

Martin J. Hemmi

The Jurisdictional Immunity of States in National Civil Proceedings for Allegations of Torture

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II	Colloquium
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Outline of contents

Acknowledgements..... III

Outline of contents..... V

Table of contents..... VII

Bibliography XIII

Table of Cases..... XLIII

Table of other Materials..... LXV

List of Abbreviations and Acronyms LXXXIII

Introduction.....1

Part I: Foundations of the Jurisdictional Immunity of States.....5

Part II: Exceptions to State Immunity 59

Part III: Potentially Conflicting International Obligations..... 139

Part IV: Conclusions and Summary..... 355

Table of contents

Acknowledgements.....	III
Outline of contents.....	V
Table of contents.....	VII
Bibliography	XIII
Table of Cases.....	XLIII
I. International Cases	XLIII
1. International Court of Justice	XLIII
2. Permanent Court of International Justice	XLV
3. International Criminal Courts and Tribunals.....	XLVI
4. European Court of Human Rights.....	XLVII
5. European Commission of Human Rights.....	LI
6. Inter-American Court of Human Rights	LI
7. Other International Courts, Tribunals and Arbitral Bodies.....	LI
II. National Cases.....	LIII
1. Austria.....	LIII
2. Belgium.....	LIII
3. Canada.....	LIII
4. France.....	LIV
5. Germany	LV
6. Greece.....	LV
7. Italy.....	LVI
8. Netherlands	LVII
9. Switzerland	LVII
10. United Kingdom	LVIII
11. United States of America	LIX
12. Other	LXIII
Table of other Materials.....	LXV

I. International Treaties and Conventions.....	LXV
II. United Nations Documents	LXVIII
1. International Law Commission.....	LXVIII
2. Committee against Torture.....	LXXI
3. Human Rights Committee	LXXII
4. Other UN Bodies.....	LXXII
III. Council of Europe Documents	LXXV
IV. National Legislations and Documents	LXXVI
1. Domestic Statutes and Acts	LXXVI
2. Other National Documents	LXXVIII
V. Other Materials	LXXIX
1. International Law Association.....	LXXIX
2. Institut de Droit International.....	LXXX
3. Other Materials	LXXXI
List of Abbreviations and Acronyms.....	LXXXIII
Introduction	1
Part I: Foundations of the Jurisdictional Immunity of States	5
§ 1 Object, Purpose and Scope of the Jurisdictional Immunity of States	5
I. Object	5
1. Jurisdictional Immunities of States	5
2. Definition of Torture	9
II. Purpose	12
1. Sovereign Equality and Non-Interference.....	12
2. International Relations and the Dignity of States	16
III. Scope	18
1. Personal Scope of State Immunity	18
a. The State.....	19
b. Political Subdivisions	22
c. State Corporations and Agencies	25
2. From an Absolute to a Restrictive Theory on State Immunity	28

§ 2 Sources of State Immunity Law	33
I. International Law	33
1. International Customary Law	33
2. International Treaties and Codifications.....	35
a. European Convention on State Immunity	35
b. United Nations Convention on Jurisdictional Immunities of States	37
c. Other Codifications and International Treaties.....	39
II. National Law.....	41
1. Countries with State Immunity Legislation.....	42
a. United States of America.....	42
b. Canada.....	44
c. United Kingdom.....	46
d. Others.....	48
2. Countries without State Immunity Legislation.....	49
a. Greece.....	49
b. Italy	51
c. Switzerland.....	54
d. Others.....	56
Part II: Exceptions to State Immunity	59
§ 3 Waiver	60
I. The Concept of an Immunity Waiver in International Law	61
II. A Treaty-based Waiver	66
III. Commission of Torture as an Implied Waiver.....	71
IV. Conclusions	77
§ 4 Exception based on the Qualification of the Act.....	79
I. <i>De jure gestionis v. De jure imperii</i>	80
II. Commission of Torture as a Sovereign Act of the State?.....	85
1. Critical Assessment by Legal Scholars.....	85
2. The Functional Immunity of State Officials	92

a. Current Legal Situation	92
b. Relation between Immunity of State Officials and Immunity of the State	104
III. Conclusion	110
§ 5 Territorial Tort Exception	113
I. Legal Sources of a Territorial Tort Exception to State Immunity	114
1. International Law	114
a. Codified Legal Basis	114
b. International Jurisprudence	118
2. National Law	122
a. Practice of States with Immunity Legislation	122
b. Practice of States without Immunity Legislation	124
3. Legal Doctrine	126
II. Territorial Torts committed by Members of the Military	132
III. Conclusions	136
Part III: Potentially Conflicting International Obligations	139
§ 6 <i>Jus cogens</i> Violations	139
I. Torture and <i>jus cogens</i> Obligations	140
1. The Nature of <i>jus cogens</i> Norms	140
2. The Prohibition of Torture as a <i>jus cogens</i> Norm	144
II. The Hierarchy Argument	147
1. The Procedure/Substance Dichotomy	150
2. Interpretation in Accordance with Public International Law	159
a. Fight against Impunity	163
b. A Humanized Sovereignty	168
c. The Position of the Individual in International Law	173
3. Conclusion on the Hierarchy Argument	181
III. Responsibility of States for Breaches of Peremptory Norms	184
1. Duty not to Recognize or Assist within the ILC Draft Articles on the Responsibility of States	185

a.	Duty not to Assist in the Commission of a Peremptory Violation.....	187
b.	Duty not to Recognize as Lawful a Situation created by a Violation of Peremptory Norms.....	190
2.	Countermeasures	195
a.	Conditions for the Referral to Countermeasures.....	196
b.	General Policy Considerations.....	212
c.	Conclusions.....	215
IV.	Forfeiture of Sovereignty Rights	217
1.	Forfeiture as a General Principle of International Law.....	218
2.	The Forfeiture of Jurisdictional Immunities as a Consequence of a <i>jus cogens</i> Violation	222
V.	Conclusion regarding <i>jus cogens</i> Violations.....	227
§ 7	Right to Access to Court.....	231
I.	Content of the Right to Access to Court.....	232
II.	Applicability of Art. 6 ECHR and the Notion of Jurisdiction under the Convention regarding State Immunity	236
III.	Limitation on the Right to Access to Court	243
1.	Legitimate Aim	244
a.	Protection of Good Administration and Prevention of Practical Difficulties	244
b.	Respect for International Law as a Legitimate Aim.....	246
c.	Protection of Bilateral Relations and the Sovereignty of another State	249
2.	Proportionality and Balancing of Interests	252
3.	Maintaining the Essence of the Right.....	260
a.	Domestic Courts of the perpetrating State as an Alternative Means?	268
b.	Diplomatic Protection as an Alternative Means?	272
c.	Conclusion on the Essence Requirement.....	277
IV.	Conclusion on the Right to Access to Court.....	278
§ 8	Right to Remedy and Reparation.....	281
I.	The Right to Remedy and Reparation in International Law.....	282

1.	Right to Remedy and Reparation in Public International Law	282
a.	Legal Bases	282
b.	Forms of Reparation and Remedy	286
2.	The Right to Remedy and Reparation under the United Nations Convention against Torture.....	294
a.	Material Scope of the UN Convention against Torture.....	295
b.	Art. 14 (1) CAT and its Territorial Scope	297
c.	Identifying and Resolving the Norm Conflict.....	314
II.	The Concept of Universality in Civil Matters	319
1.	The Concept of Universal Jurisdiction.....	320
2.	Criminal v. Civil Universal Jurisdiction	328
3.	Opening the Flood Gates.....	334
a.	<i>Forum non conveniens</i>	336
b.	<i>Forum necessitatis</i>	338
c.	Other Implementation Proposals.....	345
III.	Conclusion on the Right to Remedy and Reparation	352
	Part IV: Conclusions and Summary	355

Bibliography

ADAMS Wendy, In Search of a Defence of the Transnational Human Rights Paradigm: May Jus Cogens Norms be invoked to Create Implied Exceptions in Domestic State immunity Statutes?, in: Scott Craig (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Tort Litigation*, Oxford, 2001

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List of Abbreviations and Acronyms

ACHR	African Charter on Human and Peoples' Rights signed in Banjul on 27.6.1981, OAU Doc. No. CAB/LEG/67/rev.5
AEDP	U.S. Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. 104-132, 110 Stat. 1214 o– <i>U.S.</i>
ALRC	Australian Law Reform Commission – <i>Australia</i>
ARSIWA.	Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission, Yearbook of the International Law Commission, Vol. II (Part Two), 2001, UN Doc. No. A/56/10
Art.	Article
ATF	Arrêt du Tribunal Fédéral (published) – <i>Switzerland</i>
ATS.	Alien Tort Statute of 1789, 28 U.S.C. §1350 – <i>U.S.</i>
Australian FSIA	Foreign State Immunity Act of 1985 of the Commonwealth of Australia, Law No. 196/1985 – <i>Australia</i>
BB	Bundesblatt – <i>Switzerland</i>
BGbl.	Bundesgesetzblatt – <i>Germany</i>
BGer	Entscheide des Bundesgerichts (unpublished) – <i>Switzerland</i>
BverfGE	Bundesverfassungsgerichtsentscheid (published) – <i>Germany</i>
BvR	Bundesverfassungsgerichtsentscheid (unpublished) – <i>Germany</i>
C.A.	Court of Appeal(s)
CAHWCA	Crimes Against Humanity and War Crimes Act of 2000, Bill S-35, 1 st Session, 38 th Parl., 53-54 Eliz – <i>Canada</i>

Canadian SIA	Canadian State Immunity Act, R.S.C. 1985, c. S-18 – <i>Canada</i>
CAT	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, signed in New York on 10.12.1984, UNTS 1465
CIA	United States Central Intelligence Agency – <i>U.S</i>
CLR	Commonwealth Law Reports – <i>Australia</i>
CNN	Cable News Network
D.C.	District of Columbia
DADP	ILC Draft Articles on Diplomatic Protection adopted by the ILC in its 56 th session, Yearbook of the International Law Commission, Vol. II (Part Two), 2006, UN Doc. No. A/61/10
DEA	Drug Enforcement Agency – <i>U.S.</i>
DLR	Dominion Law Report – <i>Canada</i>
Doc.	Document
DRC	Democratic Republic of Congo
ECHR	European Convention of Human Rights and Fundamental Freedoms as amended by Protocol Nos. 11 and 14, signed in Rome on 4.11.1950, Council of Europe Document No. ETS 5
ECJ	European Court of Justice
ECSI	European Convention on State Immunity signed in Basel on 16.5.1972, ETS No. 74
ECT	Energy Charter Treaty signed in Lisbon on 17.12.1994, OJ L380, 31/12/1994
ECtHR	European Court of Human Rights
ed./eds.	edition or editors

EJIL	European Journal of International Law
ESA	European Space Agency
et al.	and others
ETS	Council of Europe Treaty Series
EU	European Union
EWCA	Court of Appeal for England and Wales – <i>United Kingdom</i>
EWHC	High Court of Justice for England and Wales – <i>United Kingdom</i>
f.	following (including the next page)
FAIPL	Federal Act of International Private Law of 18.12.1987, SR 291 – <i>Switzerland</i>
ff.	and subsequent (including next several pages)
FRY	Former Republic of Yugoslavia
GC	Grand Chamber of the European Court of Human Rights
H.R.	House of Representatives – <i>U.S.</i>
i.e.	for example
IACHR	Inter-American Convention on Human Rights, signed in San José on 22.11.1969, OAS Doc. No. 36
IACtHR	Inter-American Court of Human Rights
Ibid.	the same
ICC	International Criminal Court
ICC Statute	Rome Statute of the International Criminal Court, signed in Rome on 17.7.1998, 2187 UNTS No. 38544
ICCPR	International Covenant on Civil and Political Rights, adopted by the UNGA in New York on 19.12.1966, Treaty No. 14668

ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDI	Institut de Droit International
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
IO	International Organizations
ISDS	Investor-State-Dispute-Settlement
Israeli FSIL	Foreign State Immunity Law of 2008, Law No. 5769-2008 – <i>Israel</i>
Japanese ACJ	Act on the Civil Jurisdiction of Japan with respect to a Foreign State, Act No. 24 of 24.4.2009 – Japan
JASTA	Justice against Sponsors of Terrorism Act, Public Law, 114-222 of 28.9.2016, 130 Stat. 852 – <i>U.S.</i>
JBİ	Juristische Blätter – <i>Austria</i>
JDI	Journal de Droit International
KIA	Kuwait Investment Authority – <i>Kuwait</i>
lit.	litera
LNTS	League of Nations Treaty Series
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
NJW	Neue Juristische Wochenschrift – <i>Germany</i>
No./Nr.	Numbre

NSWCA	New South Wales Court of Appeals – <i>Australia</i>
NZLR	New Zealand Law Review – <i>New Zealand</i>
OAS	Organization of American States
OAU	Organization of the African Union
OECD	Organization for Economic Co-operation and Development
OJ	Official Journal of the European Union
p.	page
Pakistani SIO	State Immunity Ordinance VI of 11.3.1981 reproduced in UN Doc. No. ST/LEG/SER.B.20, p. 20 ff. – <i>Pakistan</i>
para.	paragraph
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PLO	Palestine Liberation Organization
R2P	Responsibility to Protect
RVICA	Redress for Victims of International Crimes Act, act to amend the State Immunity Act, Bill C-483, introduced to House of Commons of Canada, No. 402380 – <i>Canada</i>
S.C.R.	Supreme Court of Canada Reports – <i>Canada</i>
S.Ct.	U.S. Supreme Court Reports – <i>U.S.</i>
SCSL	Special Court for Sierra Leone
sec.	section
Singaporean SIA	State Immunity Act of 26.10.1979, Chapter 313, revised edition of SIA 31.12.2014, reproduced in UN Doc. No. ST/LEG/SER.B.20, p. 28 ff. – <i>Singapore</i>

S.A. FSIA	South African Foreign States Immunities Act 87 of 20.11.1981 reproduced in UN Doc. No. ST/LEG/SER.B.20, p. 34 ff. – <i>South Africa</i>
TIAS	United States Treaties and other International Agreements Series – <i>U.S.</i>
TRNC	Turkish Republic of Northern Cyprus
TVPA	Torture Victims Protection Act of 1991, Pub.L. 102-256, H.R. 2092, 106 Stat. 73 codified at 28 U.S.C. § 1350 – <i>U.S.</i>
U.S.	United States of America
U.S. FSIA	Foreign State Immunity Act of 1976, 94-583, 28 §§ 1330, 1332, 1391 (f), 1441 (d) and 1602-1611 – <i>U.S.</i>
UDHR	Universal Declaration of Human Rights, adopted by the UN General Assembly Resolution 217 [III] on 10.12.1945, UN Doc. Symbol 217 A (III)
UK	United Kingdom
UK SIA	State Immunity Act of 20.7.1978, Chapter 33 – <i>United Kingdom</i>
UKHL/HL	British House of Lords
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea signed in Montego Bay on 10.12.1982, 1833 UNTS 3
UNCSI	United Nations Convention on Jurisdictional Immunities of States and Their Property signed in New York on 2.12.2004, adopted by UNGA Resolution 59/38, UN Doc. No. A/59/508
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series

USD	U.S. Dollar
USSR	Union of Soviet Socialist Republics
v./vs.	versus
VCCR	Vienna Convention on Consular Relations signed in Vienna on 24.4.1963, 596 UNTS 261
VCDR	Vienna Convention of Diplomatic Relations signed in Vienna on 18.4.1961, 500 UNTS 95
VCLT	Vienna Convention on the Law of Treaties signed in Vienna on 23.5.1969, 1155 UNTS 331
Vol.	Volume
W.L.R.	Weekly Law Report – <i>United Kingdom</i>
WEU	Western European Union Organization

INTRODUCTION

In 2003, a Canadian-Iranian photojournalist named Zarah Kazemi travelled to Tehran to cover student demonstrations that were expected to take place against the Iranian Government. After a massive deployment of security forces, approximately 4000 students disappeared, many of which were believed to have been brought to Evin Prison, Tehran's main political detention facility. The following day, Zarah, together with hundreds of concerned family members, gathered in front of Evin Prison to discover what had happened to the arrestees. That same day, Zarah was approached by a police guard who had witnessed her taking pictures of the scene. She was herself arrested because she refused to surrender her camera, worried that public officials might harass families whose photos she had taken. 19 days later, Zarah died while in Iranian custody. In 2005, medical records appeared stating that Zarah's body showed clear signs of rape and torture, including a fractured skull, two broken fingers, missing fingernails, a crushed toe, a broken nose, and deep scratches on the neck and legs. In 2014, the Canadian Supreme Court rejected a reparation claim directed against the Iranian Government as the Iranian State enjoyed full jurisdictional immunity over the alleged offences.¹

The present study is concerned with the relationship that exists between the privilege of a State not to be subjected to the civil jurisdiction of a foreign court and the various legal obligations related to the prohibition of torture, inhuman and degrading treatment. It should be elaborated, whether a State is immune for acts of torture in national tort proceedings and, if so, what legal tensions arise from this conclusion. A primary focus is given to the international legal duties incumbent on the forum where proceedings are introduced. May a national court legally decline jurisdiction over damages claims introduced by victims of torture without violating individual rights or international obligations? What other legal measures exist that would enable a court to provide a domestic judicial remedy despite jurisdictional immunities in place?

¹ *Kazemi v. Iran*, Judgment of the Canadian Supreme Court of 10.10.2014, 2014 SCC 62, 3 S.C.R.

No comprehensive analysis over the issue has been offered within the specific subject matter of either torture or inhuman and degrading treatment. The most recent study conducted in this area concerned the relation between State immunity law and fundamental human rights violations and dates to 2007.² Many important developments have since taken place, most notably the 2012 International Court of Justice (ICJ) ruling concerning the *Jurisdictional Immunities of States*³ and the 2018 Grand Chamber judgment of the European Court of Human Rights (ECtHR) in *Nait-Liman v. Switzerland*⁴. Despite high expectations, neither judgments led to a clarification of all relevant aspects of State immunity law. Several fundamental facets were either not discussed by the courts or intentionally left out of the deliberation. The study will consider the arguments forwarded in these cases, identify unanswered questions in relation to State immunity law and torture offences, and attempt to fill gaps wherever possible.

Further, no legal literature, especially in the English language, can be found which sufficiently considers State immunity in relation to all rights and obligations connected to the prohibition of torture. Answering the research question will involve an appreciation of all legal tensions and their inherent inter-play to one-another. The present thesis should give the reader an updated and thorough insight into the current legal challenges of State immunity law as it relates to the struggle of victims of torture to receive remedy and access to justice. From a methodological point of view, issues should be presented and discussed following the recognized scientific methods known to the legal profession, including an appreciation of all relevant legal materials including case-law, treaties and other codified texts as well as academic writings.

The study is divided into four main parts: Part I is dedicated to the foundations of international and national State immunity law, introducing the object, scope, purpose, and sources of jurisdictional immunities of States. In Part II, existing exceptions to

² APPELBAUM Christian, *Einschränkungen der Staatenimmunität in Fällen schwerer Menschenrechtsverletzungen, Klagen von Bürgern gegen einen fremden Staat oder ausländische staatliche Funktionsträger vor nationalen Gerichten*, Berlin, 2007.

³ *Germany v. Italy (Greece intervening)*, Case concerning the Jurisdictional Immunities of the State, Judgment of the International Court of Justice of 3.2.2012, ICJ Reports 2012, p. 99 ff.

⁴ *Nait-Liman v. Switzerland*, Judgment of the ECtHR [GC] of 15.3.2018, No. 51357/07.

State immunity are presented and considered as a potential means for giving victims of torture access to the civil justice system of a State. Only once the immunity of States for acts of torture is established, the issue of potentially conflicting international obligations may be raised. Whether the forum State is subject of overlapping, irreconcilable obligations and how a norm conflict must be resolved, will be discussed in Part III of this thesis. Part IV offers a comprehensive conclusion as well as a summary of the legal findings.

PART I: FOUNDATIONS OF THE JURISDICTIONAL IMMUNITY OF STATES

Part I will cover the fundamentals of State immunity law. In chapter one the object and notion of the jurisdictional immunity of States as well as its impact on the jurisdiction of a court will be presented. The terminology of torture will be clarified as it serves as a basis for the analysis of the research question. Further, both the purpose and scope of jurisdictional immunities will be described in detail. Chapter two will discuss the legal sources of international and national State immunity law as well as give some insights into the recent developments of State practice.

§ 1 Object, Purpose and Scope of the Jurisdictional Immunity of States

I. Object

1. Jurisdictional Immunities of States

Jurisdictional immunities of States have been described in the following manner:

[T]he right of a State and its organs not to be held responsible for their acts by the (judicial) organs of other States.⁵

The rules on foreign State immunity hence depict situations where a national court can and cannot exercise jurisdiction over a foreign authority.⁶ While *a priori* this englobes the State's entitlement not to be subjected to a variety of national proceed-

⁵ STEIN Torsten, Immunität, in: Seidl-Hohenveldern Ignaz (ed.), Lexikon des Rechts – Völkerrecht, 3rd ed., Neuwied, 2001, p. 132, translated by BRÖHMER Jürgen, State Immunity and the Violation of Human Rights, The Hague, 1997, p. 3.

⁶ DAMIAN Helmut, Staatenimmunität und Gerichtszwang, Berlin/Heidelberg/New York/Tokyo, 1985, p. 1, FOX Hazel/WEBB Philippa, The Law of State Immunity, 3rd revised and updated edition, Oxford, 2015, p. 11, SCHAARSCHMIDT Julia, Die Reichweite des völkerrechtlichen Immunitätsschutzes, Beiträge zum Europa- und Völkerrecht, Vol. 5/2010, 2010, p. 9.

ings, this study will primarily consider the foreign immunity as an exemption from civil jurisdiction and only refer to other types of proceedings where a comparison is indeed useful. Especially execution measures ordered by national courts should clearly be distinguished from adjudication. Immunity from execution is a related but separate concept and should not be taken into consideration when assessing the civil jurisdiction over tort claims introduced by a victim of torture.⁷ Issues of implementation of a judgment will exclusively be discussed as an argument for not exercising jurisdiction in the first place.

A few misconceptions must be discussed in the context of immunities. First of all, immunities should not be confused with the responsibility of a State for internationally wrongful acts.⁸ State immunity exclusively prevents a State from litigation in the domestic judicial system of another State. This does not, however, mean that a State cannot be found liable using an alternative forum, most notably the national courts of the defending State or any available international litigation mechanism.

Secondly, immunities from adjudication, as the ICJ has continuously emphasized, are not synonymous with the lack of jurisdiction.

[I]t is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction.⁹

Jurisdiction, for the matter of this thesis, should be understood as the legal ability of a State to decide upon subject matters in a binding and authoritative fashion, either

⁷ Further reading on the immunity from execution: CRAWFORD James, *Execution of Judgments and Foreign Sovereign Immunity*, *American Journal of International Law*, Vol. 75, 1981, p. 820 ff., REINISCH August, *European Court Practice Concerning State Immunity from Enforcement Measures*, *European Journal of International Law*, Vol. 17/4, 2006, p. 803 ff., FOX/WEBB. p. 484 ff., LORZ Sigrid, *Ausländische Staaten vor deutschen Zivilgerichten*, Tübingen, 2017, p. 278 ff.

⁸ *Germany v. Italy*, para. 52 f., STEGER Ruth, *Staatenimmunität und Kriegsverbrechen*, Bern/Frankfurt, 2013, p. 115, VAN ALEBEEK Rosanne, *Immunity of States and Their Officials in International Criminal Law and International Human Rights*, Oxford, 2008, p. 326.

⁹ *Democratic Republic of Congo v. Belgium*, Case concerning the Arrest Warrant of 11.4.2000, Judgment of the ICJ of 14.2.2002, I.C.J Reports 2002, p. 3 ff., para. 46.

through legislative, executive, or judicial means.¹⁰ The forum State's judicial power to decide upon the merits of the case remains unaffected by accepting a plea of jurisdictional immunity. As the reader is soon to discover, this conclusion is essential for the recognition of liability of the forum for the dismissal of court proceedings.¹¹

Further, the immunity of a foreign State is not identical to the "Act of State" doctrine present in most common law systems. While the jurisdictional immunity of a foreign State primarily serves to protect the sovereignty of another State¹², the "Act of State" doctrine relates to issues of separation of power and internal distribution of tasks. By applying the "Act of State" doctrine, a court rejects exercising jurisdiction over its own agents or legal entities and not the one of a foreign State. It is hence a purely domestic principle which organizes the internal functioning of a State and the relationship between the judiciary and the executive branch.¹³ This thesis, however, focuses on the question of whether a national court may exercise jurisdiction over a foreign entity and the potential conflict of obligations of international law.

The concept of State immunity, as the main subject for this thesis, should further be distinguished from a number of related issues. First of all, the author does not include the immunity of State officials as an integral part of the immunity of the State he/she represents. Both the criminal and civil liability of State officials is a matter that should be treated separately. The present study does include a detailed chapter on the relationship between the immunity of State officials and the immunity of the State¹⁴, however only as it relates to the relevance of the recent development of functional immunity *ratione materiae* for the analysis of the research question. In practice this

¹⁰ JENNINGS Robert/WATTS Arthur, *Oppenheim's International Law*, 9th ed., Oxford, 2008, p. 456, CRAWFORD James, *Brownlie's Principles of Public International Law*, 8th ed., 2012, p. 456 f., APPELBAUM, p. 30, BRÖHMER, p. 34, FOX/WEBB, p. 75.

¹¹ See § 7 (II), p. 236 ff.

¹² See § 1 (II), p. 12 ff.

¹³ BATROS Ben/WEBB Philippa, *Accountability for Torture Abroad and the Limits of the Acts of State Doctrine: Comments on Habib v. Commonwealth of Australia*, *Journal of International Criminal Justice*, Vol. 8/4, 2010, p. 15, APPELBAUM, p. 34, BRÖHMER, p. 43 f., DAMIAN, p. 30, FOX/WEBB, p. 50 ff.

¹⁴ See § 4 (II.2.b), p. 104 ff.

distinction has less significance as victims of torture tend to simultaneously bring proceedings against both a representative of a State and the State *stricto sensu*.¹⁵ Nevertheless, the terminology used in this study should be considered as only relating to the State as a legal entity and not encompassing the immunity of its agents/representatives as well.¹⁶

In relation to this issue, this study does not concern the privileges of diplomats or consular agents nor the inviolability of diplomatic premises, bags or documents. Diplomatic and consular law is primarily regulated by two separate Vienna Conventions¹⁷ which are considered a “self-contained regime” not influenced by the international legal order¹⁸. These are legally independent sources silent on the matter of jurisdictional immunity of the State and consequently irrelevant for the topic at hand.¹⁹

Lastly, the immunity of International Organizations (IO) is a dogmatically separate concept, primarily based on the bilateral headquarter agreement between the IO and the host country.²⁰ States do indeed form, in one way or another, organs of an international organization which, *a priori*, are capable of entailing the responsibility of the

¹⁵ See for example: *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, Judgment of the UK House of Lords of 14.6.2006, [2006] UKHL 26, where the plaintiff brought civil proceedings against both Saudi police officers and the Ministry of Interior of Saudi Arabia or *Nait-Liman v. Switzerland*, Grand Chamber Judgment, where the plaintiff brought civil proceedings against both the alleged offenders and the Tunisian Ministry of Interior.

¹⁶ For more information regarding the immunity of State representatives: PEDRETTI Ramona, *Immunity of Heads of State and State Officials for International Crimes*, Leiden/Boston, 2015.

¹⁷ Vienna Convention on Diplomatic Relations (VCDR), signed in Vienna on 18.4.1961, 500 United Nations Treaty Series (UNTS) 95, Vienna Convention on Consular Relations (VCCR), signed in Vienna on 24.4.1963, 596 UNTS 261.

¹⁸ *United States of America v. Iran*, Case concerning United States Diplomatic and Consular Staff in Tehran, Judgment of the ICJ of 24.5.1980, ICJ Reports 1980, p. 3 ff., para. 86.

¹⁹ BRÖHMER, p. 26 f., LÖRZ, p. 52 ff., for more information regarding the immunity and inviolability in diplomatic law: VÄRK René, *Personal Inviolability and Diplomatic Immunity in Respect of Serious Crimes*, *Juridica International*, Vol. 7/2003, 2003.

²⁰ See i.e: Agreement between the United Nations and the United States of America Regarding the Headquarter of the United Nations (UN) of 21.11.1947, 61 Stat. 3416, U.S. Treaty and other International Agreements Series (TIAS) No. 1676.

latter.²¹ The liability of IO and their Member States are inherently intertwined, best shown by recent development holding the States co-responsible for internationally wrongful acts committed by international organizations.²² Nevertheless, the immunity of IO has an inherent functional character and should only be considered where the legal situation is sufficiently comparable²³.

2. Definition of Torture

The prohibition of torture, cruel, inhuman and degrading treatment or punishment is contained in Art. 5 of the Universal Declaration of Human Rights²⁴, Art. 7 of the International Covenant on Civil and Political Rights²⁵, the UN Convention against Torture²⁶, all regional human rights treaties²⁷ as well as other international treaties and text of international humanitarian law and international criminal law.

²¹ BRÖHMER, p. 24 f., LORZ p. 54 f.

²² See *Al-Dulimi and Montana Management Inc v. Switzerland*, Judgment of the European Court of Human Rights [GC] of 21.6.2016, No. 5809/08, see also the United Nations Haiti Cholera Response Multi-Partner Trust Fund, <http://mptf.undp.org/factsheet/fund/CLH00> [last accessed 13.6.2018].

²³ See discussion in § 7 (III.3), p. 260 ff. For more information regarding the immunity of international organizations: REINISCH August, *The Privileges and Immunities of International Organizations in Domestic Courts*, Oxford, 2013, DOMINICÉ Christian, *L'arbitrage et les immunités des organisations internationales*, in: Dominicé Christian et al. (eds.), *Études de Droit International en l'Honneur de Pierre Lalive*, Basel/Frankfurt, 1993, p. 483 ff.

²⁴ Universal Declaration of Human Rights (UDHR) adopted by the UN General Assembly Resolution 217 [III] on 10.12.1945, UN Doc. Symbol 217 A [III].

²⁵ International Covenant on Civil and Political Rights (ICCPR) adopted by the UN General Assembly in New York on 19.12.1966, Treaty No. 14668.

²⁶ United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) signed in New York on 10.12.1984, UNTS 1465.

²⁷ Art. 3 of the European Convention of Human Rights and Fundamental Freedoms (ECHR), as amended by Protocol Nos. 11 and 14, signed in Rome on 4.11.1950, European Treaty Series (ETS) No. 5, Art. 5 of the African Charter on Human and Peoples' Rights (ACHR) signed in Banjul on 27.6.1981, Organization of the African Union (OAU) Doc. No. CAB/LEG/67/rev.5, Art. 5 of the Inter-American Convention on Human Rights (IACHR), signed in San José on 22.11.1969, Organization of American States (OAS) Doc. No. 36, Art. 8 of the Arab Charter on Human Rights of 22.5.2004, reprinted in *International Human Rights Report*, Vol. 12, 2005, p. 893 ff.

For the sake of clarification, throughout this thesis the notion of torture is referred to in the context of different aspects and qualities it enjoys in international law. In human rights law, torture is generally defined in reference to the intensity of the agony as an “act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person [...]”.²⁸ Human rights bodies generally differentiate between torture, cruel, inhuman and degrading treatment and use both the intensity of the suffering inflicted as well as the purpose for which it was inflicted as a distinguishing factor.²⁹ The most relevant jurisprudence in this perspective is the 1978 judgment of the European Court of Human Rights in a dispute between the Republic of Ireland and the United Kingdom.³⁰ The case concerned the so-called Operation Demetrius, a series of extrajudicial measures which were used by the British Government against suspected Irish terrorists. While in detention, suspects were subjected to a combination of interrogation techniques, such as wall standing, hooding, continuous loud noises, deprivation of sleep, and deprivation of food and drink. The Court qualified this treatment as inhuman and degrading in nature, however rejected Ireland’s submission that it did also constituted torture.

In order to determine whether the five techniques should also be qualified as torture, the Court must have regard to the distinction, embodied in Article 3 (Art. 3), between this notion and that of inhuman or degrading treatment. In the Court’s view, this distinction derives principally from a difference in the intensity of the suffering inflicted.³¹

²⁸ Art. 1 (1) CAT, analyzed in detail in § 8 (I.2.a), p. 295 ff.

²⁹ KÄLIN Walter/KÜNZLI Jörg, *Universeller Menschenrechtsschutz*, 3rd ed., Basel, 2013, p. 367 ff., McDONNELL Mary-Hunter/NORDGREN Loran/LOEWENSTEIN George, *Torture in the Eyes of the Beholder: The Psychological Difficulty of Defining Torture in Law and Policy*, *Vanderbilt Journal of Transnational Law*, Vol. 44, 2012, p. 98.

³⁰ *Ireland v. the United Kingdom*, Judgment of the ECtHR of 18.1.1978, No. 5310/71.

³¹ *Ibid.*, para. 167, intensity test later reaffirmed by the Grand Chamber in *Selmouni v. France*, Judgment of the ECtHR [GC] of 28.7.1999, No. 25803/94, para. 101, *Elci et al. v. Turkey*, Judgment of the ECtHR of 13.11.2003, No. 23145/93 and 25091/94, para. 634, *Ciçek v. Turkey*, Judgment of the ECtHR of 27.2.2001, No. 25704/94, para. 154.

In addition to the intensity element, the Court later introduced elements of intent and purpose to be relevant for the identification of torture. It did so by referring to Art. 1 (1) of the UN Convention against Torture which demands that a torturous act is not only committed intentionally but for a specific purpose established by the Convention, a matter analyzed in more detail below³². Since then, a combination of both the intensity theory as well as the purpose theory is used to distinguish torture from other acts of severe mistreatment, such as cruel, inhuman or degrading treatment or punishment.

From a legal point of view, a differentiation is less relevant as human rights law prohibits all forms of severe ill-treatment. Instead, a certain threshold of applicability exists depending on a minimum intensity of the suffering according to the specific circumstances of each case.³³ Courts would be asked to consider various elements, such as the duration and type of suffering, its effects on the person concerned and, to a lesser extent, the age, health and sex of the victim. A judge must assess the unique torture experience of an individual and determine whether a specific act falls within the scope of application of the specific torture provision.³⁴ Pain inflicted on a person which does not surpass the minimum threshold might still be relevant as a potential violation of Art. 10 ICCPR protecting the human dignity of a person or Art. 17 ICCPR relating to the private integrity of an individual.³⁵ These provisions are, however, no longer considered a violation of torture and consequently irrelevant for the topic at hand.

³² See § 8 (1.2.a), p. 295 ff.

³³ KÄLIN/KÜNZLI, p. 375 f., CULLEN Anthony, Defining Torture in International Law: A Critique on the Concept Employed by the European Court of Human Rights, California Western International Law Journal, Vol. 34, 2003, p. 32, see also General Comment No. 20 of the Human Rights Committee on Art. 7 ICCPR and the Prohibition of Torture, or other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. No. CCPR/C/GC/20.

³⁴ *Aktaş v. Turkey*, Judgment of the ECtHR of 24.4.2003, No. 24351/94, para. 313, CULLEN, p. 35, SCHABAS William, The European Convention on Human Rights: A Commentary, Oxford, 2017, p. 175 f.

³⁵ KÄLIN/KÜNZLI, p. 377 f., CULLEN, p. 33, SCHABAS, p. 176 f.

At this point it is important to understand that the human rights definition of torture is wider than others used in international law. It covers a wider range of offences and includes cruel, inhuman or degrading treatment or punishment. Also, the legal situation changes significantly when referring to torture as an international crime. Torture appears several times within the Rome Statute of the International Criminal Court (ICC)³⁶ as well as in other documents relevant in international criminal law. Torture may constitute a form of genocidal behavior within the meaning of Art. 6 (b) ICC-Statute, it may fulfill the requirements of a crime against humanity in the meaning of Art. 7 (if) of the Statute and potentially be a war crime within the definition of Art. 8 (a and b) of the Statute. These, nevertheless, require a systematic and widespread behavior with numerous reported cases of torture or must have been committed during a situation of an international armed conflict. A single instance of torture or torture committed in peace time may, unlike what is held in human rights law or CAT, rarely be qualified as a relevant act of torture in international criminal law.³⁷

Torture as an international crime is, however, still a relevant factor for the appreciation of the study subject and will occasionally be appreciated as an object of international criminal law. The author, nevertheless, applies and focuses on the broader definition as established in human rights law and the UN Convention against Torture.

II. Purpose

1. Sovereign Equality and Non-Interference

To understand the purpose and interests protected by jurisdictional immunities, one must consider the origins of certain principles established in international law. One of

³⁶ Rome Statute of the International Criminal Court signed in Rome on 17.7.1998, 2187 UNTS No. 38544 (cited: ICC-Statute).

³⁷ *Prosecutor v. Tadić*, Judgment of the International Criminal Court for the former Yugoslavia (ICTY) Appeal's Chamber of 15.7.1999, IT-94-1, para. 248, *Prosecutor v. Tihomir Blaškić*, Judgment of the ICTY Appeals Chamber of 29.10.1997, IT-95-14-AR, para. 202, *Prosecutor v. Kordić and Cerkez*, Judgment of the ICTY Appeals Chamber of 26.2.2001, IT-95-14/2-T, para. 178. For more information see TRIFFTERER Otto/AMBOS Kai, Rome Statute of the International Criminal Court: A Commentary, 3rd ed., Munich, 2016, p. 111 ff.

the most influential decisions for this topic was rendered by the U.S. Supreme Court in 1812. The *Schooner Exchange v. McFaddon* case concerned the seizure of a military vessel in Philadelphia belonging to the French Emperor Napoleon. The plaintiff, Mr. Schooner, claimed that he had been illegally expropriated by the French army in 1810 which then converted his commercial vessel into a battleship without his consent. Chief Justice MARSHALL, who delivered the opinion for the majority, first emphasized that U.S. Courts *a priori* enjoyed full jurisdiction to hear the claim and order the rendition of the ship back to Mr. Schooner, as:

The jurisdiction of the nation within its territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself.³⁸

Nevertheless, certain situations may arise when a national court is expected to refrain from exercising jurisdiction over a specific case in order to serve the mutual beneficial interests of two nations.

This *perfect equality* and *absolute independence of sovereigns*, and this common interest impelling them to mutual intercourse and an *interchange of good offices* with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.³⁹ [emphasis added]

The concepts to which the U.S. Supreme Court refers in its judgment is linked to then notion of a “Nation-State” as established by the Westphalian peace treaties of 1648.⁴⁰ After a series of armed conflicts, European powers negotiated and agreed on the establishment of a new international legal order based on the equality and independence of each nation.⁴¹ The international community has since been composed out of a

³⁸ *Schooner Exchange v. McFaddon*, Judgment of the U.S. Supreme Court of 2.3.1812, 11 U.S. 116, 3 L.Ed. 287, p. 136.

³⁹ *Ibid.*, p. 137.

⁴⁰ Treaties of Westphalia, Peace Treaty between the Holy Roman Emperor and the King of France and their respective Allies of 24.10.1648 signed in Osnabrück and Münster.

⁴¹ JENNINGS/WATTS, p. 124, CRAWFORD, Brownlie's Principles of International Law, p. 447 f., FOX/WEBB, p. 25 ff., SCHAARSCHMIDT, p. 10, LORZ, p. 11, CASSESE Antonio, International Law,

number of equal political and legal entities which co-exist in a non-hierarchical structure.⁴² Immunities should guarantee that no equal must sit in judgment of another in protection of these principles and the sovereignty of each nation, a legal situation often referred to with the Latin phrase: *par in parem non habet imperium (vel jurisdictionem)*.⁴³ A State can therefore not render a judgment binding on a foreign entity without rupturing the very structure of the international legal order. Today, sovereign equality is reflected as a fundamental principle in Art. 2 (1) of the UN Charter⁴⁴.

As pointed out by some legal scholars and Chief Justice MARSHALL, jurisdictional immunities find themselves at a crossway between two main principles of international law.⁴⁵ *A priori*, a State is free to exercise jurisdiction as a consequence of the principle of (absolute) territoriality within the boundaries of its sphere of influence.⁴⁶ On the other hand, the principle of equality demands of a State not to sit in judgment over an equal as otherwise the sovereignty of another State is threatened. The relationship in which these competing principles must be placed is complex. As the ICJ recently held:

This principle [of sovereign equality] has to be viewed together with the principle that each State possesses sovereignty over its own territory

2nd ed., Oxford, 2005, p. 99, BENNOUNE Karima, Sovereignty vs. Suffering? Re-examining Sovereignty and Human Rights through the Lens of Iraq, *European Journal of International Law*, Vol. 13, 2002, p. 245.

⁴² APPELBAUM, p. 56, SORNARAJAH Muthucumaraswamy, Problems in Applying the Restrictive Theory of Sovereign Immunity, *International and Comparative Law Quarterly*, Vol. 31/4, 1981, p. 664, STEINBERGER Helmut, Sovereignty, in: Bernhard Rudolf (ed.), *Encyclopedia of Public International Law*, Vol. 3, Amsterdam, 1999, p. 515.

⁴³ BRÖHMER, p. 12, HOBE Stephan, *Einführung in das Völkerrecht*, 10th ed., 2014, p. 366, KOLB Robert/JARDIM OLIVEIRA Thiago, Le droit des immunités juridictionnelles étatiques et l'arrêt de la Cour Internationale de Justice dans l'affaire italo-allemande, *Swiss Review of International and European Law*, Vol. 2/2013, 2013, p. 245, SCHAARSCHMIDT, p. 12, APPELBAUM, p. 56.

⁴⁴ Charter of the United Nations signed in San Francisco on 24.10.1945, *United Nations Treaty Series* XVI.

⁴⁵ HIGGINS Rosalyn, Equality of States and Immunity from Suit: A Complex Relationship, *Netherlands Yearbook of International Law*, Vol. 43, 2012, p. 134, FOX/WEBB, p. 77 ff.

⁴⁶ *France v. Turkey*, the case of the S.S. Lotus, Judgment of the Permanent Court of International Justice of 7.9.1927, Series A No. 10, p. 19, see also *Democratic Republic of Congo v. Belgium*, Joint dissenting opinion of Judges HIGGINS, KOOIJMANS and BUERGENTHAL, para. 45 ff.

and that there flows from that sovereignty the jurisdiction of the State over events and persons within its territory. [...] Immunity may represent a departure from the principle of territorial sovereignty, and the jurisdiction which flows from it.⁴⁷

As the development of State immunity proceeds, the recognition of new exceptions to the jurisdictional immunity significantly influences the status and relevance of the principle of sovereign equality as discussed in a detailed chapter in this thesis.⁴⁸

A direct consequence of the equality of States is the protection of their sovereignty, independence and the prohibition of interference into the domestic affairs of another State. Despite constituting separate concepts in law, the ICJ has acknowledged that equality, sovereignty and non-interference are inherently intertwined⁴⁹ and must be considered jointly for the appreciation of the bases of foreign immunities⁵⁰. A lawsuit introduced by an individual against a foreign entity in a national court interferes with the sovereignty of the defending State in different ways. It involves the appreciation and administration of evidence that contains sensitive information about the internal decision-making process of another country.⁵¹ Further, the defendant State will be judged on actions taken within a purely domestic context with no apparent effect on the forum State where proceedings were introduced. By exercising jurisdiction, a court may therefore interfere directly within the domestic affair of another State in conflict with the sovereignty and independence of the defendant recognized by Art. 2 (4) of the UN Charter.

⁴⁷ *Germany v. Italy*, para. 57, this was also most notably pointed out by Judges HIGGINS, KOOIJMANS and BUERGENTHAL in their Joint separate opinion in *Democratic Republic of Congo v. Belgium*, para. 3.

⁴⁸ See § 6 (II.2.b), p. 168 ff.

⁴⁹ *Nicaragua v. the United States of America*, Case concerning Military and Paramilitary Activities in and against Nicaragua, Judgment of the ICJ of 27.6.1986, ICJ Report 1986, p. 14 ff., para. 202.

⁵⁰ *Germany v. Italy*, para. 57, see also LORZ, p. 10, SHAW Malcolm, *International Law*, 7th ed., Cambridge, 2014, p. 506.

⁵¹ WEBB Philippa, *The Immunity of States, Diplomats and International Organizations in Employment Disputes: The New Human Rights Dilemma?*, *European Journal of International Law*, Vol. 27/3, 2016, p. 759 f.

2. International Relations and the Dignity of States

Next to the legal principles mentioned in the previous chapter, several political justifications in relation to jurisdictional immunities must briefly be discussed. As the European Court of Human Rights states:

The grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim [...] to promote comity and good relations between States through the respect of another State's sovereignty.⁵²

On one hand, the existence of State immunity from civil jurisdiction of another State was considered justified as otherwise international collaboration would cease to exist. Immunities are deemed to be necessary for international trade, the maintaining of international peace and the working of diplomacy.⁵³ Upholding State immunity has consequently contributed to the progress of human development, the resolution of international and domestic conflicts and the achievement of common goals.⁵⁴ On the other hand, foreign immunities are a quintessential double-edged sword. As the reader will discover, immunities prevent victims of fundamental human rights violations

⁵² *Jones v. the United Kingdom*, Judgment of the ECtHR of 14.1.2014, No. 34356/06 and 40528/06, para. 188, see also *Al-Adsani v. the United Kingdom*, Judgment of the ECtHR [GC] of 21.11.2001, No. 35763/97, para. 54.

⁵³ CRAWFORD, Brownlie's Principles of Public International Law, p. 171, FORCESE Craig, De-immunizing Torture: Reconciling Human Rights and State Immunity, McGill Law Journal, Vol. 52, 2007, p. 133 f., BATES Ed, State Immunity for Torture, Human Rights Law Review, Vol. 7/4, 2007, p. 665 f., see also Brief of the Government of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as *amici curiae* in support of the petitioner, in the case of *Sosa v. Álvarez-Machain*, para. 11 ff., (cited: AUS/CH/UK Brief).

⁵⁴ APPELBAUM, p. 282, RENSMANN Thilo, Staatenimmunität und völkerrechtswidrige Hoheitsakte, Praxis des Internationalen Privat- und Verfahrensrechts, Vol. 18, 1998, p. 47, RENSMANN Thilo, Internationale Verbrechen und Befreiung von staatlicher Gerichtsbarkeit, Praxis des Internationalen Privat- und Verfahrensrechts, Vol. 19, 1999, p. 271, PAECH Norman, Staatenimmunität und Kriegsverbrechen, Archiv des Völkerrechts, Vol. 47/1, 2009, p. 60, see further ORAKHELASHVILI Alexander, State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong, European Journal of International Law, Vol. 18/5, 2007, p. 956 where he dismisses this line of reasoning, also discussed in detail in *Naït-Liman v. Switzerland*, Grand Chamber Judgment, Dissenting opinion by Judge DEDOV.

to have access to remedy and reparation and often lead to a *de facto* denial of justice. Paradoxically, it was arguably only through the existing immunity system that it was possible for the international community to elaborate and recognize international human rights law and the individual's entitlement to justice while simultaneously serve as a tool to evade responsibility in violation of these rules.

Further, civil claims introduced against a foreign authority in the domestic court of another State will inevitably cause diplomatic tensions, reputational harm and threaten the effective conduct of bilateral relations.⁵⁵ From a purely domestic point of view, jurisdictional immunities protect the foreign policy of a country and any political, economic or sociocultural relations that might exist between the two countries involved. No frivolous or malicious claims should be able to be brought by individuals to put political pressure against a foreign State. The forum will hence be tempted to decline jurisdiction over the matter as:

Un Etat ne souhaite pas interférer dans les affaires de l'autre, ne veut pas commettre d'acte inamical, n'entend pas embarrasser sa politique étrangère.⁵⁶

A notion often discussed in this context is the so-called "Dignity of a State". Especially older scholars and international jurisprudence would refer to jurisdictional immunities as a necessary mechanism for the protection of the dignity of the defending State.⁵⁷ Legal authors disagree whether this concept is still useful in modern international law.⁵⁸ In relation to the responsibility of a State to give remedy and reparation

⁵⁵ WEBB, *The Immunity of States*, p. 759 f.

⁵⁶ KOLB/JARDIM OLIVEIRA, p. 246.

⁵⁷ JENNINGS/WATTS, p. 379 f., BRÖHMER, p. 10, LÜKE Monika, *Die Immunität staatlicher Funktionsträger*, Berlin, 2000, p. 212, DAMIAN, p. 14 refers to the Arbitral Award in *Saudi Arabia v. Arabian American Oil Company (Aramco)*, Decision of the *ad hoc* Arbitration Tribunal of 23.8.1958, also published as 27 ILR 117, p. 155, see also APPELBAUM, p. 53.

⁵⁸ APPELBAUM, p. 54, HESS Burkhard, *Staatenimmunität bei Menschenrechtsverletzungen*, in: Geimer Reinhold (ed.), *Wege zur Globalisierung des Rechts*, Festschrift für Rolf Schütze, Munich, 1999, p. 304 f., WYLER Eric/PAPAUX Alain, *The Different Forms of Reparation: Satisfaction*, in: Crawford James et al. (eds.), *The Law of International Responsibility*, Oxford, 2010, p. 635, DOMINICÉ Christian, *La responsabilité non contentieuse*, in : *Société française pour le droit in-*

for internationally wrongful acts, the dignity of a State and the protection from humiliation is indeed still mentioned as an absolute limit to satisfaction as a form of reparation.⁵⁹ The concept consequently might still have some legal value which could be considered for the protection of jurisdictional immunities. In reality, dignity of a State has lost its significance especially since the restrictive theory of State immunity has become an accepted practice.⁶⁰

In summary, a number of purposes and interests have been identified that should be protected by the grant of foreign State immunity. These are namely the protection of the sovereignty, equality and independence of another State. Following the *par in parem non habet imperium* principle, a State cannot sit in judgment of an “equal” without violating the defendant’s sovereignty and is consequently barred from exercising jurisdiction over it. In addition, a State should not interfere into the domestic affairs of another. Doing so would threaten the integrity and political and legal independence of a country. Jurisdictional immunities are further argued to be necessary for international collaboration, trade and diplomacy. Also, a national court will be tempted to reject jurisdiction for the purpose of protecting its foreign policy and bilateral relations as well as the dignity of a foreign State.

III. Scope

1. Personal Scope of State Immunity

A rather controversial matter is the personal scope of State immunity. The terminology is misleading as it is not primarily about a person who is entitled to immunity but the range of legal entities that might be exempt from jurisdiction. It should first be

ternational (ed.), *La responsabilité dans le système international*, Colloque du Mans, Paris/Pedone, 1991, p. 118.

⁵⁹ Art. 37 (3) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), adopted by the International Law Commission (ILC), Yearbook of the International Law Commission, 2001, Vol. II (Part Two), UN Doc. No. A/56/10, CRAWFORD James, *The International Law Commission’s Articles on State Responsibility: Introduction, Text, and Commentaries*, Cambridge, 2005, p. 234.

⁶⁰ APPELBAUM, p. 53, DAMIAN, p. 14, LÜKE, p. 212, BRÖHMER, p. 11.

discovered how the State is defined in international law to determine who will legally be able to plea for jurisdictional immunities (lit. a) before discussing the diverging national practices in relation to political subdivisions (lit. b) and State corporations (lit. c).

a. The State

Central to the grant of jurisdictional immunities is the quality of a State as such. The UN Convention on the Jurisdictional Immunity of States (UNCIS)⁶¹ does contain a provision defining its personal scope of application. According to Art. 2 (1b) UNCIS, “for the purpose of the present Convention: “State” means the State and its various organs of government.” The commentaries of the International Law Commission to this provision do not significantly clarify the matter as it refers to the expression of “State” to include all fully sovereign and independent foreign States regardless of their form of government.⁶² It does however mention that:

The first category includes the State itself, acting in its own name and through its various organs of government, however designated, such as [...] the central government, various ministries and departments of government, ministerial or sub-ministerial departments, offices or bureaux [...]. The use of the expression “various organs of government” is intended to include all branches of government and is not limited to the executive branch only.⁶³

In order to assess statehood in international law for the purpose of jurisdictional immunities, one must consider the 1933 Montevideo Convention on the Rights and Du-

⁶¹ United Nations Convention on Jurisdictional Immunities of States and Their Property signed in New York on 2.12.2004, adopted by UNGA Resolution 59/38, UN Doc. No. A/59/508.

⁶² ILC Draft Articles on Jurisdictional Immunities of States and Their Property, Yearbook of the International Law Commission, 1991, Vol. II (Part Two), Commentary to Art. 2 UNCIS, para. 7, see also GRANT Tom, Commentary to Art. 2 (1a and b) UNCIS, in: O’Keefe Roger/Tams Christian/Tzanakopoulos (eds.), *The United Nations Convention on Jurisdictional Immunities of States*, Oxford, 2013, p. 46.

⁶³ ILC Draft Commentary to Art. 2 UNCIS, para. 6, see also GRANT, p. 47.

ties of States⁶⁴ according to which a State must possess a defined territory, a permanent population, a government, and the capacity to enter into relations with other States.⁶⁵ National Courts have referred to these criteria to consider the jurisdictional immunities of entities whose statehood is disputed in international law. For example, in respect of the Palestine Liberation Organization (PLO), both Italian and U.S. courts rejected the PLO's claim to immunity as it did not qualify as a State due to its missing effective control over a defined territory.⁶⁶ The status of Palestinian statehood is, however, a highly fluctuant one and should be assessed on a case-by-case basis, especially since it was granted full membership to UNESCO in 2011⁶⁷, observer State status at the United Nations in 2012⁶⁸ and officially changed its name to "the State of Palestine" in 2013⁶⁹.

Issues may also arise in the case of State succession. Both the Austrian and French Supreme Courts tackled the legal challenges in relation to the gradual dissolution of the Former Republic of Yugoslavia (FRY). The Yugoslav Central Bank had opposed

⁶⁴ Convention on the Rights and Duties of States signed in Montevideo on 26.12.1933 at the 7th International Conference of American States, Organization of American States.

⁶⁵ Art. 1 of the Montevideo Convention, see also JENNINGS/WATTS, p. 120 f., SHAW, p. 144 f., CRAWFORD James, *The Creation of States in International Law*, 2nd ed., Clarendon, 2006, p. 221 ff., DINH NGUYEN QUOC/DAILLIER Patrick/FORTEAU Mathias/PELLET Alain, *Droit International Public*, 8th ed., 2009, p. 450 ff.

⁶⁶ *In re Yasser Arafat*, Judgment of the Italian Court of Cassation of 28.6.1985, No. 1981, *Revista di Diritto Internazionale*, Vol. 69, 1986, p. 885, *Klinghoffer v. SNC Achille Lauro*, Judgment of the U.S. District Court for the Southern District of New York of 23.7.1992, 795 F. Supp. 112 also published in 96 ILR 68, see also *Ungar v. Palestine Liberation Organization*, Judgment of the 1st U.S. Circuit Court of 31.3.2005, 402 F.3d 274.

⁶⁷ Press Release of the United Nations Educational, Scientific and Cultural Organization (UNESCO) of 31.10.2011, General Conference admits Palestine as UNESCO Member, see Discours de la Directrice Générale de l'UNESCO Irina BOKOVA, à l'occasion de l'examen du point relatif à l'admission de la Palestine comme Etat membre de l'UNESCO of 31.10.2011, UN Doc. No. DG/2011/147.

⁶⁸ Status of Palestine in the United Nations, UNGA Resolution 67/19 of 29.11.2012, UN Doc. No. A/RES/67/19.

⁶⁹ Palestinian Authority rebrands itself "State of Palestine" after U.N. vote, CNN News Blog of 8.1.2013, available: <https://edition.cnn.com/2013/01/07/world/meast/palestinian-name-change/index.html> [last accessed: 12.6.2018].

proceedings introduced by Croatia, Bosnia-Herzegovina, Macedonia, and Slovenia to freeze assets of the FRY by referring to its immunity from execution. Both courts did not recognize or deny the FRY's entitlement to immunity but at the time suspended the trial on the basis of an ongoing settlement by international procedure, did, however, order conservation measures in the interim.⁷⁰

Nevertheless, a State must be fully independent and sovereign for foreign immunities to apply. Both New Zealand and U.S. courts disregarded the immunity of the Marshall Islands and Palau respectively, both member States of the United Nations today. Due to their quality as UN trust territories administered by the U.S. at the time, both countries could not *de jure* enter in relations with other States without the consent of the U.S. Government, lacking the necessary legal sovereignty for the entitlement to jurisdictional immunities.⁷¹

Further, at the heart of many immunity disagreements is the question regarding the recognition of a State as such by other members of the international community. Despite its (arguably) declaratory character, not constituting a necessary element for the creation of a State as a subject of international law⁷², the fact, whether the forum recognizes the defending entity as a State, is essential in practice.⁷³ It would be paradoxical to oblige the forum to grant jurisdictional immunity based on customary international law to an entity it does not recognize. Many authors consequently believe that the forum does not violate international law by exercising jurisdiction in this

⁷⁰ *Croatia, Bosnia-Herzegovina, Macedonia, Slovenia v. Republic of Former Yugoslavia*, Judgment of the French Court of Cassation of 12.10.1999, JDI (2000) 1036, *Republic of Croatia et al. v. Girocredit Bank AG der Sparkassen*, Judgment of the Austrian Supreme Court of 17.12.1996, 36 ILM 1520 (1997).

⁷¹ *Marine Steel Ltd v. Government of Marshall Islands*, Judgment of the High Court of Wellington of 12.6.1981, [1981] 2 NZLR 1, *Morgan Guaranty Trust Co v. Republic of Palau*, Judgment of the U.S. District Court for the Southern District of New York of 15.7.1991, 767 F. Supp. 561, also published in 87 ILR 590.

⁷² For more sources on recognition as either a declaratory or constitutive element see HOBE, p. 75 ff., JENNINGS/WATTS, p. 130 ff., STEIN Torsten/VON BUTTLAR Christian/KOTZUR Markus, *Völkerrecht*, 14th ed., Munich, 2017, p. 104 ff., KEMPEN Bernhard/HILLGRUBER Christian, *Völkerrecht*, 2nd ed., Bonn, 2012, p. 17 ff.

⁷³ LORZ, p. 35, FOX/WEBB, p. 344 ff.

situation, which is why recognition does in practice constitute an element necessary for the acceptance of jurisdictional immunities.⁷⁴ This is best shown by the British ruling in *Caglar v. Billingham*, a case brought by the Turkish Republic of Northern Cyprus (TRNC). The Special Commissioner of Income Tax rejected the TRNC's claim for immunity from British taxation as the TRNC was not recognized neither by the United Kingdom (UK) nor any other State or organization except Turkey.⁷⁵ On the other hand, French Courts did recognize the immunity of the Democratic Republic of Vietnam despite not being recognized as a State by the French Government as "it exercises the functions of a State within a defined territory where its government is obeyed by the majority of the population"⁷⁶.

During the codification process of UNCSI, the ILC Special Rapporteur SUCHARITKUL identified the issue of recognition as a precondition to jurisdictional immunity, however the Rapporteur proposed a significant margin of appreciation in this matter to the forum as it involves an in depth political assessment of the situation.⁷⁷ The recognition of immunity to an entity whose statehood is disputed in international law, will consequently depend on the forum State's recognition of the defendant as a State and the forum's practice on relying on this factor for the grant jurisdictional immunities.

b. Political Subdivisions

For States which have adopted a federalist structure according to which the exercise of sovereign tasks is shared with political subdivisions, the question arises whether fed-

⁷⁴ DAMIAN, p. 19, LORZ, p. 36, GEIMER Reinhold, *Internationales Zivilprozessrecht*, 7th ed., Cologne, 2015, para. 563, WEFELSCHIED Moritz, *Vollstreckungsimmunität fremder Staaten*, Frankfurt a.M, 2013, p. 40 f., see also discussion on the grant of jurisdictional immunity and the duty not to recognize in § 6 (III.1.b), p. 156 ff.

⁷⁵ *Caglar v. Billingham*, Appeal Decision of the British Special Commissioners of Income Tax of 7.3.1996, [1996] STC (SCD) 150, [1996] 1 LRC 526, (1998) also published in 108 ILR 510.

⁷⁶ *Clerget v. Banque Commerciale pour l'Europe et al.*, Judgment of the French Court of Appeal of 7.6.1969 also published in 52 ILR 310, later confirmed by the Court of Cassation on 2.11.1971 also published in 65 ILR 54.

⁷⁷ Second Report on Jurisdictional Immunities of States and their Property of Special Rapporteur Sompong SUCHARITKUL of 9.6.1980, Yearbook of International Law Commission, Vol. II, 1980, UN Doc No. A/CN.4/331/Add.1, p. 206 ff.

eral units are entitled to jurisdictional immunities in the national court of a foreign State as well. The issue is a complicated one as political subdivisions do not generally enjoy the quality of (full) subjects of international law.⁷⁸

First of all, Art. 2 (1b) UNCSI mentions constituent units and political subdivisions as an integral part of the State capable of invoking jurisdictional immunities in case they “are entitled to perform acts in the exercise of sovereign authority and are acting in that capacity”. During the drafting process, especially French delegates rejected the idea that non-independent entities, such as federal units, were capable of invoking sovereignty privileges. French Courts had a continuous practice to exercise jurisdiction over federal units, so for example in a civil proceeding for damages brought against the German Bundesland Hessen:

L'immunité de juridiction n'existe qu'au profit des Etats souverains, c'est à dire qu'ils possèdent le droit exclusif d'exercer les activités étatiques, de déterminer librement leur propre compétence dans les limites du droit international public, que tel n'est pas le cas pour les Etats membres d'une fédération qui sont soumis à la tutelle de l'Etat fédéral.⁷⁹

Similarly, French courts rejected the immunity of municipalities and self-governing cities as they lacked the necessary entitlement to refer to the equality and independence of States, as political subdivision were by their nature neither independent nor equal to a foreign country.⁸⁰

Support for this conclusion is given by drafters of the European Convention on State Immunity (ECSI)⁸¹. According to Art. 28 (1) ECSI, constituent entities or federal units

⁷⁸ FOX/WEBB, p. 352 ff., DAMIAN, p. 21 ff.

⁷⁹ *Neger v. Gouvernement du Land de Hesse*, Judgment of the Paris Court of Appeals of 5.11.1969, published in *Revue critique de droit international privé*, Vol. 59, 1970, p. 100, see also HAFNER Gerhard/KOHEN Marcelo/BREAU Susan, *State Practice regarding State Immunities/La Pratique des Etats concernant les immunités des Etats*, Leiden, 2006.

⁸⁰ *Ville de Genève v. Consorts de Civry*, Judgment of the Paris Court of Appeals of 11.6.1894, *Cas req.* 1.7.1894 S 1896.

⁸¹ European Convention on State Immunity signed in Basel on 16.5.1972, ETS No. 74.

were generally excluded from the personal scope of jurisdictional immunities. The central Government of a contracting Party could, however, notify the Secretary General of the Council of Europe with a declaration stating that its federal units were entitled to immunity from jurisdiction in the courts of other contracting States.⁸² So far, Austria, Germany and Belgium have submitted their declaration in favor of their federal territories, while other contracting States, most surprisingly Switzerland, have not.⁸³

The practice of the United States differs quite considerably in this regard. § 1603 (a) of the U.S. Foreign State Immunity Act⁸⁴ defines both the central government as well as its federal units, including municipalities, to be included in the personal scope of State immunities. Other States deny constituencies a general entitlement to immunity but would not exercise jurisdiction in case a federal unit would be tasks with executing a sovereign task at the order of the central government or within their exclusive power accorded to them on the basis of the national constitution.⁸⁵ In similar situations, political subdivisions can benefit from the immunity of the central Government on the basis of their specific act they perform, also known as functional immunity (*ratione materiae*).⁸⁶

Given the diverging State practice in this perspective, Special Rapporteur SUCHARITKUL could not conclude whether customary international law entitled federal units to jurisdictional immunity in the courts of a foreign country.⁸⁷ Once again, in case dam-

⁸² Art. 28 (2) ECSI.

⁸³ FOX/WEBB, p. 354, LORZ, p. 38, DOMINICÉ Christian, Immunité de juridiction et d'exécution des états et chefs d'états étrangers, Fiches suisses No. 934, 1992, p. 26.

⁸⁴ U.S. Foreign State Immunity Act of 1976, 94-583, 28 §§ 1330, 1332, 1391 (f), 1441 (d) and 1602- 1611 (cited: U.S. FSIA).

⁸⁵ LORZ, p. 40, DAMIAN, p. 32, SCHAUMANN Wilfred/HABSCHEID Walther, Die Immunität ausländischer Staaten nach Völkerrecht und deutschem Zivilprozessrecht, Berichte der Deutschen Gesellschaft für Völkerrecht, Vol. 8, 1968, p. 45 f., NAGEL Heinrich/GOTTWALD Peter, Internationales Zivilprozessrecht, 7th ed., Cologne, 2013, p. 38 f.

⁸⁶ To some extent also Art. 27 (1) ECSI, Art. 14 (5) UK SIA, see further FOX/WEBB, p.354, LORZ, p. 40.

⁸⁷ Second Report on Jurisdictional Immunities of States of Special Rapporteur SUCHARITKUL, p. 206 ff.

ages claims are introduced against a federal unit, the acceptance of a jurisdictional bar imposed by foreign immunity will primarily depend on the forum and its practice in this perspective.

c. State Corporations and Agencies

A growing tendency of States to share or delegate the execution of public tasks with State agencies can be observed on a national level. Especially in the communications, logistics, transport, or the resource development sectors, as well when promoting trade and economy, it is not uncommon to find State-led corporations with varying degrees of independence tasked to exercise public power.⁸⁸ These agencies find themselves in a unique relationship with the State which financially participates in the profits and deficits of the business and often exercises a high degree of control and monitoring. In this context the question arises whether a State corporation might be entitled to jurisdictional immunities in case civil claims are introduced against it in a foreign court. This issue is especially relevant in case of bankruptcy or insolvency proceedings or commercial disputes introduced by private investors.

Art. 2 (1b)(iii) UNCSI does indeed mention agencies and other instrumentalities of the State as an integral part of the State capable of raising immunity issues. A jurisdictional bar is, however, made dependent on the empowerment and actual performance of sovereign authority by the defendant legal entity. The first issue consequently relates to the type of activity which is exercised by the agency. Since the restrictive practice on State immunity law has become predominant⁸⁹, a State, and by extension its corporations, may only rely on jurisdictional immunity in the exercise of sovereign functions.⁹⁰ The Swiss Federal Court rejected the immunity plea of the Kuwait Investment Authority (KIA), an independent and separate legal entity from the Kuwaiti State

⁸⁸ FOX/WEBB, p. 356 ff., LORZ, p. 43 ff., DAMIAN, p. 24 ff., GRANT, p. 50 ff., GAUKRODGER David, *Foreign State Immunity and Foreign Government Controlled Investors*, OECD Working Papers on International Investment, Vol. 2010/02, 2010, p. 14.

⁸⁹ See § 1 (III.2), p. 24 ff.

⁹⁰ GAUKRODGER, p. 18, DAMIAN, p. 98, YANG Xiaodong, *State Immunity in International Law*, Cambridge, 2012, p. 75, KNUCHEL Sévrine, *State Immunity and the Promise of Jus Cogens*, *North-western Journal of International Human Rights*, Vol. 9/2, 2011, p. 164.

responsible for the management of funds and investment of Kuwait. The fact that KIA had a close relationship to Kuwait and that even ministers of the Kuwaiti Cabinet were sitting on its board was considered irrelevant for the question of immunities as the management of investment assets was of inherent private law nature, not in exercise of a sovereign authority.⁹¹ State corporations active in *acta de jure gestionis* activities can therefore not enjoy jurisdictional immunity in a foreign court, a fact that is of significant relevance in practice.⁹²

As explained in an upcoming chapter⁹³, distinguishing sovereign and private acts especially in the context of public tasks exercised by private or semi-private corporations, is not a simple exercise.⁹⁴ In addition, whether State corporations may enjoy immunity from execution is a key element for the workings of international trade and business. Under these circumstances, the corporate structure and legal contours of the defending entity become decisive. As explained by the Santiago Principles adopted by the International Working Group of Sovereign Wealth Funds, State-led corporations come as either a separate legal entity, or a pool of assets without separate legal personality to the State controlling them.⁹⁵ In the latter situation, the entity is often run by State agents and structurally integrated in a ministry or a department virtually indistinguishable from the State. In this situation, the agency often lacks the ability to be sued or participate in a court proceeding as an independent entity, which is why the general rules of State immunity law apply.⁹⁶

⁹¹ *Kuwait v. X SA*, Judgment of the Swiss Federal Tribunal of 24.1.1994, unpublished excerpts available in *Revue Suisse de Droit International et Européen*, Vol. 5, 1995, p. 593 ff.

⁹² GAUKRODGER, p. 15, FOX/WEBB, p. 359, WALTER Gerhard/DOMEJ Tanja, *Internationales Zivilprozessrecht der Schweiz*, 5th ed., Bern, 2012, p. 79 ff.

⁹³ See § 4 (I), p. 80 ff.

⁹⁴ YANG, *State Immunity in International Law*, p. 63, APPELBAUM, p. 81.

⁹⁵ Generally Accepted Principles and Practice No. 1, Santiago Principles, International Working Group of Sovereign Wealth Funds, Explanation and commentary, 2008, p. 11, available: http://www.ifswf.org/sites/default/files/santiagoprinciples_0_0.pdf [last accessed 18.6.2018].

⁹⁶ FOX/WEBB, p. 359, GAUKRODGER, p. 18, LORZ, p. 45, GRANT, p. 51.

For corporations with a separate legal personality, not directly incorporated in the State, the legal situation changes. Both Art. 27 (1) of the European Convention on State Immunity and Art. 10 (3) UNCSI allow for the exercise of civil jurisdiction over a foreign State corporation in case it possesses a distinct legal personality independent from the one of the State and in case it has the actual capacity to participate in a court proceeding. Several State legislators have provided for similar provisions such as the statutes adopted by Singapore⁹⁷, Pakistan⁹⁸ and South Africa⁹⁹. Already prior to the adoption of the British State Immunity Act¹⁰⁰, most notably its § 14 (2), British courts had a similar practice of exercising jurisdiction over State corporations. The English Court of Appeal disregarded the immunity of the Nigerian Central Bank for a dispute involving the purchase contract with a British Cement Enterprise, allowing for litigation in British Courts.¹⁰¹

A different approach is taken by, most notably, the United States. § 1603 (a) of the U.S. FSIA includes agencies and instrumentalities within the definition of a State under the condition that it possesses a separate legal personality, a close link to the foreign State, and the fact that it has not been incorporated in the U.S or any other third State. This means that a corporation whose majority shares are owned by a foreign State will be understood as an integral part of the latter and enjoy jurisdictional immunity and immunity from execution in the U.S. This was most notably decided by the Supreme Court in *Dole Food Co. v. Patrickson*. The case concerned tort proceedings introduced by farm workers against their employer for injuries endured from chemical exposure during working hours. The defendants claimed that the proceedings should be removed from the jurisdiction of U.S. courts in application of the U.S.

⁹⁷ §16 (2) of the Singaporean State Immunity Act of 26.10.1979, Chapter 313, revised edition of 31.12.2014, reproduced in UN Doc. No. ST/LEG/SER.B.20, p. 28 ff. (cited: Singaporean SIA).

⁹⁸ §15 (2) of the Pakistani State Immunity Ordinance VI of 11.3.1981 reproduced in UN Doc. No. ST/LEG/SER.B.20, p. 20 ff. (cited: Pakistani SIO).

⁹⁹ §15 of the South African Foreign States Immunities Act 87 of 20.11.1981 reproduced in UN Doc. No. ST/LEG/SER.B.20, p. 34 ff. (cited: S. A. FSIA).

¹⁰⁰ United Kingdom State Immunity Act of 20.7.1978, 1978 chapter 33 (cited: UK SIA).

¹⁰¹ *Trendtex Trading Corporation v. Central Bank of Nigeria*, Judgment of the English Court of Appeal of 13.1.1977, [1977] 2 W.L.R. 356 also published in 64 ILR 111.

FSIA as it was a corporation owned on the majority basis by the State of Israel. The Supreme Court agreed and confirmed the decisive factor for the acceptance of the plea of immunity to be the fact that a foreign State was a majority shareholder.¹⁰² This approach leads to a significant extension of the personal scope of foreign immunities. The U.S. FSIA contains specific provisions applicable to foreign State agencies independent of “the executive organs of the government of the State” which prevents a too significant extension of the personal scope of foreign immunities.¹⁰³ In reality, the legal structure of State corporations and their separation to the State *stricto sensu* are often blurred. In practice, Courts have the difficult task to “pierce the corporate veil” of the defendant entity and assess the State’s involvement on a case-by-case basis.¹⁰⁴

In summary, the question whether State corporations are considered an integral part of a foreign State for the purpose of foreign immunities will depend on their corporate structure and their legal personality. Dependent agencies (often) lack the necessarily ability to appear in front of the court independently and are covered by the personal scope of immunities. Structurally autonomous entities with a distinct legal personality are generally excluded from the ability to claim foreign immunity, State practice in this perspective is nevertheless not homogenous. In reality, a distinction is often irrelevant as a majority of State corporations are involved in commercial or trading activities falling under the *acta de jure gestionis* exception, for which no jurisdictional immunities will be granted.

2. From an Absolute to a Restrictive Theory on State Immunity

As seen, international law imposes on a court not to exercise jurisdiction over a foreign entity in case proceedings are introduced against it on national level. For a period in history, State immunity law was considered absolute in exempting the State from any type of national procedures. The simple fact that the defending entity fell under the personal scope of State immunity and the defendant did indeed raise the immuni-

¹⁰² *Dole Food Co. v. Patrickson*, Judgment of the U.S Supreme Court of 22.4.2003, 538 U.S. 468.

¹⁰³ FOX/WEBB, p. 359, GAUKRODGER, p. 18, DAMIAN, p. 27.

¹⁰⁴ DAMIAN, p. 25.

ty issue was enough for the dismissal of the claim without consideration of the merits.¹⁰⁵

Nevertheless, not long after the *Schooner Exchange* ruling was decided, the absolute doctrine of State immunity law was gradually rejected in practice. Already in 1886, Italian Courts assumed civil jurisdiction over a foreign State which had been involved in commercial activities with individuals.¹⁰⁶ This “restrictive approach” was later endorsed by Belgian¹⁰⁷, Swiss¹⁰⁸, and Austrian¹⁰⁹ Courts.¹¹⁰ One of the most influential judgments in this regard, at least from a continental-European perspective, was the 1963 decision of the German Constitutional Court in *re Empire of Iran*, also known as the *Heizungsreparatur case*.¹¹¹ Following the continued failure of the Iranian Embassy located in Bonn to pay for the reparation of its central heating system, the heating installing agency brought civil proceedings against the Iranian State in German Courts. The Constitutional Court, after a detailed assessment of the international practice in this regard, concluded that no obligation was incumbent on Germany anymore to grant a foreign State immunity from jurisdiction in the specific proceeding. A foreign State could only enjoy immunity for actions performed in its sovereign

¹⁰⁵ CRAWFORD, Brownlie’s Principles of International Law, p. 487 ff., GAUKRODGER, p. 11, APPELBAUM, p. 47 ff., BELSKY Adam/MERVA Mark/ROHT-ARRIAZA Naomi, Implied Waiver Under the FSIA: Proposed Exception to Immunity for Violations of Peremptory Norms in International Law, California Law Review, Vol. 77/2, 1989, p. 379 ff.

¹⁰⁶ *Gutierrez v. Elmilik*, Judgment of the Court of Cassation in Florence of 25.7.1886, Foro Italiano, Vol. I, 1886, p. 913, published in American Journal of International Law, Vol. 26, 1932, p. 622 ff.

¹⁰⁷ *SA des Chemins de Fer Liégeois-Luxembourgeois v. L’Etat Néerlandais*, Judgment of the Belgian Court of Cassation of 11.6.1903, Pas. 1903 I 295.

¹⁰⁸ *Austrian Finance Ministry v. Dreyfus*, Judgment of the Swiss Federal Tribunal of 13.3.1918, ATF 44 I 49, See more in detail *Republic Arabe Unies v. Dame X*, Judgment of the Swiss Federal Tribunal of 10.2.1960, ATF 86 I 23.

¹⁰⁹ *Dralle v. Czechoslovakia*, Judgment of the Austrian Supreme Court of 10.5.1950, SZ 23/143 also published in 17 ILR 155.

¹¹⁰ For more details about the historical development of the restrictive theory see DAMIAN, p. 1 ff., BRÖHMER, p. 17 ff., FOX/WEBB, p. 133 ff., YANG, State Immunity in International Law, p. 11 ff., LORZ, p. 11 ff.

¹¹¹ *In re Empire of Iran*, Judgment of the German Constitutional Court of 30.4.1963, BVerfGE 16, p. 27 also published in 45 ILR 57.

capacity, *acta de jure imperii*. Private acts, such as the one before the Court, were considered *acta de jure gestionis*, for which no jurisdictional immunity was due anymore.¹¹²

Common law systems around the world most often cite to the so-called “Tate-Letter” to justify a switch of practice. In 1952, the then Acting Legal Adviser of the U.S. Department of State, Jack Tate, drafted a public letter addressed to the U.S. Attorney General declaring that the United States would no longer follow the absolute doctrine of State immunity and not intervene in proceedings brought against a foreign State in commercial litigation.¹¹³ Since then, all national and international documents adopted in the area of State immunity law, including the 1972 European Convention on State Immunity and the 2004 UN Convention on the Jurisdictional Immunity of States, favor the restrictive doctrine allowing for a foreign Court to render judgments binding on a foreign State in all private law matters.¹¹⁴ Today, only the People’s Republic of China still follows the absolute doctrine of foreign jurisdictional immunity and continues to grant immunity over *acta de jure gestionis* as well:

The consistent and principled position of China is that a state and its property shall, in foreign courts, enjoy absolute immunity, including absolute immunity from jurisdiction and from execution, and [it] has never applied the so-called principle or theory of „restrictive immunity“.¹¹⁵

Since the acknowledgement of the restrictive theory in international State immunity law, courts are required to distinguish between acts for which a State can claim immunity and acts for which jurisdiction may be exercised. It is not sufficient anymore

¹¹² *In re Empire of Iran*, p. 34 ff., for more information on the distinction between *de jure imperii* and *de jure gestionis* see § 4 (I), p. 80 ff.

¹¹³ Letter issued by the U.S. Department of State on 19.5.1952 signed by Jack Tate to the Attorney General, reprinted in *Journal of International Law*, Vol. 7, 1956, p. 403 ff. (cited: Tate Letter).

¹¹⁴ Described in more detail in the upcoming chapter § 2 (I.2), p. 35 ff.

¹¹⁵ Letter of the Office of the Commissioner of the Ministry of Foreign Affairs of the People’s Republic of China in Hong Kong to the Constitutional and Mainland Affairs Bureau of the Hong Kong Government, see *FG Hemisphere Associates LLC v. Democratic Republic of Congo*, Judgment of the High Court of Hong Kong of 12.12.2008, HCMP 928/2008.

for the defending State to simply proof its statehood for immunities to apply, but it must also show that no established exception to immunity is applicable in the proceeding. National courts must consequently always assess the specific merits of the case to decide upon jurisdiction, making a once fundamental distinction between procedural and material aspects of a case obsolete.

§ 2 Sources of State Immunity Law

The upcoming chapter is dedicated to the international and domestic sources of the jurisdictional immunity of a foreign State. The international legal bases, both customary and codified in nature, will be presented in chapter I and will insofar be useful as it familiarizes the reader with the relevant legal tools used throughout this thesis. A selection of national legislations and domestic practices will be subject of chapter II. The author will refer and summarize pertinent domestic jurisprudence and developments which exemplify the legal tensions created by jurisdictional immunities and the effective implementation of a torture victim's right to remedy and access to justice.

I. International Law

1. International Customary Law

As pointed out by several legal scholars and national courts alike, the legal basis of jurisdictional immunities in international law had not been clearly established for a while. It was argued that the grant of a jurisdictional plea did not constitute an enforceable entitlement of the defending State, as no international obligation was incumbent on a national court to accept the plea of immunity. It was simply a “practical courtesy” of the forum not to exercise jurisdiction in case a foreign sovereign was involved, a question not regulated by international rules.¹¹⁶ Reference is regularly made to the *Schooner Exchange* ruling. In his deliberation, Justice MARSHALL continuously emphasized that the forums' sovereign right to exercise territorial jurisdiction remained intact in case immunities are granted, that a State would, as a sign of comity and good will, not exercise jurisdiction over the matter at hand.¹¹⁷ Territorial jurisdic-

¹¹⁶ APPELBAUM, p. 35, CAPLAN Lee, State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory, *American Journal of International Law*, Vol. 97/4, 2003, p. 750 f., FINKE Jasper, Sovereign Immunity: Rule, Comity or Something Else?, *European Journal of International Law*, Vol. 24/4, 2010, p. 870 f., *Dole Food Co. v. Patrickson*, p. 479, *Republic of Austria v. Altmann*, Judgment of U.S. Supreme Court of 7.6.2004, 327 F.3d 1246 541 US 677, p. 696.

¹¹⁷ *Schooner Exchange v. McFaddon*, p. 136 f., see also SCHULTZ Thomas/RIDI Niccolò, Comity in US Courts, *Northeastern University Law Review*, Vol. 9/2, 2017. 349 f.

tion is consequently the main and dominating principle without jurisdictional immunities constituting a restriction thereof.¹¹⁸

[O]ne does not start from an assumption that immunity is the norm, and that exceptions to the rule of immunity have to be justified. One starts from the assumption of non-immunity, qualified by reference to the functional need (operating by way of express or implied licence) to protect the sovereign rights of foreign States operating or present in the territory.¹¹⁹

Authors who defend this conclusion acknowledge that a significant practice exists to exempt a foreign State from national litigation, but courts did so without showing the necessary *opinio juris sive necessitates* for it to create an obligation of customary international law.¹²⁰

The International Court of Justice was only recently requested to clarify the status and legal basis of jurisdictional immunities in international law. As Italy, the defending State in the dispute, did exercise civil jurisdiction over the German State and could not rely on treaty law as a legal basis for its actions, the question arose, whether Italy had violated customary international law.¹²¹ While sufficient State practice existed for the recognition of a customary rule¹²², the issue at hand was whether States acted with the necessary *opinio juris* when denying jurisdiction over a foreign State. The Court referred to an extensive study of the ILC and a survey conducted in the area for the purpose of codifying international rules in State immunity matters. States participat-

¹¹⁸ JENNINGS Robert, The Place of the Jurisdictional Immunity of States in International and Municipal Law, Lecture at the European Institute at the University of Saarland, 1987, p. 3 ff.

¹¹⁹ SINCLAIR Ian, The Law of Sovereign Immunity: Recent Developments, *Recueil des Courts*, Vol. 167, 1980, p. 215.

¹²⁰ CAPLAN, p. 754, APPELBAUM, p. 35, FOX/WEBB, p. 14, MCGREGOR Lorna, Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty, *European Journal of International Law*, Vol. 18/5, 2008, p. 913 f., ORAKHELASHVILI Alexander, Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights, *European Journal of International Law*, Vol. 14/3, 2003, p. 557 f.

¹²¹ *Germany v. Italy*, para. 54.

¹²² *Ibid.*, para. 55.

ing in the survey considered it established that a foreign entity enjoyed a right not to be subjected to the civil jurisdiction of a domestic court and that international law imposed upon them the obligation not to exercise jurisdiction. From this survey, both the ILC¹²³ as well as the ICJ found sufficient proof that States acted with *opinion juris* when accepting a jurisdictional plea:

That practice shows that, whether in claiming immunity for themselves or according it to others, States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity.¹²⁴

The Court consequently recognized that State immunity law was indeed regulated by international law of which Italy was in violation when assessing jurisdiction over the German State.¹²⁵ The ICJ effectively rejected the much-discussed “comity argument” and identified a solid customary basis of jurisdictional immunities in international law.

2. International Treaties and Codifications

a. European Convention on State Immunity

The European Convention on State Immunity was the first relevant attempt at a binding multilateral codification in State immunity law after the Second World War. The process was initiated at the instigation of the Austrian Government urging the Council of Europe to harmonize the growing diverging practices in the area.¹²⁶ After eight years of work, the Drafting Commission presented its finalized text to the Committee of Ministers on 16th May 1972 and invited Member States to sign and ratify the treaty.

¹²³ Report of the International Law Commission to the General Assembly on the work of its thirty-second session, Yearbook of the International Law Commission, Vol. II (Part Two), 1980, UN Doc. No. A/61/10, p. 147, para. 26.

¹²⁴ *Germany v. Italy*, para. 56.

¹²⁵ *Ibid.*, para. 107.

¹²⁶ LORZ, p. 24, STEGER, p. 44 f., FOX/WEBB, p. 118 ff., BRÖHMER, p. 119.

By 11th June 1976, the necessary three ratification certificates were deposited allowing the Convention to enter into force. Despite being open for ratification to all 47 Member States of the Council, only eight States are presently parties to the Convention. These are in alphabetical order: Austria, Belgium, Cyprus, Germany, Luxemburg, the Netherlands, Switzerland, and the United Kingdom.¹²⁷

In a total of six Chapters, ECSI summarizes the principles applicable for the grant and disrespect of foreign jurisdictional immunities in civil proceedings. Art. 15 ECSI provides for a general obligation of the forum to decline jurisdiction in all circumstances not enlisted in Art. 1-14. The situations mentioned in these provisions were considered an exhaustive list of acts by which a State does not act within its sovereign authority, implementing the restrictive theory of State immunity law. Situations in which a State cannot claim immunity include: the institution of proceedings by the State party (Art. 1); an express or implicit waiver of immunity privileges (Art. 2); in employment disputes (Art. 5); disputes relating to immovable property situated on the territory of the forum (Art. 9); in succession proceedings (Art. 10); or in case physical harm occurred on the territory of the forum (Art. 11).

With the exception of Germany and the United Kingdom¹²⁸, all contracting parties also have ratified the Additional Protocol to the Convention¹²⁹ which entered into force on 22th May 1985. This document provides for an inter-State dispute settlement mechanism. According to its Art. 2 referring to Art. 21 (1) ECSI, any dispute concerning the interpretation and application of the Convention must be submitted to the European Tribunal on State Immunity.

¹²⁷ Council of Europe, Chart of Signatures and Ratification of Treaty No. 074, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/074/signatures?p_auth=GNS89xwE [last accessed 19.6.2018].

¹²⁸ Council of Europe, Chart of Signatures and Ratifications of Treaty 074A, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/074A/signatures?p_auth=9urPD5A8 [last accessed 19.6.2018].

¹²⁹ Additional Protocol to the European Convention on State Immunity signed in Basel on 16.5.1972, ETS 074A.

An important document in this perspective is the Explanatory Report provided by the governmental experts of the European Committee on Legal Co-operation.¹³⁰ The text is intended as neither an authoritative nor binding interpretation device but should serve as a tool for facilitating the effective implementation of the Convention and its Additional Protocol.¹³¹

ECSI, despite its low ratification ratio, constitutes a relevant international text as it is the most recent multilateral treaty in force in the subject of State immunity law. Since its adoption, it has been cited by both the European Court of Human Rights¹³² as well as the International Court of Justice¹³³ in their assessment over customary international law and serves as a source of inspiration and guidance not only in the practice of Member States to the Council of Europe but all countries world-wide.

b. United Nations Convention on Jurisdictional Immunities of States

The origins of the United Nations Convention on Jurisdictional Immunities of States and Their Property¹³⁴ dates back to 1947, when the UN General Assembly (UNGA) identified the matter as one which should be considered for universal codification by the ILC.¹³⁵ The issue was, however, suspended until 1977, when the General Assembly adopted Resolution 32/151 and formally appointed the matter to the ILC for the initial

¹³⁰ Explanatory Report to the European Convention on State Immunity and its Additional Protocol, ETS No. 74 of 16.5.1972 (cited: Explanatory Reports to ECSI).

¹³¹ See Preamble of the Explanatory Reports to ECSI.

¹³² I.e. in employment disputes: *Cudak v. Lithuania*, Judgment of the ECtHR [GC] of 23.3.2010, No. 15869/02, para. 66, *Sabeh el Leil v. France*, Judgment of the ECtHR [GC] of 29.6.2011, No. 34869/05, para. 67, *Radunović v. Montenegro*, Judgment of the ECtHR of 25.10.2016, No. 45197/13, 53000/13 and 73404/13, para. 81.

¹³³ *Germany v. Italy*, para. 62.

¹³⁴ United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCIS) signed in New York on 2.12.2004, adopted by UNGA Resolution 59/38, UN Doc. No. A/59/508.

¹³⁵ LORZ, p. 27, FOX/WEBB, p. 284 ff., STEGER, p. 45 f., LENGELSEN Robin, Aktuelle Probleme der Staatenimmunität im Verfahren vor den Zivil- und Verwaltungsgerichten, Frankfurt a.M., 2011, p. 23 f., HAFNER Gerhard, Historical Background to the Convention, in: O'Keefe Roger/Tams Christian/Tzanakopoulos (eds.), The United Nations Convention on Jurisdictional Immunities of States, Oxford, 2013, p. 4 f.

tion of the codification process.¹³⁶ On this basis, the ILC elaborated the so-called Draft Articles on Jurisdictional Immunities of States and Their Property¹³⁷, which it presented to the UNGA in 1991. 13 years later, on 2nd December 2004, the UNGA adopted UNCSI in Resolution 59/38 and invited Member States to sign and ratify the Convention. As by 2018, 22 States¹³⁸ have ratified the Convention with 13 more States¹³⁹ have signed or are in the process of ratification.¹⁴⁰ UNCSI has, however, yet to enter into force as according to its Art. 30 (1) the deposit of 30 ratification, acceptance, approval or accession certificates is necessary.

