments that are still applicable are developed by tribunals and are still to find their way into scholastic papers.

The research shows that international law has not yet recognize a right of a forum state to restrict foreign state's immunity due to the fact that the latter has violated human rights law norm even of a *jus cogens* character. Single examples of such restrictions in a state practice are not spread enough to satisfy the criteria of customary international law. There are some promising arguments that may develop into a positive norm of international law at some point. Unfortunately, this does not seem to take place any time in the near future.

Where the perpetrator is reluctant to provide remedy for victims, the only way is to resort to diplomatic measures. Individuals have little rights and possibilities to influence foreign states and bring impunity to an end. It is the task of their national states to assist them. Even though a decision to provide diplomatic protection is a matter of political will of a state, its nationals have some legitimate expectations and in most of the cases these decisions are positive.

**Introduction: Outlining the problem in brief.**

The Second World War was a horrible event in the human history. It is not a secret that during the war extremely huge among of human rights violations took place. Actions of military infringed the most important rights, those of *jus cogens* character, including prohibition of torture. In particular, German troops oppressed population of various European countries, created numerous concentration camps.

Barely will someone argue that victims of such violations are entitled to a remedy. They are to receive compensation. However, the ways to receive this compensation are not precisely defined. One may rightly say that victims shall address the court seeking redress. Throughout the second part of twentieth century those who suffered were addressing their domestic courts with claims against violators. Italian citizens were bringing suits against Germany in Italian domestic courts. In most cases domestic courts were granting compensation and initiating enforcement procedures against German property. After number of similar cases Germany initiated proceedings before the International Court of Justice against Italy arguing the prevalence of state immunity for *jure imperii* acts even though violating fundamental human rights of *jus cogens* character. The International Court of Justice considered the case in 2012. The Court noted that though violated right were of *jus*

*cogens* character, state immunity could not be barred. The ICJ stated that rules of state immunity are of procedural character, while human rights are substantial. Therefore, there is not real clash between these two sets of rules of international law.

However, issue is not yet exhausted. Number of dissenting opinions on the ICJ's case and wide range of international legal doctrinal sources still insist on the possibility of the immunity waiver. Indeed, practice of domestic and international law tribunals (apart from ICJ) adopt the decisions supporting immunity waiver. As far as the international law is not static, there is always room for assumption that relationship of state immunity and fundamental human rights may change. Immunity of high state officials was also deemed to be absolute, though Nürnberg principles affirmed that personal immunity of Head of State and any other Governmental official does not preclude accountability for serious international crimes.<sup>1</sup> In fact, similar changes are possible in case of state immunity.

The issue at stake is not only of theoretical but also practical importance. There are no rights without real enforcement. Therefore, if the states are allowed to shield themselves behind immunity, *jus cogens* human rights will be mere proclamation without effective rights to remedy. On the other hand, law on state immunity is a well-established part of public international law. Though there are number of states still following the doctrine of absolute state immunity, it is recognised, inter alia, in international treaties on states' immunity, that state shall enjoy its immunity for acts *jure imperii*. It is practically important to define the solution that will allow victims to receive compensation. Though it is always possible in theory to address courts of country-perpetrator, in practice it may be impossible or extremely inconvenient and ineffective.

This thesis is aimed to analyse possible relationships and mutual influence of rules of

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<sup>1</sup> International Law Commission, *Report of the ILC on its Second Session*, Official Records of the General Assembly, Fifth session, Supplement No.12, UN Doc. A/1316 (5 June to 29 July 1950).

public international law and human rights law. Human rights provisions are mere proclamation without effective enforcement and protection mechanisms. And ICJ in *Germany v. Italy* case does not provide real way to resolve the issue. The main emphasis will be put on possible solutions of the immunity “wall” issue. The ICJ decision in *Italy v Germany* case made it quite hard to plea in favour of the alleged possibility to bar state immunity for breach of *jus cogens* human rights rules by acts *jure imperii*. However, the question was addressed by number of legal scholars, who proposed their solutions to the problem. Furthermore, it will try to define the some practical possibilities for human rights violations victims to receive compensation in situations where the perpetrator has successfully protected itself with the immunity rule.

The First Chapter will cover in detail existing jurisprudence in the international and domestic courts on the issue. It will include analysis of the leading cases, such as *Jurisdictional Immunities of the State* case of the ICJ, *Al-Adsani* and *Kalogeropoulou* cases of the ECtHR. Moreover, particular attention will be drawn to the Greek, Italian and the US domestic approaches.

The Second Chapter will mainly consider academic theories that suggesting some solution to the problem at stake. Even after the ICJ decision there are many supporters of the immunity restriction approach. Prominent scholars and domestic court The Chapter will cover a tort exception argument, adopted in the US legal system, an implied waiver doctrine and a last resort argument.

Finally, in case the immunity waiver arguments do not prove to be successful, it is crucial to find some practical alternative remedies. The Third Chapter of the thesis will examine history of the state practice in similar issues. It is important to estimate value of diplomatic protection and its effect on the immunity issues in similar situations. By analyzing the decisions of domestic and international courts and considering current international law

developments I will address the issue of the effectiveness of diplomatic protection measures in the grave human rights violations cases.

## **Chapter 1. On the road to the Jurisdictional Immunities of the State case: was the *jus cogens* exception ever possible?**

On February 3, 2012 the International Court of Justice delivered a judgement on the Jurisdictional Immunities of the State (Italy v. Germany) case. The Court has proclaimed that Italy has violated rules of international law by allowing its courts to consider civil claims brought against Germany in the absence of any explicit immunity waiver on behalf of the latter. The decision was almost unanimous. Even though some judges disagreed with the Court's position, the ICJ decided that international law does not yet allow states unilaterally dismiss immunities of a foreign state for any reasons without explicit consent of the former. The question of whether the state immunity should cover acts of the state that violate rules (*inter alia* peremptory ones) international law was discussed long before the Italy v. Germany decision. Grand Chamber of the ECtHR has also considered whether state immunity can be overruled by the right to access to courts and by slim majority in the case of *Kalogeropoulou* ruled against this possibility. Some domestic courts and tribunals also considered similar issues. The present Chapter will deal with practice of the domestic courts that gave rise to the ICJ decision. I will firstly deal with notion of state immunity and its development in the judicial practice of domestic and international tribunals. I will evaluate arguments raised and considered in the judicial decisions prior to the ICJ opinion. After that I will address the *Jurisdictional Immunities* case itself and look at its impact on the development of the international law.

### *1.1. Development of the rules of state immunity*

Rules of state immunity have a long history and deeply root into the international law.

In the Pinochet No. 3 case Lord Browne-Wilkinson noted, “It is a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state”.<sup>2</sup> Indeed, state immunity rule stems from the principle of sovereign equality of the states.<sup>3</sup> The concept of state immunity has changed a lot as the international law has developed. At the early stages of the international law development, concept of absolute state immunity was widely applied.<sup>4</sup> Absolute immunity allowed states to enjoy immunity from all proceedings initiated in foreign states without regard to any circumstances.

In the 20<sup>th</sup> century this classic approach was slowly substituted by the restrictive understanding of the state immunity. Due to the “changes in the nature and functioning of sovereigns, [greater involvement into the private commercial activities with foreign actors], ... substantial number of nations [...] abandon the absolute theory of sovereign immunity in favor of a restrictive theory”.<sup>5</sup> Restrictive theory implies that state can perform public or governmental acts (*jure imperii*) and acts of private non-sovereign nature (*jure gestionis*). While the *jure imperii* acts of a state were protected by the sovereign immunity concept, the *jure gestionis* acts, due to their nature, were taken out of the scope of protection. Such approach was reaffirmed in international case practice<sup>6</sup> and domestic legislation<sup>7</sup>.

Restrictive approach towards state immunity was included into some international agreements. The UN Convention on Jurisdictional Immunities of States and Their Property. Article 5 of the Convention stipulates, “State enjoys immunity, in respect of itself and its

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<sup>2</sup> *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet; Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet*, [1999] UKHL 17 (March 24, 1999).

<sup>3</sup> *Id.*

<sup>4</sup> Shaw, Malcolm, *International law*, 6<sup>th</sup> edition, Cambridge University Press, p. 701 (2008).

<sup>5</sup> *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, para. 4 (1964).

<sup>6</sup> *Id.*

<sup>7</sup> E.g. State Immunity Act 1978, s. 3; US Foreign Sovereign Immunities Act 1976, ss. 1604-1605a.

property, from the jurisdiction of the courts of another State".<sup>8</sup> The Convention further enumerates several exceptions from this general rule, including commercial contract and tort exception. The European Convention on State Immunity adopts similar approach and does not allow claiming immunity in situations where State was acting as a *private actor*.<sup>9</sup> The differences between *jure gestionis* and *jure imperii* will be considered further in more details.

### 1.2. Development of the immunity principle in the decisions of domestic courts.

As the restrictive approach implies exceptions from general rule of state immunity, it was claimed that grave violations of human rights and humanitarian law could serve as a ground to strike out state immunity. Most of the domestic courts are reluctant to recognize direct possibility to estop a state from claiming sovereign immunity simply due to the nature of the sovereign act. Nonetheless, some decisions tried to overrule the state immunity concept.

#### 1.2.1. The USA approach towards the state immunity.

Following the decision of the USSC in *the Schooner Exchange v. M'Faddon*<sup>10</sup> until the second part of the 20<sup>th</sup> century the US court were applying absolute immunity approach towards the claims against foreign states. This approach was partly changed in 1976 when the Congress has adopted the Foreign Sovereign Immunities Act (FSIA). This legislation introduces several exceptions form the general sovereign immunity rule. The Act was recently amended with some anti-terrorism provisions. They allow bringing tort claims against so-called state sponsors of terrorism. While the FSIA will be considered in more

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<sup>8</sup> UN Convention on Jurisdictional Immunities of States and Their Property, UN Doc. A/59/49, Art. 5 (2004).

<sup>9</sup> European Convention on State Immunity, Basle (May 16, 1972).

<sup>10</sup> *The Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812).

details in the second chapter of the present work, I will now address some case of the US courts dealing with state immunity issue.

One of the most prominent US cases on this issue was the *Princz v. Federal Republic of Germany* case, where the US Court of Appeals addressed the situation of Hugo Princz, who was a prisoner of Jewish-American origin of the Nazi concentration camp during the Second World War. During the war Mr. Princz was captured on the territory of Slovakia and surrendered to the Nazi forces. Even though being a holocaust survivor, he was denied participation in the German governmental reparations program, since at the time of his request for reparations he was “neither a German citizen at the time of his imprisonment nor a "refugee".<sup>11</sup> Criteria for eligibility for reparations were changed in 1965, however, Hugo Princz did not file any request and subsequently was barred from doing so by the statute of limitations. Up until 1992 the appellant was trying to resolve the issue by diplomatic means. The situation attracted a lot of attention and support from the US high officials. However, all efforts were fruitless.

In 1992 Hugo Princz has filed a lawsuit to the US district court against Germany seeking for some king of compensation. The district court decided that the gravity of crimes in question allowed denying the right of Germany to claim sovereign immunity in that case.<sup>12</sup> Germany appealed arguing that Hugo Princz failed to claim reparations before the statute of limitations has run and, furthermore, that the US courts lack jurisdiction over the case as Germany enjoys sovereign immunity. The US Appeals Court overturned the district court decision. It has decided that actions performed by Nazi troops during the war were acts *jure imperii*. These acts did not fall under the commercial activity exception of FSIA. Consequently it was impossible to waive Germany’s immunity under the Act.

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<sup>11</sup> *Princz v. Federal Republic of Germany*, 26 F.3d 1166, D.C. Cir. (July 1, 1994).

<sup>12</sup> *Princz v. Federal Republic of Germany*, 813 F. Supp. 22 (D.D.C. 1992).

The US Appeals court has also considered an implied waiver argument brought up in the *amicus* brief. Its authors argued that “a foreign state that violates these fundamental requirements of a civilized world thereby waives its right to be treated as a sovereign”.<sup>13</sup> The Appeals court has disagreed with this suggestion. It has referred to the requirement of intentionality of a waiver in the FSIA and the fact that the German government has never, even implicitly, expressed its desire to waive sovereign immunity in that case. Moreover, implied waiver doctrine was not recognized in the international law doctrine. For this reason the Appeals court was not able to apply waiver exception.