Like ECSI, the United Nations Convention is subdivided in six chapters and codifies the restrictive theory on State immunity law distinguishing between acts for which jurisdictional immunity is granted (*acta de jure imperii*) and private acts over which jurisdiction may be exercised (*acta de jure gestionis*). Art. 5 UNCSI contains the general rule on the State's entitled to immunity in domestic proceedings and serves as a "tie breaker" in favor of granting immunity in case doubts should arise (also referred to as the principle of *in dubio pro immunitate*). Exceptions to the general rule of immunity are enlisted in Articles 7-17. A national court may exercise jurisdiction over a foreign State if it has consented to the proceedings (Art. 7-9), was active in commercial transactions (Art. 10), in relation to a contract of employment with an individual (Art. 11), for territorial physical torts (Art. 12), and both in respect of immovable

¹³⁶ UNGA Resolution 32/151 of 19.12.1977, UN Doc. No. A/RES/32/151, see also HAFNER, p. 5, LENGELSEN, p. 67, LORZ, p. 28.

¹³⁷ ILC Draft Articles on Jurisdictional Immunities of States and Their Property, adopted by the Commission in 1991 and submitted to the UNGA, Yearbook of the International Law Commission, Vol. II (Part Two), 1991.

¹³⁸ Austria, the Czech Republic, Equatorial Guinea, Finland, France, Iran, Iraq, Italy, Japan, Kazakhstan, Latvia, Lebanon, Liechtenstein, Mexico, Norway, Portugal, Romania, Saudi Arabia, Slovakia, Spain, Sweden, and Switzerland.

¹³⁹ Belgium, China, Denmark, Estonia, Iceland, India, Madagascar, Morocco, Paraguay, the Russian Federation, Senegal, Sierra Leone, Timor-Leste, and the United Kingdom.

¹⁴⁰ United Nations Treaty Collection, List of relevant Declarations and Reservations to the UN Convention on Jurisdictional Immunity of States and Their Property, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=_en [last accessed: 20.6.2018].

(Art. 13) and intellectual property (Art. 14). The rules on immunity from measures of constraints and execution are contained in Art. 18-21 UNCSI.

Despite having yet to enter into force, the UN Convention on State Immunity has significantly contributed to international and national jurisprudence as a source of inspiration as part of soft law in all aspects related to the jurisdictional immunity of foreign entities. Influential in this perspective are also the ILC's Comments on the 1991 Draft Articles providing for the necessary context and summary of the discussions held during the drafting procedure.¹⁴¹

c. Other Codifications and International Treaties

More codification proposals and treaties regulating foreign immunities can be found on international level. First of all, jurisdictional immunities are often subject of bilateral treaties of amities, commerce and economic relations. States reciprocally waive their immunity privileges potentially held by State-led corporations in favor of their respective citizens in a specific subject matter. Art. XI (4) of the Treaty of Amity, Economic Relations, and Consular Rights¹⁴² concluded between the United States and Iran lifts the immunity from suit and execution of all government agencies and instrumentalities, which are publicly owned or controlled, in favor of commercial litigation. This agreement is, *nota bene*, the basis of an ongoing international dispute between the two countries at the International Court of Justice.¹⁴³

¹⁴¹ ILC Commentary to the Draft Articles on Jurisdictional Immunities of States and Their Property, adopted by the Commission in its 43rd Session, Yearbook of the International Law Commission, Vol. II (Part Two), 1991.

¹⁴² Treaty of Amity, Economic Relations, and Consular Rights concluded between the United States of America and Iran, signed in Tehran on 15.8.1955, 3853 TIAS 899.

¹⁴³ Iran institutes Proceedings against the United States with regard to a Dispute concerning Alleged Violations of the 1955 Treaty of Amity, Unofficial Press Release of the International Court of Justice of 15.6.2016, No. 2016/19, see recent ICJ order: *Iran v. United States of America*, Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights, Order of the ICJ of 3.10.2018, ICJ General List No. 175.

Prior to World War II, the 1926 International Convention for the Unification of Certain Rules Concerning the Immunity of State-owned Ships¹⁴⁴ was adopted in Brussels. The Convention, as well as its 1934 Additional Protocol, never gained significance as neither the United States nor the Soviet Union ratified the Convention at the time.¹⁴⁵ Today, immunity from seizure and execution measures of ships is regulated by the United Nations Convention on Law of the Sea¹⁴⁶.

In addition, other immunity-related clauses are found in the 1933 Convention for the Unification of Certain Rules relating to the Precautionary Attachment of Aircraft¹⁴⁷, the Paris Convention on Third Party Liability in the Field of Nuclear Energy¹⁴⁸, and the International Convention on Civil Liability for Oil Pollution Damage¹⁴⁹. These treaties lift the immunity of a foreign State in civil proceedings are, however, not in specific relation to the commission of torture or the liability for torturous acts and should not be discussed further.

On the other hand, a number of non-binding instruments and codification proposals should briefly be mentioned. The *Institut de Droit International* (IDI) adopted a total of five sets of resolutions with regard to the jurisdictional immunity of foreign States.¹⁵⁰ In 1982, with its redraft of 1994¹⁵¹, the International Law Association (ILA), a

¹⁴⁴ International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, signed in Brussels on 10.4.1926, and Additional Protocol, signed in Brussels on 24.5.1934, 176 League of Nations Treaty Series (LNTS) 199.

¹⁴⁵ LORZ, p. 30, FOX/WEBB, p. 117 f., BRÖHMER, p. 122, PAECH, p. 50 f., KREN KOSTKIEWICZ Jolanta, Staatenimmunität im Erkenntnis- und im Vollstreckungsverfahren nach schweizerischem Recht, Bern, 1998, p. 224 f.

¹⁴⁶ United Nations Convention on the Law of the Sea (UNCLOS) signed in Montego Bay on 10.12.1982, 1833 UNTS 3.

¹⁴⁷ Art. 3 of the Convention for the Unification of Certain Rules relating to the Precautionary Attachment of Aircraft signed in Rome on 29.5.1933, 192 LNTS 289.

¹⁴⁸ Art. 13 of the Convention on Third Party Liability in the Field of Nuclear Energy signed in Paris on 29.7.1960, as amended by the Additional Protocol of 28.1.1964 and by the Protocol of 16.11.1982, 176 UNTS 199.

¹⁴⁹ Art. 9 of the International Convention on Civil Liability for Oil Pollution Damage signed in Brussels on 19.6.1975, 973 UNTS 3.

¹⁵⁰ 1891 Hamburg Resolution on Competence and Jurisdiction of Courts in Proceedings against sovereign States and their Representatives, 1954 Aix-en-Provence Resolution on the Jurisdic-

Committee of legal experts in the matter, elaborated and proposed the so-called ILA Montreal Draft Convention on State Immunity¹⁵², which it recommended to States for adoption. Lastly, the 1983 Inter-American Draft Convention on the Jurisdictional Immunity of States¹⁵³ was a failed attempt by the Organization of American States to follow their European counterparts and adopt a regionally binding immunity convention. Despite their non-authoritative nature, these documents are relevant for courts and legal scholars as soft law instruments and will be considered as applicable sources of law for the present thesis.

II. National Law

National practices and legislations in State immunity law may be subdivided into two groups: States which have provided for a specific statute or national act in the subject matter of State immunity, most often of common law tradition (Chapter 1), and other States relying directly on international law without national State immunity legislation (Chapter 2). A selection of domestic legislation and national practices will be

tional Immunity and the Immunity of Enforcement of the Foreign State, 1991 Basel Resolution on Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement, Yearbook of the Institute of International Law, Vol. 63, 1991 (cited: Basel Resolution), 2009 Naples Resolution on the Immunity from Jurisdiction of the State and of Persons who Act on Behalf of the State in case of International Crimes, Yearbook of International Law, Vol. 73, 2009 (cited: Naples Resolution), 2015 Tallinn Resolution sur la compétence universelle civile en matière de réparation pour crimes internationaux, Annuaire de l'Institut de droit international, Vol. 76, 2015 (cited: Tallinn Resolution), all Resolutions available on <http://www.idi-iil.org/en/publications-par-categorie/resolutions/> [last accessed 25.6.2018].

¹⁵¹ Final Report on Developments in the Field of State Immunity and Proposal for a Revised Draft Convention on State Immunity for the ILA Buenos Aires Conference 1994, International Law Association, Report of the Sixty-Sixth Conference, held at Buenos Aires, 1994, p. 2.

¹⁵² Draft Articles for a Convention on State Immunity, ILA adoption in Montreal Session between 14.-20.8.1994, in: International Legal Materials, Vol. 22/2, 1983, p. 287 ff., for a comprehensive summary of the content see BRÖHMER, p. 128 ff.

¹⁵³ Inter-American Draft Convention on Jurisdictional Immunity of States proposed to the OAS in San Jose on 21.1.1983, 22 ILM 292 (1983), for a comprehensive summary of the content see BRÖHMER, p. 136 ff.

presented in each chapter additionally citing jurisprudence of international relevance in the matter.

1. Countries with State Immunity Legislation

a. United States of America

In the United States, matters of State immunity are regulated by the Foreign State Immunity Act of 1976. The Act encompasses a list of circumstances in which U.S. Courts are legally entitled to assume jurisdiction over a foreign entity, implementing the restrictive theory on State immunity law. As a rule, foreign States should not be subjected to U.S. jurisdiction (§ 1604 FSIA), unless a situation as described in § 1605-1607 materializes. Most relevant exceptions for the present thesis are, firstly, § 1605 (a)(2) creating an exception to the jurisdictional immunity in case of commercial activity. In *Nelson v. Saudi Arabia*, a U.S. monitoring systems engineer working for a hospital in Riyadh requested the U.S. Supreme Court to assume civil jurisdiction over Saudi Arabia on the basis of this provision. The plaintiff alleged to have been arrested, illegally detained and tortured by Saudi officials after he had discovered serious security issues which he brought to the attention of the competent authorities.¹⁵⁴ The issue brought before the court related to the legal challenges of qualifying the commission of torture as either *de jure gestionis* or the *de jure imperii*, a matter discussed in detail in § 4 of this study.

Secondly, U.S. scholars and courts frequently considered the implied waiver provision as a legal basis for a victim of torture to bring a tort claim against a foreign State. In *Hugo Princz v. Germany*, an American Holocaust survivor of Jewish origin requested the U.S. Courts to order the German State to pay reparation for the pain and suffering endured in multiple concentration camps.¹⁵⁵ While the majority rejected the plaintiff's claim, Justice WALD concluded that the German State had implicitly waived its im-

¹⁵⁴ *Saudi Arabia v. Nelson*, Judgment of the U.S. Supreme Court of 23.3.1993, 507 U.S. 349.

¹⁵⁵ *Hugo Princz v. Germany*, Judgment of the U.S. District Court of Appeals of Columbia of 1.7.1994, No. 26 F. 3d 1166 (1994) confirming *Hugo Princz v. Germany*, Judgment of the U.S. Court of Appeals for the District of Columbia of 5.11.1993, No. 92-7247 and 93-7006.

munity privilege in the sense of § 1605(a)(1) U.S. FSIA by committing acts of torture.¹⁵⁶ The concept of an immunity waiver and its potential application to civil litigation of torture will be discussed in § 3.

Next to the FSIA, the U.S. legislator has adopted several national acts in relation to foreign State immunity. The 1991 Torture Victims Protection Act (TVPA)¹⁵⁷ allows torture victims to use the civil courts of the United States to bring a reparation claim against individuals who, acting in an official capacity for any foreign nation, committed torture or extrajudicial killings. The Act applies to both U.S. and foreign citizens and is not restricted to acts committed on U.S. soil, essentially implementing universal civil jurisdiction over torture offences.¹⁵⁸ Before the 2012 *Mohamad* ruling¹⁵⁹, where the Supreme Court limited the scope of application to individuals only, the TVPA could and had been used as a basis for bringing civil actions against sovereign States. The U.S. District Court of Columbia, for example, accepted jurisdiction over the Republic of Iraq in *Daliberti v. Iraq* and ordered the defending State to pay 19 Million U.S. Dollars in damages for acts of torture committed on Iraqi territory.¹⁶⁰ Also, one recent judgment of the U.S. District Court of Columbia should be cited here. In *Warmbier v. the Democratic People's Republic of Korea*, the U.S. Court ordered North Korea to pay damages on the basis of the TVPA for the torture and extrajudicial killing of Otto Warmbier. Otto was accused of having stolen a propaganda poster while on a study trip to Pyongyang for which he was detained for 17 months. During his deten-

¹⁵⁶ *Hugo Princz v. Germany*, Dissenting opinion of Judge WALD, p. 1182, see among others BELSKY/MERVA/ROTH-ARRIAZA, p. 381, JOHNSON Thora, A violation of Jus Cogens Norms as an Implicit Waiver of Immunity Under de Federal Sovereign Immunities Act, *Journal of International Law and Trade*, Vol. 19/2, 1995, p. 282.

¹⁵⁷ U.S. Torture Victims Protection Act of 1991, Pub.L. 102-256, H.R. 2092, 106 Stat. 73 codified at 28 U.S.C. § 1350 see FOX/WEBB, p. 280 f.

¹⁵⁸ See sec. 2 (a) TVPA see further FOX/WEBB, p. 274 ff.

¹⁵⁹ *Mohamad v. Palestinian Authority and the PLO*, U.S. Supreme Court decision of 18.4.2012, 132 S.Ct. 1702 (2012).

¹⁶⁰ *Daliberti v. Iraq*, Judgment of the U.S. State District Court of Columbia of 23.5.2000, 97 F. Supp. 2d 38, See PEPPER William, Iraq's Crimes of State Against Individuals and Sovereign Immunity, *Brooklyn Journal of International Law*, Vol. 18, 1992, p. 369.

tion, Otto fell into a coma and died only a few days after his return to the United States.¹⁶¹

The TVPA, however, partially follows the mechanism introduced by the 1996 Antiterrorism and Effective Death Penalty Act (AEDP)¹⁶². This legislation provides for an additional exception to the jurisdictional immunity within the U.S. FSIA by allowing U.S. nationals (only) to sue a foreign State if it had been designated as a “State sponsor of terrorism” and the plaintiff had suffered injuries by a terrorist organization supported by that State. The exception only applies to States during the period it is designated by the U.S. Department of State as a terrorist sponsor. The list is published online and currently contains four States: North Korea, Iran, Sudan and Syria.¹⁶³

In 2016, the U.S. Congress adopted the last amendment to the U.S. FSIA with the Justice against Sponsors of Terrorism Act (JASTA)¹⁶⁴. Civil claims against a foreign State no longer depend on the list provided by the U.S. Department of States. It does, however, establish a unique territorial scope and significantly extends the liability of States for aiding and abetting terrorist acts that could potentially include support for acts of torture. TVPA, AEDP, as well as JASTA are analyzed and criticized by the author in a chapter regarding implementation of universal civil jurisdiction.¹⁶⁵

b. Canada

Canada adopted its State Immunity Act (SIA) in 1985¹⁶⁶ and has since been required to interpret and apply SIA provisions on acts of torture committed extraterritorially. In *Bouzari v. Iran*, an Iranian businessman who refused to pay a bribe to a high-ranking

¹⁶¹ *Warmbier et al. v. the Democratic People's Republic of Korea*, Judgment of the U.S. State District Court of Columbia of 24.12.2018, Case No. 1:18-CV-00977.

¹⁶² Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. 104-132, 110 Stat. 1214 see further Fox/WEBB, p. 281.

¹⁶³ U.S. Department of State, List of State Sponsors of Terrorism, <https://www.state.gov/j/ct/list/c14151.htm> [last accessed 22.3.2018].

¹⁶⁴ U.S. Justice against Sponsors of Terrorism Act, Public Law, 114-222 of 28.9.2016, 130 Stat. 852.

¹⁶⁵ See § 8 (II.3.c), p. 345 ff.

¹⁶⁶ Canadian State Immunity Act (Canadian SIA), R.S.C. 1985, c. S-18 for commentaries see BRÖHMER, p. 98 f.

Iranian politician, the son of the Iranian president at the time, for the concession of an oil and gas exploitation license, brought civil proceedings against the Islamic Republic for the subsequent mistreatment inflicted on him at the hand of Iranian police forces. Houshang Bouzari alleged to have been arrested, transported to Evin prison, where he, for a period of eight months, was detained and tortured repeatedly. The Ontario Court of Appeal unanimously held that the Canadian SIA did not contain a provision allowing him to bring civil proceedings against Iran, which consequently enjoyed full jurisdictional immunity in Canadian Courts.¹⁶⁷ This conclusion was later upheld by the Canadian Supreme Court in *Kazemi*, assessing the death of a Canadian-Iranian photo-journalist who was tortured in Evin Prison.¹⁶⁸

In both proceedings, Canadian courts were confronted with challenging legal issues. It needed to be assessed, whether the rehabilitation of a torture victim on the territory of the forum or the mental pain and suffering of the surviving families could be considered a territorial tort within the meaning of § 6(a) Canadian SIA, an issue discussed at length in § 5 of this study. In addition, as Canada applies both the *forum non conveniens* as well as the *forum necessitatis* doctrines, Canadian jurisprudence has been fundamental in the analysis and implementation of universal civil jurisdiction for torture, for which it was criticized by the UN Committee against Torture as too restrictive in nature.¹⁶⁹ These issues will be discussed in § 8 (I) and (II) of the thesis.

In the wake of the *Bouzari* and *Kazemi* rulings, which left torture victims without an effective remedy, several legislative proposals were introduced in Canadian Parliament. Irwing Cotler, member of the Canadian House of Commons, introduced Bill C-483, also known as the Redress for Victims of International Crimes Act, which would have created an additional exception to the existing Canadian SIA allowing for civil jurisdiction over cases of genocide, war crimes, crimes against humanity and tor-

¹⁶⁷ *Bouzari v. Iran*, Judgment of the Ontario Superior Court of Appeal of 30.6.2004, [2004] O.J. No. 2800 71 O.R. (3d) 675, also published in 124 ILR 441, See NOVOGRODSKY Noah, Immunity for Torture: Lessons from Bouzari v. Iran, European Journal of International Law, Vol. 18/5, 2007, p. 939 ff.

¹⁶⁸ See *Kazemi v. Iran*.

¹⁶⁹ Concluding Observations and Recommendations of the UN Committee against Torture in the fourth and fifth periodic review of Canada, UN Doc. No. CAT/C/CR/34/CAN, para. 4 (g).

ture.¹⁷⁰ The Bill was never voted upon, neither were Bill S-35¹⁷¹, commonly referred to as Crimes Against Humanity and War Crimes Act, nor Bill C-394¹⁷², which provided for a more general human rights exception to the Canadian SIA. Instead, the Canadian legislator decided to follow their American counterparts and take a listing approach to foreign immunity issues. The Justice for Victims of Terrorism Act adds an exception to § 6 Canadian SIA for States and other entities designated by the Canadian Government.¹⁷³ The reader is requested to consider chapter § 8 (II)(3c) for a closer appreciation of these legislative proposals.

c. United Kingdom

Only two years after the United States, the United Kingdom adopted a national statute regulating the jurisdictional immunity of a foreign State. The State Immunity Act of 1978¹⁷⁴ codifies the British transition from an absolute to a restrictive theory among other distinguishing between *acta de jure imperii* and *acta de jure gestionis*. As a contracting party to ECSI as well as a signatory State to UNCSI, the UK SIA essentially reflects both multilateral Immunity Conventions in its content and structure by mirroring the requirements in which a civil court may exercise jurisdiction over a foreign State.¹⁷⁵ The UK SIA has since been used as a model for the adoption of a number of national State immunity acts worldwide.

British jurisprudence in the application of SIA has further been one of the corner stones of international immunity law, especially as it relates to civil proceedings introduced by victims of torture against a foreign State. Arguably the most relevant

¹⁷⁰ Redress for Victims of International Crimes Act (RVICA), Act to amend the State Immunity Act, Bill C-483, introduced to the House of Commons of Canada, No. 402380.

¹⁷¹ Canadian Crimes Against Humanity and War Crimes Act (CAHWCA) of 2000, Canadian Bill S-35, 1st Session, 38th Parl., 53-54 Eliz.

¹⁷² Canadian Bill C-394 of 2005, 1st Session, 38th Parl., 53-54 Eliy. II, 2004-2005.

¹⁷³ See § 6.1 (1) and (2) SIA currently listed entities <https://www.publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/lstd-ntts/crrnt-lstd-ntts-en.aspx> [last accessed 26.6.2018].

¹⁷⁴ United Kingdom State Immunity Act (SIA) of 20.7.1978, Chapter 33 see commentaries YANG, State Immunity in International Law, p. 144 ff., FOX/WEBB, p. 167 ff., BRÖHMER, p. 84 ff.

¹⁷⁵ For a summary of the Immunity Convention see § 2 (I.2), p. 28 ff.

decision in this field originates from British courts. Mr. Sulaiman Al-Adsani, a British/Kuwaiti dual-national, who served as a pilot in the Kuwaiti military during the Gulf wars, came into the possession of a sex tape of a member of the Kuwaiti Emir family. After the tape had entered general circulation, Al-Adsani was held at gunpoint, abducted and imprisoned by security forces. During his unlawful detention, the applicant alleges to have been tortured on several occasions, including attempted drownings in a pool that contained corpses, beaten, and lit on fire, as a consequence of which 25% of his total body surface was left severely burnt. Once released, Al-Adsani brought civil proceeding both against individual defendants as well as against the Kuwaiti Government in British Courts. After a number of judgments rendered by the Court of Appeals, Al-Adsani was denied access to British courts as Kuwait was entitled to jurisdictional immunity.¹⁷⁶ On 21st November 2001, the Grand Chamber of the European Court of Human Rights supported this conclusion and held that the United Kingdom did not violate the applicant's right to a fair trial by not exercising jurisdiction over the case.¹⁷⁷

Simultaneously, other plaintiffs brought civil proceedings against a foreign State for allegations of torture. In *Jones v. Saudi Arabia*, a group of British businessmen, who were working in Riyadh in the early 2000s, were suspected to had been responsible for a bomb detonation in the Saudi capital. Claimants, all of which were British nationals at the time of alleged violations, were arrested and severely abused by Saudi police forces over a prolonged period of time. While the Court of Appeal had unanimously decided to assume jurisdiction over the matter and disregarded the immunity of Saudi Arabia¹⁷⁸, the House of Lords¹⁷⁹ as well as the ECtHR¹⁸⁰ denied the applicants request and reinstated the defending State's immunity over the alleged offences.

¹⁷⁶ *Al-Adsani v. Government of Kuwait et al. (No. 1)*, Judgment of the England Court of Appeal of 29.1.1994, published in 100 ILR 465, *Al-Adsani v. Government of Kuwait et al. (No. 2)*, Judgment of the England Court of Appeal of 29.3.1996 published in 107 ILR 536.

¹⁷⁷ *Al-Adsani v. the United Kingdom*, Judgment of the ECtHR [GC] of 21.11.2001, No. 35763/97.

¹⁷⁸ *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, Judgment of the England Court of Appeal of 28.10.2004, [2004] EWCA Civ 1394 published in 129 ILR 629.

¹⁷⁹ *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, Judgment of the UK House of Lords of 14.6.2006, [2006] UKHL 26.

Both the *Al-Adsani* and *Jones* ruling are essential for the present study for two reasons. First of all, in both proceedings arguments of the hierarchy of norms and the peremptory quality of the prohibition of torture were raised, issues that will be discussed in detail in § 6. Secondly, both rulings are in direct relation to the individual's right to a fair trial, especially on the matter of restriction on the right to access to court. § 7 will be dedicated to this problematic.

d. Others

Next to the already mentioned statutes, a small number of countries have adopted domestic legislation regulating the jurisdictional immunity of a foreign State. These include: Singapore¹⁸¹, South Africa¹⁸², Pakistan¹⁸³, Malaysia¹⁸⁴, Malawi¹⁸⁵, Australia¹⁸⁶, Israel¹⁸⁷, Argentina¹⁸⁸, and Japan¹⁸⁹. Most acts show structural similarities to the 1978 UK State Immunity Act or, to a lesser extent, to the 1976 FSIA of the United States and implement the restrictive theory of State immunity law.¹⁹⁰ As a comprehensive summary of each legislation and its corresponding jurisprudence would go beyond the

¹⁸⁰ *Jones v. the United Kingdom*, Judgment of the ECtHR of 14.1.2014, No. 34356/06 and 40528/06.

¹⁸¹ Singaporean State Immunity Act of 26.10.1979, Chapter 313, revised edition of 31.12.2014, reproduced in UN Doc. No. ST/LEG/SER.B.20, p. 28 ff.

¹⁸² The South African Foreign States Immunities Act 87 of 20.11.1981 reproduced in UN Doc. No. ST/LEG/SER.B.20, p. 34 ff.

¹⁸³ Pakistani State Immunity Ordinance VI of 11.3.1981 reproduced in UN Doc. No. ST/LEG/SER.B.20, p. 20 ff.

¹⁸⁴ Malaysian Immunities and Privileges Act of 1984.

¹⁸⁵ Malawi's Immunities and Privileges Act No. 16 of 1981.

¹⁸⁶ Foreign State Immunity Act of 1985 of the Commonwealth of Australia, Law No. 196/1985 (cited: Australian FSIA).

¹⁸⁷ Israeli Foreign State Immunity Law of 2008, Law No. 5769-2008 (cited: Israeli FSIL).

¹⁸⁸ Argentina's Statute on the Immunity of Foreign States before Argentine Tribunals, Law No. 24/488, Boletín Oficial of 28.6.1995.

¹⁸⁹ Act on the Civil Jurisdiction of Japan with respect to a Foreign State, Act No. 24 of 24.4.2009 (cited: Japanese ACJ).

¹⁹⁰ FOX/WEBB, p. 148 ff., LÖRZ, p. 21, BANKAS Ernest, *The State Immunity Controversy in International Law: Private Suits Against Sovereign State in Domestic Courts*, Berlin, 2005, p. 443 ff. and DICKINSON Andrew/LINDSAY Rae/LOONAM James, *State Immunity: Selected Materials and Commentary*, Oxford, 2004, para. 5.021 ff.

scope of this study¹⁹¹, only one Court judgment should briefly be mentioned here. The Australian Court of Appeal of New South Wales was requested by an Australian national of Chinese origin to assume jurisdiction over the Chinese Government over several accounts of illegal arrest, detention under inhuman conditions and physical and mental abuse.¹⁹² The plaintiff, an active Falun Gong practitioner, was denied access to Australian Courts as the Australian FSIA did not contain a provision which would have allowed the court to exercise civil jurisdiction over the matter. This case is relevant as the plaintiff then requested the UN Committee against Torture to deliver a communication on whether Australian Courts violated its obligations under the UN Convention against Torture, most notably its Art. 14. In *Z. v. Australia*, the UN Committee declared the communication inadmissible as Australian courts did not have the necessary legal leeway to exercise jurisdiction over the Chinese Government¹⁹³, an issue further analyzed in chapter § 8 (I).

2. Countries without State Immunity Legislation

a. Greece

Greek jurisprudence in the matter of jurisdictional immunity of a State has received international attention, especially as it relates to the struggle of victims of the so-called “Distomo Massacre” to receive reparations for the suffering endured. On 10th June 1944, during German occupation of Greece in World War II, German forces attacked mostly unarmed civilians, including women and children, in the town of Distomo leading to over 200 people being killed. Almost 50 years later, families of the victims introduced civil proceedings against the German State in the Livadia Court of

¹⁹¹ For more information see FOX/WEBB, p. 133 ff., HAFNER/KOHEN/BREAU, p. 167 ff., the 1988 ILC Questionnaire on State Practice regarding the Jurisdictional Immunity of States, Yearbook of the International Law Commission, Vol. II (Part One), 1988, UN Doc. No. A/CN.4/410/Add.1, or the Council of Europe Committee of Legal Advisers on Public International Law Report on State Immunity of 5.6.2001, CAHDI (2001) 5.

¹⁹² *Zhang v. Zemin*, Judgment of the Court of Appeal of New South Wales of 5.10.2010, NSWCA 255, published in 141 ILR 542.

¹⁹³ *Z v. Australia*, Communication of the Committee against Torture of 28.11.2014, Communication No. 511/2012, para. 6.3.

First Instance. By judgment of 25th September 1997, the Court disregarded Germany's claim to jurisdictional immunity and ordered Germany to pay compensation for the atrocities committed.¹⁹⁴ Germany's attempts to appeal the judgment at the *Areios Pagos*, the Hellenic Supreme Court, were unsuccessful and only led to a recognition of the victims' entitlement to reparation by the highest court in Greece.¹⁹⁵

Nevertheless, enforcing the judgment was not a simple task. Art. 923 of the Greek Code of Civil Procedure¹⁹⁶ required the consent of the Greek Minister of Justice for ordering measures of constraints against the property of a foreign State. The Minister, however, refused his approval as the bilateral relations between Germany and the Hellenic Republic were at stake. Greek claimants subsequently brought proceedings in Germany and requested German Courts to recognize and execute the judgments delivered by the Hellenic Supreme Court. The German *Bundesgerichtshof* (Federal Supreme Court) rejected their request and held that the *Areios Pagos* ruling could not be enforced in Germany as it had been delivered in violation of Germany's entitlement to State immunity.¹⁹⁷ Given that both German and Greek authorities refused to implement a lawfully rendered court judgment, Greek plaintiffs then called upon the European Court of Human Rights to recognize a breach of their fair trial guarantees as contained in Art. 6 of the European Convention of Human Rights. In *Kalogeropoulou v. Greece and Germany*, the ECtHR refused to enter into the merits of the claim and

¹⁹⁴ *Prefecture of Voiotia v. Germany*, Judgment of the Regional Court of Livadia of 25.9.1997, No. 137/1997, see for more detail on the Distomo cases PERRAKIS Stelios, De la réparation des victimes des violations du droit international humanitaires et l'affaire des "réparations de guerre allemandes" en Grèce: Essai de synthèse et quelques considérations, in: Fischer-Lescano et al. (eds.), *Peace in Liberty: Festschrift für Michael Bothe*, Baden-Baden/Zurich, 2008, p. 523 ff.

¹⁹⁵ *Prefecture of Voiotia v. Germany*, Greek Supreme Court Judgment of 4.5.2000, No. 11/2000 translated in 129 ILR 521.

¹⁹⁶ Art. 923 of Greek Code of Civil Procedure, Kodikas Politikis Dikonomias, entered into force 16.9.1968, Royal Decree 657/1971 FEK 216/1.

¹⁹⁷ *Greek citizens v. Germany*, Judgment of the German Federal Supreme Court of 26.6.2003, No. III YR 245/98, NJW, 2003, p. 3488 also published in 129 ILR 556, see PAECH p. 40 ff.

declared it inadmissible as international law has yet to recognize an exception to the jurisdictional immunity of a State for the commission of international crimes.¹⁹⁸

After the dismissal of the case by the ECtHR, a political solution was found in Greece to create a specialized court with the unique purpose of reassessing the legal situation in the matter. In a very narrow majority of six-to-five votes, the Greek Special Supreme Court decided to overturn the most significant aspects of the *Areios Pagos* ruling and give full effect to Germany's jurisdictional immunity in Greece.¹⁹⁹ Nevertheless, Greek authorities requested Germany to pay reparations to victims on a voluntary basis and commence negotiations over war reparation.²⁰⁰ In 2011, the Hellenic Republic was permitted to intervene as a non-party in the ICJ proceedings between Germany and Italy in the case concerning the jurisdictional immunity of States and submitted several written observations and statements in the matter^{201 202}.

b. Italy

The Italian practice and legislation are relevant as it gives the necessary factual context to understand the dispute between Germany and Italy before the ICJ.²⁰³ The sub-

¹⁹⁸ *Kalogeropoulou v. Greece and Germany*, Judgment of the ECtHR of 12.12.2002, No. 59021/00.

¹⁹⁹ *Margellos v. Germany*, Greek Special Supreme Court of 17.9.2002, No. 6/2002, 1 AED 11, translation in 129 ILR 525.

²⁰⁰ Greece calls on Germany to negotiate over war reparations, DW online article of 4.6.2019, available: <https://www.dw.com/en/greece-calls-on-germany-to-negotiate-over-war-reparations/a-49059996> [last accessed 13.6.2019].

²⁰¹ *Germany v. Italy (Greece intervening)*, Written Statement of the Hellenic Republic of 3.8.2011, available: <http://www.icj-cij.org/en/case/143/intervention> [last accessed 27.6.2018].

²⁰² *Germany v. Italy*, The ICJ grants Greece permission to intervene in the proceedings as a non-party, International Court of Justice Press Release No. 2011/21 of 15.7.2011. For a more detailed summary of the Greek development and their involvement in the ICJ proceeding see STEGER, p. 27 ff., PAECH, p. 40 ff., TOMUSCHAT Christian, *The International Law of State Immunity and Its Development in National Institutions*, Vanderbilt Journal of Transnational Law, Vol. 44/4, 2012, p. 1107 ff.

²⁰³ More information regarding the Italian practice: SCHAARSCHMIDT, p. 7 ff., ATTERITANO Andrea, *Immunity of States and their Organs: The Contribution of Italian Jurisprudence over the Past Ten Years*, Italian Yearbook of International Law, Vol. 19, 2009, SERRANÒ Giuseppe, *Immunità degli Stati stranieri e crimini internazionali nella recente giurisprudenza della Corte di Cassazione*, *Rivista di diritto internazionale privato e processuale*, 2009, p. 607 ff.

jects of the proceedings were several court decisions rendered by Italian courts against Germany for acts committed during World War II. In *Ferrini v. Germany*, an Italian soldier called Luigi Ferrini was forcefully abducted, denied prisoner of war status and enslaved to work for the German *Wehrmacht* in the armament industry during the war. While initially, the Court of First Instance²⁰⁴ as well as the Court of Appeal²⁰⁵ had rejected the reparations claim directed against the German State based on a lack of jurisdiction in the matter, the Italian *Corte di Cassazione*, the highest Court in Italy in that matter, allowed the claim to proceed as no jurisdictional immunity was due for the commission of international crimes.²⁰⁶ Having heard about this legal outcome, other Italian citizens, mostly men who had suffered the same fate as Luigi Ferrini, introduced mass claims against Germany in Italian courts, which did exercise jurisdiction and order reparation payments.²⁰⁷

A second group of cases involved the so-called “Civitella Massacre”. On 29th June 1944, as a retaliation for the murder of four German soldiers by the Italian resistance, 203 civilians were killed in the towns of Civitella, Cornia and San Pancrazio. Family members of the deceased brought criminal proceedings against Max Josef Milde, member of the German armed forces responsible for the atrocity. On 10th October 2006, the Military Court of La Spezia sentenced Mr. Milde *in absentia* and ordered civil reparations to be paid by the German State to the victims who had participated in the pro-

²⁰⁴ *Ferrini v. Germany*, Judgment of the Court of First Instance of Arezzo of 3.11.2000, No. 1403/98.

²⁰⁵ *Ferrini v. Germany*, Judgment of the Florence Court of Appeal of 16.11.2001, No. 41/02.

²⁰⁶ *Ferrini v. Germany*, Judgment of the Italian Court of Cassation of 11.3.2004, No. 5044/2044, *Rivista di diritto internazionale*, Vol. 87, 2004, p. 539, also published in 128 ILR 659.

²⁰⁷ *Germany v. Mantelli et al.*, Judgment of the Italian Court of Cassation of 29.5.2008, No. 14201-14212, published in Italian Yearbook of International Law, Vol. 17, 2009, p. 292, *Liberato Maietta v. Germany*, Judgment of the Tribunal of Sciacca of 28.4.2004, later reaffirmed by the Italian Court of Cassation in: *Germany v. Liberato Maietta*, Judgment of the Italian Court of Cassation of 29.5.2009, No. 14209.

ceeding as *partie civile*.²⁰⁸ Germany's appeal to the judgment was rejected on 18th December 2007 citing among others the Court of Cassation judgment in *Ferrini*.²⁰⁹

The last relevant cases involved measures of constraints ordered against the Villa Vigoni, a center for cultural encounters in German-Italian relations owned by the German State and located at the shores of Lake Como (Italy). At the request of Greek claimants, families of the victims of the previously mentioned Distomo Massacre, the Florence Court of Appeals declared the judgment rendered by the *Areios Pagos* "enforceable in Italy"²¹⁰ and ordered the Villa Vigoni to be auctioned off for the purpose of reimbursing Greek citizens for the debt owed by Germany.²¹¹ The Court of Cassation, once again, rejected Germany's appeal and supported the Florence Court in its conclusions.²¹²

On 3rd February 2012, the International Court of Justice held that Italy had breached both the jurisdictional immunity of Germany by assessing civil jurisdiction as well as its immunity from execution by ordering measures of constraints.²¹³ In early 2013, the Italian Parliament adopted a law that should implement the ICJ ruling and prevent future civil claims from being litigated in Italian courts.²¹⁴ By judgment of 22nd October 2014, the Italian Constitutional Court invalidated this law as it could no longer be accepted that State immunity continues to apply for the commission of international crimes because it would be contrary to the fundamental values of democracy and human rights guaranteed by the Italian Constitution.²¹⁵ Parliament's reaction to the judgment came three weeks later. A reversed law specifically adopted with the intent

²⁰⁸ *In re Max Milde*, Judgment of the Military Court of La Spezia of 10.10.2006, Judgment No. 49.

²⁰⁹ *In re Max Milde*, Judgment of the Military Court of Appeals in Rome of 18.12.2007, Judgment No. 49.

²¹⁰ *In re Villa Vigoni*, Judgment of the Florence Court of Appeal of 2.5.2005.

²¹¹ *In re Villa Vigoni*, Decision "*decreto*" of the Florence Court of Appeal of 6.2.2007.

²¹² *In re Villa Vigoni*, Judgment of the Italian Court of Cassation of 29.5.2008, No 14199.

²¹³ *Germany v. Italy*, para. 107, 120, and 133.

²¹⁴ See Art. 3 of the Italian Law No. 5/2013: "Adesione della Repubblica Italiana alla Convenzione Nazioni Unite sulla Immunità Giurisdizionale degli Stati Esteri" of 14.1.2013.

²¹⁵ Judgment No. 238/2014 of the Italian Constitutional Court of 22.10.2014.

to block the effective application of the Constitutional Court's decision forbids Italian courts to allow civil claims against another State in their chambers.²¹⁶ The urgency of the matter is proven by the fact that it was made applicable only one day after the adoption by Parliament on 11th November 2014.

c. Switzerland

Switzerland does not provide a specific national legal basis for the application and rejection of State immunity law. Similar to other civil law countries, immunity issues are often addressed as part of customary international law directly applicable in a court setting, in the code of civil procedure, or in regulations of private international law.²¹⁷ Due to a number of factors, however, Swiss courts have been confronted with foreign immunity issues on a higher-than-average scale. First of all, Switzerland, as a host country to numerable international organizations, such as the United Nation, the World Trade Organization, and the World Health Organization, assembles both non-governmental organizations and representatives from almost every country in the world, capable of serving as defendants in a national trial. Secondly, due to the Swiss banking system, many foreign States have significant assets available in Switzerland, which could be subject of enforcement measures introduced by victims of international violations. Thirdly, Switzerland has historically been at the forefront of combating torture and other international crimes on an international level. Switzerland, as part of its humanitarian tradition, had one of the first national justice systems to recognize the peremptory quality of the prohibition of torture, inhuman and degrading treatment²¹⁸, was a key figure in both the creation of the European Committee for the Prevention of Torture²¹⁹ and the adoption of the Optional Protocol to the UN

²¹⁶ See Art. 1 of the Italian Law No. 162/2014: "Misure urgenti di Degiurisdizionalizzazione ed altri Interventi per la Definizione dell'Arretrato in Materia di Processo Civile" of 10.11.2014.

²¹⁷ For more information on the Swiss legislation: WALTER Gerhard/DOMEJ Tanja, *Internationales Zivilprozessrecht der Schweiz*, 5th ed., Bern, 2012, KREN KOSTKIEWICZ Jolanta, *Staatenimmunität im Erkenntnis- und im Vollstreckungsverfahren nach schweizerischem Recht*, Bern, 1998.

²¹⁸ *Sener v. Ministère public de la Confédération et Département fédéral de la justice et police*, Judgment of the Swiss Federal Tribunal of 22.2.1983, ATF 109 Ib 64, p. 72.

²¹⁹ Option Protocol to the UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, based on UNGA Resolution 199 adopted in New York on 9.1.2003, UN Doc No. A/RES/53/199, See EVANS Malcolm/MORGAN Rod, *Torture: How to make*

Convention against Torture²²⁰, and serves as the host for the UN Committee against Torture, capable of receiving individual complaints in torture matters.

In this context it is not surprising that Swiss courts have participated in the international discussion over the relationship between jurisdictional immunities and the protection of rights owned to victims of torture. The most relevant case law in this matter involved an in-depth appreciation of Art. 3 of the Federal Act of International Private Law²²¹, implementing a so-called *forum necessitatis* provision.²²² The case concerned Abdennacer Naït-Liman, a Tunisian national who was alleged to have become victim of extraordinary rendition from Italy to Tunisia, where he was illegally detained and tortured at the order of the Tunisian Ministry of Interior. Supported by the non-governmental organization TRIAL, he brought both criminal and civil proceedings against a representative of the Tunisian Government as well as against the Tunisian Ministry of Interior in Switzerland, the country where he received political asylum. Swiss Courts, including the highest Court in the country (the Swiss Federal Court), rejected his claim for reparation as they did not see any obligation to assume jurisdiction over Tunisia, which enjoyed full jurisdictional immunity.²²³ In 2016, a narrow majority of 4-to-3 judges of the European Court of Human Rights agreed and held that the naturalization of the applicant as a Swiss citizen did not change the fact that the claim did not establish a sufficient link to Switzerland (*Binnenbeziehung*), necessary for the application of the *forum necessitatis* provision.²²⁴ The proceeding was later referred to the Grand Chamber at the request of the applicant and accepted

the International Convention Effective, Geneva International Commission of Jurists and Swiss Committee Against Torture, in: Evans Malcolm/Morgan Rod (eds.), *Protecting Prisoners, The Standards of the European Committee for the Prevention of Torture in Context*, Oxford, 1999, p. 3.

²²⁰ EVANS/MORGAN, p. 3 f.

²²¹ Swiss Federal Act of International Private Law (FAIPL) of 18.12.1987, SR 291.

²²² For a detailed legal analysis over the issue see § 8 (II.3), p. 277 ff.

²²³ *In re Naït-Liman*, Geneva Court of first Instance Judgment of 15.9.2006 unpublished, later confirmed by the Swiss Federal Court in BGer 4C.379/2006 on 22.5.2007.

²²⁴ *Naït-Liman v. Switzerland*, Judgment of the ECtHR of 21.6.2016, No. 51357/07 see also BRÖH-MER, p. 115 ff.

for deliberation in November 2016.²²⁵ On 15th March 2018, the Grand Chamber presented its final ruling over the case and found that Art. 14 of the UN Convention against Torture did not put Swiss courts under an obligation to assume jurisdiction over the Tunisian Government.²²⁶ The arguments brought forward in this discussion as well as a potential legal consequences of a universal civil jurisdiction will be subject of § 8 (I) and (II).

d. Others

Once again, the author does not attempt to give a comprehensive and detailed assessment over the practice of each country on the planet.²²⁷ A selection of national developments should, however, briefly be discussed. The People's Republic of China, as described above, continues to adhere to the absolute doctrine of State immunity exempting a foreign States from all national proceedings and is the only country that continues to do so.²²⁸ For a while, the Russian Federation had the same practice. After a failed attempt of adopting a national State Immunity Act in 2005, Russian courts still rely on the Russian Civil Procedure Code²²⁹ which only allows for the exercise of civil jurisdiction in case the defending State specifically agrees.²³⁰ Both the Russian Government as well as the Constitutional Court reject the absolute doctrine of State immunity and apply the restrictive theory on the basis of customary international law.²³¹ Lastly, the Supreme Court of the Republic of Ireland was challenged with a complex case involving the actions of a British soldier in the trans-frontier region between

²²⁵ Referral accepted by the Grand Chamber in *Naït-Liman v. Switzerland*, Press Release of the European Court of Human Rights ECHR 390 (2016) of 29.11.2016.

²²⁶ *Naït-Liman v. Switzerland*, Judgment of the ECtHR [GC] of 15.3.2018, No. 51357/07.

²²⁷ Interested readers are advised to consider: FOX/WEBB, p. 133 ff., HAFNER/KOHEN/BREAU, p. 167 ff., BANKAS, p. 443 ff., DICKINSON/LINDSAY/LOONAM, para. 5.021 ff., LORZ, p. 20 ff.

²²⁸ FOX/WEBB, p. 164, see also Letter of the Office of the Commissioner of the Ministry of Foreign Affairs of the People's Republic of China in Hong Kong to the Constitutional and Mainland Affairs Bureau of the Hong Kong Government, see *FG Hemisphere Associates LLC v. Democratic Republic of Congo*.

²²⁹ See Art. 401 of the Civil Procedure Code of the Russian Federation, No. 138-Fz of 14.11.2002.

²³⁰ LORZ, p. 21, FOX/WEBB, p. 161, LENGELSEN, p. 77 f.

²³¹ LORZ, p. 22, FOX/WEBB, p. 162, see also: *Oleynikov v. Russia*, Judgment of the ECtHR of 14.3.2013, No. 36703/04, para. 67.

Ireland and the United Kingdom. An Irish national requested Irish Courts to order reparations to be paid by the British Government for acts committed by a member of the British army on Irish territory. The Supreme Court, later reaffirmed by the Grand Chamber of the ECtHR²³², held that the so-called territorial tort exception to the jurisdictional immunity of a foreign State did not apply in the specific case at hand and that Ireland was therefore under no obligation to assume jurisdiction over the British Government.²³³ The application of the territorial tort exception in case of torture committed on the territory of the forum is discussed in § 5.

²³² *McElhinney v. Ireland*, Judgment of the ECtHR [GC] of 21.11.2001, No. 31253/96.

²³³ *McElhinney v. Williams*, Judgment of the Irish Supreme Court of 15.12.1995, 3 Irish Reports 382 also published in 104 ILR 691.

PART II: EXCEPTIONS TO STATE IMMUNITY

Part II will consider a selection of existing exceptions to the immunity of a State from the civil jurisdiction of another State. It should be discovered whether the commission of torture is, *de lege lata*, considered an act for which a State cannot claim immunity. § 3 will describe the international concept of an immunity waiver and discover whether States have waived their immunity claims in respect of torture, inhuman and degrading treatment. § 4 is dedicated to the restrictive practice of State immunity law which requires the forum State to distinguish between *acta de jure imperii* and *acta de jure gestionis*. It will be determined under which category an act of torture must be placed. Lastly, the so-called territorial tort exception will be subject of § 5. Is a State immune from the civil jurisdiction of a State on whose territory torture was committed?

From a methodological point of view, one additional remark should be made. Parts II and III will continue to apply the recognized methods of the legal profession, including an appreciation of the available texts, case law, and academic opinions. These parts will, nevertheless, be structured according to arguments discussed in relation to the complex relationship between the prohibition of torture and the jurisdictional immunity of a foreign State, most notably within the jurisprudence of national and international courts. This is not to mean that a decision of a particular court is more or less relevant in an international law context or that the authors attempts to make a comment on the (in)significance of a specific court. The author attempts to analyze the soundness of the arguments raised which will involve an assessment over the case law which appreciated the specific issue at hand, regardless of whether a national or international court has rendered the judgment.

§ 3 Waiver

During the period when absolute immunity was the legal rule, it was accepted that a foreign State was able to willingly subject itself to the jurisdiction of a foreign court.²³⁴ A State would waive its immunity allowing the forum the full appreciative power to render a judgment in a specific proceeding. In the *Jurisdictional Immunity* case before the ICJ, both Germany and Italy exchanged arguments on whether the violation of peremptory norms could potentially constitute an act of willful submission to the jurisdiction of the forum.²³⁵ Italy referred to the opinions of the Hellenic Supreme Court which, in a six-to-five majority, decided:

[T]he defendant State could not invoke its right of immunity, which it had tacitly waived since the acts for which it was being sued were carried out by its organs in contravention of the rules of jus cogens [...].²³⁶

The ICJ never fully assessed this line of reasoning and left the issue, as many others, undiscussed.²³⁷ The upcoming chapter should hence consider, whether the waiver argument has merit or should be rejected as a legally incoherent construct. In other words, does a violation against the prohibition of torture fall within the recognized immunity exception of a waiver?

After an introduction into the concept of an immunity waiver in international law, two potential forms of a waiver should be discussed as they relate to acts of official torture. First of all, is there a provision in international law by which States explicitly waived their claim to immunity for torture either through the ratification of a treaty or any other form of agreement? Only once no waiver provision can be identified, one

²³⁴ LORZ, p. 131, YANG, *State Immunity in International Law*, p. 317, KOLB/JARDIM OLIVEIRA, p. 250, SCHAARSCHMIDT, p. 28 f., STEGER, p. 103, BOSCH Julia, *Immunität und internationale Verbrechen*, 1st ed., Baden-Baden, 2004, p. 90 f., DELLAPENNA Joseph, *Suing foreign Governments and their Corporations*, 2nd ed., 2003, p. 438 f.

²³⁵ *Germany v. Italy*, Italian Counter-Memorial, para. 4.69, *Germany v. Italy*, German Reply, para. 59.

²³⁶ *Prefecture of Voiotia v. Germany*, Greek Supreme Court, following the Livadia Court's opinion in *Prefecture of Voiotia v. Germany*, Regional Court of Livadia.

²³⁷ *Germany v. Italy*, para. 108.

may open the discussion to implied waivers. Would a State which, with the illegality of its actions in mind, tortures an individual implicitly waive its claim to jurisdictional immunity? The chapter will present the most relevant legal doctrine and jurisprudence in that matter and will be concluded with a summary of the findings.

I. The Concept of an Immunity Waiver in International Law

Waivers, sometimes referred to as voluntary submissions, are an expression of a State's consent to subject itself to the national jurisdiction of another State. It constitutes a conscious act by which a State renounces its immunity it would have otherwise enjoyed.²³⁸ Waivers therefore enable a foreign court to exercise its adjudicatory power and render a judgement binding on a foreign entity on all subject related to a dispute.²³⁹

As indicated, a State may both explicitly or implicitly agree to the exercise of jurisdiction. According to Art. 7 (1) UNCSI or Art. 2 ECSI, a State may do so explicitly through the ratification of an international agreement, the signing of a contract with an individual, or by a written or oral unilateral declaration before the court in question. Further, a State may implicitly accept jurisdiction and no longer be able to invoke its immunity if it itself has introduced the proceedings, it has intervened in the merits of the proceedings, or otherwise participated without raising the immunity issue.²⁴⁰ Other acts that may be accepted as a waiver must show "a clear, complete, unambiguous, and unmistakable manifestation of the sovereign's intent to waive its immunity"²⁴¹.²⁴² The ILC specifies that in absence of a clear indication a State is presumed to

²³⁸ FOX/WEBB, p. 377, YANG, *State Immunity in International Law*, p. 316, O'KEEFE Roger, Commentary to Art. 7 UNCSI, in: O'Keefe Roger/Tams Christian/Tzanakopoulos Antonios (eds.), *The United Nations Convention on Jurisdictional Immunities of States and their Property*, Oxford, 2013, p. 116.

²³⁹ YANG, *State Immunity in International Law*, p. 316, LORZ, p. 135, DAMIAN, p. 34 f., FORCESE, p. 147, ESSER Rainer, *Klagen gegen ausländische Staaten*, Frankfurt a.M., 1990, p. 24.

²⁴⁰ See Art. 8 (1) UNCSI, Art. 3 (1) ECSI, LORZ, p. 148.

²⁴¹ *Libra Bank v. Banco nacional de Costa Rica*, Judgment of the 2nd Circuit U.S. Court of Appeals of 12.4.1982, 676 F.2d 47, p. 49 f., see also YANG, *State Immunity in International Law*, p. 323.

have maintained its claim to immunity as the existence of a State's consent should not be "taken for granted"²⁴³. In other words, the burden of proving that a State has renounced its jurisdictional privilege in a specific court case lies exclusively on the plaintiff as there is "no room for implying the consent of an unwilling State which has not expressed its consent in a clear [...] manner."²⁴⁴ So far, it does not constitute a waiver of immunity if a representative of the State simply appears in court²⁴⁵ or if it accepts the judicial documents of the complaint²⁴⁶. It was, on the other hand, decided that a State had effectively waived its immunity when it accepted a jurisdictional clause in a commercial contract²⁴⁷, presented counter-claims against the plaintiff²⁴⁸, or agreed to it being governed by the law of the forum State²⁴⁹. By doing so, a State apprised its will that disputes in relation to the contract should be litigated by the courts of the forum State, showing sufficient intent to submission.²⁵⁰

As mentioned, a State may also renounce its immunity if it participates in the proceeding.²⁵¹ While not every action or omission can be seen as participation²⁵², the

²⁴² YANG, *State Immunity in International Law*, p. 319, LORZ, p. 137, ORAKHELASHVILI Alexander, *The Interpretation of Acts and Rules in Public International Law*, Oxford, 2008, p. 484, MALINA Manfred, *Die völkerrechtliche Immunität ausländischer Staaten im zivilrechtlichen Erkenntnisverfahren*, Marburg, 1978, p. 58 f.

²⁴³ ILC Draft Articles on Jurisdictional Immunities of States, p. 27, see also O'KEEFE, *Commentary to Art. 7 UNCSI*, p. 115.

²⁴⁴ ILC Draft Articles on Jurisdictional Immunities of States and Their Property, p. 27, see also O'KEEFE, *Commentary to Art. 7 UNCSI*, p. 116 and 129.

²⁴⁵ See Art. 8 (3) UNCSI, Art. 3 (2) ECSI, see also FOX/WEBB, p. 386, O'KEEFE, *Commentary to Art. 7 UNCSI*, p. 125.

²⁴⁶ *Church of Scientology v. the United Kingdom*, Judgment of the German Federal Court of 26.9.1978, NJW 1979, p. 1101, LORZ, p. 145, GEIMER, para. 629.

²⁴⁷ LORZ, p. 138 f., FOX/WEBB, p. 389.

²⁴⁸ Art. 9 UNCSI.

²⁴⁹ *Berdakin v. Consulado de la Republica de El Salvador*, Judgment of the U.S. District Court for the Central District of California of 15.12.1995, 912 F.Supp. 458, p. 461, *Marlowe v. Argentina*, Judgment of the U.S. District Court for Columbia of 14.3.1985, 604 F. Supp. 703, p. 708 f., YANG, *State Immunity in International Law*, p. 328, O'KEEFE, *Commentary to Art. 7 UNCSI*, p. 121.

²⁵⁰ *Joseph v. Consulate General of Nigeria*, Judgment of the 9th US Circuit Court of Appeals of 19.10.1987, 830 F.2d 1018, also published in 101 ILR 485.

²⁵¹ YANG, *State Immunity in International Law*, p. 329.

State's conscious intent to submission must clearly be recognizable.²⁵³ In *Siderman de Blake v. Argentina*, Joseph and Susana Siderman brought a damage claim against the former Argentine Military Junta which was responsible for the unlawful imprisonment and torture of the plaintiffs as well as severe threat against their family members. During the proceeding, Argentina filed a letter rogatory requesting the Los Angeles Superior Court's assistance in the criminal prosecution for fraud allegations against Mr. Siderman in Argentina. According to the Court this letter of request constituted a waiver of immunity as:

Argentina apparently not only envisioned United States court participation in its persecution of the Sidermans, but by its actions deliberately implicated our courts in that persecution. [...] If Argentina engaged our courts in the very course of activity for which the Sidermans seek redress, it has waived its immunity as to the redress.²⁵⁴

Interestingly, there has so far been only one occasion where the overall conduct of a State, regardless of whether it was involved in a concrete dispute with an individual at the time, was interpreted as a general waiver of immunity for an entire area of the law. At a time when the *de jure gestionis* exception was not yet considered a *de lege lata* exception to the jurisdictional immunity of a State, courts relied on the implied waiver argument to exercise jurisdiction over commercial disputes.²⁵⁵ The doctrine of implied waiver in case of commercial activity was endorsed by U.S. Chief Justice MARSHALL as far back as 1824:

²⁵² See Art. 4 ECSI and Art. 8 (2) and (3) UNCIS mentioning scenarios where participation is not understood as a waiver, notably appearing in Court as a witness.

²⁵³ YANG, *State Immunity in International Law*, p. 333, LORZ, p. 137, MALINA, p. 58, APPELBAUM, p. 74, HABSCHEID Walther, *Die Immunität ausländischer Staaten im Völkerrecht und deutschem Zivilprozessrecht*, in: Schauman Wilfried/Habscheid Walther (eds.), *Berichte der Deutschen Gesellschaft für Völkerrecht*, Vol. 8, 1968, p. 219.

²⁵⁴ *Siderman de Blake v. Argentina*, Judgment of the 9th U.S. Circuit Appeals Court of 22.5.1992, 965 F.2d 699, p. 722 also published in 103 ILR 454.

²⁵⁵ FOX/WEBB, p. 35 with reference to French jurisprudence most notably, *Spain v. Société Anonyme de l'Hotel George*, Judgment of the French Court of Cassation of 17.1.1973, also published in 65 ILR 61.

It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transaction of that company, of its sovereign character, and takes that of a private citizen [...] [Such action] strips [the State] of its sovereign character [...] and waives all the privileges of that character.²⁵⁶

States active in commercial activities were seen to have implicitly waived their immunity regarding their business transactions, also due to the inherently private nature of the matter.²⁵⁷ It was not necessary to actively or passively participate in a court proceeding, not even to explicitly agree to the lifting of the jurisdictional bar. While State consent must not easily be accepted, at least one historical example shows the flexibility of the implied waiver mechanism.

Further, a waiver must have been expressed by an organ of the State or an individual having the authority to do so.²⁵⁸ Neither UNCSI nor its draft commentaries explain who is considered to have the necessary legal ability to waive. It is, nevertheless, clear that only a representative of the State may do so following the delegation procedure as regulated by domestic law.²⁵⁹ As a general rule, Art. 7 of the Vienna Convention on the Law of Treaties²⁶⁰ prescribes that any Head of State, Head of Government, the Minister of Foreign Affairs (lit. a), any Head of a diplomatic mission (lit. b) or any representative with the proper accreditation will be able to consent to the jurisdiction of a foreign court on the State's behalf.²⁶¹ In practice a wider range of individuals have been accepted as valid representatives of a foreign State. Generally, any organ of a

²⁵⁶ *Bank of the United States v. Planters' Bank of Georgia*, Judgment of the U.S. Supreme Court of 11.3.1824, 22 U.S. 9 Wheat 904 6 L.Ed. 244, para. 907 f.

²⁵⁷ SORNARAJAH, p. 668.

²⁵⁸ FOX/WEBB, p. 381, LORZ, p. 133, MALINA, p. 64, YANG, *State Immunity in International Law*, p. 317 f.

²⁵⁹ FOX/WEBB, p. 381, DAMIAN, p. 36 f.

²⁶⁰ Vienna Convention on the Law of Treaties (VCLT), signed in Vienna on 23.5.1969, 1155 UNTS 331.

²⁶¹ FOX/WEBB, p. 382, LORZ, p. 133 see also ILC Guiding Principles applicable to Unilateral Declarations of States capable of Creating Legal Obligations, Yearbook of the International Law Commission, Vol. II (Part Two), 2006, UN Doc. No. A/61/10.

State, including a subdivision or department, will be legally considered able to consent to jurisdiction in the range of activities it is entrusted to perform.²⁶² Additionally, the Explanatory Reports to Art. 2 ECSI considered that “any person or body empowered to conclude written contracts in the name of the State is also deemed to have the authority to submit that State to the jurisdiction of a foreign court.”²⁶³ This would potentially enlarge the circle of authorized people to include both hired lawyers and other solicitors with the power to contract for the State.²⁶⁴ Nevertheless, the forum State may only accept this plea if the person expressing the waiver does not obviously exceed its authority or acts in a clear and evident violation of the defending State’s delegation system.²⁶⁵ If no incriminatory circumstances exist, a court may accept the willful submission and continue with the analysis over the merits of the case.

Generally speaking, a State may waive its claim to immunity at any point before or during the proceedings.²⁶⁶ Once consent is given, however, it may not easily be revoked. If the waiver clause is contained in an international treaty or agreement, the recognized rules of treaty law as codified by the VCLT apply.²⁶⁷ If the waiver is based on a contract with the individual, then the issue must be resolved according to the national legislation governing the contract.²⁶⁸ In case a consent has been given through unilateral declaration, these actions are generally considered irrevocable, as it has significantly influenced the process and recognized the *locus standi* of the individual involved in the proceeding.²⁶⁹ Only when the State itself has introduced the

²⁶² DAMIAN, p. 36 f.

²⁶³ Explanatory Reports to ECSI, para. 22.

²⁶⁴ *Aquamar v. Del Monte*, Judgment of the 11th U.S. Appeals Circuit Court of 30.6.1999, 179 F.3d 1279, *Ahmed v. Government of the Kingdom of Saudi Arabia*, Judgment of the English Court of Appeals Civil Division, ICR 25, ALL ER 248 as published in 104 ILR 629, see also FOX/WEBB, p. 382, O’KEEFE, Commentary to Art. 7 UNCSI, p. 121.

²⁶⁵ Art. 46 and Art. 47 VCLT, see LORZ, p. 134.

²⁶⁶ FOX/WEBB, p. 379, LORZ, p. 132, APPELBAUM, p. 75, GEIMER, para. 629.

²⁶⁷ See LORZ, p. 149 f., DAMIAN, p. 37, O’KEEFE, Commentary to Art. 7 UNCSI, p. 122.

²⁶⁸ LORZ, p. 150, DAMIAN, p. 38, O’KEEFE, Commentary to Art. 7 UNCSI, p. 122.

²⁶⁹ FOX/WEBB, p. 381, O’KEEFE, Commentary to Art. 7 UNCSI, p. 122, LORZ, p. 151 with references to the jurisprudence of the Federal Court of Germany in this matter.

suit and no counter claims have been granted, it is free to withdraw its complaint.²⁷⁰ In case a State has waived its immunity through participation or implicit acts, jurisdictional immunities may only resurface, once the State shows that it did only acquire the knowledge of facts on which immunity might be based after proceedings were introduced and only so if it has forwarded such a right at the earliest possible instance.²⁷¹

II. A Treaty-based Waiver

As discussed in a previous chapter²⁷², it is not uncommon for international agreements or treaties to contain a provision regarding the jurisdictional immunity of a contracting party in case a dispute with an individual should emerge. Treaties of amities, commerce and economic relations typically encompass dispute resolution clauses by which signatory States reciprocally waive their jurisdictional privilege in favor of their respective citizens, residents or businesses.²⁷³ In addition, almost all of the approximately 3500 bilateral and multilateral investment treaties concluded so far provide for Investor-State-Dispute-Resolution (ISDS).²⁷⁴ Investors are able to rely on these provisions to bring a reparations claim against a foreign State through international arbitration.

The prohibition of torture, inhuman and degrading treatment or punishment can be found in numerous legal documents of the international legal order. Next to most regional human rights treaties²⁷⁵, it is also contained in Art. 5 of the 1948 Universal

²⁷⁰ LORZ, p. 151, DAMIAN, p. 40 ff.

²⁷¹ Art. 3 (1) ECSI or Art. 8 (1) UNCSI, see also LORZ, p. 152, DAMIAN, p. 56, O'KEEFE, Commentary to Art. 7 UNCSI, p. 125.

²⁷² See § 2 (I.2.c), p. 39 ff.

²⁷³ YANG, State Immunity in International Law, p. 318, LORZ, p. 132.

²⁷⁴ Database of the United Nations Conference on Trade and Development: <http://investmentpolicyhub.unctad.org/IIA> [last accessed 12.12.2017].

²⁷⁵ Art. 7 ICCPR, Art. 3 ECHR, Art. 5 IACHR, Art. 5 ACHR.

Declaration of Human Rights and the 1975 Torture Declaration²⁷⁶ adopted by the UN General Assembly which eventually lead to the elaboration and adoption of the UN Convention against Torture. So far, not one provision has been adopted which provides for an express waiver of jurisdictional immunity in case torture was committed. No references were made in relation to a potential waiver clause during the drafting process of any of these documents.²⁷⁷ States consequently never explicitly renounced their jurisdictional immunity in case torture was committed. One international provision must, however, be mentioned in this regard. Art. 27 (1) of the Rome Statute of the ICC holds that “immunities [...] which may attach to the official capacity of a person [...] shall not bar the Court from exercising its jurisdiction over such a person.” While torture, in certain circumstances, might constitute an international crime and fall under the material scope of the Statute²⁷⁸, the waiver clause contained in this provision is in sole relation to the personal immunity of representatives of the State from criminal proceedings. It does not involve the civil liability of States in respect of other contracting parties or the ICC and is consequently irrelevant to the topic at hand.²⁷⁹

Nevertheless, certain scholars argue differently essentially putting forward that with the ratification of the UN Convention against Torture, States agreed to lift their immunity in case torture was committed.²⁸⁰ At this point, it is important to understand

²⁷⁶ Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by UNGA Resolution 3452 (XXX) of 9.12.1975, UN Doc. No. A/RES/30/3452 (cited: UN Torture Declaration).

²⁷⁷ *R. v. Bow Street Metropolitan Stipendiary Magistrate*, Judgment of the UK House of Lords of 25.11.1998, [1998] UKHL 41, 3 W.L.R. 1456 (H.L. 1998), also published in 119 ILR 27 referred to as *Ex parte Pinochet (No. 1)*, Lord GOFF OF CHIEVELEY, CREMER Wolfram, Entschädigungsklagen wegen schwerer Menschenrechtsverletzungen und Staatenimmunität vor nationaler Zivilgerichtsbarkeit, Archiv des Völkerrechts, Vol. 41/2, 2003, p. 165.

²⁷⁸ See § 1 (1.2), p. 9 ff.

²⁷⁹ APPELBAUM, p. 77.

²⁸⁰ Sympathetic to this argument, BIANCHI Andrea, Denying State Immunity to Violators of Human Rights, Austrian Journal of Public International Law, Vol. 46, 1994, p. 213 f., LILICH Richard/NEWMAN Frank, International Human Rights: Problems of Law and Policy, The Foreign Sovereign Immunities Act and International Human Rights Agreement: How They Co-Exist, University of San Francisco Law Review, Vol. 71, 1982, PAUST Jordan, Draft Brief Concerning Claims to Foreign Sovereign Immunity and Human Rights: Nonimmunity for Violations of International Law Under the FSIA, Houston Journal of International Law, Vol. 8, 1985, p. 66.

that one of the main objectives of CAT was to “promote universal respect for, and observance of, human rights and fundamental freedoms, [...] desiring to make more effective the struggle against torture [...]”.²⁸¹ For that purpose it provides for universal criminal jurisdiction in its Art. 5 and unmistakably recognizes the individual right to civil remedy and redress in its Art. 14.²⁸² These provisions are most often cited as an indication that contracting parties have waived their jurisdictional immunity in case torture occurs. Most relevant jurisprudence in this regard is the UK House of Lords ruling *Ex parte Pinochet (No. 3)*. In his deliberation, Lord Justice BROWNE-WILKINSON, later joint by Lord Justice NEWDIGATE, MILLET and PHILLIPS²⁸³, considered:

Under the Convention the international crime of torture can only be committed by an official or someone in an official capacity. They would all be entitled to immunity. [...] Therefore, the whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive and one of the main objectives of the Torture convention – to provide a system under which there is no safe haven for torturers – will have been frustrated. [...] *Chile had agreed to outlaw such conduct and Chile had agreed with the other parties to the Torture Convention that all signatory States should have jurisdiction to try official torture [...] even if such torture were committed in Chile.*²⁸⁴ [emphasis added]

While Lord Justice BROWNE-WILKINSON essentially reflects upon the immunity of a former Head of State from criminal prosecution, Lord HUTTON later reaffirmed this

²⁸¹ Excerpts of the Preamble of the UN Convention against Torture.

²⁸² Detail analysis over these provision in § 8 (I.2), p. 294 ff.

²⁸³ *R v. Bow Street Metropolitan Stipendiary Magistrate et al.*, Judgment of the UK House of Lords of 24.3.1999, [2000] 1 AC 147 also published in 119 ILR 135, referred to as *Ex parte Pinochet (No. 3)*, Lord MILLET, SAVILLE OF NEWDIGATE, PHILLIPS and to a lesser extent Lord HUTTON arguing that the ratification of CAT has led to a waiver of immunity, see also YANG, State Immunity in International Law, p. 429, FORCESE, p. 147, SHEN Quinmin, Lingering Issues of Foreign Official Immunity in Enforcing Prohibition against Torture in Domestic Courts: Pinochet’s Reasoning Reassessed, Chinese Journal of International Law, Vol. 16, 2017, p. 327 f.

²⁸⁴ *Ex parte Pinochet (No. 3)*, Lord BROWNE-WILKINSON.

reasoning being applicable for the immunity of Chile from civil proceedings as well. In his opinion, Chile lost its immunity from jurisdiction regarding torture allegations once the Torture Convention entered into force for Chile on the 30th September 1988.²⁸⁵

A majority of the legal doctrine, however, disagrees. In the first *Von Dardel* case (*Von Dardel I*) involving the unlawful imprisonment and the eventual death of a Swedish diplomat at the hands of Soviet spies, the Court considered it sufficient that the USSR, as the defending State, had ratified Art. 7 of the New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons²⁸⁶. This provision provides for universal criminal jurisdiction over the alleged crime which can be interpreted as a sign of voluntary submission to a court of a foreign State.²⁸⁷ This line of argumentation was highly relativized by the *Frolova* and *Von Dardel II* judgments and eventually overturned by the Supreme Court in *Argentina v. Amerada Hess*.²⁸⁸ There, the Courts emphasized that the subject matters of the cited Conventions were inherently criminal in nature and did not confer any civil rights to individuals. At the time of ratification, the Soviet Union could not know, in what forum claims would be introduced, severely undermining the concept of a clear, complete and unmistakable expression of a State's consent to a specific proceeding.²⁸⁹ This conclusion convinces. At least in relation to an express treaty-based waiver, the simple fact that CAT provides for universal criminal jurisdiction for torture cannot be con-

²⁸⁵ *Ex parte Pinochet (No. 3)*, Lord HUTTON.

²⁸⁶ Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents of 14.12.1973, based on UNGA Resolution 3166 (XVIII), 1035 UNTS 167.

²⁸⁷ *Von Dardel v. Union of Soviet Socialist Republics (Von Dardel I)*, Judgment of the U.S. District Court for the District of Columbia of 15.10.1985, 623 F. Supp. 246.

²⁸⁸ *Von Dardel v. Union of Soviet Socialist Republics (Von Dardel II)*, Judgment of the U.S. District Court for the District of Columbia of 6.3.1990, 736 F.Supp.1 (1990), para. 256, see also BIANCHI, Denying State immunity to Violators of Human Rights, p. 213, *Frolova v. Union of Soviet Socialist Republics*, Judgment of the 7th Circuit U.S. Court of Appeals of 10.4.1985, 761 F.2d 370, para. 31 ff., *Argentina v. Amerada Hess*, Judgment of the U.S. Supreme Court of 23.1.1989, 488 U.S. 428, para. 691 f.

²⁸⁹ *Frolova v. Union of Soviet Socialist Republics*, para. 33.

strued so as to mean an act of voluntary submission in civil proceeding against a State. By ratifying CAT, and the universality provision in it, States have accepted the duty to investigate torture offences regardless of the location where torture occurred and prosecute perpetrators if they are not extradited to a competent authority.²⁹⁰ It would be excessive to deduct an intention to submit itself to the civil jurisdiction of a foreign State from this provision alone. Given the *in dubio pro immunitate* principle as imposed by the ILC and Art. 5 UNCIS, it is difficult to justify a waiver through the ratification of a treaty which contains no mention of the immunity of the contracting parties.²⁹¹

Further, even if an international treaty contains a provision of civil redress, such as Art. 14 CAT, no explicit immunity waiver can be concluded either. The Philippine Government effectively waived the personal immunity to suit of the former Dictator Ferdinand Marcos from all human rights litigations in U.S. courts. It was argued that the Philippines were legally obliged to do so in order to fulfill its obligation under CAT.²⁹² Contrary to what was held in *Ex parte Pinochet*, the 9th Circuit U.S. Court of Appeals correctly stated that the Philippine Government had the duty to facilitate the redress of victims of the Marcos Regime in accordance with Art. 14 CAT, this obligation does, however, not contain the duty to waive immunity as CAT does not state anything about the location where reparation claims had to be introduced.²⁹³ Art. 14 CAT entails the duty to establish a procedure by which victims of torture can introduce reparations claims. While it is understandable that a State acts inherently con-

²⁹⁰ PEDRETTI, p. 397, SHEN, p. 328.

²⁹¹ *Argentina v. Amerada Hess*, para. 691 f., affirmed by *DeNegri v. Chile*, Judgment of the U.S. District Court of the District of Columbia of 6.4.1992, WL 91914, followed by YANG, State Immunity in International Law, p. 219, CREMER, p. 165, FOX/WEBB, p. 383, *Ex parte Pinochet* (No. 1), Lord GOFF OF CHIEVELEY, VAN ALEBEEK, Immunity of States, p. 362, APPELBAUM, p. 78, GARNETT Richard, The Defence of State Immunity for Acts of Torture, Australian Yearbook of International Law, Vol. 18/3, 1997, p. 107, CAPLAN, p. 765, GIEGERICH Thomas, Do Damages Claims Arising from Jus Cogens Violations Override State Immunity from the Jurisdiction of Foreign Courts?, in: Tomuschat Christian/Thouvenin Jean-Marc (eds.), The Fundamental Rules of the International Legal Order, Leiden/Boston, 2006, p. 220.

²⁹² See GARNETT, The Defence of State Immunity for Acts of Torture, p. 107, SHEN, p. 328.

²⁹³ *Hilao v. Marcos* (No. 2), Judgment of the 9th Circuit U.S. Court of Appeals of 17.12.1996, 94 F.3d 539, para. 548.

tradictory if it, on one hand, assumes the legal obligation to provide remedy and at the same time is capable of evading this responsibility through jurisdictional immunity, it cannot be concluded that by simply recognizing the individual's entitlement to remedy the State simultaneously renounces its immunity privilege.²⁹⁴ The obligations contained in CAT are subject of an in depth analysis in another chapter²⁹⁵ and involve the forum's obligation to provide a reparation mechanism for victims of torture and a potential conflict of norms with the jurisdictional immunity of the defending State. At least in relation to the waiver argument, it is not sufficient to establish an immunity exception for torture for the simple fact that a State is party to a convention which provides for an individual right to remedy.²⁹⁶

In conclusion, no provision can be identified in the international legal order by which States have waived their jurisdictional immunity in relation to acts of torture. Neither the fact that the UN Convention against Torture provides for universal jurisdiction, nor that it contains a provision recognizing an individual right to remedy and redress may be construed so as to mean an immunity waiver of the signatory States.

III. Commission of Torture as an Implied Waiver

More frequently discussed in this matter is the question whether by committing torture, a recognized *jus cogens* violation²⁹⁷, a State implicitly waives its right to claim immunity from jurisdiction. This was most famously argued by BELSKY/MERVA/ROTH-ARRIAZA in their analysis over the U.S. Foreign State Immunity Act. According to these authors, a *jus cogens* violations must fit one of the recognized exceptions to foreign immunity, as the legislator must have intended a coherent legal system free of contra-

²⁹⁴ *Smith v. Socialist People's Libyan Arab Jamahiriya*, Judgment of the U.S. District Court for New York of 17.5.1995, 886 F.Supp 306, para. 243, KNUCHEL, p. 168, BOSCH, p. 95, STEGER, p. 105, LENGELSEN, p. 54 f.

²⁹⁵ See § 8 (I.2), p. 294 ff.

²⁹⁶ CREMER, p. 165, VIVEKANANTHAN Niranjini, The Doctrine of State Immunity and Human Rights Violation of Foreign States, Sri Lanka Journal of International Law, Vol. 8, 1996, p. 140 f.

²⁹⁷ Whether the prohibition of torture has peremptory character see § 6 (I), p. 140 ff.

dictions.²⁹⁸ The international community identified a group of peremptory norms as constituting the absolute limit of sovereign actions.²⁹⁹ If a State consequently breaches its obligations in this regard, it must have recognized the illegality and at least accepted that it may no longer claim immunity for it.³⁰⁰

Many legal scholars and judges have since relied on this opinion to resolve immunity issues. In *Hugo Princz v. Germany*, an American national of Jewish origin brought civil proceedings against the German State in U.S. courts. The plaintiff had survived severe pain and suffering at the hands of Nazi Germany during World War II, as he was intentionally starved, witnessed the death of family members, was forced on a death march and was sent to two different labor camps before he was eventually liberated by U.S. forces. The majority of judges upheld Germany's claim to immunity, as no provision could be found that would allow for the exercise of jurisdiction over the claim.³⁰¹ Citing the *DeNegri* ruling where recognized victims of torture had previously unsuccessfully attempted to bring a civil claim against the perpetrating State in the U.S. forum³⁰², the Court stated that if Congress had intended to strip a foreign country from its immunity in such circumstances, it would have made peremptory violations a clear exception within the U.S. FSIA.³⁰³ In her dissenting opinion to the case, Judge WALD rejected the majority's opinion subsuming *jus cogens* violations under the implied waiver provision of the U.S. FSIA:

²⁹⁸ BELSKY Adam/MERVA Mark/ROHT-ARRIAZA Naomi, Implied Waiver Under the FSIA: A proposed Exception to Immunity for Violations of Peremptory Norms of International Law, *California Law Review*, Vol. 77 (2), 1989, p. 374 and 394.

²⁹⁹ Whether acts of torture can be identified as a sovereign act see § 4 (II), p. 85 ff.

³⁰⁰ BELSKY/MERVA/ROHT-ARRIAZA, p. 381 and 385 ff., see also CAPLAN, p. 766, PEPPER, p. 369, AKANDE Dabo/SHAH SANGEETA, Immunities of State Officials, *International Crimes and Foreign Domestic Courts*, *European Journal of International Law*, Vol. 21/4, 2011, p. 829, LIEBERMAN Philippe, Expropriation, Torture, and Jus Cogens under the Foreign Sovereign Immunities Act: *Siderman De Blake v. Republic of Argentina* in: *The University of Miami Inter-American Law Review*, Vol. 24/3, 1993, p. 535.

³⁰¹ See *Hugo Princz v. Germany*, District Court of Appeals.

³⁰² *DeNegri v. Chile*, para. 3, see JOHNSON, p. 282.

³⁰³ *Hugo Princz v. Germany*, District Court of Appeals, p. 1170.

When the Nazis tore off Princz's clothes, exchanged them for a prison uniform and a tattoo, shoved him behind the spiked barbed wire fences of Auschwitz and Dachau, and sold him to the German armament industry as fodder for their wartime labor operation, Germany rescinded any claim under international law immunity from this court.³⁰⁴

Due to Germany's acts and their constant refusal to integrate the plaintiff in any reparation scheme, WALD concluded it had implicitly waived its right to immunity from jurisdiction allowing the court to enter into the merits of the case.³⁰⁵

In more recent judgments, both Italian and Greek courts agreed and similarly relied on the implied waiver argument to assume jurisdiction over the German State in civil matters. As Germany acted in clear violation of international provisions, it could not be expected to be able to claim immunity for it and hence waived its privilege to reparation claims.³⁰⁶ While the Greek jurisprudence failed to effectively be enforced against Germany in the European Court of Human Rights³⁰⁷ and was eventually overturned³⁰⁸, Italy was found liable for violating the jurisdictional immunity of Germany by the ICJ and ordered to cease this practice³⁰⁹.

³⁰⁴ *Hugo Princz v. Germany*, Distric Court of Appeals, Dissenting opinion of Judge WALD, p. 1182.

³⁰⁵ *Ibid.*, supported by VIVEKANANTHAN, p. 147, JOHNSON, p. 286, LIEBERMAN, p. 535, PEPPER, p. 369, CANDRIAN Jérôme, *L'immunité des Etats face aux droits de l'homme et à la protection des biens culturels*, Zurich, 2005, p. 721, KARAGIANNAKIS Magdalini, *State Immunity and Fundamental Human Rights*, Leiden Journal of International Law, Vol. 11, 1998, p. 20, BERGEN Joseph, *Princz v. The Federal Republic of Germany: Why the Court should find that violating Jus Cogens Norms Constitutes an implied Waiver of Sovereign Immunity*, Connecticut Journal of International Law, Vol. 14, 1999, p. 169.

³⁰⁶ *Prefecture of Voiotia v. Germany*, Greek Supreme Court, reaffirming the Livadia Court's opinion in *Prefecture of Voiotia v. Germany*, Regional Court of Livadia, *Ferrini v. Germany*, Florence Court of Appeal, *Germany v. Mantelli*, Italian Court of Cassation, see summary of Greek and Italian jurisprudence in § 2 (II.2), p. 41 ff.

³⁰⁷ See *Kalogeropoulou v. Greece and Germany*, Judgment of the ECtHR of 12.12.2002, No. 59021/00.

³⁰⁸ *Margellos v. Germany*, p. 199 ff.

³⁰⁹ *Germany v. Italy*, para. 108.

Further argumentation in this regard is presented by authors who emphasize the similarities victims of peremptory violations share with commercial actors and private individuals who have conducted business with the State. As mentioned, the implied waiver doctrine was intrinsically relevant in the development of the restrictive theory on State immunity.³¹⁰ States active in commercial activities were considered to have waived their claim to immunity as it was considered “fundamentally unfair” that aggrieved individuals were denied legal remedy “for reasons totally unrelated to the substance of their causes of action”.³¹¹

The absolute theory of sovereign immunity enabled the foreign state to avoid the economic risks of legal liability from commercial activity thereby shifting the risks of the marketplace onto the shoulders of private parties. Allowing the state to participate in the international marketplace in this fashion, without being subject to the rule of law, impaired the ability of the market to function properly. *To preserve order in the marketplace, it became necessary to place legal limitations on the power of the State.*³¹² [emphasis added]

The *de jure gestionis* exception was therefore exclusively based on the State’s conduct towards an individual and the private law consequence of its actions serving the interest of justice and economical fairness.³¹³ The comparison to the current situation of victims of torture who bring civil claims against foreign States is striking. Both are individuals who claim reparation in civil proceedings for violation of their rights against a foreign State in a domestic court. Both faced an inherent denial of justice in case immunities were granted but only one was given the legal tool to overcome this difficulty, which is why BRÖHMER suggests that the same economical risk calculability approach, as elaborated for the *de jure gestionis* exception, could be used to resolve

³¹⁰ See FOX/WEBB, p. 35 f., SORNARAJAH, p. 668, JOHNSON, p. 268 ff.

³¹¹ TROOBOFF Peter, Foreign State Immunity: Emerging Consensus on Principles, *Recueil Des Courts*, Vol. 200, 1986, p. 268.

³¹² BELKSI/MERVA/ROHT-ARRIAZA, p. 380.

³¹³ *Ibid.*

immunity issue in relation to human rights violation.³¹⁴ In *Letelier v. Chile*, a former Chilean ambassador to the United States was assassinated in a targeted car bombing by agents of the Chilean Allende Regime. The Court, later endorsed by *Helen Liu v. China*³¹⁵, eventually rejected Chile's plea of immunity based on the territorial tort exception³¹⁶, however emphasized that the State had shown sufficient intent to violate international law by planning and calculating such an operation.³¹⁷ By saying so, the Court harmonizes the issue immunity for intentional human rights violations with the concept of an implied waiver.

Again, a majority of the legal doctrine disagrees. *Jus cogens* violations could not be understood as a sign of implicit intent for the purpose of submitting itself to the domestic court of a foreign State. Accepting so would severely overstretch the concept of a waiver, which was never intended to be used in such a broad manner. A significant lack of State practice in this regard may not be compensated through a fictional creation of a State's consent to agree to civil proceeding in a foreign court.³¹⁸ In *Smith v. Libya*, the defending State conceded that it would have violated a *jus cogens* provision when allegedly participating in a bombing of Pan Am Flight 103 over Lockerbie. It, however, rejected the argument that "such a violation demonstrates an implied waiver

³¹⁴ BRÖHMER, p. 190 and 195 supported by JOHNSON, p. 283 f.

³¹⁵ *Helen Liu v. The Republic of China*, Judgment of the 9th Circuit U.S. Court of Appeals of 29.12.1989, 892 F.2d 1419, where the Court rejected Chinas claim to immunity for the murder of a Taiwanese dissident in the United States.

³¹⁶ See § 5, p. 114 ff.

³¹⁷ *Letelier v. Chile*, Judgment of the U.S. District Court of Columbia of 11.3.1980, 488 F. Supp 665, para. 673.

³¹⁸ *Germany v. Italy*, German Reply, p. 35, KÜNZLI Jörg, Vom Umgang des Rechtsstaats mit Unrechtsregimes, Bern, 2008, p. 63, VAN ALEBEEK, Immunity of States, p. 362, APPELBAUM, p. 78, GARNETT, The Defence of State Immunity for Acts of Torture, p. 107, STEGER, p. 104, PAECH, p. 54, BARTSCH Kerstin/EBERLING Björn, Jus cogens vs. 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. 4, 2003, p. 480, ADAMS Wendy, In Search of a Defence of the Transnational Human Rights Paradigm: May Jus Cogens Norms be invoked to Create Implied Exceptions in Domestic State immunity Statutes?, in: Scott Craig (ed.), Torture as Tort: Comparative Perspectives on the Development of Transnational Tort Litigation, Oxford, 2001, p. 267.

of sovereign immunity”³¹⁹. The Court agreed. No legal basis could be found, by which jurisdiction could have been exercised essentially rejecting the implicit waiver argument.³²⁰

When murdering, torturing, or imprisoning arbitrarily, the state does not express any will and legal qualification as to the legal nature of these acts, let alone waive any privilege; it just commits them.³²¹

Indeed, a simple preparedness to be sued and the possibility that legal action might eventually be brought against the State are not enough to show sufficient intent to submission, especially as no indication exists at the moment of violation that this claim will be filed in the court of a foreign country.³²² Even accepting so would show logical deficiencies. If a State has knowledge of the international legal order and the illegality of its actions, it also knows that both customary international law and international jurisprudence continue to uphold the jurisdictional immunity in such circumstances. A State may therefore count on immunities to be applicable for torture and in no way wants to renounce that privilege.³²³

Citing the historical development of the commercial exception to State immunity in this regard might nevertheless be useful in one limited aspect: What the emergence of the commercial activity exception to sovereign immunity inherently shows is that the

³¹⁹ *Smith v. Socialist People's Libyan Arab Jamahiriya*, para. 242.

³²⁰ *Smith v. Socialist People's Libyan Arab Jamahiriya*, para. 244.

³²¹ ORAKHELASHVILI Alexander, Immunities of State Officials for International Crimes and Foreign Domestic Courts: A Reply to Dabo Akande and Sangeeta Shah, *European Journal of International Law*, Vol. 22/3, 2011, p. 851.

³²² YANG, *State Immunity in International Law*, p. 340 f., CAPLAN, p. 775, GIEGERICH, p. 230, CREMER, p. 143, BRÖHMER, p. 190, KNUCHEL, p. 167.

³²³ CAPLAN, p. 775, CREMER, p. 143, STEGER, p. 105, SCHAARSCHMIDT, p. 29, APPELBAUM, p. 195, BARTSCH/ELBERLING, p. 480, SALOMON Tim, *Die Staatenimmunität als Schild zur Abwehr gerechter Ansprüche? Zwangsarbeiterklagen vor italienischen Zivilgerichten gegen Deutschland*, *Brucerious Law Journal*, Vol. 05/2009, 2009, p. 64, DE SENA Pasquale/DE VITTOR Francesca, *State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case*, *European Journal of International Law*, Vol. 16/1, 2005, p. 101 f., REIMANN Mathias, *A Human Rights Exception to Sovereign Immunity: Some Thoughts on Prinz v. Federal Republic of Germany*, *Michigan Journal of International Law*, Vol. 16, 1995, p. 403 und 417.

implied waiver doctrine was historically used as a tool to react to changes in sovereignty.³²⁴ It could be argued that the implied waiver argument was also not sufficient to deny States immunity in commercial disputes but that States accepted a greater flexibility of the mechanism in order to be able to adapt to international developments in this area. Within the present thesis, the author comprehensively analyzes recent developments in international law and their impact on the concept of sovereignty and the principles of equality and non-interference and concludes that an adaption of the present immunity system is a necessary step.³²⁵ Even if the implied waiver concept has historically proven to be useful in this regard, domestic courts cannot be advised to lift a jurisdictional bar imposed by sovereign immunity on that mechanism alone as it is irreconcilable with the preconditions and purpose of a waiver in international law. A fictional creation of a States intent to waive would be inconsistent with the democratic principles of separation of powers and the rule of law.³²⁶

IV. Conclusions

A waiver of immunity may both explicitly or implicitly be expressed by an authorized representative of the State at any point during or before a proceeding. Consequently, the forum State where civil claims have been introduced becomes fully authorized to render a judgment binding on a foreign State. However, the clear, unambiguous, and unmistakable intention to submit itself to the jurisdiction of a foreign court is necessary and no judgment should be rendered in case no clear indication to waive is present.

Regarding the situation of victims of torture introducing a reparation claim against a foreign entity, the defending State cannot be considered to have waived its jurisdictional immunity through the ratification of the UN Convention against Torture or any other international provision, as no specific waiver clause can be identified in the international legal order. It is irrelevant for the situation at hand that CAT both pro-

³²⁴ BELKSI/MERVA/ROHT-ARRIAZA, p. 401.

³²⁵ See § 6 (II.2), p. 159 ff.

³²⁶ Similar also ADAMS, p. 267.

vides for universal jurisdiction over torture and explicitly recognizes the individual's right to remedy or reparation in case torture was committed. Neither aspects can be considered as a treaty-based waiver to the jurisdiction of a foreign court as a clear intent to submission is missing.

In addition, also the much-discussed implied waiver argument must be dismissed. A State does not renounce its claim to immunity by committing torture. While historically the *de jure gestionis* exception has emerged under the implied waiver mechanism, it is not sufficiently established that a State intends to waive its immunity by violating *jus cogens* norms. Courts are not advised to fictionally create an immunity waiver even in case a clear violation against peremptory international law occurred.

In conclusion, an act of torture may not be subsumed under neither an explicit nor an implied waiver to the jurisdiction of a foreign court as the waiver concept is unfit to deliver a torture victim with the means to access a domestic justice system.

§ 4 Exception based on the Qualification of the Act

Since the restrictive theory of State immunity has become the predominant practice in international law³²⁷, acts performed by State officials must fall into one of the recognized classifications for jurisdictional immunity: *acta de jure imperii* or *acta de jure gestionis*. Only the former is an expression of the State's sovereign power and is for this reason exempt from the civil jurisdiction of another State. The forum is, however, free to assume jurisdiction over any disputes in relation to the commercial, non-sovereign activity of a State.

Two fundamental questions of immunity law will be tackled and discussed in this chapter. First of all, distinguishing private from sovereign acts of a State is still an unpredictable process. The first section of this chapter will summarize the criteria elaborated by both jurisprudence and doctrine and show the difficulties of implementing the dichotomy in practice.

Secondly, it is hitherto unclear in what way international crimes and other breaches of peremptory norms must be qualified. More precisely to the research question at hand, does the commission of torture constitute a *de jure imperii* act of a State or may jurisdiction be exercised as a consequence of its non-sovereign nature? To resolve this issue, one must consider the recent development of the immunity of State officials from criminal jurisdiction, especially the functional immunity of State representatives for the commission of international crimes. In what way did the evolution of immunity *ratione materiae* influence the way State acts are qualified as either sovereign or private matters? The complex relationship between the immunity of the State and the immunity of its officials should be subject of the second section before a comprehensive summary of the findings will conclude the chapter.

³²⁷ See § 1 (III.2), p. 28 ff.

I. *De jure gestionis v. De jure imperii*

As mentioned in a previous chapter, the restrictive theory on State immunity law was the consequence of the gradual involvement of States in commercial and business activities with individuals or private corporations. This was most famously stated by the U.S. State Department issuing the so-called “Tate-Letter” for the introduction of a commercial exception to civil litigation with a State and the subsequent abandonment of the absolute theory of State immunity:

The department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts.³²⁸

This immunity exception and the consequential split of acts of a State according to their private/sovereign nature was considered a necessary step to ensure economical fairness and prevent a denial of justice.³²⁹ Courts are since only required to accept a plea of jurisdictional immunity for acts that constitute a sovereign behavior of the State.³³⁰

The majority of the legal doctrine emphasizes that a distinction must be made by referencing criteria elaborated by public international law so as to serve the interests of security of law and legal coherence. Despite international law not providing a clear definition of the terms, sufficient legal basis exists to determine the matter without a recourse to the law of the forum or perpetrating State.³³¹ In reality, however, the qualification will highly depend on the practice of the forum involved in a case, which is

³²⁸ See Tate Letter, p. 403 ff.

³²⁹ BELKSI/MERVA/ROHT-ARRIAZA, p. 380, FORCESE, p. 148, PAECH, p. 49, TROOBOFF, p. 268, See § 3 (I), p. 61 ff.

³³⁰ DAMIAN, p. 98, KNUCHEL, p. 164, YANG, State Immunity in International Law, p. 75, FOX/WEBB, p. 399.

³³¹ DAMIAN, p. 99, APPELBAUM, p. 80, SCHREUER Christoph, Die Durchsetzung zivilrechtlicher Ansprüche gegen ausländische Staaten, Österreichische Juristen Zeitung, Vol. 46, 1991, p. 43, CRAWFORD, Execution of Judgments, p. 855.

partly why the ICJ relied on a comparative analysis of domestic decisions to resolve the issue and simultaneously assess customary international law.³³²

One main criterion has been elaborated so far: a State is not entitled to immunity for acts performed in a private capacity. While LAUTERPACHT initially rejected the restrictive theory on the basis that all acts performed by a State are done so in its official capacity³³³, a concept of dualism has since prevailed. A State may either act under the umbrella of its sovereign power or behave like any individual would do. The distinction between *acta jure imperii* and *acta jure gestionis* is consequently based on the criterion, whether the act in question could potentially be performed by a private person as well.³³⁴

Acts that are typically considered an expression of sovereign authority usually relate to the “activities of the authorities responsible for foreign and military affairs, legislation and exercise of police power and the administration of justice”³³⁵, acts that cannot be performed by private individuals. In its 1991 Basel Resolution entitled «Contemporary Problems Concerning the Immunity of States in Relation to Question of Jurisdiction and Enforcement», the *Institut de Droit International* attempted to summarize the criteria indicative of sovereign power in which jurisdiction should not be exercised:

- a) The relation between the subject-matter of the dispute and the validity of the transactions of the defendant State in terms of public international law.
- b) The relation between the subject-matter of the dispute and the validity of the internal administrative and legislative acts of the defendant State in terms of public international law.

³³² *Germany v. Italy*, para. 70, see also FOX/WEBB, p. 402, KOLB/JARDIM OLIVEIRA, p. 248.

³³³ LAUTERPACHT Hersch, *The Problem of Jurisdictional Immunities of Foreign States*, *British Yearbook of International Law*, Vol. 28, 1951, p. 234, see also ORAKHELASHVILI, *Immunities of State Officials*, p. 850.

³³⁴ FOX/WEBB, p. 409, APPELBAUM, p. 83, YANG, *State Immunity in International Law*, p. 62 f., KOLB/JARDIM OLIVEIRA, p. 248, HIGGINS, *Equality of States and Immunity from Suit*, p. 143.

³³⁵ *In re Empire of Iran*, p. 27 also published in 45 ILR 81.

c) [...]

d) The organs of the forum State should not assume competence to inquire into the content or implementation of the foreign defence and security policies of the defendant State.

e) The organs of the forum State should not assume competence in respect of the validity, meaning and implementation of an intergovernmental agreement or decision creating agencies, institutions or funds subject to the rules of public international law.³³⁶

On the other hand, *acta de jure gestionis* are acts performed without the reference to the public power of the State. Examples usually relate to trading activities and other business undertakings.³³⁷ Both Art. 10 UNCSI and Art. 7 ECSI provide for an exception to foreign State immunity if the States engages, in the same manner as a private person, in commercial, industrial or financial transactions. In their commentary to UNCSI, the ILC clarified that the exception encompasses all kinds of activities in relation to the sale of goods or supply of services as well as any other professional trading or industrial undertakings, such as manufacturing or investment.³³⁸ By doing so, a State puts itself on the same level as an individual or a corporation and “once the sovereign had descended into the market place he can no longer invoke sovereign immunity”³³⁹.

Nevertheless, it is controversial under which circumstances the private law connection must be identified. The issue is demonstrated by *Trendtex Trading Corporation v. Central Bank of Nigeria*. The case concerned a commercial contract concluded be-

³³⁶ Art. 2 (3) of the 1991 Basel Resolution.

³³⁷ FOX/WEBB, p. 410, YANG, State Immunity in International Law, p. 76 f., ILC Commentary to Art. 2 (1c) UNCSI, para. 20 f., WITTICH Stephan, Commentary to Art. 10 UNCSI, in: O’Keefe Roger/Tams Christian/Tzanakopoulos Antonios (eds.), The United Nations Convention on Jurisdictional Immunities of States and their Property, Oxford, 2013, p. 174.

³³⁸ ILC Commentary to Art. 2 (1c) UNCSI, para. 21 ff.

³³⁹ *I Congreso del Partido*, Judgment of the English High Court of Justice of 28.1.1977, (1977) 3 W.L.R. 778, p. 801, later reaffirmed by the House of Lords on 16.7.1981, [1983] 1 AC 244, see also DAMIAN, p. 104.

tween the Nigerian State Bank and a British corporation, by which Nigeria acquired 240 000 tons of cement intended for the construction of an army base in Nigeria.³⁴⁰ By doing so, the Nigerian Government unmistakably pursued a sovereign purpose in relation to its military and defense policy. The sales contract, however, was of a quintessential private and commercial nature which *a priori* would exclude Nigeria's claim to immunity for the dispute. The issue boils down to the question of whether the purpose or the nature of the act should be decisive in the determination of the sovereign quality. In the deliberation of the UK Court of Appeal, Lord DENNING, writing for the majority, rejected Nigeria's plea of immunity on the basis of the commercial activity exception as "[t]he seller is not concerned with the purpose to which the purchase intends to put the goods."³⁴¹

This solution is supported by the majority of legal scholars as well as by a prevalent State practice.

The distinction between acts *jure imperii* and acts *jure gestionis* can only be based on the nature of the act of the State or the resulting legal relationship, not on the motive or purpose of the State activity [...]
Whether a State is entitled to immunity does not depend on the purpose pursued by the foreign State in carrying on a given activity.³⁴²

A purpose test for jurisdictional immunity would indeed be over-inclusive as a State may by principle only act in the pursuit of a public objective, a fact that would lead to a *de facto* absolute immunity in civil matters.³⁴³ Both the American and Canadian State immunity legislation hence mention that only the nature of the claim should be considered to determine the commercial character of an act.³⁴⁴ Only with the adop-

³⁴⁰ *Trendtex Trading Corporation v. Central Bank of Nigeria*, Judgment of the British Court of Appeal of 13.1.1977, [1977] 2 W.L.R. 356 also published in 64 ILR 111.

³⁴¹ *Ibid.*, p. 579 also 64 ILR 153.

³⁴² *In re Empire of Iran*, p. 26, see 45 ILR 80, see also *Argentina v. Weltover*, Judgment of the U.S. Supreme Court of 12.6.1992, 504 U.S. 607 (1992), BRÖHMER, p. 109, YANG, *State Immunity in International Law*, p. 61, CREMER, p. 141.

³⁴³ DAMIAN, p. 102, FOX/WEBB, p. 410, APPELBAUM, p. 82, BRÖHMER, p. 1, KREN KOSTKIEWICZ, p. 293.

³⁴⁴ See § 1603 (d) U.S. FSIA and § 2 of Canadian SIA.

tion of Art. 2 (2) UNCSI the discussion over the nature/purpose distinction arose anew, partly because State immunity from enforcement measures does use a purpose test for the determination of a commercial function³⁴⁵. This provision holds:

In determining whether a contract or transaction is a ‘commercial transaction’ [...] reference should be made primarily to the nature of the contract or transaction, *but its purpose should also be taken into account* if the parties to the contract have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.³⁴⁶ [emphasis added]

The ILC emphasized the importance of the context in which commercial transactions take place. The defending State should be given the opportunity to prove the non-commercial character of an act in relation to the clearly public purpose it pursues.³⁴⁷ The final version of the provision, however, simply states that the purpose of the act is not irrelevant to the determination of the commercial character but that the nature of the act should be the primary and main criterion for the qualification. This provision was criticized by legal scholars as confusing and unnecessary and is of no help for domestic courts to establish or deny jurisdiction in practice.³⁴⁸ In the end it has been accepted that the nature of the act in question is decisive in the determination of its sovereign quality and that the purpose should play only a minor role in the process.

The issue of distinguishing between *jure gestionis* and *jure imperii* on the basis of a “private person” test is further exacerbated by the fact that many areas which were typically in the exclusive realm of the State have gradually been “outsourced” to private individuals. Visas are issued by corporations, private security companies train military forces and are paid to fight wars and even prisons are privatized and tasked

³⁴⁵ Art. 19 UNCSI, see for a comprehensive analysis: FOX/WEBB, p. 517 ff.

³⁴⁶ Art. 2 (2) UNCSI.

³⁴⁷ ILC Commentary to Art. 2 (2) UNCSI, para. 26.

³⁴⁸ FOX/WEBB, p. 420, TROOBOFF, p. 316, YANG, State Immunity in International Law, p. 98 f.

with the execution of criminal sentences.³⁴⁹ Tasks usually considered as core competences of State authority enter the market place making the identification of its sovereign or private nature a complicated matter. SCHREUER analyzed this issue and strictly applies the “private person” test in this context. If, in a comparative assessment, private contractors have been charged with the execution of a public task then no jurisdictional immunity should be granted to States anymore as it loses its quintessential sovereign quality.³⁵⁰ This would potentially lift immunity for nearly all core competences of a State and factually abolish State immunity law. It is doubtful whether this approach is justified especially given the high threshold for the recognition and adaptation of customary international law.³⁵¹ Nevertheless, the privatization of public tasks has complicated the determination and granting process of jurisdictional immunities in civil proceedings. As YANG writes:

The boundary between *jus imperii* and *jus gestionis* has never been so elusive and treacherous. [...] Consequently, the ‘private person’ test can no longer be sufficient or reliable in distinguishing between an immune and a non-immune act. This is the new challenge for the State immunity doctrine at present and for the future.³⁵²

II. Commission of Torture as a Sovereign Act of the State?

1. Critical Assessment by Legal Scholars

Legal practitioners struggle to place violations of human rights, especially those amounting to a breach of peremptory norms and international crimes, in the *gestionis/imperii* dichotomy. Most notably, in its *Distomo massacre* judgment of 2000, the Greek Supreme Court based part of its reasoning to disregard Germany’s claim to immunity on the argument that war crimes could not be qualified as a sovereign act of

³⁴⁹ YANG, *State Immunity in International Law*, p. 63, APPELBAUM, p. 81.

³⁵⁰ SCHREUER, p. 43.

³⁵¹ APPELBAUM, p. 81.

³⁵² YANG, *State Immunity in International Law*, p. 60 and 64.

a State for which it can enjoy immunity from jurisdiction.³⁵³ A number of national Court rulings were decided in accordance with this reasoning.³⁵⁴

Judges usually refer to Principle II established by the Nuremberg trials according to which a person may not evade responsibility because he/she has acted in an official capacity when committing an international crime.³⁵⁵ Others argue that criminal acts can by their very nature be committed by both State officials and private individuals, suggesting that the 'private person' test would be indicative of a *de jure gestionis* quality. The State does not engage in commercial or business activity but behaves identically to any ordinary criminal in this field, which is why crimes resemble *acta de jure gestionis*.³⁵⁶ This would mean that political assassinations, torture, slavery and even war crimes would not enjoy immunity from jurisdiction as the condition for the qualification of a non-sovereign acts is fulfilled.

This is in line with the inherent quality of peremptory norms. *Jus cogens* are by definition a clear and absolute limit to State power and sovereignty. It is not possible to conclude that violations against these norms would qualify as a sovereign act of the State as it has no legal power to commit these crimes on an international level.³⁵⁷

³⁵³ *Prefecture of Voiotia v. Germany*, Greek Supreme Court, *Prefecture of Voiotia v. Germany*, Regional Court of Livadia of 25.9.1997, No. 137/1997.

³⁵⁴ *Siderman de Blake v. Argentina*, para. 716, *Ferrini v. Germany*, Italian Court of Cassation, para. 7.1 ff., *I Congreso del Partido*, English High Court of Justice, *I Congreso del Partido*, House of Lords, p. 268.

³⁵⁵ Principles of International Law Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal, appeared in Yearbook of the International Law Commission, Vol. II, 1950, para. 97.

³⁵⁶ LAUTERPACHT, The Problem of Jurisdictional Immunities, p. 225, CRAWFORD James, A Foreign State Immunity Act for Australia?, Australian Yearbook of International Law, Vol. 8, 1983, p. 89, HEIDBRINK Alfried, Der Alien Tort Claims Act (28 U.S.C. § 1350), Schadenersatzklagen vor US-amerikanischen Gerichten wegen Verletzung des Völkerrechts, Munich, 1989, p. 88.

³⁵⁷ AKANDE/SHAH, Immunities of State Officials, p. 828, BELSKY/MERVA/ROHT-ARRIAZA, p. 377, PAUST, Draft Brief Concerning Claims to Foreign Sovereign Immunity, p. 57 ff., CREMER, p. 142, CAPLAN, p. 775 f., REIMANN, p. 421 ff., BIANCHI Andrea, Immunity versus Human Rights: The Pinochet Case, European Journal of International Law, Vol. 10/2, 1999, p. 265, RICHMAN Scott, Siderman De Blake v. Argentina: Can the FSIA grant Immunity for Violations of Jus Cogens Norms?, Brooklyn Journal of International Law, Vol. 19, 1993, p. 979, ORAKHELASHVILI Alexander, Case Note on the Jurisdictional Immunity of the State case, American Journal of International Law,

Some authors consequently point out that, due to the global reach of international human rights norms, serious violations of these fundamental rules could not be a lawful State action for which it could enjoy immunity.³⁵⁸ Jurisdictional immunities were historically meant as a privilege to States to serve as a shield against abusive and unjustified claims brought against it. It could not have been the intention of the international community to exempt the most heinous violations of its fundamental concept from litigation.³⁵⁹

This fact was most notably pointed out by the plaintiff in *Nelson v. Saudi Arabia*. The case concerned a U.S. national who was recruited to work in a hospital as a monitoring systems engineer in Riyadh, Saudi Arabia. When Mr. Nelson discovered serious security issues which he brought to the attention of the board of the hospital as well as the government commission in charge of the health sector in Saudi Arabia, he was arrested and transported to a prison facility, where he was beaten, chained and tortured. After 39 days in detention, he was released and allowed to travel back to the United States, where he introduced civil proceeding against the Saudi Government. The plaintiff essentially brought forward that torture could not qualify as a sovereign act of Saudi Arabia and that it must be qualified as an *acta de jure gestionis* not allowing the defendant State to enjoy jurisdiction in the matter.³⁶⁰ While the Court of Appeals had initially allowed the claim to proceed on the basis of the commercial activity

Vol. 106/3, 2012, p. 613, ORAKHELASHVILI Alexander, State Immunity and International Public Order, German Yearbook of International Law, Vol. 45, 2002, p. 236, see also *Letelier v. Chile*, p. 673, *Helen Liu v. China*, p. 1419.

³⁵⁸ ORAKHELASHVILI, Jurisdictional Immunity of the State, p. 613, GÖRNIG Gilbert, Immunität von Staatsoberhäuptern, in: Ipsen Jörn/Schmidt-Jortzig Edzard (eds.), *Recht – Staat – Gemeinwohl*, Festschrift für Dietrich Rauschnigg, Cologne, 2001, p. 482, APPELBAUM, p. 91 f.

³⁵⁹ BIANCHI, Denying State Immunity to Violators of Human Rights, p. 200, QUADRI Rolando, *La giurisdizione sugli Stati stranieri*, Milan, 1941, p. 127.

³⁶⁰ *Saudi Arabia v. Nelson*, p. 362, See BIANCHI, Denying State Immunity to Violators of Human Rights, p. 208, GARNETT, The Defence of State Immunity for Acts of Torture, p. 105, JOHNSON, p. 282.

exception, the Supreme Court overturned the ruling and gave full effect to the jurisdictional immunity of the defendant State.³⁶¹

[T]he intentional conduct alleged here (the Saudi Government's wrongful arrest, imprisonment, and torture of Nelson) could not qualify as commercial under the restrictive theory. The conduct boils down to abuse of the power of its police by the Saudi Government, and however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature.³⁶²

Human rights violations are by their nature illegal interferences of State organs into the rights of an individual and are quintessentially of a sovereign and "governmental" quality.³⁶³ This is best shown by the fact that the UN Convention against Torture in the determination of its material scope requires torture to be committed "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity"³⁶⁴. Should the official character of the torturous act be denied then the applicability of CAT would be rendered moot.³⁶⁵ This element was most notably pointed out by the Law Lords in *Jones v. Saudi Arabia*. The UK Court of Appeal had initially relied on the *Pinochet* precedent to demonstrate that torture could "not be treated as the exercise of a State function"³⁶⁶ and had broken new ground for civil litigation for torture claims introduced against a foreign State.³⁶⁷ This

³⁶¹ *Nelson v. Saudi Arabia*, Judgment of the U.S. Court of Appeals of 21.2.1991, 923 F2d 1528, later referred to the Supreme Court in *Saudi Arabia v. Nelson*.

³⁶² *Saudi Arabia v. Nelson*, p. 361.

³⁶³ KNUCHEL, p. 165, GIEGERICH, p. 224, CREMER, p. 157, CAPLAN, p. 775, TERRY John, Taking Filártiga on the Road: Why Courts Outside the United States Should Accept Jurisdiction Over Actions involving Torture Committed Abroad, in: Scott Craig (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Tort Litigation*, Oxford, 2001, p. 126.

³⁶⁴ Art. 1 (1) CAT, see § 8 (1.2.a), p. 295 ff.

³⁶⁵ GIEGERICH, p. 224, BATES, p. 660, KNUCHEL, p. 164, SCHAARSCHMIDT, p. 26, SCHMALENBACH Kirsten, Immunität von Staatsoberhäuptern und anderen Staatsorganen, *Zeitschrift für öffentliches Recht*, Vol. 61, 2006, p. 423.

³⁶⁶ *Jones v. Saudi Arabia*, Court of Appeal, para. 127.

³⁶⁷ BATES, p. 645.

conclusion was, however, unanimously rejected by the House of Lords and later by the ECtHR³⁶⁸. Both Lord BINGHAM and HOFFMANN opined that *Pinochet* left the immunity from civil proceedings of the State unaffected as torture will *per definitionem* be a sovereign act of the State:

It is, I think, difficult to accept that torture cannot be a governmental or official act, since under article 1 of the Torture Convention torture must, to qualify as such, be inflicted by or with the connivance of a public official or other person acting in an official capacity. The claimants' argument encounters the difficulty that it is founded on the Torture Convention; but to bring themselves within the Torture Convention they must show that the torture was (to paraphrase the definition) official, yet they argue that the conduct was not official in order to defeat the claim to immunity.³⁶⁹

Jones effectively closed the door on the argument that international crimes and breaches of preemptory norms lose their sovereign quality because of their illegal character. Given that the *gestionis/imperii* distinction is primarily based on the nature of the act, torture committed by police personnel, members of the armed forces or secret services must be considered sovereign, governmental acts not because they are legal but because of their quality as law enforcement measures.³⁷⁰ Private individuals cannot typically engage in these activities and can hence not be qualified as commercial in any way. Even if violations occur, actors responsible for the action were "infused with the force and power of the government"³⁷¹ at the time of the commission. This is in line with the ILC Draft Articles on the Responsibility of the State which

³⁶⁸ *Jones v. the United Kingdom*, para. 196 ff.

³⁶⁹ *Jones v. Saudi Arabia*, House of Lords, Lord BINGHAM para. 19, see also Lord HOFFMAN, para. 88 ff.

³⁷⁰ AKANDE/SHAH, Immunities of State Officials, p. 830, YANG, State Immunity in International Law, p. 438, STEGER, p. 116, SCHAARSCHMIDT, p. 25, APPELBAUM, p. 92, CREMER, p. 157, GARNETT, The Defence of State Immunity for Acts of Torture, p. 108, see also *Bouzari v. Iran*, para. 50 ff., *Kazemi v. Iran*, para. 201 ff.

³⁷¹ YANG, State Immunity in International Law, p. 82 refers to a passage in *Doe I v. State of Israel*, Judgment of the District Court for the District of Columbia of 10.11.2005, 400 F. Supp. 2d 86.

confirm that violations of law and other excessive abuses of power are still considered an act of the State under public international law.³⁷²

The ICJ, in its judgment relating to the *Jurisdictional Immunities of States*, generally endorsed this view point and emphasized that the distinction between *de jure gestionis* and *de jure imperii* is based on the sovereign, non-sovereign character of the act and not in relation to its legality.³⁷³ Acts of military forces during an armed conflict are of inherent sovereign nature, a characterization that is not altered by the fact that international crimes had been committed.³⁷⁴ In his separate (concurring) opinion to the case, Judge KOROMA highlighted this distinction and confirmed that war crimes committed by armed forces continue to enjoy immunity as *acta de jure imperii* under current customary international law.³⁷⁵ Not confusing the lawfulness of a State action with the question whether the State enjoys immunity for it convinces insofar as it would render the whole immunity concept superfluous if it would only be granted for lawful acts.³⁷⁶ As pointed out by the ICJ, the responsibility for violations of international law is not affected by immunity and the obligation to make reparation for it remains.³⁷⁷

Judge CANÇADO TRINDADE dissented:

When a State pursues a criminal policy of murdering segments of its own population, and of the population of other States, it cannot, later on, place itself behind the shield of sovereign immunities, as these latter were never conceived for that purpose. Grave breaches of human

³⁷² Art. 7 ARSIWA, see also KNUCHEL, p. 165.

³⁷³ *Germany v. Italy*, para. 52, see also STEGER, p. 115, VAN ALEBEEK, Immunity of States, p. 326, APPELBAUM, p. 96, HIGGINS, Equality of States and Immunity from Suit, p. 138.

³⁷⁴ *Germany v. Italy*, para. 60 f.

³⁷⁵ *Germany v. Italy*, Separate opinion Judge KOROMA, para. 7, see also KREIKER Helmut, Die Entschädigung des Internationalen Gerichtshofs zur Staatenimmunität – Auswirkungen auf das (Völker-)Strafrecht?, Zeitschrift für Internationale Strafrechtsdogmatik, 2012, p. 109.

³⁷⁶ AKANDE/SHAH, Immunities of State Officials, p. 830, SHEN, p. 332, YANG, State Immunity in International Law, p. 438 ff., VAN ALEBEEK, Immunity of States, p. 331, APPELBAUM, p. 93, STEGER, p. 116.

³⁷⁷ *Democratic Republic of Congo v. Belgium*, para. 60.

rights and of international humanitarian law, amounting to international crimes, are not at all acts *jure imperii*. They are anti-juridical acts, they are breaches of *jus cogens*, that cannot simply be removed or thrown into oblivion by reliance on State immunity.³⁷⁸

He continues to doubt whether the distinction between *gestionis* and *imperii* is still adequate when it comes to international crimes. Usually the approach it follows is a *tertium non datur* system: an act must fall within one of the recognized two qualifications. Some authors, including IDI and the Italian *Corte di Cassazione*, consequently doubt whether this is still workable and argue that breaches of peremptory norms exceed the existing classification practice.³⁷⁹

N'est-il pas, non seulement contradictoire et absurde, mais également choquant au regard du respect dû à la dignité humaine de qualifier des *delicti imperii* comme étant commis *jure imperii*?³⁸⁰

Instead of uncritically reaffirming the existing system of qualification, cases should be decided on an individual basis and appreciated within the context out of which they have arisen.³⁸¹ BIANCHI refers to this group as acts *contra legem* and argues that no immunity should be granted as a statutory interpretation of the international legal order would suggest a priority of giving victims of fundamental human rights violation to justice over immunity privileges.³⁸² The suggestion of a third category of acts was highly criticized as it is in no way reflected by the practice of States.³⁸³ GIEGERICH convincingly points out that national courts tend to be more favorable towards granting

³⁷⁸ *Germany v. Italy*, Dissenting opinion Judge CANÇADO TRINDADE, para. 129.

³⁷⁹ *Ibid.*, para. 178, see also BIANCHI, Denying State Immunity to Violators of Human Rights, p. 227, ORAKHELASHVILI, Jurisdictional Immunity of the State, p. 614, *Ferrini v. Germany*, Italian Court of Cassation, p. 548, 128 ILR 671, see also SCHAARSCHMIDT, p. 15, CRAWFORD James, International Law and Foreign Sovereigns: Distinguishing Immune Transaction, British Yearbook of International Law, Vol. 54, 1983, p. 114.

³⁸⁰ Annuaire de l'Institut de droit international de Tallinn, p. 129.

³⁸¹ CRAWFORD, International Law and Foreign Sovereigns, p. 114.

³⁸² BIANCHI, Denying State Immunity to Violators of Human Rights, p. 219 ff.

³⁸³ GIEGERICH, p. 224, APPELBAUM, p. 92 f., CAPLAN, p. 775.

immunity in case the nature of an act could not be clearly established. At least in the judicial practice, immunity covers all acts for which the *de jure gestionis* character could not be proven and not only acts whose sovereign quality is upheld. This is most notably reflected by the fact that Art. 5 UNCSI codified the so-called *in dubio pro immunitate* principle which grants primacy to the plea of State immunity in case doubts arise on the qualification of an act as either *gestionis* or *imperii*. In this environment it is unlikely that an *acta tertii generis* would emerge as courts will continue to grant immunity for violations of peremptory norms.³⁸⁴

2. The Functional Immunity of State Officials

Before concluding whether the commission of torture can indeed be qualified as an *acta jure imperii* giving full effect to the jurisdictional immunity in civil matters, it should be discussed how this issue has developed regarding the functional immunity of State officials in criminal matters. After an introduction into the current legal situation and the recent work of the ILC Drafting Committee in this regard, it should be assessed in what way the argumentation that has led to a torture-related exception to functional immunity should be applied to the immunity of the State in civil matters. Are these two separate concepts or is there an inherent link making the one dependent on the other?

a. Current Legal Situation

International Tribunals and Courts

The issue of limiting the immunity of State officials in criminal proceedings for allegation of peremptory violations has been discussed by several international judicial bodies. These include the International Court of Justice as well as several International Criminal Courts and Tribunals which took the lead in determining the outlines of this jurisdictional privilege.

³⁸⁴ GIEGERICH, p. 224.

(1) International Court of Justice

In its 2002 *Arrest Warrant case*, a dispute between the Democratic Republic of Congo (DRC) and Belgium, the ICJ confirmed that an incumbent Minister of Foreign Affairs enjoyed full inviolability and personal immunity for the duration of his/her office.³⁸⁵ The immunity *ratione personae* covers both private and official act of a State representative is, however, limited to Heads of States, Heads of Government, Foreign Ministers and other high-ranking officials.³⁸⁶ Immunity was nevertheless not identical to impunity. The Court affirmed that a prosecution could be initiated against Foreign Ministers in their country of origin, before an international tribunal, or anywhere else when immunities would be waived.³⁸⁷ Most importantly however:

[A] court of one State may try a former Minister for Foreign Affairs or another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.³⁸⁸

Three core principles of the immunity of State officials must be retained from the judgment. First of all, a distinction is needed between the immunity of members of the so-called “*troika*” and the immunity of other, lower ranking State officials.³⁸⁹ Secondly, immunity *ratione personae* only applies as long as the person concerned holds office. Lastly, by doing so, the Court embraces the quintessential distinction between acts performed in a private capacity and official acts. Former Heads of States, Heads of Government or Foreign Ministers as well as any other lower State official only benefit from jurisdictional immunity *ratione materiae* for acts they perform in an official

³⁸⁵ *Democratic Republic of Congo v. Belgium*, para. 54, see also BATES, p. 670, APPELBAUM, p. 106 f., LORZ, p. 41 f.

³⁸⁶ FORCESE, p. 135 f., APPELBAUM, p. 95 ff., PEDRETTI, p. 30 ff., LORZ, p. 42, WICKREMASINGHE Chanaka, Immunities Enjoyed by Officials of States and International Organizations, in: Evans Malcolm (ed.), *International Law*, 4th ed. Oxford, 2014, p. 394 f.

³⁸⁷ *Democratic Republic of Congo v. Belgium*, para. 61.

³⁸⁸ Ibid.

³⁸⁹ FORCESE, p. 138, AKANDE/SHAH, Immunities of State Officials, p. 839 ff., PEDRETTI, p. 13 ff., SHEN, p. 314, BANKAS, p. 255.

capacity.³⁹⁰ These principles were later reaffirmed in a case concerning the immunity of sitting President of Djibouti.³⁹¹ Whether violations of peremptory norms qualify as either private or official acts of a State representative was not discussed in either rulings.

In 2012, the ICJ rendered its third judgment in relation to the immunity of State officials. Belgium had brought proceedings against Senegal for its continued unwillingness to arrest and prosecute former Chadian President Hissène Habré, residing in Dakar at the time.³⁹² For the first time, the ICJ was confronted with the immunity of a former Head of State for allegations of systematic use of torture for political means. The Court was, however, not asked to resolve the issue of whether torture could have been an act performed in an official capacity as Chad, the country of origin of the accused, communicated to the Court that it had waived the immunity of Hissène Habré for all criminal proceedings either national or international in nature.³⁹³ The question consequently remained open.

Currently pending are proceedings between Equatorial Guinea and France. The case concerns the immunity and criminal proceedings for corruption allegations brought against Mr. Teodoro Nguema Obiang Mangue, the son of the current President of Equatorial Guinea. The accused acts himself as the Second Vice-President in charge of Defence and State Security.³⁹⁴ The Court will have to consider whether Mr. Obiang Mangue enjoys personal immunity and whether severe allegations of misappropriation of public funds affects a potential exception from criminal prosecution. So far, one judgment has been delivered regarding the preliminary objections of the parties

³⁹⁰ MCGREGOR Lorna, State Immunity and Human Rights, Is there a Future after Germany v. Italy?, *Journal of International Criminal Justice*, Vol. 11, 2013, p. 139, LORZ, p. 42, VAN ALEBEEK, Immunity of States, p. 106.

³⁹¹ *Djibouti v. France*, Certain Questions of Mutual Assistance in Criminal Matters, Judgment of the ICJ of 4.6.2008, ICJ Reports 2008, p. 236, para. 170.

³⁹² *Belgium v. Senegal*, Questions Relating to the Obligation to Prosecute or Extradite, Judgment of the ICJ of 20.7.2012, ICJ Reports 2012.

³⁹³ *Ibid.*, p. 422.

³⁹⁴ *Equatorial Guinea v. France*, Questions relating to Immunities and Criminal Proceedings, Press Release of the ICJ, No. 2016/18 of 14.6.2016.

to the jurisdiction of the court³⁹⁵ and parties are currently drafting their memorials to the case.

(2) International Criminal Courts and Tribunals

At a very early stage, the International Military Tribunal at Nurnberg had indicated that State officials could not be exonerated by the fact that violations occurred in the performance of an official duty nor that an official order would exempt them from prosecution. These concepts were both incorporated in the Charter of the Tribunal as well as codified by the International Law Commission as the so-called Nurnberg Principles.³⁹⁶

Half a century later, the International Criminal Tribunal for the former Yugoslavia (ICTY) relied on the Nurnberg principles to prosecute war criminals. In *Blaškić*, the Court was asked to give meaning to the immunity *ratione materiae* of a State official accused of breaches of peremptory norms and severe violations of international humanitarian law. It opined:

[A]rise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity.³⁹⁷

The Tribunal confirmed its position on numerous occasions also in relation to the personal immunity of sitting *troika* members. In distinction to immunity *ratione materiae*, however, a trial could only be brought on an international level and not in a domestic court of a State.³⁹⁸ This conclusion was further endorsed by the Special

³⁹⁵ *Equatorial Guinea v. France*, Judgment of the ICJ on Preliminary Objections of 6.12.2018, General List No. 163.

³⁹⁶ Principles of International Law Recognized in the Charter of the Nurnberg Tribunal para. 97.

³⁹⁷ *Prosecutor v. Tihomir Blaškić*, para. 41.

³⁹⁸ See *Prosecutor v. Slobodan Milošević*, Judgment of the ICTY Trial Chamber of 8.11.2001, IT-02-54-T, para. 31, *Prosecutor v. Furundžija*, Judgment of the ICTY Trial Chamber II of 10.12.1998, IT-95-17/1, para. 140, *Prosecutor v. Dragoljub Kunarac, Radomir Dovać and Zoran Vuković*, Judgment of the ICTY Trial Chamber I of 22.2.2001, IT-96-23-T and IT-96-23/1-T, para. 494.

Court of Sierra Leone in *Taylor*. The personal immunity of the sitting Head of State of Liberia, Charles Taylor, was no obstacle to the proceeding of the Court as immunity:

[D]erives from the equality of sovereign States and therefore has no relevance to international criminal tribunals which are not organs of a State but derive their mandate from the international community. [...]

[T]he sovereign equality of States does not prevent a Head of State from being prosecuted before an international criminal tribunal or court.³⁹⁹

The International Criminal Court somewhat participated in the discussion around the immunity of State officials from criminal prosecution. Many decisions relate, however, to the execution of arrest warrants or subpoenas issued by the Court and the inherent obligation to cooperate with the Court in accordance with Art. 13 (b) of the Rome Statute. In its jurisprudence, the ICC rejected both *immunity ratione personae* and *ratione materiae* to be an obstacle to a trial.⁴⁰⁰ While in *re Al-Bashir* involving the immunity of the incumbent Head of State of Sudan, not party to the Rome Statute, an exception to the personal immunity was based on an obligation of Sudan to collaborate with the Court as imposed by a UN Security Council Resolution⁴⁰¹,⁴⁰² the Court additionally assumed jurisdiction in *Kenyatta* and *Ruto* by referring to Art. 27 of the ICC-Statute codifying a waiver of immunity and the consequential non-existence of

³⁹⁹ *Prosecutor v. Charles Taylor*, Judgment of the Special Court of Sierra Leone of 31.5.2004, Appeals Chamber, SCSL 2003-1-I, para. 51, also published in 128 ILR 264.

⁴⁰⁰ Regarding functional immunity: *Abdel Raheem Muhammad Hussein*, Judgment of the ICC Pre-Trial of 1.3.2012, ICC-02/05-01/12, regarding personal immunity: *Muammar Mohammed Ab Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment of the ICC Pre-Trial Chamber of 27.6.2011, ICC-01/11.

⁴⁰¹ UN Security Council Resolution 1593 (2005) adopted at its 5158th Meeting on 31.3.2005, UN Doc. No. S/RES/1593.

⁴⁰² *In re Al-Bashir*: Proceeding against Malawi: *Situation in Darfur*, Judgment of the ICC Pre-Trial Chamber I of 15.12.2011, ICC-02/05-01/09-139, Proceeding against Chad: *Situation in Darfur*, Judgment of the ICC Pre-Trial Chamber I of 12.12.2011, ICC-02/05-01/09, Proceedings against the DRC: *Situation in Darfur*, Judgment of the ICC Pre-Trial Chamber II of 9.4.2014, ICC-02/05-01/09, Proceedings against South Africa: *Situation in Darfur*, Judgment of the ICC Pre-Trial Chamber II of 6.7.2017, ICC-02/05-01/09, Proceeding against Jordan: Judgment pending, ICC Press Release of 11.12.2017, Nr. ICC-CPI-20171211-PR1349.

immunity before an international tribunal.⁴⁰³ By 2019, the ICC Appeals Chamber even identified an *jus cogens* immunity exception of an incumbent Head of State on customary international law, a rather controversial decision at the time.⁴⁰⁴

In summary, the international jurisprudence in the matter of jurisdictional immunity of State officials from criminal prosecution is primarily occupied with the personal immunity of incumbent high-level State representatives and not in relation to immunity *ratione materiae*. The question whether international crimes or other breaches of peremptory obligations could be covered by functional immunity was raised in only two fora. While the ICJ was released from giving an answer by an express waiver of the home State of the accused, the ICTY, the only tribunal with a substantive analysis, clearly denies functional immunity to be applicable in such circumstances as international crimes cannot have been performed in an official capacity.

National Law

(1) Ex parte Pinochet (Ugarte)

In *R. v. Bow Street Metropolitan Stipendiary Magistrate*, generally referred to as *Ex parte Pinochet* (No. 3), the British House of Lords was confronted with a request of Spain to extradite former Chilean President and Senator for lifetime Augusto Pinochet Ugarte to stand trial in Spain for crimes committed during his presidency.⁴⁰⁵ Alleged offences included several counts of torture primarily occurring in Chile against mostly

⁴⁰³ *Uhuru Muigal Kenyatta*, Judgment of the ICC Trial Chamber V of 18.10.2013, ICC-01/09-02/11-830, *William Samoei Ruto and Joshua Arap Sang*, Judgment of the Trial Chamber V (A) of 18.6.2013, ICC-01/09-01/11-777.

⁴⁰⁴ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Judgment of the ICC Appeals Chamber of 6.5.2019, Case No. ICC-02/05-01/09-397-Corr, see also AKANDE Dabo, ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals, Blog of the European Journal of International Law of 6.5.2019.

⁴⁰⁵ *R. v. Bow Street Metropolitan Stipendiary Magistrate et al.*, Judgment of the UK House of Lords of 24.3.1999, [2000] 1 AC 147 also published in 119 ILR 135, see a comprehensive summary of the judgment in BATES, p. 658, YANG, State Immunity in International Law, p. 436 ff., SHEN, p. 315, APPELBAUM, p. 104 f., FOX HAZEL/WARBRICK Colin/MCGOLDRICK Dominic, The Pinochet No. 3, The International and Comparative Law Quarterly, Vol. 48/3, 1999, p. 687 ff., BIANCHI, Immunity versus Human Rights, p. 237 ff.

Chilean national, some of which also held Spanish passports. The Lords rejected Pinochet's claim to immunity each judge delivering a separate opinion in the case.

Lord BROWNE-WILKINSON recognized that Pinochet is no longer in office and could consequently not benefit from personal but only from functional immunity.⁴⁰⁶ The question arose whether the commission of torture can be an official act of a State representative for which immunity should be granted. In his deliberation he emphasized that with the ratification of the UN Convention against Torture, Chile, the UK and Spain had assumed the responsibility to prosecute violations against the Convention regardless of where they occurred. Since Art. 1 CAT requires violations to have been performed by a State official it would make the universal jurisdiction provision unworkable if officials would be granted jurisdictional immunity for such acts. He consequently rejected Pinochet's claim to immunity as "all these factors together demonstrate that the notion of continued immunity for ex-head of state is inconsistent with the provisions of the Torture Convention"⁴⁰⁷. Lords MILLET, SAVILLE OF NEWDIGATE and PHILLIPS arrive to the same conclusions emphasizing the ratification of the UN Convention against Torture as a turning point for the immunity *ratione materiae* for torture.⁴⁰⁸

Lord HOPE OF CRAIGHEAD, and to a lesser extent Lord HUTTON, agreed on the substantive question at hand. The immunity *ratione materiae* does not encompass violations of peremptory norms reaffirming what Lord BINGHAM had stated a few years prior that "torture could not be functions of a head of State or governmental or official acts"⁴⁰⁹. Even if the alleged violations of the respondent were indeed carried out under an umbrella of his/her position as a Head of State, committing torture cannot be an

⁴⁰⁶ *Ex parte Pinochet* (No. 3), Lord BROWNE-WILKINSON, para. 100.

⁴⁰⁷ *Ibid.*, para. 114.

⁴⁰⁸ *Ex parte Pinochet* (No. 3), Lord PHILLIPS, para. 185, *Ex parte Pinochet* (No. 3), Lord MILLET, para. 179, *Ex parte Pinochet* (No. 3), Lord SAVILLE OF NEWDIGATE, para. 169.

⁴⁰⁹ *Ex parte Pinochet* (No 1), Lord BINGHAM, para. 19.

official function of this position as international law clearly defines such acts as international crimes.⁴¹⁰

Only Lord GOFF OF CHIEVELEY dissented. An exception to the immunity of foreign officials could only be achieved through an express provision in CAT, a fact that cannot be circumvented by a fictional creation of an immunity waiver.⁴¹¹ He continued that if torture would not be covered by an immunity *ratione materiae*, this might have disastrous consequences for international relations. Former Heads of State could no longer travel abroad without fearing that unfounded allegations would be brought against them at any time.⁴¹² As the only judge in the case, he concluded that Pinochet was entitled to immunity in the proceeding and rejected Spain's request for extradition.

The House of Lords decision *Ex parte Pinochet* was at the zenith of the discussion over crimes committed by State officials and its impact on the immunity from criminal proceeding. The absolute shield of immunity was abandoned giving both national and international courts an important precedence to implement universal jurisdiction.

(2) Other relevant Judgments of National Courts

Since the Pinochet judgment was rendered, many national Courts have decided cases lifting the immunity of State officials or former Head of States from criminal prosecution. In her fifth report to the ILC Drafting Committee, CONCEPCIÓN HERNÁNDEZ, UN ILC Special Rapporteur on the immunity of State officials from foreign criminal jurisdiction, presented a comprehensive analysis over the national practice in this regard.⁴¹³

⁴¹⁰ *Ex parte Pinochet* (No. 3), Lord HOPE OF CRAIGHEAD, para. 146. *Ex parte Pinochet* (No. 3), Lord HUTTON, para. 165.

⁴¹¹ *Ex parte Pinochet* (No. 3), Lord GOFF OF CHIEVELEY, para. 123.

⁴¹² *Ibid.* para. 131.

⁴¹³ Fifth Report on Immunity of State Officials from Foreign Criminal Jurisdiction, published by Special Rapporteur Concepción HERNÁNDEZ on 14.6.2016, UN Doc. No. A/CN.4/701, p. 46 ff. (cited: HERNÁNDEZ fifth Report).

As pointed out in the report, national courts have denied functional immunity to officials for a variety of reasons. In some jurisdictions the inherent quality of peremptory norms as hierarchically higher provisions was considered sufficient to trump the claim of immunity the defendant invoked⁴¹⁴, others emphasized the gravity of the violations as a justification for the exception and the subsequent prosecution⁴¹⁵. More importantly to the research topic at hand, a third group of judgments considered that violations in question could not have been performed in an official capacity since “the commission of such crimes cannot, under any circumstances, be considered an ordinary function of the State or of a State official.”⁴¹⁶

Interestingly the arguments brought forward in these proceedings were not only found to be sufficient for the exercise of criminal jurisdiction over perpetrators but also civil jurisdiction for the establishment of reparation claims. This was especially the case when allegations involved an abuse of State power for the personal enrichment of the State official, such as severe corruption charges, embezzlement or any other misappropriation of public funds.⁴¹⁷

One domestic judgment deserves closer examination as its justification for exercising jurisdiction over the claim is rather unique. While the practice and legislation of the United States regarding universal civil jurisdiction are subject of another chapter

⁴¹⁴ Ibid. p. 50 refers to *Lozano v. Italy*, Judgment of the Italian Court of Cassation of 24.7.2008, ILDC 1085 IT 2008, para. 6, *A v. Office of the Public Prosecutor of the Confederation*, Judgment of the Federal Criminal Court of Switzerland of 25.7.2012, BB.2011.140.

⁴¹⁵ *Ferrini v. Germany*, Italian Court of Cassation, also published in 128 ILR 674 but also *Attorney General of the Government of Israel v. Eichmann*, Judgment of the Israeli Supreme Court of 29.5.1962, Criminal Appeal 336/61 also published in 36 ILR 277.

⁴¹⁶ HERNÁNDEZ fifth Report, p. 50 refers to *In re Hussein*, Judgment of the German Higher Regional Court of Cologne of 16.5.2000, 2 Zs 1330/99, para. 11, *In re Pinochet*, Judgment of the Belgian Court of First Instance of Brussels of 6.11.1998, also published in 119 ILR 349.

⁴¹⁷ HERNÁNDEZ fifth Report, p. 51 refers to *United States v. Noriega*, Judgment of U.S. District Court for the Southern District of Florida of 5.3.1999, 40 F. Supp. 2d 1378, *Republic of Haiti v. Duvalier*, Judgment of the English Court of Appeal of 22.7.1989, 1 QB 202, [1989] 2 WLR 261 *Republic of the Philippines v. Marcos*, Judgment of the U.S. District Court for the Northern District of California of 11.2.1987, 665 F. Supp. 793, *Iran v. Pahlavi*, Judgment of the Court of Appeals of the State of New York of 5.7.1984, 62 N.Y.2d 474 (1984), *In re Teodroo Nguema Obiang Mangue*, Judgment of the Court of Appeal of Paris of 13.6.2013, No. 2012/08462.

within this thesis⁴¹⁸, the *Samantar* ruling should be discussed here. The case concerned a group of Somali nationals who alleged they have endured torture at the hands of Somali government agents under the command of Muhammad Ali Samantar, former Minister of Defence and former Prime Minister of Somalia.⁴¹⁹ The plaintiffs brought civil proceedings under the Torture Victim Protection Act which is not limited to torture committed within the territory of the United States.⁴²⁰ The Supreme Court unanimously rejected Samantar's claim to immunity and allowed the trial to be continued. In its deliberation the Court emphasized that the FSIA is only applicable to the State and not its officials. While the Court of Appeals had initially argued that the FSIA applied but that the commission of torture was not something that a person could perform in an official capacity⁴²¹, the Supreme Court went a step further and completely denied immunity to all former officials as they could not qualify as either a "State" nor an "organ of a State" within the meaning of the FSIA. Whether this approach correctly reflects the customary international law concept of immunity *ratione materiae* or the overwhelming practice to include representatives within the definition of a State⁴²² is doubtful. HERNÁNDEZ points out that the same result could have been achieved by referencing its own jurisprudence that *jus cogens* violations are not part of the regular functions of a State.⁴²³

⁴¹⁸ See § 8 (II.1), p. 320 ff.

⁴¹⁹ *Yusuf v. Samantar*, Judgment of the U.S. Supreme Court of 1.6.2010, US 130 S Ct. 227 (2010).

⁴²⁰ See § 8 (II.3.c), p. 345 ff.

⁴²¹ *Yusuf v. Samantar*, Judgment of the U.S. Court of Appeals for the 4th Circuit of 8.1.2009, 552 F.3d 371, p. 376.

⁴²² See § 4 (II.b), p. 104 ff.

⁴²³ HERNÁNDEZ fifth Report, p. 51 refers to *Leteleir v. Chile*, 79 ILR 561, *Jiméney v. Aristeguieta*, Judgment of the U.S. Court of Appeals for the 5th Circuit of 12.12.1962, 311 F2d 547, *Hilao v. Marcos (No. 1)*, Judgment of the 9th Circuit U.S. Court of Appeals of 16.6.1996, 103 F.3d 767, *Xuncax et al v. Héctor Gramajo*, Judgment of the U.S. District Court of Massachusetts of 12.4.1995, 886 F.Supp. 162, *Bawol Cabiri v. Baffour Assasie-Gyimah*, Judgment of the U.S. District Court for Southern District of New York of 18.4.1996, 921 F. Supp. 1189.

Work of the ILC

In its Resolution 61/34 of 4th December 2006, the UN General Assembly allocated the topic of the immunity of State officials from foreign criminal jurisdiction to the ILC for a potential codification of rules in the area.⁴²⁴ The ILC led by several Special Rapporteurs have been in the process of elaborating draft articles in this matter.

In the afore mentioned fifth Report of CONCEPCIÓN HERNÁNDEZ, the Special Rapporteur elaborates proposals for limits and exceptions of immunity for State officials from foreign criminal jurisdiction. Both international and national practice, according to HERNÁNDEZ, have developed sufficiently to include to topic in a codification process. She consequently presented Draft Art. 7 in 2016 for crimes in respect of which immunity does not apply. It reads:

1. Immunity shall not apply in relation to the following crimes:
 - (i) Genocide, crimes against humanity, war crimes, torture and enforced disappearances;
 - (ii) Corruption-related crimes;
 - (iii) [Territorial offences]
2. Paragraph 1 shall not apply to persons who enjoy immunity *ratione personae* during their term of office.
3. Paragraphs 1 and 2 are without prejudice to:
 - (i) Any provision of a treaty that is binding on the forum State and the State of the official, under which immunity would not be applicable;
 - (ii) The obligation to cooperate with an international tribunal which, in each case, requires compliance by the forum State⁴²⁵

⁴²⁴ Report of the ILC to the General Assembly on the work of its fifty-eighth session, Yearbook of International Law Commission, Vol. II (Part Two), 2006, UN Doc. No. A/61/454.

⁴²⁵ Draft Art. 7 as proposed by the Fifth report on Immunity of State Officials from Foreign Criminal Jurisdiction, published by Special Rapporteur Concepción HERNÁNDEZ, UN Doc. No. A/CN.4/701, p. 95.

In 2017, during its 69th Session, the ILC sitting in plenary discussed and adopted Draft Art. 7 in relation to crimes for which no immunity should be granted. Amending the text proposed by HERNÁNDEZ, the Committee split the issues of personal and functional immunity into two separate provisions, dropped the corruption-related crimes as well as territorial offences as exceptions to immunity, but included the crime of apartheid as an element for which no immunity is available.⁴²⁶ The crimes contained in the list should be understood according to specific treaty texts annexed to Draft Art. 7.⁴²⁷ With the specific example of torture, it is the definition as contained in the 1984 UN Convention against Torture which should be decisive for an exception of immunity from foreign criminal proceedings. This clarification is indeed helpful as the definition of torture as an international crime defined in the Rome Statute would have been significantly narrower as it demands a systematic character of violations.⁴²⁸

In summary, the functional immunity of State officials and former Heads of States, Heads of Government or Foreign Ministers is a well-established concept in international law. While the jurisprudence of the ICJ is mostly silent on whether violations of peremptory norms or commissions of international crimes are indeed acts that can be performed in an official capacity, international criminal tribunals and domestic courts have stated that immunity *ratione materiae* would not be available in such circumstances. As international law clearly prohibits these acts, no State representative can claim that it was part of his/her official duty to commit torture or other *jus cogens* violations. The recent documents published by the ILC indicate that a provision with a torture-related exception to the functional immunity will be included in a set of draft

⁴²⁶ Draft Art. 7 (1) for Crimes under International Law in respect of which Immunity *ratione materiae* shall not apply provisionally adopted by the ILC plenary at its 69th Session on 10.7.2017, UN Doc. No. A/CN.4/L.893, for a comprehensive comparison between the two proposals see BERNABEI Giulia, Nobody's Land: Where all step but No One Settles, iLawyer Blog of 10.12.2017, <http://ilawyerblog.com/nobodys-land-where-all-step-but-no-one-settles/> [last accessed 21.5.2018].

⁴²⁷ Draft Art. 7 (2) of the same document with the Annex of List of treaties referred to in draft Art. 7 (2).

⁴²⁸ See § 1 (1.2), p. 7 ff., see also VAN ALEBEEK Rosanne, The "International Crime" Exception in the ILC Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction: Two Steps Back?, American Journal of International Law Unbound, Vol. 112, 2018.

articles regarding immunity from foreign criminal jurisdiction. By doing so, the ILC may strengthen the international recognition that torturers can no longer count on jurisdictional immunity to shield them from judicial review.

b. Relation between Immunity of State Officials and Immunity of the State

In the counter-memorial presented by Italy to the ICJ, the Italian delegation referred to the development of international criminal law as an indication that the gravity of violations has an impact on the question, whether jurisdictional immunities can legally be granted.⁴²⁹ In detail, it referred to the argumentations presented in *Ex parte Pinochet* and in the international jurisprudence described above to make the ICJ aware of the inherent inconsistency to hold individual perpetrators of international crime responsible for *jus cogens* breaches but not the State in whose name the violations occurred.

[F]unctional immunity and State immunity express the same international obligation to refrain from the exercise of jurisdiction over foreign States for their sovereign acts. [...] In the light of the close relation between functional immunity and State immunity, it seems legitimate also to refer to the practice relating to the punishment of State officials responsible for international crimes, and to infer from this the possibility of also subjecting foreign States to jurisdiction.⁴³⁰

Holding otherwise would be inconsistent with its previous case law as the ICJ had already identified a dual responsibility of both the individual and the State for international crimes in its 2007 judgment of *Bosnia and Herzegovina v. Serbia and Montenegro*.⁴³¹

⁴²⁹ *Germany v. Italy*, Italian Counter-Memorial, para. 4.78 ff.

⁴³⁰ *Ibid.*, para. 4.82, see also BIANCHI, Immunity versus Human Rights, p. 264, DE SENA/DE VITTOR, p. 104.

⁴³¹ *Bosnia and Herzegovina v. Serbia and Montenegro*, Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Judgment of the ICJ of 26.2.2007, ICJ Reports 2007, p. 47, para. 173.

The International Court of Justice, on the other hand, found no ambiguity in distinguishing between these two related but distinct types of jurisdictional immunities. With regard to *Pinochet*, the Court emphasized that a majority of judges found an exception to immunities applicable due to the adherence of all States involved in the disputes to the UN Convention against Torture which, according to the Court, had no bearings in the proceedings against Germany.⁴³² It further emphasized that the recent development in international criminal law regarding the functional immunity of State officials only involves the establishment of criminal jurisdiction and not, as in the case discussed before the court, the civil jurisdiction against the State. No parallels could therefore be drawn as it involved quintessentially different types of proceedings which explains an apparently contradictory result.⁴³³ The acts of the German army must therefore be qualified as *acta jure imperii*, regardless of the fact that violations of *jus cogens* norms occurred for which no functional immunity could be granted.⁴³⁴

In *Jones*, both the Court of Appeal and the House of Lords have, to a certain extent, stepped away from the argumentation forwarded in *Pinochet*, at least as it relates to the establishment of civil jurisdiction over a foreign State. The concept of “acting within an official capacity” should not be confused with the issue of *acta de jure imperii*. By inflicting pain and suffering amounting to torture, the underlying reasoning behind CAT is that an individual cannot claim that he or she had acted under the power of the State. The perpetrator should be brought to justice without any indication to the liability of the State in the matter. The State *stricto sensu* is not involved in this proceeding whatsoever, which is why no conclusions can be drawn from this development on the sovereign quality of *acta jure imperii*. The fact that a State representative cannot claim immunity for an act has consequently no effect on the im-

⁴³² *Germany v. Italy*, para. 87, see KLOTH Matthias/BRUNNER Manuel, Staatsimmunität im Zivilprozess bei gravierenden Menschenrechtsverletzungen, Archiv des Völkerrechts, Vol. 50, 2012, p. 228 f., BIANCHI, Immunity versus Human Rights, p. 194.

⁴³³ *Germany v. Italy*, para. 87, see also HESS Burkhard, Staatenimmunität und ius cogens im geltenden Völkerrecht: Der Internationale Gerichtshof zeigt die Grenzen auf, Praxis des Internationalen Privat- und Verfahrensrechts, Vol. 32/2, 2012, p. 203, PAYANDEH Mehrdad, Staatenimmunität und Menschenrechte, Juristenzeitung, Vol. 19/2012, 2012, p. 954.

⁴³⁴ *Germany v. Italy*, para. 60.

munity of the State for the same action, especially as it involves different types of proceedings.⁴³⁵

This conclusion is supported by a prevailing legal literature. Immunity *ratione materiae* and *acta jure gestionis* are two separate concepts independent from one another.⁴³⁶ The *gestionis/imperii* dichotomy is exclusively based on the nature of the act as established by the “private person” test rather than the legality of the action, a fact that cannot be circumvented by referencing the functional immunity of State officials in criminal matters. It would be dogmatically inconsistent to argue that a torture-exception in civil proceedings exists with regard to the jurisdictional immunity of the State because one was recognized in respect of the immunity of its officials in criminal jurisdiction.⁴³⁷

Other scholars bring forward the so-called “attribution rules” as contained in the ILC Articles on the Responsibility of the State for its Internationally Wrongful Acts (ARSIWA). According to Art. 4-11 ARSIWA, all actions of a State official are attributable to a State even if the person exceeds its authority or contravenes clear instructions given by the State. Both the State official and the State are hence equally responsible for the internationally wrongful act and can be made liable under international law.⁴³⁸

⁴³⁵ *Jones v. Saudi Arabia*, Court of Appeal, Lord MANCE, para. 71, supported by Lord PHILLIPS, para. 134, see also *Jones v. Saudi Arabia*, House of Lords, Lord HOFFMANN, para. 78 ff. and *Jones v. the United Kingdom*, para. 14 ff., see BATES, p. 653, HIGGINS, Equality of States and Immunity from Suit, p. 142.

⁴³⁶ FOX/WEBB, p. 400 f., DE SENA/DE VITTOR, p. 107 f., GIEGERICH, p. 224, APPELBAUM, p. 94, KNUCHER, p. 165, SCHAARSCHMIDT, p. 32, SHEN, p. 339 f., TRAPP Kimberley/MILLS Alex, Smooth runs the Water where the Brook is Deep: The obscured complexities of *Germany v. Italy*, Cambridge Journal of International and Comparative Law, Vol. 1/1, 2012, p. 161, AKANDE Dabo/SHAH Sangeeta, Immunities of State Officials, International Crimes and Foreign Domestic Courts: A Rejoinder to Alexander Orakhelashvili, European Journal of International Law, Vol. 22, 2011, p. 860, QUADRI Rolando, Diritto internazionale pubblico, 5th renewed ed., Naples, 1989, p. 616.

⁴³⁷ *Germany v. Italy*, German Memorial, para. 59, YANG, State Immunity in International Law, p. 438, AKANDE/SHAH, Immunities of State Officials, p. 831, SHEN, p. 342, SCHAARSCHMIDT, p. 32, STEGER, p. 120, BATES, p. 658, APPELBAUM, p. 205, BOTHE Michael, Die strafrechtliche Immunität fremder Staatsorgane, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, Vol. 31, 1971, p. 262 ff.

⁴³⁸ SHEN, p. 343 f., DE SENA/DE VITTOR, p. 104, MCGREGOR, State Immunity and Human Rights, p. 141, NOLLKAEMPER André, Concurrence between Individual Responsibility and State Respon-

This must necessarily be the case as a State, as a legal entity, can only act through representation and can consequently only violate international law through the actions of its officials. In this context it would be illogical to argue that torture committed by a State actor was not performed in an official capacity but constituted a sovereign act for the purpose of a jurisdictional plea. States could be encouraged to circumvent responsibility by shifting the blame to lower-ranking State agents, like police officers, prison guards or military personnel.⁴³⁹ This is unsatisfying as the main benefactor of torturous acts tends to be the State and not the intermediate torturer.⁴⁴⁰

In *Jones v. the United Kingdom*, the European Court of Human Rights recognized a general rule in international and domestic law that the immunity of State officials is in direct link with the immunity of the State on whose behalf actions are taken. The Court referred to decisions rendered by judges in Great Britain⁴⁴¹, Canada⁴⁴², Australia⁴⁴³, New Zealand⁴⁴⁴ as well as by the ICTY⁴⁴⁵ and ICJ⁴⁴⁶ to show that individuals are a mere instrument of the State and that consequently:

State immunity in principle offers individual employees or officers of a foreign State protection in respect of acts undertaken on behalf of the

sibility in International Law, *International and Comparative Law Quarterly*, Vol. 52, 2003, p. 619.

⁴³⁹ AKANDE/SHAH, Immunities of State Officials, p. 827, Fox Hazel, Where Does the Buck Stop? State Immunity from Civil Jurisdiction and Torture, *Law Quarterly Review*, Vol. 121, 2005, p. 353, BATES, p. 655.

⁴⁴⁰ NOVOGRODSKY, p. 951, AKANDE/SHAH, Immunities of State Officials, p. 832, MCGREGOR, State Immunity and Human Rights, p. 140, WHOMERSLEY Christopher, Some Reflections on the Immunity of Individuals for Official Acts, *International and Comparative Law Quarterly*, Vol. 41, 1999, p. 850, DICKINSON/LINDSAY/LOONAM, p. 342.

⁴⁴¹ *Propend v. Sing*, Judgment of the English Court of Appeal of 2.5.1997, [1997] EWCA Civ 1433, also published 111 ILR 611.

⁴⁴² *Jaffe v. Miller*, Judgment of the Ontario Court of Appeal of 17.6.1993, 13 OR (3d) 745, also published 95 ILR 446, see NOVOGRODSKY p. 951.

⁴⁴³ *Zhang v. Zemin*, see 141 ILR 542.

⁴⁴⁴ *Fang et al. v. Jiang Zemin et al.*, Judgment of the High Court of New Zealand of 21.12.2006, [2006] HC AK CIV 2004-404-5843.

⁴⁴⁵ *Prosecutor v. Tihomir Blaškić*, para. 41.

⁴⁴⁶ *Djibouti v. France*, para. 196.

*State under the same cloak as protects the State itself.*⁴⁴⁷ [emphasis added]

The question whether an official of a State can enjoy immunity must go hand in hand with the question whether the State is equally immune for the same act. The State and its officials are indistinguishable from one another, which is why a differentiation between immunity granted to the State and immunity granted to a State representative is illogical and only leads to an unnecessary fragmentation of international law.⁴⁴⁸

This conclusion is partly convincing. Other than diplomatic and consular law whose sources are found in self-contained treaty regimes, the immunity of State officials and the immunity of States are both customary in nature and are, as discussed throughout this thesis, in a constant state of adaption to the international legal order. Both are argued to be justified for the protection of bilateral relations, the sovereignty and equality of States and are necessary for international cooperation and diplomacy. In its origin, its rational and its nature functional immunity and State immunity are quintessentially the same, indicated by the fact that Art. 2 (b)(iv) UNCSI defines representatives of the State acting in that capacity as an integral part of the State to which the Convention should apply.⁴⁴⁹ The ILC, in their commentary to UNCSI, clearly endorses the viewpoint that State immunity and State official immunity are essentially identical:

Actions against such representatives or agents of a foreign Government in respect of their official acts are essentially proceedings against the

⁴⁴⁷ *Jones v. the United Kingdom*, para. 204, see also AKANDE/SHAH, Immunities of State Officials, p. 827, *Annuaire de l'Institut de droit international de Tallinn*, p. 128.

⁴⁴⁸ *Ferrini v. Germany*, Italian Court of Cassation, 128 ILR 674, similar also *Germany v. Italy*, Italian Counter-Memorial, para. 4.81, FOX, *Where Does the Buck Stop?*, p. 354, STEGER, p. 119, YANG, *State Immunity in International Law*, p. 433, MCGREGOR, *State Immunity and Human Rights*, p. 139, DE SENA/DE VITTOR, p. 108, SCHAARSCHMIDT, p. 32, STAMMLER Philipp, *Der Anspruch von Kriegsofern auf Schadensersatz*, Berlin, 2009, p. 232.

⁴⁴⁹ BATES, p. 665, KRIEGER, p. 120, PAYANDEH, p. 954, TAMS Christian, *Schwierigkeiten mit dem Jus Cogens*, *Archiv des Völkerrechts*, Vol. 40, 2002, p. 347.

State they represent. The foreign State, acting through its representatives, is immune *ratione materiae*.⁴⁵⁰

How can it hence be explained that a torture-related exception could have developed in relation to functional immunity but not in relation to the State *stricto sensu*? Basing a distinction solely on the nature of the proceeding seems too minimalistic. In what way is prosecuting a former Head of State less damaging to the protection of international relations and the preservation of international peace and security than a reparation claim? As discussed in more detail below⁴⁵¹, the nature of the proceeding, at least in the author's opinion, cannot be the sole justification for separating *ratione materiae* from *jure imperii*. Neither can be that one proceeding is directed against a physical person and the other against a legal entity. Valid reasons can exist for a victim of torture to bring a claim against the State and not against the individual torturer. Either the perpetrator has disappeared, has deceased or it can simply not be established who effectively executed the order to torture as victims are routinely blindfolded.⁴⁵² Both from a political and legal point of view a distinction is irrelevant as both are equally responsible for the violation and both proceedings will involve delicate diplomatic deliberations. As Lord BINGHAM convincingly states in *Jones*:

It is, however, clear that a civil action against individual torturers based on acts of official torture does indirectly implead the state since their acts are attributable to it. Were these claims against the individual defendants to proceed and be upheld, the interests of the Kingdom [of Saudi Arabia] would be obviously affected, even though it is not a named party.⁴⁵³

In addition, in response to the ICJ's approach that immunity must be considered regardless of the question of responsibility: If immunities are completely independent

⁴⁵⁰ ILC Commentary to Art. 2 (b)(iv) UNCSI, para. 18.

⁴⁵¹ The relation between civil and criminal proceedings for violations of torture is further discussed in § 8 (II.2), p. 328 ff.

⁴⁵² NOVOGRODSKY, p. 951.

⁴⁵³ *Jones v. Saudi Arabia*, House of Lords, Lord BINGHAM, para. 31, see also DICKINSON/LINDSAY/LOONAM, p. 342.

from the lawfulness and gravity of an action, how can a *jus cogens* exception to the functional immunity of State officials be explained and justified? What international criminal law at least manages to demonstrate is that the commission of a crime does indeed affect the grant of jurisdictional immunities. Saying that jurisdictional immunities by their nature cannot be made dependent on the gravity of allegations is hence incorrect. While this might have been the case prior to the creation of international criminal law, the modern international legal order does not sustain a strict distinction between immunity and responsibility anymore.

The author does not argue that the immunity *ratione materiae* and *acta jure imperii* are identical legal regimes and recognizes that in recent years these have evolved largely independently from one another. Nevertheless, the development of a *jus cogens* exception to functional immunity does provoke a number of inconsistencies and contradictions as discussed in this chapter. When considering the immunity of State officials, one recognizes that many elements and qualities historically related to jurisdictional immunities have been abandoned. This is especially the case with its supposedly purely procedural nature not intermingling issues of the procedure of a claim with the merits brought forward in a proceeding as well as its apparent need for a strict separation between legality and accountability.

III. Conclusion

Since the emergence of the restrictive theory of State immunity, State acts must be distinguished between *acta jure gestionis* and *acta jure imperii*. The differentiation is based on the so-called “private person” test by which a State is not entitled to claim jurisdictional immunities for acts which could have equally been performed by an individual. Despite some contradictory remarks by the ILC, it is the nature of the act in question which is decisive for the qualification and not the purpose for which an act was performed.

Under which concept the commission of torture and other breaches of peremptory norms must be placed is a matter fiercely discussed by legal scholars and courts alike. The author would *a priori* join the majority of scholars that strictly applying the “private person” test according to its nature alone would suggest that most violations of

torture, especially those committed by law enforcement or military agents, must be classified under the *de jure imperii* group due to their inherent public and governmental character. The *de jure gestionis* concept solely encompasses business and commercial activities of the State and was never intended to be stretched as far as to cover official acts of torture. The author, however, cannot support the conclusion that such a behavior can be considered a sovereign act of the State. States do not possess sovereignty to commit *jus cogens* breaches. Holding so would quintessentially be inconsistent with the very nature of *jus cogens* norms as absolute limits to State actions and the recent development of functional immunity from foreign criminal jurisdiction.

The context in which the immunity of States and State representatives must be placed is complex and needs further clarification. The author emphasizes that immunity *ratione materiae* and *acta jure imperii* are separate concepts and need to be treated as such. Nevertheless, the recent development of international criminal law and the immunity of State officials has led to a number of inconsistent and irrational situation with regard to the continued immunity of the State for actions for which its representatives were de-immunized. The problem lies primarily with the tools established for distinguishing sovereign from private acts which have become unworkable in the modern legal order. While YANG refers to the growing privatizations of public tasks to show the inoperability of the “private person” test⁴⁵⁴, this is even more evident in relation to international crimes and breaches of peremptory norms, a fact most notably brought forward by Italian Courts in *Ferrini*⁴⁵⁵.

International crimes, such as torture, should not be classified as either private or sovereign acts of a State. The author consequently expresses sympathy with the third group approach as proposed by the Judge CANÇADO TRINDADE⁴⁵⁶, the *Institut de Droit International*⁴⁵⁷ and BIANCHI’s concept of an *acta contra legem*⁴⁵⁸, but this fact alone does not provide a sufficient basis to deny the jurisdictional immunity of a State *de*

⁴⁵⁴ YANG, *State Immunity in International Law*, p. 60 and 64.

⁴⁵⁵ *Ferrini v. Germany*, Italian Court of Cassation, p. 548, 128 ILR 671.

⁴⁵⁶ *Germany v. Italy*, dissenting opinion Judge CANÇADO TRINDADE, para. 177 ff.

⁴⁵⁷ *Annuaire de l’Institut de droit international de Tallinn*, p. 129.

⁴⁵⁸ BIANCHI, *Denying State Immunity to Violators of Human Rights*, p. 219 ff.

lege lata. As long as no sufficient State practice and *opinion juris* exists to create an *acta tertii generis*, national courts will, *in dubio*, continue to grant foreign States immunity from jurisdiction for torture and do not violate customary international law for doing so. Under the current legal system, a victim of torture can consequently not successfully bring a civil claim against a foreign State based solely on the qualification of the act within the restrictive theory of State immunity.

§ 5 Territorial Tort Exception

Both Italian⁴⁵⁹ and Greek⁴⁶⁰ national courts have relied on the so-called territorial tort exception in State immunity law to exercise civil jurisdiction over the Federal Republic of Germany for crimes committed during the Second World War. A jurisdictional bar may extraordinarily be disregarded if a compensation claim has been introduced by an individual for bodily injuries or physical harm caused by actors of a foreign State if violations occurred on the territory of the forum. The growing acceptance to deny State immunity in similar circumstances was later highlighted by the Italian delegation as one of the main arguments in the ICJ proceeding against Germany.⁴⁶¹ Could a domestic court hence be allowed to disregard the jurisdictional immunity of a foreign State if acts of torture were committed on its territory?

As we are soon to discover, implementing the territorial tort exception in practice has shown several obstacles which should be addressed in this chapter. First, a presentation of the legal sources of the territorial tort exception, the case law in this matter as well as a summary of the legal doctrine will provide the reader with the necessary basis to grasp the difficulty of applying the territorial tort exception in practice. In a second step, a special focus is given to territorial torts committed during an armed conflict or by foreign armed forces present on the territory of the forum. This scenario adds to the complication as many States refuse to apply the territorial tort exception if the military of another State is involved. Final observations on the relevance of the territorial tort exception for civil suits introduced by victims of torture will conclude the chapter.

⁴⁵⁹ *Ferrini v. Germany*, Italian Court of Cassation, 128 ILR 672.

⁴⁶⁰ *Prefecture of Voiotia v. Germany*, Greek Supreme Court, p. 472 ff., see summary of the case in GAVOUNELI Maria/BANTEKAS Ilias, *Prefecture of Voiotia v. Federal Republic of Germany*, No. 11/2000, Areios Pagos (Hellenic Supreme Court), *American Journal of International Law*, Vol. 95, 2000, p. 199 ff.

⁴⁶¹ *Germany v. Italy*, Italian Counter-Memorial, para. 4.28 ff.

I. Legal Sources of a Territorial Tort Exception to State Immunity

1. International Law

a. Codified Legal Basis

Both the European and UN Convention on State Immunity encompass an exception to the jurisdictional immunity of States “which relates to pecuniary compensation for death or injury to a person, [...] caused by an act or omission which is alleged to be attributable to a State”⁴⁶². The rationale behind the territorial exception is twofold: first of all, offences committed on the territory of the forum should be litigated in the court of *locus commissi* according to the law applicable in that country. This not only to facilitate the litigation but also in order to give full meaning to the principle of territoriality.⁴⁶³ At least in relation to acts committed by representatives of a State outside their regular jurisdiction, the principle of sovereign equality and State dignity yields to the principle of territoriality leading to a rejection of jurisdictional immunities in the matter.⁴⁶⁴ Secondly, a natural person who has suffered a personal injury, death or other physical damage at the hands of an actor of a foreign State should be provided with the necessary civil recourse to demand compensation in the forum where violations have been committed.⁴⁶⁵

In their commentary to Art. 12 UNCSI, the ILC explains that this provision was primarily intended to cover traffic accidents and damages occurring within “the transport of goods and passengers by rail, road air or waterways”⁴⁶⁶. It could, however, not be excluded, so the ILC continues, that intentional physical harm, such as battery,

⁴⁶² Art. 12 UNCSI, see also Art. 11 ECSI.

⁴⁶³ Fifth report on Jurisdictional Immunities of States and their Property of Special Rapporteur Motoo OGISO, Yearbook of International Law Commission, Vol. II (Part One), 1983, UN Doc. No. A/CN.4/363, para. 69 f.

⁴⁶⁴ HIGGINS, Equality of States and Immunity of Suit, p. 134.

⁴⁶⁵ ILC Commentary to Art. 12 UNCSI, para. 3.

⁴⁶⁶ Ibid., para. 4.

assault, arson or even homicide would fall under the scope of Art. 12 UNCSI as well.⁴⁶⁷ Nevertheless, the exception would only cover physical harm to an individual or destruction of tangible property excluding any mental suffering or other psychological pain or anguish. Initially, a broader notion of damages was accepted by notably Canadian Courts to be integrated within the territorial tort concept as well.⁴⁶⁸ The jurisprudence relating to torture as a territorial tort shows a different picture in this perspective. Psychosocial distress or other mental pain of the victim or surviving family members could not fall under the territorial tort exception.⁴⁶⁹ In addition, civil claims arising from other “substantive” human rights violations, such as unlawful imprisonment or illegitimate interference into a person’s privacy would also be precluded from suit.⁴⁷⁰ The material scope of the territorial exception only encompasses pecuniary damages in relation to bodily injuries or death of an individual excluding all other forms of damages.

Further, the removal of jurisdictional immunities under Art. 12 UNCSI is conditional upon two geographical elements. First of all, only acts occurring in whole or in part on the territory of the forum can be subject of the claim.⁴⁷¹ While in *Al-Adsani* and *Jones* the plaintiffs had argued that the act of torture initiated in Kuwait or Saudi Arabia continued on the territory of the United Kingdom through the hospitalization and rehabilitation process, both the Court of Appeal as well as the House of Lords rejected the applicants’ territorial tort argument on the basis of the missing *locus delicti com-*

⁴⁶⁷ Ibid., see also HALL Christopher, UN Convention on State Immunity: The Need for a Human Rights Protocol, *International and Comparative Law Quarterly*, Vol. 55/2, 2006, p. 419.

⁴⁶⁸ *United States of America v. Friedland*, Judgment of the Ontario Court of Appeals of 23.12.1999, [1999] 182 DLR (4th) 614 also published in 120 ILR 417, *Schreiber v. Canada*, Judgment of the Canadian Supreme Court of 12.9.2002, [2002] 3SCR 269, para. 67 also published in 147 ILR 276, see also FOX/WEBB, p. 482.

⁴⁶⁹ *Kazemi v. Iran*, para. 56 and 170, *Bouzari v. Iran*, para. 46, FOX/WEBB, p. 476, YANG, *State Immunity in International Law*, p. 200 and 221, HALL, *UN Convention on State Immunity*, p. 420, VIVEKANANTHAN, p. 134.

⁴⁷⁰ FOAKES Joanne/O’KEEFE Roger, Commentary to Art. 12 UNCSI, in: O’Keefe Roger/Tams Christian/Tzanakopoulos Antonios (eds.), *The United Nations Convention on Jurisdictional Immunities of States and their Property*, Oxford, 2013, p. 217, YANG, *State Immunity in International Law*, p. 221, FOX/WEBB, p. 482.

⁴⁷¹ ILC Commentary to Art. 12 UNCSI, para. 6.

missi. The territorial tort exception would only apply to the immediate act of violence or destruction and could not be extended fictionally to include pain or suffering that followed once the commission of the act has ended.⁴⁷²

Secondly, the perpetrator responsible for the violent act or the omission that led to bodily harm must likewise be present on the territory of the forum. This condition essentially excludes all transboundary acts of violence or other trans-frontier torts from being litigated in the forum where the damaging result had materialized.⁴⁷³ During the drafting process, especially Russian and Byelorussian delegates had pushed for the inclusion of a second territorial requirement. Situations of transboundary violence were better suited to be negotiated in a bilateral diplomatic setting as it would otherwise cause a flood of civil litigations from being introduced.⁴⁷⁴ Governments and other authors in support of the expansion of the territorial scope of Art. 12 UNCSI essentially argued that a too restrictive approach would prevent the exception from being useful in practice.⁴⁷⁵ In the end, the adopted version of Art. 12 UNCSI does prevent the forum from exercising jurisdiction over transboundary events, such as letter bombs, rocket launches, cyber-attacks or even environmental catastrophes that caused injury or death on the territory of another State including fires, air pollution, floods or nuclear disasters.⁴⁷⁶

Two elements should further be pointed out. First of all, the ILC clearly emphasizes the location where acts were committed as the decisive factor for the application of the territorial tort exception. In other words, a distinction according to the nature of the

⁴⁷² *Al-Adsani v. Government of Kuwait (No. 2)*, see 107 ILR 536, *Jones v. Saudi Arabia*, House of Lords, see also YANG Xiaodong, State Immunity in the European Court of Human Rights: Reaffirmations and Misconception, *British Yearbook of International Law*, Vol. 74, 2003, p. 379.

⁴⁷³ ILC Commentary to Art. 12 UNCSI, para. 7, FOAKES/O'KEEFE, p. 221, FOX/WEBB, p. 472 f., BLANKÉ/FALKENBERG, p. 1823, HALL, UN Convention on State Immunity, p. 419.

⁴⁷⁴ Preliminary Report of Special Rapporteur MOTOO OGISO on Jurisdictional Immunities of States and their Property of 20.4.1988, *Yearbook of International Law Commission*, Vol. II (Part Two), 1988, UN Doc. No. A/38/10, para. 96.

⁴⁷⁵ *Ibid.*, para. 91, see also FOAKES/O'KEEFE, p. 212 and FOX/WEBB, p. 470, BIANCHI, Denying State Immunity to Violators of Human Rights, p. 217, SCHREUER, p. 61.

⁴⁷⁶ ILC commentary to Art. 12 UNCSI, para. 7, see also YANG, State Immunity in International Law, p. 217, FOAKES/O'KEEFE, p. 218.

acts is not useful as the proposal contained in Art. 12 UNCSI does not differentiate between *acta jure imperii* and *acta de jure gestionis*.⁴⁷⁷ While the jurisprudence of national and international courts have concluded differently⁴⁷⁸, at least regarding the territorial tort exception as understood by the ILC, the sovereign/private dichotomy has been abandoned. Secondly, civil claims introduced via the territorial tort exception will not depend on the nationality of the applicant. It is perfectly conceivable that a claimant sues his/her State of nationality if damage occurred abroad or that a person without any connection to the forum or perpetrating State uses this mechanism to receive compensation.⁴⁷⁹

Next to UNCSI, the European Convention on State Immunity also provides for a territorial tort clause in its Art. 11. Despite not being completely identical to the text in Art. 12 UNCSI, the slight literal differences do not impact the content of the provision in a significant way. Both provisions apply to procedure of redress of an individual for bodily injuries committed by a foreign officer on the territory of the forum, exclude trans-frontier torts and require the double territorial connection to be applicable. Generally, it is believed that Art. 11 ECSI applies to both sovereign and private acts of a State.⁴⁸⁰ Analyzing the Explanatory Report to the Convention does, however, complicate the matter. The Convention was intended as a compromise between the absolute and restrictive theory on State immunity law containing an exhaustive list of occasions in which the jurisdictional immunity could be disregarded.

On the other hand, [the State] is entitled to immunity in respect of all other acts even those which are according to the doctrine of relative State immunity, *acta iure gestionis*.⁴⁸¹

⁴⁷⁷ ILC commentary to Art. 12 UNCSI, para. 8.

⁴⁷⁸ See below § 5 (I.b. and II), p. 118 ff.

⁴⁷⁹ YANG, State Immunity in International Law, p. 215, HALL, UN Convention on State Immunity, p. 419.

⁴⁸⁰ DAMIAN, p. 113, CREMER, p. 146, BRÖHMER, p. 116 f., SCHAARSCHMIDT, p. 16, STEGER, p. 62, APPELBAUM, p. 127.

⁴⁸¹ Explanatory Reports to ECSI, para. 56.

This formulation shows that drafters did not intent to go further than what was already acknowledged in the restrictive theory on State immunity law at the time. Acts exercised as an expression of sovereign power, even those performed on the territory of another State, should enjoy absolute and full immunity from jurisdiction.⁴⁸² The impact of this commentary must, nevertheless, be relativized. The Committee of Experts responsible for drafting ECSI made clear that the Explanatory Reports were never intended as the sole authoritative source of interpretation of the Convention and its Additional Protocol but should simply facilitate their implementation and application by State parties.⁴⁸³ States that have ratified the Convention, to this day only eight out of 47 Member States of the Council of Europe have done so⁴⁸⁴, should not be restricted to adopt a more extensive practice in the application of the Convention.

It should only briefly be mentioned that other non-binding documents were created and discussed in an attempt to codify the territorial tort exception to foreign State immunity. While both Art. III F of the ILA Montreal Draft Convention on State Immunity and Art. 2 (2e) of the 1991 Basel Resolution of the *Institut de Droit International* provide for the most extensive territorial tort exception in international law, specifically including transboundary torts, Art. 6 (e) of the Inter-American Draft Convention only applies to business and commercial activities exercised on the territory of the forum. The latter explicitly emphasizes the continued distinction between sovereign and private acts in the application of the territorial tort exception was, however, never adopted by the Organization of American States.

b. International Jurisprudence

The first instance, when an international Court was requested to interpret and apply the territorial tort exception, happened in the *McElhinney v. Ireland* ruling before the Grand Chamber of the ECtHR.⁴⁸⁵ The case concerned an incident that occurred in the

⁴⁸² APPELBAUM, p. 127, STEGER, p. 62.

⁴⁸³ See Preamble of the Explanatory Report to ECSI, para. II, see also APPELBAUM, p. 128.

⁴⁸⁴ ECSI ratified by Austria, Belgium, Cyprus, Germany, Luxembourg, the Netherlands, Switzerland, and the United Kingdom, see § 2 (1.2), p. 35 ff.

⁴⁸⁵ *McElhinney v. Ireland*, Judgment of the ECtHR [GC] of 21.11.2001, No. 31253/96.

trans-border region between the United Kingdom and the Republic of Ireland, where an Irish citizen accidentally ran into a British border patrol with his car. As a consequence, the British soldier fired a total of six shots in the general direction of the vehicle and pursued the applicant on foot onto Irish territory. Once under his control, the soldier ordered the three passengers to exit the car and stand against the wall with their hands in the air. According to the applicant, the British soldier in a state of “blind rage” then aimed his gun at Mr. McElhinney and pulled the trigger twice, although the gun did not fire as it was apparently jammed. After the incident, McElhinney brought civil proceeding against the British Government in Irish Courts, alleging that he feared for his life and suffered from severe post-traumatic shock.

In the assessment of the ECtHR Grand Chamber, the Republic of Ireland did not violate the applicant’s right to access to court by not assuming jurisdiction over the claim. It agreed with the Irish Supreme Court⁴⁸⁶ that, despite a clear trend in international law toward limiting State immunity for personal injuries caused by an act or omission within the forum, no customary international obligation could be identified by which Ireland was obligated to allow the claim to proceed.

Certainly, it cannot be said that Ireland is alone in holding that immunity attaches to suits in respect of such torts committed by *acta jure imperii* or that, in affording this immunity, Ireland falls outside any currently accepted international standards.⁴⁸⁷

In the Court’s opinion, the territorial tort exception would therefore not apply to acts performed in a sovereign capacity significantly reducing the scope of the provision. A State has the legitimate interest that sovereign acts exercised by a foreign entity on its territory enjoy jurisdictional immunity and that issues in relation to extraterritorial exercise of sovereign power be addressed in a diplomatic setting as questions of national security are involved.⁴⁸⁸

⁴⁸⁶ *McElhinney v. Williams*, see 104 ILR 69.

⁴⁸⁷ *McElhinney v. Ireland*, para. 38.

⁴⁸⁸ *Ibid.*

A total of five judges disagreed. In a joint dissenting opinion by judges CAFLISCH, BARRETO and VAJIĆ, the authors essentially forwarded the works of the ILC in relation to Art. 12 UNCSI as a clear indication that customary law has shifted towards accepting the territorial tort exception for sovereign acts as well. During the drafting process, no discussion arose on the matter whether *jure imperii* acts would not be affected by the provision indicating that no obligation is incumbent on a national court anymore to grant immunity for territorial torts.⁴⁸⁹ As the applicant was an Irish national and the alleged violation of rights occurred on Irish territory, accepting the British plea of immunity in such circumstances constituted a disproportionate interference into the claimant's right to access to court.⁴⁹⁰ This solution is justified as the interests of the individual to bring proceeding against a foreign State in similar circumstances should enjoy priority over the grant of immunity, given the enhanced protection of individuals in international law.⁴⁹¹

The conclusions of the Grand Chamber in the matter were later reaffirmed in *Grosz v. France* as well as *Kalogeropoulou v. Greece and Germany*. In both cases, the ECtHR held that the forum could not be obliged to override the jurisdictional immunity of another State for compensation claims even if violations occurred in the forum.⁴⁹²

A detailed discussion over the applicability of the territorial tort exception was later held by Germany and Italy in their dispute before the International Court of Justice. In their submissions to the Court, Germany criticized the arguments, most notably brought forward by Italian Courts in *Ferrini*, that war crimes with a territorial nexus to the forum would not be covered by jurisdictional immunity. It emphasized that the territorial clause contained in both ECSI and UNCSI had a narrow scope and was

⁴⁸⁹ *McElhinney v. Ireland*, Dissenting opinion of Judges CAFLISCH, BARRETO and VAJIĆ, p. 20, see also APPELBAUM p. 126.

⁴⁹⁰ *McElhinney v. Ireland*, Dissenting opinion of Judge ROZAKIS, para. 3.