However, the *Princz* case was not unanimous. Dissenting Judge Wald tried to argue in favor of the implied waiver argument. With reference to the Nurnberg trial precedent, he argued that considering the *jus cogens* nature of the nature of war crimes and crimes against humanity, “state is never entitled to immunity for any act that contravenes a *jus cogens* norm, regardless of where or against whom that act was perpetrated”.<sup>14</sup> As for the intentionality requirement, he indicated that Germany should have realized that it might in future be accountable for these grave crimes. This mere knowledge is, according to the Judge Wald, is sufficient to establish an implied waiver of the sovereign immunity. The dissent implies that the act of granting immunity is in fact an act out of grace and comity. Serious human rights breaches are out of the scope of *bona fide* consideration. According to the Judge Wald Congress never had an intention to “thwart the opportunity of an American victim of the Holocaust to have his claims heard by the United States judicial system”.<sup>15</sup> Hardly can I agree with such views on the state immunity concept. I disagree with the idea to treat an act of granting immunity as an act of courtesy but not a legal obligation. Moreover, treating the fact that perpetrator might foresee accountability for a wrongful act as an implied and

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<sup>13</sup> *Supra* 11, p. 13.

<sup>14</sup> Dissenting opinion of Judge Wald in *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (1994).

<sup>15</sup> *Id.*

intentional waiver of the immunity seems to me not correct. I will cover the implied waiver argument further below in more details.

The *Princz* case was a major case before the FSIA was amended. Judicial approach has changed with the extension of the immunities exception scope of the Act.<sup>16</sup> Some of ‘terrorist states’ are not able now to enjoy state immunity where these states have committed a terrorist act that resulted in injury or death of the US citizen. This approach is rather unique and is driven by the anti-terrorist considerations of the USA. I will cover the tort exception under the amended FSIA in the second chapter of the present work, since it is not directly overridden by the ICJ decision and still may be possible to apply.

### 1.2.2. Canadian view on the foreign states immunity issue.

Canada is one of the states that have special State Immunity Act adopted. Most provisions of the named act are quite conventional and comparable to the FSIA ones. However, Canadian Court applies some interesting views while interpreting the Act. One of the most prominent Canadian cases on the issue of foreign state immunity reflecting the position of the domestic courts is the *Bouzari* case.<sup>17</sup>

The *Bouzari* case concerned the Iranian national Houshang Bouzari. In the 1993 in the course of his work in the field of oil and gas exploration in Iran he was offered an unofficial deal on behalf of the Iranian President to secure the large commercial contract for the payment of 50 million US dollars. As he refused the offer, he was abducted from his hotel room, robbed and transferred to the Iranian prison where he was tortured for several months. Mr. Bouzari managed to escape and fled Canada with his family, where subsequently he acquired a citizenship. In 1998 he initiated a civil proceeding against Iran in Canada claiming

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<sup>16</sup> *Flatow v. Islamic Republic of Iran*, 999 F.Supp. 1 (March 11, 1998); *Alejandre v. Republic of Cuba*, 996 F.Supp. 1239 (1997).

<sup>17</sup> *Bouzari v. Islamic Republic of Iran*, Court of Appeal for Ontario (December 4, 2003).

damages. Mr. Bouzari explained that there was not possibility for him to initiate the proceedings in Iran, as he was unable to return under the risk of torture and death.

The final decision on the case was made by the Court of Appeal for Ontario. Issue of state immunity was one of the most important questions of the case. The appellant together with intervening Amnesty International and Canadian Lawyers for International Human Rights claimed that the gravity of crimes in question should justify the existence of universal jurisdiction over the case and that state immunity cannot be applied. In support of this view, there were two main blocks of arguments.

First argument referred to the application of the Canadian State Immunity Act. At first the appellant noted that section 18 of the Act provides opportunity to strike down foreign state immunity where the state is involved in “criminal proceedings or proceedings in the nature of criminal proceeding”.<sup>18</sup> It is obvious that foreign state will not be brought in the criminal proceedings as an accused. This provision was most likely intended to prevent the act from being used in cases where foreign state officials are brought before the court in criminal cases. Nonetheless, the appellant claimed that the nature of proceedings was criminal, as he was seeking punitive damages. The Court rejected this view. Even though the punitive damages have deterrent effect, they are available only in civil proceedings.<sup>19</sup>

Furthermore, the appellant relied on the tort exception in the State Immunity Act. Section 6 of the Act allows estopping foreign state from enjoying immunity in cases where this state inflicted bodily harm or death that occurred on the territory of Canada. Mr. Bouzari argued that his mental sufferings continued on the territory of Canada and therefore the exception applies. The Court rejected this, and noted that the place where the action is occurred matters, not where the effects took place.

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<sup>18</sup> State Immunity Act, R.S.C., sec. 18 (1985).

<sup>19</sup> *Supra* 17, para. 44.

Finally, the appellant relied on the commercial activity exception and claimed that acts of torture resulted from his commercial activity on the territory of Iran. However, the Court found that acts of torture were not of commercial, but of a sovereign nature. Therefore all arguments under the State Immunity Act were dismissed.

Second block of arguments relates to the general international law obligations of Canada. The appellant claimed that treaty rules and peremptory norms of international law obliged Canada to provide judicial remedy against a foreign state. First of all, it was argued that article 14 of the Convention Against Torture obliges states to provide forum in torture cases against foreign states regardless of sovereign immunity. The appellant noted that the text of article 14 does not contain any limitation with regards to the territory or jurisdiction. Moreover, the phrase such limitation was present in the early drafts but then intentionally omitted.<sup>20</sup> The Court disagreed with this view.

### *1.2.3. On the Road to the ICJ: Ferrini v. Federal Republic of Germany case.*

One of the first cases, where Italian courts have addressed the issue of foreign state immunity in situations where violations of human rights are involved was *Ferrini v. Federal Republic of Germany*.<sup>21</sup> Like in the US decisions on this matter, the Italian Court of Cassation (Corte di Cassazione) has addressed and involved rules of international law.<sup>22</sup> However, different approach and deep analysis of the international law allowed the Italian Court to come to the conclusion different from the ones of the US courts.

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<sup>20</sup> Id, para. 80.

<sup>21</sup> *Ferrini v. Federal Republic of Germany*, Court of Cassation Appeal decision, no 5044/4; ILDC 19 (March 11, 2004). Full text in Italian is available at

[http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Italy/Ferrini\\_Cassazione\\_6-11-2003.pdf](http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Italy/Ferrini_Cassazione_6-11-2003.pdf)

<sup>22</sup> Pasquale De Sena & Franchesca De Vittor, *State immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case*, EJIL Vol. 16, No.1, 91 (2005).

Similar to the *Princz* decision, the *Ferrini* case involved person (Luigi Ferrini) captured by German troops during the World War II. Later on Mr. Ferrini was captured on the Italian territory, transferred to Germany where he was subjected to a forced labour. In 2000 Germany has established a ‘Remembrance, Responsibility and Future’ Foundation to provide reparations for forced labourers. However, in 2001 German government specified that category of war prisoners should not receive any compensation form the Foundation. The Government justified this by making reference to the international law standards that allow not paying prisoners of war for some job they were performing.<sup>23</sup> This decision resulted in for than 100.000 declined reparations requests including the one of Mr. Ferrini. After the war Mr. Ferrini filed a lawsuit seeking damages for mental and physical harm. Both the Court of First Instance and the Appellate Court proclaimed lack of jurisdiction due to the rules of state immunity.<sup>24</sup>

The Supreme Court of Italy, however, adopted completely different approach. The Court has considered three arguments suggested by the claimant. First argument Mr. Ferrini referred to was the suggestion that the Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters should prevail over the existing rules of customary international law. The Supreme Court, however, refused to accept this submission, as the Convention did not apply to the law proceedings that were entailed by the sovereign acts.<sup>25</sup> The Court has also rejected an argument suggesting that rules on state immunity are not rules of customary international law.<sup>26</sup>

The main emphasis was put on the fact that there were violations of human rights and that they took place on the territory of the forum state. The Court acknowledged that

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<sup>23</sup> Convention relative to the Treatment of Prisoners of War, Geneva, article 34 (July 27, 1929).

<sup>24</sup> Tribunale di Arezzo, decision No. 1403/98 (November 3, 2000) as referred to at Supra note 21, p. 93.

<sup>25</sup> *Ferrini v. Federal Republic of Germany*, para. H1, English translation available at: [http://www.geneva-academy.ch/RULAC/pdf\\_state/Ferrini.pdf](http://www.geneva-academy.ch/RULAC/pdf_state/Ferrini.pdf)

<sup>26</sup> *Id.*, para. H2.

according to the customary rules of international law, states enjoy sovereign immunity for *jure imperii* actions (including military ones). However, the Court has noted that factual underpinnings of the case made it exceptional, and allowed striking down German immunity. Firstly, deportation to slave labour is illegal under the international law.<sup>27</sup> The Court of Cassation referred to several international instruments and judicial decisions to show that distinction between acts *jure imperii* and *jure gestionis* are not important where wrongful act has occurred on the territory of the forum state and constitutes a breach of fundamental human rights rules.<sup>28</sup> The Court was persuaded that there international trend aimed to prioritise fundamental human rights over state immunity in the most severe cases is present. All these considerations, together with the fact that the wrongful act originated on the Italian soil, have helped the Supreme Court to rule out state immunity and explain the difference from existing decision of the ECtHR in the *Al-Adsani* case.<sup>29</sup> At this time the ECHR has already confirmed the English Court of Appeal approach that did not allow to unilaterally estop state from enjoying its immunity. Consequently, it was crucial to distinguish situation of Mr. Ferrini from the Mr. Al-Adsani one.

The decision in *Ferrini* has led to a number of similar cases. In most of them Italian courts have accepted that Germany is not allowed to enjoy its immunity for actions that violated peremptory rules of international law. Subsequently, this practice entailed application to the ICJ made by Germany against Italy: *Jurisdictional Immunities* case.

Even though approaches of the various domestic courts vary greatly, it is possible to see the intention to reevaluate the existing rules on state immunity. In the *Ferrini* decision, the

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<sup>27</sup> Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), article 6(b), United Nations (August 8, 1945).

<sup>28</sup> E.g.: United Nations Convention on Jurisdictional Immunities of States and Their Property, United Nations (December 2, 2004); *Bouzari v. Islamic Republic of Iran*, CanLII 871, Ont. C.A. (December 4, 2004).

<sup>29</sup> *Supra* 16, p. 95.

Italian Court of Cassation has referred to this trend.<sup>30</sup> Numerous states indicated willingness to bar state immunity in cases where serious human rights breaches are involved. The Court of Cassation indicated that judicial practice and provisions from domestic immunities acts show the desire to step away from the acts *jure imperii/gestionis* approach and take the territorial factors in more considerations. The Court also supported this view by referring to the multilateral international immunities treaties. Considering changes in the regulations of the foreign state officials immunities, this approach was quite possible to believe in. However, as I will show below, the ICJ was not so easy to persuade with these arguments.

### *1.3. Cases of Al-Adsani and Kalogeropoulou and their impact.*

Before the ICJ's judgement the European Court of Human Rights has addressed the issue of sovereign state immunity in cases of grave human rights violations. The European Court has not adopted the same approach as Italian Court of Cassation. *Al-Adsani* and *Kalogeropoulou* cases indicated that the ECtHR was reluctant to deliver decision that will allow barring foreign states from enjoying their immunities in cases where violations of human rights are involved. The ECtHR has upheld the conservative approach and did not risk suggesting any new solutions to the existing problem.

#### *1.3.1. Case of Al-Adsani v the United Kingdom.*

One of the first cases of the European Court of Human Rights concerning state immunities from grave human rights violation was *Al-Adsani v. the United Kingdom*. The case concerned Mr. Al-Adsani who served as a pilot in the Kuwait air forces during the Gulf War. The applicant obtained sex videotapes of some high Kuwait officials. Later on,

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<sup>30</sup> *Ferrini v Federal Republic of Germany*, Appeal decision, no 5044/4; ILDC 19, IT 2004, paras. H9-H13 (March 11, 2004), translation available at: [http://www.geneva-academy.ch/RULAC/pdf\\_state/Ferrini.pdf](http://www.geneva-academy.ch/RULAC/pdf_state/Ferrini.pdf)

these videotapes somehow were distributed. The applicant was found responsible for this. He was falsely imprisoned and tortured by Kuwait authorities. After he managed to escape, he filed a civil law suit in the UK claiming damages for mental and physical injury.