⁴⁹¹ *McElhinney v. Ireland*, Dissenting opinion of Judge LOUCAIDES, para. 21, see also STEGER, p. 59 and § 6 (II.2.c), p. 173 ff.

⁴⁹² *Kalogeropoulou v. Greece and Germany*, p. 8, *Grosz v. France*, Judgment of the ECtHR of 16.6.2009, No. 14717/06.

never intended to apply to acts committed during an armed conflict.⁴⁹³ Even accepting so would not allow Italian Courts to exercise jurisdiction over Germany. With specific reference to the *McElhinney* ruling, Germany reasoned that all *acta jure imperii* would continue to be covered by absolute immunity even if exercised on the territory of another State.⁴⁹⁴ Italy highlighted the recent work of the ILC in relation to UNCSI. A traditional distinction based on the nature of the acts has become irrelevant within the application of the territorial tort exception.⁴⁹⁵ While the controversy of the applicability of the tort exception to State immunity during an armed conflict is subject of the next section, the Court, in its final deliberation, considered that it was “not called upon in the present proceedings to resolve the question whether there [was] in a customary international law a “tort exception” to State immunity applicable to *acta jure imperii*”⁴⁹⁶ and consequently left this issue unresolved. The Court’s silence on the matter astonishes as it was one of the main legal issues raised in the proceeding and the international community had anticipated a decision in this perspective. This fact was most notably pointed out by Judge GAJA. In his dissenting opinion to the case, he admitted that sufficient State practice and evidence of *opinion juris* existed to recognize the customary status of the territorial tort exception to both *jure gestionis* and *jure imperii* or at least that Italy could not be found liable under general international law to have applied to exception to the case at hand.⁴⁹⁷

⁴⁹³ *Germany v. Italy*, German Memorial, para. 71, see also STEGER, p. 65, DICKINSON Andrew, *Germany v. Italy and the Territorial Tort Exception*, Journal of International Criminal Justice, Vol. 11, 2013, p. 150.

⁴⁹⁴ *Germany v. Italy*, German Memorial, para. 72.

⁴⁹⁵ *Germany v. Italy*, Italian Counter-Memorial, para. 4.28, see also KLOTH/BRUNNER, p. 225, BLANKE/FALKENBERG, p. 1822 f., KLOTH Matthias, *Staatenimmunität im Zivilprozess*, Archiv des Völkerrechts, Vol. 50/2, 2012, p. 225, BORNKAMM Paul, *State Immunity Against Claims Arising from War Crimes: The Judgment of the International Court of Justice in Jurisdictional Immunities of the State*, German Law Journal, Vol. 13/6, 2012, p. 776.

⁴⁹⁶ *Germany v. Italy*, para. 65.

⁴⁹⁷ *Germany v. Italy*, Dissenting opinion Judge GAJA, para. 12.

2. National Law

a. Practice of States with Immunity Legislation

Of the known national legislations adopted in the matter of State immunity law, all but the Pakistani SIO recognize that a State cannot claim jurisdictional immunity for physical harm inflicted on an individual on the territory of the forum.⁴⁹⁸ The U.S. Congress, on a later occasion, reaffirmed and extended the applicability of the tort exceptions in the so-called Antiterrorism and Effective Death Penalty Act to apply more generally the acts of terrorism as well.⁴⁹⁹

None of the cited legislations do, however, mention whether the exception applies to both private and sovereign acts of a State. Especially the jurisprudence of the U.S. American Courts draws a clear picture in this regard. In both the *Letelier* and *Liu* decisions, judges concluded that the political assassination committed on the territory of the U.S. falls within the territorial tort exception contained in § 1605 (a)(5) U.S. FSIA despite constituting a sovereign act of the State. Arguments of both defending States, that the exception would not apply to acts of sovereign power, were dismissed by the Courts which allowed both civil proceedings to continue.⁵⁰⁰ One additional case should briefly be mentioned in this perspective. In *Olsen and Sanchez v. Mexico*, the U.S. Court of Appeals for the 9th Circuit was asked to apply the tort exception involving a plane crash that occurred during a prisoner exchange program between the U.S. and Mexico.⁵⁰¹ The aircraft operated by the Mexican Government lost control during its descent to a San Diego military airport, killing all passengers on board. Family of the deceased, who were waiting nearby during the incident, brought civil proceedings in Californian Courts for the loss of their relatives. Mexico, with reference to its immunity, rejected the Court's jurisdiction over the matter as the "public/private

⁴⁹⁸ § 1605 (a)(5) U.S. FSIA, § 5 of UK SIA, § 7 Singaporean SIA, § 6 S. A. FSIA, § 6 of Canadian SIA, § 13 of Australian SIA, Section 5 of Israeli FSIL, Art. 2 of Argentina's Law No. 24'488 and Art. 10 Japanese ACJ.

⁴⁹⁹ See § 2 (II.1.a), p. 42 ff. and § 8 (II.3.c), p. 345 ff.

⁵⁰⁰ *Letelier v. Chile*, p. 671, *Helen Liu v. China*, p. 1426 ff.

⁵⁰¹ *Olsen and Sanchez v. Government of Mexico*, Judgment of the U.S. Court of Appeals for the 9th Circuit of 30.3.1984, 729 F.2d 641.

distinction applies not only to the U.S. FSIA generally, but specifically to section 1605(a)(5), the non-commercial torts exception to immunity⁵⁰². The Court disagreed. A systematic interpretation of the U.S. FSIA would suggest that the territorial tort exception was intended to apply to both *jure gestionis* and *jure imperii* acts alike. Failing to do so would make the provision superfluous, which Congress could not have intended.⁵⁰³ Mexico's plea of jurisdictional immunity was consequently rejected, and reparations ordered in favor of the plaintiffs.

Canadian Courts arrived at the same conclusions. While the private/sovereign dichotomy in the application of the territorial tort exception as contained in § 6 of Canadian SIA was initially rejected in *Jaffe v. Miller*⁵⁰⁴, the Canadian Supreme Court later reaffirmed the irrelevance of the nature test in *Schreiber v. Canada*:

The “personal injury” exception to immunity does not depend on the nature of the conduct underlying the claim. It is applicable to both *jure imperii* and *jure gestionis* acts. An alternate interpretation would deprive the victims of the worst breaches of basic rights of any possibility of redress in national courts, which would jeopardize potentially important progress in the protection of the rights of the person, at least in Canada.⁵⁰⁵

Although no case law has been reported so far, Australian legislation seems to go in the same direction. During the drafting process of the Australian State Immunity Act, more precisely its § 13, the Australian Law Reform Commission published a report on the progress of the legislation in which it clearly stated that the territorial tort exception “applies to all torts properly within the jurisdiction irrespective of whether they

⁵⁰² *Olsen and Sanchez v. Government of Mexico*, p. 645, see also YANG, *State Immunity in International Law*, p. 205 ff., CREMER, p. 148.

⁵⁰³ *Olsen and Sanchez v. Government of Mexico*, p. 645, see also APPELBAUM p. 120.

⁵⁰⁴ *Jaffe v. Miller*, see also *Walker v. Bank of New York Inc.*, Judgment of the Ontario Court of Appeals of 31.1.1994, (1994), 16 O.R. (3d) 504 (C.A.) and *United States of America v. Friedland*, also published in 120 ILR 417.

⁵⁰⁵ *Schreiber v. Canada*, para. 37.

originate in an act which might be describes as ‘sovereign’, ‘governmental’ or *jure imperii*.⁵⁰⁶

Nevertheless, one national development of States with a national immunity statute falls out of line. British Courts, in their appreciation of § 5 UK SIA, held that customary international law would bind British authorities to grant immunity in case torts were committed on British soil if acts in questions were qualified as *de jure imperii*. Both the House of Lords and the UK Court of Appeal analyzed the territorial tort exception in this perspective ordering that courts should only accept jurisdiction over territorial tort for private acts of a foreign State.⁵⁰⁷ The basic idea behind this immunity exception seems to be that only minor, accessory events, such as traffic accidents not in direct relation to exercise of sovereign power should be concerned, which is why the British Court continuously upheld the continued entitlement to immunity for (other) *acta jure imperii*.⁵⁰⁸

b. Practice of States without Immunity Legislation

Next to the already discussed *McElhinney* ruling rendered by the Irish Supreme court in favor of a continued application of the nature distinction in case territorial torts occur⁵⁰⁹, other case law of predominantly European civil law tradition should briefly be presented. These national courts could not rely on the interpretation of a national Statute, were consequently asked to directly apply and give meaning to codified and customary international law.

As mentioned, both Greek and Italian courts have contributed extensively to the case law in this perspective, defending its applicability to both private and sovereign acts of a State. This was most notably done in the *Ferrini* and *Distomo* decisions, where a

⁵⁰⁶ Report No. 24 on Foreign State Immunity of 30.6.1984, Australian Law Reform Commission, [1984] ALRC 24, para. 113.

⁵⁰⁷ *Littrell v. United States of America*, Judgment of the U.S. Court of Appeals of 12.11.1995, [1995] 1 Weekly Law Reports 82 also published in 100 ILR 438, *Holland v. Lampen-Wolfe*, Judgment of the UK House of Lords of 12.7.2000, 3 All ER 808 [2000] 1 Weekly Law Reports 1573 also published in 119 ILR 367.

⁵⁰⁸ *Propend v. Sing*, see also APPELBAUM, p. 122.

⁵⁰⁹ *McElhinney v. Williams*, see 104 ILR 691.

majority of judges of the Hellenic Supreme Court (*Areios Pagos*) and the Italian *Corte di Cassazione* defended the ILC's approach to the matter giving primacy to the location where bodily injuries occurred over the nature of the acts committed.⁵¹⁰ As a reminder⁵¹¹, the Italian jurisprudence was later found to be in violation of Germany's jurisdictional immunity by the ICJ. However, it was only criticized for its lack of consideration that crimes were committed by armed forces during an armed conflict and not because Italy had applied it to *de jure imperii* acts in general.⁵¹² In Greece, a Special Supreme Court was established and asked to reassess its position in the matter. In the *Margellos* ruling, by a six-to-five majority, the Court decided to overrule the *Areios Pagos* jurisprudence. However, the overturning only relates to activities of a foreign State's military forces and not in relation to other acts of *jure imperii*.⁵¹³

An adverse development could be observed in France. In both the *Bucheron* and the *Grosz* judgments, the French *Cour de Cassation* upheld Germany's entitlement to jurisdictional immunity for acts of forced deportation occurred on French territory during World War II.⁵¹⁴ It did so by exclusively considering the *de jure imperii* nature of the act with no specific reference to the territorial tort exception, giving some indication of the nature requirement applying to all circumstances before the court.

Lastly, Polish⁵¹⁵, Dutch⁵¹⁶, Belgian⁵¹⁷ as well as Slovenian⁵¹⁸ Courts did not assess jurisdiction over a State for crimes committed on their territory. Nevertheless, in all cases

⁵¹⁰ *Ferrini v. Germany*, Italian Court of Cassation, see 128 ILR 672, *Prefecture of Voiotia v. Germany*, Greek Supreme Court, p. 472 ff.

⁵¹¹ See § 2 (II.2.b), p. 51 ff.

⁵¹² *Germany v. Italy*, para. 78, FOAKES/O'KEEFE, p. 223.

⁵¹³ *Margellos v. Germany*, see 129 ILR 525, p. 532, see also SCHAARSCHMIDT, p. 16, STEGER, p. 62, APPELBAUM, p. 127.

⁵¹⁴ *Bucheron v. Germany*, Judgment of the French Court of Cassation of 16.12.2003, No. 02-45961, *Grosz v. Germany*, Judgment of the French Court of Cassation of 3.1.2006, No. 04-47504.

⁵¹⁵ *Natoniwski v. Germany*, Judgment of the Supreme Court of Poland of 29.10.2010, Polish Yearbook of international Law, Vol. 30, 2010, p. 299.

⁵¹⁶ *United States of America v. Eemshaven Port Authority*, Judgment of the Supreme Court of the Netherlands of 12.11.1999, Nederlandse Jurisprudentie, 2001, No. 567 translated in 127 ILR 225.

no considerations were given to whether the territorial tort would apply to *acta jure imperii* during peacetime.

The issue of torts committed by non-members of the military on the territory of another State continues to be a highly controversial matter. European Courts do not give a clear answer to this regard but seem to favor a continued application of the nature distinction in cases where territorial torts occurred. This conclusion is not supported by the North American as well as Australian practice which clearly include *acta jure imperii* within the territorial tort exception.

3. Legal Doctrine

As seen, an analysis over the legal text as well as the domestic and international jurisprudence in relation to the tort exception has left many questions unanswered. While the jurisprudence of the ECtHR tends to deny the applicability of the territorial tort exception to *acta jure imperii*, it does so against the practice of domestic courts of especially common law origin as well as against the rather clear indication of the drafters who codified the matter in international texts. Both the ICJ and most national courts are of no help in this matter and fail to deliver an answer to the question whether the territorial tort exception has gained customary international law status and whether it applies to sovereign acts performed during peacetime.

A clear majority of the legal doctrine seems to support the view that the territorial tort exception does apply to acts committed as an exercise of sovereign power.⁵¹⁹ The ILC's emphasis on the location of the acts instead of their nature is often cited to show that territorial tort exception created an exception to *jure imperii* as well as *jure gestionis*.

⁵¹⁷ *Botelberghe v. Germany*, Judgment of the Court of First Instance of Ghent of 18.2.2000, also published in 168 ILR 471.

⁵¹⁸ *A.A.Ž v. Germany*, Judgment of the Slovenian Constitutional Court of 8.3.2001, Up-13/99-24.

⁵¹⁹ YANG, *State Immunity in International Law*, p. 207, FOX/WEBB, p. 478, DAMIAN, p. 113, BLANKE/FALKENBERG, p. 1823, FOAKES/O'KEEFE, p. 223, KLOTH/BRUNNER, p. 225 f., BIANCHI, *Denying State immunity for Violation of Human Rights*, p. 217, PAECH, p. 74 f., CRAWFORD, *International Law and Foreign Sovereigns*, p. 111, SEEGER Martin, *Das Individualrecht auf Wiedergutmachung*, Münster, 2005, p. 246.

Among many voices raised in this discussion, the statement of former UN Special Rapporteur on State Immunity SUCHARITKUL should be cited:

[The territorial tort exception] is based on the *locus delicti commissi* and the eventual and justifiable exercise of such jurisdiction, even in respect of damage resulting from activities normally categorized as *acta jure imperii*. [...] The distinction between *jus imperii* and *jus gestionis*, or the two types of activities attributable to the State, appears to have little or no bearing in regard to this exception.⁵²⁰

This development is astonishing as it indicates that States have gone past the absolute protection of sovereign acts from the judicial interference of another State. State practice in this area is, however, far from being coherent. Some legal scholars deduct from the ICJ's silence on the matter an implicit acceptance that the territorial tort exception can be applied against *jure imperii* acts as well.⁵²¹ While this opinion convinces, it cannot be ignored that a significant skepticism towards exercising jurisdiction over sovereign acts of a foreign State continues. Especially the jurisprudence of the European Court of Human Rights adds to the uncertainty and severely hampers the development of the territorial tort exception as a part of customary international law. Nevertheless, one argument, most notably brought forward by the U.S. Court of Appeals in the *Olsen* judgment, convinces the most. Recognizing a tort exception only in relation to private acts of a State is illogical as it would add nothing of substance to the matter at hand. A systematic interpretation of the legal texts would consequently suggest that territorial tort exception must be read outside the traditional private/sovereign dichotomy and that the nature test therefore does not apply in this provision.⁵²²

⁵²⁰ Fifth Report on Jurisdictional Immunities of States and their Property by UN Special Rapporteur on Immunity of States Sompong SUCHARITKUL, Yearbook of the International Law Commission, Vol. II (Part One), 1983, para. 67, UN Doc. No. A/CN.4/363/Add.1.

⁵²¹ FOX/WEBB, p. 478, KRAJEWSKI Markus/SINGER Christopher, Should Judges Be Front-Runners?, The ICJ, State Immunity and the Protection of Fundamental Human Rights, Max Planck Yearbook of United Nations Law, Vol. 16, 2012, p. 19.

⁵²² *Olsen and Sanchez v. Government of Mexico*, p. 645, similar also APPELBAUM, p. 120.

The ICJ, as the most significant interpretation body in public international law, missed out on a rare opportunity to give guidance on the application of the territorial tort exception.⁵²³ With UNCSI yet to enter into force, the question of whether the territorial tort exception applies to States as part of customary international law remains inherently relevant. The ICJ's lack of reasoning puts domestic courts in an inherent dilemma. At least in relation to acts committed during peacetime, a national judge does not know if exercising jurisdiction over *jure imperii* crimes would violate the immunity of a foreign State.⁵²⁴ A court would consequently most likely favor the *in dubio pro immunitate* principle and deny jurisdiction over the matter leaving claimants without any real recourse of action. The author consequently believes that the ICJ, by not assessing all relevant legal issues brought before it, significantly endangers national and international justice and the implementation of the individual right to remedy and reparation.⁵²⁵ This even though, as Judge GAJA argues, all elements necessarily for the recognition of the customary status of the territorial tort exception are present.⁵²⁶

As described above, an exception for territorial tort litigation is contained in both UNCSI, ECSI and, with the exception of Pakistani legislation, in all national statutes implementing State immunity law. With the low ratification rates of the Immunity Conventions, State practice in that matter can be described as only moderate, which is why many authors cannot conclude that the territorial tort exception has gained customary international law status.⁵²⁷ Some scholars disagree and essentially put forward two points to justify a customary rule.

⁵²³ DICKINSON, Territorial Tort Exception, p. 151. FOAKES/O'KEEFE, p. 223, KREIKER, p. 109.

⁵²⁴ DICKINSON, Territorial Tort Exception, p. 161, FOX/WEBB, p. 480, NOLLKAEMPER André, International Adjudication of Global Public Goods: The Intersection of Substance and Procedure, European Journal of International Law, Vol. 23, 2012, p. 769.

⁵²⁵ Similar also the Canadian Supreme Court in *Schreiber v. Canada*, para. 37, see also HALL, UN Convention on State Immunity, p. 420.

⁵²⁶ *Germany v. Italy*, Dissenting opinion Judge GAJA, para. 9.

⁵²⁷ *McElhinney v. Ireland*, para. 27, SCHAARSCHMIDT, p. 17, HESS, Staatenimmunität bei Menschenrechtsverletzungen, p. 293, TOMUSCHAT Christian, Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law, in: Randelzhofer Albrecht/Tomuschat Christian (ed.) State Responsibility in Instances of Grave Violations of

First of all, the moderate ratification of the Immunity Conventions does not prevent customary international law from developing.⁵²⁸ This is best proven by the case law regarding the recognition of the customary character of the employment exception to the jurisdictional immunity. In *Cudak v. Lithuania*, the Grand Chamber of the ECtHR considered the defending State bound to the employment exception to State immunity law even though Lithuania was not a contracting party to UNCIS and has yet to ratify ECSI in this regard. The ILC had acknowledged in its drafting reports the emerging trend to deny jurisdictional immunities in employment disputes and no particular objections, not by the Lithuanian nor any other government delegation, could have been observed during the drafting process.⁵²⁹ The Court further stated that Lithuania did not vote against the inclusion of the clause in the UN Convention which the Court found sufficient indication to justify applying the employment exception to Lithuania as part of customary international law.⁵³⁰ In the eyes of the Grand Chamber as stated in *Cudak*, later reaffirmed in *Sabeh el Leil v. France*⁵³¹ and *Radunović v. Montenegro*⁵³², the drafting procedure of the UN Convention should be understood as a codification of customary practices in matters relating to the jurisdictional immunity of a State. A standard, when applied to the territorial tort provision in Art. 12 UNCIS, should likewise lead to a recognition of the customary character of the clause. On numerous occasions it was acknowledged by the ICJ that the drafting of multilateral conventions is a fundamental tool in recording and development of customary rules⁵³³, a fact that

Human Rights, The Hague, 1999, p. 315, DÖRR Oliver, Staatliche Immunität auf dem Rückzug?, Archiv des Völkerrechts, Vol. 41, 2003, p. 209.

⁵²⁸ DICKINSON, Territorial Tort Exception, p. 158, KLOTH/BRUNNER, p. 240.

⁵²⁹ *Cudak v. Lithuania*, para. 66.

⁵³⁰ *Ibid.*, para. 67, see also LÖRZ, p. 32.

⁵³¹ *Sabeh el Leil v. France*, para. 67, France had signed but not ratified UNCIS and was nevertheless considered bound to Art. 11 UNCIS.

⁵³² *Radunović v. Montenegro*, para. 81, Montenegro was neither signatory nor party to ECSI or UNCIS and was considered bound to Art. 11 UNCIS.

⁵³³ So i.e.: *Germany v. Italy*, para. 55 but also *Germany v. Denmark* and *Germany v. the Netherlands*, Case concerning the North Continental Shelf, Judgment of the ICJ of 20.2.1969, ICJ Reports 1969, p. 3 ff., para. 77, *Libya v. Malta*, Case concerning the Continental Shelf, Judgment of the ICJ of 3.6.1985, ICJ Reports 1985, p. 13 ff., para. 27.

deserves more consideration when assessing the customary character of the territorial tort exception.⁵³⁴

Secondly, within the assessment of State practice it must be distinguished between the recognition of a new customary international obligation and its partial demise. For the emergence of an exception to an existing international custom, other less stringent standards should apply.⁵³⁵ The almost exclusively German-speaking doctrine in this regard often refers to the *Heizungsreparatur* case of the German Constitutional Court. There, so according to these scholars, the Court considered it sufficient that a “significant practice” of States was recognizable that the customary rule should not be applied to a certain situation anymore instead of the usual “generally accepted” practice and recognized a new customary exception to the jurisdictional immunity of a foreign State based on the commercial activity of the latter.⁵³⁶

In the territorial tort context this would mean that a State should not be penalized for actions taken against the jurisdictional immunity of another State which public international law does not specifically prohibit anymore.⁵³⁷ From the moment when States have abandoned the *opinio juris* of a customary rule (partially or entirely), no violation of law occurs anymore.⁵³⁸ As shown by the ICJ’s silence on the matter, no clear prohibition to exercise jurisdiction over territorial torts can be identified even if *acta jure imperii* have led to bodily injuries on the territory of the forum during peace time. This is justified by the significant practice of especially Northern American, Australian and, to a much lower extent, European States in this matter.

⁵³⁴ DICKINSON, Territorial Tort Exception, p. 161, KLOTH/BRUNNER, p. 240.

⁵³⁵ Most notably CREMER, p. 150 ff. but also APPELBAUM, p. 132 f., KLOTH/BRUNNER, p. 238 f., SCHREUER, p. 45, DICKINSON, Territorial Tort Exception, p. 162.

⁵³⁶ *In re Empire of Iran*, p. 36, CREMER, p. 153, DICKINSON, Territorial Tort Exception, p. 162, RESS Georg, Entwicklungstendenzen in der Immunität ausländischer Staaten, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 40, 1980, p. 227, Similar argues by VAN ALEBEEK Rosanne, Jurisdictional Immunities of the State (Germany v. Italy): On Right Outcomes and Wrong Terms, *German Yearbook of International Law*, Vol. 55, 2012, p. 295.

⁵³⁷ *Germany v. Italy*, Dissenting opinion Judge GAJA, para. 9, *Germany v. Italy*, Dissenting opinion Judge YUSUF, para. 47, DICKINSON, Territorial Tort Exception, p. 163.

⁵³⁸ CREMER, p. 153 f.

Applying this standard to the territorial tort issue would lead to a recognition of a customary international exception to the jurisdictional immunity of State applicable to *acta jure imperii* not committed by armed forces. Nevertheless, it is unclear whether this solution withstands outside the German context. Public international law seems to apply a higher threshold for the partial disappearance of a customary norm.⁵³⁹ The author does not attempt to resolve this complicated and fundamental issue of international law in the present thesis but rather opts for concluding that the customary international law status of the territorial tort exception for *acta jure imperii* is a highly controversial matter. Judge YUSUF seems to agree and simply states:

[P]ractice clearly attests to the fact that the scope and extent of State immunity, particularly in the area of violations of human rights and humanitarian law, which is currently characterized by conflicting decisions of national courts in its interpretation and application, remains an uncertain and unsettled area of international custom, whose contours are ill-defined.⁵⁴⁰

Assuming for one instance that torture can be considered a sovereign act of a State⁵⁴¹, it is not clear whether a national court may exercise jurisdiction over a foreign State for torture committed on its territory without violating State immunity law. The author concludes that the territorial tort exception is an emerging norm and applicable to both private and sovereign acts of a State, is however, unable to conclude whether it has gained customary status. As UNCSI has yet to enter into force, only the eight European States that have already ratified ECSI could potentially apply the exception on a treaty law basis. States must then, however, rely on the majority of the legal doctrine considering Art. 11 ECSI applicable to both *acta jure imperii* and *acta jure gestionis* acts and not on the Explanatory Report to the Convention. Keeping in mind that violations must occur in the forum, only a minimal number of victims of torture

⁵³⁹ CREMER, p. 151 f., APPELBAUM, p. 134, VAN ALEBEEK, Jurisdictional Immunities of the State, p. 295.

⁵⁴⁰ *Germany v. Italy*, Dissenting opinion Judge YUSUF, para. 26.

⁵⁴¹ Whether or not this is the case was analyzed in a previous chapter § 4 (II), p. 85 ff.

could potentially rely on the territorial tort exception to bring civil proceeding against a foreign State.

II. Territorial Torts committed by Members of the Military

When torts are committed by armed forces on the territory of the forum the legal situation changes quite drastically. Art. 31 ECSI specifically precludes the European Convention to apply in the situation of military personnel present on the territory of another State or acts committed during an armed conflict. The Explanatory Reports to the Convention unmistakably confirms this outcome as:

The Convention is not intended to govern situations which may arise in the event of armed conflict; nor can it be invoked to resolve problems which may arise between allied States as a result of the stationing of forces.⁵⁴²

The United Nations Convention does not contain a similar provision and is silent on the matter. As emphasized by the ILC, however, military activities are excluded from the material scope of Art. 12 UNCSI and should not apply to situations of armed conflict.⁵⁴³ The issue was already relentlessly discussed before the drafting process even began, which is why the Chairman of the *ad hoc* Committee on Jurisdictional Immunities, GERHARD HAFNER, recommended not to include the activities of members of the military in the Convention in his report to the UN General Assembly.⁵⁴⁴ Both Norway and Sweden, nevertheless, felt the need to reaffirm their position in this perspective before ratifying the Convention via submitting reservations to Art. 12 UNCSI in this regard.⁵⁴⁵

⁵⁴² Explanatory Report to ECSI, para. 116.

⁵⁴³ ILC Commentary to Art. 12 UNCSI, para. 10.

⁵⁴⁴ Report of the Chairman of the *ad hoc* Committee on Jurisdictional Immunities of States and Their Property Gerhard HAFNER to the UN General Assembly, Record of the 6th Committee of the 13th Meeting on 25.10.2004, UN Doc. No. A/C.6/59/SR.13, para. 36.

⁵⁴⁵ United Nations Treaty Collection, List of relevant Declarations and Reservations to the UN Convention on Jurisdictional Immunity of States and Their Property,

The trend not to apply the territorial tort exception to military actions can further be observed on a national level. Next to the European jurisprudence described above showing a rather homogenous practice in this regard⁵⁴⁶, both the British and Singaporean State Immunity Acts contain provisions excluding the immunity of visiting forces from the application of the Statute.⁵⁴⁷

Germany essentially brought this development to the attention of the International Court of Justice in the proceeding against Italy. Even if a customary international basis existed that would allow Italy to exercise jurisdiction over acts committed on its territory, State practice clearly shows that military actions would be exempt from the application of the territorial tort exception.⁵⁴⁸ The ICJ agreed and rejected Italy's argument that Art. 31 ECSI simply consisted of a savings clause that did not prevent member States from taking further actions.⁵⁴⁹ Especially the practices established through national judicial decisions predominantly suggest that a State is entitled to jurisdictional immunity in civil matters for acts resulting in the death or personal injury of an individual committed by the armed forces of another State or any State organ in the conduct of an armed conflict.⁵⁵⁰ In their individual separate (concurring) opinions to the case, both Judges KEITH and KOROMA justify this conclusion as:

Acts committed in the course of armed conflict between States, are, [...], of a markedly different kind. They are acts at the international, inter-State level, of a sovereign nature relating to the implementation of foreign, security and defence policies of the defendant State. [...] Claims in respect of war damages and losses against former belligerents are in

https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=_en [last accessed: 20.6.2018].

⁵⁴⁶ See § 5 (1.2.b), p. 124 ff.

⁵⁴⁷ § 16 (2) UK SIA and § 19 (2a) Singaporean SIA.

⁵⁴⁸ *Germany v. Italy*, German Memorial, para. 71, *Germany v. Italy*, German Reply, para. 53.

⁵⁴⁹ *Germany v. Italy*, Italian Counter-Memorial, para. 4.37 ff., *Germany v. Italy*, Italian Rejoinder, para. 4.6 f.

⁵⁵⁰ *Germany v. Italy*, para. 77.

practice dealt with by inter-State negotiations [...] often on a reciprocal basis and not by way of individual claims.⁵⁵¹

It is correct that violations of law leading to bodily injuries of a person are much more likely to occur during an armed conflict. The flood of litigation caused by individual civil claims would significantly hamper bilateral relations and endanger international peace and collaboration.⁵⁵²

Some scholars, nevertheless, highlight the inconsistency of this solution within the international legal order. Especially Judge GAJA, who struggles with the need to differentiate between acts of armed forces and acts of other State representatives for immunities to apply. As emphasized by the ICJ, the question whether a State is entitled to immunity does not affect its responsibility of the State for breaches of international law.⁵⁵³ A State would therefore be liable under Art. 41 (3) ARSIWA regardless of who was responsible for the actions. A distinction based on the number of victims or the circumstances such as an armed conflict is irrational from this legal point of view.⁵⁵⁴ HIGGINS, in her assessment over the development of the principle of sovereign equality in international law, describes the territorial tort exception as one indication that the principle of territoriality outweighs the equality of States concept.⁵⁵⁵ This can be observed throughout current State immunity law and is only hampered by the military activity counter-exception in territorial torts.

This situation has to be seen as curious and in the view of this writer is unlikely to stand the test of time. It is inherently anomalous that the exercise of territorial jurisdiction prevails over immunity where torts

⁵⁵¹ *Germany v. Italy*, Separate opinion of Judge KEITH, para. 15 and 18, similar also *Germany v. Italy*, Separate opinion of Judge KOROMA, para. 6, see also DICKINSON, Territorial Tort Exception, p. 152.

⁵⁵² *Germany v. Italy*, German Reply, para. 53 supported by SCHAARSCHMIDT, p. 19, STEGER, p. 69, APPELBAUM, p. 131, STAMMLER, p. 333, for a comprehensive assessment over the flood gate argument see § 8 (II.3), p. 334 ff.

⁵⁵³ *Germany v. Italy*, para. 100.

⁵⁵⁴ *Germany v. Italy*, Dissenting opinion Judge GAJA, para. 9 f., see also HALL, UN Convention on State Immunity, p. 424.

⁵⁵⁵ HIGGINS, Equality of States and Immunity from Suit, p. 134.

are concerned, but not where criminal acts of a foreign military are concerned. There will surely be more to this legal story in the years to come.⁵⁵⁶

In addition, taking the *McElhinney* case as an example, whether the United Kingdom enjoyed immunity in this matter would essentially depend on the status of the actor of the violation, *in casu* the border protection personnel. If a State would delegate border control responsibilities to the civil police forces instead of the military, this national administrative decision would be the decisive element to determine whether the State would enjoy jurisdictional immunity on an international level.⁵⁵⁷ The author doubts whether drafters of the national constitution are aware of this fact when regulating the distribution of tasks on a national level.

Also, some authors argue that a systematic, literal and teleological interpretation of the UN Convention would not suggest that a distinction between war and peace time is necessary for the application of Art. 12 UNCSI. References to the drafting history and the opinion of the Chairman of the *ad hoc* Committee should be rejected as the historical interpretation method has only subsidiary, auxiliary character in accordance with Art. 32 VCLT.⁵⁵⁸ This line of reasoning, however fails to include that State practice in the application of the Convention is indeed a primary method of treaty interpretation⁵⁵⁹ which clearly denies the tort exception from being applicable to acts of armed forces.

As supported by the majority of the legal doctrine as a legitimate conclusion, one of the main statements of the ICJ in the *Jurisdictional Immunities* case is that armed forces cannot be held liable for violations of law that caused death or physical injury

⁵⁵⁶ Ibid., p. 138 f.

⁵⁵⁷ YANG, *State Immunity in International Law*, p. 214 f.

⁵⁵⁸ DICKINSON Andrew, *Status of Forces under the UN Convention on State Immunity*, *International and Comparative Law Quarterly*, Vol. 55/2, 2006, p. 431 f., supported by HALL, *UN Convention on State Immunity*, p. 422 f.

⁵⁵⁹ Art. 31 (3b) VCLT.

of individuals in the forum where violations had been committed.⁵⁶⁰ A territorial tort exception, if indeed recognized to cover both private and sovereign acts of a State, would consequently only be relevant for acts committed by State officials not in relation to the military of a foreign State, a fact that significantly reduces its relevance in practice.

III. Conclusions

A State may not rely on its jurisdictional immunity for acts or omissions that caused bodily injuries, other physical harm or the death of an individual if violations occurred on the forum where proceedings are introduced. While this provision does not distinguish between the nationality of the claimant and initially appears relevant for the introduction of civil claims by victims of torture, a detailed assessment over the matter shows a different picture.

First of all, only acts committed in the forum by a foreign official present on the same territory falls under the scope of the provision. It excludes any transboundary or trans-frontier damaging acts, a fact that cannot be circumvented by arguing that the rehabilitation process for the injury or that the mental distress and suffering of family members took place on the territory of the forum.

Secondly, and more importantly, both the customary law character as well as its applicability to *acta jure imperii* are highly controversial. While both the ICJ as well as the domestic jurisprudence in this regard are inconclusive, the case law of the European Court of Human Rights goes against the common law practice in this perspective as well as the opinion of drafters of the Immunity Conventions. The author joins the majority of the legal doctrine and concludes that the territorial tort exception is applicable to both *acta jure gestionis* as well as *acta jure imperii* is, however, unable to determine whether the territorial tort exception has gained customary international law status. With ECSI only in force in eight countries, only a marginal number of

⁵⁶⁰ FOX/WEBB, p. 468 and 481, FOAKES/O'KEEFE, p. 223, DAMIAN, p. 113, VAN ALEBEEK, Jurisdictional Immunities of States, p. 313 f., KLOTH/BRUNNER, p. 226, STEGER, p. 73, SCHAARSCHMIDT, p. 18, STAMMLER, p. 228, APPELBAUM, p. 131, SALOMON, p. 65, BLANKE/FALKENBERG, p. 1824, KRAJEWSKI/SINGER, p. 20.

occasion could be considered in which the territorial tort exception might apply on the basis of treaty law. In any case, even if such a situation occurred, it would not cover acts committed by a foreign military or violations occurring during an armed conflict significantly reducing the relevance of this exception in practice.

The territorial tort exception to State immunity law is meaningful nonetheless. At least in the opinion of the majority of legal scholars, State immunity law has gone past the sacrosanct private/sovereign dichotomy and a partial demise of the absolute protection of *acta jure imperii* has been initiated.

PART III: POTENTIALLY CONFLICTING INTERNATIONAL OBLIGATIONS

As discovered in Part II of this study, with the limited exception of situations described in § 5, international law does not allow for torture to fall under one of the existing exceptions to the jurisdictional immunity of a State. Part III, as the most extensive part of this thesis, considers a variety of legal obligations and concepts that may enter in conflict with the ongoing duty to accept the jurisdictional plea of a foreign State in a national civil proceeding in case torture was committed. First of all, § 6 discusses a number of aspects which are in direct relation to the peremptory character of the prohibition of torture. Further, the exclusion of a person from accessing the justice system should be put to a test on its compatibility with the individual's right to access to court (§ 7). Lastly, the effective implementation of the internationally recognized right to remedy and reparation is severely hampered by jurisdictional immunities of a State. § 8 will most notably analyze whether issues arise in relation to provisions contained in the United Nations Convention against Torture specifically in Art. 5 and 14.

§ 6 *Jus cogens* Violations

In the following chapter the main focus should be given to the relationship between the plea of State immunity and the international obligations characterized as “*jus cogens*”. Can a foreign State continue to validly invoke its jurisdictional immunity when the allegations brought against it constitute a violation of the most fundamental values of the international community? During the drafting process of the UN Convention on Jurisdictional Immunities, the ILC Working Group identified the issue of “existence or non-existence of jurisdictional immunity in actions arising, *inter alia*, out of violations of *jus cogens* norm”⁵⁶¹ as one key aspect of concern. Later the Working

⁵⁶¹ Annex to the Report of the International Law Commission on the Work of its Fifty-First Session of 23.7.1999, UN Doc. No. A/54/10, Yearbook of the International Law Commission 1999, Vol. II (Part Two), para. 4.

Group, however, announced that it would not include the issue in the further development of the Convention as it “did not seem to be ripe enough for the Working Group to engage in a codification exercise over it.”⁵⁶² To this day, domestic and international jurisprudence as well as legal scholars are unable to agree on a solution to this problem.

After an introduction into the concept and nature of *jus cogens* provisions, chapter I will discuss whether the prohibition of torture qualifies as a peremptory norm within the meaning of Art. 53 VCLT. Chapters II to IV will then analyzing a number of substantive arguments raised against the continued immunity of States for acts in violation of peremptory norms, such as the hierarchy and coherence arguments (chapter II), arguments based on the obligations contained in the Draft Articles of the Responsibility of States for Internationally Wrongful Acts (chapter III), and arguments in relation to the forfeiture of sovereign rights as a general principle of international law (chapter IV). A comprehensive synthesis of the findings (chapter V) will conclude the *jus cogens* section of this thesis.

I. Torture and *jus cogens* Obligations

1. The Nature of *jus cogens* Norms

Peremptory norms, also known as *jus cogens* obligations, are generally defined as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”⁵⁶³. Examples of *jus cogens* norms include the prohibition of genocide, protection of individuals against slavery and racial discrimination as well as the prohibition of crimes against humanity.⁵⁶⁴ With the specific example of genocide, codified by the 1948 UN Conven-

⁵⁶² Ibid. para. 9.

⁵⁶³ Art. 53 VCLT.

⁵⁶⁴ ILC Commentary to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2001, Vol. II (Two), p. 85 (cited: ILC ARSIWA Commentary), citing the ICJ jurisprudence: *Portugal v. Australia*, Case concerning East

tion against Genocide⁵⁶⁵, any international treaty under which two or more States would agree to commit or assist the commission of genocide would be considered null and void *ab initio* in accordance with Art. 53 VCLT.

The *jus cogens* rule seeks primarily to prevent genocide. The international legal order does not recognize as valid any legal instrument that would promote, facilitate or condone the commission of genocide.⁵⁶⁶

While certain authors argue that peremptory norms are an exclusive tool for the interpretation and application of treaties⁵⁶⁷, the concept of *jus cogens* has nonetheless been designated as effecting international law beyond treaty law and has since been applied as customary international law in other areas of international and national law.⁵⁶⁸ Before the emergence of peremptory norms, the different rules adopted through the international normative procedure were considered equal in rank and status.⁵⁶⁹

The reason for this state of affairs is that States did not intend to place limitations on their sovereign powers that they had not expressly or implicitly accepted. Therefore, even if the custom-creating process was general in nature and brought about rules binding on the whole international community, such rules could not override a contrary treaty en-

Timor, Judgment of 30.6.1995, ICJ Reports 1995, p. 90 ff., *Legality of the Treat to use Nuclear Weapons*, Advisory Opinion of the ICJ of 8.7.1996, ICJ Reports 1996, p. 226 ff., p. 257.

⁵⁶⁵ Convention on the Prevention and Punishment of the Crime of Genocide signed in Paris on 9.12.1948, approved and proposed by the UNGA Resolution 260 a (III), 78 UNTS 277 (cited: Genocide Convention).

⁵⁶⁶ *Germany v. Italy*, German Memorial, para. 86.

⁵⁶⁷ SCHAARSCHMIDT, p. 22 f., YANG, State immunity in International Law, p. 430, HANNIKAIEN Laurie, Peremptory Norms (Jus cogens) in International Law: Historical Development, Criteria, Present Status, Helsinki, 1988, p. 293 ff.

⁵⁶⁸ ORAKHELASHVILI Alexander, Peremptory Norms in International Law, Oxford, 2012, p. 423, CASSESE, International Law, p. 205, *Prosecutor v. Furunžija*, para. 154, APPELBAUM, p. 258, BERKSY/MERVA/ROTH-ARRIAZA, p. 388.

⁵⁶⁹ CASSESE, International Law, p. 198.

tered into by two or more States in derogation from the customary rule.⁵⁷⁰

This lack of hierarchy was only reversed with the adoption of the concept of *jus cogens*. States agreed that certain “peremptory norms” should be designed to uphold the most fundamental and superior values in the international legal order.⁵⁷¹ Those rules should enjoy a higher rank as they represented the “ethical minimum recognized by all States of the international community.”⁵⁷²

By postulating a hierarchy of rules, rather than sources, on the basis of their content and underlying values, *jus cogens* has made its way into the system. The unprecedented character of a normative category expressly conceived to accord priority to certain rules to the detriment of others broke away from the traditional principle of mutual flexibility between the sources, where treaty and customary law rules could derogate from one another.⁵⁷³

By doing so, States deliberately renounced parts of their sovereign power for the protection of common interests, rather than aiming for self-centered objectives. Modern public international law has gone beyond a simple network of bilateral and multilateral treaties to include public policies and greater moral goals. This belief of an international public order, whose purpose it is to protect common values and to serve moral and ethical minimum standards, is clearly materialized in the concept of peremptory norms. In the words of the ICJ:

In such a convention [against genocide] the contracting States do not have any interests of their own, they merely have, one and all, a com-

⁵⁷⁰ Ibid.

⁵⁷¹ SHAW, p. 88 f., BERKSY/MERVA/ROTH-ARRIAZA, p. 389.

⁵⁷² VON VERDROSS Alfred, Forbidden Treaties in International Law, American Journal of International Law, Vol. 31, 1937, p. 574.

⁵⁷³ BIANCHI, Denying State Immunity for Violations of Human Rights, p. 494 f.

mon interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the Convention.⁵⁷⁴

An infringement of peremptory obligations was considered “so essential for the protection of fundamental interests of the international community that [their] breach is recognized as a crime by that community as a whole.”⁵⁷⁵ Violating *jus cogens* norms does, however, not only entail the State’s liability under Chapter III of Draft Articles on the Responsibility of the State but also leads to the individual criminal responsibility of the perpetrator on international level. Furthermore, the extension of any State’s jurisdiction for violation committed extraterritorially is justified by the sanctity of these norms and the interest of the community to prosecute their violations.⁵⁷⁶ States are therefore free to criminally prosecute violators of peremptory norms in their national court, regardless of where the act was committed.

Other than the legal consequences of a *jus cogens* violation, the moral effect that peremptory norms exercise on States is more relevant for its practical implementation. CASSESE believes that the primary purpose of the *jus cogens* concept is to give a diplomatic and psychological motivation not to adopt a behavior that the rest of the community considers a violation of fundamental norms.⁵⁷⁷ *Jus cogens* norms are therefore more compelling to a State before a violation has been committed. The enhanced protection of those rules should create a “chilling effect” that should eventually lead to the abstention of the infringing behavior once and for all. Actions taken to prevent the violations of peremptory norms should therefore be considered as serving its main purpose of the provision and should receive special recognition for serving a higher purpose.

⁵⁷⁴ Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of the ICJ of 28.5.1951, ICJ Reports 1951, p. 23 ff.

⁵⁷⁵ UN Special Rapporteur Robert AGO proposed Art. 19 (2) ARSIWA in the Yearbook of the International Law Commission, Vol. II (Part Two), 1976, p. 119.

⁵⁷⁶ *Prosecutor v. Furudžija*, para. 156, CASSESE, International Law, p. 208.

⁵⁷⁷ CASSESE, International Law, p. 202 f.

2. The Prohibition of Torture as a *jus cogens* Norm

The question of whether the prohibition of torture constitutes a *jus cogens* obligation seems to be a resolved issue. Although not listed in the International Law Commission's commentary to Art. 53 VCLT, the ILC mentions acts of torture as one violation that would entail the responsibility of States for breaches of peremptory norms⁵⁷⁸ (Art. 41 ARSIWA) and was recognized under Art. 26 ARSIWA as one obligation to be respected in compliance with peremptory norms.⁵⁷⁹ On several occasions, both national and international courts argued in favor of a peremptory status of the prohibition of torture.⁵⁸⁰ The Swiss Federal Court was among the first national courts to decide that the torture provision consisted of a *jus cogens* obligation as early as 1983.⁵⁸¹ The U.S. Court of Appeals held in *Sidermann de Blake v. Argentina* that:

“in light of the unanimous views of these authoritative voices, it would be unthinkable to conclude other than that acts of official torture violate customary international law. And while not all customary international law carries with it the force of a *jus cogens* norm, the prohibition against official torture has attained that status.”⁵⁸²

Torture should enjoy the highest status in international law and invalidate all other rules not having the same character⁵⁸³, an opinion equally shared by the UK House of Lords in *Pinochet (No. 3)*⁵⁸⁴.

On the international level, two court decisions are most often cited to recognize and promote torture as a *jus cogens* norm. On one hand, the ICTY, in the case of *Prosecutor v. Furundžija*, clearly stated:

⁵⁷⁸ ILC ARSIWA Commentaries, p. 113.

⁵⁷⁹ Ibid. p. 85.

⁵⁸⁰ *Al-Adsani v. Government of Kuwait et al. (No. 2)*, see 107 ILR 540 f., *Filártiga v. Peña-Irala*, Judgment of the United States Court of Appeals for the 2nd Circuit of 30.6.1980, 630 F.2d 876.

⁵⁸¹ *Sener v. Ministère public de la Confédération et Département fédéral de la justice et police*, p. 72.

⁵⁸² *Siderman de Blake v. Argentina*, para. 717.

⁵⁸³ *Prosecutor v. Furundžija*, para. 153 f.

⁵⁸⁴ *Ex parte Pinochet (No. 3)*, see 119 ILR 175.

The *jus cogens* nature of the prohibition against torture [...] is designed to produce a deterrent effect, in that it signals to all members of the international community [...] that the prohibition of torture is an absolute value from which nobody must deviate.⁵⁸⁵

Secondly, the International Court of Justice followed this opinion in *Belgium v. Senegal*, concerning the systematic use of torture as a political tool by former Chadian dictator Hissène Habré.⁵⁸⁶

Next to the peremptory character, the prohibition of torture is qualified as an absolute obligation. The absolute character of the prohibition of torture prevents a State from conducting any balancing of interests irrespective of the conduct of the person concerned or the values at stake. A State is not allowed to resort to acts of torture even during public emergencies threatening the life of a nation such as war, internal political instabilities, terrorism, or natural catastrophes.⁵⁸⁷ Germany was, for example, held responsible for a violation of Art. 3 ECHR for having threatened a child-kidnapper with torture in order to save an 11-year-old boy's life from certain death.⁵⁸⁸ In this case, the Grand Chamber of the ECtHR had recognized that every person had a right not to be subjected to torture because of its inherent link to the individual's human dignity.⁵⁸⁹ In addition, other regional human rights bodies stressed the importance of the absolute character of torture. The Inter-American Court of Human Rights found several violations of Art. 5 ACHR with regard to Peru's practice to use torture as a mean to combat terrorism:

Any use of force that is not strictly necessary to ensure proper behavior on the part of the detainee constitutes an assault on the dignity of the person, in violation of Article 5 of the American Convention. The exigencies of the investigation and the undeniable difficulties encountered

⁵⁸⁵ *Prosecutor v. Furunžija*, para. 155.

⁵⁸⁶ *Belgium v. Senegal*, p. 422.

⁵⁸⁷ Art. 2 (2) CAT.

⁵⁸⁸ *Gäfgen v. Germany*, Judgment of the ECtHR [GC] of 1.6.2010, No. 22978/05.

⁵⁸⁹ *Ibid.*, para. 120.

in the anti-terrorist struggle must not be allowed to restrict the protection of a person's right to physical integrity.⁵⁹⁰

In 2014, the U.S. Senate published a report on the CIA's use of torture in the fight against international terrorism.⁵⁹¹ In a previously top-secret document, the detention and interrogation programs used against suspects of terrorism were explained in a detailed manner. The report, first of all, confirmed that CIA used torture as a method of interrogation, and secondly, that "the CIA's use of its enhanced interrogation techniques was not an effective means of acquiring intelligence or gaining cooperation from detainees."⁵⁹²

From a more philosophical point of view, MAYERFELD defends the absolute character of the prohibition of torture.⁵⁹³ On one hand the weighing of interests against acts of torture would implicate a desensitization of the torturous acts. Who would be qualified to rank the culpability of the acts committed that would justify resorting to torture? The abstraction necessary for such a call would necessarily imply objectification of fundamental societal values.

The problem is that real-life complexities are not brought back into consideration. People confuse the abstract example with the real world. The reasoning about torture may be distorted by the volatile emotions of fear and anger.⁵⁹⁴

Secondly, MAYERFELD argues that the "ticking-time-bomb-scenario" often used to justify torture for the accomplishments of greater goods is unrealistic.⁵⁹⁵ Even if such a

⁵⁹⁰ *Loayza Tamayo v. Peru*, Judgment of the Inter-American Court of Human Rights (IACtHR) of 17.9.1997, Series C No. 33, para. 57, *Cantoral Benavides v. Peru*, Judgment of the IACtHR of 18.8.2000, Series C No. 69, para. 96.

⁵⁹¹ Report of Committee Study of the U.S. Central Intelligence Agency's Detention and Interrogation Program, published by U.S. Senate on 9.12.2014, 113th Congress, 2nd Session, S. Report 113-288.

⁵⁹² Ibid. p. 11.

⁵⁹³ MAYERFELD Jamie, In Defense of the Absolute Prohibition of Torture, Public Affairs Quarterly, University of Washington, Volume 22/2, 2008.

⁵⁹⁴ MAYERFELD, p. 113.

⁵⁹⁵ Ibid., p. 114 ff.

situation was to occur, authorizing torture would still be fundamentally wrong from a humanity point of view and cannot be authorized without causing the wider (unlawful) use of torture. This opinion convinces insofar as clear parallels exist to the complex issues discussed by the German Constitutional Court in the *Luftsicherheitsgesetz case*⁵⁹⁶. The Court decided that a law that would authorize to shoot down a hijacked plane, intended to be used as a weapon of mass destruction, violates the German Constitution and human dignity of the passengers. The decision emphasized that it would be impossible to set up a safeguard mechanism that is sufficiently clear and detailed and sufficiently fast to be of practical use. In addition, the values sacrificed, such as human dignity and a minimal level of humanity, would be incompatible with the structure of a democratic society.⁵⁹⁷ The same should be concluded for authorizing acts of torture. It is unimaginable that a system can be created that contains all the necessary safeguard mechanisms to ensure that acts of torture would only be available in extreme situations, while at the same time be of practical use. A justified use of torture consequently does not seem to be compatible with standards of rule of law in a democratic society.

II. The Hierarchy Argument

One of the most discussed arguments against granting State immunity in national proceedings consists of the dilemma when a jurisdictional bar prevents the analysis over an alleged violation of a *jus cogens* provision. Because of its higher hierarchical position, preemptory norms should take primacy over State immunity claims. This reasoning was most prominently brought forward by several national courts to deny functional immunity of State officials from criminal proceedings⁵⁹⁸, as well as the Italian *Corte di Cassazione* for denying Germany's civil immunity in the *Ferrini*

⁵⁹⁶ *Luftsicherheitsgesetz case*, Judgment of the German Constitutional Court of 15.2.2006, No. 1 BvR 357/05.

⁵⁹⁷ *Ibid.*, para. 128 ff.

⁵⁹⁸ See HERNÁNDEZ Fifth report, p. 50 refers to *Lozano v. Italy*, Judgment of the Italian Court of Cassation of 24.7.2008, ILDC 1085 IT 2008, para. 6, *A v. Office of the Public Prosecutor of the Confederation*, Judgment of the Federal Criminal Court of Switzerland of 25.7.2012, BB.2011.140.

judgement. In section 9 of the latter decision, the Court argued that the German army committed horrendous acts of international crimes that constituted a serious violation of fundamental human rights, which “are protected by norms from which no derogation is permitted, which lie at the heart of the international order and prevail over all other conventional and customary norms, including those which relate to State immunity.”⁵⁹⁹ It continued:

There is no doubt that a contradiction between two equally binding legal norms ought to be resolved by giving precedence to the norm with the highest status. [...] [The priority status] which, in respect of particularly serious criminal activities, now attaches to the protection of fundamental human rights over and above the protection of State interests through the recognition of immunity from foreign jurisdiction.⁶⁰⁰

Another important stand against granting immunity for *jus cogens* violations was taken by judges ROZAKIS and CAFLISCH, joined by four other judges in their dissenting opinion to the ECtHR case of *Al-Adsani v. the United Kingdom*:

Due to the interplay of the *jus cogens* rule on prohibition of torture and the rules on State immunity, the procedural bar of State immunity is automatically lifted, because those rules, as they conflict with a hierarchically higher rule, do not produce any legal effect. In the same vein, national law which is designated to give domestic effect to the international rules on State immunity cannot be invoked as creating a jurisdictional bar, but must be interpreted in accordance with and in the light of the imperative precepts of *jus cogens*.⁶⁰¹

While the hierarchy argument appears to be a straightforward way to resolve the *jus cogens* issue in immunity law, it does not reflect current State practice. An overwhelming majority of national courts have delivered judgements excluding a *jus co-*

⁵⁹⁹ *Ferrini v. Germany*, Italian Court of Cassation, p. 668.

⁶⁰⁰ *Ibid.* p. 673.

⁶⁰¹ *Al-Adsani v. the United Kingdom*, Joint dissenting opinion of Judges ROZAKIS and CAFLISCH, joined by Judges WILDHABER, COSTA, CABRAL BARRETO and VAJIĆ, para. 3.

gens exception to State immunity, so for example the U.S. courts in *Hugo Princz v. Germany*. While the District Court of Columbia had initially lifted Germany's immunity with regard to violations of peremptory norms⁶⁰², the Court of Appeals later reversed the judgment giving full effect to Germany's immunity.⁶⁰³ U.S. jurisprudence continuously emphasized the clear separation of power between the legislative branch and the judiciary when discussing the topic at hand.⁶⁰⁴

[I]f violations of *jus cogens* committed outside the United States are to be exceptions to immunity, Congress must make them so. The fact that there has been a violation of *jus cogens* does not confer jurisdiction under the FSIA.⁶⁰⁵

Similar decisions were taken by courts in the United Kingdom⁶⁰⁶, Canada⁶⁰⁷, Poland⁶⁰⁸, Slovenia⁶⁰⁹, Australia⁶¹⁰ and New Zealand⁶¹¹. More international and regional courts seem to agree. In *Kalogeropoulou v. Greece and Germany* and *Jones v. the United Kingdom*, the ECtHR reaffirmed the *Al-Adsani* precedent for granting immunity to States responsible for violations of peremptory norms.⁶¹² Later, the ICJ held Italy liable for violating the jurisdictional immunity of Germany by specifically endorsing the continued concept of State immunity for *jus cogens* violations.⁶¹³

⁶⁰² See *Hugo Princz v. Germany*, District Court of Appeals.

⁶⁰³ See *Hugo Princz v. Germany*, U.S. Court of Appeals.

⁶⁰⁴ BERKSY/MERVA/ROHT-ARRIAZA, p. 368 ff.

⁶⁰⁵ *Siderman de Blake v. Argentina*, para. 719.

⁶⁰⁶ See *Jones v. Saudi Arabia*, House of Lords.

⁶⁰⁷ See *Bouzari v. Iran*.

⁶⁰⁸ *Natoniwski v. Germany*, Judgment of the Supreme Court of Poland, Polish Yearbook of international Law, Vol. 30, 2010, p. 299.

⁶⁰⁹ See *A.A.Ž v. Germany*.

⁶¹⁰ *Zhang v. Zemin*, see 141 ILR 542.

⁶¹¹ See *Fang et al. v. Jiang Zemin et al.*

⁶¹² *Kalogeropoulou v. Greece and Germany*, para. D.1.a., *Jones v. the United Kingdom*, para. 91.

⁶¹³ *Germany v. Italy*, para. 97.

The first section of this chapter will explain and critically analyze the so-called procedure/substance dichotomy. The majority of the legal doctrine rejects the hierarchy argument within the context of jurisdictional immunities based on this dogmatic differentiation. Secondly, the lack of implementation of a hierarchical higher norm leading to a *de facto* impunity for violations against the most fundamental values of international community has led some scholars to propose a solution based on a holistic appreciation of the international legal order. Section two will interpret the continued immunity of States for *jus cogens* violations in the light of recent developments of modern international law.

1. The Procedure/Substance Dichotomy

In the discussion around the conflict of law between State immunities and *jus cogens* provisions, the distinction between norms that represent exclusive substantive obligation and others that constitute procedural rules has become a major reason for disagreement among legal scholars. Famously invoked by the ICJ to justify the continuance of a sitting Congolese Foreign Minister's immunity over international crimes, the Court held:

Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law.⁶¹⁴

Although the ICJ relates this to the jurisdictional privileges in criminal matters enjoyed by incumbent Heads of States, the same must be understood as applying to immunities in general. The distinction between rules of adjudication and rules of substantive nature also found its way into regional and domestic jurisprudence. The ECtHR specifically emphasized the procedural character of jurisdictional bars, such as State immunities, in *Al-Adsani*, *Fogarty* and *McElhinney*.⁶¹⁵ A special attention should

⁶¹⁴ *Democratic Republic of Congo v. Belgium*, para. 60.

⁶¹⁵ *Al-Adsani v. the United Kingdom*, para. 23 ff., *Fogarty v. the United Kingdom*, Judgment of the ECtHR [GC] of 21.11.2001, No. 37112/97, para. 35 f., *McElhinney v. Ireland*, para. 36 f.

be given to the British case law in this regard. Lord HUTTON first took this stand in the prominent case against former Chilean dictator August Pinochet.⁶¹⁶ Later Lord HOFFMANN and BINGHAM cited HUTTON to resolve the same issue regarding jurisdictional immunities enjoyed by the Kingdom of Saudi Arabia.⁶¹⁷

In distinction to substantive rules that determine whether a specific conduct was lawful or unlawful⁶¹⁸, rules of procedural nature are rules that govern the judicial and non-judicial interpretation, implementation and enforcement of substantive rules.⁶¹⁹ As such, procedural rules determine whether a court has jurisdiction to hear a claim, whether the claim is otherwise admissible, or how an international responsibility of a State or an international organization must be implemented.⁶²⁰ They must, on one hand, clearly be distinguished from procedural obligations, such as the duty to collaborate, the obligation to give the necessary information or the duty to notify. These are substantive in nature and will lead to the direct responsibility of the State concerned should they be disrespected.⁶²¹

Distinguishing the different types of rules is not an easy task, as no universally accepted guidelines exist nor has any case-law been elaborated that provide a tool for their distinction. Some rules may even be considered as both substantive and procedural, this is namely the case for the rule on the exhaustion of local remedies⁶²² or the most-favored-nation treatment⁶²³ known in international investment law. The distinction is often performed with the intention to conceptualize legal arguments and to “better

⁶¹⁶ *Ex parte Pinoche (No. 3)*, Lord HUTTON, para. 213 ff.

⁶¹⁷ *Jones v. Saudi Arabia*, House of Lords, Lord BINGHAM, para. 24, Lord HOFFMAN, para. 44 f.

⁶¹⁸ *Germany v. Italy*, para. 58.

⁶¹⁹ TALMON Stefan, *Jus Cogens after Germany v. Italy: Substance and Procedural Rules Distinguished*, *Leiden Journal of International Law*, Vol. 25, 2012, p. 982.

⁶²⁰ *Ibid.*

⁶²¹ *Ibid.*

⁶²² CRAWFORD James/GRANT Thomas, *Exhaustion of Local Remedies*, in: Wolfrum Rüdiger (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. 10, Heidelberg, 2012, p. 903 f.

⁶²³ DOLZER Rudolf/SCHEUER Christoph, *Principles of International Investment Law*, 2nd ed., Oxford, 2014, p. 253.

understand the function and operation of legal rules.”⁶²⁴ The dichotomy becomes especially relevant when discussing the temporal effect of the law. While substantive rules can only be applied retroactively in exceptional circumstances, procedural rules need to be employed by the Courts from the moment they are adopted regardless of the case at hand. The Supreme Court of Poland relating to State immunity explains:

In the realm of procedural law, the basic inter-temporal rule is different: a proceeding initiated under the new law takes place according to that law [...]. Therefore, the assessment of whether the State enjoyed immunity should be determined according to the rules of international law in force at the time of [the] Court’s decision on admissibility in the present case and not at the time when the tort alleged by the Plaintiff occurred.⁶²⁵

While *jus cogens* provisions primarily show a substantive obligation not to adopt a specific behavior that would otherwise lead to international responsibility, State immunities are jurisdictional bars that are of exclusive procedural nature and constitute a privilege of States not to be subjected to an equal’s jurisdiction.⁶²⁶ Many authors including the ICJ in the *Jurisdictional immunities case*⁶²⁷ therefore argue that no conflict of norms arises when granting States their immunity even in case violations of *jus cogens* norms are alleged.⁶²⁸ Consequently, the hierarchy argument becomes irrelevant as the basis for its application, namely a conflict of norms, is non-existent.

Following the dichotomy between substantive and procedural rules, it seems illogical that the peremptory character of the alleged violation would impact the preliminary

⁶²⁴ TALMON, Substance and Procedural Rules Distinguished, p. 984.

⁶²⁵ *Natoniewski v. Germany*, p. 301.

⁶²⁶ FOX/WEBB, p. 84 ff., CRAWFORD, Brownlie’s Principles of International Law, p. 487 f.

⁶²⁷ *Germany v. Italy*, para. 93.

⁶²⁸ YANG, State Immunity in International Law, p. 429, SHEN, p. 321 and 334, CAPLAN, p. 741, AKANDE/SHAH, Immunities of State Officials, p. 832 f., SCHAARSCHMIDT, p. 22, SALOMON, p. 65, GIEGERICH, p. 203, GATTINI Andrea, War Crimes and State Immunity in the Ferrini Decision, *Journal of International Criminal Justice*, Vol. 3, 2005, p. 224.

assessment of the court's jurisdiction.⁶²⁹ This view is confirmed by the ICJ ruling in *Democratic Republic of Congo v. Rwanda*⁶³⁰ as well as *Portugal v. Australia*⁶³¹. In both cases the ICJ emphasized that simply because allegations of *jus cogens* violations are submitted does not give jurisdiction to the Court which is exclusively based on the consent of the parties involved. Granting immunities, for example for acts of torture, can *ipso facto* not be considered an interference into the substantive rule of the prohibition of torture. The absolute character of this provision consequently remains untouched.

As the prohibition of torture undisputedly has been recognized as a *jus cogens* obligation, the extent to which the peremptory norm protection reaches is not clear.

The prohibition of torture is a primary norm, which solely aims at outlawing the practice of torture; as such, it does not stipulate anything about the ways in which the rule must be enforced. For the normative hierarchy argument to prevail, it would be necessary to show that another *jus cogens* norm has emerged under international law that obliges the forum State to provide victims with civil remedies for acts committed abroad by the foreign State.⁶³²

Supporters of this line of reasoning, however, start from the assumption that *jus cogens* provisions are of an exclusive substantive nature which do not entail any procedural obligations upon States. Italy, joined by a number of legal scholars, believes that such an interpretation would be too narrow a construct to effectively protect the fundamental values represented by *jus cogens* norms.⁶³³ A substantive *jus cogens* rule

⁶²⁹ VAN ALEBEEK, Jurisdictional Immunities of the State, p. 293.

⁶³⁰ *Democratic Republic of the Congo v. Rwanda*, Case concerning Armed Activities on the Territory of the Congo, Judgment of the ICJ of 19.12.2005, ICJ Reports 2005, p. 3 ff., para. 69.

⁶³¹ *Portugal v. Australia*, para. 28.

⁶³² KNUCHEL, p. 160 see also KÜNZLI, Vom Umgang des Rechtsstaats mit Unrechtsregimes, p. 320, GIEGERICH, p. 203, CAPLAN, p. 741.

⁶³³ *Germany v. Italy*, Italian Rejoinder, p. 32, BARTSCH/EBERLING, p. 486, BLANKE/FALKENBERG, p. 1835, FASSBENDER Bardo, Der Schutz der Menschenrechte als zentraler Inhalt des völkerrechtlichen Gemeinwohls, Europäische Grundrechte Zeitschrift, Vol. 30, 2003.

must necessarily imply certain procedural powers for a State to be capable of taking enforcement actions against a perpetrator.⁶³⁴ The main issue at hand consequently is to discover whether *jus cogens* provisions contain procedural elements which are capable of colliding with jurisdictional immunities.

Taking the specific example of the prohibition of torture, procedural consequences can be identified from the substantive obligation not to torture an individual, such as the inadmissibility of evidence obtained through torturous means. The House of Lords, later confirmed by the ECtHR⁶³⁵, refused to admit evidence obtained through torture committed abroad as it is “the duty of States to reject the fruits of torture inflicted in breach of international law.”⁶³⁶ Such an obligation was however not deemed peremptory in nature. In addition, the law regulating the lawfulness or unlawfulness of evidence should not be confused with rules on procedure of the court.⁶³⁷ It may however be proof of the direct implications of the prohibition of torture to rules dealing with the proceedings of alleged violations.

Nevertheless, jurisdictional components may be identified that directly derive from *jus cogens* obligations. On one hand, all States are free to establish universal jurisdiction to prosecute violators of peremptory norms, a fact that inherently distinguishes national court from international tribunals, whose jurisdiction is limited to what States or the UN Security Council submit to them.⁶³⁸ The jurisprudence of the ICJ in *Democratic Republic of Congo v. Rwanda* as well as *Portugal v. Australia* have no bear-

⁶³⁴ ORAKHELASHVILI, *State Immunity and Hierarchy of Norms*, p. 955, ORAKHELASHVILI, *Immunity of State Officials*, p. 849 ff., MCGREGOR, *Torture and State Immunity*, p. 903, REIMANN, p. 422, ZIMMERMANN Andreas, *Sovereign Immunity and Violations of International Jus Cogens – Some Critical Remarks*, *Michigan Journal of International Law*, Vol. 16, 1995, p. 437 f.

⁶³⁵ *Le: Gäfgen v. Germany*, para. 24 f.

⁶³⁶ *A (FC) et al. v. Secretary of State for Home Department*, Judgment of the UK House of Lords of 16.12.2004, UKHL No. 56 (2004), Lord BINGHAM OF CORNHILL, para. 34.

⁶³⁷ TALMON, *Substance and Procedural Rules Distinguished*, p. 981.

⁶³⁸ *Vgl. Prosecutor v. Furunžija*, para. 156, PEDRETTI, p. 397 ff.

ings in the discussion as it involved its jurisdiction to hear the dispute and not the one of an individual State.⁶³⁹

Secondly, there may even be an obligation to assume jurisdiction under the principle of *aut dedere aut iudicare*.⁶⁴⁰ *Jus cogens* norms, such as the prohibition of torture, therefore clearly have procedural elements that can enter in conflict with jurisdictional immunities as they may oblige a State to assume jurisdiction for acts committed abroad in order to prevent impunity.⁶⁴¹ Whether this obligation enjoys hierarchical superiority over other rules of international law is highly controversial. AKANDE/SHAH, among many authors, support Germany's proposition that obligations arising from violation of *jus cogens* do not necessarily have overriding effect.⁶⁴² Also, some domestic courts, like the Court of Appeals for Ontario, specifically refused to extend the peremptory character of the prohibition of torture to cover procedures of civil remedies.⁶⁴³

However, some scholars, including judges of the ICJ, seem to be more open to the idea that victims of *jus cogens* violation should have a justiciable right available to reclaim their losses as it is necessary that "the effective combating of grave crimes has arguably assumed a *jus cogens* character."⁶⁴⁴ Most developed in this regard is the jurisprudence of the Inter-American Court of Human Rights (IACtHR) that delivered two fundamental decisions concerning procedural implications of *jus cogens* obligations. In *Goiburú et al. v. Paraguay*, the IACtHR was confronted with heinous crimes committed in collaboration of several South American States, also known as the "Opera-

⁶³⁹ ORAKHELASHVILI, Immunity of State Officials, p. 852, in the Lotus ruling the Permanent Court of International Justice (PCIJ) emphasized that State have *a priori* full territorial sovereignty see *France v. Turkey*, p. 19.

⁶⁴⁰ PEDRETTI, p. 397, SHEN, p. 322.

⁶⁴¹ Whether this jurisdiction can both be criminal and civil is discussed in a chapter below § 8 (II.2), p. 272 ff.

⁶⁴² AKANDE/SHAH, Immunities of State Officials, p. 836 f., Also *Germany v. Italy*, German Memorial, para. 83 ff.

⁶⁴³ See *Bouzari v. Iran*.

⁶⁴⁴ *Democratic Republic of Congo v. Belgium*, Dissenting opinion of Judge AL-KHASAWNEH, para. 7, *Ferrini v. Germany*, Italian Court of Cassation, para. 668 f.

tion Condor” involving enforced disappearances, torture and murder of thousands of individuals. In its judgement, the Court found it established that several States were responsible for violations that amounted to international crimes in breach of peremptory obligations. In cases of similar gravity, the fundamental character of the judicial guarantees and the possibility to demand an effective judicial review become inherently essential. In these circumstances, so according to the IACtHR, the right to access to justice has peremptory norm quality as otherwise *jus cogens* violations would go unpunished.⁶⁴⁵

The IACtHR, later reaffirming this conclusion in a proceeding against Peru⁶⁴⁶, actively promoted the expansion of the obligations of peremptory norms to additionally cover its procedural elements. The most famous defender of this so-called “comprehensive theory” is Judge CANÇADO TRINDADE. Other than publishing papers recognizing the Inter-American Court’s role in promoting a comprehensive view on *jus cogens* norms⁶⁴⁷, he later composed a detailed dissenting opinion in the ICJ *Jurisdictional immunities* case, criticizing the ICJ’s lack of recognizing the procedural element of *jus cogens* norms.⁶⁴⁸ Accepting that the individual’s right to access to justice in cases of breaches of *jus cogens* norms also enjoy the same peremptory quality would lead to a direct conflict between procedural immunities and individual judicial guarantees which could only be solved by giving primacy to the latter. State immunity could no

⁶⁴⁵ *Goiburú et al. v. Paraguay*, Judgment of the IACtHR of 22.9.2006, Series C No. 153, para. 128 f.

⁶⁴⁶ *La Cantuta v. Peru*, Judgment of the IACtHR of 29.11.2006, Series C No. 162, para. 160.

⁶⁴⁷ CANÇADO TRINDADE Antônio, The Expansion of the Material Content of *Jus cogens*: The Contribution of the Inter-American Court of Human Rights, in: Spielman Daniel et al. (eds.), *Melanges en l’honneur de Christopher Rozakis*, Brussels, 2011, p. 27 ff.; CANÇADO TRINDADE Antônio, *Jus cogens: The Determination and the Gradual Expansion of Its Material Content in Contemporary International Case Law*, XXXV Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano, Washington D.C., Secretary General of the OAS, 2009, p. 3 ff.; CANÇADO TRINDADE Antônio, *La Ampliación del Contenido Material del Jus cogens*, XXXIV Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano, Washington D.C., Secretary General of the OAS, 2008, p. 1 ff.

⁶⁴⁸ *Germany v. Italy*, Dissenting opinion Judge CANÇADO TRINDADE, para. 121 ff.

longer be invoked against violations of *jus cogens* obligations, giving full effect to both the substantive and procedural obligations represented by peremptory norms.⁶⁴⁹

While supporters of a comprehensive theory of *jus cogens* have a legitimate interest of preventing the occurrence of future violations of international crimes as well as granting victims an effective access to justice, the legal argumentation must be criticized on one central aspect: it remains highly unlikely that the comprehensive theory of *jus cogens* norms would meet the international threshold of peremptory norms as set out by the VCLT.⁶⁵⁰ While regionally it may certainly have an impact on the interpretation of similar case law in the future, it is not sufficiently recognized in international law to deploy its peremptory quality on a global level. The author does not attempt to analyze the complex legal issue of the existence of regional *jus cogens* norms⁶⁵¹, but simply concludes that hitherto it cannot be said that sufficient recognition exists with regard to a peremptory procedural right to access to justice for victims of *jus cogens* violations.⁶⁵²

Nevertheless, the reasoning forwarded by the Inter-American Court convinces and should be developed further: it is irrational to assume that the international community agrees to protect the fundamental common values but does not allow for procedural means to implement their safeguard. This would completely diminish the moral and diplomatic incentives to respect *jus cogens* norms which, as we have seen, is considered the main objective of peremptory norms. One could argue that the fact that a State would be confronted with having to pay civil compensation to a torture victim is not of sufficient concern to the State to create any “chilling effect”. Paying an individual does not exercise the necessary psychological pressure to prevent a State from

⁶⁴⁹ Ibid., para. 129.

⁶⁵⁰ Art. 53 VCLT.

⁶⁵¹ See discussions in: HASMATH Reza, The Utility of Regional *Jus cogens*, American Political Science Association Annual Meeting, available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1366803 [last accessed 30.8.2018], RUIZ FABRI Hélène, Enhancing the Rhetoric of *Jus Cogens*, European Journal of International Law, Vol. 23/4, 2012, TSCHANNEN Pierre, Staatsrecht der Schweizerischen Eidgenossenschaft, 4th ed., 2016, p. 558 ff.

⁶⁵² KÜNZLI, Vom Umgang des Rechtsstaats mit Unrechtsregimes, p. 320, APPELBAUM, p. 270, SCHAARSCHMIDT, p. 24 f.

torturing and is therefore not directly linked to the prevention of acts of torture that would justify *jus cogens* character. However, the fact that this civil suit could be brought in a foreign national court, may constitute a major threat to the State's international reputation and diplomatic relations. This could be the necessary incentive not to torture individuals and consequently serve its primary purpose of preventing the future occurrence of violations.⁶⁵³

On the other hand, the author would like to join a growing number of scholars and the *Institut de Droit International* and emphasize that the importance of distinguishing between substantive and procedural rules has lost its value since the restrictive theory on State immunity was adopted.⁶⁵⁴ During the period of absolute immunity the simple fact that a State invoked its procedural privilege sufficed to bring an end to the proceeding without any inquiry into the allegations brought against it. However, since then, national courts necessarily must analyze the allegations forwarded by plaintiffs to establish whether it fits any of the recognized exceptions to State immunity. The procedural nature of the jurisdictional plea does hence not mean that it is unaffected by a substantive analysis by the forum as it must be established whether acts committed by the defendant State constitute a sovereign or private act.⁶⁵⁵ At least for States following the restrictive theory of State immunity, the preliminary character of jurisdictional immunities would not constitute an obstacle to subject the grant of the procedural bar to a "gravity check" as a decision upon jurisdiction necessarily involves

⁶⁵³ ORAKHELASHVILI Alexander, Between Impunity and Accountability for Serious International Crimes: Legal and Policy Approaches, *Netherlands International Law Review*, Vol. 60, 2008, p. 229.

⁶⁵⁴ KOLB/JARDIM OLIVEIRA, p. 160 f., TRAPP /MILLS, p. 154, *Annuaire de l'Institut de droit international de Tallinn*, p. 111, ESPOSITO Carlos, Jus cogens and Jurisdictional Immunities of States at the International Court of Justice: A Conflict Does Exist, *Italian Yearbook of International Law*, Vol. 21, 2011, p. 165, CONFORTI Benedetto, The Judgment of the International Court of Justice on the Immunity of foreign States: A missed Opportunity, *Italian Yearbook of International Law*, Vol. 21, 2011, p. 138, CIAMPI Annalisa, The International Court of Justice between "Reason of State" and Demands for Justice by Victims of Serious International Crimes, *Revista di Diritto Internazionale*, Vol. 95/2, 2012, p. 385 f.

⁶⁵⁵ FOX/WEBB, p. 400 f., ORAKHELASHVILI, Jurisdictional Immunities of the State, p. 613 f.

an assessment of the merits.⁶⁵⁶ As mentioned previously, this fact is further demonstrated by the recent emergence of a torture-related exception to the functional immunity of State officials.⁶⁵⁷ A strict separation between procedure and substance is consequently not possible anymore as jurisdictional immunities seem to have developed so far as to make the distinction irrelevant.⁶⁵⁸

2. Interpretation in Accordance with Public International Law

Additional legal reasoning with regard to the relationship between immunities and *jus cogens* violations is presented by authors who are concerned about the factual consequences that the substance/procedure dichotomy entails. When KOSKENNIEMI used the terms of “excessive formalism”⁶⁵⁹, other authors call it a “purely doctrinal composition”⁶⁶⁰ that is “overly formalistic and detached from the reality of human rights protection.”⁶⁶¹ At the center of the criticism are the repercussions that granting State immunity would have on victims. The distinction between procedural and substantive rules results in injustice and does not effectively protect the most fundamental values of international law and leads to a *de facto* impunity.⁶⁶²

⁶⁵⁶ KOLB/JARDIM OLIVEIRA, p. 160 f., ESPOSITO, p. 165, TRAPP/MILLS, p. 154, MCGREGOR Lorna, State Immunity and Jus Cogens, *The International and Comparative Law Quarterly*, Vol. 55/2, 2006, p. 444.

⁶⁵⁷ See § 4 (II.b), p. 110.

⁶⁵⁸ *Germany v. Italy*, Dissenting opinion Judge YUSUF, para. 36, WALKER Lee, Jurisdictional Immunities of the State (Germany v Italy: Greece intervening), *Australian International Law Journal*, Vol. 19, 2012, p. 256.

⁶⁵⁹ KOSKENNIEMI Martti, *From Apology to Utopia: The Structure of International Legal Argument*, Cambridge, 2009, p. 564.

⁶⁶⁰ *Democratic Republic of Congo v. Belgium*, Dissenting Opinion Judge VAN DEN WYNGAERT, para. 28 and 33.

⁶⁶¹ PAVONI Ricardo, Human Rights and the Immunities of Foreign State and International Organizations, in: De Vet Erika/Vidmar Jure (eds.), *Hierarchy in International Law: The Place of Human Rights*, Oxford, 2012, p. 75.

⁶⁶² ORAKHELASHVILI, Jurisdictional Immunity of the State, p. 615, MCGREGOR, State Immunity and Jus Cogens, p. 444.

To deal with this issue, a number of authors propose a more general balancing of interests that should be performed on a case-by-case basis in the spirit of Art. 31 VCLT.⁶⁶³ National statutes, such as the ones implementing State immunities, must always be interpreted to give full effect to the *jus cogens* provision in order to keep international and national legal regimes free from contradictions.⁶⁶⁴ Lord Justice STEYN explains how national statutes must be interpreted in a way that is compatible with the obligations set out by human rights treaties:

Under ordinary methods of interpretation a court may depart from the language of the statute to avoid absurd consequences. [...] Undoubtedly, a court must always look for a contextual and purposive interpretation.⁶⁶⁵

Italy, reflecting the identical reasoning in the *Ferrini* judgement, forwarded this argument before the ICJ:

Italy considers that international immunity law must be interpreted and applied consistently with the fundamental values shared by the international community and embodied in peremptory norms of international law. A systematic interpretation of the international legal system – an interpretation consistent with the hierarchy of norms – does not imply the removal of State immunity in any case of violation of *jus cogens* norms. Nevertheless, the invocation of immunity from jurisdiction cannot be used by States to avoid their responsibility and deny to individuals any form of reparation and compensation. [...] Otherwise, *the*

⁶⁶³ ATTERITANO, p. 37, DE SENA/DE VITTOR, p. 108, BIANCHI, State Immunity and Human Rights, p. 210 ff., ADAMS, p. 259, TERRY, p. 128 f., VAN ALEBEEK, Immunity of States, chapter 3.1, VAN ALEBEEK, Jurisdictional Immunities of the State, p. 300 ff., BIANCHI Andrea, Overcoming the Hurdle of State Immunity in the Domestic Enforcement of International Human Rights, in: Conforti Benedetto/Francioni Francesco (eds.), Enforcing International Human Rights in Domestic Courts, The Hague, 1997, p. 421 ff.

⁶⁶⁴ TERRY, p. 129, GIEGERICH, p. 224, ADAMS, p. 258 f.

⁶⁶⁵ *Regina v. A.*, Judgment of the UK House of Lords of 17.5.2001, [2001] UKHL 25, para. 44.

*withdrawal of immunity seems to be the only way to establish the consistency of the international legal system.*⁶⁶⁶ [emphasis added]

A comprehensive interpretation of the legal text must be done in order to guarantee security of law and establish a contradiction-free legal structure. Some authors therefore like to refer to this reasoning as bringing forward an argument of coherence whose purpose it is to take a wholesome approach to the resolution of tensions created by immunities and peremptory norms.⁶⁶⁷ The Supreme Court of Canada highlighted this interpretive principle in *Baker v. the Canadian Minister of Citizenship and Immigration* whereas domestic legislation must be seen through the lenses of a contextualized international framework applicable in a country. The Court essentially forwarded the assumption that the legislator is presumed to have acted in compliance with international law and can consequently not have intended a result which goes against the fundamental values of the international community.⁶⁶⁸ Judges are asked to identify the fundamental values and interests of society and adjust their decision accordingly.⁶⁶⁹

The domestic rules of statutory interpretation as extended by the ruling in *Baker* could be sufficient to permit a court considering a civil action against a foreign state or state official for acts of torture to refer to international obligation in its search for values indirectly embedded by the legislature in the State Immunity Act.⁶⁷⁰

⁶⁶⁶ *Germany v. Italy*, Italian Counter-Memorial, para. 4.76 f.

⁶⁶⁷ TERRY, p. 129, JACOBS Francis/ROBERTS Shelley, *The Effect of Treaties in Domestic Law*, London, 1987, p. 32, BIANCHI, *Denying State Immunity to Violators of Human Rights*, p. 221, BIANCHI, *Overcoming the Hurdle of State Immunity*, p. 432, see also: McCORMIC Neil, *Coherence in Legal Justification*, in: Peczenik Aleksander/Lindhal Lars/van Roemund Bert (eds.), *Theorie der Normen*, Festgabe für Ota Weinberger zum 65. Geburtstag, Stockholm, 1984, p. 41 ff.

⁶⁶⁸ *Baker v. the Minister of Citizenship and Immigration*, Judgment of the Supreme Court of Canada of 9.7.1999, [1999] 2 S.C.R. 817, p. 861, see also BIANCHI, *Denying State Immunity to Violators of Human Rights*, p. 221, McCORMIC, p. 41 ff., ADAMS, p. 258 f.

⁶⁶⁹ McCORMIC, p. 41, TERRY, p. 129, ADAMS, p. 257.

⁶⁷⁰ ADAMS, p. 258.

What FRANCIONI called “equity”⁶⁷¹ has long been an established judicial tool for statutory interpretation. Domestic courts have indeed applied this method on the issue of jurisdictional immunities of a State before.⁶⁷² So did the Supreme Court of Austria arguably recognize the territorial tort exception on State immunity in 1961 as a consequence of the comprehensive interpretative method described in this chapter.⁶⁷³ The Court was only able to do so without violating international law as the “restriction of immunity was obtained through logical reasoning rather than through the application of existing customary norms”.⁶⁷⁴ In *Von Dardel v. the USSR*, a case involving the kidnapping, imprisonment and killing of a Swedish diplomat, the U.S District Court disregarded the jurisdictional bar imposed by foreign immunity by relying on a comprehensive interpretation of international law to give meaning to the U.S. FSIA.⁶⁷⁵ In addition, Lord Justice WARD, while rejecting the claimant’s argument in *Al-Adsani v. Kuwait*, showed sympathy to the situation of the plaintiff and built on the concept of statutory interpretation to suggest a *de lege lata jus cogens* exception to foreign State immunity.⁶⁷⁶

In the following section, the statutory interpretation method should be applied to the research question at hand. May a torture-related exception to foreign State immunity be recognized by a comprehensive interpretation of the international legal order? The author discusses several developments which have taken place within public interna-

⁶⁷¹ FRANCIONI Francesco, From Utopia to Disenchantment: The Ill Fate of Modern Monism in the ICJ Judgment on the Jurisdictional Immunities of States, *European Journal of International Law*, Vol. 23/4, 2012, p. 1131.

⁶⁷² TERRY, p. 129, ADAMS, p. 258, BIANCHI, Overcoming the Hurdle of State Immunity, p. 430.

⁶⁷³ *Holubek v. Government of the United States of America*, Judgment of the Austrian Supreme Court of 10.2.1961, 84 JBl 43, also published in 40 ILR 73.

⁶⁷⁴ ATTERITANO, p. 33 and 37.

⁶⁷⁵ *Dardel v. Union of Soviet Socialist Republics (Von Dardel I)*, Judgment of the U.S. District Court of D.C of 15.10.1985, 623 F Supp. 246 (D.D.C. 1985), see TELLES Bruce, *Von Dardel v. Union of Soviet Socialist Republics: Overcoming the Defense of Foreign Sovereign Immunity in Cases under the Alien Tort Claims Act*, *Boston College International and Comparative Law Review*, Vol. 10/2, 1987.

⁶⁷⁶ *Al-Adsani v. Government of Kuwait (No. 2)*, Opinion Lord Justice WARD, see also GARNETT, *The Defence of State Immunity for Acts of Torture*, p. 112.

tional law in recent years, all of which contradict the continued concept of State immunity for *jus cogens* violations. First of all, the continued fight of the international community against the impunity of international crimes should be presented and analyzed in the light of State immunity law. Secondly, both the concepts of sovereignty and non-interference into internal matters have undergone major changes in the last decades. What conclusions can be drawn on how States may invoke their immunity from this development? And lastly, individuals have continuously been empowered as both rights holders and bearers of international obligations. In what way does the gradual acceptance of the individual as a subject of international law change the concept of State immunity law?

a. Fight against Impunity

The United Nations defines impunity as an “impossibility, *de jure* or *de facto*, of bringing perpetrators of violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, [...] tried, [...] and to making reparations to their victims.”⁶⁷⁷ The principles forwarded by the UN specifically mention the right to remedy and reparations for the injuries suffered as one key aspect in the fight against impunity as well that all victims have an inalienable right to know the truth about the violation.⁶⁷⁸ The Council of Europe later acknowledged that State immunity law directly impacts impunity for violations suffered by individuals. The Secretary General was tasked with elaborating a comprehensive report on the effective implementation of the European Convention of Human Rights with regard to foreign State immunity, in which he accentuated the clear “need to ensure that the rules on State immunity do not lead to impunity for perpetrators of serious human rights violations.”⁶⁷⁹ In his report, the

⁶⁷⁷ UN Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, Economic and Social Council, UN Doc. No. E/CN.4/2005/102/Add.1 (cited: UN Impunity Principles).

⁶⁷⁸ Principle 1 of UN Impunity Principles.

⁶⁷⁹ Secretary General of the Council of Europe, Follow-Up to the Secretary General’s Report under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies, Doc. No. SG/Inf(2006)5 and SG/Inf(2006)13, para. 2.

Secretary urged member States to find a common approach to establish binding “exceptions to State immunity in cases of serious human rights abuses”⁶⁸⁰ as otherwise a widespread denial of justice would occur. The Committee of Ministers, during its 1110th meeting in 2011, summarized the Council of Europe’s position on “eradicating impunity for serious human rights violations” in a form of a non-binding guideline and once again endorsed a direct link between granting immunities of a foreign State and impunity for the violations committed by that State.⁶⁸¹

With the 2009 Naples Resolution, the *Institut de Droit International* tackled the underlying conflict arising between jurisdictional immunities of States and international crimes, such as torture. “The removal of immunity from proceedings in national courts is one way by which effective reparation for the commission of international crimes may be achieved.”⁶⁸² Immunities should not be granted in order to prevent reparation claims invoked by victims of such crimes.⁶⁸³ By 2015, the Institute specifically proposed measures to fight impunity through the extension of a State’s national jurisdiction in spite of foreign immunities being applicable.⁶⁸⁴ Historically, all States have already implemented such an approach with the adoption of a universal jurisdiction in criminal matters. The very fact that universal jurisdiction exists and is indeed implemented against foreign public officials in criminal matters⁶⁸⁵ shows that it is indeed justified to disregard jurisdictional immunities for the sake of giving justice to victims of international crimes. As described by the author in a chapter regarding the matter, nothing would suggest that universal civil jurisdiction would be more threatening to international relations than universality in criminal matters and is equally justified for the achievements of international justice.⁶⁸⁶ A torture-related exception

⁶⁸⁰ Ibid. para. 17.

⁶⁸¹ Eradicating Impunity for Serious Human Rights Violations, Council of Europe Committee of Ministers Resolution adopted on 30.3.2011 during its 1110th Meeting, Doc. Nr. H/Inf(2011)7 (cited: Council of Europe Guidelines on Eradicating Impunity).

⁶⁸² Preamble to the 2009 Naples Resolution.

⁶⁸³ Ibid. Principle II (2).

⁶⁸⁴ Art. 2 Tallinn Resolution.

⁶⁸⁵ See § 4 (II.2), p. 75 ff.

⁶⁸⁶ See § 8 (II.2), p. 328 ff.

to State immunity would therefore bring this concept back in line with functional immunity of State officials.⁶⁸⁷

In addition, the prohibition of torture enjoys both peremptory and absolute qualities. Such protection is only granted to provisions representing the most fundamental values in international society. Victims of torture were not only subjected to extreme mental and physical suffering⁶⁸⁸, but more importantly, the prohibition of torture directly relates to the protection of an individual's essence as a human being.⁶⁸⁹ The UN General Assembly unanimously adopted a declaration on a global ban of torture as "any act of torture [...] is an offense to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights."⁶⁹⁰ An absolute moral ban on torture must necessarily be followed by the absolute legal ban of torturous practices or otherwise altering existing provision that foster the future commission of such acts.

At this point, it is important to mention that also authors who typically defend the strict distinction between procedural and substantial rules have accepted that substantive rules may influence the interpretation and application of procedural rules.⁶⁹¹ The very foundation of the substance/procedure dichotomy, the *Arrest Warrant case* before the ICJ, only decided to uphold Mr. Ndombesit's immunity for *jus cogens* violation as it did not lead to impunity.⁶⁹² Either the individual responsible for the crime can be tried before his/her national court. Secondly, immunity can be waived by the State they are representing. Thirdly, provided that there is universal jurisdiction, once the person concerned ceases to hold the office, he/she can be brought before any national court for acts committed prior or subsequent the period of office or that the individual committed in his/her private capacity. Lastly, the person might be tried

⁶⁸⁷ As discussed by the author at length in § 4 (II.b), p. 104 ff.

⁶⁸⁸ *Ireland v. the United Kingdom*, para. 167, see also § 1 (I.2), p. 9 ff.

⁶⁸⁹ MAYERFELD, p. 118.

⁶⁹⁰ Art. 2 UN Torture Declaration.

⁶⁹¹ TALMON, Substance and Procedural Rules Distinguished, p. 995.

⁶⁹² *Democratic Republic of Congo v. Belgium*, para. 60.

before an international court.⁶⁹³ In a joint separate opinion to the case, Judges HIGGINS, KOOIJMANS and BUERGENTHAL emphasized the growing relevance of the fight against impunity which the Court did not sufficiently consider in its deliberation:

On the one scale, we find the interest of the community of mankind to prevent and stop impunity for perpetrators of grave crimes against its members; on the other, there is the interest of the community of States to allow them to act freely on the inter-State level without unwarranted interference. [...] Reflecting these concerns, what is regarded as a permissible jurisdiction and what is regarded as the law on immunity are in constant evolution. The weights on the two scales are not set for all perpetuity. Moreover, a trend is discernible that in a world which increasingly rejects impunity for the most repugnant offences, the attribution of responsibility and accountability is becoming firmer, the possibility for the assertion of jurisdiction wider and the availability of immunity as a shield more limited.⁶⁹⁴

Clearer words were taken by *ad hoc* Judge VAN DEN WYNGAERT. In her dissenting opinion, she raised doubts whether measures described by the Court to prevent impunity would actually be implemented in practice. Prosecution would primarily presuppose the willingness and ability of the home country to act which the government often lacks. The strict distinction between immunity and impunity therefore is purely hypothetical and “in practice immunity leads to *de facto* impunity.”⁶⁹⁵

In cases where foreign immunity is invoked to block a victim of torture access to justice hence shows a clear asymmetry. Comparing the two situations of a State that sees his dignity threatened by being subjected to a foreign jurisdiction respecting the rule of law and the situation of humiliation and suffering a victim of torture has witnessed, it seems clear which one should prevail. It is difficult to understand in what way the

⁶⁹³ Ibid. para. 61.

⁶⁹⁴ *Democratic Republic of Congo v. Belgium*, Dissenting opinion of Judges HIGGINS, KOOIJMANS and BUERGENTHAL, para. 75.

⁶⁹⁵ *Democratic Republic of Congo v. Belgium*, Dissenting opinion of Judge VAN DEN WYNGAERT, para. 34 ff.

dignity, sovereignty and equality of one State is impaired when victims of severe human rights violation bring a claim against it but not when businesses do in a commercial setting (*de jure gestionis*). In other words, the arguments often brought forward to protect State immunities for *jus cogens* violations only convinces when immunities are absolute. The author would like to remind the reader that the commercial exception to State immunity was deemed necessary as it was considered unfair that State immunity would prevent a contractual party to bring a suit against a State.⁶⁹⁶ As Lord WILBERFORCE explains:

It is necessary in the interest of justice to individuals having transactions with the State to bring such transactions before the courts. To require a State to answer a claim based upon such transactions does not involve a challenge to or inquiry into any act of sovereignty or governmental act of that State. It is, in accepted phrases, neither a threat to the dignity of that State, nor any interference with its sovereign functions.⁶⁹⁷

It is indeed contradictory that the same is not held for victims of torture, as they never voluntarily transacted with the State as do traders and commercial business people.⁶⁹⁸ Many scholars agree. State immunity law, as a flux concept, should be adapted to reflect an evolved understanding of fundamental values in international law. Jurisdictional immunities are “a classic subject of international law in perennial need of adjustment to contemporary notions of State and the rule of Law.”⁶⁹⁹

The exercise of adjudicatory jurisdiction over a foreign state is deemed to be compatible with the foreign state’s sovereignty in many cases (*jure*

⁶⁹⁶ See § 3 (I), p. 61 ff.

⁶⁹⁷ *I Congreso del Partido*, House of Lords, Lord WILBERFORCE, para. 262.

⁶⁹⁸ REDRESS, Immunity v. Accountability, Considering the Relationship between State Immunity and Accountability for Torture and other Serious International Crimes, 2006, p. 43, available on www.redress.org [last accessed 31.8.2018].

⁶⁹⁹ GAVOUNELI, State Immunity and the Rule of Law, Athens, 2001, p. 19, similar also KNUCHEL, p. 174 f., McMENAMIN, p. 214, MCGREGOR, Torture and State Immunity, p. 904, ORAKHELASHVILI, State Immunity and Hierarchy of Norms, p. 955.

gestionis). Thus, the question is not whether it is possible to exercise jurisdiction over foreign states at all but where to draw the line.⁷⁰⁰

It is the author's opinion that a general and systematic exclusion of torture victims would severely hurt the global goal of combating impunity and heavily undermine the structure set in place to protect the most fundamental values of the international society. Exercising domestic jurisdiction over a foreign State is not a new phenomenon and should evolve to include human rights litigation.

b. A Humanized Sovereignty

Two principles are often mentioned to justify the rights and immunity privileges of sovereign States in international law.⁷⁰¹ As the concept of a nation-State emerged as a consequence of the Westphalian peace treaty, both the principle of equality of sovereigns and the duty not to interfere in the affairs of another were considered essential to establish a new international legal order.⁷⁰² *Par in parem non habet imperium* should guarantee that no equal must sit in judgment of another⁷⁰³ creating an exception to jurisdiction based on the equality and sovereignty of another State.⁷⁰⁴ Over decades international law has strengthened the position of States with regard to their sovereignty over their own territory and codified the principles of equality and non-interference as core-foundation of the United Nations.⁷⁰⁵

On the other hand, the sovereignty of States was never a self-contained regime and under the constant influence of the international legal order. As former UN Secretary General, BOUTROS-BOUTROS GHALI, stated:

[The] respect for fundamental sovereignty and integrity [is] crucial to any common international progress. The time of absolute and exclusive

⁷⁰⁰ BRÖHMER, p. 196.

⁷⁰¹ See i.e: *Al-Adsani v. the United Kingdom*, para. 54, *Germany v. Italy*, para. 57, also REDRESS, Immunity v. Accountability, p. 48 f., MCGREGOR, Torture and State Immunity, p. 913.

⁷⁰² FOX/WEBB, p. 25 ff., FORCESE, p. 133 f., BATES, p. 665 f, see also § 1 (II.2), p. 12 ff.

⁷⁰³ CRAWFORD, Brownlie's Principles of International Law, p. 488 f.

⁷⁰⁴ See § 1 (II), p. 12 ff.

⁷⁰⁵ See Art. 2 (1), 2 (4) and 2 (7) UN Charter.

sovereignty, however, has passed; its theory was never matched by reality.⁷⁰⁶

A number of international tribunals, including the PCIJ and the ICJ, recognized early on limits to the absolute sovereignty of States. In the 1928 *Island of Palmas case*, the sole arbitrator MAX HUBER described the principle of territorial sovereignty in a detailed manner, however, acknowledged that sovereign powers must be exercised in accordance with international law.⁷⁰⁷ Later, the ICJ identified certain international obligation as being owned to the international community as a whole. The *Barcelona Traction case* changed the concept of sovereignty in a significant way. Suddenly, a State's internal actions could have consequences on an international level. States could no longer argue that they had an absolute right to commit violations of law within their territory and that the non-interference principle would shield them from criticism and responsibility.⁷⁰⁸ Further, with the development of international human rights as constituting *erga omnes* obligations has significantly impacted the concept of sovereignty in international law:

The idea of human rights developed as a defence against despotism in the exercise of government power. It was based upon the recognition that *the human being does not exist for the benefit of the State, but that the State exists for the benefit of the human being*. The principal objective of human rights is to provide a set of rules for the relationship between the individual and the government, bearing in mind their fundamental inequality of power.⁷⁰⁹ [emphasis added]

⁷⁰⁶ An Agenda for Peace – Preventative Diplomacy, Peacemaking, an Peace-Keeping, Report of the Secretary General BOUTROS-BOUTROS GHALI of 17.6.1992, UN Doc. No. A/47/277-S/24111, para. 17.

⁷⁰⁷ *United States of America v. the Netherlands*, Case concerning the Island of Palmas, Judgment of the Permanent Court of Arbitration of 4.4.1928, Report of International Arbitral Awards, Vol. II, p. 829 ff.

⁷⁰⁸ REDRESS, Immunity v. Accountability, p. 49, PAECH, p. 51 ff.

⁷⁰⁹ BURGERS Herman/DANELIUS Hans, The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dordrecht, 1988, p. 5.

By the end of the 20th century, the international legal system “has developed from a post-Westphalian configuration of sovereignty with the mostly unchecked power of a single monarch towards an individual-centered, humanized system”⁷¹⁰. The essential *raison d’être* of a State is now to serve the needs, interests and security of its population and not the other way around. Especially since the Millennium Report was published by UN Secretary General KOFI ANNAN, sovereignty must be understood as a responsibility to uphold fundamental rights ensured to individuals. The well-being of a human should be considered the sole foundation of a State and its powers to act on international as well as domestic level.⁷¹¹ The UN General Assembly later endorsed this approach in the 2005 World Summit reassessing that each and every State had the responsibility to protect its populations from severe violations of their fundamental rights.⁷¹² This so-called “Responsibility to Protect Doctrine” (R2P) was developed as far as to allow for military intervention in case widespread and systematic violations of human rights occurred within a territory. The UN Security Council, acting under Chapter VII of the UN Charter, referred to R2P in order to justify travel bans, arms embargo, asset freezing against the Libyan authorities and a no-fly zone which would allowed UN troops to use force against the Libyan military.⁷¹³

This re-characterization of sovereignty has only recently become subject of discussions around the jurisdictional immunities of a State. When international law has gone so far as to allow for the military intervention and the use of force against a State for the protection of human rights, what repercussions would this concept have on the immunity of a State for *jus cogens* violations?

⁷¹⁰ PETERS Anne, *Humanity as the A and Ω of Sovereignty*, *European Journal of International Law*, Vol. 20/3, 2009, p. 514, see also BENNOUNE, p. 244, BERKSY/MERVA/ROTH-ARRIAZA, p. 381.

⁷¹¹ *We the Peoples: The Role of the United Nations in the 21st Century*, Report of Secretary General Kofi ANNAN of 27.3.2000, UN Doc. No. A/54/2000, para. 217 ff., see also PETERS, p. 522.

⁷¹² Resolution 60/1 adopted by the UNGA on 24.10.2005, UN Doc. No. A/RES/60/1, para. 138.

⁷¹³ See UN Security Council Resolution 1970 (2011) of 26.2.2011, UN Doc. No. S/RES/1970(2011), UN Security Council Resolution 1973 (2011) of 17.3.2011, UN Doc. No. S/RES/1973(2011) and UN Security Council Resolution 2009 (2011) of 16.9.2011, UN Doc. No. S/RES/2009(2011).

Judge CANÇADO TRINDADE contributes to this discussion in his dissenting opinion in *Germany v. Italy*. Building on the humanization of public international law and the sovereignty of States, he primarily criticizes the Court's assessment and its shortsightedness of the strict inter-State outlook.⁷¹⁴ The creation of the sovereignty and immunity of States at the exclusion of human beings within the international legal order has historically led to the sacrifice of millions of people.⁷¹⁵ It is, however, wrong to assume that the concept of sovereignty has not been influenced by a process of humanization as the legal order has gone beyond a strict State-centric framework. The jurisdictional immunities of States need to be appreciated within the light of this humanized, constitutionalized legal system.⁷¹⁶

If immunity derives from sovereignty, its meaning, extent, and impact must also be contingent on the current scope of sovereignty. Yet, by simply restating the origins of immunity in sovereignty, courts have failed to acknowledge the restriction on the scope of immunity caused by the evolution of sovereignty over time. As such, judicial decisions in which a state pleads immunity against allegations of torture result in an inevitable clash between the principles of 1648 and those of today.⁷¹⁷

It is indeed symptomatic for both national and international court to not sufficiently consider the recent developments in international law when assessing issues related to human rights and foreign State immunity. Legal findings in relation to the principles of equality of States, non-interference, and sovereignty are often based on a Westphalian understanding of the terms.⁷¹⁸ CAPLAN, in his synthesis, consequently

⁷¹⁴ *Germany v. Italy*, Dissenting opinion Judge CANÇADO TRINDADE, para. 161 ff.

⁷¹⁵ *Ibid.*, para. 163.

⁷¹⁶ *Ibid.*, para. 176, see also PAYANDEH, p. 957.

⁷¹⁷ MCGREGOR, *Torture and State Immunity*, p. 916, see also SIMPSON Gerry, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*, Political Science Quarterly, Vol. 119/4, 2004 p. 11.

⁷¹⁸ REDRESS, *Immunity v. Accountability*, p. 49, MCGREGOR, *Torture and State Immunity*, p. 912, ORAKHELASHVILI, *State Immunity and Hierarchy of Norms*, p. 955, PAECH, p. 52 f., KADELBACH Stefan/KLEINLEIN Thomas, *Überstaatliches Verfassungsrecht*, Archiv des Völkerrechts, Vol. 44, 2006, p. 237 f.

suggests that jurisdictional immunities may only be granted if it is indeed in the interest of mankind and the collective benefit.⁷¹⁹ By saying so, he inherently accepts that situations may exist where immunities must be disregarded as a consequence of protection of superior values, nevertheless fails to give specific guidance on how such theory must be implemented. A more concrete solution is proposed by PETERS:

[C]onflicts between state sovereignty and human rights should not be approached in a balancing process in which the former is placed off against the latter on an equal footing, but should be tackled on the basis of a presumption in favour of humanity.⁷²⁰

This approach convinces insofar as it suggests a clear guideline for courts to appreciate issues in relation to State immunity and human rights violation and implements a reversible presumption of superiority including a possible margin to decide otherwise in the specific case.

HIGGINS, on the other hand, concentrates on the development of international State immunity law and its effect on the principle of sovereign equality. As describe in a previous chapter⁷²¹, jurisdictional immunities find themselves in a crossway between two fundamental principles of international law: principle of (absolute) territoriality and the protection of the equality of States. During the absolute period of State immunity, practice tended to favor the latter and exempted States from the jurisdiction in all national proceedings. Since the restrictive theory on State immunity has become the accepted practice, a major shift occurred whereas primacy is given to the application of territorial jurisdiction over the principle of sovereign equality.⁷²² The significance of sovereign equality in theory and practice should consequently not be overestimated as with every new exception to the jurisdictional immunity of States, the relevance of *par in parem non habet imperium* gradually fades.⁷²³ This is best proven by

⁷¹⁹ CAPLAN, p. 777 ff.

⁷²⁰ PETERS, p. 514.

⁷²¹ See § 1 (II.1), p. 12 ff.

⁷²² HIGGINS, Equality of States and Immunity from Suit, p. 132 f.

⁷²³ Ibid., p. 134.

the recognition of the so-called territorial tort exception. As explained by the author in § 5 (I) of the present thesis, it is not unheard of anymore that a domestic court may exercise jurisdiction over a foreign court for acts constituting *acta de jure imperii*. Admittedly in only a limited number of circumstances, a once sacrosanct protection of sovereign acts has been abandoned, a fact that deserves more attention by the international community and courts when deciding upon State immunity issues.

Courts are consequently urged to apply a modern understanding of foreign State immunity as the basis of application, the concept of sovereignty, equality and the principle of non-interference have undergone significant developments since the Treaties of Westphalia were concluded. A decisive factor both the ECtHR and the ICJ had not sufficiently considered in their jurisprudence.

c. The Position of the Individual in International Law

Related to the phenomenon of the humanization of international law and State sovereignty comes the significant evolution individuals have undergone as both subjects and objects of international law. States were historically considered the sole actors of international law. Shortly after World War II had ended, a gradual introduction of humanitarian values into the international legal order could be observed.⁷²⁴ A number of influential authors of the post-war period consequently recognized that individuals, in a limited sphere, could be subjects of international law as this development must have had an influence on how individuals are perceived on the international level.⁷²⁵ Both the jurisprudence of the ICJ and the ECtHR would certainly support such a conclusion, as it directly acknowledges that certain rights and privileges of individuals go beyond the domestic jurisdiction and are of a common concern of the international community.⁷²⁶ How this development has affected foreign State immunity is a matter

⁷²⁴ ORAKHELASHVILI Alexander, The Position of the Individual in International Law, California Western International Law Journal, Vol. 31/2, 2000, p. 244, SHAW, p. 188 f., BERKSY/MERVA/ROTH-ARRIAZA, p. 384 and 392 f.

⁷²⁵ LAUTERPACHT Herscht, Oppenheim International law, 8th ed., New York, 1955, p. 639, FRIEDMANN Wolfgang, The Changing Structure of International Law, London, 1962, p. 233.

⁷²⁶ *Belgium v. Spain*, Case concerning the Barcelona Traction, Light and Power Company, Judgment of the ICJ of 5.2.1970, ICJ Report 1970, p. 3 ff., para. 33 ff.

of discussion. ECtHR Judge LOUCAIDES recognized on a number of occasions that the development of human rights law must be better appreciated within the immunity context:

The international law immunities originated at a time when individual rights were practically non-existent and when States needed greater protection from possible harassment through abusive judicial proceedings. The doctrine of State immunity has in modern times been subjected to an increasing number of restrictions, the trend being to reduce its application in view of the developments in the field of human rights which strengthen the position of the individual.⁷²⁷

He is later joined by Judge CANÇADO TRINDADE who addressed this issue in his detailed dissenting opinion to the *Jurisdictional immunities case* before the ICJ:

To insist on pursuing a strictly inter-State approach in the relationship of responsibility leads to manifest injustice. [...] Individuals are indeed subjects of international law (no merely “actors”), and whenever legal doctrine departed from this, the consequences and results were catastrophic. Individuals are *titulaires* of rights and bearers of duties which emanate directly from international law [...].⁷²⁸

Nevertheless, certain skepticism prevails. Scholars from dualist countries reject this proposition as States and international organization are and continue to be the only subjects of international law.⁷²⁹ For the purpose of coherence, the author will not discuss the issue of the personality of individuals in international law in detail as it

⁷²⁷ *McElhinney v. Ireland*, Dissenting opinion Judge LOUCAIDES, similar also in *Fogarty v. the United Kingdom*, and *Al-Adsani v. the United Kingdom*.

⁷²⁸ *Germany v. Italy*, Dissenting opinion Judge CANÇADO TRINDADE, para. 179 ff.

⁷²⁹ See discussion in JENNINGS/WATT, p. 846 f., CRAWFORD, Brownlie's Principles of International Law, p. 121, for a detailed summary of the doctrinal opinions in this regard see ORAKHELASHVILI, The Position of the Individual in International Law, p. 243 ff.

would certainly go beyond the scope of the present thesis.⁷³⁰ Instead, certain aspects should be presented as they relate to the changed concept of the immunity of States.

To begin, it is certainly true that individuals have significantly been empowered through the international human rights framework. Beginning with the 1948 Universal Declaration of Human Rights, States have recognized genuine rights belonging to the individual on an international level.⁷³¹ Since then, a number of United Nations bodies allow individuals to request communications and petitions with regard to violations of treaty-related rights. These are most prominently the First Optional Protocol to the International Covenant on Civil and Political Rights⁷³² which implements an individual complaint mechanism at the UN Human Rights Committee for violations of Covenant rights, and, with regard to the topic of this thesis, the 1984 UN Convention against Torture enabling the Committee Against Torture to receive individual complaints. On a regional level, a number of human rights tribunals have been established which can hold a State responsible for violation of human rights at the direct request of an individual. These are namely the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court of Human and People's Rights. As described in the previous chapter, the protection of individuals and their human dignity has become a central purpose of international law and the international community⁷³³ which has provoked a significant change in the relations between States and between a State and an individual. The protection of individuals is a key element in many disciplines of international law. With the 1951 Geneva Refugee Con-

⁷³⁰ Further literature on the issue: CASSESE Antonio, *The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise*, *Journal of International Criminal Justice*, Vol. 5, 2007, p. 109 ff., MARAUHN Thilo, *Die Rechtsstellung des Menschen im Völkerrecht*, Tübingen, 2007, FROWEIN Jochen, *Das Individuum als Rechtssubjekt im Konsularrecht*, in: Flume Werner et al. (eds.), *Internationales Recht und Wirtschaftsordnung, Festschrift für Frederik Alexander Mann zum 70. Geburtstag*, Munich, 1977, p. 367 ff.

⁷³¹ HOBE Stephan, *Einführung in das Völkerrecht*, 10th ed., Tübingen, 2014, p. 167, PAECH, p. 52 f.

⁷³² Optional Protocol to the International Covenant on Civil and Political Rights adopted by UNGA in New York on 16.12.1966, Resolution 2200 A (XXI).

⁷³³ Art. 1 (3) UN Charter.

vention⁷³⁴, contracting parties have accepted the obligation to host persons fleeing from prosecution and human rights violation. This very fact presupposes that States have given up on the strict inter-State character of international law and the principle of non-interference. Acts performed in a purely national setting have transnational consequences including the obligation as described by the Geneva Refugee Convention. In addition, international humanitarian law describes rules on relief and treatment of combatants *hors the combat*.⁷³⁵ It forbids unnecessary suffering and cruel and inhuman treatment,⁷³⁶ establishes rules on the protection of the civil population and the objects necessary for their survival⁷³⁷, and, this is paramount for the present discussion, can be enforced through an international criminal mechanism.

The trials of the international criminal tribunals have brought a significant change on how individuals are perceived in international law. The Nurnberg and Tokyo trials were at the starting point to hold individuals liable for violating international norms. Persons responsible for international crimes, including crimes against humanity, war crimes, genocide, or aggression may be brought before an international criminal court. Individuals have since become a main bearer of international obligations and have paradoxically not received the necessary legal tool to defend themselves against violations committed against them.⁷³⁸ In addition, the fact that individuals are criminally prosecuted in international law must have had an impact on the State's responsibility as well, a fact that was most notably argued by the Italian delegation its coun-

⁷³⁴ Convention relating to the Status of Refugees signed in Geneva on 28.7.1951 adopted by the UNGA Resolution 429 (V), 189 UNTS 137.

⁷³⁵ See the First Geneva Convention for the Amelioration of the Condition of the Wounded Sick in Armed Forces in the Field, signed in Geneva on 12.8.1989, 75 UNTS 31, Second Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, signed in Geneva on 12.8.1949, 75 UNTS 85, Third Geneva Convention relative to the Treatment of Prisoners of War signed in Geneva on 12.8.1949, 75 UNTS 135.

⁷³⁶ See Common Art. 3 to all Geneva Conventions and Art. 12 (2) First and Second Geneva Conventions, Art. 13 Third Geneva Convention and Art. 31 f. Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, signed in Geneva on 12.8.1949, 75 UNTS 287.

⁷³⁷ See Art. 4 and 53 ff. Fourth Geneva Convention.

⁷³⁸ HOBE, Einführung ins Völkerrecht, p. 168, SHAW, p. 189, PAECH, p. 53, BERKSY/MERVA/ROTH-ARRIAZA, p. 385, CLAPHAM Andrew, The Role of the Individual in International Law, European Journal of International Law, Vol. 21/1, 2010, p. 27.

ter-memorial to the ICJ.⁷³⁹ Italian Courts had recognized the jurisdictional immunity of Germany in the light of recent developments in international criminal law and human rights. Especially the consistent tendency of international law to criminalize severe violation of international law could not be seen in isolation of individual responsibility but simultaneously engages the liability of the State as well. Italy referred to the ICJ opinion in *Bosnia and Herzegovina v. Serbia and Montenegro* where the Court recognized a joint dual responsibility of the individual and the State in question.⁷⁴⁰ Italy further considered:

[T]here should be no temptation to allow States to free themselves from these obligations is testified by the evolution of the mechanisms to impose criminal responsibility on individuals.⁷⁴¹

If both the individual and the State are responsible for an act, how can it be justified that only individuals can be made responsible for their actions on both international and national level but not the State? A distinction solely based on the legal quality of the defendant does not convince as both proceedings will impact international relations and diplomacy.⁷⁴²

Not sufficiently discussed regarding the position of an individual in international law are the privileges and rights referred to investors in international investment law. This is astonishing as international investment treaties provide for the most elaborated international mechanism regarding individual protection in existence.⁷⁴³ Similar to human rights treaties, international investment agreements are of an asymmetrical nature granting exclusive individual rights while referring virtually all obligations to the host State of the investment.⁷⁴⁴ Should a substantive obligation be violated by a

⁷³⁹ *Germany v. Italy*, Italian Counter-Memorial, p. 100 ff.

⁷⁴⁰ *Bosnia and Herzegovina v. Serbia and Montenegro*, para. 173.

⁷⁴¹ *Germany v. Italy*, Italian Counter-Memorial, para. 5.32.

⁷⁴² See § 4 (II.2.b), p. 104 ff.

⁷⁴³ See HEMMI Martin, Using International Investment Arbitration for Compensating Victims of Torture, forthcoming, para. 1.

⁷⁴⁴ GAZZINI Tercisio, Bilateral Investment Treaties, in: Gazzini Tercisio/De Brabandere Eric (eds.), *International Investment Law*, Leiden, 2012, p. 107.

State party to an investment treaty, individuals would be allowed to bring a direct claim against it on the basis of an Investor-State-Dispute-Settlement clause (ISDS) in one of many international arbitration centers.⁷⁴⁵ The circumstances under which ISDS is implemented are unique in international law. An individual would not be obliged to exhaust local remedies before introducing proceedings, generally no prior notification or negotiation period is required and no minimum amount regarding the disputed sum exists.⁷⁴⁶ One of the most extraordinary provisions regarding an individual procedural right on international level is contained in the Energy Charter Treaty (ECT)⁷⁴⁷. Art. 26 ECT allows any nationals, and even any permanent residents of contracting parties⁷⁴⁸, to bring a direct claim against a foreign State. Next to a number of European and former Soviet countries, membership was also conferred to the European Union (EU) and Euratom making it the only provision in international law by which an individual may bring a direct claim against a supranational organization. During the ratification process, the European Commission had made the statement that:

It is declared that, due to the nature of the EU internal legal order [...] the International Energy Charter Treaty on dispute settlement mechanisms cannot be construed so as to mean that any such mechanisms would become applicable in relations between the European Union and its Member States, or between said Member States [...].⁷⁴⁹

⁷⁴⁵ FRANCIONI Francesco, Access to Justice, Denial of Justice and International Investment Law, in: Dupuy Pierre-Marie/Francioni Francesco/Petersmann Ernst (eds.), *Human Rights in International Investment Law and Arbitration*, Oxford, 2009, p. 65, see also HEMMI, *Using Investment Arbitration for Compensating Victims of Torture*, sec. 2 (forthcoming).

⁷⁴⁶ See HEMMI, *Using International Investment Arbitration for Compensating Victims of Torture*, sec. 2 (forthcoming).

⁷⁴⁷ Energy Charter Treaty signed in Lisbon on 17.12.1994, OJ L380, 31/12/1994, p. 24.

⁷⁴⁸ See Art. 7 (a) ECT see for more information HEMMI Martin, *The Concept of Nationality and Diplomatic Protection in International Investment Law*, Jusletter of 19.6.2017, para. 23 ff.

⁷⁴⁹ Declaration by the European Commission on behalf of the European Union, deposited at the Secretariat of the International Energy Charter on 20.5.2015.

By declaring so, the European Union nevertheless recognizes that ISDS is indeed an option for nationals and permanent residents originating from countries not members to the European Union, such as Japan, Mongolia, Turkmenistan or even Russia.⁷⁵⁰

With a total number of approximately 3500 treaties concluded among States that contain ISDS provisions⁷⁵¹, individuals have received a powerful tool to demand remedy for violations endured by a State. The highest reward so far granted by an international tribunal involved the bankruptcy of a Russian Oil company (Yukos Universal limited). Using the ISDS clause contained in the ECT, the Permanent Court of Arbitration ordered Russia to pay USD 50 billion to compensate individuals.⁷⁵² Also, following the attempt to introduce plain packaging for cigarette boxes in Togo, the Togolese government changed its legislative plan as it was brought to its knees by a cigarette company that threatened international proceedings.⁷⁵³ International investment law has developed so far as to put individuals not only on the same footing as States, or as we have seen supranational organizations, investors may even bring countries to the brink of financial collapse.

Keeping this context in mind, in what way would civil proceedings introduced by a victim of torture be more threatening to the functioning of a State especially so since businesses may already benefit from the *de jure gestionis* and commercial exception to State immunity?⁷⁵⁴ It seems inconsistent to argue that the dignity and sovereignty of a State is undermined when it's made responsible for killing and torturing individuals but not when it's almost made bankrupt through investment or business arbitration.

⁷⁵⁰ HEMMI, Using Investment Arbitration for Compensating Victims of Torture, sec. 2 (forthcoming).

⁷⁵¹ Database of the United Nations <http://investmentpolicyhub.unctad.org/IIA> [last accessed 12.12.2017].

⁷⁵² *Yukos Universal Limited v. The Russian Federation*, Decision of the Permanent Court of Arbitration of 18.7.2014, Case No AA 227.

⁷⁵³ No Logo, Article of the Economist published on 4.8.2016: <https://www.economist.com/news/business/21703424-big-tobaccos-controversial-ailing-crusade-against-plain-packaging-no-logo> [last accessed: 12.12.2017].

⁷⁵⁴ The same question raised by SHAW, p. 519 ff., AMNESTY INTERNATIONAL, *Germany v. Italy: The right to deny State immunity when victims have no other Recourse*, Amnesty International Publications, 2011, p. 19.

This argument was essentially raised by the Italian *Corte di Cassazione* to justify the disregard of Germany's State immunity:

It would be quite paradoxical for the international legal system, which allows the exercise of civil jurisdiction vis-à-vis foreign States in the event of violation of contractual obligations, to exclude it when faced with much graver violation, such as those which constitute crimes against humanity which mark the breaking-point of tolerable exercise of sovereignty. To state the contrary would mean to use a merely procedural rule to achieve an aim of paramount injustice.⁷⁵⁵

A number of authors have since supported scholars like Judges CAÑADO TRINDADE and LOUCAIDES in their view that the development of the individual in international law is not yet sufficiently taken into account with regard to the jurisdictional immunity of a State and that the ICJ had "unduly underestimated and irresponsibly neglected the position of the human person in international law"⁷⁵⁶.⁷⁵⁷ In a context where "the transformation from inter-state law to an individual-centered system has not yet found a definitive new equilibrium"⁷⁵⁸, it can no longer be accepted that a whole class of potential claimants is excluded from reparation and justice as a consequence of jurisdictional immunities.⁷⁵⁹ It is paradoxical for the Court to impose both criminal and civil responsibility on States and their representative without generating an effective implementation mechanism for the right to civil redress for the victims.⁷⁶⁰ Especially keeping in mind the recognized exceptions to foreign State immunity which allow individuals to bring civil proceedings against a foreign State in a domestic court,

⁷⁵⁵ *Germany v. Mantelli et al.*, p. 5, Similar also AMNESTY INTERNATIONAL, *Germany v. Italy*, p. 19.

⁷⁵⁶ *Germany v. Italy*, Dissenting opinion Judge CAÑADO TRINDADE, para. 181.

⁷⁵⁷ Supported by McMENAMIN, p. 214, REINISCH August, *International Organizations before National Courts*, Cambridge 2012, p. 286, BERKSY/MERVA/ROTH-ARRIAZA, p. 393, PAECH, p. 59, AMNESTY INTERNATIONAL, *Germany v. Italy*, p. 19.

⁷⁵⁸ KOKOTT Juliane, *States and Sovereign Equality*, in: Wolfrum Rüdiger (ed.), *Max Planck Encyclopaedia of Public International Law*, Oxford, 2007, para. 4.

⁷⁵⁹ REINISCH, *International Organizations before National Courts*, p. 286, HIGGINS, *Equality of States and Immunity from Suit*, p. 146.

⁷⁶⁰ CLAPHAM, p. 27.

the position of individuals have significantly changed since 1945. It is correct that individuals must be considered as only partial subjects of international law as they have yet to attain the same *ius standi* privileges of States.⁷⁶¹ With regard to the procedural enforcement of their rights, however, individuals have increasingly become able to bring cases against States both on national and international level, a fact that deserves more attention within the appreciation of State immunity law and violations of *jus cogens* norms.⁷⁶²

3. Conclusion on the Hierarchy Argument

While at a first glance the hierarchical argument seems to be a straightforward manner to resolve the issue of State immunity for a *jus cogens* violation, a detailed analysis reveals problems to which international law fails to give clear answers. While most national and international jurisprudence emphasize the conceptual distinction between substantive and procedural rules, and therefore dismiss a hierarchical approach based on a non-existent norm conflict, they fail to deliver a reliable tool for differentiating the one from the other. Especially when it comes to *jus cogens* norms, a strict substantive content of peremptory norms would seem too restrictive a concept to effectively protect fundamental values. Certain procedural components, such as the obligation to assess jurisdiction over *jus cogens* violations, can be identified in public international law leading to the assumption that peremptory norms go further than just outlawing a substantive practice. These secondary *jus cogens* obligations enter in direct conflict with procedural privileges such as jurisdictional immunities of a State. How these conflicts may be resolved is a matter of discussion. While the Inter-American Court of Human Rights has chosen to extent the peremptory character of *jus cogens* norms to cover their means of implementation, the necessary State practice to endorse such an approach globally is not sufficiently established. National and international jurisprudence in this area seems to draw a clear picture. States, for now, may still invoke the jurisdictional bar in civil matters even in case torture allegations are brought forward. Nevertheless, the author emphasizes that since the restrictive

⁷⁶¹ HOBE, Einführung ins Völkerrecht, p. 169.

⁷⁶² Ibid., HIGGINS, Equality of States and Immunity from Suit, p. 137.

doctrine on State immunity has become predominant in international law, the distinction between procedural and substantive obligations has lost its value. Courts must since analyze the merits of the case to establish or deny jurisdiction over a claim.

A non-ignorable number of international scholars defend the idea that national statutes implementing State immunity law must be interpreted in such a way as to consider the recent development in international law and give full effect to the fundamental values represented by peremptory norms. Indeed, analyzing the issue of a continued immunity of State immunity for *jus cogens* violations creates several areas of conflict. First of all, given the high importance granted to *jus cogens* norms in international law and the continued struggle against impunity, it does seem contradictory that a State may elude responsibility through jurisdictional immunity in civil matters. Historically, the international community has already created the necessary tool to give victims access to justice through the extension of domestic jurisdiction over immunity privileges. The theoretical basis and legal justification of a criminal universality can and should be applied for the introduction of civil universal jurisdiction for violations of peremptory norms.

Secondly, the concept of sovereignty, State equality and the principle of non-interference have undergone major changes and cannot serve as an unchecked justification for a continued immunity for torture in all circumstances. Sovereignty may no longer be understood as a simple shield from interference but as a responsibility to the population and the protection of individual rights. Courts are urged to apply a more modern understanding of these notions especially when dealing with State immunity issues. Potential balancing acts performed between sovereignty and humanity interests must *a priori* be decided in favor of the latter given the gradual humanization of sovereignty rights within international law. In addition, courts should be reminded that the international legal order does indeed allow for exercising jurisdiction over both *de jure gestionis* and *de jure imperii* acts in domestic litigation.

Lastly, the enhanced position of the individual in international law needs to be better acknowledged. Developments in international refugee law, international human rights, international investment protection as well as the evolution of individual criminal responsibility must have had significant repercussions on the immunity of States. Given the extensive rights of an individual to introduce proceeding against a State in

both domestic and international law, a *jus cogens* exception to State immunity does not pose a bigger threat to the dignity of a State than what is already practiced in other areas of international law.

Through a systematic interpretation of the legal provisions described in this chapter, a court could reach the conclusion that a sovereign immunity provision in a domestic statute have no place as a defense against acts amounting to torture. As previously practiced, it could depart from the literal meaning of national statutes and justify assessing jurisdiction as otherwise serious crimes would go unpunished. It may, however, not be ignored that such an approach hardly reflects the requirement of a democratic society as a court seemingly arbitrarily departs from the provision adopted by elected representatives. Recognizing an implied *jus cogens* exception based on the comprehensive interpretative method consequently shows a democratic legitimacy gap.⁷⁶³ In addition, critical positivist authors would argue that a strict separation between morals and the law is necessary and that arguments like the one on coherent interpretation of a legal order is simply an idealist, emotional, and political response to the lack of legal reasoning.⁷⁶⁴ The responsibility to adapt an inherent contradictory legal order is therefore in the hands of the legislator and not the judiciary.⁷⁶⁵ The ICJ also responded negatively to a coherence approach as the “immunity cannot [...] be made dependent upon the outcome of a balancing exercise of the specific circumstances of each case to be conducted by the national court before which immunity is claimed.”⁷⁶⁶

The author of this thesis concludes that, for the moment, no torture-related exception to State immunity can be created on the basis of the hierarchical superior position the prohibition of torture in this respect. The statutory interpretation method is indeed

⁷⁶³ ADAMS, p. 259.

⁷⁶⁴ Ibid., p. 271, regarding critical positivist theory: HART Herbert, *The Concept of Law: Collection of Essays*, in: Cassese Antonio (ed.), *Realizing Utopia: The Future of International Law*, Oxford, 2012, CASSESE Antonio, *Five Masters of International Law*, *European Journal of International Law*, Vol. 22, 2011, p. 1175 ff., FEICHTNER Isabel, *Realizing Utopia through the Practice of International Law*, *European Journal of International Law*, Vol. 23/4, 2012, p. 1143 ff.

⁷⁶⁵ ADAMS, p. 273.

⁷⁶⁶ *Germany v. Italy*, para. 106.

one example on how a national court could attempt to harmonize human rights law with State immunity but that it would indeed cause a number of legitimacy and rule of law issues. Nevertheless, what the analysis of the “coherence argument” manages to bring across is that a State immunity exception for torture and other peremptory norms is necessary as it would otherwise undermine the fundamental values of the international legal order. The current State immunity system is in contradiction with many recent developments in international law and should be modernized in relation to violations of peremptory norms.

Jus cogens may play a role in [the] evolution [of creating a *jus cogens* exception] by buttressing the view that such an exception is necessary because it is in line with the values incorporated by the international community in a higher legal category. [...] By admitting that the denial of immunity is not a direct consequence of *jus cogens*, but that peremptory norms provide a compelling reason for States to depart from existing practice, one can frame a claim that is compatible with that normative category and therefore most likely to be adopted by courts.⁷⁶⁷

III. Responsibility of States for Breaches of Peremptory Norms

The upcoming chapter should tackle two essential legal questions. First of all, is it conceivable that the forum State, by granting jurisdictional immunities in case of an alleged violation of the prohibition of torture, directly or indirectly assists in the commission of a breach of international law or at least recognizes its legitimacy? This would essentially go against the obligations contained in the ILC Draft Articles of the Responsibility of States and expose the forum State to international liability. Both the obligation not to assist as well as the obligation not to recognize the lawfulness of a situation created by a breach of a peremptory norm should be presented and analyzed.

Further, the ILC Draft Articles codified the procedure and preconditions necessary for a State to take countermeasures in case a violation of international law has been

⁷⁶⁷ KNUCHEL, p. 174.

committed. Could the jurisdictional privilege of a foreign State be disregarded as a direct countermeasure in reaction to an internationally prohibited act of torture? It will be discussed whether judicial countermeasures against the immunity of a State are indeed a lawful and adequate tool for a victim of torture to receive access to a domestic civil court.

1. Duty not to Recognize or Assist within the ILC Draft Articles on the Responsibility of States

Chapter III of the ILC Draft Articles of the Responsibility of States for Internationally Wrongful Acts is dedicated to the obligations and rights of States arising out of severe *jus cogens* violations. Keeping in mind the uniqueness and sanctity of peremptory norms, the ILC wanted to differentiate the consequences of serious *jus cogens* violations from “ordinary” breaches of international law.⁷⁶⁸ While the main responsibilities, such as reparations and remedies, are primarily owned by the perpetrating State, a serious breach of international law also causes rights and duties to be respected by all members of the international community.⁷⁶⁹ In the explanatory comments to Art. 40 ARSIWA, the ILC explains that the applicability of this chapter will depend on the seriousness of the breach in question. Not all violations of peremptory norms automatically fulfill this threshold but must be of a systematic, gross or egregious nature.⁷⁷⁰

To be regarded as systematic, a violation would have to be carried out in an organized and deliberate way. In contrast, the term “gross” refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the val-

⁷⁶⁸ BIRD Annie, Third State Responsibility for Human Rights Violations, *European Journal of International Law*, Vol. 21/4, 2010, p. 886.

⁷⁶⁹ KÜNZLI, Vom Umgang des Rechtsstaats mit Unrechtsregimes, Chapter 5, with regard to *jus cogens* violations p. 340 ff., KÜNZLI Jörg, *Zwischen Recht und Politik: Der rechtliche Handlungsspielraum der schweizerischen Südafrikapolitik*, Bern, 2005, p. 281 ff.

⁷⁷⁰ ILC ARSIWA Comments to Art. 40, para. 7, CRAWFORD, *ILC Articles on State Responsibility*, p. 247.

ues protected by the rule. [...] Factors which may establish the seriousness of a violation would include the intent to violate the norm; the scope and number of individual violations; and the gravity of their consequences for the victims.⁷⁷¹

The ILC, however, refuses to determine a clear procedure to distinguish a serious breach from an ordinary violation of peremptory norms. Other international organs, such as the UN Security Council, were considered more capable to establish criteria on a case-by-case basis.⁷⁷² Nevertheless, the ILC ignores that this differentiating exercise is both performed by international and domestic entities alike. More detailed guidelines in this regard would therefore significantly enhance the security of law and prevent the abuse of rights contained in the ILC Draft Articles.

The need for better guidelines in this respect are best shown in a scenario where a breach of *jus cogens* has taken place but without qualifying as systematic or gross violation of a peremptory norm. JØRGENSEN, for examples, mentions the 1979 Tehran Hostage taking as one possible incident of an “ordinary” breach of international law.⁷⁷³ As we are about to discover, any third State not affiliated with the commission of a wrongful act is under the obligation not to assist the perpetrating State within the commission of a breach of law and not to recognize such actions as lawful. JØRGENSEN consequently asks if a third State could have assisted Iran in prolonging the unlawful hostage situation in Teheran or specifically recognize the lawfulness of such action without violating international norms?⁷⁷⁴ The ILC could not have intended such an interpretation, which is why KÜNZLI emphasizes that at least the obligation of non-recognition and of non-assistance may be mandatory on States as part of customary

⁷⁷¹ ILC ARSIWA Comments to Art. 40, para. 8, CRAWFORD, ILC Articles on State Responsibility, p. 247.

⁷⁷² ILC ARSIWA Comments to Art. 40, para. 9, CRAWFORD, ILC Articles on State Responsibility, p. 248.

⁷⁷³ JØRGENSEN Nina, The Obligation of Non-Assistance to the Responsible State, in: Crawford James/Pellet Alain/Olleson Simon (eds.), *The Law of International Responsibility*, Oxford, 2010, p. 692.

⁷⁷⁴ Ibid.

international law regardless of the “aggravated” qualification, the egregiousness or the systematic nature of the violation in question.⁷⁷⁵

a. Duty not to Assist in the Commission of a Peremptory Violation

Both Italian⁷⁷⁶ and Greek courts justified lifting the immunity from jurisdiction of the German State as granting it would have constituted an illegal support within the commission of an internationally wrongful act in violation of the ILC Draft Articles on the Responsibility of States:

The recognition of immunity for an act contrary to peremptory international law would amount to complicity of the national court to the promotion of an act strongly condemned by the international public order.⁷⁷⁷

It is correct that Art. 41 (2) ARSIWA obliges a State to refrain from “recogniz[ing] as lawful a situation created by a serious breach within the meaning of article 40, nor render[ing] aid or assistance in maintaining that situation.” It is, however, highly controversial whether an accepted plea for immunity from jurisdiction may constitute an act of complicity within the meaning of Art. 41 ARSIWA. First of all, Art. 41 (2) ARSIWA constitutes a *lex specialis* to the general obligation of non-assistance contained in Art. 16 ARSIWA, however imposes further reaching obligations. While Art. 16 requires a continued act of a violation and proof that the assisting State had knowledge of the circumstances of the internationally wrongful act, Art. 41 (2) ARSIWA contains no such reference.⁷⁷⁸

⁷⁷⁵ KÜNZLI, *Vom Umgang des Rechtsstaats mit Unrechtsregimes*, p. 352, KÜNZLI, *Zwischen Recht und Politik*, p. 302, see also ORAKHELASHVILI, *State Immunity and Hierarchy of Norms*, p. 964.

⁷⁷⁶ *Ferrini v. Germany*, Italian Court of Cassation, para. 9, see also *Germany v. Italy*, Italian Rejoinder, para. 4.9.

⁷⁷⁷ *Prefecture of Voiotia v. Germany*, Regional Court of Livadia, see also GAVOUNELI Maria, *War Reparation Claims and State Immunity*, *Revue Hellénique de Droit International*, Vol. 50, 1997, p. 599.

⁷⁷⁸ ILC ARSIWA Comments to Art. 41, para. 11, KÜNZLI, *Vom Umgang des Rechtsstaats mit Unrechtsregimes*, p. 354.

Examples of acts that would constitute a violation of the prohibition of complicity are exports, delivery or transfer of arms and weapons used for the commission of an internationally wrongful act⁷⁷⁹, the import of goods and services that would allow the perpetrating State to maintain the illegal situation, or allowing the perpetrating State to use a territory for military purposes or the commission of international crimes.⁷⁸⁰ On the other hand, it does not suffice to simply instigate the commission of a wrongful act or morally support the violation in any way.⁷⁸¹ Only substantial aid and assistance will fall within the scope of Art. 41 (2) ARSIWA, such as financial and economic assistance or political and material collaboration.⁷⁸² Nevertheless, the notion of assistance remains extremely broad. The ILC, in an attempt to clarify the limits of the prohibited acts, held:

The aid or assistance must have the effect of making it materially easier for the State receiving the aid or assistance in question to commit an internationally wrongful act.⁷⁸³

A clear and direct causal link between the support and the violation of the law and a significant degree of intensity are hence necessary for Art. 41 (2) ARSIWA to be violated.⁷⁸⁴ In respect to the grant of foreign immunity, an overwhelming majority of the legal doctrine denies the possibility of it constituting a prohibited act of complicity.⁷⁸⁵ While it could be argued that national courts, by refusing to lift the jurisdictional bar imposed by foreign immunity, do facilitate the continued impunity for a *jus cogens*

⁷⁷⁹ BOIVIN Alexandra, Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons, *International Review of the Red Cross*, Vol. 87, 2005, p. 472, KÜNZLI, *Zwischen Recht und Politik*, p. 285.

⁷⁸⁰ KÜNZLI, *Zwischen Recht und Politik*, p. 285.

⁷⁸¹ QUIGLEY John, Complicity in International Law: A New Direction in the Law of State Responsibility, *British Yearbook of International Law*, Vol. 57, 1986, p. 80, GRAEFRATH Bernhard, Complicity in the Law of International Responsibility, *Revue Belge de Droit International*, Vol. 1996/2, 1996, p. 374.

⁷⁸² GRAEFRATH, p. 374.

⁷⁸³ *Yearbook of the International Law Commission*, Vol. II (Part Two), 1978, p. 104.

⁷⁸⁴ GRAEFRATH, p. 374.

⁷⁸⁵ KNUCHEL, p. 164, KÜNZLI, *Vom Umgang des Rechtsstaats mit Unrechtsregimes*, p. 355, GIEGERICH, p. 235, CAPLAN, p. 775. KOLB/JARDIM OLIVEIRA, p. 259.

violation⁷⁸⁶, it does seem excessive to qualify the forum State as an accomplice to the perpetrating State. Keeping in mind the substantial threshold that exists in relation to the application of Art. 41 (2) ARSIWA, the author of this thesis cannot see in what way a simple denial to exercise jurisdiction in civil proceedings would qualify as a “substantial aid and assistance” which “makes the violation materially possible”.

In addition, from a purely legal point of view, the forum State, despite exercising a significant control over the matter, does not generally choose to grant immunity to a State but is obliged to do so under customary international law. In *Jones v. Saudi Arabia*, the UK House of Lords did eventually grant Saudi Arabia immunity from jurisdiction over well documented acts of torture. Lord HOFFMANN specifically stated that he harshly condones torture as a violation of international law but that the UK lacked the necessary means to establish jurisdiction over an act of torture committed by public officials of a foreign State.⁷⁸⁷ This reasoning can hardly be considered an act of assisting Saudi Arabia in the commission of a breach of law. Accepting so would severely overstretch the concept of complicity and assistance in international law, which is why the ICJ in the proceedings between *Germany v. Italy*, at least from the author’s point of view, correctly decided:

[R]ecognizing the immunity of a foreign State in accordance with customary international law does not amount to [...] rendering aid and assistance in maintaining that situation, and so cannot contravene the principle in Article 41 [ARSIWA].⁷⁸⁸

The grant of jurisdictional immunity to a foreign State can consequently not qualify as a prohibited act of complicity within the meaning of Art. 41 (2) ARSIWA.

⁷⁸⁶ Next to the case law already cited, a few authors in support of this opinion: VIVEKANANTHAN, p. 147, PAUST Jordan, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Non-immunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine*, *Virginia Journal of International Law*, Vol. 23, 1983, p. 227, MANN Frederick, *The Doctrine of Jus Cogens in International Law*, in: Ehmke Horst et al. (eds.), *Festschrift für Ulrich Scheuner*, Berlin, 1973, p. 415.

⁷⁸⁷ *Jones v. Saudi Arabia*, House of Lords, opinion expressed by Lord HOFFMANN.

⁷⁸⁸ *Germany v. Italy*, para. 93.

b. Duty not to Recognize as Lawful a Situation created by a Violation of Peremptory Norms

Nevertheless, it should further be analyzed whether the grant of immunity directly or indirectly recognizes the legitimacy of a violation of peremptory norm in breach of Art. 41 (2) ARSIWA. By failing to take active measures against a State and its immunity, could it be argued that the forum State at least tacitly recognizes the legitimacy of the action?⁷⁸⁹

In order to give a conclusive answer to this question, one should first consider the content of the duty of non-recognition. In two separate advisory opinions the ICJ was tasked to clarify the legal consequences of a severe violation of international law on the international community and on a third State not involved in the violation. In *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory case*, the ICJ first of all recognized that Israel was in a continued breach of the Palestinian people's *jus cogens* right to self-determination.⁷⁹⁰ Any and all States were hence under the obligation not to recognize the legality created by the construction of the wall, not to assist in maintaining the illegal situation and have the duty to see "that any impediment, resulting from the construction to the wall, to exercise by the Palestinian people of its right to self-determination is brought to an end."⁷⁹¹ In its assessment on what actions would constitute a recognition of the situation, the ICJ remains intentionally vague and refers to the General Assembly and the Security Council to give additional guidance on the obligations incumbent on States.⁷⁹² The ICJ's reluctance in this matter surprises as it had already clarified to some extent the notion of recognition in an earlier opinion in a matter regarding the illegal presence of South

⁷⁸⁹ Among others argued by ORAKHELASHVILI, *State immunity and Hierarchy of Norms*, p. 964, BERKSY/MERVA/ROTH-ARRIAZA, p. 401.

⁷⁹⁰ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of the ICJ of 9.7.2004, ICJ Reports 2004, p. 136 ff., para. 138.

⁷⁹¹ *Ibid.*, para. 159.

⁷⁹² *Ibid.*, para. 160, see also DAWIDOWICZ Martin, *The Obligation of Non-Recognition of an Unlawful Situation*, in: Crawford James/Pellet Alain/Olleson Simon (eds.), *The Law of International Responsibility*, Oxford, 2010, p. 685.

African authorities in Namibia.⁷⁹³ In this case the ICJ had briefly mentioned that the duty of non-recognition includes:

[T]he obligation to abstain from entering into treaty relation with South Africa in all cases which the Government of South Africa purports to act on behalf of or concerning Namibia.⁷⁹⁴

States must further not send any diplomatic or special mission to South Africa whose jurisdiction includes the territory of Namibia as well as must refrain from sending consular agents to Namibia and withdraw agents already sent.⁷⁹⁵ In addition, States were obliged to abstain from fostering financial or economic relations with South Africa in regard to business conducted on the Namibian territory as it would imply recognition.⁷⁹⁶ On the other hand, the ICJ held that non-recognition should never deprive the Namibian people from any advantages derived from international co-operation and suggested that official acts performed by the South African authorities, such as birth registration, marriage licenses, or death certificates, may extraordinarily be accepted by a foreign State as official documents,⁷⁹⁷ this for the prevention of a too rigid application of the duty not to recognize for the purpose of protecting the interests of the population under occupation.⁷⁹⁸

Nevertheless, the exact content of the duty of non-recognition remains largely unclear.⁷⁹⁹ A number of authors have attempted to give meaning to this obligation by

⁷⁹³ *Legal Consequences for States of the continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of the ICJ of 21.6.1971, ICJ Reports 1971, p. 16 ff.

⁷⁹⁴ *Ibid.*, para. 122.

⁷⁹⁵ *Ibid.*, para. 123.

⁷⁹⁶ *Ibid.*, para. 124.

⁷⁹⁷ *Ibid.*, para. 125.

⁷⁹⁸ CHRISTAKIS Théodore, L'obligation de non-reconnaissance des situations créées par le recours illicite à la force ou d'autres actes enfreignant des règles fondamentales, in: Tomuschat Christian/Touvenin Jean-Marc (eds.), *The Fundamental Rules of the International Legal Order*, Leiden/Boston, 2006, p. 161.

⁷⁹⁹ BIRD, p. 890, KÜNZLI, *Vom Umgang des Rechtsstaats mit Unrechtsregimes*, p. 353, DAWIDOWICZ, p. 685, CHRISTAKIS, p. 129.

analyzing situations when non-recognition was imposed. In principle, all peremptory norm violations give rise to the obligation of non-recognition.⁸⁰⁰ This is insofar convincing as a violation of peremptory norms automatically leads to the nullity of the act in international law. A State can therefore not logically accept its validity.⁸⁰¹ As LAUTERPACHT explains, the main scope of the duty of non-recognition is to prevent the gradual validation of a violation of law by seeking recognition from other members of the international community.⁸⁰² Non-recognition should stop a customary “law-creating effect of facts” that exists in international law and is essentially equivalent to the principle of *ex injuria jus non oritur*.⁸⁰³ Examples on acts of non-recognition might include the rejection of travel documents, the suspension of the effect of bilateral and multilateral treaties or the rejection of the request to become a member to an international organization should the entity in question have illegally declared its independence.⁸⁰⁴

In practice, however, the almost exclusive application of the duty not to recognize was in relation to the illegal occupation or annexation of a territory by a foreign State or the illegitimate declaration of independence.⁸⁰⁵ Next to the already mentioned examples of Namibia and the occupied Palestinian Territories, one might mention the

⁸⁰⁰ ORAKHELAASHVILI, State immunity and Hierarchy of Norms p. 964, DAWIDOWICZ, p. 679, KÜNZLI, Zwischen Recht und Politik, p. 300, TALMON Stefan, Duty not to ‘Recognize as Lawful’ a Situation Created by the Illegal Use of Force or other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?, in: Tomuschat Christian/Touvenin Jean-Marc (eds.), The Fundamental Rules of the International Legal Order, Leiden/Boston, 2006, p. 99.

⁸⁰¹ DUGARD John, Recognition and the United Nations, Cambridge, 1987, p. 135, KÜNZLI, Vom Umgang des Rechtsstaats mit Unrechtsregimes, p. 340, KÜNZLI, Zwischen Recht und Politik, p. 293.

⁸⁰² LAUTERPACHT Hersch, Recognition in International Law, Cambridge, 1947, p. 430, see also CHRISTAKIS, p. 133, BERKSY/MERVA/ROTH-ARRIAZA, p. 401.

⁸⁰³ LAUTERPACHT, Recognition in International Law, p. 430, see also FROWEIN Jochen, Non-Recognition, Max Planck Encyclopedia of Public International Law, Vol. 10, Heidelberg, 2012, p. 314 ff., DAWIDOWICZ, p. 677.

⁸⁰⁴ DAWIDOWICZ, p. 685.

⁸⁰⁵ KÜNZLI, Vom Umgang des Rechtsstaats mit Unrechtsregimes, p. 353, DAWIDOWICZ, p. 685 f., CHRISTAKIS, p. 128.

situation of independence of Bantustan⁸⁰⁶, the Turkish Republic of Northern Cyprus⁸⁰⁷, the Iraqi occupation of Kuwait⁸⁰⁸, or, a more recent example, the annexation of the Crimean Peninsula by the Russian Federation⁸⁰⁹. Many scholars, including the ICJ Judge KOOIJMANS, consequently have difficulty to understand what could constitute an act of recognition in case genocide, slavery or torture was committed.⁸¹⁰ One possible description of the duty of non-recognition could take the form of an obligation to deny the legal claim to status or rights of a wrongdoing State.⁸¹¹ Notwithstanding that this definition could potentially include the obligation to deny jurisdictional immunities in case of alleged torture⁸¹², DAWIDOWICZ accepts that no such practice exists and consequently doubts the practical applicability of the duty of non-recognition to the prohibition of torture.⁸¹³ Legal scholars almost unanimously agree.⁸¹⁴ An obligation to take active measures against the immunity of a foreign State and to assume jurisdiction over it would go against the very nature of the duty not to recognize which by definition entails the obligation to abstain rather than to act.⁸¹⁵

⁸⁰⁶ UNGA Resolution 3411 (XXX) of 28.11.1975, UN Doc No. A/RES/30/3411 calling on governments to deny recognition, see also KÜNZLI Jörg, *Zwischen Recht und Politik: Der rechtliche Handlungsspielraum der schweizerischen Südafrikapolitik*, Bern, 2005.

⁸⁰⁷ UN Security Council Resolution 541 of 18.11.1983, UN Doc. No. S/RES/541(1983) and Resolution 550 of 11.5.1984, UN Doc. No. S/RES/550(1984), for more information see TALMON Stefan, *Kollektive Nichtanerkennung illegaler Staaten. Grundlagen und Folgen einer international koordinierten Sanktion, dargestellt am Beispiel der Türkischen Republik Nord-Zypern*, Tübingen, 2006.

⁸⁰⁸ UN Security Council Resolution 662 of 6.8.1990, UN Doc. No. S/RES/666(1990).

⁸⁰⁹ UNGA Resolution 68/262 of 27.3.2014, UN Doc. No. A/RES/68/262 calling on governments not to recognize the Russian annexation of Crimea.

⁸¹⁰ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Separate Opinion Judge KOOIJMANS, para. 44, TALMON, *Kollektive Nichtanerkennung*, p. 116 ff., TALMON, *Duty not to Recognize*, p. 103 and 118, DAWIDOWICZ, p. 683.

⁸¹¹ TALMON, *Kollektive Nichtanerkennung*, p. 116 ff., DAWIDOWICZ, p. 683.

⁸¹² ORAKHELASHVILI, *State Immunity and Hierarchy of Norms*, p. 964.

⁸¹³ *Ibid.*, p. 686.

⁸¹⁴ KNUCHEL, p. 164, GIEGERICH, p. 235, KOLB/JARDIM OLIVEIRA, p. 259, CANDRIAN, p. 589 f., *Germany v. Italy*, para. 93.

⁸¹⁵ KÜNZLI, *Vom Umgang des Rechtsstaats mit Unrechtsregimes*, p. 342 and 355, KÜNZLI, *Recht und Politik*, p. 282, CAPLAN, p. 775, GIEGERICH, p. 235, TALMON, *the Duty not to Recognize*, p. 112.

Keeping in mind that the scope of the duty not to recognize is the prevention of a gradual legalization of prohibited unlawful action (for example annexation of a territory), it is difficult to argue in what way this applies to the grant of immunity for an act of torture. It is unlikely that acts of torture would gradually become legalized simply because the enforcement of a limited number of acts is prevented by jurisdictional immunities. As we have discussed in the previous chapter, Lord HOFFMANN had specifically acknowledged the illegality of the acts taken by Saudi Arabia before deciding immunity would be granted.⁸¹⁶ It did consequently not contribute to any gradual legitimization of torture as a lawful measure but rather strengthened its international recognition as a *jus cogens* norm.

TALMON, on the other hand, convincingly points out one situation where the duty not to recognize might involve a direct obligation to deny jurisdictional immunity of a foreign “State”. In case a new State claims to have gained independence while the international community refuses to recognize the legitimacy of the independence, for example as happened with the Turkish Republic of Northern Cyprus, Bantustan, Rhodesia, or the Republic of Abkhazia, any State would be under the obligation to deny such entities any privileges that are incumbent to statehood, including jurisdictional immunities.⁸¹⁷ This conclusion persuades as the grant of immunity would directly acknowledge the existence of statehood and is hence a prohibit act of recognition within Art. 41 (2) ARSIWA. At least in theory it is hence possible to deduct from the duty of non-recognition an obligation to deny jurisdictional immunity to a foreign State. This exception is, however, limited to “illegal” States and entities whose statehood is not recognized by the international community. The practical relevance of this obligation is consequently slight.

With regard to existing States, however, the author doubts that Art. 41 (2) ARSIWA would be violated in case the forum State would grant jurisdictional immunity for alleged violation of the prohibition of torture. It, first of all, does not qualify as a substantial assistance which makes the violation materially possible and secondly does

⁸¹⁶ *Jones v. Saudi Arabia*, House of Lords, opinion expressed by Lord HOFFMANN.

⁸¹⁷ TALMON, the Duty not to Recognize, p. 116, supported by CHRISTAKIS, p. 157.

not contribute to the gradual legalization of torturous acts in international law. The concept of non-recognition is unfit to convincingly establish a torture-related exception to State immunity and seems to be an inadequate tool for effectively preventing the continued impunity for violations of peremptory norms.

2. Countermeasures

As we have seen, the commission of an illicit act of international law will call for the liability of a State responsible for the action. The question arises whether the forum State, or any other State which was injured by the breach of a peremptory norm, would legally be allowed to lift the procedural privilege as a consequence of a reprisal against the wrong-doing State. As the former Chairperson of the Committee against Torture suggested:

[A]s a countermeasure permitted under international public law, a State could remove immunity from another State – a permitted action to respond to torture carried out by that State. There was no peremptory norm of general international law that prevented States from withdrawing immunity from foreign States in such cases to claim for liability for torture.⁸¹⁸

Many legal scholars seem to agree and propose reprisals against foreign immunity as a possible solution to reconcile human rights with State immunity law.⁸¹⁹ States are free to relax the procedural bar enjoyed by a foreign sovereign in response to a violation of

⁸¹⁸ Committee against Torture, Consideration of Reports submitted by States Parties under Article 19 of the Convention during its thirty-fourth session, Summary Record of the Second Part of the 646th Meeting on 6.5.2005, UN Doc. No. CAT/C/SR.646/Add.1, para. 67, see also BRÖHMER, p. 192.

⁸¹⁹ Most notably: GIEGERICH, p. 232 ff., FORCESE, p. 165 f., TARRE MOSER Patricia, Non-Recognition of State Immunity as a Judicial Countermeasure to Jus Cogens Violations: The Human Rights Answer to the ICJ Decision on the Ferrini Case, *Göttingen Journal of International Law*, Vol. 4, 2012; ATTERITANO Andrea, Immunity of States and their Organs: The Contribution of Italian Jurisprudence over the Past Ten Years, *Italian Yearbook of International Law*, Vol. 19, 2009; KOKOTT Juliane, Missbrauch und Verwirkung von Souveränitätsrechten bei gravierenden Völkerrechtsverstößen, in: Beyerlin Ulrich et al. (eds.), *Recht zwischen Umbruch und Bewahrung*, Heidelberg, 1995, p. 148 f.

the prohibition of torture especially if it consists of the only remedy available.⁸²⁰ Italy had raised this issue in its oral pleading in the *Jurisdictional Immunities* case, however, decided not to include it in its final submission to the Court, which is why the ICJ judgment is silent on the matter.⁸²¹

This section is dedicated to a detailed analysis over the preconditions necessary for taking countermeasures in international law as well as their application to reprisals taken against the immunity of a foreign State. In a second step, some policy considerations should be discussed. Are countermeasures a suitable tool for the implementation of a torture-related exception to State immunity? A summary of the findings will conclude the chapter.

a. Conditions for the Referral to Countermeasures

Reprisals, also known as countermeasures, are otherwise unlawful measures not in violation of international law when taken in response to a previous violation of international law by another State.⁸²² They are intended as a decentralized method to enforce international obligations⁸²³ and should convince the perpetrating State to cease the breach of international law and pay reparations for the harm caused.⁸²⁴ Chapter II of the ILC Draft Articles on the Responsibility of States codifies the conditions and rules applicable for taking countermeasures as well as their limitations. A State is therefore bound to respect certain principles as the reprisal would otherwise be considered a violation of international law exposing liability.⁸²⁵ It should briefly be mentioned that obligations contained in chapter II are not conditional on a “aggravated” violation of peremptory norms but apply to any breaches of law for which a State is

⁸²⁰ FORCESE, p. 167, GIEGERICH, p. 232, STEGER, p. 121 f.

⁸²¹ *Germany v. Italy*, Oral Proceeding as contained in CR 2011/18, p. 38 ff., see also FOX/WEBB, p. 16.

⁸²² CRAWFORD, ILC Articles on State Responsibility, p. 281; TOMUSCHAT Christian, *Human Rights Between Idealism and Realism*, 3rd ed., Oxford, 2014, p. 316 f., BRÖHMER, p. 192 f.

⁸²³ KÜNZLI, *Vom Umgang des Rechtsstaats mit Unrechtsregimes*, p. 29.

⁸²⁴ ZOLLER Elisabeth, *Peacetime Unilateral Remedies: An Analysis of Countermeasures*, Dobbs Ferry, 1984.

⁸²⁵ CRAWFORD, ILC Articles on State Responsibility, p. 470.

responsible. It is consequently not necessary that a State proves the egregiousness or systematic nature of a breach to be entitled to refer to countermeasures.

Entitlement for taking Countermeasures

First of all, countermeasures may only be taken by a State which is directly injured by the breach of international law and only against the State which is responsible for the action.⁸²⁶ In the case of violation of peremptory norms, however, not only the injured State is entitled to refer to what is called “solidary measures” or “collective countermeasures”.⁸²⁷ As the ICJ mentioned:

The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party.⁸²⁸

While the ICJ only discusses the prohibition of torture as being part of the principle *erga omnes partes*, international law has since acknowledged the duty not to torture as an obligation owned towards other members of international community, non-parties to CAT, as well.⁸²⁹ As peremptory norms, including the prohibition of torture, are obligations owned to the international community as a whole, its breach affects all States alike. All States have an interest for their enforcement and are therefore entitled to refer to countermeasures. Factual circumstances, such as the nationality of the victim concerned or the location where torture was committed, are not decisive for countermeasures to be invoked.⁸³⁰ The prohibition of torture must consequently be understood as a bundle of obligations. As a human right, the individual has the right

⁸²⁶ Art. 49 (1) ARSIWA, CRAWFORD James, Counter-measures as Interim Measures, European Journal of International Law, Vol. 5, 1994, p. 66.

⁸²⁷ TARRE MOSER, p. 812, SHEN, p. 326.

⁸²⁸ *Belgium v. Senegal*, para. 69.

⁸²⁹ *Prosecutor v. Furundžija*, para. 151 ff., ILC ARSIWA Commentary on Art. 40, para. 4 ff.

⁸³⁰ *Belgium v. Spain*, para. 32, Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the ILC of 13.4.2006 by Martti KOSKENNIEMI, UN Doc. No. A/CN.4/L.682, para. 396, KÜNZLI, Vom Umgang des Rechtsstaats mit Unrechtsregimes, p. 32.

not to be tortured by any State officials, however, as a peremptory norm, protecting the most fundamental values of the international community, a State has accepted not to torture anyone as a binding promise to each State and the international society as well. This consequently gives any State the legal ability to refer to reprisals against a State which is responsible for torture. JAMES CRAWFORD, former Special Rapporteur on State Responsibility, identifies some difficulties with this solution. If multiple States start demanding different things from the wrong-doing State for the exact same breach of international law, the consequences could be complete chaos and disorder. He rightly suggests a duty to collaborate and coordinate between all State willing to take solidarity measures and foster an organized response to a violation of law.⁸³¹

On a domestic level, the executive branch is generally tasked with taking reprisals as it is the traditional body in charge of conducting foreign relations.⁸³² Only a small number of cases may be cited where the legislative branch ordered measures to be taken against a foreign State. For example in the U.S. where Congress has adopted provisions implementing sanction against Russia for alleged implications in the 2016 presidential elections.⁸³³ Reprisals against the immunity of a State, on the other hand, will most likely be taken by a judicial body. Whether courts are entitled to do so is disputed. It could be argued that judicial countermeasures are unlawful from an international law point of view as only a limited number of government officials are even capable of effectively bind a State to treaties and other obligations.⁸³⁴ The VCLT is clear on this aspect stating that only the Head of State, Head of Government, Minister of Foreign Affairs, and government officials with proper accreditation have the full power to conclude treaties.⁸³⁵ TARRE MOSER rejects this reasoning as it constitutes an

⁸³¹ Report of the International Law Commission on the Work of its Fifty-Second Session Special Rapporteur on State Responsibility James CRAWFORD, Yearbook of International Law Commission, 2000, Vol II (Part Two), UN Doc. No. A/55/10, para. 352.

⁸³² TARRE MOSER, p. 833.

⁸³³ Congressional push for sanctions against Russia could set up clash with Trump, The Washington Post, 18.12.2016: https://www.washingtonpost.com/news/powerpost/wp/2016/12/18/congressional-push-for-sanctions-against-russia-could-set-up-clash-with-trump/?utm_term=.e9d738159fc5 [last accessed: 7.3.2017].

⁸³⁴ ATTERITANO, p. 36.

⁸³⁵ Art. 7 VCLT.

irrelevant aspect to the question at hand. It must be distinguished between members of government capable of concluding international treaties from organs and representative of a State whose actions are capable of causing international liability.⁸³⁶ According to ARSIWA, all branches of a State are capable of violating international provisions attributable to a State regardless of “whether the organ exercises legislative, executive, judicial or any other functions.”⁸³⁷ It would consequently be logical to assume that any individual or organ whose actions are attributable to a State needs to have the appreciative power available to decide upon measures which precludes international liability, including reprisals.⁸³⁸ In relation to the jurisdictional immunity of a State, it is necessarily a national court which violates international customary law by exercising jurisdiction over another sovereign. The ICJ, for example, held that actions taken by Italian courts, *in casu* an interference with Germany’s jurisdictional immunity, constituted a violation of international law attributable to the Italian State.⁸³⁹ It is hence accepted that actions of domestic courts are capable of entailing State liability if they are responsible for the commission of an international wrongful act. Consequently, courts must have available the power to refer to countermeasures in order to preclude international liability for their actions. This persuades also from the point of view that domestic courts play an important role in the enforcement of international law provisions, such as the conviction of pirates or other perpetrators of international crimes.⁸⁴⁰ Countermeasures, as a decentralized enforcement mechanism, are no different and should therefore be available to domestic courts as much as to any other branch of a State. Judicial countermeasures are hence a lawful and necessary tool for the implementation and enforcement of international obligations.

⁸³⁶ TARRE MOSER, p. 833 f.

⁸³⁷ Art. 4 ARSIWA.

⁸³⁸ TARRE MOSER, p. 834.

⁸³⁹ *Germany v. Italy*, para. 139.

⁸⁴⁰ TARRE MOSER, p. 835, O’CONNELL Mary Ellen, *The Power and Purpose of International Law*, Oxford, 2008, p. 328.

The Nature of Countermeasures

Secondly, international law dictates that not all international obligations may be suspended for the sake of a reprisal. Art. 50 ARSIWA enumerates which obligations should not be impaired by countermeasures. States must, for example, refrain from the threat or use of force within the limits embodied by the Charter of the United Nations.⁸⁴¹ Further, neither obligations for the protection of fundamental human rights nor obligations of humanitarian character or *jus cogens* norms can be subject of countermeasures.⁸⁴² With regard to international relations law, the ILC mandates that States must continue to respect the inviolability of diplomatic and consular agents, premises, archives and documents.⁸⁴³ This condition originates from a judgment of the ICJ. In *United States of America v. Iran*, the International Court of Justice held that no countermeasures may be taken against diplomatic and consular staff as “diplomatic law itself provides the necessary means of defense against, and sanctions for, illicit activities by members of diplomatic or consular mission.”⁸⁴⁴ A State would at any time be allowed to declare a diplomat or consular agent a *persona non grata* without needing to give an explanation.⁸⁴⁵ Consequently, there is no need to refer to countermeasures as other more suitable means are available. Diplomatic and consular law constitute, what is called, “self-contained regimes” which exist independent from other rules of international law and follow the exclusive rules of the adopted treaty provisions.⁸⁴⁶ As different authors explain, the same cannot be concluded for the immunity of foreign States or its officials, whose primary sources of law are found elsewhere.⁸⁴⁷ Both Head of State immunity and foreign State immunity have been, and continue to be, subject of adaptations influenced by the entire international legal order. State immunity cannot be seen as a self-contained regime and does not fall within one of the ex-

⁸⁴¹ Art. 50 (1a) ARSIWA.

⁸⁴² Art. 50 (1b-d) ARSIWA.

⁸⁴³ Art. 50 (2b) ARSIWA.

⁸⁴⁴ *United States of America v. Iran*, para. 83.

⁸⁴⁵ Referring to Art. 9 VCDR and Art. 23 of VCCR.

⁸⁴⁶ *United States of America v. Iran*, para 86.

⁸⁴⁷ APPELBAUM, p. 284, STEGER, p. 123, SCHAARSCHMIDT, p. 34, LÜKE, p. 365.

ceptions listed in Art. 50 ARSIWA.⁸⁴⁸ As the list contained in Art. 50 is non-exhaustive, States are free to conclude additional provisions prohibiting countermeasures against certain international obligations through an international agreement.⁸⁴⁹ Neither the European Convention on State Immunity nor the UN Convention on Jurisdictional Immunities of States mention the scenario of countermeasures or the possible exoneration of immunities from reprisals. Procedural bars resulting from foreign State immunity may therefore be subject of countermeasures for as long as States do not agree otherwise.⁸⁵⁰

According to Art. 49 (3) ARSIWA reprisals must, as far as possible, be of suspensive nature and must not cause irreversible damage to the wrong-doing State.⁸⁵¹ This condition is not absolute and relates to the general principle of proportionality, demanding that only the least intrusive means shall be taken to convince a State to make reparations.⁸⁵² With regard to the jurisdictional immunity in civil matters, this is unproblematic as trials may be suspended at any time and resumed again at a later stage giving full effect to the immunity of a foreign State.

Further, reprisals must exclusively be directed towards persuading the wrong-doing State to respect international law and pay reparations.⁸⁵³ As collective countermeasures are a decentralized form of enforcement of international obligations, their unique purpose must be the respect of international law and not to serve the self-interests of the State referring to them.⁸⁵⁴ For solidarity measures to be lawful, it is hence necessary that the breach of international law is ongoing as otherwise countermeasures as a means of enforcement would become unusable. TOMUSCHAT, in relation to grave human rights violations, argues that as long as no reparation or remedies are granted the

⁸⁴⁸ Among others: TARRE MOSER, p. 821, APPELBAUM, p. 284, DAMIAN, p. 79.

⁸⁴⁹ Art. 51 ARSIWA, ILC ARSIWA Commentary to Art. 51, p. 133.

⁸⁵⁰ TARRE MOSER, p. 830.

⁸⁵¹ CRAWFORD, Counter-measures as Interim Measures, p. 68.

⁸⁵² Ibid., CRAWFORD, ILC Articles on State Responsibility, p. 286.

⁸⁵³ Art. 49 (1) ARSIWA, FORCESE, p. 167.

⁸⁵⁴ CRAWFORD, Counter-measures as Interim Measures, p. 67.

violation of law continues.⁸⁵⁵ In other words, it is not decisive that torture is still in process but that the reparation for the mistreatment has not yet taken place. In distinction to the concept of diplomatic protection, a State forwards the right of the victim concerned when referring to countermeasures. It may therefore only ask for reparation in the name of the victim but not request it for itself.⁸⁵⁶ Individuals should be the unique holder of the rights and the exclusive beneficiaries of the reparation claimed through reprisals.⁸⁵⁷ Through the non-recognition of foreign immunity, the victim of torture will be made available a civil proceeding to which the outcome will either recognize the right to be compensated or reject the claimants' allegations.⁸⁵⁸ The forum State has no evident self-interest within the proceedings so that no abuse of countermeasure can be identified. It is consequently possible to conclude that a State may take countermeasure against the immunity of a foreign State in order to give effective remedy to a victim of torture.⁸⁵⁹

Previous Violation of International Law

A countermeasure must follow a previously committed wrongful act attributable to a foreign State. Preemptive countermeasures are not legal as the violation against which countermeasures are taken must have preexisted.⁸⁶⁰ With the specific example of lifting immunities by the means of a countermeasure, some authors believe immunities to be unfit to fulfill this condition.⁸⁶¹ In order to establish whether a violation of international law attributable to a State has taken place, one must necessarily lift the veil of immunity. If a court refers to countermeasures in order to deny immunities in

⁸⁵⁵ TOMUSCHAT, *Individual Reparation Claims in Instances of Grave Human Rights Violations*, p. 6.

⁸⁵⁶ HILLGRUBER Christian, *The Right of Third States to Take Countermeasures*, in: Tomuschat Christian/Touvenin Jean-Marc (eds.), *The Fundamental Rules of the International Legal Order*, Leiden/Boston, 2006, p. 269.

⁸⁵⁷ CRAWFORD, *ILC Articles on State Responsibility*, p. 209.

⁸⁵⁸ The trial itself could be considered a form of reparation, see § 8 (I.1.b), p. 236 ff.

⁸⁵⁹ TARRE MOSER, p. 841.

⁸⁶⁰ *Portugal v. Germany*, *Responsibility of Germany for Damages caused in the Portuguese Colonies in the South of Africa*, Naulilaa case, *International Arbitral Award of 31.7.1928*, *UN Reports of International Arbitral Awards*, Vol. II, p. 1013 ff., para. 1027.

⁸⁶¹ BRÖHMER, p. 193, APPELBAUM, p. 285 f., STEGER, p. 124, SCHAARSCHMIDT, p. 33.

civil proceedings and only later discovers that no torture has taken place or that torture is not attributable to the State, a Court would have already violated the plea of immunity at this point. Countermeasures against immunities are therefore impossible.⁸⁶² The ICJ argues similarly in *Germany v. Italy*. Italy had argued that the gravity of the violation should affect the possibility of a State to rely on its immunity.⁸⁶³ The ICJ responded:

If immunities were to be dependent upon the State actually having committed a serious violation of international human rights law or the law of armed conflict, then it would become necessary for the national court to hold an enquiry into the merits in order to determine whether it had jurisdiction.⁸⁶⁴

The ICJ concluded that in such a scenario, immunities would lose their inherent preliminary nature defying their purpose of existence.⁸⁶⁵ Three main points may be raised against this opinion. First of all, as mentioned in a previous chapter, since the adoption of the restrictive theory on State immunity a strict distinction between procedural and substantive aspects of a trial has lost its value.⁸⁶⁶ A court must necessarily go into the merits to discover whether the dispute at hand falls within one of the existing exception to State immunity. The forum State must therefore analyze whether the actions taken by the wrong-doing State constituted sovereign acts (*de jure imperii*), whether a link of employment exists between the claimant and the defending State (employment exception), and even what sort of violation is claimed and where it was committed (territorial tort exception).⁸⁶⁷ States which follow the restrictive theory of State immunity necessarily must examine the merits before recognizing immunity. The procedure for referring to countermeasures is therefore no different than the

⁸⁶² APPELBAUM, p. 285 f., BUCHER Andreas, L'immunité de l'Etat confronté à ses crimes, Swiss Review of International and European Law, Vol. 2014/4, 2014, p. 556.

⁸⁶³ *Germany v. Italy*, para. 81.

⁸⁶⁴ *Ibid.*, para. 82.

⁸⁶⁵ *Ibid.*

⁸⁶⁶ See § 6 (II.1), p. 150 ff.

⁸⁶⁷ HIGGINS, Equality of States and Immunity from Suit, p. 141, BUCHER, p. 557.

implementation of any established immunity exception. This approach is not uncommon in civil litigation. Civil courts are used to decide on the merits in order to discover if they enjoy jurisdiction over the matter. In commercial or tort matters, a jurisdiction of a court may depend on the law applicable on the place where physical or moral damage occurred or the law of the country where the damaging behavior was committed, on the location where the disputed obligation needed to be fulfilled and more.⁸⁶⁸ In order to implement private international law legislation, civil courts would hence need to take a preliminary decision on the merits only to discover whether they have jurisdiction over the matter. Civil courts are therefore experts in complex jurisdictional decisions involving an in-depth analysis over the merits and are hence the most capable forum for the implementation of jurisdictional countermeasure.⁸⁶⁹

Secondly, functional immunity of State officials has developed to such an extent as to deny a procedural bar in case a State actor has committed a *jus cogens* violation.⁸⁷⁰ When immunities are inherently preliminary in nature, why could a *jus cogens* exception develop with regard to functional immunity but not with regard to foreign State immunity? Even Prof. KOLB – the solicitor defending Germany within the proceeding against Italy before the ICJ – later admitted that the preliminary nature of jurisdictional immunities would not prevent an exception based on the gravity of the allegations to be implemented.⁸⁷¹

Thirdly, for the implementation of criminal universality, any court must examine the merits in order to assess jurisdiction over the defendant irrespective of whether the person concerned enjoys immunity. In what way must this procedure be distinguished from the referral to countermeasure against the immunity of a foreign sovereign? Courts have already today moved passed an exclusively preliminary understanding of

⁸⁶⁸ See for example Art. 5 Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters concluded in Lugano on 30.9.2007 between Switzerland, Norway, Iceland, and the Members of the European Union, OJ L339, p. 3 ff.

⁸⁶⁹ FOX, Where does the Buck Stop?, p. 358.

⁸⁷⁰ See § 4 (II.2), p. 92 ff.

⁸⁷¹ KOLB/JARDIM OLIVEIRA, p. 260 f., conclusion supported by HIGGINS, Equality of States and Immunity from Suit, p. 142.

immunities, both in case of functional immunity as a well as State immunity.⁸⁷² The ICJ's opinion consequently seems over-simplistic and does not fully convince, especially as the court did not examine this merit with regard to countermeasures, however in relation to a general *jus cogens*-exception to immunity.⁸⁷³ The condition for the existence of a previous breach of international law does, in this author's opinion, not prevent countermeasures to be taken against the immunity of a foreign State.

Procedural Aspects for invoking Countermeasures

The forth condition relates to procedural elements that must be taken into consideration. First of all, the forum State must, before taking any countermeasures, request the perpetrating State to cease the continued violation of law and/or to make a reparation.⁸⁷⁴ If a State disregards the request, the forum State must notify the perpetrating State of its intent to invoke countermeasures. If any inter-State proceedings are introduced by either party, countermeasures should not be invoked as long as the dispute is pending before an international tribunal.⁸⁷⁵

Further, legal scholars have yet to agree whether the local remedies rule must be followed. According to this rule "a State should be given the opportunity to redress an alleged wrong within the framework of its own domestic legal system before its international responsibility can be called into question."⁸⁷⁶ Generally all modern human rights treaties contain the exhaustion of local remedy rule, including art. 35 (1) ECHR and art. 41 (1c) ICCPR. Several international decisions may be cited referring to the local remedies rule as a principle of international law.⁸⁷⁷ It is therefore believed that

⁸⁷² KOLB/JARDIM OLIVEIRA, p. 260.

⁸⁷³ TARRE MOSER, p. 851.

⁸⁷⁴ See *Hungary v. Slovakia*, Case concerning the Gabčíkovo-Nagyamaros Project, ICJ Judgment of 25.9.1997, ICJ Report 1997, p. 81 ff., para. 84.

⁸⁷⁵ Art. 50 (2) ARSIWA see also, GIEGERICH, p. 232.

⁸⁷⁶ CANÇADO TRINDADE Antônio, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights*, Cambridge, 1983, p. 1.

⁸⁷⁷ *Switzerland v. the United States of America*, Interhandel case, Judgment of the ICJ of 21.3.1959, ICJ Reports 1959, p. 27 ff., *Belgium v. Spain*, p. 30.

the local remedies rule must also be followed in case countermeasures are invoked as otherwise the wrong-doing State would not have sufficient opportunity to deal with the alleged breach within its own judicial system. Reprisals may only be taken as long as the victim has shown that it used all effective means available within the domestic system of the perpetrating State.⁸⁷⁸ D'ASCOLI/SCHERR, however, emphasize the clear need to distinguish between the exhaustion of local remedies rule within the human rights context and the one applicable in general public international law.⁸⁷⁹ With regard to countermeasures, their object, their sources and purpose seems to differ from human rights litigation.⁸⁸⁰ Countermeasures are invoked by all injured States as a consequence of a breach of obligations owed towards them and only secondarily in relation to a violation of the individual's rights. Countermeasures, a subject outside the human rights area, deal exclusively with matters and action taken within an inter-State setting. It would therefore be irrational to apply the local remedy rule in the scenario where a forum State would lift immunities as a consequence of a *jus cogens* violation. The perpetrating State was, at this point, already requested to cease the continued violation of law and pay reparations. It did therefore have enough opportunity to acknowledge the violation and adapt its behavior accordingly.

GERGEN disagrees. The local remedies rule is a reasonable tool for preventing frivolous and unjustified claims from reaching the transnational level of dispute resolution.⁸⁸¹ It guarantees that only claimants who have no other remedy available could ask another State for assistance.⁸⁸² This opinion seems somewhat convincing as it demands the necessity requirement within the proportionality assessment to be respected. As it will be discussed in an upcoming section, it would be disproportionate to apply countermeasures if the victim of torture would have available another, less intrusive remedy.

⁸⁷⁸ APPELBAUM, p. 287 f., GERGEN Jennifer, Human Rights and the Foreign Sovereign Immunities Act, Virginia Journal of International Law, Vol. 36, 1996, p. 795.

⁸⁷⁹ D'ASCOLI Silvia/SCHERR Kathrin, The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection, European University Institute Working Papers, Vol. 2007/02, 2007, p. 17 f.

⁸⁸⁰ Ibid., see also GERGEN, p. 795.

⁸⁸¹ Ibid., p. 796.

⁸⁸² Ibid., p. 797.

From a procedural standpoint, it therefore seems justified to ask a victim of torture to prove that it has exhausted all available means before countermeasures may be taken. Nevertheless, the requirement for an effective and fair trial must always be respected. If any procedural guarantees of the person concerned would not be sufficiently respected by the wrong-doing State, a victim of torture cannot objectively be asked to use the domestic courts of the perpetrating State.⁸⁸³ BIRD emphasizes that the same must be concluded if the victim has available an individual complaint mechanism on international level. The European, African or American Court of Human Rights or any of the UN Commissions would be capable of giving a sufficient effective remedy in this respect.⁸⁸⁴

In conclusion, the forum State must request the wrong-doing State to cease the continued violation of international law and make reparation for the harm caused. It further is obliged to notify the foreign State of its intent to refer to reprisals before any measures are taken. This, however, hardly represents an obstacle in the implementation of a torture-related reprisal against foreign immunity as a trial may be suspended at any time. A more challenging question to answer is whether a victim of torture must show that it has exhausted all remedies within the domestic justice system of the wrong-doing State before another State may be entitled to countermeasures. On one hand the local remedy rule must be distinguished from its application within the human rights context and its application in general international law. Countermeasures are an exclusive inter-State measure enforcing an obligation owned towards a State and only in connection to the mistreatment of the individual concerned. In combination with a proportionality analysis, however, it becomes evident that reprisals shall exclusively be taken if a victim of torture has no other effective remedy available. The preliminary character of jurisdictional immunities does not constitute an obstacle for countermeasures to be taken. Nevertheless, the judicial forum of the perpetrating State needs to fulfill the requirement of an effective and independent court, as otherwise the individual's right to access to court would be infringed. In case a victim proves that it has respected the local remedy rule, including any international

⁸⁸³ See § 7 (III.3.a), p. 268 ff.