The case of Al-Adsani was firstly considered by British courts with the House of Lords rejecting existence of jurisdiction due to the rules of state immunity. The House of Lords (HoL) has examined international state practice and came to a conclusion, that nothing suggests that foreign state immunity can be waived in civil claims arising from acts of torture. The HoL distinguished *Ferrini* case as it concerned violations of human rights occurred on the territory of forum and defendant states both. *Pinochet* case argument was refused, as it was different from the Al-Adsani situation. Members of House of Lords in *Pinochet (No. 3)* based their arguments on the UN Torture Convention, which provides universal jurisdiction for criminal proceedings against people involved in acts of torture. Civil nature of the claim in question and lack of any territorial nexus of violation with the UK has lead to the decision of the HoL that Kuwait is entitles to the immunity.

As British courts on the basis of Kuwait's immunity have refused his claims, he filed a complaint to the ECtHR arguing violation of his right to fair trial. In its reasoning the ECtHR has firstly referred to the work of the International Law Commission.<sup>31</sup> The ILC has examined state practice in civil claims arising from the acts of torture (or violation of other *jus cogens* rules) on the territory of the defendant state. While the ILC has noted presence of sympathy towards the *jus cogens* argument, it found that in majority of cases the immunity was preserved. In addition, the Commission has draw attention to the recent *ex part Pinochet (No. 3)* case delivered by the House of Lords and Anti-Terrorism and Effective Death Penalty Act of 1996 in the US.

The ECtHR stated that interference into the applicants right to fair trial was in

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<sup>31</sup> *Al-Adsani v. The United Kingdom*, Application no. 35763/97, para. 23 (November 21, 2001).

compliance with the ECHR. The Court indicated that the right to access the court is not an absolute right. In order to be in conformity with the Convention, the limitation must follow a legitimate aim and be proportionate to this aim. In the Court's view, desire to respect sovereignty of the foreign state and "promote comity and good relations between States"<sup>32</sup> could be considered as a legitimate aim. As for the proportionality, the Court noted that action made in compliance with general rule of international law (rules of state immunity) could not in any even be regarded as disproportionate.

The decision was criticized by legal scholars and dissenters for failure to address properly a *jus cogens* argument. The Court has noted that in *Pinochet (No. 3)* case the violation of peremptory rules of international law allowed to waive personal immunity. However, the Court made a distinction between criminal and civil cases. According to the decision, nothing in the international law practice suggests that state are not entitles to their sovereign immunity in civil cases arising from violations of *jus cogens* rules.

The decision was delivered by extremely narrow majority of judges (9 to 8). Dissenters argued that distinction between civil and criminal cases are not important in cases where violations of the *jus cogens* rules are concerned. In their dissenting opinion Judges Rozakis and Caflisch formulated an opinion that due to the superior nature of prohibition of torture, "State immunity is automatically lifted, because those rules, as they conflict with a hierarchically higher rule".<sup>33</sup> Judge Loucaides has agreed with the *jus cogens* argument and also added that the blanket immunity rules violate article 6.1 of the Convention. Lack of proper balancing in itself amount to the violation even without invoking peremptory rules of international law.

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<sup>32</sup> Id, ¶ 54.

<sup>33</sup> Id, Joint Dissenting opinion of Judges Rozakis and Caflisch joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic, p. 30.

### 1.3.2. Case of *Kalogeropoulou et. al. v. Greece and Germany*.

Case of *Al-Adsani* was not the last where the ECtHR was involved in balancing rules of state immunity and grave violations of human rights. On 12 December 2002 the ECtHR has issued a decision on inadmissibility of an application against Greece and Germany in *Kalogeropoulou* case. The case concerned rights of almost 250 victims and relatives of victims of Nazi crimes occurred on the territory of Greece. As well as in *Al-Adsani* case, by the majority of votes the Court found no violation of rights of the applicants to access to court.

The situation occurred in 1944 when German SS troops entered the village of Distomo and started mass killings and rapes of the civilian population. Nazi forces pillaged the village, it was claimed to be retaliation for the earlier actions of Greek resistance troops.<sup>34</sup>

Applicants have firstly filed a lawsuit against Germany to the Greek Court in 1995.<sup>35</sup> They claimed compensation for physical and mental injuries. The Court has firstly noted the differences between act *jure imperii* and *jure gestionis*. Even though state enjoys immunity for the former ones, the Court concluded that where *jus cogens* violations take place, immunity could be waived. In its reasoning it has involved wide range of arguments. Firstly, The Greek Court referred to the article 12 of the UN Immunities Convention and the US cases of *Letelier v Republic of Chile*<sup>36</sup> and *Liu v. Republic of China*.<sup>37</sup> The former case concerned political assassination of a former Chilean official on command of Pinochet's Government. The latter one involved assassination of Henry Liu on command of Head of Chinese Intelligence Bureau. Both crimes took place on the territory of the USA. All these

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<sup>34</sup> Kerstin Bartsch and Björn Elberling, *Jus Cogens v. State Immunity, Round Two: The Decision of the European Court of Human Rights in the Kalogeropoulou et. al. v. Greece and Germany Decision*. German Law Journal, Vol. 04, No. 05, 478.

<sup>35</sup> *Prefecture of Voiotia v. Federal Republic of Germany*, Case No. 137/1997 (October 30, 1997).

<sup>36</sup> *Letelier v. Republic of Chile*, 488 F. Supp. 665 (1980).

<sup>37</sup> *Liu v. Republic of China*, 892 F.2d 1419 (1988).

sources supported territorial tort argument (*loci delicti commissi*). The Court was aware of the military actions exception from this rule. In order to resolve this issue, the Court has noted “[I]n case of military occupation that is directly derived from an armed conflict and that ... does not bring about a change in sovereignty or preclude the application of the laws of the occupied State, crimes carried out by organs of the occupying power in abuse of their sovereign power do not attract immunity”.<sup>38</sup> Furthermore, the Court has noted that murders and pillaging were committed against civilian population not taking part in the hostilities. Consequently, they were just “hideous murders ... not necessary ... to maintain the military occupation”.<sup>39</sup> Secondly, the Court has invoked an implicit waiver argument. According to the reasoning of the Court, a state by violating peremptory norm of international law tacitly waives its immunity. As the result of the analysis, the Court found Germany *in absentia* liable and ordered to pay compensation.

Hellenic Supreme Court has upheld the *Prefecture of Voiotia* decision of the lower court in the appeal hearing. The argument involved by the Court indicated that acts committed in violation of the *jus cogens* rules cannot be regarded as acts *jure imperii* and therefore, do not enjoy immunity. The decision was not unanimous and number of dissenters noted that there is no a rule of international law that supports such position. The Germany refused to make any payments and Enforcement proceedings were initiated in Greece. Under the Greek Code of Civil Procedure<sup>40</sup> there is a need to receive a consent form Minister of Justice in order to seize assets of foreign state. Minister of Justice refused to grant such consent and enforcement proceedings after several court hearings were stopped. As the result, the applicants have filed an application to the ECtHR.

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<sup>38</sup> *Prefecture of Voiotia v. Federal Republic of Germany*, Case No. 137/1997, 10 (October 30, 1997), as referred to in Maria Gavouneli & Ilias Bantekas, *Prefecture of Voiotia v. Federal Republic of Germany* Case No. 11/2000, AJIL, Vol. 95, No. 1, 198, 199-200 (January, 2001).

<sup>39</sup> *Id.*

<sup>40</sup> Greek Code of Civil Procedure, Article 923, as referred to in *Supra* 34, p. 480.

While application was still pending, Greek Special Highest Court has with a narrow majority has declared that Germany must have immunity from all claims brought against it on the territory of Greece.<sup>41</sup> The Court has invoked rules of customary international law regarding action of armed forces. The Court referred to the judgment of the ECtHR in *Al-Adsani* case and some domestic case practice and came to a conclusion that there is no such rule in international law that will allow to waive state's immunity in cases of *jus cogens* violations.

The ECtHR has declared the application inadmissible because it was manifestly ill-founded. First of all, the Court has noted that fight to access the court was not an absolute in nature. As the result, it can be limited. Though refusal of Greek Minister of Justice to initiate the enforcement proceedings was interference into the applicants' rights, such interference was justified. As in the *Al-Adsani* case, the ECtHR indicated that desire to respect international law and principle of sovereign equality of states could be considered as a legitimate aim. Furthermore, the interference was proportionate as it was made in accordance with the rules on state immunity.

### 1.3.3. Considerations on the *Al-Adsani* and *Kalogeropoulou* cases.

The decisions of the ECtHR did not introduce anything new to solve to the clash between rules on state immunity and *jus cogens obligations*. Judge Ferrari Bravo expressed his unhappiness about the fact that the Court has failed to make 'courageous judgment'. The Court was criticized for not addressing the *jus cogens* argument directly.

Some authors claim that decisions in *Al-Adsani* and *Kalogeropoulou* cases are in fact

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<sup>41</sup> *Federal Republic of Germany v. Militiadis Margellos*, Case No. 6/17-9-2002, Special Highest Court of Greece (September 12, 2002).

more political in nature than legal.<sup>42</sup> It was claimed that if the ECtHR decided in favor of the applicant in both cases, it would bring a judicial chaos. The door will be open to lawsuits against foreign states in the domestic courts, and that will undermine the principle of sovereign equality of states. While such fears are indeed based on a particular reasonable ground, it is hard to accept them. For the rule to become *jus cogens* there is need for widespread acceptance among international community. Domestic courts would hardly abuse acceptance of the *jus cogens* exception to the state immunity.

#### *1.4. Case concerning Jurisdictional Immunities of the State (Italy v. Germany) and its effect on the human rights protection.*

On the 3<sup>rd</sup> of February 2012, the International Court of Justice has delivered long expected judgment on the case between Italy and Germany.<sup>43</sup> The judgment was upheld with large majority. This decision has resolved long going debate on the *jus cogens* exception to the state immunity. The following part will (1) cover main facts of the *Italy v. Germany* case, (2) describe the position of the ICJ on the main Italy's arguments and (3) estimate the influence of the decision on the state of human rights today.

##### *1.4.1. Factual and procedural background of the case.*

The case originated from the Italian judicial practice that allowed Italian citizens to sue the Federal Republic of Germany for the violations of human rights and humanitarian law during the World War II. As it was indicated above, the Italian Supreme Court in its *Ferrini* and subsequent cases concluded that could be bared from using its sovereign immunity since compensation was sought for the violation of *jus cogens* rules.

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<sup>42</sup> Supra 34, 484, see also Concurring Opinion of Judge Pellonpää, Case of Al-Adsani v. the United Kingdom.

<sup>43</sup> *Jurisdictional Immunities of the State (Italy v. Germany)* case, (ICJ, February 3, 2012).

The Federal Republic of Germany has concluded two agreements with Italy on the compensation issues. Germany paid 40 million Deutsche marks as compensation to the victims of the war crimes. Under the article 3 of the Agreement of 31 July, 1963 “payment provided ... [constituted] final settlement between the Federal Republic of Germany and the Italian Republic of all questions”<sup>44</sup> concerning war crimes compensation. Nonetheless, certain groups of people, in particular military internees were not entitled to these compensatory sums. As a result of number of cases before Italian courts, practice to waive German immunity was formed. The ICJ was asked to interpret the rules on state immunity to define whether the *jus cogens* exception exists.

#### 1.4.2. *The ICJ's position on the Italian claims.*

Italy has raised a number of arguments to supports its position. First argument considered by the Court was *territorial tort principle*. As it follows from the facts of the case, violations partly took place on the territory of Italy, i.e. forums state. In other words, this argument was related only to a part of proceedings of the Italian courts. Italy based its arguments on the assumption that tortuous acts of state (even acts *jure imperii*) cannot be protected by state immunity. Article 12 of the UN Convention on Jurisdictional Immunities of States and Their Property indicates that “a State cannot invoke immunity from jurisdiction before a court of another State ... in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was

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<sup>44</sup> Agreement on ‘Compensation for Italian nationals subjected to National-Socialist measures of persecution’, as referred to in *Jurisdictional Immunities of the State (Italy v. Germany) case*, para. 25 (ICJ, February 3, 2012).

present in that territory at the time of the act or omission”.<sup>45</sup> Italy suggested that such wording allows waiving foreign state immunity even in cases of military *jure imperii* actions.