⁸⁸⁴ BIRD, p. 898.

proceedings available, countermeasures may be taken against the immunity of a foreign State.

Proportionality

Which methods are to be chosen as a countermeasure lies within the margin of appreciation of the State referring to it.⁸⁸⁵ Nevertheless, the means applied must be proportional to the “injuries suffered, taking into account the gravity of the internationally wrongful act and the rights in question.”⁸⁸⁶ The *ratio* behind this requirement is to guarantee that the countermeasure does not create a more significant damage than the initially wrongful act.⁸⁸⁷ This inherently limits the means to what is able, what is necessary and what is proportionate in a strict sense, three elements of a proportionality test which shall be examined hereafter.⁸⁸⁸

Regarding the aptitude of a measure, not much discussion is needed to establish that the non-recognition of foreign State immunity is a suitable means to give justice and remedy to a victim of torture. A judgment would acknowledge that torture has taken place and legally recognize the individual’s right to be compensated. It is, however, true that the wrong-doing State will continue to benefit from immunity from execution, rendering it difficult for the victim to implement the court’s decision. Nevertheless, the judgment itself may be seen as part of the satisfaction to the victim as it constitutes an “important form of recognition and closure to victims.”⁸⁸⁹ In addition, it is a strong manifestation against impunity and reinforcement of the respect of *jus cogens* norms.⁸⁹⁰ Keeping in mind that the main purpose of a *jus cogens* norm is to give

⁸⁸⁵ Eighth Report on State Responsibility by Special Rapporteur on State Responsibility Gaetano ARRANGO-RUIZ of 24.5.1992, Yearbook of the International Law Commission, Vol. II, 1992, UN Doc. No. A/CN.4/444 and Add. 1-3, p. 13, TARRE MOSER, p. 819.

⁸⁸⁶ Art. 51 ARSIWA.

⁸⁸⁷ O’KEEFE Roger, Proportionality, in: Crawford James et al. (eds.), The Law of International Responsibility, Oxford, 2010, para. 1157.

⁸⁸⁸ ELAGAB Omer, The Legality of Non-Forcible Counter-Measures in International Law, Oxford, 1988, p. 90.

⁸⁸⁹ DONOVAN Donald/ROBERTS Anthea, The Emerging Recognition of Universal Civil Jurisdiction, American Journal of International Law, Vol. 100, 2006, p. 148, see also § 8 (I.b), p. 286 ff.

⁸⁹⁰ TARRE MOSER, p. 846.

a diplomatic incentive not to adopt a behavior that the rest of the international community considers a violation of most fundamental values, countermeasures against the immunity of a State would significantly strengthen the protection of fundamental norms fulfilling the main purpose of a reprisal: enforcement of international law obligations. Countermeasures against State immunity are therefore able to protect international law obligations.

In relation to the necessity of a measure, only the least intrusive, equally suitable means available will satisfy a proportionality test.⁸⁹¹ An official diplomatic complaint might be less intrusive. It does, however, not embrace the international importance of the peremptory norm violated by the State and not implement the individual right to justice whatsoever.⁸⁹² Nevertheless, as we have already discussed, should there be an adequate domestic remedy within the judicial system of the wrong-doing State or an international proceeding available, countermeasures against its immunity would be considered disproportionate. Judicial countermeasures against a foreign State can consequently be made conditional on the fact that no other effective remedy exists.⁸⁹³ If the victim has exhausted local remedies or cannot be expected to do so, a countermeasure against the immunity of a foreign State may be considered necessary for the implementation of the identified goals.

Thirdly, in an explanatory note to a previous draft of ARSIWA, the Special Rapporteur on State Responsibility, GAETANO ARANGIO RUIZ, clarified which elements must be taken into consideration for a proportionality test in the strict sense:

The degree of gravity of an internationally wrongful act should be determined by reference to a number of factors, including the objective importance and the subjective scope of the breached rule [...] the effects

⁸⁹¹ ELAGAB, p. 90.

⁸⁹² TARRE MOSER, p. 847.

⁸⁹³ GIEGERICH, p. 232.

of the breach upon both the injured State and the “object of the protection” [*in casu* the victim of torture] afforded by the infringed rule.⁸⁹⁴

As TARRE MOSER correctly states, in case collective countermeasures are taken, the political damage caused to the State referring to it are not relevant for a proportionality analysis. On the other hand, the injuries suffered by the victim of a severe human rights abuse must be appreciated within the light of the values it represents within the international law framework.⁸⁹⁵ To exemplify the damages caused to a victim of torture the facts established by the Ontario Court of Appeal in *Bouzari v. Iran* may be cited. The Court accepted this submission as credible. Mr. Bouzari alleges to have become victim of severe mistreatment as he was:

[B]lindfolded, beaten with fists, whipped with steel cables and subjected to electric shocks to his genitals. He was deprived of food, sleep and sanitation. His head was forced into a bowl full of excrement and held there. He was subjected to several fake executions by hanging. He was suspended by the shoulders for lengthy periods. His ears were beaten until his hearing was damaged.⁸⁹⁶

Throughout this thesis, the importance of the prohibition of torture, the values it defends both in the protection of human dignity and the fundamental freedoms of the Charter of the United Nations, were established on several occasions.⁸⁹⁷ Both national and international courts have relentlessly spoken out for its protection, both as it represents a *jus cogens* norm as well as an *erga omnes* obligation.⁸⁹⁸ It is therefore undisputed that victims of such a severe mistreatment have a crucial interest to justice, truth and reparation that needs to be taken into account.

⁸⁹⁴ Seventh Report on State Responsibility by Special Rapporteur on State Responsibility Gaetano ARANGIO-RUIZ of 29.5.1995, Yearbook of International Law Commission, Vol. II (Part One), 1995, para. 74, UN Doc. No. A/CN.4/469/Add.1-2.

⁸⁹⁵ TARRE MOSER, p. 824.

⁸⁹⁶ *Bouzari v. Iran*, para. 12.

⁸⁹⁷ Most importantly so in § 6 (I.2), p. 144 ff., and § 6 (II.2), p. 159 ff.

⁸⁹⁸ See § 6 (I), p. 140 ff.

On the other hand, a part of the legal doctrine protects the importance of State immunity as it is deeply rooted within the principle of sovereign equality. It represents an inherent part of the functioning of international relations assuring the continued collaboration between all members of the international community.⁸⁹⁹ Lifting a sovereign's immunity as a consequence of a reprisal would necessarily cause significant bilateral and multilateral disturbances, leading some authors to assume that it would constitute a disproportionate measure even in case of the violation of peremptory norms.⁹⁰⁰ Also the ECtHR consistently protected the grant of immunity to a foreign State in case of *jus cogens* violations as it constitutes "a legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty."⁹⁰¹

At this point the author would like to remind the reader that a detailed analysis over the tensions created between foreign immunity and the struggle of victims of torture to receive compensation in a previous chapter.⁹⁰² In his conclusion, the author recognized the current system of immunity of a foreign State to be inconsiderate to the recent development in international law. In a strict proportionality assessment, it can be concluded that a reprisal against a procedural bar of immunity may constitute an adequate measure for the protection of individual rights as balancing exercises between sovereignty and humanity interests must *a priori* be decided in favor of the latter.⁹⁰³ Or more precisely: a general dominance of the interests protected by foreign immunity over the interests of a victim of torture cannot automatically be assumed. Depending on the circumstances, individual access to a foreign domestic court can be considered superior resulting in a reprisal against the immunity of a foreign State to be considered a proportionate measure.

⁸⁹⁹ APPELBAUM, p. 288, LÜKE, p. 376, SCHAARSCHMIDT, p. 33, STEGER, p. 124, SALOMON, p. 64, see § 1 (II), p. 10 ff.

⁹⁰⁰ APPELBAUM, p. 289.

⁹⁰¹ *Al-Adsani v. the United Kingdom*, para. 54, *Jones v. the United Kingdom*, para. 196 ff., a detailed examination of this question relating to Art. 6 ECHR in § 7, p. 191 ff.

⁹⁰² See § 6, p. 147 ff.

⁹⁰³ See PETERS, p. 514, similar also TARRE MOSER, p. 847 f., see § 6 (II.2.b), p. 168 ff.

b. General Policy Considerations

Accepting that countermeasures may be taken for the purpose of lifting the procedural bar of foreign immunity in case of torture has one substantial advantage. It essentially reaffirms the concept of a continued immunity of foreign States for *jus cogens* violations.⁹⁰⁴ As countermeasures are by definition an *a priori* unlawful measure for which international liability is precluded; a State referring to it quintessentially endorses the illegality of its action. The forum State referring to reprisals against the immunity of a foreign State therefore acknowledges that it would have otherwise violated the foreign State's immunity if the latter had not previously breached a peremptory norm. It is hence in line with current State practice and supports the 2012 ICJ judgment in *Germany v. Italy* where the Court unmistakably confirmed the continued jurisdictional immunities of States for *jus cogens* violations. Countermeasures against the procedural bars in torture cases may therefore be an ideal method to reconcile the individual's right to access to court and remedy with general principles of international law as well as customary international law.⁹⁰⁵ No adaption of the existing State immunity law is necessary as countermeasures, *de lege lata*, can be used to give victims of torture access to a foreign court.

Nevertheless, some doctrinal opinions claim that countermeasures against the immunity of a foreign State are indeed lawful would, however, broaden the field of application beyond *jus cogens* violations in an excessive way.⁹⁰⁶ Following this reasoning, every human rights violation with *erga omnes* character will give the forum State the opportunity to ignore foreign immunity. This conclusion seems over-simplistic. It is doubtful whether every human rights violation will be able to fulfill the proportionality test for the countermeasure to be taken. In the examination of the strict proportionality assessment, the peremptory character of the violation of torture essentially leads to the conclusion that a reprisal against a procedural privilege was indeed proportional. Not every human right protects the most fundamental values of interna-

⁹⁰⁴ TARRE MOSER, p. 851, BRÖHMER, p. 193.

⁹⁰⁵ FORCESE, p. 165.

⁹⁰⁶ ATTERITANO, p. 36, GIEGERICH, p. 232 f.

tional community. It can therefore hardly be argued in what way countermeasures could be justified in reaction to non-*jus cogens* violations.

However, within the domestic system of a State, the invocation of a countermeasure could create considerable political and legal tensions. Reprisals may be taken by any branch of a State including both the judiciary and the executive. Only because a judge will be able to refer to countermeasures does not mean that such an approach is reasonable. The executive branch generally has all the experience dealing with politically sensitive issues, especially since it is responsible for maintaining peaceful international relations.⁹⁰⁷ A victim of torture may not raise any enforceable right to be assisted by a foreign State through the means of countermeasures. The decision to do so will involve a purely political appreciation of the circumstances, a matter in which national judges hardly have expertise.⁹⁰⁸ The judiciary's task is to appraise whether other authorities have correctly assessed the situation or have acted in an inopportune or discriminatory way. KÜNZLI therefore argues that the executive necessarily needs to give its permission to national courts in order to deny the procedural privilege of a foreign State through a countermeasure.⁹⁰⁹ The author bases his reasoning on the traditional prerogative of the executive to take countermeasures, however fails to mention in what way this prerogative needs to be understood as an exclusive right. As discussed, legal reasoning would imply that any organ whose action might lead to the responsibility of a State needs to have available the means for precluding wrongfulness on international level, including countermeasures codified in Art. 22 ARSIWA. Nevertheless, it would be advisable that judicial countermeasures are only applied in coordination with the executive branch. Even if it is permissible under international law, the foreign ministry will not easily agree to countermeasures to be taken against a State to which they have economic and political ties. Should the government decline, then the judiciary may refer to its expertise in determine whether this decision was indeed opportune. A clear disruption between the judicial and executive branch could be the consequence and will most likely occur any time judicial countermeasures are

⁹⁰⁷ KÜNZLI, *Vom Umgang des Rechtsstaats mit Unrechtsregimes*, p. 67, GIEGERICH, p. 234.

⁹⁰⁸ FORCESE, p. 167.

⁹⁰⁹ KÜNZLI, *Vom Umgang des Rechtsstaats mit Unrechtsregimes*, p. 67, also GIEGERICH, p. 234.

invoked. Government officials would consequently refuse to comply with the decision rendered against their clear wishes and would be tempted to restrict the court's jurisdiction through legislative means, putting in danger the judicial independence and separation of power.⁹¹⁰

With the possible exception of the United States, hardly any State will willingly apply countermeasures against a foreign sovereign in order to give a victim of torture access to justice. The U.S. maintains a list of so-called "States sponsoring terrorism" not recognizing the immunity of a foreign State. In addition, several legislative changes have occurred within the United States, giving victims of torture access to the courts in civil proceedings against a foreign State or State officials.⁹¹¹ Some authors believe that U.S. legislation may be seen as a way to codify a continued legislative countermeasure against the immunity of designated States in which an ongoing systematic breach of international peremptory law can be recognized and consequently endorsing the American approach as legitimate and lawful.⁹¹² A blanket waiver codified in the national legislation for all torture committed abroad is, however, not sufficient to fulfill the procedural requirements set out by the ILC, namely the duty to request cessation and notify the wrong-doing State before reprisals are invoked.⁹¹³ Iran has recently introduced proceedings against the United States for this practice, raising the question if codification of a consistent countermeasure against a State may be a violation of international law.⁹¹⁴ Legislative codification of countermeasures, at least in the U.S. American rendition, may therefore not be a lawful method.

⁹¹⁰ ADAMS, p. 272 f., BENVENISTI Eyal, Judges and Foreign Affairs: A Comment on the Institut de Droit International's Resolution on The Activities of National Courts and the International Relations of their States, *European Journal of International Law*, Vol. 5, 1994, p. 426.

⁹¹¹ See § 2 (II.1.a), p. 42 ff. and § 8 (II.3.c), p. 345 ff., see also *Flatow v. Iran*, U.S. District of Columbia Judgment of 11.3.1998, 99 F. Supp 1.

⁹¹² FORCESE, p. 167, GIEGERICH, p. 234, APPELBAUM, p. 285.

⁹¹³ FORCESE, p. 167.

⁹¹⁴ Iran institutes Proceedings against the United States with regard to a Dispute concerning Alleged Violations of the 1955 Treaty of Amity, Unofficial Press Release of the International Court of Justice of 15.6.2016, No. 2016/19.

Even in case a State would be willing to claim countermeasures against the immunity of a foreign State, ADAMS convincingly argues that the community of States would likely consider unilateral actions taken at the decision of a single court to be an illegitimate response to a violation. The fact that the forum State would in theory have acted legally does not change the potential diplomatic aftermath of such an action.⁹¹⁵

Lastly, a State attempts to guarantee the respect of an obligation the wrong-doing State owes to the State taking reprisals and not to represent an individual in a diplomatic context. As a consequence, an individual has no enforceable right to oblige the forum State to take countermeasures but doing so is left to the complete discretion of the State concerned.⁹¹⁶ In order to receive remedy, a victim of torture faces a considerable challenge of persuasion. A claimant must show that countermeasures need to be applied, that it is a proportional method, that it is justified given the threat to bilateral relations, that it consists of its only remedy and that no lawful or unlawful counterstrikes will be the consequence. Countermeasures therefore hardly seem realistic. Due to the discretionary character of reprisals, countermeasures could not be used as a means to give remedy to a victim of torture in a systematic fashion. It does consequently not satisfy the individual's need to justice in a sufficient manner.

c. Conclusions

Countermeasures against the immunity of a foreign State are not a violation of international law.⁹¹⁷ Nevertheless, certain preconditions must be respected. For the time being, no international agreement has been concluded between States which would exonerate foreign immunity from the effects of a reprisal. In addition, foreign immunity does not fall within one of the obligations recognized by the ILC as not affected by reprisals. Countermeasures may therefore be applied as long as they do not qualify as

⁹¹⁵ ADAMS, p. 273.

⁹¹⁶ HILLGRUBER, p. 291.

⁹¹⁷ Same conclusion supported by BIRD, p. 898, TAMS Christian, *Enforcing Obligations Erga Omnes in International Law*, Cambridge, 2005, p. 253, GATTINI Andrea, *To what Extent are State Immunity and Non-Justiciability Major Hurdles to Individuals' Claim for War Damages*, *Journal of International Criminal Justice* Vol. 1, 2003, KOKOTT, *Missbrauch und Verwirkung von Souveränitätsrechten*, p. 148 f., KÜNZLI, *Vom Umgang des Rechtsstaats mit Unrechtsregimes*, p. 66, GIEGERICH, p. 232.

an abusive or disproportionate reaction to the violation of an international obligation at hand. Due to the peremptory character of the prohibition of torture, it is possible to conclude that countermeasures against State immunity would not *in generalis* be considered a disproportionate reaction. This must, however, be assessed on a case-by-case basis. Reprisals against the immunity of a State are of suspensive nature and able to implement the individual's right to justice and truth. Nevertheless, should the victim of torture have access to an international tribunal or commission which is competent to hear the claim, or should the victim yet have to exhaust all domestic remedies available, countermeasures may not be taken as less intrusive means are accessible. In all other circumstances, reprisals are lawful if the forum State's request for cessation and reparation have been disregarded and the forum State's intent to refer to countermeasures has been announced and notified.

No other ILC codified principle seems to prohibit the referral to judicial countermeasures against immunities in case of torture was committed. Regarding the State referring to reprisals, all States are therefore free to apply countermeasures in case the prohibition against torture is infringed. In order to prevent a disproportionate and disorganized approach, the State must however collaborate and coordinate their measures with other States willing to do the same.

Countermeasures against the immunity of a State can harmonize the existing legal practice and the individual right to justice without any legislative changes needed. On the other hand, it will, in most cases, lead to a disruption between the different branches of a State, especially if the foreign ministry has not given its consent for countermeasures to be taken or if it has not been notified of proceedings taking place. Especially since the referral to reprisal is left to the complete discretion of State organs which will not easily be convinced to apply measures at the expenses of their bilateral relation with the defending State, countermeasures against foreign immunities in favor of a victim of torture seem unrealistic. Even in case reprisals were to be applied, this approach cannot be considered as sufficient for giving effective remedy to torture victims in a systematic fashion.

IV. Forfeiture of Sovereignty Rights

Violations of peremptory norms, such as the prohibition of torture, are not usually discussed in the light of general principles of international law. Nevertheless, Art. 38 (1) of the ICJ Statute mentions in its lit. (c) that general principles of law, at least in theory, apply within the appreciation of an international law dispute as an equal source of law indistinguishable from treaty provisions and international customs. Based on the legal writings of the German academic JULIANE KOKOTT⁹¹⁸, Italy, in their proceeding against Germany before the ICJ, argued that the German State had forfeited its claim to immunity as a consequence of an “abuse of sovereignty” caused by a severe violation of fundamental norms.⁹¹⁹ This view was previously supported by the Hellenic Supreme Court in a decision against Germany when it denied the jurisdictional immunity for the commission of the Distomo massacre in 1943.⁹²⁰ The issue was never fully analyzed by the ICJ in its final judgment, which consequently seems to support Germany’s view that such an approach was “the fruit of theoretical speculation”⁹²¹.⁹²² Nevertheless, general principles of international law are the cornerstone of the international legal order and should not be left out in the discussion of the research question.

The following chapter is dedicated to the general principle of forfeiture of sovereignty rights and considers whether the jurisdictional immunity of a foreign State might be forfeited in case acts of torture are committed by its public officials. In a first step, the principle of forfeiture is presented in the light of its (disputed) nature as a general principle of international law. In what circumstances might the principle of forfeiture be examined and what limits exist regarding its application? Only in a second step,

⁹¹⁸ KOKOTT, *Missbrauch und Verwirkung von Souveränitätsrechten*, p. 135 ff.

⁹¹⁹ *Germany v. Italy*, Italian Counter-Memorial, para. 4.69.

⁹²⁰ *Prefecture of Voiotia v. Germany*, Greek Supreme Court, para. 14.

⁹²¹ *Germany v. Italy*, German Reply, p. 35, *Germany v. Italy*, German Memorial, p. 70 ff.

⁹²² BALKEN/FALLENBERG, p. 1836, STEGER, p. 112, KREICKER Helmut, *Die Entscheidung des Internationalen Gerichtshofs zur Staatenimmunität – Auswirkung auf das (Völker-)Strafrecht?*, *Zeitschrift für Internationale Strafrechtsdogmatik*, Vol. 4/2012, 2012, p. 121.

should it be considered whether jurisdictional immunities are forfeitable as such, notably in case peremptory norms had been violated.

1. Forfeiture as a General Principle of International Law

With the notion of forfeiture international law may acknowledge that certain violations of international law are so flagrant that a State can no longer exercise a certain status it previously held or expect other members of the international community to respect certain privileges recognized by international law.⁹²³ Forfeiture, as a concept, is inherently related to other, more recognized principles of international law, such as estoppel, abuse of rights or acquiescence. It, however, constitutes an “*aliud*”, an autonomous, separate concept and must be distinguished from other principles for several reasons.⁹²⁴ In contrast to estoppel, better known as the prohibition of contradictory behavior, forfeiture does not rely on a previous act of the State in order to be applicable.⁹²⁵ It is perfectly conceivable that an embassy forfeits its status as such in case its premises are used for drug trafficking, the storage of illegal weapons or explosives⁹²⁶, or, as happened in London in 1984, for fatally shooting a British police officer deployed for protecting the embassy⁹²⁷.⁹²⁸ Forfeiture was also discussed in the case of Umaru Dikko, a former Nigerian minister who was kidnapped in London and unsuccessfully transported in a diplomatic bag.⁹²⁹ The Dikko affair raised several legal ques-

⁹²³ KOKOTT, *Missbrauch und Verwirkung von Souveränitätsrechten*, p. 137, PAECH, p. 60, DOEHRING Karl, *Statusverwirkung im Völkerrecht*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 67, 2007, p. 386 f., DOEHRING Karl, *Zum Rechtsinstitut der Verwirkung im Völkerrecht*, in: Böckstiegel Karl-Heinz et al. (eds.), *Völkerrecht, Recht der Internationalen Organisation Weltwirtschaftsrecht*, Berlin/Bonn, 1988, p. 52.

⁹²⁴ DOEHRING, *Zum Rechtsinstitut der Verwirkung*, p. 53 f., KOKOTT, *Missbrauch und Verwirkung von Souveränitätsrechten*, p. 139.

⁹²⁵ DOEHRING, *Statusverwirkung*, p. 388, DOEHRING, *Zum Rechtsinstitut der Verwirkung*, p. 53.

⁹²⁶ KOKOTT proposes these scenarios would lead to a forfeiture of rights: KOKOTT, *Missbrauch und Verwirkung von Souveränitätsrechten*, p. 135.

⁹²⁷ *Case of Yvonne Fletcher*, Editorial Comment of the American Journal of International Law, Vol. 80, 1986, p. 135 ff.

⁹²⁸ DOEHRING, *Statusverwirkung*, p. 388, PAECH, p. 60.

⁹²⁹ AKINSANYA Adeoye, *The Dikko Affair and Anglo-Nigerian Relations*, *International and Comparative Law Quarterly*, Vol. 34/3, 1985, p. 602 ff.

tions under the Vienna Convention of Diplomatic Relation among others, whether diplomatic bags may contain a living person or if such a conduct would lead to a forfeiture of the diplomatic inviolability.⁹³⁰

Similar to the estoppel principle, acquiescence is not equal to forfeiture as it requires a previous action (or omission) to have taken place.⁹³¹ By a prolonged abstention of a State with regard to rights and privileges contained in a treaty or elsewhere, a party to a contract may reasonably assume that the State has renounced the entitlement.⁹³² As discussed, this is not necessarily the case with forfeiture which applies regardless of prior actions or abstentions.

A more controversial matter is the contrast between the abuse of rights and the forfeiture of sovereignty rights.⁹³³ While the abuse of a right and its cessation of validity presupposes that the “abuser” exercises a specific right against its original purpose or in conflict of other rights⁹³⁴, the majority of the legal doctrine argues that forfeiture leads to a loss of a privilege as a reaction to a violation other than the right which is forfeited or in a scenario where no right may be claimed by the State.⁹³⁵

Werden aus einer Botschaft Bomben geworfen, wird nicht, wie beim Rechtsmissbrauch, von einem Recht ein zu weit gehender, seinem Sinn nicht entsprechender Gebrauch gemacht, den es einzudämmen gilt. [...] Es gibt kein Recht, auf das sich die Staaten in diesem Zusammenhang formal berufen könnten. Die Staaten verhalten sich vielmehr grund-

⁹³⁰ KOKOTT, *Missbrauch und Verwirkung von Souveränitätsrechten*, p. 146 f.

⁹³¹ *Ibid.*, see also KOLB Robert, *la désuétude en droit international public*, *Revue générale de droit international public*, Vol. 2007/3, 2007, p. 577 ff.

⁹³² DOEHRING, *Zum Rechtsinstitut der Verwirkung*, p. 52.

⁹³³ CREMER, p. 155.

⁹³⁴ KOKOTT, *Missbrauch und Verwirkung von Souveränitätsrechten*, p. 139.

⁹³⁵ *Ibid.*, DOEHRING, *Zum Rechtsinstitut der Verwirkung*, p. 53, APPELBAUM, p. 279, KISS Alexandre, *Abuse of Rights*, in: Rudolf Bernhard (ed.), *Encyclopedia of Public International Law*, Vol. 3, Amsterdam, 1999, p. 5.

sätzlich und auch formal rechtswidrig [...]. Deshalb kommt für die Beispielfälle Verwirkung und nicht Rechtsmissbrauch in Betracht.

The intensity threshold of the violation of law that leads to forfeiture of sovereignty rights should also not be underestimated. Only in extraordinary situations of a severe violation of obligations should forfeiture be considered.⁹³⁷ It is not sufficient for a State to simply act in violation of international law, the behavior of the State must show conclusive proof that the State has radically given up on the respect of international law.⁹³⁸ With the specific example of the inviolability of an embassy, the State which forwards the argument of forfeiture would need to guarantee that the premises are used in a manifestly illegal way. While this does not seem to be an issue with an ambassador shooting out of an embassy window, it becomes much more challenging to prove that explosives, ammunition or drugs are stored at the embassy without entering the premises and confiscating the objects. If the State decides to take actions against the inviolability of the embassy and fails to find the prohibited goods, it commits itself a severe violation of international law.⁹³⁹

As mentioned, the general principle quality of the concept of forfeiture is disputed as the threshold of recognition as a “rule accepted in the domestic law of all civilized States”⁹⁴⁰ is significant. A general principle of law must derive from the comparison of all legal systems of the world.⁹⁴¹ While a quasi-unanimity is sufficient for the establishment of a general principle⁹⁴², DOEHRING argues that forfeiture is, in one way or

⁹³⁶ KOKOTT, Missbrauch und Verwirkung von Souveränitätsrechten, p. 140.

⁹³⁷ MANN Frederick, Inviolability and Other Problems of the Vienna Convention on Diplomatic Relations, in: Hailbronner Kay/Ress Georg/Stein Torsten (eds.), *Staat und Völkerrechtsordnung*, Berlin, 1989, p. 563.

⁹³⁸ DOEHRING, Zum Rechtsinstitut der Verwirkung, p. 56.

⁹³⁹ KOKOTT, Missbrauch und Verwirkung von Souveränitätsrechten, p. 146.

⁹⁴⁰ CRAWFORD, *Brownlie's Principles of Public International Law*, p. 34, JENNINGS/WATT, p. 36 f., IPSSEN Knut, *Völkerrecht*, 6th ed., Munich, 2014, Chapter 16, VON VERDROSS Alfred/SIMMA Bruno, *Universelles Völkerrecht*, 3rd new edited version, 2010, p. 382 ff.

⁹⁴¹ THIRLSWAY Hugh, *The Sources of International Law*, in: Evans Malcolm (ed.), *International Law*, 4th ed., Oxford, 2014, p. 104, DOEHRING Karl, *Völkerrecht*, 2nd ed., Heidelberg, 2004, p. 181.

⁹⁴² THIRLSWAY, p. 104, DOEHRING, *Völkerrecht*, p. 182.

another, recognized by most civil and common law countries suggesting that it does constitute a general principle of law. He, however, accepts that, due to the lack of discussion in legal writings and jurisprudence, further development is needed regarding its recognition on the international level.⁹⁴³ KOKOTT agrees and additionally refers to the international legal order which can provide the necessary legal practice to create a general principle of law regardless of national legislation.⁹⁴⁴ Indeed, international law provides a number of examples where a status or a privilege may directly be forfeited. Art. 60 VCLT, which codifies customary international law, allows for the suspension and termination of a treaty as a consequence of a serious breach of its provisions. A member State of the United Nations may be expelled if it persistently violates the fundamental values of the organization.⁹⁴⁵ The membership rights, including the right to vote on matters within the EU, can be suspended in application of Art. 7 of the Treaty on European Union⁹⁴⁶. The right to innocent passage in the territorial waters of a State may be forfeited.⁹⁴⁷ The status of neutrality and the consequent protection from armed interference can be relinquished if the State fails to respect the provisions applicable in that matter.⁹⁴⁸ More examples may be cited where the main essence of the forfeiture concept is reflected in international law. Nevertheless, the international community has yet to specifically endorse forfeiture as a general principle, which is why some scholars convincingly raise doubts about forfeiture being applicable in international law.⁹⁴⁹

⁹⁴³ DOEHRING, Statusverwirkung, p. 390, DOEHRING, Zum Rechtsinstitut der Verwirkung, p. 52, see also APPELBAUM, p. 279, SCHAARSCHMIDT, p. 29 f., PAECH, p. 59.

⁹⁴⁴ KOKOTT, Missbrauch und Verwirkung von Souveränitätsrechten, p. 140 f., see also MOSLER Hermann, General Principles of Law, in: Rudolf Bernhardt (ed.), Encyclopedia of Public International Law, Vol. 3, Amsterdam, 1999, p. 101 f.

⁹⁴⁵ Art. 6 of the Charter of the United Nations.

⁹⁴⁶ Treaty on European Union of 26.10.2012, OJ C 326/13, p. 13.

⁹⁴⁷ Art. 17 UNCLOS.

⁹⁴⁸ See SPRING Alexander, The International Law Concept of Neutrality in the 21st Century, Zurich, 2014, p. 108 ff.

⁹⁴⁹ APPELBAUM, p. 280, CREMER, p. 155, PAECH, p. 59 f.

In case the general principle quality of the concept of forfeiture is recognized, it should briefly be discussed under which circumstances a general principle of law might be applied. While many authors suggest that general principles are subsidiary to treaty law and international customs⁹⁵⁰, this conclusion is inaccurate. From a scientific point of view, all sources of international law are equal in theory. No real hierarchy of sources exists which would give precedence to treaty and customary law over general principles.⁹⁵¹ Only once the sources are applied a certain preference prevails. Due to their *lex specialis* nature, treaty and customary law are generally applied instead of general principles of law. The main function of principles is consequently reduced to “filling the gap” once treaty or customary law is incomplete.⁹⁵² When referring to general principles, one must consequently show that no treaty provision or international customs may be applied for resolving the issue at hand.⁹⁵³ Courts have rarely relied on general principles within their appreciation of a case which *a priori* lessens their practical importance.⁹⁵⁴

2. The Forfeiture of Jurisdictional Immunities as a Consequence of a *jus cogens* Violation

Before taking the specific example of forfeiture of jurisdictional immunities, it must further be discussed what rights and privileges are capable of being forfeited by a State. While TOMUSCHAT argues that all rights of international law are forfeitable,

⁹⁵⁰ APPELBAUM, p. 280, CREMER, p. 155, KOKOTT, Missbrauch und Verwirkung von Souveränitätsrechten, p. 140.

⁹⁵¹ DOEHRING, Völkerrecht, p. 183, JENNINGS/WATTS, p. 39.

⁹⁵² JENNINGS/WATTS, p. 40, DOEHRING, Völkerrecht, p. 183, JAENICKE Günter, Völkerrechtsquellen, in: Schlochauer Hans-Jürgen (ed.), Wörterbuch des Völkerrechts, Vol. 3, Berlin, 1962, p. 771, CREMER, p. 155, SCHAARSCHMIDT, p. 30, STEGER, p. 110, SCHMALENBACH, p. 420, HERDEGEN Matthias, The Abuse of Diplomatic Privileges and Countermeasures not Covered by the Vienna Convention on Diplomatic Relations, Zeitschrift für öffentliches Recht und Völkerrecht, Vol. 46, 1986, p. 154.

⁹⁵³ KOKOTT, Missbrauch und Verwirkung von Souveränitätsrechten, p. 142, APPELBAUM, p. 180, DOEHRING, Statusverwirkung, p. 389.

⁹⁵⁴ JENNINGS/WATTS, p. 39, THIRLSWAY, p. 104.

including the protection from the use of force⁹⁵⁵, the majority of the legal doctrine accepts certain limits. First of all, the most fundamental provisions in international law can never be forfeited. This is for example the case for all *jus cogens* norms which are absolute and should never be disregarded.⁹⁵⁶ In addition, human rights can neither be forfeited as they protect the very essence of a human being, the human dignity.⁹⁵⁷ Building on this idea, KOKOTT elaborated a general rule on the “forfeitability” of rights and proposes:

Verwirkbar sind grundsätzlich nur solche Rechtspositionen, die im Parikularinteresse des Verwirkenden garantiert sind, über die er mithin verfügen kann.⁹⁵⁸

This is persuasive as only the perpetrating State should be penalized for a flagrant violation of law and not individuals or other States not responsible for the breach. This essentially leads to the conclusion that all obligations with *erga omnes* character are exempt from forfeiture as their protection not only involves the self-interest of the perpetrating State but the interests of the international community as a whole.⁹⁵⁹

With regard to the jurisdictional immunity of a State, at first sight it seems obvious that jurisdictional privileges inherently serve the exclusive interests of the State concerned. It is an exemption from the national adjudication of civil obligations owed to an individual without which a State could be ordered to pay due reparation. On the other hand, it is argued that immunities have a wider purpose of making international relations and diplomacy feasible which is in the interests of the whole international

⁹⁵⁵ TOMUSCHAT Christian, Gewalt und Gewaltverbot als Bestimmungsfaktoren der Weltordnung, Europa-Archiv, Vol. 36, 1981, p. 332.

⁹⁵⁶ KOKOTT, Missbrauch und Verwirkung von Souveränitätsrechten, p. 142 and 150, see also STEGER, p. 111.

⁹⁵⁷ DOEHRING, Statusverwirkung, p. 392.

⁹⁵⁸ KOKOTT, Missbrauch und Verwirkung von Souveränitätsrechten, p. 145, later endorsed by APPELBAUM, p. 282, RENSMANN, Staatenimmunität, p. 47, RENSMANN, Internationale Verbrechen, p. 271.

⁹⁵⁹ APPELBAUM, p. 282, KOKOTT, Missbrauch und Verwirkung von Souveränitätsrechten, p. 142, STEGER, p. 111.

community.⁹⁶⁰ Nevertheless, jurisdictional immunities do not qualify as *erga omnes* obligations. It is correct that all States want to protect their own claim to immunity by ensuring that the immunity system is upheld, it, however, seems too farfetched to exclude “forfeitability” for this reason alone. In case a State is found to be responsible for torture, it becomes difficult to see in what way the interests of the international community are protected when jurisdictional immunities lead to a *de facto* impunity of the *jus cogens* violation. Both CAPLAN and DOEHRING argue that the grant of jurisdictional immunities can and should be made dependent on the fact that it contributes to the “collective benefit” of the international community which, in case of violation of peremptory norm, is arguably not the case.⁹⁶¹ In addition, KOKOTT, the author who developed the criteria for “forfeitability”, accepts that jurisdictional immunities are a forfeitable claim since they may be waived with the consent of the State in question.⁹⁶² She essentially puts forward the argument that foreign State immunities are not absolute. Since a number of customary exceptions to State immunity have been identified, States have accepted that they can be made subject to the jurisdiction of another State. The system is in a constant state of flux, however, is not in danger of disappearing. The question is not whether to abolish State immunity once and for all but to modernize the system to better reflect the fundamental values it contains. The argument by which immunities are exempt from forfeiture does, at least in the opinion of the author, not fully persuade.

As not yet sufficient practice exists regarding the threshold of application of the forfeiture concept, it is not clear whether a violation of a peremptory norm is sufficient for immunity rights to be disregarded.⁹⁶³ A number of legal scholars argue that severe human rights violations, including the prohibition of torture, causes forfeiture to be

⁹⁶⁰ APPELBAUM, p. 282, RENSMANN, Staatenimmunität, p. 47, RENSMANN, Internationale Verbrechen, p. 271, PAECH, p. 60, see § 1 (II.2), p. 16 ff.

⁹⁶¹ DOEHRING, Statusverwirkung, p. 391 and 393, CAPLAN calling it the „theory of collective State benefit“, p. 777 ff.

⁹⁶² KOKOTT, Missbrauch und Verwirkung von Souveränitätsrechten, p. 148, supported by SALOMON, p. 64, PAECH, p. 65.

⁹⁶³ BRÖHMER, p. 194.

applicable.⁹⁶⁴ The author, however, doubts whether forfeiture is justified in all situations of peremptory violations. Keeping in mind the extraordinary examples given in the previous chapter, such as armed attacks exercised from embassy buildings or the mailing of a former Nigerian minister through the diplomatic mail, it becomes difficult to see in what way forfeiture can be made applicable in a systematic fashion.⁹⁶⁵ Forfeiture should be limited to extreme scenarios in which the will to respect international law has been abandoned.⁹⁶⁶ Citing the case of *Gäfgen v. Germany*⁹⁶⁷, where the ECtHR found a violation of Art. 3 ECHR and held Germany responsible for having threatened a child-kidnapper with torture in order to save an 11-year-old boy's life from certain death, does this equally qualify as a flagrant violation of law simply because it involves the violation of a peremptory norm? May a right only be forfeited if the *jus cogens* violation also constitutes an international crime as defined by international criminal law?⁹⁶⁸ Is it the same as a "severe violation of peremptory norms" as contained in Chapter III of the ILC Draft Articles or an additional distinction not yet contained in international law? More clarification and developments are needed with respect to the notion of "flagrant violation". For the moment it is not possible to answer these questions as the research material on the concept of forfeiture is not sufficiently developed.⁹⁶⁹

Especially courts and international tribunals are consequently asked to further clarify the concept of forfeiture and identify it as a general principle of law. Given the specific

⁹⁶⁴ DOEHRING, Statusverwirkung, p. 387, KOKOTT, Missbrauch und Verwirkung von Souveränitätsrechten, p. 140 and 148 f., DOEHRING, Zum Rechtsinstitut der Verwirkung, p. 52, DOEHRING Karl/RESS Georg, Diplomatische Immunität und Drittstaaten, Archiv des Völkerrechts, Vol. 37, 1999, p. 85, KREIKER, p. 121, HERDEGEN Matthias, The Abuse of Diplomatic Privileges and Countermeasures not Covered by the Vienna Convention on Diplomatic Relations, Zeitschrift für öffentliches Recht und Völkerrecht, Vol. 46, 1986.

⁹⁶⁵ Similar also GIEGERICH, p. 225.

⁹⁶⁶ DOEHRING, Zum Rechtsinstitut der Verwirkung, p. 56 see also BALKEN/FALLENBERG, p. 1838, GIEGERICH, p. 224.

⁹⁶⁷ *Gäfgen v. Germany*, Judgment of the ECtHR [GC] of 1.6.2010, No. 22978/05.

⁹⁶⁸ DOEHRING raises this idea however fails to give a conclusive answer, DOEHRING, Zum Rechtsinstitut der Verwirkung, p. 55.

⁹⁶⁹ APPELBAUM, p. 279, STEGER, p. 110 arrive to the same conclusion.

nature of general principles, however, this is unlikely to occur within the foreseeable future. As we have discovered, due to the subsidiary nature of the application of general principles, courts are reluctant to analyze legal issues from an exclusive general principle point of view. With the specific examples of jurisdictional immunities, where the ICJ held that neither treaty nor customary law acknowledged a *jus cogens* exception, the Court, however, missed an opportunity to elaborate its position with regard to forfeiture of sovereignty rights, especially since Italy had raised the issue in its memorial. General principles are useful in exactly these types of situations, when a change in customary practice is considered necessary but is hindered by a path dependency⁹⁷⁰. This decision is, however, an inherently moral one and difficult to implement in the practice of a national or international court as it is unlikely that a judge will identify an exception to foreign immunity on the sole basis of a general principle of law.⁹⁷¹

During the Nuremberg trials in 1946, for the first time in the history of international law cabinet members of a foreign State were stripped from their immunity as:

He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under International Law.⁹⁷²

As no treaty law or international custom would have permitted such actions to be taken, DOEHRING argues that the tribunal put in action the general principle of forfeiture against the immunity of a foreign official.⁹⁷³ In 2017, the ILC draft Art. 7 on the limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction where the Commission attempts to summarize and identify customary

⁹⁷⁰ See BALKEN/FALLENBERG, p. 1837, for more literature regarding the concept of path dependency: SCHREYÖGG Georg, Organisatorische Pfadabhängigkeit und ihre Folgen, Research Gate, Vol. 1/2013, 2013, BEYER Jürgen, Pfadabhängigkeit ist nicht gleich Pfadabhängigkeit, Wider den impliziten Konservatismus eines gängigen Konzepts, Zeitschrift für Soziologie, Vol. 34/1, 2005, p. 5 ff.

⁹⁷¹ APPELBAUM, p. 281, CREMER, p. 157.

⁹⁷² International Military Tribunal (Nuremberg) Judgment of 1.10.1946, Nr. US-E-174, p. 56.

⁹⁷³ DOEHRING, Statusverwirkung, p. 389, DOEHRING, Zum Rechtsinstitut der Verwirkung, p. 57.

international law in that matter.⁹⁷⁴ This development was arguably made possible only by the progressive decision taken in Nuremberg. The author can only raise the question, whether the referencing of forfeiture as an initial step against the jurisdictional immunity of a State might similarly influence State practice in this perspective. Could the general principles of forfeiture hence be the first domino piece to cause a chain reaction in that matter?

In summary, the argument by which a State forfeits his claim to jurisdictional immunities in case it commits a breach of peremptory norms lies, at least for now, on a shaky foundation. While the author opines that jurisdictional immunities are a forfeitable privilege, the threshold of the application of the concept of forfeiture and its recognition as a general principle of law need further development and clarification. In *Germany v. Italy*, the ICJ let the opportunity pass for assessing its position on the matter and potentially influence a change in the customary practice of States. As for the victim of torture who introduces civil proceeding against a foreign State in a domestic court, the concept of forfeiture does not (yet) give the necessary means to effectively implement the individual's claim to reparation and access to court.

V. Conclusion regarding jus cogens Violations

The prohibition of torture, inhuman and degrading treatment enjoys significant protection in international law. Next to its absolute and non-derogable character, its qualification as a *jus cogens* norm raises a number of issues with regard to the continued jurisdictional immunity of a State in civil proceedings for torturous acts.

First of all, the dogmatic distinction between procedural and substantive obligations in international law essentially leads to the outcome that the hierarchical superior rule, *in casu* the prohibition of torture, is hindered from taking effect against the jurisdictional immunity of a State. While it could be argued that peremptory norms both contain substantive and procedural elements which are capable of entering in conflict with jurisdictional privileges, the author joins the majority of the legal doc-

⁹⁷⁴ Draft Art. 7 (1) for Crimes under International Law in respect of which immunity *ratione materiae* shall not apply, p. 84 ff.

trine in concluding that no sufficient practice exists that would justify the recognition of procedural *jus cogens* norms. On the other hand, the author emphasizes that the substance/procedure dichotomy has lost its value since the restrictive theory on State immunity has become predominant.

Secondly, a growing number of scholars advocate that a continued immunity for *jus cogens* violation can no longer be accepted as it would lead to an inherently contradictory outcome. A torture-related exception to immunity may be achieved through a comprehensive interpretation and a re-characterization of State immunity law within the wider legislative context. The authors analyzed three recent developments of international law that must be taken into consideration when assessing the immunity of States for peremptory violations. These are namely, the continued struggle against impunity that has led to the introduction of criminal universality, the gradual humanization of sovereignty rights and its impact on the principle of non-interference and equality of States, and, lastly, the enhanced position of the individual as both an object and subject of international law. While it is disputed whether a court can legally recognize a torture exception to State immunity through the comprehensive interpretive method, the author can only conclude that such an exception is indeed necessary to reflect the fundamental values represented by the prohibition of torture and re-establish a legal order free of contradictions. It can nevertheless not be ignored that legitimacy and rule of law issues arise through the statutory interpretation method, which is why especially positivist scholars and the ICJ reject its validity.

Thirdly, a State cannot be said to have committed a prohibited act of complicity when granting a State jurisdictional immunity for a *jus cogens* violation. It is not possible to conclude that such an action would violate the concept contained in Art. 41 (2) ARSIWA. The same must be concluded with regard to the duty not to recognize a situation created by the violation of a peremptory norm as lawful. Only in one situation would the granting of immunity constitute a prohibited act of recognition: a plea for immunity introduced by an “illegal” State or an entity whose statehood is severely disputed in international law. In all other circumstances, allowing for a jurisdictional bar to take effect in a domestic civil proceeding does not constitute recognition.

In a fourth step, the authors considered countermeasures as being one legal method to give victims of torture access to a domestic civil court despite jurisdictional immu-

ities in place. Judicial reprisals are indeed a lawful means to lift the jurisdictional bar but lead to a number of practical and political problems. As long as the international community fails to recognize a torture-related exception to jurisdictional immunities, however, courts may, on a case-by-case basis, refer to countermeasures in order to allow victims of torture to request remedy and reparation.

Lastly, the author analyzed whether a State forfeits its claim to immunity if it tortures an individual. While the jurisdictional immunity of a State is forfeitable as such, both the recognition of the forfeiture concept as well as the conditions for its implementation need further development and clarification. Hitherto, forfeiture may not be used to justify the disrespect of State immunity for torture.

§ 7 Right to Access to Court

Jurisdictional bars will inadvertently prevent an individual from bringing a civil case in an impartial and independent judicial forum. State immunity will therefore directly enter in conflict with the individual's right to a fair trial and, in particular, the right to access to court. As both the jurisdictional bar imposed by State immunity and the right to access to court are procedural in nature, the following section should be dedicated to an analysis of two seemingly incompatible obligations. Italy, in the proceedings against Germany before the ICJ, had argued in favor of an exception to State immunity based on the impediment to access to courts as "these victims have suffered, and continue to suffer, a flagrant denial of justice."⁹⁷⁵ Hence, the question arises, whether the judicial exclusion of torture victims as a consequence of an accepted plea for immunity would violate their individual rights to access to justice.

While the right to access to court knows many foundations in international law, a primary focus is given to the procedural guarantees protected by the European Convention of Human Rights, in particular its Art. 6. This does, however, not mean that the same solutions could not be found discussing other regional human rights guarantees, such as Art. 8 and 25 ACHR⁹⁷⁶ or other international human rights treaties, such as art. 14 ICCPR⁹⁷⁷. In practice, where immunity exceptions for torture allegations were indeed analyzed by non-European courts, for example by the Ontario Superior Court of Justice in *Bouzari v. Iran*, the tendency is to rely on the jurisprudence of the European Court of Human Rights to resolve the issue.⁹⁷⁸ It therefore seems appropri-

⁹⁷⁵ *Germany v. Italy*, Italian Counter-Memorial, para. 1.3, see also para. 4.88 ff.

⁹⁷⁶ Jurisprudence in relation to access to court of the IACtHR is inherently related to amnesty legislation adopted by different American States: *Barrios Altos et al. v. Peru*, Judgment of the IACtHR of 14.3.2001, Series C No. 75 and *Gomes Lund et al. v. Brazil*, Judgment of the IACtHR of 24.11.2010, Series C No. 219, where the court has found a violation of access to court as contained in Art. 25 and 8 ACHR.

⁹⁷⁷ See comprehensive analysis over Art. 14 ICCPR with regard to foreign jurisdictional immunities in APPELBAUM, p. 166 ff.

⁹⁷⁸ *Bouzari v. Iran*, p. 441, see for more information General Comment No. 32 of the Human Rights Committee with regard to the Right to Equality before Court and Tribunals and to a Fair Trial, UN Doc. No. CCPR/C/GC/32.

ate to highlight the European case law regarding the matter. Where discrepancies to other human rights treaties have arisen, specific reference will be made within the text.

After an introduction into the content of Art. 6 ECHR and the right to access to court, an in-depth discussion will be held regarding the applicability of this provision in relation to foreign State immunity law, especially the relevance of the notion of “jurisdiction” as contained in Art. 1 ECHR. Further, a jurisdictional bar restricting the access to court in torture cases should be put to the limitation test as described by the jurisprudence of the ECtHR. A comprehensive conclusion will complete the chapter.

I. Content of the Right to Access to Court

In the determination of his civil rights and obligations [...] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.⁹⁷⁹

Even though not expressively included in the wording of Art. 6 (1) ECHR, the essential right to access to court makes an integral part of the fair trial guarantees.⁹⁸⁰ In the landmark decision of *Golder v. the United Kingdom*⁹⁸¹, the ECtHR was asked to decide, whether a factual access to a judicially independent forum may be implied within Art. 6 ECHR. The case concerned a violation of a prisoner’s right to court as he was prevented from contacting his solicitor to bring a civil action against a prison officer for alleged defamation. The Government of the United Kingdom had initially argued that such a contentious right in civil matters would have needed to be specifically

⁹⁷⁹ Art. 6 (1) ECHR.

⁹⁸⁰ FROWEIN Jochen/PEUKERT Wolfgang, Europäische Menschenrechtskonvention, Kommentar, 3rd ed., Kehl, 2009, p. 166, KARPENSTEIN Ulrich/MAYER Franz, Konvention zum Schutz der Menschenrechte und Grundfreiheiten, 2nd ed., Munich, 2015, p. 157, MAYER-LADEWIG Jens/HARRENDORF Stefan/KÖNIG Stefan, Kommentar zu Art. 6 EMRK, in: Mayer-Ladewig Jens/Nettesheim Martin/von Raumer Stefan (eds.), Handkommentar Europäische Menschenrechtskonvention, 4th ed., Baden-Baden, 2017, p. 207 f.

⁹⁸¹ *Golder v. the United Kingdom*, Judgment of the ECtHR of 21.2.1975, No. 4451/70.

included in the Convention. The Court, however, disagreed by referring to general principles of international law:

The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally recognized fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice [...] The Court thus reaches the conclusion, [...] that Article 6 para. 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal.⁹⁸²

The *Golder* ruling has since been considered as recognizing the individual's right to access to court within the scope of Art. 6 ECHR.⁹⁸³ No one should arbitrarily be deprived from accessing the justice system. A person needs to have a practical and effective opportunity to have any claim relating to his or her civil rights and obligations heard before an independent court or tribunal.⁹⁸⁴ Violations of this right may include demanding excessive court fees and security costs in relation to the claimant's financial situation⁹⁸⁵ or issues related to the timely and prompt hearing of a case⁹⁸⁶. In addition, any procedural bars, *de jure* or *de facto* which inadvertently limit the possibility of applying to a court, will interfere with this right as well. This might occur when tribunals interpret procedural rules too strictly leading to an "excessive formalism" or if certain subjects of law were excluded from bringing a claim in court.⁹⁸⁷

⁹⁸² *Golder v. the United Kingdom*, para. 36.

⁹⁸³ KLOTH Matthias, *Immunities and the Right of Access to Court under Article 6 of the European Convention of Human Rights*, Boston, 2010, p. 5, FROWEIN/PEUKERT, p. 176.

⁹⁸⁴ *Al-Dulimi v. Switzerland*, Grand Chamber Judgment, para. 126, *Bellet v. France*, Judgment of the ECtHR of 4.12.1995, No. 23805/94, para. 38, *Nunes Dias v. Portugal*, Judgment of the ECtHR of 10.4.2003, No. 69829/01, para. 36.

⁹⁸⁵ *Ait-Mouhoub v. France*, Judgment of the ECtHR of 28.10.1998, No. 103/1997/887/1099, para. 57 f., *Kreuz v. Poland*, Judgment of the ECtHR of 19.7.2001, No. 28249/95, para. 60 ff.

⁹⁸⁶ *Melnyk v. Ukraine*, Judgment of the ECtHR of 28.3.2006, No. 23436/03, para. 26.

⁹⁸⁷ See *Zvoloský and Zvolská v. the Czech Republic*, Judgment of the ECtHR of 12.11.2002, No. 46129/99, para. 51, *Sotiris and Nikos Koutras ATTEE v. Greece*, Judgment of the ECtHR of 16.11.2000, No. 39442/98, para. 20.

Art. 6 ECHR only applies in the determination of the individuals' civil rights and obligations. In order to enjoy procedural safeguards, the applicant must show that a dispute arose over a substantive civil right which is domestically codified.⁹⁸⁸ First of all, Art. 6 ECHR is inapplicable to non-contentious and unilateral procedures lacking two opposing parties.⁹⁸⁹ A lack of a genuine and serious dispute over a right will inadvertently fall outside the scope of Art. 6 ECHR. The term "dispute" must be understood as a domestic decision whose outcome directly and decisively influences the right in question.⁹⁹⁰ The Court, for example, held that extending an operating license of a nuclear power plant did not have a sufficient direct impact on the applicant's right to life, physical integrity or property and could therefore not be understood as forming a contentious dispute over such rights.⁹⁹¹ On the other hand, Art. 6 ECHR was found to be applicable in case a construction of a dam was permitted which would have flooded the applicants' village.⁹⁹² Secondly, a contentious civil right must be recognized by national law, meaning that a domestic law or national statute foresees an arguable claim.⁹⁹³ Whether municipal law qualifies the right in question as containing civil obligations is irrelevant as the notion of civil rights is interpreted autonomously by the ECtHR.⁹⁹⁴ Nonetheless, it is not enough for the application of Art. 6 ECHR that a dispute is of pecuniary nature. Tax proceedings and other "core matters" of public authorities, such as customs duties or military and civil service, are outside the ap-

⁹⁸⁸ *Roche v. the United Kingdom*, Judgment of the ECtHR [GC] of 19.10.2005, No. 32555/96, para. 116 with subsequent references to earlier case law, see also FROWEIN/PEUKERT, p. 151 f., MAYER-LADEWIG/HARRENDORF/KÖNIG, p. 190.

⁹⁸⁹ *Alaverdyan v. Armenia*, Judgment of the ECtHR of 24.8.2010, No. 4523/04, para. 35.

⁹⁹⁰ Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb), available: www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf [last accessed: 24.8.2018], p. 7, MAYER-LADEWIG/HARRENDORF/KÖNIG, p. 195.

⁹⁹¹ *Athanassoglou v. Switzerland*, Judgment of the ECtHR [GC] of 6.4.2000, No. 27644/95, para. 46 ff., *Balmer-Schafroth et al. v. Switzerland*, Decision of the European Commission on Human Rights of 26.8.1997, No. 67/1996/686/876, para. 40.

⁹⁹² *Gorraiz Lizarraga et al. v. Spain*, Judgment of the ECtHR of 27.4.2004, No. 62543/00, para. 46.

⁹⁹³ *Szücs v. Austria*, Judgment of the ECtHR of 24.11.1997, No. 135/1996/754/953, para. 33, MAYER-LADEWIG/HARRENDORF/KÖNIG, p. 190.

⁹⁹⁴ GRABENWARTER Christoph, European Convention on Human Rights; Commentary, Munich, 2014, p. 101, MAYER-LADEWIG/HARRENDORF/KÖNIG, p. 190.

plicability of Convention.⁹⁹⁵ In addition, certain law disciplines are excluded from the application of Art. 6 ECHR. These are primarily related to the field of immigration law, asylum and deportation.⁹⁹⁶

Further, with regard to actions taken by public authorities, doubts may arise whether disputes between an individual and a State for alleged acts of torture may enter the jurisdiction of Art. 6 (1) ECHR. Must it be distinguished between a State acting on official grounds and a State acting on a private capacity for procedural guarantees to be applicable? The Court negates such a distinction in *König v. Germany*. For the determination of a civil character it must exclusively be focused on the substantive content of the disputed right and not the context out of which it may have arisen.⁹⁹⁷ Furthermore, in the ruling of *Woś v. Poland*⁹⁹⁸ the European Court of Human Rights was asked to qualify compensations claims of victims of the National Socialist period to discover whether the right to be compensated for injuries inflicted by a public authority contained civil rights and obligations. The Court determined:

With regard to the civil character of the disputed right, the Court observed in its admissibility decision that it was not persuaded by the Government's arguments that the compensation claims in issue were not based on classic concepts of civil-law liability but that they were of a humanitarian nature. [...]. Rather, the applicant suffered an interference with his means of subsistence and was claiming an individual, economic right flowing from specific rules laid down in the Foundation's statute and its internal regulations [...]. Thus, *the Court was of the view that the right to claim compensation on account of Nazi persecution from the Polish-German Reconciliation Foundation could be considered*

⁹⁹⁵ *Ferrazzini v. Italy*, Judgment of the ECtHR [GC] of 12.7.2001, No. 44759/58, para. 25, see also: FROWEIN/PEUKERT, p. 157, KARPENSTEIN/MAYER, p.162.

⁹⁹⁶ *Maaouia v. France*, Judgment of the ECtHR [GC] of 5.10.2000, No. 39652/98, para. 38, MEYER-LADEWIG, p. 123 f.

⁹⁹⁷ *König v. Germany*, Judgment of the ECtHR of 28.6.1978, No. 6232/73, para. 89, see also FROWEIN/PEUKERT, p. 152, MEYER-LADEWIG/HARRENDORF/KÖNIG, p. 193, KARPENSTEIN/MAYER, p. 162.

⁹⁹⁸ *Woś v. Poland*, Judgment of the ECtHR of 8.6.2006, No. 22860/02.

“civil” for the purposes of Article 6 § 1 of the Convention.⁹⁹⁹ [emphasis added]

Similarly, compensation claims brought forward by victims of torture may likewise be qualified as civil in the sense of Art. 6 (1) ECHR. It is irrelevant for the application of this article that a dispute did not arise between two individuals but between a State and a person, as only the substance of the disputed right determines the applicability of the right to access to court.¹⁰⁰⁰

II. Applicability of Art. 6 ECHR and the Notion of Jurisdiction under the Convention regarding State Immunity

In the opinion of the European Court of Human Rights, the right to access to court may be infringed if a whole range of civil claims is excluded from judicial review without restraint or control by the Court.¹⁰⁰¹ The Court has since continuously applied Art. 6 ECHR in cases related to immunities of foreign States. The United Kingdom and Ireland had initially raised the issue of jurisdiction in the *Al-Adsani*, *Fogarty* and *McElhinney* rulings, all delivered by the Court on the same day.¹⁰⁰² Matters of foreign immunity were outside the jurisdiction of the national court and therefore the State, falling outside the scope of Art. 6 ECHR. Claims based on this article in relation to foreign State immunity should consequently be declared inadmissible as the claimants have no actionable right under municipal law and the ECtHR did not enjoy any jurisdiction *ratione materiae* regarding the matter.¹⁰⁰³ Support for this approach is given by numerous authors¹⁰⁰⁴, most notably VOYIAKIS. He opined that States are only obliged

⁹⁹⁹ Ibid., para. 76.

¹⁰⁰⁰ FROWEIN/PEUKERT, p. 152, KARPENSTEIN/MAYER, p. 16.

¹⁰⁰¹ *Sabeh el Leil v. France*, para. 50, *McElhinney v. Ireland*, para. 23 ff., *Cordova v. Italy*, Judgment of the ECtHR of 30.1.2003, No. 40877/98, para. 58.

¹⁰⁰² *Al-Adsani v. the United Kingdom*, para. 44, *Fogarty v. the United Kingdom*, para. 22, *McElhinney v. Ireland*, para. 21.

¹⁰⁰³ *Al-Adsani v. the United Kingdom*, para. 44, *Fogarty v. the United Kingdom*, para. 22, *McElhinney v. Ireland*, para. 21.

¹⁰⁰⁴ See for ex: DAMIAN, p. 17, *Naït-Liman v. Switzerland*, Grand Chamber Judgment, Partly concurring opinion by Judge WOJTYCZEK.

to guarantee procedural safeguards to individuals “within their jurisdiction” in the sense of Art. 1 ECHR. Limitation on the jurisdiction of the forum State are, however, imposed by an “external factor”, namely international law and sovereign equality.¹⁰⁰⁵ According to this author, the Court erred in accepting the applicability of Art. 6 ECHR following the opinion of Lord MILLET in the British House of Lords ruling of *Holland v. Lampen-Wolfe* which he seems to agree upon:

Article 6 [ECHR] requires contracting States to maintain fair and public judicial processes and forbids them to deny individuals access to those processes for the determination of their civil rights. It presupposes that the contracting States have the power of adjudication necessary to resolve the issues in dispute. But it *does not confer on contracting States adjudicative powers that they do not possess*.¹⁰⁰⁶ [emphasis added]

Accepting the jurisdiction of the Convention in relation to immunities, VOYIAKIS continues, contracting parties would need to assume jurisdiction in violation of customary law to fulfill their obligation under Art. 6 ECHR. The Convention cannot be understood as giving their contracting parties more competences than before ratifying the ECHR, so that the applicability of the whole Convention must be negated.¹⁰⁰⁷ The European Commission on Human Rights declared an application inadmissible forwarding a similar reasoning. Dutch authorities granted jurisdictional immunity to the Iran-US Claims Commission which consequently prevented a compensation claim to be heard in Dutch courts. The Commission held that the administrative decision by the Claims Commission were not acts that had occurred “within the jurisdiction” of the Netherlands in the sense of Art. 1 ECHR. The Netherlands was therefore under no obligation to give the claimant access to its courts.¹⁰⁰⁸

¹⁰⁰⁵ VOYIAKIS Emmanuel, Access to Court v. State Immunity, International and Comparative Law Quarterly, Vol. 52/2, 2003, p. 308.

¹⁰⁰⁶ *Holland v. Lampen-Wolfe*, para. 846.

¹⁰⁰⁷ VOYIAKIS, p. 309, concurring *Naït-Liman v. Switzerland*, Grand Chamber Judgment, Partly concurring opinion by Judge WOJTYCZEK, p. 65.

¹⁰⁰⁸ *Spaans v. the Netherlands*, Decision of the European Commission on Human Rights of 3.11.1986, No. 12516/86, similarly also *N et al. v. Italy*, Decision of the European Commission on Human Rights of 4.12.1995, No. 24236/94.

The European Court of Human Rights continuously dismissed this line of reasoning, since immunities were neither absolute nor barred *in limine*. Immunities may be waived, leading to a procession of the trial. The Court continues by emphasizing that jurisdictional bars are purely procedural in nature, leaving the jurisdiction over the cause of action (the substantive right) intact.¹⁰⁰⁹

The proceedings which the applicant intended to pursue were for damages for personal injury, a cause of action well known to [municipal] law. The Court does not accept the Government's submission that the applicant's claim had no legal basis in domestic law since any substantive right which might have existed was extinguished by operation of the doctrine of State immunity.¹⁰¹⁰

The Court, by saying so, endorses its own jurisprudence in relation to Art. 6 ECHR. The applicability of that right will exclusively be determined by the substance of the disputed right. Municipal law recognizes a material right to compensation for bodily or mental harm.¹⁰¹¹ Consequently, a real dispute has arisen on domestic level whose outcome had a direct implication on individual's civil right which *ipso facto* makes Art. 6 ECHR applicable. This outcome is not changed through a procedural privilege which have no impact on the substantive jurisdiction of national courts.¹⁰¹²

Many legal scholars justify the Court's conclusion. SCHERMERS, in an article discussing the immunity of diplomats, argues that it is unproblematic to give superiority to the application of the Convention in relation to immunities. All European countries, members of the Council of Europe, are obliged to guarantee individuals a fair trial implementing and protecting their civil rights and obligations. In such a scenario, making the right to access applicable in one State – for example in the State where

¹⁰⁰⁹ *Nait-Liman v. Switzerland*, Grand Chamber Judgment, para. 103 ff., KLOTH, Immunities and the Right of Access to Court, p. 12, FROWEIN/PEUKERT, p. 178.

¹⁰¹⁰ *Al-Adsani v. the United Kingdom*, para. 44.

¹⁰¹¹ *Ibid.*, where the applicant claimed to have been tortured by Kuwaiti authorities, *McElhinney v. Ireland*, para. 21, where the applicant's life was endangered by being fired upon, *Nait-Liman v. Switzerland*, Grand Chamber Judgment, para. 110.

¹⁰¹² KLOTH, Immunities and the Right of Access to Court, p. 12.

violations were committed – makes it applicable for all.¹⁰¹³ To the problem that this reasoning would only bind European countries which have ratified the Convention, SCHERMERS observes that Art. 14 ICCPR contains virtually the same obligations as Art. 6 ECHR and does constitute customary law. Access to court might even be developed enough to be recognized as a general principle of international law which would consequently bind all countries worldwide.¹⁰¹⁴

Another line of reasoning is presented by authors who emphasize the absolutism of the territorial jurisdiction within their domestic courts. As discovered in a previous chapter¹⁰¹⁵, the grant of immunity was historically a sign of mutual comity and reciprocity, rather than an enforceable right of the foreign State. In other words, granting immunity has always been a decision of the forum State and therefore emerges directly out of its sovereignty rather than the lack thereof.¹⁰¹⁶ State authorities and especially national courts err in assuming that immunities constitute a sort of “primary rule” instead of reflecting their real nature: an exception to the rule without which national courts would enjoy full leeway.¹⁰¹⁷ Lady HIGGINS joint by her fellow judges KOOIJMANS and BUERGENTHAL endorsed this viewpoint in the ICJ case law of *Democratic Republic of Congo v. Belgium* in a dissenting opinion.¹⁰¹⁸ The adoption of national statutes implementing foreign immunities, such as the 1978 State Immunity Act of the UK, must be understood as an expression of State sovereignty.¹⁰¹⁹ States may choose to follow the restrictive or the absolute theory of foreign immunity and determine the procedure and conditions by which immunities may be claimed. The national legislator is

¹⁰¹³ SCHERMERS Henry, Diplomatic Immunity in Modern International Law in: Denters Erik/Schrijver Nico (eds.), *Reflection on International Law from the Low Countries*, The Hague, 1998, p. 156 ff.

¹⁰¹⁴ Ibid.

¹⁰¹⁵ See § 2 (I.1), p. 33 ff.

¹⁰¹⁶ MCGREGOR, *Torture and State Immunity*, p. 913 f., CAPLAN, p. 780.

¹⁰¹⁷ HIGGINS Rosalyn, *Certain Unresolved Aspects of the Law of State Immunity*, *Netherlands International Law Review*, Vol. 29, 1982, p. 271.

¹⁰¹⁸ *Democratic Republic of Congo v. Belgium*, Separate Opinion of Judges HIGGINS, KOOIJMANS and BUERGENTHAL, para. 71.

¹⁰¹⁹ GARNETT Richard, *Should Foreign State Immunity be Abolished?*, *Australian Yearbook of International Law*, Vol. 20, 1999, p. 177.

independent enough to adopt such statutes which may only be explained when a State has sovereignty (and therefore jurisdiction) over the subject.

This opinion seems, at least partly, convincing. Also, in relation to States without immunity legislation, it is illusory to assume that a forum State has no control over the case at hand simply because a foreign authority is involved. Pinochet, even if his trial involved criminal jurisdiction and not civil, was effectively stripped of his immunity by the British House of Lords.¹⁰²⁰ Before that, the Austrian Supreme Court was able to acknowledge a territorial tort exception to the *jure imperii* concept of State immunity law.¹⁰²¹ Both developments can only be explained by accepting that British and Austrian authorities had a certain margin of appreciation and therefore jurisdiction over the case.

It is a common mistake to understand immunities as synonymous to the lack of jurisdiction or control instead of its real nature; the suspension of otherwise existing jurisdiction.¹⁰²² The ICJ continuously supported this conclusion, most notably so in the *Arrest Warrant case*:

[I]t is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction.¹⁰²³

The granting of immunity must therefore as well be understood as a sovereign decision, by which the forum State shows that it has chosen to follow customary practices. To say that this jurisdiction stems from the comity of other nations or of a contractual obligation shared with another States is, however, not persuasive, especially since immunities have been widely acknowledged as being regulated by international law

¹⁰²⁰ *Ex parte Pinochet (No. 3)*, see also § 4 (II.2.a), p. 97 ff.

¹⁰²¹ *Holubek v. Government of the United States of America*, Judgment of the Austrian Supreme Court of 10.2.1961, 84 JBl 43, also published in 40 ILR 73.

¹⁰²² *Germany v. Italy*, para. 52 f., STEGER, p. 115, VAN ALEBEEK, Immunity of States, p. 326, YANG, State Immunity in International Law, p. 73.

¹⁰²³ *Democratic Republic of Congo v. Belgium*, para. 46.

on the basis of the principle of equality of States rather than national comity.¹⁰²⁴ It is indeed the national authorities of the forum State taking the decision to grant immunity which will directly affect the right of an individual within its jurisdiction. The applicability of Art. 6 ECHR must therefore be accepted as the forum State exercises a significant control over the individual and the implementation of his civil rights.¹⁰²⁵

It is correct, as explained in a previous chapter, that the ICJ recognized the legal entitlement of States not to be subjected to a foreign national jurisdiction.¹⁰²⁶ The discussion, whether the grant of immunity consists of a right of the foreign State or is a privilege granted by comity of the forum, is no longer relevant for the ECHR to apply.¹⁰²⁷ Since the restrictive theory on State immunity law has become predominant, the jurisdictional bar of foreign immunity is no longer granted automatically. The forum court must necessarily appreciate the merits of a case to see if it fits the *de jure gestionis* qualification, the territorial tort exception, or any other *de lege lata* exceptions and enjoys significant control to do so. The judgment to grant foreign immunity is therefore clearly a decision of the forum for which it can and should be made liable under the supervision of the ECtHR.¹⁰²⁸

Further, the importance of distinguishing the applicability of the Art. 6 ECHR from its contentious analysis should be emphasized. Public interests, such as the political and the diplomatic context in which a dispute may have arisen, are irrelevant for the appreciation of the applicability of the Convention and should therefore not be taken into consideration at this point. It is exclusively the substance of the civil right in question which determines the applicability of the right to access to court and, in this

¹⁰²⁴ Most clearly by the International Law Commission in UN Doc. No. A/CN.4/424, or the ICJ in *Germany v. Italy*, para. 53 and 113, KLOTH/BRUNNER, p. 223.

¹⁰²⁵ Similar also APPELBAUM, p. 178.

¹⁰²⁶ *Germany v. Italy*, para. 56, for a discussion over the so-called “comity argument” see § 2 (I.1), p. 26 ff.

¹⁰²⁷ Comprehensive summary over the opinions discussed in that matter as well as a historical approach to the question in CAPLAN, p. 745 ff., BRÖHMER, p. 9 ff., DAMIAN, p. 14 ff.

¹⁰²⁸ See ANGELET Nicolas, “Jurisdiction” – what’s in the name?, in: Ruys Tom/Angelet Nicolas/Ferro Luca (eds.), *The Cambridge Handbook on Immunities and International Law*, Cambridge, (forthcoming).

perspective, it is difficult to argue that the forum State has no decisive power over the implementation.

Nevertheless, VOYIAKIS raises a valid point. It is surprising that the Court only rarely discussed this issue in relation to Art. 1 ECHR with respect to the implementation of international obligations, as giving a clear answer is not a simple task. Judge SAJÓ in his partly concurring opinion in *Al-Dulimi v. Switzerland*, where the Court found a violation of Art. 6 ECHR in relation to a UN Security Council mandated freezing of assets, is one of the only voices raised questioning the applicability of the Convention under Art. 1 ECHR in relation to conflicting international obligations. He doubts whether Switzerland even had the necessary leeway to perform the Court mandated obligation to ensure that measures are not taken arbitrarily by the Security Council. He eventually negates that Switzerland had any control or jurisdiction over the case and that the application should have been declared inadmissible.¹⁰²⁹ The same discussion needs to be held in relation to the implementation of State immunity. In a more recent judgement of the Court, *Naït-Liman v. Switzerland*, the seven-headed council of judges had unanimously concluded the applicability of Art. 6 ECHR without giving any reference to the doctrinal opinions describe in this chapter.¹⁰³⁰ The case was later referred to the Grand Chamber where only Judge WOJTYCZEK presented an alternative view denying the applicability of Art. 6 ECHR on the basis of a missing jurisdiction of the defending State.¹⁰³¹ This behavior is quite symptomatic for judges of the Court. In *Jones v. the United Kingdom*, the Court was asked to reconsider its decision regarding the applicability of Art. 6 ECHR in relation to foreign immunity.¹⁰³² The Court's assessment only generally referred to its reasoning in *Al-Adsani* as no reason was apparent that would justify a different conclusion.¹⁰³³ It seems that judges uncritically follow the insufficiently reasoned *Al-Adsani* precedence, not only in relation to the applica-

¹⁰²⁹ *Al-Dulimi v. Switzerland*, Judgment of the ECtHR of 26.11.2013, No. 5809/08 partly concurring opinion Judge SAJÓ.

¹⁰³⁰ *Naït-Liman v. Switzerland*, ECtHR Judgment, para. 79 ff.

¹⁰³¹ *Naït-Liman v. Switzerland*, Grand Chamber Judgment, partly-concurring opinion Judge WOJTYCZEK.

¹⁰³² *Jones v. the United Kingdom*, para. 162.

¹⁰³³ *Ibid.*, para. 164 f.

bility of 6 ECHR, but, as we are soon to discover, in the appreciation of its content as well. While the author supports the conclusion of the majority in this regard finding the Convention applicable, the Court is nevertheless advised to give a more substantiated reasoning in relation to Art. 1 of the Convention.

III. Limitation on the Right to Access to Court

Once the applicability of Art. 6 ECHR is established, the right to access to court must be appreciated in the light of the case law of the Court. Already in the landmark decision of *Golder v. the United Kingdom*, the ECtHR had clarified that access to justice was not an absolute right, but that it may be subject to implied limitations.¹⁰³⁴ In relation to the issue of immunities, the Court acknowledged a set of elements which should prevent an unjust limitation to the individual's right to access to court. What was later known as the "Ashingdane test" was most notably established by the ECtHR in the ruling of *Ashingdane v. the United Kingdom*¹⁰³⁵. The Court has since applied this test specifically in case jurisdictional immunities would interfere with an individual's right to court:

[The Court] must be satisfied that the limitations applied do 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. Furthermore, a limitation will not be compatible with Art. 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.¹⁰³⁶

¹⁰³⁴ *Golder v. the United Kingdom*, para. 38, see also *Stanev v. Bulgaria*, Judgment of the ECtHR [GC] of 17.1.2012, No. 36760/06, para. 230, *Al-Dulimi v. Switzerland*, Grand Chamber Judgment, para. 129, *Nait-Liman v. Switzerland*, Grand Chamber Judgment, para. 114, MAYER-LADEWIG/HARRENDORF/KÖNIG, p. 209.

¹⁰³⁵ *Ashingdane v. the United Kingdom*, Judgment of the ECtHR of 28.5.1985, No. 8225/78.

¹⁰³⁶ *Waite and Kennedy v. Germany*, Judgment of the ECtHR [GC] of 18.2.1999, No. 36083/94, para. 59.

The Ashingdane test dictates that any *de jure* or *de facto* limitations to the right to access to court must fulfill the following criteria: first of all, any interference into the Conventions rights must be justified in the pursuit of a legitimate aim. Secondly, the means employed to achieve this aim must be proportional. Thirdly, the essence of the right to justice must always be protected.¹⁰³⁷

Each of these criteria will be discussed in the upcoming section relating to the acceptance of foreign State immunity in case a civil suit is brought in a national court by a victim of torture. Can the grant of foreign immunity be regarded as a legitimate and just restriction of the right to access to court or does it violate the Court's pre-established case law and consequently the individual's right to justice?

1. Legitimate Aim

Many objectives can be named that can qualify as a legitimate aim for the restriction of Convention rights. Art. 8 – 11 ECHR each contain a limitation clause enumerating a few acceptable objectives for the restriction of the rights concerned. These objectives are: national security, public safety, economic wellbeing of the country, prevention of disorder or crime, protection of health or morals or the protection of rights and freedoms of others. Art. 6 ECHR does not mention the scenario of restricting an individual's right to access to court. One must therefore consult the extensive case law of the Court in this matter and appreciate the arguments raised in the specific immunity context.

a. Protection of Good Administration and Prevention of Practical Difficulties

The Grand Chamber of the ECtHR argued in *Naït-Liman v. Switzerland* that the refusal of jurisdiction over civil actions for torture committed abroad was in the interest of protecting the good administration and effectiveness of the national justice system. A civil universality could create considerable practical obstacles for a Court, especially in the appreciation and gathering of the evidence and the execution and implementation

¹⁰³⁷ FROWEIN/PEUKERT, p. 177, KARPENSTEIN/MAYER, p. 176 ff., MAYER-LADEWIG/HARRENDORF/KÖNIG, p. 210.

of their decisions.¹⁰³⁸ The Government of the United Kingdom, as a third-party observer to the case, supported Switzerland's argumentation in this regard and rejected the applicant's reasoning that the rarity of cases of this nature should be seen as a mitigating element.¹⁰³⁹

In the author's opinion, this argument does not fully persuade, an opinion that is shared by both dissenting judges to the case who severely criticized the Court on this matter. Practical challenges for national courts, such as the continued immunity of a State from execution, may not constitute a legitimate aim for the interference into individual's rights. As described in detail below, the individual's right to remedy and reparation does not necessarily involve an actual payment of funds. Remedy, and consequently justice, may be served by simply allowing victims to participate in a proceeding, by acknowledging that a violation has taken place, or by giving the opportunity to confront perpetrators and potentially receive an apology.¹⁰⁴⁰ The civil trial serves itself as a form of reparation and justice regardless of the fact whether the judgment may be subsequently enforced. Holding otherwise would confuse two linked but separate legal issues: Immunity from jurisdiction and immunity from execution and enforcement measures.¹⁰⁴¹ Regarding the difficulties of evidence gathering, it should not be forgotten that in civil proceedings, unlike in criminal prosecution, it is the burden of the plaintiff introducing the claim to present evidence in his/her favor and not the State's. It is not a legitimate public interest to facilitate evidence gathering in this situation as "the risk of losing a case can in no way be regarded as a legitimate ground for restricting the right of access to a court"¹⁰⁴².

Also, States have assumed an obligation to protect the human rights of their population. Challenges, such as a financial burden on the justice system may not always

¹⁰³⁸ *Naït-Liman v. Switzerland*, Grand Chamber Judgment, para. 118 and 123, see also DO-NOVAN/ROBERTS, p. 158.

¹⁰³⁹ *Ibid.*, para. 160.

¹⁰⁴⁰ See § 8 (1.1.b), p. 286 ff.

¹⁰⁴¹ Convincingly brought forward by the applicant in *Naït-Liman v. Switzerland*, Grand Chamber Judgment, para. 120.

¹⁰⁴² *Naït-Liman v. Switzerland*, Grand Chamber Judgment, Dissenting opinion Judge SERGHIDES, para. 93.

excuse the material protection of such rights, especially as this argumentation relates to the implementation of a potential torture-related exception to State immunity and not to its material existence.¹⁰⁴³ What other authors have called “the flood gate argument” needs to be distinguished from the substantive analysis over the individual right to access to justice and the legitimacy of the interference.¹⁰⁴⁴ The reader is advised to study the examples discussed in § 8 (II.3), where the author attempts to harmonize a potential risk of mass litigation with the implementation of the victims right to remedy and reparation.¹⁰⁴⁵

The protection of the good administration as well as the protection from potential practical difficulties during or after a court proceeding can, at least in the context of immunity from civil procedures, not constitute a legitimate aim for the purpose of restricting the access to courts.

b. Respect for International Law as a Legitimate Aim

In different rulings, the Court has emphasized the importance of the implementation of general international law and compliance with international principles protected by State immunity:

The grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State’s sovereignty.¹⁰⁴⁶

It is only rarely that the illegitimacy of the respect of international law was challenged before the Court. In a handful of cases, the applicants had unsuccessfully attempted to

¹⁰⁴³ *Naït-Liman v. Switzerland*, Grand Chamber Judgment, Dissenting opinion Judge DEDOV, p. 77, and Dissenting opinion SERGHIDES, para. 92 ff., see also KLOTH, Immunities and the Right of Access to Court, p. 15, ORAKHELASHVILI, State Immunity and Hierarchy of Norms, p. 956, PAECH p. 56.

¹⁰⁴⁴ Comprehensive analysis over the flood gate argument see § 8 (II.3), p. 334 ff.

¹⁰⁴⁵ See § 8 (II.3), p. 334 ff.

¹⁰⁴⁶ *Jones v. the United Kingdom*, para. 188, see also: *Fogarty v. the United Kingdom*, para. 34, *McElhinney v. Ireland*, para. 35, *Al-Adsani v. the United Kingdom*, para. 54, *Kalogeropoulou v. Greece and Germany*, para. 60, *Cudak v. Lithuania*, para. 60, *Sabeh el Leil v. France*, para. 48 f.

win their trial by claiming that the plea of State immunity itself would not pursue a legitimate interest. In a joint submission to the Court, REDRESS and the World Organization Against Torture made the following submissions as third-party interveners in favor of the claimants' allegations: in the unique circumstances in which torture was committed – a recognized violation of international law demanding all States to prevent and punish the crime – no legitimate objective can be found if it results in a denial of justice. This would undermine the very foundation on which Art. 6 ECHR is based.¹⁰⁴⁷ VOYIAKIS comes to the same conclusion, however, through different reasoning:

[The Court] did not contend that it would be worthwhile for the State of the forum to adopt policies which promote international comity, *but that the State of the forum was bound to accord them specific entitlements as a matter of international law*. With that in mind, the three applications did not concern a conflict between the applicants' right of access to court and the respondent States' policy of promoting international comity. They rather concerned a straight conflict between the respondents' obligations under the Convention to adjudicate the applicants' claims and their obligations under general international law to accord immunity from jurisdiction to the defendant foreign States.¹⁰⁴⁸ [emphasis added]

He essentially argues that the compliance with international law is not a public policy or a legitimate aim. Immunities are imposed on the courts of the forum State regardless of any public interest. If immunities are indeed acknowledged as an entitlement of the defending State and not a courtesy, then no public policies are needed for their implementation. The values protected by immunities may therefore not be used as a justification for the restriction of Art. 6 ECHR as they are two obligations inherently

¹⁰⁴⁷ Joint Written comments by Redress and the World Organisation against Torture in the case of *Nait-Liman v. Switzerland*, para. 20, available on the Redress Trust website: http://www.redress.org/downloads/1211Nait-Liman-submission_Final.pdf [last accessed 20.9.2018].

¹⁰⁴⁸ VOYIAKIS, p. 311.

incompatible with one another. A valid public interest for the restriction of the right to court can therefore not be found.

Further, the Court was criticized for its lack of consistency.¹⁰⁴⁹ While it has accepted that the respect of international obligations may constitute a legitimate objective in respect of foreign State immunity, the same was not held in relation to obligations imposed by international organizations. In *Capital Bank AD v. Bulgaria*, a revocation of a Bulgarian Bank's license at the order of the International Monetary Fund led to an alleged denial of judicial review over the decision. In the Court's assessment compliance with other international obligations did not justify the restriction of Convention rights.¹⁰⁵⁰ In the same case the Court referred to its rulings in relation to obligations towards international organizations, where it was established that membership to an international organization may not justify the non-observance of Convention obligations.¹⁰⁵¹ This argumentation, however, ignores that the mentioned case law treats the transfer of jurisdiction to an international organization after the ratification of the ECHR. This reasoning – most notably brought forward in *Bosphorus v. Ireland*¹⁰⁵² – only convinces as Contracting States may only liberate themselves from the obligations taken on through the ratification of the ECHR, when the organization offers an effective alternative for the realization of one's rights. Principles of State immunity and equality of sovereigns have however pre-existed the Convention, so that the transfer of jurisdiction argument, the so called "Bosphorus-presumption", is not directly applicable in relation to State immunity, at least not in relation to the legitimacy element of the limitation.¹⁰⁵³

While the argumentation of the Court in accepting the legitimate objective for the restriction of the right to justice may be considered vague and insufficiently clear,

¹⁰⁴⁹ ORAKHELASHVILI, State Immunity and Hierarchy of Norms, p. 960.

¹⁰⁵⁰ *Capital Bank AD v. Bulgaria*, Judgment of the ECtHR of 24.11.2005, No. 49429/99, para. 111.

¹⁰⁵¹ See further: *Matthews v. the United Kingdom*, Judgment of the ECtHR [GC] of 18.2.1999, No. 24833/94, *Waite and Kennedy v. Germany*, Judgment of the ECtHR [GC] of 18.2.1999, No. 26083/94.

¹⁰⁵² *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, Judgment of the ECtHR [GC] of 30.6.2005, No. 45036/98.

¹⁰⁵³ FOX/WEBB, p. 440.

there can indeed be found a public interest of granting a foreign State immunity and it does relate to the respect of international obligations and customary law. From a domestic point of view, international obligations must be respected because it serves the security of law (*pacta sunt servanda*) and respects the rule of law, both interests that are of international and domestic value and therefore legitimate objectives to be followed. KLOTH, however, rightly criticizes the Court for being too minimalistic in its appreciation of the legitimacy element. Often insufficient attention is given to that element and the Court would test if the immunity invoked is legitimate instead of testing the legitimacy of the interests protected by immunities.¹⁰⁵⁴ He eventually relativizes this approach as it would not have changed the outcome of the rulings and can generally be regarded as an uncontroversial matter.¹⁰⁵⁵

c. Protection of Bilateral Relations and the Sovereignty of another State

Courts often invoke the principle of *par in parem non habet imperium* to justify granting foreign States their immunity in national courts. The sovereign equality, as described by Art. 2 (1) of the UN Charter, relates to the dignity of States not to be subjected to an “equal’s” jurisdiction.¹⁰⁵⁶ In addition, the forum State has a legitimate interest to discourage forum shopping as it could not be ignored that civil claims introduced against a foreign court could potentially lead to diplomatic difficulties.¹⁰⁵⁷ While bilateral relations between the forum State and the perpetrating State are a key interest in a political and diplomatic reality, certain authors argue that they do not represent any legal obligations.¹⁰⁵⁸ As described in detail in § 1 of this thesis, State immunity law essentially serves to protect the sovereign equality of States, their independence and dignity as well as, arguably, the working of international diplomacy and collaboration.¹⁰⁵⁹ In the specific case of Mr. Naït-Liman, dissenting Judge SERGHIDES intelligently points out that the protection of diplomatic relations between Switzerland and Tuni-

¹⁰⁵⁴ KLOTH, Immunities and the Right of Access to Court, p. 13.

¹⁰⁵⁵ Ibid., p. 15.

¹⁰⁵⁶ See § 1 (II), p. 12 ff.

¹⁰⁵⁷ *Naït-Liman v. Switzerland*, Grand Chamber Judgment, para. 127.

¹⁰⁵⁸ ORAKHELASHVILI, State Immunity and Hierarchy of Norms, p. 956.

¹⁰⁵⁹ See § 1 (II), p. 12 ff.

sia did not constitute a relevant factor in the restriction of Convention rights. Swiss authorities had granted the applicant asylum, showing clear indication that he was being politically prosecuted by public officials in Tunisia, an act that threatened the diplomatic relations between those countries in a more significant way:

It is contradictory for Switzerland to grant political asylum to the applicant on the one hand, on the basis of his allegations that he was subjected to torture in Tunisia and, on the other hand, to consider him attempting to forum-shop when he resorts to the Swiss courts and seeking non-pecuniary damage in respect of those alleged events in Tunisia.¹⁰⁶⁰

Further, it should not be ignored that certain authors advocate that foreign immunities actually worsen bilateral relations.¹⁰⁶¹ According to judges in the *Ferrini* judgment, it might be justified to deny State immunity for crimes which “threaten the whole humanity and undermine the foundation of peaceful international relations.”¹⁰⁶² This opinion is shared by Judge CANÇADO TRINDADE, who does not seem convinced that the granting of immunities is a proper way of keeping international cooperation intact. In his words:

In my understanding, what jeopardizes or destabilizes the international legal order are the international crimes and not the individual suits for reparation in the reach for justice. In my perception, what troubles the international legal order, are the cover-up of such international crimes accompanied by the impunity of the perpetrators, and not the victims search for justice. [...] They are anti-juridical acts, they are breaches of *jus cogens* that cannot simply be removed or thrown into oblivion by reliance on State immunity. This would block the access to justice, and impose impunity. It is, in fact, the opposite that should take place:

¹⁰⁶⁰ *Naït-Liman v. Switzerland*, Grand Chamber Judgment, Dissenting opinion Judge SERGHIDES, para. 95.

¹⁰⁶¹ ORAKHELASHVILI, *State Immunity and Hierarchy of Norms*, p. 956.