The ICJ has agreed that international law recognizes *locus delicti commissi* principle, for instance in cases of traffic accidents on the territory of the forum state. Distinction between acts *jure imperii* and *jure gestionis* were intentionally omitted not to restrict the application of the article.<sup>46</sup> However, the ILC has expressly noted that the article was not intended to “apply to situations involving armed conflicts”.<sup>47</sup> The ICJ has also referred to the United Kingdom State Immunity Act and the Singapore State Immunity Act that exclude from tort exception situations of military conflicts and domestic case practice of European states. Consequently, the ICJ concluded that territorial tort argument could not be applied in the present case.

Second argument raised by Italy consisted of two parts: *jus cogens* and last resort exceptions. Italy has suggested, similar to the dissenters in the *Al-Adsani* case, that gravity of crimes committed by Germany during the war precluded it from enjoying state immunity even from civil claims for damages.

The ICJ has examined the domestic case law and ECtHR practice on the issue. As well as the majority of the courts the International Court of Justice has concluded that there is no existing rule of international law that will preclude a state from enjoying its immunity for the breach of human rights and humanitarian law. Moreover, the Court has referred to the International Law Commission being reluctant to include *jus cogens* or similar exception into the UN Immunity Convention.

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<sup>45</sup> United Nations Convention on Jurisdictional Immunities of States and Their Property, United Nations, article 12 (December 2, 2004).

<sup>46</sup> Yearbook of the International Law Commission, 1991, Vol. II (2), UN Doc. A/CN.4/SER.A/1991/Add.1 (Part 2), p. 45, para. 8. Available at:

[http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC\\_1991\\_v2\\_p2\\_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1991_v2_p2_e.pdf)

<sup>47</sup> Id, p. 46, para. 10.

However, the Court did not simply indicated lack of positive law that will allow *jus cogens* exception. In fact, it completely shut down the possibility to invoke the argument later. The ICJ, like some authors before it,<sup>48</sup> has rejected the existence of a very conflict between state immunity and *jus cogens* rules. The Court has stated that the former rules are of a procedural nature and they do not address the “question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful”.<sup>49</sup> The *jus cogens* prohibition of torture, on the contrary, is a substantive law that relates to the violation that served as a basis of proceedings. Consequently, there is no clash between these two sets of rules at all. The ICJ further noticed that respect to state immunity of a foreign state “does not amount to the recognizing as lawful a situation created by the breach of a *jus cogens* rule”.<sup>50</sup> IN other words such action will not entail breach of article 41(2) of the ILC Articles on State Responsibility for Internationally Wrongful Acts (ARS), which prohibits recognition of unlawful situation resulted from breach of a *jus cogens* rule.<sup>51</sup>

While considering *jus cogens* exception, the Court has also examined *Pinochet (No. 3)* case, which has served as an argument in favour of judicial bar of state immunity. In fact, Italian Supreme Court has applied it in its *Ferrini* case. The Court emphasised the existence of a big difference between the *Italy v. Germany* and *Pinochet (No. 3)* cases. While the former concerned immunity of a state, the latter one was about immunity of a state official. Moreover, the Court referred to the difference in the nature of proceedings (criminal and civil).

Argument of last resort implied that Italy’s action were the only was victims could

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<sup>48</sup> Andreas Zimmermann, *Sovereign Immunity and Violations of International Jus cogens – Some Critical Remarks*, 16 MJIL, 433, 437-438 (1995)

<sup>49</sup> *Jurisdictional Immunities of the State (Italy v. Germany) case*, para. 93 (ICJ, February 3, 2012).

<sup>50</sup> *Id.*

<sup>51</sup> ILC Articles on Responsibility of States for Internationally Wrongful Act, art. 41(3). UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), article 41.

receive compensation for the damages incurred to them. The Court has agreed that even though designed groups of Italian citizens have received compensation, military internees were excluded from these groups. Nonetheless, the Court noted that it is impossible to conclude that state immunity may be “dependent upon the existence of effective alternative means of securing redress”.<sup>52</sup>

As it was pointed out above, the decision was adopted by very large majority of Judges. There was only one dissenter that directly argued with reasoning of the majority on the *jus cogens* argument. Arguments suggested by the dissenting Judges would be in more details considered further in Chapter 2. Meanwhile, the decision was not a surprise for the international community, even more it is considered as a “victory to traditional conceptions of international law”.<sup>53</sup> Nonetheless, it can also be regarded as a loss for international human rights law, as thousands of people were denied their right to remedy.

#### *1.4.3. The influence and outcome of the ICJ’s decision.*

The approach adopted by the ICJ towards the *jus cogens* argument was quite strict and did not leave any discretion to domestic courts. Such wording has made any further development of the argument highly unlikely. This rather extreme approach was criticised by Judge Bennouna and Judge Yusuf. Such position will make the courts more reluctant to apply case-by-case balancing approach.<sup>54</sup> However, I tend to agree with the ICJ position on this argument. It is highly questionable whether the *jus cogens* argument, as suggested by Italy, could have brought more good than harm. Simple bar of sovereign immunity due to the

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<sup>52</sup> Supra note 48, para. 101.

<sup>53</sup> Paul Stephan on ICJ Decision in Jurisdictional Immunities of the State (Germany v. Italy). Available at: <http://www.lawfareblog.com/2012/02/paul-stephan-on-icj-decision-in-jurisdictional-immunities-of-the-state-germany-v-italy-2/>

<sup>54</sup> Ingrid Wuerth, *ICJ Issues jurisdictional Immunities Judgment*. Available at: <http://opiniojuris.org/2012/02/07/icj-issues-jurisdictional-immunities-judgment/>

gravity of crimes, without any additional safeguard requirements, would have resulted in a flood of lawsuits against foreign states. In fact, I have never seen the *jus cogens* exception as a real solution to the existing problem, but rather as a possible way to complicate international relations and the existing judicial mechanisms.

As for some other possible consequences of the decision, some authors suggest that the ICJ's "judgment may imply that there also exists no ... exception to immunity from prescriptive jurisdiction".<sup>55</sup> As the result of such assumption, one can regard American approach on human rights litigation under Foreign Sovereign Immunities Act as incompatible with international law. I cannot completely agree with such view, as the refusal to accept the *jus cogens* exception does not necessarily impairs the territorial tort principle's application.

All things considered, the *Jurisdictional Immunities* decision can be characterised as a positive step. While dismissing all the Italian arguments in the case, the ICJ still left some leeway open for future developments of the international law on state immunity with regards to the violations of the human rights. The ICJ shifted the focus of domestic courts towards more realistic approaches towards sovereign immunity issues. At the present, there are some allegedly legal and political solutions to the problem. I will address both of them in the following Chapters.

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## Chapter 2.

The ICJ's decision has clearly made it impossible to argue that the gravity of crime may in any way influence the application of sovereign immunity rules. Nonetheless, it does not necessarily mean that it is totally impossible to bar state from enjoying its immunity from

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<sup>55</sup> Supra 52.

suits in foreign states. Italian ICJ Judge Giorgio Gaja pointed in his dissenting opinion<sup>56</sup> to the *Jurisdictional Immunities of the State* case that a breach of *jus cogens* can should particular consequences under international law. Article 41 of ILC Articles on Responsibility of States for Internationally Wrongful Acts does not include closed list of all possible consequences following the breach of peremptory norm. In particular, paragraph 3 indicates possibility of existence of “further consequences that a breach to which this chapter applies may entail under international law”.<sup>57</sup> Giorgio Gaja considered that “restriction of immunity could well be regarded as an appropriate consequence”<sup>58</sup> of violation of *jus cogens* norm. Such view suggests that there still may be a leeway for an immunity restriction even after the ICJ decision.

There are number of theories that suggest a solution to the existing problem that were not directly ruled out by the *Jurisdictional Immunities* decision. In the present Chapter I will evaluate whether there is still a legal way that will allow barring states from enjoying sovereign immunity for grave human right breaches. I will start by presenting several scholastic theories that may be applied to the issue at stake. I will continue with the territorial tort exception. While being ruled out by the ICJ in the *Germany v. Italy* case, it can still be applied in different and limited circumstances. I will conclude by considering the last resort exception, which I believe is the most promising theory at the present day.

### 2.1. Theoretical views on the sovereign immunity claims for the acts in violation the *jus cogens* rules.

Legal scholars were trying to find a way to overcome the sovereign immunity shield

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<sup>56</sup> Dissenting opinion of Judge ad hoc Gaja. Available at: <http://www.icj-cij.org/docket/files/143/16895.pdf>

<sup>57</sup> ILC Articles on Responsibility of States for Internationally Wrongful Act, art. 41(3). UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

<sup>58</sup> *Supra* note 55, para. 10.

in the *jus cogens* violation cases long before the *Jurisdictional Immunities* decision was delivered. I would like to consider the most prominent approaches to the problem that have not been directly overruled by the ICJ, and, therefore, still might be applied in practise in future (regardless of how low these chances are).

The theory of an implied waiver of the immunity has been already considered in the First Chapter of the present work. Indeed, the US Court has found this argument not persuasive in the *Princz* case. The theory suggests that by perpetrating a grave violation of international law the state implicitly waives its sovereign immunity for all subsequent legal actions. While the theory was not directly rejected by any major international tribunal or organisation, its obvious flaws entailed general reluctance to apply or even consider this theory. Firstly, the concept of waiver implies expressing an intention to give up a certain privilege. It is widely agreed that intention to commit an illegal act cannot be construed as an intention to give up sovereign immunity later on.<sup>59</sup> The popularity of this argument in the US courts is explained by the presence of the implied waiver provision on the FSIA. However, some authors tend to forget that regardless of how wide the interpretation of the section 1610(a) of the FSIA could be, state immunity is governed by the rules of customary international law. In late 90s a doctrine of forfeiture of sovereign rights emerged in Europe.<sup>60</sup> The doctrine is rather similar to the implied waiver one. It implies that violations of the *jus cogens* and *ergo omnes obligations* amount to the forfeiture of the sovereign immunity right. Consequently, no element of intention is present. While this idea has fewer flaws than the implied waiver argument, it is still quite unrealistic and not supported by any international practice.

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<sup>59</sup> Jürgen Bröhmer, *State Imunity and the Violations of Human Rights*, p. 191, Martinus Nijhoff Publishers (1997).

<sup>60</sup> Juliane Kokott, *Mißbrauch und Verwirkung von Souveränitätsrechten bei gravierenden Völkerrechtsverstößen*, in *Recht zwischen Umbruch und Bewahrung* / hrsg. von Ulrich Beyerlin ... [et al.] (1995).

An alternative view on the problem shifts the focus from situations where immunity possibly can be removed towards examination of the nature of acts than entail sovereign immunity. A long-standing approach of Alexander Orakhelashvili suggests<sup>61</sup> that acts of state violating jus cogens rules, such as torture, shall not be regarded as acts *jure imperii*. According to him, acts of torture and other grave violations can be made by private actors as well as by governmental officials. Consequently, being not exclusively subjected to governmental discretion, they cannot be regarded as acts *jure imperii*. However, such position is questionable. ILC Articles on Responsibility of States for Internationally Wrongful Acts indicate “that conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions”.<sup>62</sup> Consequently, acts *jure imperii* are characterized by actual allegiance of perpetrator to a particular state but not by criterion of legality of action in question. This approach was reaffirmed by number of scholars and domestic courts. According to Thomas Giegerich mere fact that act was made in violation of *jus cogens* “does not in itself transform sovereign acts into *acta jure gestionis*”.<sup>63</sup>

The nature of sovereign acts was addressed in the *Victoria Transport* case the US Court of Appeals noted that only “strictly political or public acts about which sovereigns have traditionally been quite sensitive” could be regarded as sovereign ones.<sup>64</sup> The Court named, *inter alia*, diplomatic, commercial and military acts of the government as an example.

In the later case of *Saudi Arabia v. Nelson* the USSC states that sovereign immunity

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<sup>61</sup> Alexander Orakhelashvili, *Peremptory norms in international law*. Oxford: Oxford University Press (2008).

<sup>62</sup> *Supra* 50, article 7.

<sup>63</sup> Thomas Giegerich, *Do Damages Claims Arising from Jus Cogens Violations Override State Immunity from the Jurisdiction of Foreign Courts?*, in *The Fundamental Rules of the International Legal Order*, at 224 (2006).

<sup>64</sup> *Victoria Transport v. Comisaria General De Abastecimientos Y Transportes*, 336 F.2d 354, para. 11 (1964)

covers only “sovereign or public acts [...], but not [...] private or commercial in character”.<sup>65</sup> Unlike in the *Victoria Transport* case, the issue of sovereign was covered by FSIA of 1976. The Act required granting foreign states immunity except in cases where the question arises from commercial activity. While the majority of Judges agreed that acts of torture could not be treated as commercial activity, dissenting Justice Stevens objected. He noted that for the US court to have jurisdiction, the state’s act must be “based upon a commercial activity”.<sup>66</sup> This wording allows much broader interpretation than that applied by the majority. Since the torture occurred as the result of the petitioner’s employment activity, the FSIA exception should be applied. Exactly the same line of reasoning was applied by the petitioner in the Canadian *Bouzari v. Islamic Republic of Iran* that I have covered earlier. Similar to the Nelson case, it was rejected by the majority of Judges.

In the *I Congreso* case the Lords of Appeal have acknowledged that the distinction between acts *jure imperii* and *jure gestions* is very narrow and to establish the nature of an act courts must examine “background of the whole context in which the claim is made”.<sup>67</sup> The House of Lords decided that the act of a foreign state should not enjoy immunity if “it is an act which could be performed by any private actor”.<sup>68</sup> Indeed, this is a very narrow interpretation that allows barring state from enjoying immunity for a wide range of actions, including even military ones.

The issue of legality of an act should not be important in determination of the nature of that act.<sup>69</sup> Both acts of torture and breach of the contract violate respective norm of international law. However the former is usually regarded as an act *jure imperii* while the latter is without any doubt an act *jure gestionis*. Nonetheless, it is claimed that acts in

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<sup>65</sup> *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993).

<sup>66</sup> *Id.*, Dissenting opinion of Justice Stevens.

<sup>67</sup> *I Congreso del Partido*, 1 A.C. 244 (1998)

<sup>68</sup> *Supra* 60, p. 323.

<sup>69</sup> *Supra* 48, para. 60.

violation of *jus cogens* rules of international law cannot be perceived as sovereign ones and, therefore, cannot entail sovereign immunity.<sup>70</sup> The ICJ's decision did not directly address this issue. While both parties in the case agreed that acts of torture and forced slavery in the course of military actions constituted acts *jure imperii*, it is not entirely clear whether there would be an opposite answer to this question in different circumstances.

It seems that the contextual approach remains to be the most prudent in determining the nature of acts in question. Domestic judicial practice indicates that motive and purpose of an act are important to define the nature of that act.<sup>71</sup> Moreover, not only the judicial perception of the act is important, but also the way it is regarded by the acting state.<sup>72</sup>

Despite all said, the situations where courts have defined acts violating international human rights law and/or *jus cogens* norms are very rare. Judges and scientists may suggest excluding acts violating peremptory rules of international law from the scope of *jure imperii* actions, but the courts still reluctant to adopt these views. The USSC in *Saudi Arabia v. Nelson* noted that even though torture by the police is contrary to the recognised rules of international law and is an abuse of power by government, these acts are still remain within the albeit of the police powers. Therefore, they are sovereign in nature.<sup>73</sup>

For these reasons, it is rather hard to suggest that actions in violation of *jus cogens* rules will soon or ever be regarded as acts *jure gestionis* or any similar category (e.g. *delicta*

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<sup>70</sup> *Supra* 60, p. 325; see also Wendy A. Adams, *In Search of Defence of the Transnational Human Rights Paradigm: May Jus Cogens be Invoked to Create Implied Exceptions in Domestic Immunity Statutes?*, in *Torture as Tort*, Craig Scott, ed., Hart Publishing (June 2001); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (1992)

<sup>71</sup> *I Congreso del Partido*, 1 A.C. 244 (1998); *United States of America v. The Public Service Alliance of Canada and Others (Re Canada Labour Code)*, 91D.L.R.(4th)449;94ILR (1992); *Reid v. Republic of Nauru*, 1VR251;101ILR (1993); *De Sanchez v. Banco Central de Nicaragua and Others*, 770 F.2d 1385 (1985).

<sup>72</sup> M. Shaw, *International law: 6<sup>th</sup> edition*, Cambridge University Press, p. 711 (2008).

<sup>73</sup> *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993).

*imperii*, as suggested by Judge Trindade in his dissent to the ICJ' case)<sup>74</sup>. Nonetheless, the door is not completely sealed. International community may develop new understanding of the existing international law concepts. On the other hand, similar to my views on the *jus cogens* argument, I cannot agree that blunt shift in practice can do anything good. Creation of a *delicta imperii* category may seriously undermine existing international relations and create a judicial chaos.

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## 2.2. Tort exception to the sovereign immunity rules

I have briefly touched upon the issue of territorial tort exception to the sovereign immunity in the previous chapter. Unlike arguments suggesting complete removal of a sovereign immunity in the human rights violation cases, the territorial tort exception works in a more delicate way. It provides a number of safeguards and conditions on which a court may bar foreign state from enjoying sovereign immunity. The concept of territorial tort is widely recognized not only on domestic level, but it is also included in several international multilateral instruments.<sup>75</sup>

Despite the Italian tort exception argument was rejected by the ICJ in the Jurisdictional Immunities case, it still can be viable. In fact, the ICJ did not overrule this exception. According to the statistics suggested by the ICJ, “nine of the ten States [...] which have legislated specifically for the subject of State immunity have adopted provisions to the effect that a State is not entitled to immunity in respect of torts occasioning death, personal injury or damage to property occurring on the territory of the forum State”.<sup>76</sup> Consequently, territorial tort exception per se is consistent with international law.

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<sup>74</sup> Dissenting Opinion of Judge Cañado Trindade, Dissenting, *Jurisdictional Immunities of the State* (Germany v. Italy: Greece Intervening), (ICJ, February 3, 2012).

<sup>75</sup> E.g. United Nations Convention on Jurisdictional Immunities of States and Their Property, United Nations, art. 12 (December 2, 2004); European Convention on State Immunity, art. 11 (1972).

<sup>76</sup> *Jurisdictional Immunities of the State (Italy v. Germany)* case, para. 70 (ICJ, February 3, 2012).

However, the scope of application of the territorial tort exception is very narrow. First of all, this concept does not automatically cover all personal injury of death cases. The act or omission must take place on the territory of the forum state. The wording of this requirement may differ. For instance, the UN Convention on Jurisdictional Immunities requires the wrongful conduct to occur “in whole or in part” on the territory of the forum state.<sup>77</sup> Domestic legislation is usually more precise and requires for the act to occur on the territory of the forum state in whole.<sup>78</sup> However, the essence of the requirement remains the same, the tortious act must occur on the territory of the forum state to fall within its jurisdiction.

Moreover, domestic case practice demonstrates that for the court to dismiss state’s immunity under the tort exception, the substantial wrongful action must take place on the territory of the forum state, not its direct consequences. In the previously mentioned *Bouzari v. Islamic Republic of Iran* case, the Canadian Court directly rejected to recognize subsequent sufferings of Mr. Bouzari sufficient to satisfy the requirements of the State Immunity Act.

The only exception from this requirement is represented by the recent amendments to the US FSIA. Terrorism exception to the sovereign immunity allows bringing claims seeking damages for personal injuries against states designated as sponsors of terrorism.<sup>79</sup> However, even this unorthodox and rather controversial exception provides high level of safeguards for foreign states. For example, inter alia, section 1605A(a)(2)(A)(iii) obliges claimant to provide “a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration”.<sup>80</sup>

Furthermore, the application of the territorial tort exception is not possible in the

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<sup>77</sup> United Nations Convention on Jurisdictional Immunities of States and Their Property, United Nations, art. 12 (December 2, 2004)

<sup>78</sup> See: Canadian State Immunity Act, R.S.C., 1985, c. S-18; Australian Foreign States Immunities Act (1985); The UK State Immunity Act (1978).

<sup>79</sup> Foreign Sovereign Immunities Act, § 1605A.

<sup>80</sup> *Id.*, § 1605A(a)(2)(A)(iii).

armed conflict situation where the tortuous action is committed by armed forces of the state. This view was expressed by the Chairman of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property during the 6<sup>th</sup> Committee meeting and later supported by the ICJ.<sup>81</sup> Moreover, the ECtHR observed that the international trend to limit territorial tort exception in the armed conflict situations and did not find it contrary to the ECHR. Courts usually justify such exception by the fact that military actions are inherently of *jure imperii* nature and enjoy immunity privilege. While this justification is widely accepted, it is necessary to mention that domestic courts tend to disregard difference between acts *jure imperii* and *jure gestionis* while applying territorial tort exception.<sup>82</sup>

Considering all said, the territorial tort exception is a real way to bar states from enjoying sovereign immunity. However, it is highly unlikely that it will have large practical impact on the situations where states violate human rights and cover themselves behind the immunity. Situations where states commit a tortuous act on the foreign territory are quite rare and are usually limited to traffic accidents. This exception will not help former Nazi camp internees or people tortured on a foreign soil to receive compensation from a perpetrator.

### 2.3. *The last resort argument.*

The argument of last resort that was “substantially overlooked, if not completely sidelined”<sup>83</sup> by the ICJ in the *Immunities* case. In the *Jones v. Saudi Arabia* case<sup>84</sup> the claimants has brought an action against Saudi Arabia and its officials claiming damages for

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<sup>81</sup> Summary of the work of the Sixth Committee, United Nations Doc. A/C.6/59/SR.13, para. 36; *Jurisdictional Immunities of the State (Italy v. Germany)* case, para. 69 (ICJ, February 3, 2012).

<sup>82</sup> See e.g.: *Bouzari v. Islamic Republic of Iran* (December 4, 2003); *Letelier v. Republic of Chile*, 188 F.Supp. 665 (D.D.C., 1980); *Liu v. Republic of China* 642 F.Supp. 297 (N.D. Cal. 1986).

<sup>83</sup> Dissenting Opinion of Judge Yusuf, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, (ICJ, February 3, 2012).

<sup>84</sup> *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others*, UKHL 26, 22 (2006).

the acts of torture committed on the territory of the defendant state. The issue before the House of Lords was to define whether state immunity could be stroke out where violation of the peremptory rules is involved. The answer was negative. Lord Bingham has expressed a view that ban of torture “does not automatically override all other rules of international law”.<sup>85</sup> He has referred to the opinion Hazel Fox QC:

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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.<sup>86</sup>

The argument that breach of international peremptory rule cannot lead to the waiver of immunity and emergence of jurisdiction was also supported by reference of the House of Lords to the decision of the ICJ on the Armed Activities on the Territory of the Congo case.<sup>87</sup> Democratic Republic of Congo has argued that on the number of grounds, inter alia on the alleged violation of international law prohibiting genocide and torture, that ICJ automatically has a jurisdiction in the case. The ICJ has indicated that even though the states are obliged to act in accordance with requirements of international law, violation this obligation per se cannot create an ICJ’s jurisdiction over it. In other words, the Court has drawn a line between procedural and substantive issues.

In the *Jurisdictional Immunities* case Italy argued that as victims had not real chance to seek redress other than through Italian courts, its actions were justified by the last resort exception.

In the absence of a specific conventional régime that determines how victims should have access to reparations, victims are entitled, as a measure of last resort, to appeal to the courts of the State where the egregious violations of international humanitarian law were

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<sup>85</sup> Id., para. 24.

<sup>86</sup> Hazel Fox QC, *The Law of State Immunity*, Oxford University Press, 525 (2002).