¹⁰⁶² *Ferrini v. Germany*, Italian Court of Cassation, para. 9.

breaches of *jus cogens*, bring about the removal of claims of State immunity, so that justice can be done.¹⁰⁶³

The author, nevertheless, believes that the protection of bilateral relations may be accepted as a legitimate aim for restricting access to court. A comprehensive weighing of interests necessarily implies a global assessment of all rights and interests involved and not just the legal ones. In addition, the protection of State sovereignty and equality are contained in the UN Charter and are consequently legal in character, this includes (in a very limited matter) the dignity of a State which is occasionally referenced in the law of State responsibility.¹⁰⁶⁴ The ICJ emphasized the importance of maintaining good relations among all members of the international community. As the ICJ pointed out, immunities are “an instrument essential for effective co-operation in the international community, and for enabling States, irrespective of their differing constitutional and social systems, to achieve mutual understanding and to resolve their differences by peaceful means.”¹⁰⁶⁵ Judge PELLONPÄÄ later added that it was therefore necessary to continue granting States their immunity even for acts constituting violations of peremptory norms, as otherwise this collaboration would cease to exist.¹⁰⁶⁶ This reasoning, however, only persuades in a scenario where State immunities are absolute. Foreign States may already today be brought under national jurisdiction without their proper consent. With the adoption of the restrictive theory in State immunity law, inter-State relations had to adapt to a new concept and managed to keep international cooperation and bilateral diplomacy intact. The protection of a foreign State’s sovereignty may consequently be accepted as a legitimate aim for the purpose of restricting an individual’s access to court but must significantly be relativ-

¹⁰⁶³ *Germany v. Italy*, Dissenting opinion Judge CAÑADO TRINDADE, para. 129.

¹⁰⁶⁴ ILC ARSIWA Commentary, p. 107, see also CRAWFORD, ILC Articles on State Responsibility, p. 234.

¹⁰⁶⁵ *United States of America v. Iran*, para. 91.

¹⁰⁶⁶ *Al-Adsani v. the United Kingdom*, concurring opinion of Judge PELLONPÄÄ joined by Judge Sir BRATZA.

ized in its importance as the concept of sovereignty has undergone major changes in recent history.¹⁰⁶⁷

To conclude, both the respect of international law, the protection of sovereignty, equality and diplomatic relations constitute a legitimate objective for the purpose of restricting an individual's access to court through jurisdictional immunities. Practical difficulties, such as aggravated evidence gathering or challenges for the enforcement of the judgment on the other hand, do not qualify as a legitimate aim in this specific immunity context. Due to its inherent civil nature of the proceeding, the State is not responsible for evidence gathering or protecting plaintiffs from long and costly litigation. Also, this line of reasoning threatens to distract from the real issue at hand: the exercise of jurisdiction in civil matters and not the recognition or enforcement thereof. Similarly, a potential flood of litigation which could threaten the working of the judicial branch is an irrelevant factor for the restriction of access to justice. The reader is advised to study the proposals elaborated by the author in § 8 (II.3) of this thesis.

Lastly, voices claiming that foreign immunities actually worsen bilateral relations and international cooperation should not be left unheard, are however not sufficiently elaborated to allow a Court to find a violation on the individual's right to justice on this basis alone. Protection of bilateral relation may, nevertheless, constitute a relevant public policy in the application of the Ashingdane restriction test.

2. Proportionality and Balancing of Interests

For an interference to be legitimate and lawful, the means employed to achieve the objectives must be in a reasonable relation of proportionality. In other words: State interference must be "necessary in a democratic society" striking a fair balance between the demands of the general public and the severity of the interference into the individual's fundamental right.¹⁰⁶⁸ It must be mentioned that the ECtHR has, time and

¹⁰⁶⁷ See § 6 (II.2.b), p. 168 ff.

¹⁰⁶⁸ *Sporrong and Lönnroth v. Sweden*, Judgment of the ECtHR of 23.9.1982, No. 7151/75 and 7152/75, para. 73, *Al-Dulimi v. Switzerland*, Grand Chamber Judgment, para. 129, *Naït-Liman v. Switzerland*, Grand Chamber Judgment, para. 114.

time again, acknowledged a substantial margin of appreciation in relation to the proportionality analysis.¹⁰⁶⁹ Local authorities are better suited to perform this function, especially regarding issues lacking a European consensus. The ECtHR, in these cases, is limited to appreciating the national court's assessment to the test of an unreasonable and arbitrary judgment.¹⁰⁷⁰

In the Court's opinion, a proportionality analysis must always be exercised in harmony with other rules of international law, including jurisdictional immunities. In a very general manner, this led the Court to assume that the grant of immunity may not *per se* be regarded as a disproportionate interference in the individual's right to a fair trial as it reflects generally recognized rules of public international law.¹⁰⁷¹ In *Al-Adsani*, the Grand Chamber performed an appreciation of the interests at hand, however failed to counterbalance it against a clear legitimate aim. It did, on the other hand, recognize the importance of the values protected by the prohibition of torture as a peremptory norm and identified "a special stigma, attaching only to deliberate inhuman treatment causing very serious and cruel suffering."¹⁰⁷² Nevertheless, the Court concluded that no violation of Art. 6 ECHR could be found as international law has yet to recognize a torture-related exception to State immunity and that recent developments in relation to criminal proceedings against State officials could not be compared to the civil jurisdiction over a foreign State.¹⁰⁷³

In *Jones v. the United Kingdom*, the applicants argued that the Court should revisit its position in *Al-Adsani* as it failed to conduct a substantive proportionality analysis, including assessment of the individual merits and the specific circumstances of each

¹⁰⁶⁹ See among others: *Kopp v. Switzerland*, Judgment of the ECtHR of 25.3.1990, No. 1998-II, para. 59, *Nait-Liman v. Switzerland*, ECtHR Judgment, para. 109.

¹⁰⁷⁰ *Anheuser-Busch Inc v. Portugal*, Judgment of the ECtHR [GC] of 11.1.2007, No. 73049/01, para. 85 f.

¹⁰⁷¹ *Al-Adsani v. the United Kingdom*, para. 55 f., *McElhinney v. Ireland*, para. 36 f., *Fogarty v. the United Kingdom*, para. 35 f., *Kalogeropoulou v. Greece and Germany*, para. 70, *Cudak v. Lithuania*, para. 56 f., *Jones v. the United Kingdom*, para. 189.

¹⁰⁷² *Al-Adsani v. the United Kingdom*, para. 59.

¹⁰⁷³ *Ibid.*, para. 63 ff.

case.¹⁰⁷⁴ A number of authors forward the same criticism, claiming that the Court never fully took up a significant weighing of interests of the parties' claim.¹⁰⁷⁵ This fact was also pointed out by the minority judges in the *McElhinney* and *Al-Adsani* rulings. In several dissenting opinions, Judge LOUCAIDES observed that granting a blanket immunity without a meaningful balancing of competing interests constituted a disproportionate limitation to Art. 6 ECHR:

In present democratic society an absolute immunity from judicial proceedings appears to be an anachronistic doctrine incompatible with the demands of justice and the rule of law.¹⁰⁷⁶

Simply because a foreign State is involved in a national dispute, and jurisdictional immunities may be relevant, does not excuse the Court from properly assessing the proportionality of an interference. LOUCAIDES continues by emphasizing that general rules of international law should only insofar be taken into consideration as they are embodied in the Convention. One should be reluctant to accept limitations on Convention rights through more general principles of international law, especially so when they lack *jus cogens* character.¹⁰⁷⁷ As a consequence, the Court faces an inherent dilemma: either it accepts that the right to access to court as described by the Convention is "ineffective, theoretical and illusory" which would go against its latest jurisprudence or that it must take precedence over general obligations of international law.¹⁰⁷⁸ The reasoning does, however, not fully convince. General international law should not be completely left out of the equation, especially since Art. 31 (3c) VCLT demands a treaty provision to be interpreted in conformity with obligations of the international legal order shared among contracting parties.¹⁰⁷⁹ Nevertheless, these

¹⁰⁷⁴ *Jones v. the United Kingdom*, para. 193.

¹⁰⁷⁵ APPELBAUM, p. 180, MCGREGOR, *State Immunity and Human Rights*, p. 135, VOYIAKIS, p. 312.

¹⁰⁷⁶ *McElhinney v. Ireland*, Dissenting opinion Judge LOUCAIDES, similar also in *Fogarty v. the United Kingdom*, Dissenting opinion Judge LOUCAIDES and *Al-Adsani v. the United Kingdom*, Dissenting opinion Judge LOUCAIDES.

¹⁰⁷⁷ *Ibid.*

¹⁰⁷⁸ MCGREGOR, *State Immunity and Human Rights*, p. 135.

¹⁰⁷⁹ KLOTH, *Immunities and the Right of Access to Court*, p. 40.

constitute only one interest among many to be considered within a comprehensive proportionality analysis.

In the 2016 Chamber case of *Naït-Liman v. Switzerland*, three out of seven judges had declared the interference into the right to access to court a disproportionate measure as the interest of torture victims to bring a civil action against a foreign State was considered superior to the jurisdictional privilege of a State.¹⁰⁸⁰ The case was later accepted for referral by the Grand Chamber, where only two out of 17 judges concluded similarly.¹⁰⁸¹ The Court emphasized that Switzerland was under no obligation to give the applicant access to its courts and that Switzerland did not act in a manifestly unreasonable way when accepting the jurisdictional plea of foreign State.¹⁰⁸² An identical solution can be found in *Jones*. The Court did not find the UK responsible for an Art. 6 ECHR violation primarily referencing its margin of appreciation doctrine. Consequently, the Court, once again, did not assess proportionality in a sufficient detailed manner and only generally referred to the reasoning presented in its *Al-Adsani* precedence. When asked about a potential referral to the Grand Chamber for the purpose of revalidation, the Court did not see any reason to depart from *Al-Adsani* as it constituted a “recent and comprehensive judgement”.¹⁰⁸³

What the Court, however, ignored is, firstly, that the *Al-Adsani* judgment dates to the year 2001 and was decided at a very slim majority of 9-to-8 votes. Many important developments have since taken place in international law such as a growing number of exceptions to personal and functional immunities of State officials, case law regarding the immunity of international organizations and the essence of Art. 6 ECHR. Secondly, a referral to the *Al-Adsani* ruling does not excuse the Court from an individual proportionality analysis. No general superiority should be assumed in favor of foreign

¹⁰⁸⁰ *Naït-Liman v. Switzerland*, ECtHR Judgment, Joint Dissenting opinion of Judges KARAKAŞ, VUČINIĆ and KÜRIS, para. 16.

¹⁰⁸¹ *Naït-Liman v. Switzerland*, Grand Chamber Judgment, Dissenting opinion of Judge DEDOV, p. 73 f., *Naït-Liman v. Switzerland*, Grand Chamber Judgment, Dissenting opinion of Judge SERGHIDES, para. 103.

¹⁰⁸² *Naït-Liman v. Switzerland*, Grand Chamber Judgment, para. 198.

¹⁰⁸³ *Jones v. the United Kingdom*, para. 194 f.

immunity, but a meaningful balancing of all interests involved in the specific circumstances of each case must be at the center of any legal assessment. Consequently, a general superiority of State immunity over the rights contained in Art. 6 ECHR must be denied as cases differ considerably.¹⁰⁸⁴

Furthermore, other legal scholars put forward an argument of ability. No evidence can be found that the denial of State immunity, like in cases related to employment or commercial disputes, has led to a deterioration of bilateral relations. The grant of State immunity is hence not able to achieve the legitimate aim identified in the first step of the Ashingdane test, resulting in a disproportionate interference into the right to access to court.¹⁰⁸⁵ This opinion should not easily be dismissed. The jurisprudence of the Court ignores that bringing a civil case against a foreign State within the forum of another State is already a reality today, including for *de jure imperii* acts¹⁰⁸⁶. *De lege lata* exceptions to State immunity, such as for commercial activity, employment issues or the physical or mental harm occurring the territory of the forum, have led to a rupture of the absolute principle on equality among State in favor of the territoriality principle.¹⁰⁸⁷ Since then, no significant political or diplomatic struggles have occurred for the simple fact that a State has exercised jurisdiction over another. The reduced significance of the interest protected by State immunity must therefore be taken into consideration within a balancing exercise.

Also, KÜNZLI convincingly points out an inherent inconsistency in the Court's case law regarding Art. 6 ECHR.¹⁰⁸⁸ In two cases against Switzerland delivered by the ECtHR on

¹⁰⁸⁴ APPELBAUM, p. 180, similar also PINGEL Isabelle, L'immunité des Etats, in: Tomuschat Christian/Touvenin Jean-Marc (eds.), *The Fundamental Rules of the International Legal Order*, Leiden/Boston, 2006, p. 242 f.

¹⁰⁸⁵ ORAKHELASHVIL, *State Immunity and Hierarchy of Norms*, p. 956.

¹⁰⁸⁶ See § 5 (I.3), p. 126 ff.

¹⁰⁸⁷ See a comprehensive analysis of the impact of the restrictive theory of State immunity law on the principle of State equality by HIGGINS Rosalyn, *Equality of States and Immunity from Suit: A Complex Relationship*, *Netherlands Yearbook of International Law*, Vol. 43, 2011.

¹⁰⁸⁸ KÜNZLI Jörg, *Die Schweiz im Sandwich zwischen New York und Strassburg*, Blog of the Swiss Center of Expertise in Human Rights: <http://www.skmr.ch/de/themenbereiche/justiz/artikel/egmr-normkonflikt.html> [last accessed 15.9.2018].

the same day, the Court had found a violation of the individual's right to access to court of a representative of a torture-regime giving primacy to Art. 6 ECHR over the implementation of a UN Security Council resolution¹⁰⁸⁹ while at the same time a victim of torture was denied access to the Swiss courts for the injuries suffered by a foreign authority¹⁰⁹⁰. This leads to the remarkable situation, whereas a representative of a torture-regime should have been granted judicial review within Swiss courts while the same was not held with regards to the victims of a similar regime. From a legal point of view, alleged supporters of international crimes and acts of terrorism seem to have a more substantial legal protection with regard to their fair trial guarantees than their victims, because the implementation of a Security Council resolution, forcing Switzerland to freeze assets without giving the person concerned an opportunity to challenge the proceeding, was considered a disproportionate interference into Art. 6 rights while the grant of jurisdictional immunity for a well-documented case of torture was deemed justified. Accepting superiority to the rights contained in Art. 6 ECHR over the plea of immunity is insofar convincing as the right to access to court enjoys priority over general rule of international customary law because of its *lex specialis* character.¹⁰⁹¹

An important set of case law must briefly be mentioned in this respect. The Grand Chamber of the ECtHR found several violations of Art. 6 ECHR declaring the grant of State immunity a disproportional interference into the claimant's rights.¹⁰⁹² All cited cases concerned alleged unlawful dismissals from the employment at a foreign embassy. The claimants had attempted to receive compensation by filing a civil suit before the labor courts of their respective home States, and were, however, barred from accessing justice due to the jurisdictional immunities enjoyed by the foreign embassies. The ECtHR declared that the embassies did not enjoy State immunity in accordance

¹⁰⁸⁹ *Al-Dulimi v. Switzerland*, Grand Chamber Judgment, para. 153 ff.

¹⁰⁹⁰ *Naït-Liman v. Switzerland*, ECtHR Judgment, para. 121 f.

¹⁰⁹¹ KÜNZLI, *Vom Umgang des Rechtsstaats mit Unrechtsregimes*, p. 322 see also *McElhinney v. Ireland*, Dissenting opinion Judge LOUCAIDES, similar also in *Fogarty v. the United Kingdom*, Dissenting opinion Judge LOUCAIDES and *Al-Adsani v. the United Kingdom*, Dissenting opinion Judge LOUCAIDES.

¹⁰⁹² *Cudak v. Lithuania*, para. 74, *Sabeh el Leil v. France*, para. 67, *Radunović v. Montenegro*, para. 81.

with Art. 11 UNCSI and that domestic courts therefore erred in declaring the claims inadmissible. The fact that neither States had ratified ECSI nor UNCSI and that the latter had yet to enter into force, did not change the fact that Art. 11 UNCSI constituted customary law and was therefore binding. The violations were consequently not in relation to the failure to conduct a comprehensive proportionality assessment as much as it was the misapplication of relevant international law provisions. As concluded in Part II of the thesis, current international law fails to recognize a torture-related exception to State immunity law and is consequently not comparable to civil trials introduced against a State in an employment setting. The legal conclusions found by the ECtHR, most notably in *Cudak v. Lithuania*, *Sabeh el Leil v. France*, and *Radunović v. Montenegro*, are consequently not relevant for the appreciation of the research topic, at least in relation to the proportionality assessment of a potential legal interference into fair trial guarantees.

In an attempt to summarize the legal findings, it cannot be said that the grant of foreign State immunity is always a proportionate interference into the right to access to court of the claimant. The Court, in its proportionality assessment, primarily focused on the fact that public international law, which it understands to include only State immunity law, did not yet provide for a torture-related exception to the jurisdictional immunity of a State and that this was enough indication that no disproportionate interference into the individual's right to access to court had taken place. The Court, however, fails to appreciate all relevant developments of public international law. As describe in detail by the author in a previous chapter¹⁰⁹³, sovereign equality and the protection from interference have significantly lost relevance in international law, the notion of sovereignty has gradually been humanized, the fight against impunity fortified as well as individuals been majorly empowered on an international level. Given these developments, the author concurs with PETERS who concludes:

[C]onflicts between state sovereignty and human rights should not be approached in a balancing process in which the former is placed off

¹⁰⁹³ See § 6 (II.2.b), p. 168 ff.

against the latter on an equal footing, but should be tackled on the basis of a presumption in favour of humanity.¹⁰⁹⁴

The author does not consider that Art. 6 ECHR is violated every time a jurisdictional immunity is granted in a civil proceeding introduced by a torture victim. A proportionality assessment requires that each case be appreciated within its unique circumstances and that the solution be justified through a comprehensive analysis. In the specific situation of the plaintiffs in *Nait-Liman*, *Al-Adsani*, and *Jones*, the author, however, can only conclude in favor of the claimants. As all plaintiffs in the mentioned case law were nationals of the forum State at the time proceedings were introduced before the Court, it cannot be said that the claimants had acted abusively as no form of “forum shopping” can be said to have occurred.¹⁰⁹⁵ Governments of Tunisia, Kuwait and Saudi Arabia in these specific affairs attempted nothing to rectify the situation of the plaintiffs or acknowledge responsibility in any way. There were no investigations, no diplomatic channels opened, no attempt to give the claimants remedy or reparation, no alternative forum available and no emergency situation which would have justified a temporary grant of immunity. In these cases, the proportionality analysis clearly demands a priority of giving access to justice to the claimants who allege to have become victims of torture and continue to be denied any effective remedy within the foreseeable future.

On the other hand, it does not surprise that the ECtHR did not find a violation in these proceedings. The Court simply stated that national courts have not acted arbitrarily or in a manifestly unreasonable fashion by giving priority to jurisdictional immunity of a foreign State, which is true in relation to all cases brought before the Court so far. It, however, does not answer if the interference into the claimant’s right to court was indeed proportional.¹⁰⁹⁶ Given its margin of appreciation doctrine, the European Court of Human Rights may not be the ideal forum to acknowledge a viola-

¹⁰⁹⁴ PETERS, p. 514.

¹⁰⁹⁵ This was for example held in *Jones v. Saudi Arabia*, Court of Appeal, Lord MANCE, para. 92 and 96, but subsequently overturned, see *Jones v. Saudi Arabia*, House of Lords.

¹⁰⁹⁶ See i.e: *Nait-Liman v. Switzerland*, Grand Chamber Judgment, para. 205 ff.

tion of Art. 6 ECHR. This burden consequently falls on national courts, which possess the full appreciative power necessary for a comprehensive proportionality assessment.

Nevertheless, the jurisprudence of the ECtHR is not free from contradictions. The author agrees with KÜNZLI that the current case law of the Court is inconsistent and leads to absurd protection gaps which may only be closed through a change of practice. The Grand Chamber is therefore urged to reassess its current position in relation to State immunity from civil proceedings and the proportionality requirement of a restriction into Art. 6 ECHR rights by victims of torture as it is unjustifiably at odds with its own jurisprudence and fails to include all relevant factors of public international law.

3. Maintaining the Essence of the Right

The case law of the Court demands that, assuming that a grant of State immunity for committed torture complies with the legitimacy and proportionality requirements, the rights contained in Art. 6 ECHR may only be restricted as far as the very essence of rights is not impaired.¹⁰⁹⁷ Most legal scholars believe that the Court essentially ignored this criterion in their considerations regarding a legitimate interference into Art. 6 ECHR and applied the “essence test” as being integrated within the proportionality assessment, which is not only legally incoherent but leads to a distortion of the legal findings.¹⁰⁹⁸ Judge COSTA went as far as to describe the Courts assessment as being

¹⁰⁹⁷ *Al-Dulimi v. Switzerland*, Grand Chamber Judgment, para. 129, *Naït-Liman v. Switzerland*, Grand Chamber Judgment, para. 114, *Baka v. Hungary*, Judgment of the ECtHR of 27.5.2014, No. 20261/12, para. 120.

¹⁰⁹⁸ VOYIAKIS, p. 312, KLOTH, Immunities and the Right of Access to Court, p. 19, MCGREGOR, State Immunity and Human Rights, p. 134, ORAKHELASHVILI, State immunity and International Public Order, p. 254, TOMONORI Mizushima, Denying Foreign State Immunity on the Grounds of the Unavailability of Alternative Means, *The Modern Law Review*, Vol. 71/5, 2008, p. 737, REINISCH August/WEBER Ulf, In the Shadow of Waite and Kennedy: The Jurisdictional Immunity of International Organization, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement, *International Organizations Law Review*, Vol. 1, 2004, p. 85.

“unorthodox and illogical”¹⁰⁹⁹, going against the established procedure for the restriction of Convention rights. As pointed out by the majority, the proportionality problematic does not even arise once the essence of the right is infringed and can therefore not be used as method to legitimize the interference into the essence of the right.¹¹⁰⁰

[The approach] the Court is taking is in danger of mixing up the three different criteria of the test. If the outcome of the third criterion entirely depends on the assessment of the other two, it does not add anything to the test.¹¹⁰¹

As a condition *sine qua non*, the appreciation of the essence of a right must be performed completely independent from any balancing of interests, including any political, legal or diplomatic values. As *Al-Adsani* is arguably the most significant decision the ECtHR has taken in relation to State immunity, all subsequent decisions heavily relied on the argumentation of the Grand Chamber despite its obvious flaw in relation to the essence requirement. Consequently, no comprehensive analysis over the essence of Art. 6 ECHR can be found in relation to the grant of State immunity, the only exception being the *McElhinney* ruling, where the Court generally referred to the courts in Northern Ireland as a possible alternative forum for the applicants.¹¹⁰² However, the Court failed to mention in what context this element needs to be appreciated. This systematic error is best shown by the fact that the Grand Chamber fails to mention the essence requirement as a necessary examination step in *Nait-Liman* and, once again, falsely integrated questions in relation to the nucleus of the right in the proportionality assessment.¹¹⁰³ One question consequently remains unanalyzed by the

¹⁰⁹⁹ *Prince Hans-Adam II of Liechtenstein v. Germany*, Judgment of the ECtHR [GC] of 12.7.2001, No. 42527/98 concurring opinion of Judge COSTA.

¹¹⁰⁰ *Prince Hans-Adam II of Liechtenstein v. Germany*, joint concurring opinion of Judges RESS and ZUPANČIČ.

¹¹⁰¹ KLOTH, Immunities and the Right of Access to Court, p. 18.

¹¹⁰² *McElhinney v. Ireland*, para. 39.

¹¹⁰³ *Nait-Liman v. Switzerland*, Grand Chamber Judgment, para. 117.

Court: is the essence of Art. 6 ECHR impaired if no alternative means of action is available to the claimant?

Many scholars seem to believe so as it is difficult to argue how the Court could deny a violation of Art. 6 ECHR if all measures granting immunity to a foreign State would deprive the applicant access to justice with no effective alternative remedy.¹¹⁰⁴

Immunities totally eliminate the right of access to court, not leaving any scope for its exercise. What, if not the essence of the right of access is being affected?¹¹⁰⁵

These inconsistencies were notably pointed out by Judges KARAKAŞ, VUČINIĆ and KÜRIS, representing the minority opinion in the Chambers' judgment in *Naït-Liman v. Switzerland*:

En l'espèce, le rejet du recours du requérant sans un examen sur le fond par les tribunaux suisses a gravement nui à la substance du droit d'accès du requérant à un tribunal [...]. Nous considérons que cette *impossibilité de demander réparation équivaut à un déni de justice* et qu'il y a eu par conséquent violation de l'article 6 § 1 de la Convention.¹¹⁰⁶ [emphasis added]

In order to identify the "nucleus" of Art. 6 ECHR, one must primarily consult the case law regarding other kinds of immunities, most notably the jurisdictional privileges of international organizations. In two cases brought against Germany, the applicants had unsuccessfully attempted to bring an employment dispute against the European Space Agency (ESA) within German labor courts.¹¹⁰⁷ As the ESA qualifies as an international

¹¹⁰⁴ VOYIAKIS, p. 312, REDRESS, Immunity v. Accountability, p. 42, PINGEL, p. 246, *Naït-Liman v. Switzerland*, Grand Chamber Judgment, Dissenting opinion DEDOV, p. 76, *Naït-Liman v. Switzerland*, Grand Chamber Judgment, Dissenting opinion SERGHIDES, para. 114.

¹¹⁰⁵ KLOTH, Immunities and the Right of Access to Court, p. 19.

¹¹⁰⁶ Joint dissenting opinion of Judges KARAKAŞ, VUČINIĆ and KÜRIS in *Naït-Liman v. Switzerland*, ECtHR Judgment, para. 18, later joint by judges DEDOV and SERGHIDES in the Grand Chamber ruling.

¹¹⁰⁷ *Waite and Kennedy v. Germany*, Judgment of the ECtHR [GC] of 18.2.1999, No. 26083/94, *Beer and Regan v. Germany*, Judgment of the ECtHR [GC] of 18.2.1999, No. 28934/95.

organization, German courts granted jurisdictional immunity over the matter preventing any proceedings to be held. The Grand Chamber of the ECtHR was asked, whether this grant of immunity was compatible with the applicants' right to justice. In the Court's opinion, the essence of the right to access justice was not impaired as the applicants had available an alternative mean of legal process, namely the ESA Appeals Board, which functions independently from the Agency.¹¹⁰⁸ Later, the Court broadened the application of the alternative means test to cover domestic immunities as well, finding several violation of the right to access to court because of the unavailability of alternative means.¹¹⁰⁹ Numerous countries in Europe and elsewhere have since decided cases denying immunity to international organizations forwarding a similar reasoning.¹¹¹⁰ In *S.M. v. Western European Union*, the Belgian labor Court demanded that international organizations with a headquarter agreement must accept jurisdiction by the national court, when it fails to establish a proper and independent internal system to settle disputes as otherwise the applicant's right to access court would be voided of all meaning.¹¹¹¹ In a similar fashion the Paris Court of Cassation¹¹¹² referred to the ECtHR argumentation in *Waite and Kennedy v. Germany* to withhold the immunity of the African Development Bank for the prevention of a denial of justice. The ECtHR later relativized that threshold on the quality of an internal appeals mechanism. In *Gasparini v. Italy and Belgium*, the Court held that the NATO Appeals Panel provided

¹¹⁰⁸ *Waite and Kennedy v. Germany*, para. 73.

¹¹⁰⁹ See several judgments in relation to parliamentary immunity of Italian politicians: *Cordova v. Italy*, Judgment of the ECtHR of 30.1.2003, No. 40877/98, *De Jorio v. Italy*, Judgment of the ECtHR of 3.6.2004, No. 73936/01, *Ielo v. Italy*, Judgment of the ECtHR of 6.12.2005, No. 23053/02.

¹¹¹⁰ For a comprehensive overview: REINISCH, The Privileges and Immunities of International Organizations in Domestic Courts, THÉVENOT-WERNER Anne-Marie, The Right of Staff Members to a Tribunal as a Limit to the Jurisdictional Immunity of International Organizations in Europe, in: Peters Anne et al. (eds.), *Les Acteurs à L'ère du Constitutionnalisme Global*, Paris, 2014, p. 111.

¹¹¹¹ *S.M. v. Western European Union*, Judgment of the Brussels 4th Chamber Labor Court of 17.9.2003, *Journal des Tribunaux du Travail* 2004, p. 617.

¹¹¹² *Banque Africaine de Développement v. M.A. Degboe*, Judgment of the French Court of Cassation of 25.1.2005, No. 04-41012 132 JDI 1142 (2005).

for sufficient equivalent protection as it only needed to be comparable, but not identical to the safeguards of Art. 6 ECHR.¹¹¹³

Only in 2013, the Grand Chamber of the ECtHR deviated from the requirement of an effective alternative test in a decision relating to the immunity of the United Nations. Seemingly against the growing acceptance in both national and regional courts, the ECtHR held that the *Waite and Kennedy* precedence could not be interpreted in such a way as to mean that the lack of alternative remedy would *ipso facto* constitute a violation of the individual's right to Court.¹¹¹⁴ Specific reference is made to the judgment of the ICJ in the case concerning the jurisdictional immunity of Germany for atrocities committed in World War II. Italy, as the defending State in the proceedings, argued that the lift of State immunity was a necessary action for the protection of the essence of the individual's right to access justice, an obligation that both Italy and Germany had assumed under several human rights treaties.¹¹¹⁵ The ICJ analyzed this so-called "last resort argument" from a strictly customary law point of view. In the Court's opinion, no basis can be found in State practice that would make the entitlement of State immunity dependent on the existence of an effective alternative means for securing redress.¹¹¹⁶ The argumentation expressed by the Court does, however, not fully acknowledge the substance of the argument raised. The question related to the grant of foreign State immunity that would come equal to a denial of justice and therefore touch upon the essence of the individual's right to court and not whether State practice reflects the outcome of the argument. Judges CANÇADO TRINDADE and YUSUF both made the Court aware of this fact by citing most notably *Ashingdane v. the United Kingdom* and *Waite and Kennedy v. Germany*, relevant jurisprudence neglected

¹¹¹³ *Gasparini v. Italy and Belgium*, Judgment of the ECtHR of 12.5.2009, No. 10750/03, see also WEBB Philippa, *The Immunity of States, Diplomats and International Organizations in Employment Disputes: The New Human Rights Dilemma?*, *European Journal of International Law*, Vol. 27/3, 2016, p. 756.

¹¹¹⁴ *Stichting Mothers of Srebrenica et al. v. the Netherlands*, Judgment of the ECtHR of 11.6.2013, No. 65542/12, para. 164.

¹¹¹⁵ *Germany v. Italy*, Italian Counter-Memorial, para. 4.100.

¹¹¹⁶ *Germany v. Italy*, para. 101.

within the deliberation of the ICJ.¹¹¹⁷ A third ICJ judge similarly voiced his support for an exception based on the forum of last resort. Even though Judge BENNOUNA belonged to the group of the majority finding Italy responsible for violating Germany's immunity, he most articulately expressed:

Thus, it is only in exceptional circumstances — when a State presumed to be the author of unlawful acts rejects any engagement of its responsibility, in whatever form — that a State could lose the benefit of its immunity before the courts of the forum State. The right of the individuals concerned to have access to justice in their own country would then take precedence, where the State in question had refused to submit to the fundamental principles of law — on which, moreover, it was itself relying. [...] [This] strikes an equal balance between State sovereignties and the considerations of justice and equity operating within such sovereignties.¹¹¹⁸

Further, the missing State practice for the inclusion of an alternative means test is only partly true and only in relation to State immunity in a strict sense. As mentioned *Al-Adsani*, most influential decision in this regard, never analyzed the issue while *McElhinney* did indeed base parts of its reasoning on the availability of alternative means. The Supreme Court of Poland did uphold the immunity of Germany in civil proceedings, however analyzed, whether the exception from jurisdiction would constitute a disproportionate restriction on the individual's right to access court. It concluded that, only if there are alternative means available which the Court *in casu* believed to exist, it was not a violation of Art. 6 ECHR.¹¹¹⁹ The same goes for the Constitutional Court of Slovenia. It granted Germany immunity from civil jurisdiction, however, only as long as effective remedies are available in German courts.¹¹²⁰ Both the

¹¹¹⁷ *Germany v. Italy*, Dissenting opinion Judge CANÇADO TRINDADE, para. 214, Dissenting opinion Judge YUSUF, para. 56.

¹¹¹⁸ *Germany v. Italy*, Separate opinion Judge BENNOUNA, para. 15 and 18.

¹¹¹⁹ *Natonievsky v. Germany and the Federal Chancellery for Payment*, Judgment of the Polish Supreme Court of 29.10.2010, Polish Yearbook of International Law, Vol. 30, 2010, p. 299 ff.

¹¹²⁰ See *A.A.Ž. v. Germany*.

Polish and Slovenian court rulings were cited by the ICJ as proof that state practice supported the continued immunity of States for severe human rights violation. These rulings, however, failed to be analyzed in a sufficiently detailed manner.

As seen in this chapter, a growing State practice reflects the existence of an alternative independent forum as a prerequisite in relation to the immunity of international organizations and domestic immunities. This trend was again picked up in 2016 by the Grand Chamber's decision in *Al-Dulimi v. Switzerland*:

[T]he Court takes the view that, for as long as there is no effective and independent judicial review, [...] it is essential that such individuals and entities should be authorised to request the review by the national courts of any measure adopted pursuant to the sanctions regime. Such review was not available to the applicants. It follows that the very essence of their right of access to a court was impaired.¹¹²¹

Although this decision is not in relation to the grant of immunities, the Grand Chamber unmistakably identified the “core” of the right to access to court as to impose an alternative forum for redress. The simple question remains, if the legal reasoning may be applied for the immunity of foreign States as well, or if issues of comparability arise between the immunity of international organizations and the one of foreign State.

It is indeed true that a certain hesitation is not misplaced when applying and comparing the jurisprudence of immunities of international organizations with the one on State immunity. IO immunity is generally based on a headquarter treaty with the host country which, by doing so, partially renounces sovereign powers.¹¹²² As already explained, the so-called “Bosphorus presumption” becomes inherently relevant in this situation while State immunity law originates from completely different legal sources.¹¹²³ In the opinion of the Supreme Court of the Netherlands, the immunity of an international organization (*in casu* the United Nations) and State immunity must clearly be distinguished. The differences do, so according to the Dutch court, not go

¹¹²¹ *Al-Dulimi v. Switzerland*, Grand Chamber Judgment, para. 134.

¹¹²² FOX/WEBB, p. 440.

¹¹²³ KOLB/JARDIM OLIVEIRA, p. 251 f.

as far as to justify a differentiated approach in the appreciation of the right to fair trial.¹¹²⁴ Even authors who traditionally defend the strict separation between the different types of immunities emphasize that, as it relates to the identification of the essence of Art. 6 ECHR, the distinction between IO immunity and State immunity are not significant enough “to obviate the need for the application of the alternative means test to foreign state immunity.”¹¹²⁵ Both the ICJ and the ECtHR seem to have accepted that “cross-fertilization” between the types of immunities is indeed a reality. Both courts tend to refer to their mutual case law without distinguishing between IO and State immunity. They exclusively do so to justify the continued immunity of both entities for human rights violation. So, for example in *Stichting Mothers of Srebrenica and Others v. the Netherlands*, where the Court heavily relied on the ICJ *Jurisdictional immunities of States* case for upholding the immunity of the United Nations despite the lack of alternative forum. This may only be explained by accepting a direct comparability of the immunity of IO and foreign State immunity in relation to the alternative test. It consequently seems more than plausible that the *Germany v. Italy* precedence did negatively affect the established, more human-rights friendly scheme of immunities of international organizations; a phenomenon that some authors regret.¹¹²⁶

It must clearly be emphasized that no issues of comparability arise in this matter as the case law of the ECtHR in relation to the immunities of international organization must be understood as a process of identification of the “core” of Art. 6 ECHR. It would be illogical and inherently inconsistent to argue that this delimitation procedure needs to be performed differently in relation to the immunity of States. The essence of a right stays the same regardless of the circumstances. This leads the author to conclude that the alternative means test is applicable in State immunity cases

¹¹²⁴ *Mothers of Srebrenica Association v. the Netherlands and the United Nations*, Judgment of the Supreme Court of the Netherlands of 13.4.2012, No. 10/04437.

¹¹²⁵ TOMONORI, p. 737, see also MCGREGOR, *State Immunity and Human Rights*, p. 135, PINGEL, p. 247.

¹¹²⁶ MCGREGOR, *State Immunity and Human Rights*, p. 135.

as well, for the unique purpose of appreciating and protecting the nucleus of Art. 6 ECHR.¹¹²⁷

a. Domestic Courts of the perpetrating State as an Alternative Means?

It remains to be seen if the granting of foreign State immunity would deprive the claimant from any access to justice. Germany, in the *Jurisdictional immunities case*, argued that no denial of justice occurred as Italian citizens, as well as any persons under German jurisdiction, had access to its judicial system. It was therefore incorrect to assume that victims had no alternative means, keeping the essence of the right to court intact.¹¹²⁸ In distinction to disputes involving the immunity of IO, in case of State immunity for torture allegation, the victims always have the possibility of remedy in the courts of the perpetrating State. This argument may be accepted as the case law of the ECtHR only demands an effective access to an independent and impartial court, not however that the claim introduced must successfully lead to compensation.¹¹²⁹ Lord Justice MANCE specifically accepts the possibility to refer a case to the forum *locus delicti*, however only if the requirements of effective and adequate remedy are fulfilled. A failure to do so would allow the forum State to assess jurisdiction:

But, where there is no adequate remedy in the state where the systematic torture occurs, it might well in my view be regarded as disproportionate to maintain a blanket refusal of recourse to the civil courts of another European jurisdiction, the courts of which would under their ordinary domestic rules possess and (apart from immunity) be able to exercise jurisdiction. [...]. But, if a state can be shown to have failed to provide an effective domestic remedy for alleged torture, this must on

¹¹²⁷ The same opinion expressed by: TOMONORI p. 743, FRULLI Micaela, *The Times They Are A-Changing*, *Journal of International Criminal Justice*, Vol. 9, 2011, p. 1141, APPELBAUM, p. 182, MCGREGOR, *State Immunity and Human Rights*, p. 135.

¹¹²⁸ *Germany v. Italy*, German Reply, para. 34.

¹¹²⁹ KLOTH, *Staatenimmunität im Zivilprozess*, p. 233, HESS, *Staatenimmunität und ius cogens*, p. 206, for a summary of the Court's requirement on impartiality and independence: ECtHR Guide on Art. 6 ECHR (civil limb), p. 26 ff., FROWEIN/PEUKERT, p. 189 ff. and 221 ff., KARPENSTEIN/MAYER, p. 173 ff., MAYER-LADEWIG/HARRENDORF/KÖNIG, p. 222 ff.

any view weaken its position in insisting on a claim to state immunity in respect of such a claim against one of its officials elsewhere.¹¹³⁰

Justice MANCE justifies this approach by referring to the jurisprudence of the European Court of Human Rights in *Soering v. the United Kingdom*. The ECtHR made the forum State responsible for insufficiently effective protection of human rights in the United States and held that the United Kingdom would violate its obligation contained in Art. 3 ECHR if it would extradite Mr. Soering:

It would hardly be compatible with the underlying of the values of the [ECHR] were a Contracting State knowingly to surrender a fugitive to another State where there were substantial ground for believing that he would be in danger of being subjected to torture.¹¹³¹

The reasoning behind the so-called *non-refoulement* system should equally be applicable in cases related to the grant of State immunity.¹¹³² The forum State should be found liable for a violation of Art. 6 ECHR if it grants jurisdictional immunity by referring to the exclusive jurisdiction of the perpetrating State in case substantial grounds exist that the right to access to court would not be infringed. The forum State therefore may not blindly refer to the courts of the perpetrating State to liberate itself from the obligations contained in Art. 6 ECHR.¹¹³³

This legal reasoning convinces, should however be thought further: in a more recent decision, the ECtHR specifically acknowledged the forum State's obligation to prevent a denial of justice. In the case of *Othman (Abu Qatada) v. the United Kingdom*, the Court prevented an extradition of a terrorist suspect to Jordan despite diplomatic assurances in place and the fact that the continued presence of the applicant endangered the public security of the United Kingdom. Substantial grounds existed that torture evidence would be used in the judicial proceedings against the applicant once criminal proceeding were introduced in Jordan. This would amount to a denial of

¹¹³⁰ *Jones v. Saudi Arabia*, Court of Appeal, Lord Justice MANCE, para. 86.

¹¹³¹ *Soering v. the United Kingdom*, Judgment of the ECtHR of 7.7.1989, No. 14038/88, para. 88.

¹¹³² TOMONORI, p. 744 f.

¹¹³³ Similar also BRÖHMER, p. 165, *McElhinney v. Ireland*, Dissenting opinion Judge LOUCAIDES, p. 22.

justice and a violation of the applicant's fair trial guarantees, leading to the violation of Art. 6 ECHR with respect to the extradition proceedings undertaken by British authorities.¹¹³⁴ Clearer words were taken by the Court in relation to proceedings brought by Al-Nashiri, a suspected Saudi terrorist held in Guantánamo Bay. Both Romania and Poland held secret CIA black-sites where the plaintiff alleged to have been tortured without access to any legal representation or to the justice system of either country. Further, both States were suspected to have aided in the organization of Al-Nashiri's transfer to Guantánamo, where the plaintiff continued to be subjected to a flagrant denial of justice.¹¹³⁵ Both Poland and Romania were found to have violated Art. 3 and 6 of the Convention. Relevant to the discussion at hand are, however, the deliberation of the Court in relation to the continued breach of fair trial guarantees in Guantánamo.

Poland's cooperation and assistance in the applicant's transfer from its territory, despite a real and foreseeable risk that he could face a flagrant denial of justice engaged the Polish State's responsibility under Article 6 § 1 of the Convention.¹¹³⁶

By saying so, the Court imposes an extraterritorial obligation on States not to transfer individuals to a territory where a flagrant denial of justice would occur. Without specifically naming it as such, the Court essentially recognizes *non-refoulement* obligations on States in relation to Art. 6 ECHR. The same must be concluded regarding victims of torture, whose only remedy consists of the inadequate justice system of the State that is responsible for their torture. This argumentation is in line with the values and objectives represented in the preamble of the Convention, namely the consideration

¹¹³⁴ *Othman (Abu Qatada) v. the United Kingdom*, Judgment of the ECtHR of 17.1.2012, No. 8139/09, para. 263 ff.

¹¹³⁵ *Al-Nashiri v. Romania*, Judgment of the ECtHR of 31.5.2018, No. 33234/12, *Al-Nashiri v. Poland*, Judgment of the ECtHR of 24.7.2014, No. 28761/11.

¹¹³⁶ *Al-Nashiri v. Poland*, para. 568, later reaffirmed in relation to Romania in *Al-Nashiri v. Romania*, para. 721.

of securing the universal and effective recognition and observance of Convention rights.¹¹³⁷

Next to the legal requirements of impartiality and independence of the courts, applicants need to have a *de jure* and *de facto* access to the justice system of the perpetrating State. With the example of the German World War II reparation scheme, applicants like Mr. Ferrini were excluded from any means of redress as they had had a legal entitlement to prisoner-of-war status during the internment:¹¹³⁸

[The ICJ] considers that it is a matter of surprise – and regret – that Germany decided to deny compensation to a group of victims on the ground that they had been entitled to a status which, at the relevant time, Germany had refused to recognize, particularly since those victims had thereby been denied the legal protection to which that status entitled them.¹¹³⁹

Even though the justice system of present day Germany sufficiently respects the rule of law and the impartiality and independence of its courts, a group of victims has no legal access to judicial review. Further, *de facto* restriction to access to court may prevent a victim to bring a civil claim. The may not only be political in nature but can relate to the factual circumstances of each case. Mr. Naït-Liman, in the proceedings against Switzerland before the ECtHR, had argued that he cannot reasonably be expected to introduce a civil claim in Tunisia as he and his solicitor would be at a substantial risk of persecution.¹¹⁴⁰ In the English Court of Appeals case *Mohammed v. Bank of Kuwait* it was held that a torture victim cannot without further assessment of the situation be referred to the forum of the State responsible for the torture. In this case, Kuwait was not seen as a suitable alternative as both the police and the justice branch were politically bias.¹¹⁴¹ References were made to the opinion expressed by

¹¹³⁷ Preamble of the European Convention of Human Rights, para. 3.

¹¹³⁸ *Germany v. Italy*, para. 99 f.

¹¹³⁹ *Ibid.*

¹¹⁴⁰ *Naït-Liman v. Switzerland*, ECtHR Judgment, para. 89.

¹¹⁴¹ *Mohammed v. Bank of Kuwait and the Middle East KSC*, Judgment of the English Court of Appeals of 30.5.1996, 1 W.L.R. 1483 [1996], see also TERRY, p. 122 f.

Lord BROWNE-WILKINSON in the *Ex parte Pinochet* (no. 3) case that “a totalitarian regime will not permit adjudication by its own courts on its own shortcomings”¹¹⁴²; a fact very likely to occur in case torture was committed.

In *Nait-Liman*, the ECtHR had left this question open but implicitly accepted that a civil suit was for the time being factually impossible.¹¹⁴³ The forum State, in its decision to grant immunity to a foreign State, should therefore consider if it would be unreasonable to demand from the victim to subject itself to the jurisdiction of the perpetrating State. This assessment relates to the factual circumstances outside the court room that would prevent a claimant from successfully introduce proceedings.

In summary, a referral to the jurisdiction of the foreign State as a possible alternative forum may only be accepted if two cumulative elements are fulfilled. First, the offending State needs to be able to give the claimants an effective and adequate remedy before an impartial and independent Court. Secondly, claimants must have a *de facto* access to those courts and can reasonably be asked to introduce proceedings there. State courts where the claimant would be at risk of future mistreatment cannot be accepted as it would be in violation of the values and objectives represented by the preamble of the ECHR and its recent case law. Should either element not be respected, the decision to grant immunity to a foreign State would constitute a *de jure* or *de facto* denial of justice in violation of the individual’s right to access to court.

b. Diplomatic Protection as an Alternative Means?

In its concluding remarks the ICJ noted that reparation claims against Germany may still be subject of further negotiation between the two States concerned.¹¹⁴⁴ The Court referred to the continued possibility that the system of diplomatic protection would still be available after the court ruling. The British authorities argued similarly in *Al-Adsani v. the United Kingdom* even though the plaintiff had to no avail requested

¹¹⁴² *Ex parte Pinochet* (No. 3), Lord BROWNE-WILKINSON, para. 109.

¹¹⁴³ *Nait-Liman v. Switzerland*, Grand Chamber Judgment, most notably para. 15 and 111, question not fully assessed by the Court in the Grand Chamber Judgment despite exchange of deliberation of the parties, see *Nait-Liman v. Switzerland*, Grand Chamber Judgment, para. 101.

¹¹⁴⁴ *Germany v. Italy*, para. 104.

diplomatic assistance on several occasions¹¹⁴⁵. The British government reasoned that Mr. Al-Adsani would not be left without a remedy due to the continued possibility of an inter-State claim through diplomatic representation.¹¹⁴⁶ May diplomatic protection therefore be understood as a sufficient alternative means of redress conserving the essence of the right to access to court?

Severe doubts may be raised that diplomatic protection constitutes an adequate alternative for the settlement of a civil claim.¹¹⁴⁷ On one hand, current international law acknowledges no right of the individual to be represented by a government even in cases involving *jus cogens* violation.¹¹⁴⁸ States still enjoy a significant margin of appreciation for the introduction of proceedings against a foreign State and are only required to give “due consideration to the possibility to exercise diplomatic protection” in case significant injury has occurred.¹¹⁴⁹ Only a minority of the legal doctrine, most accurately so KIND citing the Constitutional Court of South Africa¹¹⁵⁰, considers the latitude of discretion equal to zero, when the violation of international law necessary for the invocation of diplomatic protection is equivalent to an egregious breach of international law, namely a *jus cogens* violation.¹¹⁵¹ States are, nevertheless, free to adopt a right to diplomatic protection in national law or through national jurisprudence. The German Constitutional Court, for example, held, that individuals may have a legitimate expectation to be assisted by their home government on the basis of the values enshrined in the German Constitution and that the State therefore has a duty

¹¹⁴⁵ See *Al-Adsani v. Government of Kuwait* (No. 2), see 107 ILR 534.

¹¹⁴⁶ *Al-Adsani v. the United Kingdom*, para. 50.

¹¹⁴⁷ MCGREGOR, *Torture and State Immunity*, p. 908.

¹¹⁴⁸ For a detailed analysis and references to literature: KIND Andreas, *Der diplomatische Schutz*, Bern, 2014, p. 44 ff. and 105 ff.

¹¹⁴⁹ Art. 19 (a) of the ILC Draft Articles on Diplomatic Protection adopted by the ILC in its 56th session, Yearbook of the International Law Commission 2006, Vol. II (Part Two), UN Doc. No. A/61/10.

¹¹⁵⁰ *Kaunda et al. v. the President of the Republic of South Africa*, Judgment of the Constitutional Court of South Africa of 4.8.2004, No. CCT 23/04.

¹¹⁵¹ KIND, p. 45 and 104 ff.

to act.¹¹⁵² Any attempt to include a comprehensive right to diplomatic protection of the individual within the ILC Draft Articles on Diplomatic Protection (DADP), however failed.

International courts only recently started to increase the political and legal pressure on States based on the duty to protect individuals through diplomatic means. Moldova was mandated on more than one occasion to actively protest against human rights violations committed in the Russian controlled territory of Transnistria.¹¹⁵³ Both the Human Rights Committee¹¹⁵⁴ as well as the General Court of the European Union¹¹⁵⁵ have found violations of fair trial guarantees for not sufficiently assisting individuals in the de-listing process of the UN sanctions regime specifically suggesting that diplomatic measures would have been a viable option.¹¹⁵⁶ In addition, the ECtHR ordered countries that hosted CIA black-sites and aided in the transfer of foreign nationals to Guantánamo Bay to seek diplomatic assurances that the death penalty will not be sought against them.¹¹⁵⁷ Nevertheless, the current legal situation is still far from recognizing an individual right to diplomatic protection.¹¹⁵⁸ As the ICJ says:

¹¹⁵² *Hess decision*, Judgment of the German Constitutional Court of 16.12.1980, 2BvR 419/80 reported in BVerfGE 55, p. 349.

¹¹⁵³ *Catan et al. v. Moldova and Russia*, Judgment of the ECtHR [GC] of 19.10.2012, No. 43370/04, 8252/05 and 18454/06, para. 147, *Ilaşcu et al. v. Moldova and Russia*, Judgment of the ECtHR [GC] of 8.7.2004, No. 48787/99, para. 348 ff.

¹¹⁵⁴ *Sayadi and Vinck v. Belgium*, Communication of the Human Rights Committee of 29.12.2008, Doc No. CCPR/C/94/D/1472/2006.

¹¹⁵⁵ *Ayadi v. Council of the EU*, Judgment of the EU General Court of 12.7.2006, No. T-253/02, ECLI:EU:T:2006:200, later partially overturned.

¹¹⁵⁶ For a comprehensive summary and analysis over the issue see HOFER Nicola, Spannungsfeld zwischen Individualsaktionen des UN-Sicherheitsrats gegen terroverdächtige Personen und Menschenrechten (publication pending).

¹¹⁵⁷ *Al-Nashiri v. Poland*, para. 584 f., *Al-Nashiri v. Romania*, para. 738 f.

¹¹⁵⁸ *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*, Judgment of the English Court of Appeals of 6.11.2002, [2002] EWCA Civ 1598, para. 99, REDRESS, Bringing the International Prohibition of Torture Home, Implementation Guide for the UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment, Access to Justice and Reparation, 2006, p. 82, available on www.redress.org [last accessed 31.8.2018].

[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 persons 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 to resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress.¹¹⁵⁹ [emphasis added]

Individuals consequently need to convince a State to represent them within an inter-State claim or take any other diplomatic measures. In addition, applying the rules recognized by the ILC, a considerable group of individuals would be excluded from diplomatic protection. In accordance with Art. 7 DADP, diplomatic proceedings are unavailable when exercised against a State of which that person is also a national, unless the nationality of the forum State is predominant, both at the date of injury and at the date of the official representation of the claim. In the case of Mr. Al-Adsani, a British-Kuwaiti dual national, it needs to be proven, whether he had closer ties to Kuwait or the United Kingdom at the moment torture was committed. Doing so is a difficult task as it involves the appreciation of evidence, which is hard or impossible to obtain and inherently subjective. Whether the United Kingdom had standing to introduce diplomatic protection against Kuwait is therefore unclear. In the case of Mr. Naït-Liman, the claimant was only naturalized by Switzerland after the commission of the alleged violations, thus excluding him completely from diplomatic protection. Further, States may only rely on diplomatic protection for persons having the nationality of that State¹¹⁶⁰ and, in a very limited manner, for refugees and stateless persons¹¹⁶¹. The possibility of extending diplomatic protection, for example to include permanent residents or third country nationals, are being discussed in case law and

¹¹⁵⁹ *Belgium v. Spain*, p. 3 ff.

¹¹⁶⁰ Art. 4 DADP.

¹¹⁶¹ Art. 8 DADP, with the exception for claims introduced against the country of nationality (Art. 8 (3) DADP).

literature, however, have yet to become law or are not practiced in a sufficient manner.¹¹⁶²

Even in cases where diplomatic protection is feasible and indeed exercised, the individual concerned will lose control over the case at hand. The victim of the alleged violation of international law will not necessarily be allowed to participate in the negotiations or the proceedings and will not be advised for strategy or arguments brought forward. WARBRICK/MCGOLDRICK explains that the position of the individual in inter-State claims is simply to be the “object of wrong” that gives the State standing to ask for compensation, comparable to items or objects like the airspace in case of wrongful territorial interference.¹¹⁶³ Also, with regard to the reparation payment, the offending State will exclusively be obliged to compensate the aggrieved State, which will then have the leeway to decide if and how much money will be transferred to the victims of the international violation. Art. 19 (c) DADP only prescribes that States “should transfer to the injured person any compensation obtained for the injury from the responsible State”. As the Special Rapporteur on Diplomatic Protection JOHN DUGARD explains, for the moment no violation of rights and obligations would occur, in case if the home State retains the payment or uses it for its own purposes.¹¹⁶⁴ The Permanent Court of International Justice, in the 1933 case of *Czechoslovakia v. Hungary*, held that:

By taking up the case of one of its subject and resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting *its own right* – its right to ensure, in the person of its subjects, respect for the rule of international law.¹¹⁶⁵ [emphasize added]

¹¹⁶² *Al-Rawi v. Secretary of State for Foreign Affairs*, Judgment of the English Court of High Justice of 12.10.2006, [2006] EWHC 458, para. 115 ff., KIND, p. 116 f., HEMMI, The Concept of Nationality and Diplomatic Protection in International Investment Law, para. 23 ff.

¹¹⁶³ WARBRICK Colin/MCGOLDRICK Dominic, Diplomatic Representation and Diplomatic Protection, International Comparative Law Quarterly, Vol. 51, 2002, p. 726.

¹¹⁶⁴ First ILC Report on Diplomatic Protection by John DUGARD of 7.3.2000, UN Doc. No. A/CN.4/506, p. 240.

¹¹⁶⁵ *Czechoslovakia v. Hungary*, Judgment of the Permanent Court of International Justice of 15.12.1933, PCIJ Series A/B No. 61, para. 231, more recently affirmed by the ICJ in *Guinea v.*

It may only be concluded that diplomatic protection cannot serve as an appropriate method to protect the individual right to justice as a person has no rights whatsoever under diplomatic protection.¹¹⁶⁶ AMNESTY INTERNATIONAL comes to the same conclusion and additionally points out that States tend to waive the right to reparation on behalf of their nationals once a Peace Treaty is signed.¹¹⁶⁷ Victims were never asked for their consent and are consequently stripped of the possibility of diplomatic protection. The International Law Association identified the lack of access to justice in national courts “by reasons of the absence of local remedies to exhaust in the alleged wrongdoer state and barring of suit against such a state by a plea of state immunity in the courts of other states”¹¹⁶⁸ as sufficient indication to deviate from the exclusively discretionary approach to diplomatic protection.

In other words, diplomatic protection, in its current legal form, does not provide for sufficient means of redress. On one hand, a considerable number of persons are excluded from the diplomatic protection mechanism and secondly international law does not yet confer a person with the necessary enforcement tools to be effectively compensated through this procedure. Diplomatic protection may therefore not be accepted as an adequate alternative method to receive reparation in case torture was committed. Diplomatic protection might therefore not prevent that the grant of State immunity impairs the very essence of the right to access to court.

c. Conclusion on the Essence Requirement

The European Court of Human Rights has repeatedly missed out on an actual and real assessment of the essence requirement in relation to the grant of foreign State im-

Democratic Republic of Congo, Case concerning Ahmadou Sadio Diallo, Judgment of the ICJ of 27.5.2007, ICJ Reports 2007, p. 582 ff., para. 160 f.

¹¹⁶⁶ MCGREGOR, Torture and State Immunity, p. 911, HEMMI, The Concept of Nationality and Diplomatic Protection in International Investment Law, para. 5, REDRESS, Bringing the International Prohibition of Torture Home, p. 81.

¹¹⁶⁷ AMNESTY INTERNATIONAL, Germany v. Italy: The Right to Deny State Immunity when Victims have no other Recourse, Amnesty International Publications, 2011.

¹¹⁶⁸ Final Report of the ILA Committee on Diplomatic Protection of Persons and Property, London Conference of 2000, para. 162, available: <http://www.ila-hp.org/index.php/committees?committeeID=55> [last accessed: 21.9.2018].

munity. An analysis over the matter represents a strong indication that the very essence of the right to access to court would be impaired in case jurisdictional immunities would completely prevent the applicants from having their claims heard, leading to a denial of justice. States, where proceedings are introduced, may not simply refer to the justice system of another State to comply with the obligation contained in Art. 6 ECHR but need to ensure that the suit is processed by an impartial and independent Court, giving the individual a real and effective right to justice. In addition, there cannot be any factual circumstances that would make receiving compensation objectively impossible or prevent the applicant from accessing the court in any other way. Plaintiffs cannot reasonably be asked to risk persecution, mistreatment or any other severe violation of human rights in order to introduce proceedings using the justice system of the accused State. A grant of immunity in such cases would impair the very essence of Art. 6 ECHR, therefore leading to a violation of the individual's right to access to court. Also, the continued possibility for the applicant to be diplomatically represented by his/her home State cannot be accepted as an adequate alternative means of action. Under the current international legal order diplomatic protection is unavailable for a considerable number of victims and individuals have additionally no guarantee that legal actions are introduced and, if so, that victims would indeed be compensated through that measure.

IV. Conclusion on the Right to Access to Court

The European Convention of Human Rights contains in its Art. 6 ECHR the right of every person to have a dispute in relation to his/her civil obligations and rights heard before an independent and impartial tribunal. Reparation claims resorting out of *jus cogens* violation will fall within the realm of Art. 6 ECHR although a sovereign State and not a private individual is responsible for the violation. Continuously confirmed by the ECtHR, it is exclusively the content of the disputed right that determines the applicability of the fair right guarantees. State immunity will enter in conflict with this provision as it obliges the forum State to renounce jurisdiction over any legal proceedings introduced against a foreign State. The ECtHR continuously dismissed any line of reasoning in relation to the inapplicability of the Convention as a whole focusing on the substantive jurisdiction over civil matters also in case State immunity would bar

any proceedings to be admitted. This conclusion seems to be the correct outcome. The Court is nevertheless advised to motivate its decisions in a more detailed manner as many voices raise valid legal arguments not sufficiently addressed by the Court in its jurisprudence.

Once the applicability of Art. 6 ECHR is established, the analysis presented in this chapter strongly indicates that the right to access to court is violated in many cases where State immunity would bar a torture victim to introduce a civil procedure. In a first step, the Court correctly identifies the respect of international obligations and pursuit of peaceful international relations as legitimate objectives to be protected, despite using vague and insufficiently clear wording. Some doctrinal opinions representing a clear minority in this regard fail to convince and need to be dismissed. Also, the protection of sovereign equality and non-interference may constitute a legitimate aim for the purpose of restriction of Convention rights, must however largely be relativized as these concepts have undergone major changes in international law within the last decades.

In relation to the proportionality analysis, the Court's current assessment is unsatisfying in many ways. In all judgments of the Court, it emphasized the significant margin of appreciation granted to national courts who were considered better suited for appreciating the proportionality requirement in respect of their sovereignty in the matter. The margin of appreciation doctrine is partially why the Court has failed to acknowledge a violation of Art. 6 ECHR in its jurisprudence so far. Nevertheless, the Court's approach is inconsistent and must be criticized on several aspects: firstly, most legal scholars correctly emphasize that a blanket referral to the opinion presented by the *Al-Adsani* judgment does not qualify as a comprehensive and effective balancing of interests as required by law. Secondly, the Court did not take into consideration all relevant aspects of international law when establishing the applicable international law framework. Most notably, the Court did not consider the reduced significance of sovereignty and equality of States in international law.

It must, however, not be concluded that procedural bars imposed by State immunity would *ipso facto* constitute a disproportionate interference into the individual's right to access to court. In cases where effective alternative means are available to the applicant, or will be available in the foreseeable future, the grant of State immunity does

neither qualify as a disproportionate interference into the individual right to justice nor impairs its essence. This presupposes however, that a civil claim can be introduced in an impartial and independent court and that the applicant is not otherwise prevented from doing so through other factual circumstances. The continued possibility of introducing an inter-State proceeding through diplomatic representation can for several reasons not be accepted as an alternative means. On one hand, current international law excludes a considerable number of torture victims from being assisted by their home State or any other State. Secondly, a person has no enforceable right that obliges the home State to assist him or her. Lastly, even if an inter-State claim is successfully introduced, international law fails to deliver the individual with the necessary legal means to be effectively compensated through diplomatic protection.

Further, the current jurisprudence of ECtHR is unjustifiably at odds with both the case law relating to the immunities of international organization and domestic immunities as well as the rights ensured for suspected international criminals. These situations may only be rectified through the adjustment of case law in relation to State immunity by essentially granting primacy to the individual right to access to court over the grant of State immunity in all situations that do not fulfill the requirements described in this chapter. A considerable number of authors agree on this point as they arrive to the conclusion that the right to access to justice is violated once the Court accepts the applicability of Art. 6 ECHR with regard to State immunity.¹¹⁶⁹ The Court, most notably the Grand Chamber, must be urged to reassess its current position in relation to jurisdictional immunities enjoyed by foreign States for the sake of consistency and legal rationale, in the spirit of the universal protection of human rights as imposed by the preamble of the European Convention of Human Rights.

¹¹⁶⁹ Most notably: VOYIAKIS, p. 313, TOMONORI p. 752, KLOTH, Immunities and the Right of Access to Court, p. 20, APPELBAUM, p. 180, BRÖHMER, p. 186 ff., AMNESTY INTERNATIONAL, *Germany v. Italy*, p. 23, REDRESS, *Immunity v. Accountability*, p. 40 f.

§ 8 Right to Remedy and Reparation

In the court proceeding between Germany and Italy before the ICJ regarding the jurisdictional immunity of a State, Italy emphasized the prevailing trend in international law to recognize and strengthen the rights of victims of severe human rights violations to receive remedy and reparation.¹¹⁷⁰ The continued obligation of Italy to implement this right under both international and domestic law would make it a violation of law to grant Germany jurisdictional immunity in civil matters as it would render the right to reparation ineffective.¹¹⁷¹ The ICJ, in its judgment of 2012, agreed with Italy to the extent that Germany had not (yet) fully complied with its obligation to give reparations for atrocities committed during World War II. The ICJ, however, refused to analyze the substantive argument raised by the Italian delegation that foreign immunity was in conflict with an individual enforceable right to reparation.¹¹⁷² Even if such a right existed and was indeed enforceable, customary international law and State practice would not acknowledge an exception to immunity for reparation claims.¹¹⁷³ The ICJ, once again, circumvents the substance of the issues raised and “failed to adequately address this core issue”¹¹⁷⁴, namely to know whether the international right to remedy and reparation enters in conflict with foreign State immunity and, if so, how the norm conflict should be resolved.

The present chapter is dedicated to the right to remedy and reparation in international law. After an introduction into its legal bases, its status, its forms and its relevance for victims of human rights violations, chapter I essentially focuses on the right to reparation as contained in the UN Convention against Torture. In the second step (chapter II), the so-called “principle of universal jurisdiction in civil matters” should be presented and discussed. Does such a principle arise out of domestic or interna-

¹¹⁷⁰ *Germany v. Italy*, Italian Counter-Memorial, p. 89 ff.

¹¹⁷¹ *Ibid.*, p. 98.

¹¹⁷² *Germany v. Italy*, para. 108.

¹¹⁷³ *Ibid.*

¹¹⁷⁴ *Germany v. Italy*, Dissenting opinion Judge YUSUF, p. 291.

tional law and, if so, what legal obstacles exist for its implementation? A comprehensive summary of the observations will conclude the chapter (III).

I. The Right to Remedy and Reparation in International Law

1. Right to Remedy and Reparation in Public International Law

a. Legal Bases

The principle of reparation was in a general manner recognized by the Permanent Court of International Justice in its 1927 judgment regarding the *Factory at Chorzów case*:

It is a principle of international law and even a general conception of law that any breach of an engagement involves an obligation to make reparation in an adequate form [...] reparation is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.¹¹⁷⁵

At the time, reparation was mostly seen as an inter-State measure rather than a right of the individual. States, as the exclusive actors of international law at the time, were asked to act on behalf of their nationals should they suffer damages at the hand of a foreign State.¹¹⁷⁶ With the emergence of human rights, however, this concept significantly changed. By 1948, the Universal Declaration of Human Right, namely its Art. 8, affirmed that everyone was entitled to remedy and reparation should his/her fundamental rights be violated by a State actor. This was later echoed in the texts of several human rights treaties. Art. 24 (4) and (5) of the International Convention against

¹¹⁷⁵ *Germany v. Poland*, Case concerning the Factory at Chorzów, Judgment of the Permanent Court of International Justice of 26.7.1927, PCIJ Series A No. 9, p. 27.

¹¹⁷⁶ EVANS Christine, *The Right to Reparation in International Law for Victims of Armed Conflict*, Cambridge, 2012, p. 29.

Enforced Disappearance¹¹⁷⁷ should serve as an example on how the right to reparation is formulated in modern terms:

Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation. The right to obtain reparation [...] covers material and moral damages and, where appropriate, other forms of reparation, such as a) restitution, b) rehabilitation, c) satisfaction, including restoration of dignity and reputation [and] d) guarantees of non-repetition.

Other human rights treaties codifying the right to remedy and reparation include Art. 2 (3), 9 (5) and 14 (6) ICCPR, Art. 14 (1) CAT, Art. 5 (5), Art. 6, Art. 13 ECHR and Art. 3 of its seventh Protocol, Art. 10, 25 and 63 IACHR, Art. 6 of the Convention against Racial Discrimination etc.¹¹⁷⁸

The United Nations General Assembly contributed to the strengthening of the individual right to reparation in several ways. While the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power¹¹⁷⁹ focuses on the rights of victims from an international criminal law perspective, the 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law¹¹⁸⁰ (“Van Boven-Bassiouni Principles”) reaffirm the right of victims or their families to recover reparations in a general manner. Despite their non-binding

¹¹⁷⁷ International Convention for the Protection of All Persons from Enforced Disappearance signed in Paris on 6.2.2007, based on UNGA Resolution 61/177, 2716 UNTS 3.

¹¹⁷⁸ See also: Art. 39 of the Convention of the Right of the Child signed in New York on 20.11.1989, 1577 UNTS 3, Art. 27 of the Protocol to the African Charter of Human and People’s Rights on the Establishment of an African Court on Human and Peoples’ Rights of 10.6.1998, Art. 24 (4) and (5) of the Convention for the Protection of All Persons from Enforced Disappearance.

¹¹⁷⁹ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the UN General Assembly on 29.11.1985, UN Doc. No. A/RES/40/34.

¹¹⁸⁰ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the UNGA on 21.3.2006, UN Doc. No. A/RES/60/147.

character, these declarations significantly influenced the work of international tribunals and human rights bodies. The Pre-Trial Chambers of the International Criminal Court have referred to these instruments for the assessment of harm suffered by individuals in the Democratic Republic of Congo including the determination of economic loss.¹¹⁸¹ As part of international criminal law, another provision must be mentioned in this regard. Art. 75 of the ICC-Rome Statute binds the ICC to respect the principles of reparation to victims of atrocities prosecuted in its chambers. It further gives the ICC the power to order appropriate reparations, giving victims standing to participate in the proceedings as *partie civile*. In addition, the UN Human Rights Committee used the mentioned principles as a basis for the adoption the 2016 General Guidelines on Measures of Reparation under the Optional Protocol to the ICCPR¹¹⁸² and the General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States parties to the Covenant¹¹⁸³. Both documents expressly confirm the individual's right to reparation once Covenant rights have been violated.

On a regional level, the Council of Europe Committee of Ministers Guidelines on eradicating impunity for serious human rights violations must be mentioned. In order to prevent the continued impunity in some cases:

States should take all appropriate measures to establish accessible and effective mechanisms which ensure that victims of serious human rights violations receive prompt and adequate reparation for the harm suffered.¹¹⁸⁴

Given its well-established legal bases in treaty law, international jurisprudence and its broad acceptance within the international community, a majority of authors argues

¹¹⁸¹ *Situation of the Democratic Republic of the Congo*, Judgment of the ICC Pre-Trial Chamber I of 17.1.2006 in relation to the Applications for Participation in the Proceedings of VPRS 1-6, ICC-01/04, para. 115.

¹¹⁸² Guidelines of the Human Rights Committee on Measures of Reparation under the Optional Protocol to the International Covenant on Civil and Political Rights, UN Doc. No. CCCPR/C/158.

¹¹⁸³ General Comment No. 31 of the Human Rights Committee on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. No. CCPR/C/21/Rev.1/Add, para. 16.

¹¹⁸⁴ Principle No. XVI of the Council of Europe Guidelines on Eradicating Impunity.

that the individual right to reparation and remedy has achieved customary international law status.¹¹⁸⁵ EVANS, in her analysis of the minority opinion, convincingly points out that the skepticism towards accepting the customary status of the right to reparation often originates from an incomplete assessment of the legal bases.¹¹⁸⁶ For the purpose of this thesis, the question can, however, remain open. At least in relation to the codification of the right to remedy and reparation in some self-executing human rights provisions, such as Art. 14 (1) CAT, Art. 2 (3) ICCPR or the Art. 5, 6 and 13 ECHR, victims of human rights abuses have a judiciable right to reparation capable of being raised in a domestic setting, irrespective of the question whether this right may be qualified as customary.

Next to international law, it should only briefly be mentioned that a number of States have adopted legislation in favor of victims of human rights violation within their domestic legal system. With regard to the violations against the prohibition of torture, the 1991 U.S. Torture Victims Protection Act can be cited which provides torture victims with the necessary municipal legal basis for civil actions. In Germany, after peace treaties were signed specifically recognizing the obligations of reparations towards victims of Nazi persecution, the Federal Government adopted the *Bundesentschädigungsgesetz*¹¹⁸⁷. Since then, applicants fulfilling the legal requirements may request a lump sum with regard to suffering endured during the war. Further, Art. 48 (e) of the Constitution of the Republic of Yemen obliges public authorities in the country to adopt a procedure for determining the appropriate compensation for any harm caused by the public authorities that amount to physical or psychological

¹¹⁸⁵ SHELTON Dinah, Remedies in International Human Rights Law, 3rd ed., Oxford, 2015, p. 238, BASSIOUNI Cherif, International Recognition of Victims' Rights, Human Rights Law Review, Vol. 6/2, 2006, p. 217, International Commission of Jurists in collaboration with fifteen NGOs including the Association for the Prevention of Torture, Joint Written Statement at the Commission on Human Rights, 2005.

¹¹⁸⁶ EVANS, p. 41 criticizing PISILLO-MAZZESCHI Riccardo, International Obligations to Provide for Reparation Claims?, in: Randelzhofer Albrecht/Tomuschat Christian (ed.), State Responsibility and the Individual, The Hague, 1997, p. 171 f., as well as TOMUSCHAT, Human Rights Between Idealism and Realism, p. 415 ff.

¹¹⁸⁷ German Bundesgesetz zur Entschädigung für Opfer der nationalsozialistischen Verfolgung of 18.9.1953, BGBl. I p. 626.

torture.¹¹⁸⁸ While domestic law has certainly an important role to play within the implementation of the right to reparation, this chapter is dedicated to a possible norm conflict between two obligations of international law and should not be commented further.

b. Forms of Reparation and Remedy

With the adoption of the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts, the ILC has codified the different forms of reparation in its Art. 34-39. While ARSIWA only applies to reparations in an inter-State setting¹¹⁸⁹, the ICJ has since reaffirmed these principles to be relevant for individual-State procedures as well¹¹⁹⁰. As the ILC notes, the forms of reparation described below are not a distinguishable secondary obligation incumbent on the State in violation of international law but are rather an integral part of the duty to make full reparation for the injury caused as prescribed by Art. 31 ARSIWA.¹¹⁹¹ Further, it should be noted that a certain flexibility is available to the authorities deciding between different forms of reparation. The specific circumstances of each case should be taken into consideration and be applied in a proportional manner as not to put the perpetrating State under an unreasonable or excessive burden to comply.¹¹⁹²

In this section the available forms of reparation will be discussed with the exception of “interests” as described in Art. 38 ARSIWA. The payment and calculation of interests can be fundamental in the area of investment disputes and other business-related arbitrations, in cases of physical and psychological injuries such as the ones endured

¹¹⁸⁸ Constitution of the Republic of Yemen of 16.5.1991 translation available: http://www.servat.unibe.ch/icl/ym00000_.html [last accessed 12.9.2017].

¹¹⁸⁹ ILC ARSIWA Commentary, p. 96, CRAWFORD, ILC Articles on State Responsibility, p. 213.

¹¹⁹⁰ *Guinea v. Democratic Republic of Congo*, para. 4, see also UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by UNGA Resolution 60/147 on 21.3.2006, UN Doc. No. A/RES/60/147.

¹¹⁹¹ ILC ARSIWA Commentary, p. 96, see also CRAWFORD, ILC Articles on State Responsibility, p. 212.

¹¹⁹² ILC ARSIWA Commentary, p. 96, see also CRAWFORD, ILC Articles on State Responsibility, p. 212 f.

by victims of torture, “interests” have less significance and should not be analyzed further.¹¹⁹³ Also, while some legal texts further create a distinct category for rehabilitation, the authors includes this form of reparation within (most notably) the compensation chapter.

Restitution

According to Art. 35 ARSIWA, a State is under the obligation to “re-establish the situation which existed before the wrongful act was committed” as long as it is materially possible and not disproportionate in relation to the violation at hand.¹¹⁹⁴ Restitution is a broad term and can take different forms, such as material restoration, replacement of a damaged object, the release of a person in detention or the reversal of a judicial act.¹¹⁹⁵ The Permanent Court of International Justice emphasized in the *Chozów Factory case* that restitution was a central element to reparation as its scope is to wipe out all legal and material consequences of the wrongful act and should consequently enjoy primacy over other forms of reparation.¹¹⁹⁶ Monetary compensation or other forms of reparation should only be second to restitution in situations where the re-establishment of the situation is no longer an option. In many situations of wrongful actions, however, restitution has become impossible because the damaged caused to the individual or an object has led to irreversible harm. This is best shown by the judgment of the ICJ in the case of the LaGrand brothers. Germany had initially demanded *restitutio in integrum* in the form of an annulment of the death penalty imposed on two German citizens in violation of the Vienna Convention on Consular

¹¹⁹³ For more literature on interests as a form of reparation: LAUTERPACHT Elihu/NEVILL Penelope, The Different Forms of Reparation: Interests, in: Crawford James et al. (eds.), *The Law of International Responsibility*, Oxford, 2010, p. 613 ff., NEVILLE Penelope, Awards of Interests by International Courts and Tribunals, *British Yearbook of International Law*, Vol. 78, 2007, p. 255 ff., AFFOLDER Natasha, Awarding Compound Interests in International Arbitration, *American Review of International Arbitration*, Vol. 12, 2001, p. 45 ff.

¹¹⁹⁴ Example of a disproportionate restitution in *Finland v. Denmark*, The ICJ held that the destruction of an already built bridge would be too burdensome for Denmark: *Finland v. Denmark*, Case concerning Passage through the Great Belt, Orders of the ICJ of 29.7.1991, ICJ Reports 1991, p. 12.

¹¹⁹⁵ ILC ARSIWA Commentary, p. 96, see also CRAWFORD, ILC Articles on State Responsibility, p. 214.

¹¹⁹⁶ *Germany v. Poland*, p. 47 f.

Relations.¹¹⁹⁷ Nonetheless, restitution became impossible, once the U.S. had executed both LaGrand brothers despite pending proceedings before the ICJ.¹¹⁹⁸

Despite the theoretical priority of restitution as a form of reparation, it has become a rare occurrence in practice. Many international tribunals, most significantly relating to arbitration in business matters, have favored granting compensation or other forms of reparation over restitution even when re-establishment would have been feasible.¹¹⁹⁹

Compensation

Art. 36 ARSIWA obliges the perpetrating State to “cover any financially assessable damage including loss of profits” insofar as such damages have not been covered by restitution. Compensation therefore entails reparation in a classical monetary sense for actions causing material damages to a State or its nationals. In the *Gabčíkovo-Nagymaros Project case*, the ICJ held that:

It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it.¹²⁰⁰

The scope of compensation is limited to what is “financially assessable”. The ILC deducts from this term any damage to property, personnel, and companies which are

¹¹⁹⁷ *Germany v. the United States of America*, Case concerning LaGrand, ICJ Judgment of 27.6.2001, ICJ Reports 2001, p. 466 ff.

¹¹⁹⁸ More case summaries in relation to restitution: GRAY Christine, The Different Forms of Reparation: Restitution, in: Crawford James et al. (eds.), *The Law of International Responsibility*, Oxford, 2010, p. 589 ff., ALVAREZ DE EULATE Maximiliano, *La Restitutio in Integrum en la Practica y en la Jurisprudencia Internacional*, Revista de Ciencia y Tecnica Juridica, Vol. 11, 1972, p. 29 ff.

¹¹⁹⁹ See, i.e: *Walter Fletscher Smith v. The Compañia Urbanizadora del Parque y Playa de Marianao*, International Arbitration Tribunal established between Cuba and the United States, Arbitration of 2.5.1929, Reports of International Arbitral Awards, Vol. II, p. 918, *Government of Kuwait v. American Independent Oil Company*, Judgment of the *ad hoc* Arbitral Tribunal of 24.3.1982, 21 ILM 976, p. 533, see also, GRAY identifying a gap between theory and practice, p. 589 f.

¹²⁰⁰ *Hungary v. Slovakia*, para. 152.

capable of being evaluated in financial terms.¹²⁰¹ With regard to the death and injury of a person, the ICJ held that the compensation may include the cost of pensions and other grants made to victims or their dependents, loss of earnings and earning capacities, medical treatment and rehabilitation costs which are all considered financially assessable.¹²⁰² Despite not initially intended to be included within the scope of Art. 36 ARSIWA, the international jurisprudence has ordered moral and non-material damages to be included within the compensation claim as part of a financially assessable damage.¹²⁰³ In cases relating to diplomatic protection and the death or injury of a person, tribunals have taken into consideration elements, such as the loss of loved ones, pain and suffering and discomfort of the intrusion on the person, home or private life, injury to feelings, humiliation, shame or damage to the reputation.¹²⁰⁴

Such damages are very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated therefore as compensatory damages.¹²⁰⁵

The burden of proof is generally on the side of the alleged victim or the State claiming liability, as it is up to the plaintiff to establish all necessarily elements for a compensation claim to be successfully introduced.¹²⁰⁶ The standard of proof might be more or less stringent, depending on the forum where claims are introduced. The Eritrea-Ethiopia Claims Commission established in 2000, for example, relaxed the standard of

¹²⁰¹ ILC ARSIWA Commentary, p. 99, see also CRAWFORD, ILC Articles on State Responsibility, p. 220.

¹²⁰² *United Kingdom v. Albania*, Case regarding the Corfu Channel, ICJ Judgment on the Amount of Compensation of 15.12.1949, ICJ Reports 1949, p. 249.

¹²⁰³ *Germany v. United Kingdom*, Case relating to the sinking of the Lusitania, Arbitration of the Mixed Claim Commission established between Germany and the United Kingdom of 1.11.1923, Report of International Arbitral Awards, Vol. VII, p. 32.

¹²⁰⁴ ILC ARSIWA Commentary, p. 101, see also CRAWFORD, ILC Articles on State Responsibility, p. 223.

¹²⁰⁵ *Germany v. United Kingdom*, p. 40.

¹²⁰⁶ BARKER John, The Different Forms of Reparation: Compensation, in: Crawford James et al. (eds.), *The Law of International Responsibility*, Oxford, 2010, p. 602.

proof as it would have been time consuming, expensive and difficult for claimants to assemble the necessary data. The Claims Commission consequently decided that it was not in the interest of justice to demand a high level of standard which would have caused widespread impunity.¹²⁰⁷

A number of regional and international courts and tribunals have taken different approaches on how the damage is evaluated. While the European Court of Human right often considers the finding of a violation of law a sufficient remedy to the victim without ordering monetary compensation¹²⁰⁸, other courts, especially arbitration tribunals, take a more generous stand towards compensating victims for their damages. This is most prominently shown by the *Yukos rulings*, both processed before the ECtHR and the Permanent Court of Arbitration (PCA). While the PCA ordered Russia to pay damages as high as 50 billion USD¹²⁰⁹ for the illegal expropriation of foreign owned oil company, the ECtHR issued a significantly lower reward of 1.9 billion Euros¹²¹⁰ as it considered the judgment to be otherwise sufficient just satisfaction. It must still be mentioned that the exact calculation of the damage will greatly depend on the circumstances of the case.¹²¹¹

Satisfaction

Satisfaction as a rather unique form of reparation comes in play once restitution and compensation have been exhausted but reparation is nevertheless not considered to be fully given. Art. 37 (2) ARSIWA enumerates possible mechanisms of satisfaction

¹²⁰⁷ *Eritrea-Ethiopia Claims Commission*, Final Award, Eritrea's Damage Claim of 17.8.2009, Report of International Arbitral Awards, Vol. XXVI, p. 530, para. 41.

¹²⁰⁸ So i.e: *McCann et al. v. the United Kingdom*, Judgment of the ECtHR [GC] of 27.9.1995, No. 18984/91, para. 219 where the Court found a violation of Art. 2 ECHR however refused to order monetary compensation.

¹²⁰⁹ *Yukos Universal Limited v. The Russian Federation*, Judgment of the Permanent Court of Arbitration of 18.7.2014, No. AA 227.

¹²¹⁰ *OAo Neftyanaya Kompaniya Yukos v. Russia*, Judgment of the ECtHR of 31.7.2014, No. 14902/04.

¹²¹¹ Further information regarding measure of compensation in: BARKER, p. 604 ff., SHELTON, chapters 3 and 9, MARBOE Irmgard, Compensation and Damages in International Law: The Limits of "Fair Market Value", Journal of World Investment and Trade, Vol. 7, 2006, p. 273 ff.

such as “an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality”. As this list suggests, satisfaction is not in relation to any financial or monetary interest of the victim, and consequently not financially assessable, but rather shows a symbolic character.¹²¹² Satisfaction taking the form of a monetary compensation is a controversial matter. Although not initially intended to serve as a means to receive additional financial assets, it is not excluded that a court may order satisfaction being done in form of a payment. This was, for example, the case when the Mixed Claims Commission between Venezuela and Italy ordered the Venezuelan Government to pay 5'500 £ to Italy “as a satisfaction of the point of honor”¹²¹³.

Despite its symbolic nature, satisfaction is a fundamental part of reparation. The obligation to give remedy will, once again, inherently depend on the specific circumstances of the case. The ILC in their comments on Art. 37 (2) ARSIWA for example mentions the order to conduct an inquiry into the causes of an accident, the obligation to establish a trust fund to manage compensation payments in the future, the introduction of criminal investigation against the individual responsible for the harm, but also a guarantee of non-repetition or a declaration of wrongfulness as possible satisfaction mechanisms.¹²¹⁴ Further, an apology is one of the most common forms of satisfaction. The ILC mentions a number of case law where an apology of wrongdoing has been extended by the perpetrating States, such as in *LaGrand*, the *Rainbow Warrior*¹²¹⁵ or in different *Consular Relation*¹²¹⁶ cases.

¹²¹² ILC ARSIWA Commentary, p. 106, see also CRAWFORD, ILC Articles on State Responsibility, p. 231.

¹²¹³ Article II of the Mixed Claims Commission Italy-Venezuela constituted under the Protocols of 13.2.1903, Report of the International Arbitral Awards 1903, Vol. X, p. 479.

¹²¹⁴ ILC ARSIWA Commentary, p. 106, see also CRAWFORD, ILC Articles on State Responsibility, p. 232 f.

¹²¹⁵ *New Zealand v. France*, Case concerning the sinking of the Rainbow Warrior, Judgment of the Arbitration Tribunal of 30.4.1990, Report of International Arbitral Awards, Vol. 20, p. 215 ff.

¹²¹⁶ I.e.: *Paraguay v. the United States of America*, Case concerning the Death Penalty imposed on Paraguayan Nationals, ICJ Order on Provisional Measures of 9.4.1990, ICJ Reports 1998, p. 248 ff.

The importance of satisfaction as a means of reparation should not be underestimated. Especially as it relates to victims of torture, the general misconception exists that claimants solely introduce civil proceeding in order to benefit the most out of a breach of law.¹²¹⁷ In reality, at least as it relates to civil proceeding against a foreign State, criminal proceedings are unavailable and civil courts the only possible forum to introduce a claim. In addition, the psychological effect of participating in a civil trial as an equal party against a perpetrator is essential for the rehabilitation of the victim and the feeling that justice has been served.¹²¹⁸ It recognizes the victim as such giving it the opportunity to find closure for the suffering endured and is consequently a necessary step towards a full vindication of victim's rights.¹²¹⁹

The goals of criminal and tort law overlap. Most fundamentally, criminal convictions and civil judgments both play an important declarative function in society. Although by tort claims private parties may seek vindication of private interests, judgments in these cases affirm much wider interests manifested in the norms that the community is prepared to enforce. Punishment and compensation represent two distinct, but complementary, ways of condemning past, and deterring future, wrongdoings.¹²²⁰

Consequently, conducting a civil trial fulfills a much wider goal than to ask for monetary compensation for the damage caused to a victim. It further contributes to the struggle against impunity and the prevention for serious violations of international

¹²¹⁷ KAMMINGA raises concerns about the growing privatization of heinous crimes in: KAMMINGA Menno, *Universal Civil Jurisdiction, Is it Legal? Is it Desirable?* Proceedings of the Annual Meeting (American Society of International Law), Vol. 99, 2005, p. 215.

¹²¹⁸ For more information: DONOVAN/ROBERTS, p. 155, MUTTUKUMARU Christopher, *Reparation to Victims*, in: Lee Roy (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, The Hague, 1999, p. 264, DONAT-CATTIN David, *Art. 75 ICC Statute: Reparations to Victims*, in: Trieffterer Otto/Ambos Kai (eds.), *Commentary on the Rome Statute of the International Criminal Court*, 3rd ed., Munich, 2016.

¹²¹⁹ TERRY, p. 122 f.

¹²²⁰ DONOVAN/ROBERTS, p. 154.

human rights and humanitarian law.¹²²¹ Victims of torture or their surviving family often seek justice and recognition not just in their name but for many others affected by the same actions unable to introduce proceedings. Helen Todd, a mother of a New Zealand national killed by Indonesian military forces during a massacre in Dili, most impressively brought this to a point:

I bring this case because those who killed him and those in power who set the policies that killed him have not even acknowledged that a crime has been committed. [...] I bring this case not only as Kamal's mother but on behalf of the hundreds of East Timor mothers who are forced to grieve in silence for their dead children. Our grief is the same, but, unlike them, I can bring a case against a military officer without putting the rest of my family in danger. Whatever compensation is awarded by the court in this case will belong to the mothers of all the victims of the Dili massacre, and I will find a way to get it into their hands.¹²²²

Nevertheless, satisfaction is not unlimitedly possible. According to Art. 37 (3) ARSIWA "[s]atisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State." As explained by the ILC, satisfaction shall also never be used as a punitive measure against a State or in an abusive or disproportional way.¹²²³ It is, however, difficult to argue in what way an apology or the obligation to conduct a thorough investigation can be considered disproportional. Regarding the dignity of a State, the ILC argues that this element was introduced to protect the principle of equality among States and mentions that in history there have been examples of humiliating demands of satisfaction; however, the ILC refuses to give specific refer-

¹²²¹ KOH Harold, Symposium: International Law: Transnational Public Law Litigation, Yale Law Journal, Vol. 100, 1991, p. 2372, MCGREGOR Lorna, The Need to Resolve the Paradoxes of the Civil Dimension of Universal Jurisdiction, Proceedings of the Annual Meeting (American Society of International Law), Vol. 99, 2005, p. 126.

¹²²² *Todd v. Panjaitan*, Judgment of the U.S. District Court of Massachusetts of 26.10.1994, No. 92-12255, Declaration of Helen Todd, para. 22 ff.