<sup>87</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, (ICJ, February 3, 2006).

committed ... and to obtain a derogation from the principle of immunity.<sup>88</sup>

Last resort exception can only be invoked in cases where the responsible state has failed to provide redress for the victims. In theory this exception complies with the principle of exhaustion of local remedies and at the same time eases the effect of state immunity that sometimes deprives claimants from any remedy.<sup>89</sup> Unlike *jus cogens* argument, last resort exception is procedural in nature. It allows transferring jurisdiction and denying immunity in cases where no alternatives for the victims exist. However, the ICJ has rejected this suggestion, as there is no rule or state practice supporting dependence of state immunity “upon the existence of effective alternative means of securing redress”.<sup>90</sup>

Nonetheless, number of Judges<sup>91</sup> has expressed a support to the last resort argument. Judge Bennouna in his concurring opinion showed a concern regarding ICJ’s position. He disagreed that the lack of related state practice and jurisprudence could serve as a ground (see paras. 101-4 of the Jurisdictional Immunities of the State judgment) to automatically reject the argument. With reference to the precedent of *Corfu Channel* case Judge Bennouna suggested that the Court could have used general principles of law to assess last resort argument and define the way laws of state immunity and state responsibility correspond with each other. Indeed, the Court approached the case very “mechanically” and invoked state immunity without regard to its circumstances. Judge Bennouna interprets last resort exception as waiving state immunity in very small number of cases where the responsible

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<sup>88</sup> Counter-Memorial of Italy, Case Concerning Jurisdictional Immunities of the State (Germany v. Italy), para. 6.26 (ICJ, December 22, 2009).

<sup>89</sup> Micaela Frulli, *The Times They Are A-Changing’ — The Italian Court of Cassation Denies Germany Immunity from Execution to Allow Compensation to War Crimes’ Victims*, 9 *Journal of International Criminal Justice*, p. 1129-42, at 1141 (2011).

<sup>90</sup> *Supra* 37, para. 101.

<sup>91</sup> See Separate Opinion of Judge Bennouna; Dissenting Opinion of Judge Cançado Trindade, Dissenting Opinion of Judge Yusuf, *Jurisdictional Immunities of the State* (Germany v. Italy: Greece Intervening), (ICJ, February 3, 2012).

state “rejects any engagement of its responsibility”.<sup>92</sup> This approach implies balancing of the right of victims to remedy and access to courts and rules of state immunity in cases where no other possible ways to claim redress are available for victims.

*Ad hoc* Judge Yusuf has expressed his disagreement with the scope of the issue the Court has addressed in the judgment. With the reference to the constant Italian claims, Judge Yusuf indicated that it was necessary to limit the issue of general applicability of rules on state immunity in the cases of war crimes and grave human right violations to the particular situation denial of remedy for Italian citizens and immunity waiver. The Court has almost omitted lack of reparations situation in its decision and has only considered last resort argument in the few paragraphs of the judgment.

Consequently, the ICJ has not completely rejected the last resort argument, but set it aside by referring to the lack of relevant legal and state practice. Support to this exception is emerging among legal scholars and practitioners. Some legal scholars suggest, “state is not required to grant foreign state immunity if there are no alternative means for the settlement of the claim”.<sup>93</sup>

The ECtHR has addressed the situation where state immunity rule application will entail denial of justice in the abovementioned *Al-Adsani v. the United Kingdom* case. Together with noting that state immunity restriction on the access to court right is compatible with convention, the European Court indicated “limitations applied [should] not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired”.<sup>94</sup> One can say that in the situations where domestic courts constitute the last way to seek redress due to the reluctance of the responsible state to provide

<sup>92</sup> Separate Opinion of Judge Bennouna, para. 15, Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), (ICJ, February 3, 2012).

<sup>93</sup> Mizushima Tomonori, *Denying Foreign State Immunity on the Grounds of the Unavailability of Alternative Means*, *Modern Law Review*, vol. 71, Issue 5, p. 734-752, at 752 (2008).

<sup>94</sup> *Al-Adsani v. The United Kingdom*, Application no. 35763/97, para. 53 (November 21, 2001).

remedy, applications of the rules on state immunity may impair the right or at least make the limitation disproportionate. Nonetheless, the European Court has failed to address this issue in the *Al-Adsani* case.

The decision was also criticized due to the fact that ECtHR has failed to apply its previous case law on immunity of foreign parliaments<sup>95</sup> and international organizations<sup>96</sup>. The European Court has numerously stated that rules of immunity constitute disproportional limitation on the applicants' right to access to court where no other alternative remedies exist. While this criticism is based on some reasonable grounds, none of the previous cases concerned rules of state immunity. Consequently, *Al-Adsani* case did not overrule preceding decisions, but applied amended logics to the new and unique circumstances.

Lorna McGregor claims that if the the ECtHR will stick to its understanding of the right under article 5 of the European Convention in the number of pending immunities cases it will "either have to acknowledge that the right of access to a court is ineffective, ... or it will have to find that ... it must interpret its Convention in line with international law, in cases of clear conflict, the specific Convention requirements override general international law".<sup>97</sup>

The implications of the ICJ's *Jurisdictional Immunities* decision can also, unfortunately, make domestic and international courts more reluctant to apply and develop last resort exception. In the recent judgment of the Supreme Court of the Netherlands in the *Mothers of Srebrenica Association* case the suggestion to waive immunity of the United Nations on the basis of last resort exception was completely rejected. In fact, the Dutch

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<sup>95</sup> *Cordova v. Italy (No. 1)*, Application No. 40877/98 (January 30, 2003).

<sup>96</sup> *Waite and Kennedy v. Germany*, Application No. 26083/94 (February 18, 1999).

<sup>97</sup> Lorna McGregor, *State Immunity and Human Rights: Is There a Future after Germany v. Italy?*, *Journal of International Criminal Justice*, Vol. 11, Issue 1, 125-145, at 145 (March 2013).

Supreme Court used the exact reasoning the ICJ used in the *Jurisdictional Immunities*.<sup>98</sup> The ECtHR recently has upheld the position of the Dutch Court.<sup>99</sup> There was no violation of article 6 found and the UN immunity remained.

The Commercial Division of the Supreme Court of Quebec has recently considered *Estate of Kazemi and Hashemi v. Islamic Republic of Iran* case. The case concerned alleged torture and assassination of the Zahra Kazemi by the Iranian authorities. His son initiated proceedings in Canada claiming damages from Iran. According to the plaintiff, it is impossible for him to receive “enjoy procedural fairness and obtain a fair hearing”<sup>100</sup> in the respondent state’s courts. The Quebec Court has upheld state immunity saying that Canadian State Immunity Act does not preclude plaintiff from enjoying his right to fair trial, but simply defines that Canadian courts are not competent to consider the claim.

*2.3.1. Practical challenges on the way of for further application of the forum of last resort exception.*

As it follow from the abovementioned considerations, last resort exception, if possible to apply, must be subjected to a very high level of scrutiny and applied in the narrowest number of cases. The key concept in the last resort argument is lack of any other available means to seek redress for the victim. As the result, domestic courts must evaluate all other ways capable to resolve the issue (if any) and assess heir effectiveness.

First obvious practical obstacle is lack of possibility and sometimes desire of domestic

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<sup>98</sup> *Mothers of Srebrenica Association v. the Netherlands and the United Nations*, case No. 10/04437, Supreme Court of the Netherlands (April 13, 2012). Available at: <http://www.rechtspraak.nl/Organisatie/Hoge-Raad/Supreme-court/Summaries-of-some-important-rulings-of-the-Supreme-Court/Pages/Ruling-Dutch-Supreme-Court-Mothers-of-Srebrenica.aspx> (Visited on March 11, 2013).

<sup>99</sup> *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Application No. 65542/12 (June 11, 2013).

<sup>100</sup> *Estate of Kazemi and Hashemi v. Islamic Republic of Iran*, Case No. 500-17-031760-062, para. 161, Superior Court of Quebec (January 25, 2011).

courts to evaluate situation. It usually requires allocation of quite noticeable amount of time and resources to conduct a research on alternative dispute resolution means. In addition, misevaluation and waiver of foreign state immunity can entail undesirable diplomatic and legal consequence for the forum state. Consequently, it is highly doubtful that domestic courts will be eager to apply last resort exception.

In case the forum state will find itself willing to evaluate available alternative means, it will face lack of any proper legal guidelines on how to perform this task. In its immunity related cases ECtHR has applied the ‘reasonable alternative means’ test. The jurisprudence of the European Court does not exactly answer the question of how to evaluate the effectiveness of the alternative ways to resolve a dispute. It is argued that ECtHR’s ‘exhaustion of local remedies’ test can be applied to assess possibility to invoke last resort exception.<sup>101</sup> While it can surely help in determination of reasonable available means, it must be applied with some alterations. The test was developed for the vertical application by the international human rights tribunal, but was not applies in between states. Moreover, it focuses on the institutional existence and effectiveness of a remedy, but omits some other relevant factual considerations that may emerge on the international arena. For instance, situations where all appropriate institutional structures exist in the responsible state but the victims are bared from applying to them due to the responsible state’s actions. It is moreover, not exactly clear how will the test be applies to the non-judicial means of dispute resolution (e.g. diplomatic protection, negotiations, etc.). In fact, British government in *Al-Adsani* case argued that the applicant failed to exhaust all available remedies such as “diplomatic representations or an inter-State claim”.<sup>102</sup> Judge Bennouna also considers diplomatic protection as an alternative way to resolve damages claims.<sup>103</sup> However, if one will follow ECtHR logics, diplomatic protection

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<sup>101</sup> Supra 97, p. 137.

<sup>102</sup> *Al-Adsani v. The United Kingdom*, Application no. 35763/97, para. 50 (November 21, 2001).

<sup>103</sup> Supra 92.

cannot be proclaimed as an effective remedy, as it is not a right of individual and its application completely depends on the will of the state. The issue of effectiveness of further alternative non-judicial means will further be raised and assessed in the 3<sup>rd</sup> Chapter of the present thesis.

#### 2.4. Concluding remarks on the alternative legal ways to resolve the existing issue.

I have to admit that the Jurisdictional Immunities decision has closed or at least seriously suspended all possibilities for international community to develop a way to estop states from enjoying sovereign immunity in *jus cogens* violation cases. While many human rights activists disagree with the ICJ position and try to invent new ways to overcome it, the truth is that states enjoy sovereign immunity for acts *jure imperii* regardless of their lawfulness.

Theoretical approaches aimed to rethink the understanding of *jure imperii* acts or create new *delicta imperii* concept remain theoretical. Hardly can I see the international community to adopt them in practice and voluntarily waive the existing sovereign immunity protection mechanism. Moreover, I doubt whether such unrealistic development will help to resolve the existing situation.

Territorial tort exception is a working international mechanism. However, as I have mentioned above, its scope application is rather narrow. This exception was not initially intended to serve as a leeway to challenge sovereign immunity in human rights violation cases. This exception is to be applied in the traffic accident cases and attempts to extend this scope are very unnatural and most likely will never be successful.

Similar things can be said about last resort argument. While it is undoubtedly driven by very good intentions, there are no practical indicators that can prove this argument will seriously adopted any time soon. However, in the long-term perspective this might be

possible. As the future remains uncertain, it is still important to look for a practical solution that will allow victims of human rights violation to find compensation. I tend to believe that this solution can be found in the sphere of international relations rather than in the legal one. Should any of the arguments mentioned above become practically applicable, the international relations among states will be seriously challenged. With the floodgates open, victims will engage in the forum shopping practices and the judicial certainty might be undermined. Considering all this, I will try to find less damaging solution to the problem in the following and concluding chapter of the present work.

### **Chapter 3. Diplomatic protection as the last resort remedy.**

While any possibilities to ban state from enjoying its immunity for acts *jure imperii* seem to remain in the status of *lex ferenda* and prospects of any changes remain very uncertain, the need for a practical remedy for victims is urgent. In the *Mavrommatis Palestine Concessions* case the Permanent Court of International Justice has affirmed that “It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights - its right to ensure [...] respect for the rules of international law”.<sup>104</sup> States remain most dominant actors in international law and it is quite logical for a state to pick up a claim that has failed to succeed on the national level and bring it to the international fora. In fact, State acts of such nature are not rare. Italian attempts to negotiate the reparation agreements with Germany and its application to the ICJ serve as a great example. State’s intervention removes the issue of state

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<sup>104</sup> *Mavrommatis Palestine Concessions*, PCIJ, Series A, No. 2, p. 12 (August 30, 1924).

immunity from the table and brings an additional weight to the individuals' claims and some degree of diplomatic leverage. ILC Special Rapporteur John Dugard has also noted that "diplomatic protection remains an important weapon in the arsenal of human rights protection".<sup>105</sup>

However, the prospects of such solution are not so bright. First of all, states are not often eager to engage in a legal dispute that does not affect their interests much. There are voices suggesting that in the era of human rights developments states might be under the obligation to step in and provide some sort of assistance where their citizens' rights were violated by a foreign state's actions. However, states are reluctant to accept such approach and it is not very likely that an obligation of such kind exists or will emerge any time in future.

Secondly, the Italian example indicates that state's interference is not an absolute guarantee for success even if grave violation of international law by a foreign state is proven beyond any doubts. Where the lack of positive developments occurs solely due to the reluctance of a respondent state to cooperate, what are the limits of the assistance? Diplomatic protection seems to be a process, not a right of individual for a successful result from state's intervention.<sup>106</sup>

It is evident, that introduction of the diplomatic protection as a way to overcome the jurisdictional immunities issue raises number of problematic issues. The success of this solution highly unpredictable and depends on highly on political will of states. However, half a loaf is better than none. For this reason, in the present Chapter I will cover diplomatic protection as a possible practical way to resolve the situation where there are no other remedies available due to the jurisdictional immunities a perpetrator enjoys. I will firstly

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<sup>105</sup> First report on diplomatic protection by Mr. John R. Dugard, Special Rapporteur, U.N. Doc. A/CN.4/506, para. 32 (2000).

<sup>106</sup> C.F. Amerasinghe, *Diplomatic Protection*, Oxford: Oxford University Press, p. 80 (2008).

consider the general concept of diplomatic protection and its application to the situations where grave human rights breaches take place. In particular, I will examine the alleged obligation of a state to provide assistance to their nationals from the public international law and human rights law point of view. Secondly, I will analyze domestic case law on that matter.

### *3.1. Diplomatic protection under the general international law.*

Diplomatic protection is a long existing concept in international law. The understanding of that concept has altered throughout the history and its current state will be described further in the present Chapter. The ILC suggests that “diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility”.<sup>107</sup> It seems that the concept of diplomatic protection includes wide range of measures available for a state to provide leverage on the international fora. The suggestion that diplomatic protection may be an obligation of a state has received some support recently. In the present part I will examine the prospects of such suggestion under the current international law.

#### *3.1.1. Obligation to provide diplomatic protection as lex ferenda.*

Diplomatic protection was always perceived as a right of a state.<sup>108</sup> Nonetheless, suggestions that particular circumstances of the case may transform such right into an obligation has emerged very early in the international law history. Such opinion was

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<sup>107</sup> Draft Articles on Diplomatic Protection, UN Doc. A/61/10, article 1 (2006).

<sup>108</sup> See e.g. Borchard, *Diplomatic Protection of Citizens Abroad or, The law of international claims*, Banks Law Pub. Co., New York (1919).

expressed by Vattel in his works. He suggested that where the citizen's rights are violated, the state is offended and "is bound to protect this citizen [...] punish the aggressor, and, if possible, oblige him to make full reparation; since otherwise the citizen would not obtain the great end of the civil association, which is, safety".<sup>109</sup> Such suggestion were have never acquired enough support in the international community to transform into a legally binding rule. In the abovementioned *Mavrommatis Palestine Concessions* case the PCIJ has stressed out that by undertaking some measures of diplomatic protection states primarily ensure their own interest "in respect for the rules of international law".<sup>110</sup> The ICJ came to the same conclusion in the *Notteböhme* case.<sup>111</sup> None of these cases speak of the diplomatic protection as of obligation. In its *Barcelona Traction* decision the ICJ has expressly voiced the following:

Within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal person on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is resort to national law, if means are available, with a view to furthering their cause or obtaining redress. The municipal legislator may lay upon the State an obligation to protect its citizens abroad, and may also confer upon the national a right to demand the performance of that obligation, and clothe the right with corresponding sanctions. However, all these questions remain within the province of municipal law and do not affect the position internationally.<sup>112</sup>

Human Rights law developments have not introduced much change. While some voices suggested that international human rights instruments contain an implied right of an individual to a diplomatic protection by its state, this was not supported in practice. The European Commission on Human Rights has noted that "no right to diplomatic protection or

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<sup>109</sup> The Law of Nations, book II, Chapter VI, para. 71, Berry and Rogers (1787)

<sup>110</sup> Supra 103, p. 12.

<sup>111</sup> *Notteböhme case (Lichtenstein v. Guatemala)*, ICJ Rep. 4 (April 6, 1955).

<sup>112</sup> *Barcelona Traction Light & Power Co. Ltd. (Belg. v. Spain)*, Second Phase, 1970 ICJ Rep. 3, para. 78 (February 5, 1970)

other such measures by a High Contracting Party on behalf of persons within its jurisdiction is as such guaranteed by the Convention”.<sup>113</sup>

Recent attempts to implement the obligation to provide assistance into the ILC Articles on Diplomatic Protection were not successful, at least not entirely. Special Rapporteur John Dugard has suggested including a provision into the Articles concerning a legal obligation of states to protect their citizens on the diplomatic level.<sup>114</sup> The proposed article obliged states to provide diplomatic protection to their nationals in situations where there was no possibility to bring an individual claim before a competent international tribunal. The provision was limited to a claims resulted form a grave breaches of *jus cogens* norms by foreign states. The proposal was not supported by the Commission, however, it was not unanimously rejected either.

Subsequently the Commission discussed the matter once again and agreed to introduce a less intrusive provision into article 19 under the title ‘recommended practice’. According to the article states should “give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred”.<sup>115</sup> Such wording was influenced by a number of domestic cases arguing that states should at least have an obligation to consider a request of an individual. The article suggests that states do not have a complete discretion where the need to provide diplomatic protection emerges. The provision requires due consideration, i.e. there may be situations where state’s rejection to provide assistance can be found arbitrary or unbalanced. Without a functioning international mechanism of supervision over the diplomatic protection practices it seems that this function is within the competence of the domestic courts. This suggestion is supported by municipal case law that will be analyzed below.

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<sup>113</sup> *Bertrand Russell Peace Foundation v. United Kingdom*, App. No. 7597/76, para. 123 (May 2, 1978).

<sup>114</sup> ILC Report, UN Doc. A/55/10, paras. 447-456 (2000).

<sup>115</sup> Draft Articles on Diplomatic Protection, UN Doc. A/61/10, article 19 (2006).

### 3.1.2. Responsibility to protect as a source of an obligation to provide diplomatic protection.

In 2000 Secretary General of the UN stressed the necessity to find a new way to approach serious humanitarian crises, since the humanitarian intervention doctrine impaired the sovereignty of states principle and was highly criticized by international community.<sup>116</sup> In response to this Canadian Government established an independent International Commission on Intervention and State Sovereignty that issued a report suggesting new Responsibility to Protect doctrine (further- “R2P”).<sup>117</sup> The doctrine was discussed in the UN High-Level Panel report<sup>118</sup> and subsequently adopted by the UN General Assembly during the World Summit meeting.<sup>119</sup> Provisions of the World Summit Outcome on the R2P doctrine were also supported by the Security Council of the UN.<sup>120</sup>

At that point the doctrine was rather vague. For that reason Secretary General of the UN introduced a Report aimed to shape the doctrine so it will be able to be enforced in practice.<sup>121</sup> The report introduced a three-pillar structure of the doctrine: “(1) the protection responsibilities of the state; (2) international assistance and capacity building; (3) timely and decisive response”.<sup>122</sup> For the purposes of the present research the first pillar matters the most. The R2P doctrine has altered the established concept of state sovereignty. Right to protect its citizens has transformed into an obligation to confront grave human rights violations.

The Report mostly speaks about the prevention of violations. Nonetheless, the

<sup>116</sup> Kofi A. Annan, *We the peoples' the role of United Nations in the 21<sup>st</sup> Century*, United Nations (2000).

<sup>117</sup> *The Responsibility to Protect*, Ottawa: International Development Research Centre (2001).

<sup>118</sup> High-level Panel on Threats, Challenges and Change, *A more secure world: our shared responsibility*, UN Doc. A/59/565 (2004)

<sup>119</sup> United Nations General Assembly Resolution 60/1. 2005 World Summit Outcome, UN Doc. A/Res/60/1, paras. 138-139 (2005).

<sup>120</sup> United Nations Security Council Resolution 1674, UN Doc. S/Res/1674, para. 4 (2006).

<sup>121</sup> *Implementing the responsibility to protect*, UN Doc. A/63/677 (2009).

<sup>122</sup> *Id.*, para. 11.

question of impunity of perpetrators is also raised.<sup>123</sup> Although it mostly seems to concern impunity of individuals and criminal responsibility, it is possible to extend the concept beyond that. The guidelines describe appropriate measures in situations where there is a need to protect population from the internal threat. They are silent, however, when it comes to the protection of a state's nationals from a foreign perpetrator. The responsibility to end impunity remains. It is possible to suggest that in such case a state should adopt an appropriate diplomatic remedy and tackle the impunity on its own or with the support of international community.

### 3.2. Domestic jurisprudence on diplomatic protection: Guantanamo bay cases and beyond.

As it was mentioned above, the decision to provide individuals with a right to a diplomatic protection lays within the competence of a state. While the explicit provisions on this matter are not a common case in international community, domestic court has frequently considered claims of individuals asking to compel governments to provide assistance.

In the *Hess* case German Constitutional Court has addressed the complaint of a former Nazi member who was convicted by the Nurnberg Tribunal and imprisoned.<sup>124</sup> He demanded German Government to challenge the legality of detention on his behalf. The Court found that Federal Government was under the constitutional obligation to provide diplomatic protection to Mr. Hess. However, the Basic Law did not establish any limits on this obligation. Germany was entitled to a wide discretion in these questions. Moreover, acts of diplomatic protection must not always be successful and achieve the results that are most favorable for the victim. In that case the Court dismissed a complaint, since the Government provided sufficient efforts to improve the position of the victim. While the case seems to *prima facie* represent a positive trend, it should be noted that German example is quite unique

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<sup>123</sup> Id., para. 17.

<sup>124</sup> Hess decision, BVerfGE 55, 349 2 BvR 419/80 (December 16, 1980).

and hardly can be used as an example for an emerging state practice.

In the *Kaunda v. President of the Republic of South Africa* case the Constitutional Court of South Africa found that South African Government is under obligation to provide due considerations to requests for diplomatic protection from those citizens whose rights under international law can be violated by other states.<sup>125</sup> The case concerned Samuel Kaunda and over sixty other South African citizens who were arrested by Zimbabwe officials and were under the risk of extradition to Equatorial Guinea for alleged participation in an attempt to perform *coup d'état*. These individuals requested South African government to prevent the extradition as they were afraid to face unfair trial and death penalty in Equatorial Guinea.

The Court precisely stated that current international law recognizes a right for a state to provide diplomatic protection, but not an obligation to do so.<sup>126</sup> The Court directly referred to the *Barcelona Traction* case where the ICJ has found that “a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit [and] a State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease”.<sup>127</sup> It also emphasized that the decision to provide diplomatic protection “is an aspect of foreign policy which is essentially the function of the executive”.<sup>128</sup>

The Court expressly distinguished the *Kaunda* case from its earlier *Mohamed* decision.<sup>129</sup> In the latter case the Court has found that unlawful transfer of an individual to the United States where he could have been subjected to death penalty was against constitutional law of South Africa and international human rights law standards. In that particular case the

<sup>125</sup> *Kaunda and others v. President of the Republic of South Africa*, 2004 (10) BCLR 1009 (CC).

<sup>126</sup> *Id.*, para. 23

<sup>127</sup> *Barcelona Traction Light & Power Co. Ltd. (Belg. v. Spain)*, Second Phase, 1970 ICJ Rep. 3, paras. 78-79 (February 5, 1970).

<sup>128</sup> *Supra* 124, para. 77.

<sup>129</sup> *Mohamed v. President of the Republic of South Africa*, 2001 (3) SALR 893 (CC).

Constitutional Court has proclaimed that South African government is obliged to conduct negotiations and seek diplomatic assurances from the American government in order to remedy the situation that has occurred solely as the result of the wrongful actions of the South African government.

Therefore, the Constitutional Court of South Africa did not recognize the existence of an obligation of a state to provide diplomatic protection to its citizens under international law. Nor did it suggest that individuals have right to such protection from a state. The Court suggested that the government should act in the spirit of the South African Constitution and its obligations under international human rights law and consider taking appropriate steps in order to protect rights of citizens. The governmental discretion is not unlimited. It seems that in extreme cases where the refusal to provide protection is explicitly unbalanced the Court has a right to intervene.

Number of cases concern complaints of Guantanamo Bay prison detainees asking their national countries to provide some assistance and facilitate repatriation. Prisoners are facing grave human rights violations. At the same time they are simply stripped of any real possibility to bring a claim in the US and diplomatic protection is the measure of last resort for them.

In the *Khadr v. Prime Minister of Canada* case the Canadian Court of Appeal has considered the situation of a Canadian citizen who was captured by US military forces and detained in Guantanamo Bay. Khadr was at the age of 15 when he was captured in Afghanistan and transferred to Cuba. Throughout his detention he was interviewed by military officials, including Canadian ones, in order to obtain intelligence. Mr. Khadr challenged his detention the Crown's decision not to seek his reparation back to Canada. Justice O'Reilly of the Federal Court found that Canada was responsible for breaching Mr. Khadr's right to life, liberty and security under section 7 of the Canadian Charter of Rights

and Freedoms.<sup>130</sup> Under the subsection 24(1) of the Charter the Court ordered the State to as soon as possible request the return of Mr. Khadr as it was the only suitable remedy available.

While the Crown contested the violation of Mr. Khadr's rights and the legality of the order to return him, arguing that the decision to pursue the return of a citizen detained abroad exclusively belongs to the Crown and lays within the albeit of its foreign affairs discretionary powers. The Federal Court of Appeal of Ontario disagreed and upheld the decision of the Federal Court.<sup>131</sup>

Particular circumstances of the case, namely the fact that Mr. Khadr was questioned by Canadian authorities without any due process and they were aware of the conditions of the detention, allowed the Court of Appeal to conclude that the Crown has violated its obligation under section 7 of the Canadian Charter of Rights and Freedoms. The Court agreed with the conclusion of Justice O'Reilly that this breach gave rise to an obligation of Canada to provide remedy for Mr. Khadr. The only appropriate remedy available was Mr. Khadr's repatriation.<sup>132</sup> The Court of Appeal rejected the argument of the Government that the decision to provide diplomatic protection lies exclusively within its competence. The Court noted that the state is similarly barred from extraditing citizens to another country where he will face

The Court of Appeal has expressly stated that the decision does not oblige Canada to "request the repatriation of any Canadian citizen detained abroad".<sup>133</sup> Moreover, the order to request Mr. Khadr's return is not based on the conditions of the imprisonment.

English court dealt with two prominent cases on diplomatic protection claims from the Guantanamo Bay detainees. The first of them concerns British national Feroz Ali Abbasi

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<sup>130</sup> *Khadr v. Canada* (Prime Minister), FC 405 (2009).

<sup>131</sup> *Khadr v. Canada* (Prime Minister), FCA 246 (2009).

<sup>132</sup> For the remedy to be appropriate it must fulfill the test suggested in the *Doucet-Boudreau v. Nova Scotia* (Minister of Education), SCC 62 (2003). The remedy must be effective, should not result in undue hardship to the state's interests and should not exceed the scope of the competence of the courts.

<sup>133</sup> *Supra* 130, para. 34.

who was captured by the US military forces on the territory of Afghanistan and transferred to Cuba.<sup>134</sup> He was captured and kept imprisoned as an enemy combatant without any proper access to court or legal assistance and allegedly suffered from mental and or physical abuses.<sup>135</sup> At first Mr. Abbasi unsuccessfully tried to challenge his detention at first in the US courts. After that his mother brought a suit in the UK on his behalf asking courts to order the Foreign Office to take some steps to repatriate Mr. Abbasi.

The court found itself unable to provide Mr. Abbasi with an appropriate remedy. Justices drew an attention to the fact that international law has not yet recognized an obligation to provide diplomatic protection. The court is also not able to make decisions that will affect the conduct of foreign policy. The decision to protect British nationals lays in the competence of the Foreign Office. Its decisions are “reviewable if it can be shown that [they] were irrational or contrary to legitimate expectation; but the court cannot enter the forbidden areas”.<sup>136</sup> The court considered action that had already been taken by Foreign Office (consideration to provide assistance and negotiations on this matter with the USA) as sufficient to fulfill all legitimate expectations that Mr. Abbasi could have.

The second Guantanamo detainee case concerned the situation of Mr. Al Rawi several other individuals, who were detained by the Gambian authorities and subsequently handed to the US military forces.<sup>137</sup> Unlike Mr. Abbasi, Al Rawi was not a British national. He possessed an Iraqi citizenship. Seeking refuge from the Hussein regime in Iraq he moved to the UK with his family in 1983 and stayed there since that date, having been granted indefinite leave to remain. Mr. Al Rawi took a business trip to the Gambia and immediately

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<sup>134</sup> *R. (on the application of Abbasi & Anor.) v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] EWCA Civ 1598 (November 6, 2002).

<sup>135</sup> The conclusion on inhuman conditions and treatment of Guantanamo Bay detainees can be drawn from the following sources. United Nations Committee Against Torture, *Conclusions and Recommendations of Committee Against Torture: United States of America*, U.N. Doc. CAT/C/USA/CO/2 (2006); United Nations Commission on Human Rights, *Situation of Detainees at Guantanamo Bay*, U.N. Doc. E/CN.4/2006/120 (2006).

<sup>136</sup> *Supra* 133, para. 106.

<sup>137</sup> *R. (on the application of Al Rawi and others) v. Secretary of State and Foreign and Commonwealth Affairs*, [2006] EWCA Civ. 1279 (October 12, 2006).

upon arrival he was arrested by the state forces and transferred to the UN military base in Afghanistan. Few months later Mr. Al Rawi was moved to Guantanamo prison. Following these events Mr. Al Rawi together with two other prisoners (British refugees) filed a lawsuit in the UK trying to compel the government to take immediate steps to release him from the prison. Among other arguments, the petitioners relied on the fact that the British intelligence services were supervising them and were informed about the extraordinary rendition.

The Court adopted similar approach to the one of the *Abbasi* case. Justices referred to the legitimate expectations argument and stated that in similar cases petitioners can expect the Foreign Office to “consider a British national’s request that representations be made on his behalf”.<sup>138</sup> Nothing suggested that the same expectations could exist for a non-British national. Nonetheless, as it follows from the facts of the case, the Foreign Office considered the request of Mr. Al Rawi.

Furthermore Justices took a closer look on the diplomatic protection concept from the international law point of view. They came to a conclusion that current state of law did not suggest that there is an obligation on behalf of the state to provide protection to its citizens or residents. In cases where the torture practices allegedly took place the state is empowered, due to the *ergo omnes* obligations imposed on states by the prohibition of torture, to “insist on fulfilment of the obligation [to refrain from torture] or in any case to call for the breach to be discontinued”.<sup>139</sup> Human rights law does not provide a remedy in such cases either. Justices specifically pointed that British government did not take any part in the petitioners’ detention and transfer. Therefore the UK had no responsibility under the international human rights law.

While the appeal was rejected, all three applicants were subsequently successfully

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<sup>138</sup> Id., para. 89.

<sup>139</sup> *Prosecutor v. Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia, para. 151 (December 10, 1998)

repatriated from the Guantanamo prison. It clearly follows that British courts are reluctant to proclaim that an obligation to provide diplomatic protection exists under international or domestic law. The legitimate expectation to have the request for assistance considered by the Foreign Office is the only expectation individuals may have in similar situations. However it is limited to nationals and does not cover permanent residents.

The Australian Federal Court considered another prominent case on diplomatic protection.<sup>140</sup> The case concerned the Australian citizen David Hicks who was held in Guantanamo prison for more than five years without any formal charges. Since the Australian government did not take any steps to repatriate Mr. Hicks, the filed suit against the Attorney General and the Minister for Foreign Affairs trying to compel the State to provide him with diplomatic assistance.

Subsequently Justice Tamberlin dismissed the case due to the fact that Mr. Hicks admitted his guilt on the material support to terrorism charges and was extradited to Australia. This event is rather unfortunate since Tamberlin J. has noted that there were “no principle or authority precisely in point on the issues raised in the exceptional circumstances of this case which mandate a conclusion that the application has no reasonable prospect of success”.<sup>141</sup>

Tamberlin J. addressed the issue of justiciability of acts of the executive. He referred to the British jurisprudence on that matter and noted that the principle did not mean that the “judiciary must shut their eyes”<sup>142</sup> especially in cases where the act at question “constitutes ... an infringement of human rights”.<sup>143</sup> Consequently, it is possible to assume that court may exercise some supervision over the executive policies with regards to diplomatic protection. This means that there may be some obligations on behalf of the state in situations

<sup>140</sup> *Hicks v. Ruddock* [2007] FCA 299 (March 8, 2007).

<sup>141</sup> *Id.*, para. 92.

<sup>142</sup> *Kuwait Airways Corp v Iraqi Airways Co & Anor*, [2002] UKHL 19, para. 26 (May 16, 2002).

<sup>143</sup> *Oppenheimer v Cattermole (Inspector of Taxes)*, [1976] AC 249, Lord Justice Cross of Chelsea (1976).

where its citizen's rights are violated by a foreign state. Unfortunately the without a final judgment in the *Hicks* case question of the nature and extent of such obligations remained unanswered.

The cases considered above indicate that courts are quite reluctant to acknowledge the existence of an obligation to provide diplomatic protection under international or municipal law. On the closer look it is possible to extract a principle that suggests that governmental discretion is not unlimited. Individuals seem to have a legitimate expectation that their national state will consider their request. Unfounded and unbalanced refuse to provide assistance may be justiciable by domestic courts under certain circumstances. It is more prudent to speak about judicial review of diplomatic protection, not about an obligation to provide it. This view is consistent with the provisions of article 19 of Draft Articles on Diplomatic Protection.

**Conclusion: are there any prospects of success?**

Current research has demonstrated that international law at its present form does not allow restricting foreign states' immunity for acts *iure imperii* unilaterally. The ICJ completely cut any possibilities to apply *jus cogens* argument. Remaining solutions are either not supported by international community enough to form a rule of customary international law or not at all developed and require some further implementation. An example of a former is the tort exception that is practiced only in the US and covers mostly terrorism cases. The latter case is the last resort exception that is nothing more than a promising theory at the moment without any binding force.

However, there is no need to be pessimistic. Rules of state immunity (like international law in general) constantly evolve. Immunity of foreign officials can be used as an example proving that there is always room for a progressive development. There is an interest in international community and among legal scholars for that issue. Bearing in mind the ever-going development of the Human Rights law, there are not reasons to believe that the situation will not change in the recent future.

Furthermore, even with state immunity rules there is still a possibility for victims to receive an appropriate remedy. Where an individual petition on the national or international level gives no results, diplomatic protection can be of a great use. While its availability depends highly on the political will of a state, international practice indicates that states usually are willing to provide some sort of assistance. Italian attempts to negotiate sufficient remedies for its citizens serve as a great example. In the Guantanamo Bay cases, even though domestic court found against the claimants, states undertook diplomatic attempts to repatriate its citizens and in most of the cases succeeded.

Unfortunately situations where victims are prevented from receiving any remedies for human rights violations occur in practice. International community should address situations

of a grave human rights breaches more closely and pay particular regard to victims' interests. While there are number of ways to seek redress (individual petitions on domestic and international level, diplomatic protection, etc.) it takes a significant amount of time to exhaust them all and there are no guarantees that in the end there will be any compensation. It seems necessary to adopt a treaty or guidelines that will describe the way international community should address grave *jus cogens* breaches and treat victims.

I consider that the most efficient way is to approach the denial of remedy on the international level. While state immunity rules may change at some point in the future, the question is whether it is necessary and even fruitful for them to change. Good intentions may bring us to a situation where victims are filing complaints and forums states' courts rule in their favour but then a question of enforcement rises. If one was able to restrict not only jurisdictional but also immunity from enforcement measures, the *jus cogens* complaints would risk to turn into a tool of political leverage. On the other hand, diplomatic way is less coercive and in fact promises better and faster remedy for victims.

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