¹²²³ ILC ARSIWA Commentary, p. 107, see also CRAWFORD, ILC Articles on State Responsibility, p. 234.

ences to any situation.¹²²⁴ Some authors believe that humiliation as a limit to satisfaction is not useful in practice as it is hard to imagine in what way satisfaction for a recognized wrongful international act can be considered humiliating for the responsible State.¹²²⁵ In practice, the dignity of a State consequently establishes no real limit to satisfaction as a means of reparation.

2. The Right to Remedy and Reparation under the United Nations Convention against Torture

With reference to the specific topic of this thesis, the jurisdictional immunities of States in case torture was committed, it seems justified to analyze the UN Convention against Torture as a *lex specialis* with regard to the individual's right to remedy and reparation. Before the right to remedy and reparation as contained in Art. 14 (1) CAT is discussed, it should be mentioned what elements constitute torture as defined by the Convention. A definition of the term is insofar useful as it draws the line between persons falling under the protection of the Convention and others who have suffered severe mistreatment but will not be able to rely on the provisions described below.

In a second step, the content of Art. 14 (1) CAT will be analyzed with regard to its territorial scope. The right to remedy and reparation will only enter in conflict with foreign immunity when Art. 14(1) CAT has extraterritorial application. In other words, a norm conflict between the right to remedy and State immunity only arises if the forum State is under the obligation to allow for remedy and reparation claims for torture committed outside its territory or jurisdiction. Applying the recognized methods of treaty interpretation in international law, the author will, in section two of this chapter, determine the territorial scope of Art. 14 (1) CAT. In a third step, a possible norm conflict should be identified and discussed.

¹²²⁴ Ibid.

¹²²⁵ WYLER/PAPAU, p. 635, DOMINICÉ, La responsabilité non contentieuse, p. 118.

a. Material Scope of the UN Convention against Torture

Art. 1 (1) CAT defines torture as following:

For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.¹²²⁶

As the definition given by the Convention is complex, several elements should be pointed out. First, only torture committed by a public official or with the consent of a person acting in an official capacity will be protected by the Convention. Acts of “public” torture are typically committed by police or security forces or instigated through the order of higher officials and representatives of public authorities. In other words, torture occurring as a criminal act between two private individuals is not subject to the Convention.¹²²⁷ This scenario is insofar irrelevant to the present thesis as it would not entail the liability of any State official or the State itself and therefore not be in application of immunity issues.

Secondly, the torture must have been an intentional act. Severe pain or suffering as a consequence of negligence or an accident will fall outside the material scope of CAT.¹²²⁸ In addition, it is not enough that the acts taken by public officials are simply

¹²²⁶ Art. 1 (1) CAT.

¹²²⁷ CULLEN, p. 34, BURGERS Herman/DANELIUS Hans, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dordrecht, 1988, p. 120, NOVAK Manfred/MCARTHUR Elizabeth, *The United Nations Convention against Torture: A Commentary*, Oxford, 2008, p. 77.

¹²²⁸ BURGERS/DANELIUS, p 119, NOVAK/MCARTHUR, p. 73, CULLEN, p. 33.

intentional; they need to follow a specific purpose as described by the Convention. Art. 1 (1) CAT enlists the most common motives for torturing individuals such as information gathering, coercion or punishment. This list is, however, non-exhaustive, thus giving way to the fact that other purposes may be accepted as long as they have a certain connection to the purposes mentioned in para. 1.¹²²⁹ As BURGERS/DANELIUS explain, a purpose relevant for the Convention must have a – at least remote – connection to interests or policies of a State or its organs.¹²³⁰

Lastly, the Convention demands a certain severity of the pain and suffering endured by a person. This element was already subject of a brief analysis in § 1 (I) of the study and should not be discussed further.¹²³¹ The author would like to emphasize that the UN Convention against Torture takes a different approach than the opinions expressed in the mentioned chapter, especially with regard to the jurisprudence of the European Court of Human Rights. As the full title of the UN Convention suggests, it also englobes inhuman and degrading treatment or punishment to a certain extent. It is, however, distinguished from torture in several ways. First of all, the prohibition of cruel, inhuman and degrading treatment or punishment is found in Art. 16 CAT, unlike torture which is prohibited under Art. 2 (1) CAT. Also, the Convention misses a clear definition of the terms cruel, inhuman and degrading treatment. Historically, the drafters did not find any common ground to define these terms and were consequently not able to impose far reaching substantive obligations upon contracting parties.¹²³² On the other hand, drafters wanted to include cruel, inhuman and degrading treatment at least in relation to the more general obligations contained in Art. 10-13 CAT.¹²³³ This essentially leads to the exclusion of the application of the most important provisions of the Convention in relation to treatment which is considered cruel, inhuman or degrading, including Art. 14 (1) CAT imposing the duty to provide a

¹²²⁹ BURGERS/DANELIUS, p. 118, NOVAK/McARTHUR, p. 69.

¹²³⁰ Ibid.

¹²³¹ See § 1 (I.2), p. 9 ff.

¹²³² Report of the Working Group on a Draft Convention against Torture and other Cruel and, Inhuman or Degrading Treatment or Punishment of 9.3.1984, UN Doc. No. E/CN.4/1984/72, see summary in BURGERS/DANELIUS, p. 118 and NOVAK/McARTHUR, p. 69.

¹²³³ See Art. 16 (1) CAT.

civil remedy. Unlike the notions used in human rights law, the distinction between torture and cruel, inhuman and degrading treatment is not so much in relation to the severity of the pain suffered¹²³⁴ as it is more in relation to the purpose of the acts.¹²³⁵ Other than Art. 1 CAT, Art. 16 (1) CAT contains no reference to the purpose for which pain or suffering was inflicted, however leaves its application intentionally open.

Following the definition of Art. 1 (1) CAT certain victims of severe treatment are excluded from the application of the Convention. These are namely acts committed by a private individual who is not acting in an official capacity of a State, unintentional acts or acts that were not committed within the pursuit of a purpose describe in the Convention or, with specific relation to Art. 14 (1) CAT, persons who suffered cruel, inhuman or degrading treatment not amounting to torture.

b. Art. 14 (1) CAT and its Territorial Scope

As mentioned, the obligation to provide a civil remedy for acts of torture is based in Art. 14 (1) of the UN Convention against Torture. It reads:

Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for full rehabilitation as possible.

While the material content of the provision seems sufficiently clear, namely to provide an effective mechanism to demand remedy and reparation, one main controversy remains. Under CAT, is any State party obliged to grant a victim of torture remedy and reparation in case torture was committed outside the jurisdiction of the State concerned or does Art. 14 CAT only bind the State responsible for the act? In other words, it must be discussed whether Art. 14 CAT must be applied extraterritorially. Accepting so would put the forum State in an inherent dilemma: either it accepts jurisdiction over a foreign State in violation of customary international law or it grants

¹²³⁴ NOVAK/McARTHUR, p. 69 refer to several documentations, which demand the elimination of the so-called “vertical model” and replace it with a “horizontal model” in which torture and inhuman and degrading treatment all stand alongside.

¹²³⁵ BURGERS/DANELIUS, p. 150, NOVAK/McARTHUR, p. 69.

foreign immunity preventing a victim of torture from receiving compensation. Hence, are the obligations contained in Art. 14 CAT incompatible with the jurisdictional immunity of a foreign sovereign?

Whether Art. 14 CAT contains a geographical limitation should be discussed applying the recognized methods of treaty interpretation. Treaties should first and foremost be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹²³⁶ While the exact number of interpretative methods is disputed, the author will focus on five main interpretation mechanisms: in a first part, the literal, systematic and teleological method should be applied jointly focusing on the concrete wordings found in Art. 14 (1) CAT as well as its relation to the Convention as a whole. In a second step, Art. 14 CAT should be placed in a historical context, analyzing the *travaux préparatoire* of its drafting procedure. Lastly, many developments have taken place since the Convention was adopted. Domestic courts and the Committee against Torture have expressed their opinions in relation to the geographical limitation of Art. 14 CAT. These elements should be appreciated within the context of a subsequent practice or agreement among State Parties. In the conclusion chapter, it should be elaborated in what way foreign State immunity is compatible with obligations contained in the UN Convention against Torture.

Art. 14(1) CAT according to its Text, Context and Purpose

The text of Art. 14 (1) CAT does not contain any reference to its geographical scope in any of the authentic versions. British, New Zealand and Canadian courts therefore emphasized that a natural reading of Art. 14 CAT would not suggest an obligation to give redress for torture that occurred abroad because a territorial limitation was implicitly contained in para. 1.¹²³⁷ On the other hand, some authors argue that the wording was intentionally left open in favor of a territorially broad application of Art. 14

¹²³⁶ Art. 31 (1) VCLT.

¹²³⁷ *Bouzari v. Iran*, para. 80, *Jones v. Saudi Arabia*, House of Lords, para. 25, *Fang et al. v. Jiang Zemin et al.*, para. 28.

CAT.¹²³⁸ Following the specific wording found in Art. 14 (1) CAT, the fact that “the victim of torture” should receive a procedure for remedy, would, at least according to the author of this thesis, literally suggest a broad interpretation in the sense of the clause providing remedy not only to victims who suffered violation on the territory of the forum but to all victims of torture as defined by the Convention.¹²³⁹

Art. 14 (1) CAT must be further contrasted in the light of provisions found in other articles within the Convention as a text must necessarily be read as a whole. Some authors identified different types of articles within the UN Convention against Torture with regard to their geographical scope.¹²⁴⁰ A first group of articles expressly contain references that only apply to conduct occurring within the territory or jurisdiction of the State party. These are namely Art. 2 (1), 5 (1a), 7 or 16. In addition, Art. 11-13 each contain specific wording that the obligations found in these articles would only be in relation to “torture [which] has been committed in any territory under its jurisdiction”. For these articles an extraterritorial application is therefore clearly excluded.

A second group of articles imply that a State has obligations regardless of the location where torture occurred. Art. 15 CAT, which prohibits the use of evidence obtained through torture, contains no clear geographical scope but must logically be applied to all acts of torture. Applying this article in a geographically limited fashion would create a considerable protection gap which drafters could not have intended. The same must be concluded with regard to Art. 3 CAT codifying *non-refoulement* and Art. 5 (2) CAT with regard to universal criminal jurisdiction. The obligation to detain all persons suspected for having committed torture (Art. 6), the obligation to extradite such a person (Art. 8), and the obligation to assist in criminal proceedings (Art. 9) must likewise be interpreted in a geographically unlimited manner as otherwise the Con-

¹²³⁸ APPELBAUM, p. 160, BYRNES Andrew, Civil Remedies for Torture Committed Abroad: An Obligation under the Convention against Torture?, in: Scott Craig (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Tort Litigation*, Oxford, 2001, p. 548.

¹²³⁹ CREMER, p. 166.

¹²⁴⁰ BYRNES, p. 541 ff., HALL Christopher, The Duty of States Parties to the Convention against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad, *European Journal of International Law*, Vol. 18/5, 2007, p. 924 ff.

vention would lose its value. Certain articles within the Convention consequently show an extraterritorial character despite a lack of clear reference in the text.

A third group of articles also contains no reference to the territorial scope. Other than group number two, no geographical link can be established whatsoever. This is namely the case for Art. 1 CAT defining torture as understood by the Convention as well as Art. 17-24 CAT establishing inter-State and individual proceeding mechanisms or an instrument for periodic review. Art. 10 CAT can be subsumed under the same category. It contains the obligation to provide training and education for law enforcement personnel and other public officials. Indeed, this relates to public officials within the territory of the State concerned, however, as a prevention mechanism, it does not say anything about torture which has already occurred or to the location where torture must have been committed. The author therefore classifies Art. 10 CAT as a geographically neutral provision.

With respect to Art. 14 (1) CAT, the majority of legal scholars refers to Art. 14 (2) CAT as a clear indication that para. 1 cannot be understood as having an extraterritorial effect.¹²⁴¹ This article contains a so-called “savings clause” through which a contracting States would be allowed to adopt legislation going further than the provisions contains in the Convention, so for example Lord Justice MANCE who understands paragraph 1 in a geographically limited manner:

[A]rticle 14 (1) is dealing with (no more than) a right of redress in the legal system of the State (State A) [...] State A is, in short, the responsible State, and it must ensure proper civil redress. Article 14 (1) is not designed to *require* every other State (State B) to provide redress in its civil legal system for acts of torture committed in State A, although under article 14 (2) it remains *permissible* for State B to provide redress in

¹²⁴¹ Most notably: NOVAK/McARTHUR, p. 494 and 502, BYRNES, p. 543, APPELBAUM, p. 159, PARLETT Kate, Universal Civil Jurisdiction for Torture, European Human Rights Law Review, Vol. 4, 2007, p. 395 f.

State B for acts of torture (either in State A or elsewhere) by officials etc. of State A.¹²⁴² [emphasis in the original version]

A referral to the drafting history of Art. 14 (2) CAT, which we are about to discover must be done with caution, reveals a different outcome. The origin of the savings clause can be traced back to a discussion of the Working Group around the circle of people being able to demand compensation once a torture victim had died.¹²⁴³ Some representatives were concerned that the draft at the time would exclude a number of affected persons from accessing compensation, such as a neighbor, a friend or a rehabilitation center which had given financial assistance to the torture victim before his/her death.¹²⁴⁴ It was therefore suggested to allow States an extension of the personal scope not only to mean the relatives but to all next of kin, including legal entities and institutions. Hence, the main object of the saving clause was to prevent a too narrow interpretation of Art. 14 (1) CAT with regard to the person claiming reparation.¹²⁴⁵ No reference may be found to the geographical scope or the legality of universal civil jurisdiction within para. 2. The existence of Art. 14 (2) CAT can consequently not be interpreted in such a manner as to mean a limitation on the right to compensation.¹²⁴⁶

Systematically analyzing the different articles in the Convention would indicate that drafters have introduced specific language when they intended to geographically limit the scope of a provision (Group 1).¹²⁴⁷ If no such limitation is expressly found within an article, logic reveals an implied extraterritorial application (Group 2) or shows an obligation where no geographical scope may be created (Group 3). The fact that Art. 14 (1) CAT contains no reference to its territorial application hence gives strong

¹²⁴² *Jones v. Saudi Arabia*, Court of Appeal, opinion of Lord Justice MANCE, para. 21.

¹²⁴³ NOVAK/McARTHUR, p. 490.

¹²⁴⁴ NOVAK/McARTHUR, p. 491.

¹²⁴⁵ NOVAK/McARTHUR, p. 491, para. 95.

¹²⁴⁶ Same conclusion supported by: BURGERS/DANELIUS, p. 147, APPELBAUM, p. 163, MORA Paul, *The Legality of Civil Jurisdiction over Torture under the Universal Principle*, German Yearbook of International Law, Vol. 55, 2009, p. 379.

¹²⁴⁷ ORAKHELASHVILI, *State Immunity and Hierarchy of Norms*, p. 961.

evidence that no geographical limitation must be read within this provision as it would otherwise be the only article within the Convention, where no geographical indication would mean a territorially limited scope.¹²⁴⁸ In addition, 14 (2) CAT cannot be interpreted in such a manner as to mean a limitation of the protection of torture victims. Drafters intended para. 2 to be used for the extension of the personal scope of Art. 14 (1) CAT and in no way proposed this paragraph as a potential restriction on the geographical scope of para. 1.¹²⁴⁹

This conclusion is supported by a teleological approach. A treaty provision should always be read within the light of its object and purpose. With regard to CAT, the Preamble of the Convention shows that it was adopted “to promote the universal respect for, and observance of, human rights and fundamental freedoms”.¹²⁵⁰ More specifically it desires to “make more effective the struggle against torture and other cruel, inhuman and degrading treatment or punishment throughout the world”.¹²⁵¹ Applying these concepts to the question of extraterritoriality of Art. 14 (1) CAT, it becomes apparent that this article must be implemented in a way to include torture which occurred outside the forum State’s jurisdiction. As we have seen throughout this thesis, many torture victims would otherwise be left without an effective remedy leading to a *de facto* impunity of the torture endured. Legal scholars who analyzed this aspect unanimously support the conclusion in relation to the teleological interpretation of Art. 14 CAT.¹²⁵²

Following the literal, systematic and teleological treaty interpretation methods, the obligation to provide a mechanism for redress and compensation as described in the UN Convention against Torture must be applied regardless of where torture occurred. In other words, any contracting parties would be obliged to give a victim of torture

¹²⁴⁸ BYRNES, p. 545, HALL, *Duty of State Parties to the Convention against Torture*, p. 926.

¹²⁴⁹ PARLETT, p. 398 f.

¹²⁵⁰ Preamble of the Convention against Torture.

¹²⁵¹ *Ibid.*

¹²⁵² Most clearly so: DONOVAN/ROBERTS, p. 148, BYRNES, p. 545, HALL, *Duty of State Parties to the Convention against Torture*, p. 927, ADAMS, p. 263, ORAKHELASHVILI, *State Immunity and Hierarchy of Norms*, p. 961.

the legal means to introduce civil proceedings regardless of the location of the presumed torture acts.

The travaux préparatoires and the Historical Method of Treaty Interpretation

Next to the interpretative methods describe in section one, the *travaux préparatoires* of the drafting process can shed light into the meaning of a treaty provision. In distinction to what is applied in national law, the historical method of treaty interpretation has only a secondary supplementary character as described in Art. 32 VCLT. A historical interpretation should only be relied upon if the application of the ordinary methods contained in Art. 31 VCLT leave the meaning ambiguous or if it leads to a result which is manifestly absurd or unreasonable.¹²⁵³ The ICJ had acknowledged the priority of methods described in Art. 31 VCLT by saying that “[i]f the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.”¹²⁵⁴ During the drafting procedure of the VCLT, the ILC gave two reasons for the restrictive use of the preparatory works within the appreciation of the treaty text. Firstly, a higher value should be given to the actual text adopted with the consent of all State parties. Secondly, in many cases the *travaux* reveal themselves to be incomplete or misleading so that a considerable discretion should be exercised within their appreciation.¹²⁵⁵ The supplementary character of the historical treaty appreciation technique means that it is not meant as an autonomous method like the ones contained in Art. 31 VCLT but that it should simply aid in the procedure.¹²⁵⁶ This solution seems convincing as especially countries which did not participate within the drafting of a convention or gained independence after the adoption of a treaty would indeed be disadvantaged and consequently discouraged to sign and ratify a treaty. Giving a

¹²⁵³ Art. 32 (a) and (b) VCLT, see *Qatar v. Bahrain*, Case concerning Maritime and Territorial Questions, Judgment of the ICJ of 1.7.1994, ICJ Reports 1994, p. 112 ff., para. 41, also *Nait-Liman v. Switzerland*, Grand Chamber Judgment, para. 192.

¹²⁵⁴ *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion of the ICJ of 3.3.1950, ICJ Report 1950, p. 8.

¹²⁵⁵ ILC Draft Articles on the Law of Treaties with commentary, Yearbook of the International Law Commission, 1966, Vol. II, p. 220 see also: DÖRR Oliver/SCHMALENBACH Kirsten, Vienna Convention on the Law of Treaties: A Commentary, Berlin/Heidelberg, 2012, p. 572.

¹²⁵⁶ ILC, Draft Articles on the Law of Treaties, p. 220.

supplementary character to the historical treaty interpretation method therefore facilitates the subsequent ratification of a treaty.

During the drafting procedure of the UN Convention against Torture both the Swedish and Dutch delegations had submitted texts in relation to the geographical scope of Art. 14 CAT. While the Swedish draft specifically mentioned that “each State Party shall guarantee an enforceable right to compensation to the victim of an act of torture”¹²⁵⁷ the Dutch delegation insisted on inserting the phrase “committed in any territory under its jurisdiction”¹²⁵⁸ after the word torture. The Dutch supplement had, however, disappeared in the final version of Art. 14 CAT which, as we have seen, contains no geographical restriction.¹²⁵⁹ During the ratification procedure of CAT in the United States, President Ronald Reagan had raised the observation that the geographical limitation was deleted by mistake as no discussion over the issue may be identified in the *travaux*. This would be surprising as the introduction of a civil universality necessarily would have been a controversial matter.¹²⁶⁰ At the time of ratification, the United States introduced a declaration that it understands Art. 14 CAT as to mean to “provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of the State Party”.¹²⁶¹ Many authors, including the former UN Special Rapporteur on Torture MANFRED NOVAK, arrive to the same conclusion.¹²⁶² Not one State had objected to the reservation made by the U.S. demonstrating that the deletion of a geographical restriction was merely a mistake.¹²⁶³

¹²⁵⁷ Letter from the Permanent Representative of Sweden to the UN Office at Geneva of 18.1.78 addressed to the Division of Human Rights, UN Doc. No. E/CN.4/1285.

¹²⁵⁸ See Report of the Commission of Human Rights on its thirty-seventh session of 13.3.1981, UN Doc. No. E/CN.4/1475.

¹²⁵⁹ NOVAK/MCARTHUR, p. 457.

¹²⁶⁰ Summary and Analysis of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in: Message from the President of the United States transmitting the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 20.5.1998, 10th Congress, 2nd Session.

¹²⁶¹ List of Reservations and Declarations to the UN CAT in NOVAK/MCARTHUR, p. 1227 ff., U.S. Reservation to CAT, p. 1278 f.

¹²⁶² NOVAK/MCARTHUR, p. 494 and 502, PARLETT, p. 395 f., BYRNES, p. 543, APPELBAUM, p. 163.

¹²⁶³ NOVAK/MCARTHUR, p. 492.

Nevertheless, following the date line of submissions to the *travaux*, the final version of Art. 14 CAT presented by the Working Group to the Commission on Human Rights, indicated that the final text of Art. 14 CAT was “adopted in 1982”, a whole year after the Dutch had submitted their supplement.¹²⁶⁴ This shows strong evidence that the Working Group decided to omit a geographical limitation like it did in all previous drafts.¹²⁶⁵ Within the Preamble specific reference is made to the UN General Assembly Declaration on the Protection of All Persons from Being Subjected to Torture¹²⁶⁶ which later led to the adoption of the Convention against Torture. The correspondent article on the rights to remedy and reparation for torture victims of this so-called Torture Declaration (Art. 11) neither contains a geographical limitation in contrast to articles 4, 6, 8, 9, and 10. This would indicate that the right to remedy and reparation was not intended to be geographically limited from the very beginning.

Following the call of the Secretary General to comment on the draft Convention prepared by the Working Group¹²⁶⁷, a total of 31 States, including the Netherlands and the United States, had submitted remarks on the final version of CAT, none of which identified any “mistake” that had taken place in the wording of Art. 14 CAT. The Dutch went as far as to call it “the best possible text”¹²⁶⁸ being “the outcome of intensive and prolonged deliberations” which would be surprising given that they should have been especially attentive to submissions they had made under Art. 14 CAT.¹²⁶⁹ France specifically emphasized its satisfaction over the “consensus provision relating

¹²⁶⁴ Reports of the informal open-ended Working Groups of the Human Rights Commission on Human Rights, Report of the thirty-eighth session of 15.3.1982, UN Doc. No. E/CN.4/1982/30/Add. 1, Annex I, p. 23.

¹²⁶⁵ HALL, Duty of States Parties to the Convention against Torture, p. 933.

¹²⁶⁶ Declaration of the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the UNGA Resolution 3452 (XXX) of 9.12.1975, UN Doc. No. A/RES/30/3452.

¹²⁶⁷ Report of the Secretary General containing the Comments of States on the Convention on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 6.11.1984, UN Doc. No. A/39/499/Add.1.

¹²⁶⁸ *Ibid.*, para. 12.

¹²⁶⁹ HALL, Duty of States Parties to the Convention against Torture, p. 934.

to [...] compensation of victims¹²⁷⁰ indicating that some sort of discussion and agreement must have had taken place. Regarding the declaration made by the United States by which they acknowledge only torture committed within the jurisdiction of a State party to be engulfed within Art. 14 CAT, it is striking that no State has reacted neither in support nor in disapproval of this interpretation. If the wording found in the final draft of Art. 14 CAT truly consistent of a mistake, then why has no other country reacted since its discovery? HALL convincingly points out that not one State has made any attempt to invoke the procedure for the correction of errors in treaty texts provided for in Art. 79 VCLT.¹²⁷¹ It does seem implausible that a major “mistake” would have just been overlooked given the complexity of the drafting process.

While some scholars believe the silence of States to the U.S. declaration of non-extraterritoriality to mean an endorsement, the author rather argues in favor of HALL’s interpretation that it must, in this specific situation, be interpreted as a disagreement. It is more likely that the Working Group has arrived at some sort of informal understanding to delete the geographical restriction in Art. 14 CAT without referencing it in the *travaux*. This would explain, why States have remained inactive to the declaration made by the United States which has since adopted legislation providing victims of torture with a remedy procedure for acts committed outside their jurisdiction.¹²⁷² During the drafting procedure both delegates from the U.S. Congress and the Senate stated that the adoption of TVPA was necessary for the implementation of its international obligations under CAT¹²⁷³, an indication that even the U.S. applies Art. 14 (1) CAT in an territorially unrestricted fashion despite having declared otherwise.

¹²⁷⁰ See Summary Record of the 51st Meeting of the UNGA 3rd Committee held on 27.11.1984 on Torture and Other Cruel Treatment, UN Doc. No. A/C.3/39/SR.51, para. 19.

¹²⁷¹ HALL, Duty of States Parties to the Convention against Torture, p. 936.

¹²⁷² See the U.S. Torture Victims Protection Act of 1991 as well as the U.S. Justice Against Sponsors of Terrorism Act of 2016.

¹²⁷³ U.S. House of Representatives Report, H.R.367 (102nd Congress), 1st Session, Point 1 (1991), U.S. Senate Report, S.Report 249 (102nd Congress), 1st Session (1991).

In conclusion, we have discovered that the *travaux* are of no help to identify an extra-territorial character to Art. 14 (1) CAT.¹²⁷⁴ The author's reading of the *travaux* would rather suggest that drafter intended a geographically unlimited scope with regard to Art. 14 CAT. In any case, it is highly unlikely that a geographical limitation was forgotten or dropped by mistake. Given the subsidiary nature of the historical interpretation method, it should not be put too much emphasis on the discussions of the drafters in the matter as it rather confuses scholars and courts than it sheds light into the legal issue at hand. The author therefore suggests that the historical interpretation method should not be taken into consideration when deciding upon the extraterritoriality of Art. 14 (1) CAT. This solution is in line with the VCLT and the ICJ requirements of subsidiarity of the historical treaty interpretation mechanism and supported by the Grand Chamber of the ECtHR.¹²⁷⁵

The Subsequent Practice or Agreements of State Parties

According to Art. 31 (3a and b) VCLT any subsequent agreement or practice of State Parties regarding the interpretation of a treaty must be taken into consideration. In this respect, major developments have taken place since the adoption of the Convention. Many a court or human rights treaty body was confronted with the issue of extraterritorial application of Art. 14 CAT. Among many judgments the *Fang* decision must be cited. The High Court of New Zealand specifically applied Art. 14 CAT in a geographically limited manner. In their opinion:

The absence of such detailed provisions for civil liability under Article 14 of the Torture Convention points strongly towards the proposition [...] that it is aimed at providing civil remedies for acts of torture committed within the territory of the forum state.¹²⁷⁶

¹²⁷⁴ *Nait-Liman v. Switzerland*, Grand Chamber Judgment, para. 198, and MORA arrives to the same conclusion: MORA, p. 378.

¹²⁷⁵ *Nait-Liman v. Switzerland*, Grand Chamber Judgment, para. 192.

¹²⁷⁶ *Fang et al. v. Jiang Zemin et al.*, para. 28.

In *Bouzari v. Iran*, the Court of Appeals for Ontario, later reaffirmed by the Canadian Supreme Court in *Kazemi v. Iran*¹²⁷⁷, held that Canada was under no obligation to guarantee a civil procedure for torture committed outside its jurisdiction.¹²⁷⁸ The applicant, an Iranian national, seized the Canadian Courts in order to receive compensation for torture endured in Iran by Iranian officials and raised Art. 14 (1) CAT as legal basis for his action. The Court rejected the applicant's claim stating that "a full textual analysis of the provisions of the Convention shows that the absence of explicit territorial language does not necessarily mean the absence of territorial limitation. The text of the Convention itself simply provides no answer to the question."¹²⁷⁹

Later, Canadian authorities were criticized for a too narrow interpretation of Art. 14 (1) CAT by the UN Committee against Torture. Only one year after the *Bouzari* judgment was rendered, the Committee expressed its concern regarding the absence of effective measures to provide civil compensation to victims of torture in all cases.¹²⁸⁰ Canada should review its position under Art. 14 CAT and ensure an adequate procedure for compensation to all victims of torture irrespective of the location where torture was committed.¹²⁸¹ It, once again, reaffirmed its position during the sixth periodic review of Canada in 2012 with a specific remark on the issue of State immunity:

The Committee remains concerned at the lack of effective measures to provide redress, including compensation, through civil jurisdiction to all victims of torture, mainly due to the restrictions under provisions of the State Immunity Act.

The State party should ensure that all victims of torture are able to access remedy and obtain redress, wherever acts of torture occurred and regardless of the nationality of the perpetrator or victim. In this regard,

¹²⁷⁷ See *Kazemi v. Iran*.

¹²⁷⁸ See *Bouzari v. Iran*.

¹²⁷⁹ *Ibid.*, para. 76.

¹²⁸⁰ Concluding Observations of the Committee against Torture to Canada, para. 4 (g).

¹²⁸¹ *Ibid.*, para. 5 (f).

*it should consider amending the State Immunity Act to remove obstacles to redress for all victims of torture.*¹²⁸² [emphasis added]

The Committee has since given numerous similar recommendations and incentives for State parties to fulfill their obligations under Art. 14 CAT for torture committed abroad. It did, for example, praise the U.S. legislation for its “broad legal recourse to compensation for victims of torture, whether or not such torture occurred in the United States of America”¹²⁸³, welcomed a French legislative change which allowed compensation for acts of terrorism committed abroad¹²⁸⁴, recommended the United Kingdom to adopt the “Torture Damages Bill”¹²⁸⁵ that would have established a torture-related exception to the British State Immunity Act¹²⁸⁶, and urged the Republic of Korea to ensure that claimants would have a legal remedy available for torture committed abroad¹²⁸⁷.

Several British Lords took stands against the Committee in *Jones v. Saudi Arabia* for its concluding remarks regarding the interpretation of Art 14 CAT. While Lord HOFFMANN criticized the Committee’s opinion as having “no value”¹²⁸⁸, Lord BINGHAM OF CORNHILL relativized the Committee’s findings as a simple recommendation without any adjudicative powers, whose impact of “influencing the trend of international thinking [...] is slight”.¹²⁸⁹ The majority of Lords hence came to the conclusion that 14 (1) CAT does not oblige State Parties to give remedy for torture committed outside the jurisdiction

¹²⁸² Ibid., para. 4 (g).

¹²⁸³ Report of the Committee against Torture of its twenty-third and twenty-fourth Session of 19.5.2000, UN Doc. No A/55/44 Supplement No. 44, p. 31.

¹²⁸⁴ Concluding Observations and Recommendations of the Committee against Torture in the third periodic review of France, UN Doc. No. CAT/C/FRA/CO/3, para. 4 (f).

¹²⁸⁵ This legislative bill is discussed in detail in § 8 (II.3.c), p. 345 ff.

¹²⁸⁶ Concluding Observations and Recommendations of the Committee against Torture on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, UN Doc. No. CAT/C/GBR/CO/5, para. 22.

¹²⁸⁷ Concluding Observations and Recommendations of the Committee against Torture in the second periodic review of the Republic of Korea, UN Doc. No. CAT/C/KOR/CO/2, para. 8 (a).

¹²⁸⁸ *Jones v. Saudi Arabia*, House of Lords, para. 57.

¹²⁸⁹ Ibid., para. 23.

of a State.¹²⁹⁰ In the 2017 judgment of the recently established British Supreme Court, Mr. Belhaj and his spouse brought proceedings alleging illegal detention under inhuman conditions as well as extraordinary rendition from Malaysia to Libya. The plaintiffs claimed an international coalition of secret services, including the British MI6, was responsible for the severe mistreatment of the applicants and consequently brought proceedings against the British Government within UK courts. Lord Justice MANCE delivered the lead judgment rejecting their appeal. Even if the allegation were indeed true, there was no indication that the UN Convention against Torture would oblige British courts to assume jurisdiction over extraterritorial events.¹²⁹¹ Art. 14 CAT could not be construed so as a geographically unrestricted provision therefore rejecting an obligation of universal civil jurisdiction for acts of torture.¹²⁹²

By December 2012, the Committee had adopted General Comment No. 3 relating to the application of Art. 14 CAT by State parties asserting the extraterritorial character of the provision.¹²⁹³ It considered the right to remedy inserted within the Convention to be applicable regardless of nationality of the victim or the location where torture occurred. It would be especially important to provide remedy in case a victim is unable to exercise the rights guaranteed under Art. 14 CAT in the territory where the violation was committed.¹²⁹⁴ In such a scenario, all State parties were under an obligation to provide an effective civil procedure even in case foreign immunity would bar civil claims to be introduced:

Similarly, granting immunity in violation of international law, to any State [...] is in direct conflict with the obligation of providing redress to victims. When impunity is allowed by law or exists *de facto*, it bars victims from seeking full redress as it allows the violators to go unpun-

¹²⁹⁰ Ibid., para. 34.

¹²⁹¹ *Belhaj v. Straw*, Judgment of the UK Supreme Court of 17.1.2017, [2017] UKSC 3, para. 108.

¹²⁹² Ibid., para. 281.

¹²⁹³ General Comment No. 3 of the Committee against Torture for the Implementation of Article 14 by State Parties, UN Doc. No. CAT/C/GC/3.

¹²⁹⁴ Ibid., para. 22.

ished and denies victims the full insurance of their rights under article 14.¹²⁹⁵

The Committee has further delivered case law regarding the territorial scope of Art. 14 (1) CAT. The first mentionable decision dates to 2002, three years prior its recommendation to Canada for an extraterritorial application of Art. 14 CAT. In a case brought forward by a victim of the Pinochet regime, *Roitman Rosenmann v. Spain*, the Committee declared a complaint against Spain inadmissible as the right compensation “would be justiciable vis-à-vis the State responsible for the acts of torture, i.e. Chile, [and] not Spain.”¹²⁹⁶

In a more recent decision of 2014, the Committee was for the first time asked to give its opinion in a case relating to the right to compensation for acts of torture committed extraterritorially by officials of another State involving immunity issues. In *Z v. Australia*, an Australian citizen of Chinese origin endured severe mistreatment by Chinese officials on several occasions.¹²⁹⁷ After being expelled from China numerous times and exported back to Australia, the plaintiff, recognized Falun Gong practitioner, filed tort claims against the former President of China and the Chinese State. Australian Courts dismissed all appeals giving full effect to the immunity from civil liability for torture citing the Australian Foreign States Immunities Act. The claimant asked the Committee to give full meaning to General Comment No. 3 recognizing the extraterritorial scope of Art. 14 (1) CAT and hence to find a violation of law as Australia failed to provide her with an enforceable right to redress and compensation for State-inflicted torture endured in China.¹²⁹⁸

The Committee, first of all, confirmed the validity of General Comment No. 3 and its opinion of the extraterritorial obligation to give redress for torture occurred abroad. It nevertheless declared the communication inadmissible as it observed that “in the

¹²⁹⁵ Ibid., para. 42.

¹²⁹⁶ *Marcos Roitman Rosenmann v. Spain*, Communication of the Committee against Torture of 30.4.2002, Communication No. 176/2000, para. 6.6.

¹²⁹⁷ *Z v. Australia*, para. 2.1-2.19.

¹²⁹⁸ *Z v. Australia*, para. 3.1.

specific circumstances of this case, the State party is unable to establish jurisdiction over officials of another State for alleged acts committed outside the State party's territory"¹²⁹⁹ endorsing the *Roitmann Rosenmann* precedent. This conclusion is inherently paradoxical. The Committee, on one hand, proposes the amendment of national immunity legislation to give full effect to the obligations contained in CAT, however this does not acknowledge a clear disregard of its recommendations to State parties. It is understandable that the Committee exercises a certain restraint when drafting a binding conclusion on a State party other than when declaring its opinion in non-binding general comments. In this author's opinion, the difference in legal character does, nonetheless, not justify this contradictory outcome. Either Art. 14 (1) CAT does have extraterritorial effect or it does not. The Committee is not urging States to develop a "new" extraterritorial obligation in Art. 14 CAT that needs further recognition and practice before taking effect but to correctly apply the existing provision already binding on all contracting parties.

In his concurring opinion in a judgment of the European Court of Human Rights, *Naït-Liman v. Switzerland*, Judge LEMMENS deducts from the Committee's behavior a clear trend towards denying an extraterritorial aspect of Art. 14 CAT. Referencing to the rulings of the Committee in *Roitman Rosemann* and *Z*:

On peut déduire de ces deux décisions que, aussi longtemps que les acteurs présumés de mauvais traitements ne se trouvent pas sur le territoire de L'État partie (matière pénale) ou n'y résident pas (matière civile), cet État n'a aucune obligation de donner aux victimes le droit d'obtenir réparation devant ses juridictions.¹³⁰⁰

This conclusion was later upheld by the Grand Chamber. The Court emphasized that the geographical scope of Art. 14 CAT was a highly controversial matter. While certainly documents (almost entirely soft law) and opinions can be cited in support of a civil universality in case torture was committed, both State practice and especially the

¹²⁹⁹ *Z v. Australia*, para. 6.3.

¹³⁰⁰ *Naït-Liman v. Switzerland*, ECtHR Judgment, Concurring Opinion of Judge LEMMENS, para. 2.

jurisprudence of the Committee would not reflect any obligation of contracting parties to open their courts to torture committed extraterritorially.¹³⁰¹

Lastly, it should briefly be mentioned that the European Court of Justice (ECJ) only recently recognized a clear extraterritorial effect of Art. 14 (1) CAT.¹³⁰² The case concerned a Sri-Lankan national with severe post-traumatic stress disorder and suicidal tendencies resulting from torture endured at the hands of Sri-Lankan police officers. The applicant's request for asylum had been rejected by British authorities and his expulsion ordered. The ECJ intervened and ordered subsidiary protection as the applicants right to remedy, rehabilitation and redress were not sufficiently protected in the State of origin.¹³⁰³ By saying so, the ECJ acknowledges the *non-refoulement* principle to be applicable to Art. 14 CAT. British authorities would be in violation of this provision in case torture was committed in Sri Lanka as no real and effective right to remedy and rehabilitation would be available there. The Court did not directly state that the UK was bound to give remedy and reparation for torture committed in Sri-Lanka but that no expulsion should be ordered *de facto* holding the UK responsible for an extra-territorial obligation contained in Art. 14 CAT.

With regard to the subsequent practice of contracting parties, a majority of legal scholars emphasize that national and international courts interpret State practice to indicate a geographically limited understanding of Art. 14 CAT.¹³⁰⁴ The author, at least for now, concludes similarly as current State practice and especially the paradoxical opinions expressed by the Committee suggest a strict territorial application of paragraph one of the article. Nevertheless, the Committee against Torture takes active measures in forging a more human rights friendly approach to foreign immunity which, as soft law, is valuable nonetheless. Especially analyzing the ECtHR Grand Chamber assessment in *Nait-Liman*, the most recent and influential case law in this

¹³⁰¹ *Nait-Liman v. Switzerland*, Grand Chamber Judgment, para. 198.

¹³⁰² *MP v. Secretary of State for Home Department*, Judgment of the European Court of Justice [GC] of 24.4.2018, Case C-353/16, ECLI:EU:C:2018:276.

¹³⁰³ *Ibid.*, para. 52 ff.

¹³⁰⁴ NOVAK/McARTHUR, p. 494, PARLETT, p. 398, MORA, p. 377, HALL, Duty of States Parties to the Convention against Torture, p. 929.

area, the Court's opinion highly depended on the Committee's behavior not to have found any violation of Art. 14 CAT despite General Comment No. 3 in place.¹³⁰⁵ The author may only raise the question of how States would be convinced to change their behavior should the Committee adapt its practice to give full effect to General Comment No. 3 with regard to the extraterritorial effect of remedy rights. Such a significant change might tip the scale within the appreciation of interpretation method described by Art. 31 (3a and b) VCLT and consequently lead to a different outcome. The author consequently believes that the UN Torture Committee is the key actor in this matter and should be encouraged to abandon its contradictory attitude. It is the one responsible entity for the interpretation and implementation of CAT obligations and is urged to defend the extraterritoriality of Art. 14 (1) CAT more vigorously.

c. Identifying and Resolving the Norm Conflict

The right to remedy and redress as contained in the UN Convention against Torture guarantees all victims of torture as defined in Art. 1 (1) CAT to have an enforceable right to introduce civil proceedings within a State. Whether or not this right enters in direct conflict with the obligation to grant a foreign State immunity from domestic civil jurisdiction will depend on the territorial scope of Art. 14 (1) CAT.

When applying the recognized methods of treaty interpretation, a clear answer on the extraterritorial character of Art. 14 CAT cannot be given so easily. While the literal, systematical and teleological interpretation method give a clear indication that the obligations contained in Art. 14 CAT bind all Contracting Parties alike and not just the perpetrating State, the historical interpretation method shows no clear picture. Regarding the *travaux préparatoires*, legal scholars as well as courts seem to have put too much emphasis on the historical documents and the geographically limited proposition introduced by the Dutch delegation during the drafting procedure.¹³⁰⁶ For several reasons it is not convincing that the geographical limitation was omitted by mistake. In the author's opinion it is more likely that the drafting committee came to an infor-

¹³⁰⁵ *Nait-Liman v. Switzerland*, Grand Chamber Judgment, para. 190.

¹³⁰⁶ See: NOVAK/MCARTHUR, p. 494 and 502, PARLETT, p. 398, BYRNES, p. 543, APPELBAUM, p. 163, *Nait-Liman v. Switzerland*, ECtHR Judgment, para. 33 ff.

mal understanding to suppress a clear reference to the territorial scope of Art. 14 CAT and return to the original territorially unlimited version as contained in the UN Declaration on Torture. In any case, given the subsidiary nature of the historical interpretation method in international law, the author suggests to simply ignore the *travaux préparatoires* within appreciation of the territorial scope of Art. 14 CAT, as it seems to confuse both legal scholars and courts more than it sheds light into the legal issues raised.

Further, the appreciation of subsequent agreement and practice of contracting parties is stuck in a paradoxical limbo. While many domestic courts as well as the ECtHR have opted against a territorially unlimited understanding of the obligations contained in Art. 14 CAT, the Committee against Torture has criticized several States for doing so and for not giving full effect to General Comment No. 3. The Committee, however, fails to identify a disrespect of its recommendations in its jurisprudence. This development, at least for now, establishes the situation, where States are asked to implement a broad understanding of Art. 14 CAT are, however, not penalized for not fulfilling their obligations. This leads to the conclusion that domestic courts are not hindered to adopt a territorially limited approach to the right to remedy and reparation severely undermining General Comment No. 3.

Another interpretive element not yet mentioned needs to be included within the discussion of the extraterritorial character of Art. 14 CAT. According to Art. 31 (3c) VCLT, a treaty must necessarily be read within the context of “any relevant rules of international law applicable in relations between the parties”¹³⁰⁷. The customary rules of State immunity law consequently enter the equation in a significant way. Especially the European Court of Human Rights has, time and time again, emphasized the importance of a coherent international legal order in the assessment of State immunity issues¹³⁰⁸ which leads to the assumption that Art. 14 CAT should not be interpreted so

¹³⁰⁷ Art. 31 (3c) VCLT.

¹³⁰⁸ *Nait-Liman v. Switzerland*, ECtHR Judgment, para. 105, *Al-Adsani v. the United Kingdom*, para. 55, *Kalogeropoulou v. Greece and Germany*, para. D.1.c, *Jones v. the United Kingdom*, para. 195, *Fogarty v. the United Kingdom*, para. 35, *McElhinney v. Ireland*, para. 36, *Cudak v. Lithuania*, para. 56, *Sabeh el Leil v. France*, para. 48.

wide as to put the forum State under conflicting international law obligations. While this opinion convinces, it should, however, never be read in a vacuum. The author stresses the fact that Art. 31 (3c) VCLT constitutes only one of several interpretation methods and criticizes the ECtHR for being too selective in their legal argumentation as all interpretative elements must be applied jointly. Also, as elaborated in detail previously, all relevant factors of international law must be taken into consideration, including developments described in § 6 (II.2).¹³⁰⁹

This leads to an inherent dilemma. In a situation where the different treaty interpretation methods lead to a different outcome, the ILC highlights the unity of procedure based on good faith and effectiveness:

When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.¹³¹⁰

What the ILC¹³¹¹ and the ICJ¹³¹² call the principle of *ut magis valeat quam pereat* (it is better to have effect than to be made void) essentially favors the application of a treaty over its non-application. Applied to the question at hand, in situations where courts are uncertain whether Art. 14 CAT is applied extraterritorially for cases amounting to torture, jurisdiction should be exercised. This would be in line with the text, the context and the purpose of Art. 14 CAT and strengthen the legal protection of victims of torture.¹³¹³ Support for this conclusion is given by former UN Special Rapporteur on Torture JUAN MÉNDEZ confirming that “article 14 is not geographically limited on its

¹³⁰⁹ For an analysis over the most relevant developments of international law and its impact on foreign State immunity see § 6 (II.2), p. 130 ff.

¹³¹⁰ ILC Draft Articles on the Law of Treaties, p. 219.

¹³¹¹ Ibid.

¹³¹² *Advisory Opinion concerning the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Opinion of the ICJ of 30.3.1950, ICJ Reports 1950, p. 229.

¹³¹³ Conclusion supported by: ADAMS, p. 263, CREMER, p. 166, HALL, *Duty of States Parties to the Convention against Torture*, p. 936 f., ORAKHELASHVILI, *State Immunity and Hierarchy of Norms*, p. 961.

face and will apply no matter where the torture takes place.”¹³¹⁴ This scenario would essentially lead to a direct conflict of norms between the individual’s right to introduce civil proceedings in a domestic court and the immunity of foreign State in said court.

How this norm conflict should be resolved is a matter which has not been extensively discussed in literature or jurisprudence.¹³¹⁵ The *Institut de Droit International* criticizes the ICJ for not paying sufficient attention to the inherent conflict arising between the right to reparation and the grant of jurisdictional immunities.¹³¹⁶ On one hand, the Court does accept that the right to reparation constitutes a distinct legal obligation owned to a victim of a violation of law. On the other hand, according to IDI, the Court fails to identify a clear conflict between these norms once no other remedy is available for the introduction of civil claims.¹³¹⁷ Once a norm conflict has been established, an overwhelming majority of opinions expressed in this regard resolves the issue in favor of the individual’s right to reparation. In its 2009 Naples session of IDI, Lady HAZEL FOX presenting the Institute’s Resolution on The Fundamental Rights of the Person and the Immunity from Jurisdiction of States claiming that “the removal of immunity from proceedings in national courts is one way by which effective reparation for the commission of international crimes may be achieved.”¹³¹⁸ Art. 2 (2) of the Principles further suggests: “immunities should not constitute an obstacle to the appropriate reparation to which victims of crimes addressed by this resolution are entitled.”¹³¹⁹ By 2015, the IDI had adopted the Tallinn Resolution on the implementation of universal civil jurisdiction. In Art. 5 of the document the Institute once again confirmed that “State immunity shall not deprive of its effects the State’s obligation to repair the

¹³¹⁴ Interim Report of the UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Juan MÉNDEZ of 7.8.2015, UN Doc. No. A/70/303, para. 56.

¹³¹⁵ *Bouzari v. Iran*, para. 80 f., *Kazemi v. Iran*, *Naït-Liman v. Switzerland*, ECtHR Judgment, para. 33 ff., APPELBAUM, p. 163, BYRNES, p. 543, GIEGERICH, p. 220, TAMS, Schwierigkeiten mit dem Jus Cogens, p. 348, CANDRIAN, p. 582 ff.

¹³¹⁶ *Annuaire de l’Institut de droit international de Tallinn*, p. 113 f.

¹³¹⁷ *Ibid.*, p. 117 f.

¹³¹⁸ *Annuaire de l’Institut de droit international session de Naples*, p. 228.

¹³¹⁹ *Ibid.*, p. 230.

prejudice caused to victims of international crimes” giving unmistakable priority over the implementation of the right to effective and prompt reparation with regard to jurisdictional immunities.¹³²⁰

Most convincing argument brought forward in this discussion is the principle of *lex specialis derogat generalis*. It is correct that the wording in Art. 14 (1) CAT does not contain any reference to the immunity of a foreign State. Nevertheless, the forum State which is under the obligation to grant immunity from jurisdiction under customary international law while at the same time is asked to implement Art. 14 (1) CAT, a treaty provision which gives specific entitlements to victims of torture will have to conclude that the UN Convention against Torture enjoys superiority because of its *lex specialis* nature.¹³²¹ CREMER arrives to the same conclusion, but adds one procedural step. A real conflict of norms only arises once the victim of torture has been denied effective remedy in the State, where torture was committed or if said State is unwilling or unable to fulfill its obligation under Art. 14 CAT.¹³²² The forum State is obligated to lift the foreign State immunity privilege with regard to victims of torture as a *lex specialis* rule in circumstances where the right to reparation would rendered ineffective.

This additional procedural step is insofar convincing as it would implement the right to reparation against a foreign State only in cases where no other means are available. The author of this thesis, however, argues that a conflict of norm exists regardless of prior actions taken by the victim or the situation in the perpetrating State. It is not a question of resolving a norm conflict to ask of the victim of torture to exhaust local remedies, the norm conflict inflicted on the forum State exists nonetheless. In the interest of rule of law, however, all State actions, including the lifting of a procedural bar, should always be exercised according to the general principle of proportionality. In the implementation of a torture-related exception to the jurisdictional immunity of a State, it consequently seems proportional to ask from the plaintiff to exhaust local remedies before being permitted to use a foreign civil court.

¹³²⁰ Annuaire de l’Institut de droit international de Tallinn, p. 136.

¹³²¹ TERRY, p. 120, STEPHENS Beth, Expanding Remedies for Human Rights Abuses: Civil Litigation in Domestic Courts, German Yearbook of International Law, Vol. 40, 1997, p. 137.

¹³²² CREMER, p. 166.

Judge YUSUF, in his dissenting opinion in the ICJ proceedings between Germany and Italy, criticizes the majority of his colleagues for not having sufficiently analyzed the individual's right to reparation within their appreciation and consequently completely failed to address the core issue of the case.¹³²³ After a comprehensive presentation of the individual's entitlement to reparation and remedy in the international legal order, YUSUF accepts that "jurisdictional immunities come into conflict with fundamental right consecrated under human rights or humanitarian law, for which a forum State has an obligation to secure and enforce in its territory [...]."¹³²⁴ He consequently proposes a balancing exercise where immunity should only be given in cases where it does not lead to a denial of justice rendering the right to reparation completely void of any meaning:

Recognizing that a failure to make reparations for war crimes or crimes against humanity may result in non-immunity before domestic courts, particularly when no other means of redress is available, is not so much about further narrowing the scope of State immunity, but about bringing it in line with the growing normative weight attached by the international community to the protection of human rights and humanitarian law, and the realization of the right to effective remedy for human beings.¹³²⁵

II. The Concept of Universality in Civil Matters

Giving priority to the implementation of Art. 14 (1) CAT over the grant of jurisdictional immunity of a foreign State would essentially lead to a universal jurisdiction in civil matters over torture offences. The upcoming section of the thesis wants to address this issue and show that it would not be a violation of international law to assess universal civil jurisdiction in civil matters and that a significant State practice already exists regarding extraterritorial civil jurisdiction for torture committed abroad.

¹³²³ *Germany v. Italy*, Dissenting Opinion Judge YUSUF, para. 1 and 3.

¹³²⁴ *Ibid.*, para. 28.

¹³²⁵ *Ibid.*, para. 52.

In relation to this discussion, a specific reference is necessary to another provision of CAT. In distinction to Art. 14 (1) CAT, the object of Art. 5 (2) CAT is not to grant substantive rights to a victim of torture but a provision with the sole purpose of extending the jurisdiction of national courts to torture committed outside a contracting party's territory. What is known as "universal jurisdiction" may put a State under the obligation to assume jurisdiction over extraterritorial events and prosecute a foreign official. The question should be tackled of whether Art. 5 (2) CAT might be applied to establish jurisdiction in both criminal as well as civil matters. Is universal civil jurisdiction a legal and desirable measure to implement the victims' right to remedy and reparation as contained in Art. 14 CAT? What practical issues might occur when universal jurisdiction is exercised and how could they be resolved? In section three of this chapter, both *forum non conveniens* and *forum necessitatis* should be analyzed as possible mechanisms to prevent malicious and unjustified claims from being raised in a domestic court while at the same time preventing a denial of justice.

1. The Concept of Universal Jurisdiction

The principle of universal jurisdiction permits a State to assume jurisdiction for a limited category of crimes even if no connection to the territory or to a national of said State exists.¹³²⁶ Traditionally universal jurisdiction was introduced for the purpose of a global fight against piracy on the high sea. Any State could legally seize a pirate ship or other property, arrest the crew and decide upon penalties to be imposed as it was in the interest of all States to maintain peace and safety for the commerce on the high sea.¹³²⁷ With the development of international law, national courts have gradually extended the scope of universal jurisdiction in criminal matters to include other crimes as well. Israel tried and convicted Adolf Eichmann, a Nazi officer responsible for the organization of the holocaust, for his crimes committed during World War II,

¹³²⁶ DONOVAN Donald, Universal Civil Jurisdiction – The Next Frontier?, in: Proceedings of the Annual Meeting (American Society of International Law), Vol. 99, 2005, p. 117, WALLACH David, The Irrationality of Universal Civil Jurisdiction, Georgetown Journal of International Law, Vol. 86, 2015, p. 812.

¹³²⁷ *Democratic Republic of Congo v. Belgium*, Separate Opinion of President GUILLAUME, para. 5, refers to Art. 105 UNCLOS.

years before the creation of the Israeli State.¹³²⁸ Spain partially relied on the universality principle to request the United Kingdom to extradite Augusto Pinochet, the former Chilean Dictator responsible for widespread murder and torture.¹³²⁹ The rational and justification of universal jurisdiction is based on the existence of certain crimes universally condemned so that all States have the legitimate interest to punish and prosecute them regardless of the *locus delicti*.¹³³⁰ As described by the European Commission in an *amicus curiae* brief to the U.S. Supreme Court: “When properly exercised, universal jurisdiction affirms fundamental principles of international law.”¹³³¹

Universal jurisdiction was since codified by the United Nations in different texts and documents. Examples for treaty provisions implementing universal jurisdiction are Art. 6 of the UN Genocide Convention, Art. 7 of the New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Art. 5 (2) of the Convention against the Taking of Hostages¹³³², Art. 8 of the Convention for the Suppression of Terrorist Bombings¹³³³, Art. 4 (2b) of the Drug Trafficking Convention¹³³⁴ and, as mentioned, Art. 5 CAT which reads:

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

¹³²⁸ *Attorney General of the Government of Israel v. Eichmann*, p. 310.

¹³²⁹ See *Ex parte Pinochet* (No. 3).

¹³³⁰ See among many: SADAT Leila, Exile, Amnesty and International Law, *Notre Dame Law Review*, Vol. 81, 2006, p. 975, Brief of the European Commission on behalf of the European Union as *amicus curiae* in support of neither party in *Kiobel v. Royal Dutch Petroleum*, Judgment of the U.S. Supreme Court of 17.4.2013, 569 U.S. No. 10-1491, p. 16 (cited: Brief of the European Commission in *Kiobel v. Royal Dutch Petroleum*).

¹³³¹ Brief of the European Commission in *Kiobel v. Royal Dutch Petroleum*, p. 16.

¹³³² International Convention against the Taking of Hostages, signed in New York on 17.12.1979, based on UNGA Resolution 146 (XXXIV), UN Doc. No. A/RES34/146.

¹³³³ International Convention for the Suppression of Terrorist Bombings signed in New York on 12.1.1998, 2149 UNTS 256.

¹³³⁴ Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances signed in Vienna on 20.12.1988, 1582 UNTS 95.

- (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
 - (b) When the alleged offender is a national of that State;
 - (c) When the victim is a national of that State if that State considers it appropriate.
2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article. [...]

The interesting aspect of this treaty provision is not that a contracting party has the means to assume jurisdiction over extraterritorially committed torture but that it has the obligation to do so if a perpetrator is present on its territory and is not extradited to a State willing to prosecute the crime.¹³³⁵ What is known as the principle of *aut dedere aut judicare* was extensively discussed by the ICJ in a case concerning former Chadian President Hissène Habré, who was accused of being responsible for systematic torture and crimes against humanity in Chad.¹³³⁶ Belgium had requested Senegal, the country where Mr. Habré was residing at the time, to bring criminal proceedings against the accused on the basis of the Convention against Torture or else extradite him to Belgium.¹³³⁷ The Court decided in favor of Belgium's claim to the extent that it held Senegal responsible for failing to make immediate preliminary inquiry into the facts of systematic torture and crimes against humanity committed by the accused in Chad and for failing to submit the case to its competent authorities for the purpose of prosecution in violation of CAT.¹³³⁸ It further unanimously ordered Senegal to extra-

¹³³⁵ PEDRETTI, p. 397, ADAMS, p. 252, SHEN, p. 324 ff.

¹³³⁶ *Belgium v. Senegal*, p. 422.

¹³³⁷ *Belgium v. Senegal*, para. 1.

¹³³⁸ *Ibid.*, para. 122.

dite Mr. Habré should it continue to fail to introduce criminal proceedings against him.¹³³⁹

Even though universal jurisdiction primarily relates to the criminal prosecution of persons responsible for international crimes, it is increasingly used in civil matters as well. The United States famously provides civil fora for any person who has fallen victim to a violation of “the law of nations”¹³⁴⁰ among others depending on the Alien Tort Statute of 1789 and the 1991 Torture Victims Protection Act.¹³⁴¹ The TVPA allows for filing of civil suits against individuals who, acting in an official capacity for any foreign nation, committed torture or extrajudicial killing. Before the *Mohamad* decision¹³⁴², where the Court limited the TVPA’s scope to be applicable only against natural persons, cases could and were indeed brought against certain States for torture committed outside U.S. jurisdiction.¹³⁴³

In relation to universal jurisdiction in civil matters in the U.S., one court ruling must be discussed in detail. In the case of *Sosa v. Álvarez-Machain*¹³⁴⁴, the Supreme Court of the United States upheld the Alien Tort Statute and endorsed the continued principle of universal civil jurisdiction in case of torture and subsequent murder of an individual.¹³⁴⁵ The case concerned a U.S. drug enforcement agent who was kidnapped and murdered by a Mexican drug cartel in 1985. After several attempts to convince Mexico to extradite Mr. Álvarez-Machain to the U.S. for the purpose of criminal prosecution, the Drug Enforcement Administration (DEA) illegally abducted him and smuggled him across the U.S.-Mexican border. Because of this extraordinary rendition, no criminal proceedings could be brought against Mr. Álvarez-Machain in U.S. courts, how-

¹³³⁹ Ibid.

¹³⁴⁰ See the U.S. Alien Tort Statute of 1789, 28 U.S.C. §1350.

¹³⁴¹ Comprehensive overview of the U.S. legislation and case law in § 2 (II.1.a), p. 42 ff.

¹³⁴² *Mohamad v. Palestinian Authority*, Judgment of the U.S. Supreme Court of 18.4.2012, 132 S.Ct. 1702 (2012).

¹³⁴³ See § 2 (II.1.a), p. 42 ff.

¹³⁴⁴ *Jose Francisco Sosa v. Humerto Álvarez-Machain*, Judgment of the U.S. Supreme Court of 29.6.2004, 542 U.S. 692.

¹³⁴⁵ Universal civil jurisdiction as established by the U.S. Court of Appeals for the 2nd Circuit in *Filártiga v. Peña-Irala*.

ever civil remedies would still be available based on the Alien Tort Statute (ATS). The Supreme Court unanimously decided that the ATS established jurisdiction over civil suits brought against a foreign citizen for crimes committed outside the United States in violation of the law of nations or a treaty to which the United States is party. The fact that the territorial application was later significantly reduced by the Supreme Court in *Kiobel v. Royal Dutch Petroleum* does not change the fact that the U.S. has applied (and continues to apply through AEDP and JASTA¹³⁴⁶) universal civil jurisdiction since decades.

During the proceeding in *Sosa v. Álvarez-Machain* a joint brief of the Governments of Australia, the Swiss Confederation and the United Kingdom was introduced as *amici curiae* in support of the petitioner. The Australian-Swiss-British memorandum draws a rather skeptical picture towards universality in civil matters and requires a “substantial effect” to the forum State in order to exercise jurisdiction. The brief rejects universal civil jurisdiction even in cases relating to *jus cogens* violation as long as it has an effect on a “responsible legislative sovereign” (*in casu* Mexico).¹³⁴⁷ A broad assertion of jurisdiction would potentially cause a disagreement among sovereign States that could disrupt trade and investment in a global economy and “undermine the political efforts to foster development of the rule of law and good governance”¹³⁴⁸. The memorandum restricts the use of universal civil jurisdiction to cases, where no such sovereign exists, either because of civil war¹³⁴⁹, or in cases involving failed States.¹³⁵⁰ The Governments of Australia, Switzerland and the United Kingdom consequently urged the Supreme Court to give full effect to the doctrine of *forum non conveniens* and exhaustion of

¹³⁴⁶ See § 2 (II.1.a), p. 42 ff.

¹³⁴⁷ AUS/CH/UK Brief, p. 10 and 27.

¹³⁴⁸ Ibid., see also BATES, p. 665 f. and NOLTE Georg, Universal Jurisdiction in the Area of Private Law – The Alien Tort Claims Act, in: Tomuschat Christian/Touvenin Jean-Marc (eds.), *The Fundamental Rules of the International Legal Order*, Leiden/Boston, 2006, p. 279.

¹³⁴⁹ As done by the U.S. 2nd Circuit Court in relation to Yugoslavia in *Kadić v. Karandžić*, Judgment of 13.10.1995, 70 F.3d 232.

¹³⁵⁰ AUS/CH/UK Brief, p. 17 and 23.

local remedies in extraterritorial disputes among foreign nationals¹³⁵¹, an issue which is discussed further below.¹³⁵²

In contrast to the briefs introduced by Australia, Switzerland and the UK, the European Commission, which also submitted briefs on behalf of the European Union in both the *Sosa* and in *Kiobel* rulings, largely supported the principle of universal civil jurisdiction. It primarily argued that universal civil jurisdiction is not exclusive to the U.S. but common to any civil law country applying the “adhesive” criminal procedure (in German “*Adhäsionsverfahren*”).¹³⁵³ In those countries, where victims are allowed to participate in the criminal proceedings against a perpetrator as *partie civile*, the clear line between criminal and civil procedure disappears.¹³⁵⁴ A trial based on the exercise of criminal universal jurisdiction consequently entails the possibility to request compensation as an equal part within the proceedings. According to the European Commission, “adhesive” procedures are exercised in at least 15 EU-member States¹³⁵⁵ and Switzerland, Argentina, Bolivia, China, Colombia, Costa Rica, Myanmar, Panama, Senegal and Venezuela.¹³⁵⁶

Adhesive criminal procedures are, however, not just a national phenomenon. Art. 75 of the ICC-Rome Statute provides the International Criminal Court with the possibility to “order directly against a convicted person specifying appropriate reparations”¹³⁵⁷ after it has “take[n] account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.”¹³⁵⁸ In *Prosecutor v.*

¹³⁵¹ Ibid., p. 26.

¹³⁵² See § 8 (II.3.c), p. 345 ff.

¹³⁵³ Brief of *amicus curiae* of the European Commission on behalf of the European Union in support of neither party, in the proceedings of *Sosa v. Álvarez Machain*, Judgment of the Supreme Court (cited: Brief of the European Commission in *Sosa v. Álvarez-Machain*), p. 21 f.

¹³⁵⁴ Ibid, see also BATROS/WEBB, p. 1169.

¹³⁵⁵ Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxemburg, the Netherlands, Poland, Portugal, Romania, Spain, and Sweden.

¹³⁵⁶ Brief of the European Commission in *Kiobel v. Royal Dutch Petroleum*, p. 18 f.

¹³⁵⁷ Art. 75 (2) ICC-Statute.

¹³⁵⁸ Art. 75 (4) ICC-Statute, for a closer analysis see: DONAT-CATTIN, p. 1853 ff., MCCARTHY Conor, *Reparations and Victims Support in the International Criminal Court*, Cambridge, 2012.

Furundžija, the ICTY made a brief remark on the extraterritorial aspect of the victim's right to reparation. Due to the fundamental value represented by the prohibition of torture, a "victim could bring a civil suit for damage in a foreign court, which would therefore be asked *inter alia* to disregard the legal value of the national authorizing act."¹³⁵⁹ By saying so the ICTY endorses the "adhesive" criminal procedure and even accepts that a national statute preventing victims from introducing civil claims should be disregarded if it fails to provide effective remedy.

Nevertheless, the European Commission believes that universal civil jurisdiction should be restricted in cases of grave violations of international law and only if no other remedy is available. By stating so, the Commission emphasizes the necessity to recognize the State where crimes were committed as the predominantly responsible one for the adjudication of civil claims. It however accepts that, in certain circumstances, foreign courts must fill the accountability gap through the assessment of universal jurisdiction as it would otherwise lead to impunity.¹³⁶⁰

Next to the U.S., Canada has adopted legislation implementing universal civil jurisdiction. According to the 2012 Justice for Victims of Terrorism Act, Canadian Courts enjoy civil jurisdiction over acts committed abroad under the condition that reparations are requested resulting from terrorists acts and are introduced by Canadian passport holders, permanent residents or as long as the civil claim has a "real and substantial connection to Canada"¹³⁶¹. Any person or entity involved in terrorist activities, including sovereign States, can no longer enjoy jurisdictional immunity otherwise enjoyed by international law.¹³⁶²

In addition, Dutch Courts established universal civil jurisdiction over acts of torture committed abroad. In the 2013 *Akpan* case, the District Court of The Hague held the Shell Holding company responsible for the severe mistreatment of the Ogoni people

¹³⁵⁹ *Prosecutor v. Furundžija*, para. 155.

¹³⁶⁰ Brief of the European Commission in *Kiobel v. Royal Dutch Petroleum*, p. 18 f.

¹³⁶¹ § 4 (2) of the Justice for Victims of Terrorism Act, S.C. 2012, c. 1, S. 2.

¹³⁶² § 4 (1a) and (1b) Justice for Victims of Terrorism Act.

in Nigeria during the course of its petroleum-extraction activities.¹³⁶³ Previously, the same court had ordered damages in favor of a Palestinian doctor who had been tortured by Libyan officials outside Dutch territory.¹³⁶⁴

What this development shows is, first of all, that a significant practice of universal civil jurisdiction exists on both domestic and international level and, secondly, that the assertion of universal civil jurisdiction is not *per se* a breach of international obligations. International law is almost silent on the preconditions necessary for a State to assume jurisdiction.¹³⁶⁵ Generally reference is made to the PCIJ opinion in the *Lotus* ruling where the Court has acknowledged that a State has a significant margin of discretion to establish both criminal and civil jurisdiction over extraterritorial events.¹³⁶⁶ What DONAVAN/ROBERTS refer to as a “permissive customary principle”, essentially gives a State the liberty to assume universal jurisdiction as part of its exclusive sovereignty over subject matters.¹³⁶⁷ During the 1999 Hague Conference on Private International Law, the participants adopted a draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters. The Convention, which never became law, distinguished between a “white list” of areas where contracting parties are allowed to exercise civil jurisdiction, a “black list” where jurisdiction would be excluded and a “grey list” where jurisdiction was possible but the recognition and enforcement of a judgment may be denied by contracting parties. Among the prohibited bases of jurisdiction contained in Art. 18, a State could not exercise jurisdiction over civil matters, where no connection could be established to the forum (a.k.a universal civil jurisdiction). Art. 18 (3), however, contained an exception to this rule advocating for a universal civil jurisdiction for a limited number of crimes:

¹³⁶³ *Akpan v. Shell*, Judgment of the District Court of The Hague of 30.1.2013, No. C/06/337050/HA.

¹³⁶⁴ *El-Hojouj v. Amer Derbas*, Judgment of the District Court of The Hague of 21.3.2012, No. 400822/HA.

¹³⁶⁵ *Annuaire de l’Institut de droit international de Tallinn*, p. 91.

¹³⁶⁶ *France v. Turkey*, p. 19, see also *Democratic Republic of Congo v. Belgium*, Arrest warrant case, Joint dissenting opinion of Judges HIGGINS, KOOIJMANS and BUERGENTHAL, para. 45 ff.

¹³⁶⁷ DONOVAN/ROBERTS, p. 144.

Nothing in this Article shall prevent a court in a Contracting State from exercising jurisdiction under national law *in an action claiming damages* in respect of conduct which constitutes –

a) genocide, a crime against humanity or a war crime [...]

b) [...]

c) a grave violation against a natural person of non-derogable fundamental rights established under international law, *such as torture, slavery forced labor of disappeared persons.*

Sub-paragraphs [...] c) above apply only if the party seeking relief is exposed to a *risk of a denial of justice because proceedings in another State are not possible or cannot reasonably be required.*¹³⁶⁸ [emphasis added]

Many authors agree and stress the fact that universal jurisdiction in civil matters is legal at least for the crimes for which universal criminal jurisdiction exists.¹³⁶⁹ It would not make sense to oblige a State to assume extraterritorial criminal jurisdiction over an individual in respect of the *aut dedere aut judicare* principle but consider it a breach of law to do the same in civil matters. So far international law does not prohibit States from providing torture victims with a civil remedy even if acts were committed extraterritorially.¹³⁷⁰

2. Criminal v. Civil Universal Jurisdiction

The obligation to assume jurisdiction over an extraterritorial act of torture is contained in Art. 5 (2) CAT. A literal, systematic and historic interpretation of the clause would suggest that it only applies to the establishment of criminal jurisdiction over

¹³⁶⁸ Hague Conference on Private International Law, Preliminary Draft Convention on Jurisdiction and Foreign Judgment in Civil and Commercial Matters, adopted on 30.10.1999.

¹³⁶⁹ KAMMINGA, Universal Civil Jurisdiction, p. 125, TERRY, p. 133, PARLETT, p. 386, HALL, UN Convention on State Immunity, p. 421 f., MCGREGOR, The Need to Resolve the Paradoxes of the Civil Dimension of Universal Jurisdiction, p. 127, *Sosa v. Álvarez-Machain*, Concurring opinion Justice BREYER.

¹³⁷⁰ NOWAK/MCARTHUR, p. 494 ff.

torture committed abroad while no such guarantee exists with regard to civil jurisdiction.¹³⁷¹ In States where “adhesive” criminal proceedings are implemented however, the criminal and civil aspects of a claim are inherently intertwined. As shown by the *Milde* proceedings in Italy, it is not uncommon for victims to participate in the criminal trial and attach civil claims for damages against both the perpetrator and additionally against the foreign State for violations endured.¹³⁷² If a State is internationally obliged to prosecute a perpetrator for extraterritorial acts of torture under international law while at the same time provides civil remedies to victims of torture in the criminal proceedings under domestic law, how can a criminal court justify denying the torture victims to participate in the proceedings as *partie civile* and not order reparations directed against a foreign State? As we have seen, no clear prohibition exists for a domestic court to assume civil universality in international law that could serve as a legal basis for the court’s denial to assert civil jurisdiction. The sole question is consequently not whether universal jurisdiction can be asserted, but whether it is desirable to do so when allegations of torture are forwarded.

As a reminder, the scope of universal jurisdiction essentially relates to the protection of fundamental values in international law. For a limited category of crimes, including the prohibition of torture, the necessity to bring justice to victims and end the continued impunity was considered sufficient reason for an extension of jurisdiction because of their “sheer heinousness [...] which are universally condemned and which every state has an interest in repressing even in the absence of traditional connecting factors.”¹³⁷³

[T]he torturer has become like the pirate and the slave trader before him *hostis humani generis*, an enemy of all mankind.¹³⁷⁴

A significant number of legal scholars claim that the rationale behind criminal jurisdiction may similarly justify the exercise of civil universality, many even giving it pri-

¹³⁷¹ ADAMS, p. 264, BURGERS/DARNELIUS, p. 132 f., PARLETT, p. 394.

¹³⁷² See summary of the *Milde* proceedings in § 2 (II.2.b), p. 43 ff.

¹³⁷³ DONOVAN/ROBERTS, p. 143, see also WALLACH, p. 813.

¹³⁷⁴ *Filártiga v. Peña-Irala*, para. 890.

ority over criminal prosecution as it constitutes a less intrusive means.¹³⁷⁵ It is correct to assume that the State's involvement in civil proceedings is not as damaging to the international relations as it might be in criminal law. The State simply provides a forum in which a private individual and foreign State exchange arguments and rebuttals on an equal footing. Just because jurisdiction is exercised does not mean that the defendant State will be found liable for the allegations raised. In criminal proceedings, however, a State representative (the public prosecutor) is asked to actively conduct investigations and prove the culpability of a foreign official, an act that undeniably leads to diplomatic tensions.¹³⁷⁶ This argument seems rather convincing. If the international community has survived the introduction of a criminal universality, which allows a State to arrest and convict former Heads of State and other incumbent public officials¹³⁷⁷, it is difficult to argue in what way civil proceeding against a State would be a bigger threat to the equality, sovereignty or dignity of States or the friendly relations among the international community. REYDAMS refers to this phenomenon as "*qui peut le plus peut le moins*" essentially arguing that universal civil jurisdiction, as a less severe action, necessarily must have been implied within the development of the universal criminal jurisdiction.¹³⁷⁸

Skeptics of a universality principle in civil matters primarily focus on the differences in nature, scope and implementation that exist between civil and criminal procedures. The Grand Chamber of the ECtHR noted that the possibility of joining an ongoing criminal proceeding as a *partie civile* could not be compared to an autonomous civil proceeding. The establishment of the facts and the administration and evaluation of the evidence presented significantly fewer practical difficulties when the investigation

¹³⁷⁵ DONOVAN/ROBERTS, p. 153 and 155, PARLETT, p. 390, MCGREGOR, *State Immunity and Human Rights*, p. 143, VAN SCHAACK Beth, *Justice Without Borders: Universal Civil Jurisdiction*, Proceedings of the Annual Meeting (American Society of International Law), Vol. 99, 2005, p. 120, REYDAMS Luc, *Universal Jurisdiction: International and Municipal Legal Perspectives*, Oxford, 2003, p. 3, *Sosa v. Álvarez-Machain*, concurring opinion of Justice BREYER.

¹³⁷⁶ VAN SCHAACK, *Justice Without Borders*, p. 121 f.

¹³⁷⁷ See § 4 (II.2.a), p. 92 ff.

¹³⁷⁸ REYDAMS, p. 3, see also PAECH, p. 58, MCGREGOR, *State Immunity and Human Rights*, p. 143, NOLLKAEMPER, *Concurrence between Individual Responsibility and State Responsibility*, p. 617.

is conducted by the competent prosecuting authority.¹³⁷⁹ Further, criminal proceedings are generally introduced by a decision of a public authority (normally the attorney general or the public prosecutor). It is up to the public authorities to conduct a comprehensive weighing of interests and assess the potential impacts of a criminal proceeding against a foreign individual. Civil proceedings are introduced by the sole discretion of the victim.¹³⁸⁰ Courts would have limited possibility to deny jurisdiction over claims introduced based on universal civil jurisdiction by an individual. Private persons, so BRADLEY, often ignore the possible impact on foreign policy or the international security that the initiation of their claims might have.¹³⁸¹ A counter-argument may, however, be raised that civil proceedings are more adapt to have the rights of victims implemented exactly due to the fact that they are initiated by the individual and do not depend on the State's discretion.¹³⁸² In fact, States are reluctant to introduce proceedings in relation to another sovereign's human rights violations for pure political reasons.¹³⁸³ Courts should, however, be reminded that civil suits against a foreign State are already a reality today as individual may initiate them *proprio motu* for acts recognized as *de jure gestionis* or even for reparation claims of physical harm endured on the territory of the forum¹³⁸⁴. No significant worsening of bilateral relations could since be observed.

Other authors argue that civil proceedings, by their nature, are no substitute to criminal proceedings and that it is not in the interest of international justice to capitalize from international crimes.¹³⁸⁵ As the standard of proof is significantly lower in civil

¹³⁷⁹ *Nait-Liman v. Switzerland*, Grand Chamber Judgment, para. 185.

¹³⁸⁰ VAN SCHAAK, *Justice Without Borders*, p. 120 also *Nait-Liman v. Switzerland*, Grand Chamber Judgment, partly-concurring opinion Judge WOJTYCZEK.

¹³⁸¹ BRADLEY Curtis, *Universal Jurisdiction and U.S. Law*, University of Chicago Legal Forum, Vol. 2001/1, 2001, p. 347.

¹³⁸² MCGREGOR, *The Need to Resolve the Paradoxes of the Civil Dimension of Universal Jurisdiction*, p. 126.

¹³⁸³ TERRY, p. 115.

¹³⁸⁴ Even for acts qualifying as *de jure imperii*, see § 5, p. 114 ff.

¹³⁸⁵ KAMMINGA, *Universal Civil Jurisdiction*, p. 125, VAN SCHAAK, *Justice Without Borders*, p. 120.

proceedings, it makes it “easier” for a person to make a profit out of criminal offences.¹³⁸⁶

Civil proceedings do not to the same extent reflect the opprobrium associated with serious criminal offences. Moreover, the response to serious crime should not be privatized by leaving it entirely to the victims [...]. In sum, while I am in favor of the effective implementation of the right to reparation for victims of human rights abuses, I question the wisdom of pursuing this objective through the exercise of universal civil jurisdiction.¹³⁸⁷

This argument does, however, not correctly depict the situation in which many victims of severe human rights violation find themselves. Victims of torture are not always allowed to participate in a criminal trial as an equal party to the dispute as criminal proceedings are centered around the rights and culpability of the perpetrator.¹³⁸⁸ The interests of victims are often not sufficiently taken into consideration during the prosecution of a crime as it is arguably not the primary scope of the criminal system to rehabilitate the victim but to punish a violation of the law and prevent the occurrence of future offences.¹³⁸⁹ Also, in many circumstances criminal proceedings are no longer an option or have been unavailable from the beginning. This is inherently the case when a claim is directed against a foreign State. At least in relation to torture, no criminal prosecution can be brought against a State under current international law and civil remedies become the only possibility for a victim to receive justice in

¹³⁸⁶ VAN SCHAACK, *Justice Without Borders*, p. 120, TERRY, p. 118.

¹³⁸⁷ KAMMINGA, *Universal Civil Jurisdiction*, p. 125.

¹³⁸⁸ VAN SCHAACK Beth, *With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change*, *Vanderbilt Law Review*, Vol. 57/2305, 2004, MCGREGOR, *The Need to Resolve the Paradoxes of the Civil Dimension of Universal Jurisdiction*, p. 126.

¹³⁸⁹ Opinion supported by STRATENWERTH Günter, *Schweizerisches Strafrecht, Allgemeiner Teil I: Die Straftat*, 4th ed., 2011, p. 44 ff., the scope of the criminal system is a controversial matter and regularly discussed by theorists, a summary of the arguments in: SEELMANN Kurt/GETH Christopher, *Strafrecht, Allgemeiner Teil*, 6th ed., Basel, 2016, p. 4 ff., SIMON Manon, *The Applicability of the Defence of Duress to Cases of Unlawful Killing in International Criminal Law*, Zurich/St. Gallen, 2018, p. 92 ff.

court.¹³⁹⁰ This is also the reason why WALLACH's argument that the "enforcement gap that lies at the heart of universal criminal jurisdiction simply does not exist with respect to civil jurisdiction"¹³⁹¹ must be rejected.

Victims of torture, whose only remedy consists of the introduction of civil claims, continue to be denied justice and remedy in case foreign States are granted immunity from jurisdiction. At least in the human rights context, the fear about the capitalization of international crimes is unjustified, given that victims, as explained above, introduce proceedings not simply out of financial gain but rather out of the need to be recognized as a victim and be able to face perpetrators in a court setting.¹³⁹² In this context, it would be illogical to allow for criminal jurisdiction for acts of torture but deny civil claims as both proceedings emerge from the same illegal conduct of a person.¹³⁹³

Lastly, it might be correct that a public prosecutor or public officials is better placed for evidence gathering or the elaboration of a diplomatically sensitive trial strategy. On the other hand, as mentioned in § 7 of the thesis, no public interests may be identified that would oblige the State to make evidence gathering easier for parties to a civil dispute.¹³⁹⁴ If civil claimants have not enough evidence to support their legal claim against a State, then their request for damages will be denied like it would be in any other tort proceedings. The Court, where litigation is introduced, should simply provide a fair "battle ground" for the exchange of legal arguments and should treat victims of human rights violations like any other civil plaintiff.

In summary, despite some discrepancies between proceedings exercised in civil matters and criminal prosecutions, it can be concluded that in most circumstances uni-

¹³⁹⁰ YANG, *State Immunity in International Law*, p. 426 ff., MCGREGOR, *State Immunity and Human Rights*, p. 141.

¹³⁹¹ WALLACH, p. 830.

¹³⁹² MCGREGOR, *The Need to Resolve the Paradoxes of the Civil Dimension of Universal Jurisdiction*, p. 126, see also § 8 (I.1.b), p. 286 ff.

¹³⁹³ SHEN, p. 342, KEITNER Chimène, *Foreign Official Immunity after Samantar*, *Vanderbilt Journal of Transnational Law*, Vol. 44, 2011, p. 837.

¹³⁹⁴ § 7 (III.1.a), p. 244 ff.

versal civil jurisdiction should be exercised even if Art. 5 (2) CAT does not specifically oblige the forum State to do so.¹³⁹⁵ With the interest of the fight against impunity, universal civil jurisdiction is as much justified as universal criminal jurisdiction. In many ways, civil jurisdiction, as a less intrusive means, might be more capable of protecting the bilateral relations between the forum State and the State in which torture was committed. It gives victims the full control to introduce a trial against the perpetrator better implementing their internationally recognized right to reparation and remedy. A torture-related exception to the jurisdictional immunity of a State leading to a universality in civil matters would therefore not violate international provisions and at least partially compensates the accountability gap for severe human rights violations.

3. Opening the Flood Gates

One of the most cited arguments against universal civil jurisdiction is that litigating human rights violation in a foreign State could give rise to significant disagreement among sovereign States and endanger international peace and collaboration.¹³⁹⁶ In his separate opinion in the *Arrest Warrant case*, Judge GUILLAUME fears that universal jurisdiction would create a “total judicial chaos” as many judicial overlaps exists for the identical claim.¹³⁹⁷ This fear was shared by a significant number of courts and scholars believing that a torture-related exception to State immunity law would create a collapse of the national justice system.¹³⁹⁸ In the previously mentioned British-Australian-Swiss *amicus* brief to the *Sosa v. Álvarez-Machain* case, the submitting Governments urged the U.S. Supreme Court to deny jurisdiction in circumstances

¹³⁹⁵ Conclusion supported by TERRY, p. 120, PARLETT, p. 401 f.

¹³⁹⁶ *Germany v. Italy*, German Reply, para. 53 supported by SCHAARSCHMIDT, p. 19, STEGER, p. 69, APPELBAUM, p. 131, BATES, p. 666, WALLACH, p. 10, GIEGERICH, p. 208, AUS/CH/UK Brief, para. 27, BASSIOUNI Cherif, Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice, Virginia Journal of International Law, Vol. 42, 2001, p. 90.

¹³⁹⁷ *Democratic Republic of Congo v. Belgium*, Separate opinion Judge GUILLAUME, para. 15.

¹³⁹⁸ *Al-Adsani v. The United Kingdom*, Concurring opinion of Judge PELLONPÄÄ, *Nait-Liman v. Switzerland*, Grand Chamber Judgment, para. 118 and 123, *Germany v. Italy*, Oral submission by KOLB Robert on behalf of Germany of 12.9.2012, para. 52, BRÖHMER, p. 196 and 204, WALLACH, p. 10

where another sovereign would be more adapt to exercise jurisdiction, therefore giving full effect to the so-called *forum non conveniens* principle.¹³⁹⁹ On the other hand, in some legal systems around the world, the legislator has provided for an “emergency forum” known as *forum necessitatis*. Beside Switzerland¹⁴⁰⁰ this is the case in a total of 11 EU Member States¹⁴⁰¹ and in the Canadian Province of Québec¹⁴⁰². Also relevant in this regard is the so-called Brussels I-bis Regulation found in EU law. In the exclusive matter of succession and the creation of a European Certificate of Succession, Art. 11 of this regulation provides for *forum necessitatis* if the claim could not reasonably be brought in the court of a third State.¹⁴⁰³ If civil proceedings abroad prove impossible or the institution of proceedings cannot reasonably be expected from the claimants, then civil court should hear the claim if the dispute has sufficient connection with the forum State. It must, however, be mentioned that in all legislation a sufficient connection to the forum State is necessary for the establishment of jurisdiction.

Both the *forum non conveniens* and the *forum necessitatis* approach are useful in preventing an abuse of civil universality, however, both provide diametrically opposed dogmatic instruments to do so. While in most common law countries a claimant must prove that the forum is the most adequate to hear the claim (in other words, has the most factual relevance to the claim), in some civil law countries it suffices to show a minimum *nexus* to the forum in order for proceedings to be admissible. Further, certain States have either adopted legislation implementing universal civil jurisdiction or have discussed legislative proposals to do so. Through what mechanisms was a harmonization between individual remedy rights and an effective domestic justice system intended to be achieved? This field of tension should be discussed in the present

¹³⁹⁹ AUS/CH/UK Brief, para. 27.

¹⁴⁰⁰ Art. 3 FAIPL.

¹⁴⁰¹ Austria, Belgium, Estonia, France, Germany, Luxembourg, the Netherlands, Norway, Poland, Portugal and Romania, see *Nait-Liman v. Switzerland*, Grand Chamber Judgment, para. 84 f.

¹⁴⁰² Art. 3136 Civil Code of Québec, CCQ-1991.

¹⁴⁰³ Art. 11 of Regulation No. 650/2012 of the European Parliament and of the Council of 4.7.2012 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Acceptance and Enforcement of Authentic Instruments in Matters of Succession and on the Creation of European Certificate of Succession, OJ L 201, p. 107.

chapter among others responding to the question, in what way national law could be concretized to prevent abusive and unjustified claims from being introduced in a domestic court, minimizing the potential impact on bilateral relations.

a. *Forum non conveniens*

Forum non conveniens should be exercised if the court in which a trial is introduced is clearly less appropriate than another located in a different country.¹⁴⁰⁴ This way the phenomenon of “forum shopping” can be excluded as only one court, namely the State where the most *nexus* to the claim exists, will be competent to render a judgment.¹⁴⁰⁵ Following the rationale behind the *forum non conveniens* theory, even if a plaintiff has established the necessary cause of action for his proceeding to be introduced, the national court might still deny jurisdiction if it would compromise its sovereignty or security interests.¹⁴⁰⁶ The courts exercise a significant discretion in their decision to refer the matter to another forum taking into account the competing interests of the plaintiff and of a foreign State.¹⁴⁰⁷ Especially with regards to human rights abuses committed abroad, the *forum non conveniens* theory seems justified as – from a purely practical point of view – evidence gathering is most effectively done in the forum where violations occurred.¹⁴⁰⁸ As described above, this, however, only holds true for criminal proceedings, where the administrations of evidence is primarily exercised by public officials, unlike what the practice is in civil proceedings.¹⁴⁰⁹

¹⁴⁰⁴ *Voth v. Manildra Flour Mills Ltd*, Judgment of the High Court of Australia of 13.12.1990, 171 CLR 538, *Piper Aircraft Co v. Reyno*, Judgment of the U.S. Supreme Court of 8.12.1981, 454 U.S. 235, *Spilada Maritime Corp v. Cansulex Ltd*, Judgment of the UK House of Lords of 19.11.1986, [1987] AC 460.

¹⁴⁰⁵ KOZYRIS John, Multinational Litigation and the Notion of *forum non conveniens* as a Remedy against Jurisdictional Abuse, *Revue hellénique de Droit International*, 1992, p. 7 ff.

¹⁴⁰⁶ GARNETT, Should Foreign State Immunity be Abolished?, p. 186, TERRY, p. 121, FLAUSS Jean-François, *Compétence civile universelle et droit international general*, in: Tomuschat Christian/Touvenin Jean-Marc (eds.), *The Fundamental Rules of the International Legal Order*, Leiden/Boston, 2006, p. 397.

¹⁴⁰⁷ GARNETT, Should State Immunity be Abolished?, p. 186 and 188.

¹⁴⁰⁸ DONOVAN/ROBERTS, p. 158.

¹⁴⁰⁹ See § 7 (III.1.c), p. 201 ff.

In addition, following the established rules of private international law, the court will have to apply the law of the country where the damaging act occurred.¹⁴¹⁰ Despite the fact that national civil courts have experience in applying foreign law as part of civil litigation, it can be argued that courts are best placed to interpret their own legislation rather than the one from a foreign State, making a strict application of the *forum non conveniens* theory a justified method to prevent judicial errors.¹⁴¹¹

On the other hand, the legal threshold for a claim to be successfully introduced should not be underestimated. It does not suffice to show that a significant *nexus* to the forum exists but that it has the most factual ties to the case at hand. Depending on the circumstances, the burden of proof is considerably high, given that by default no jurisdiction is exercised and the plaintiff's motions will be dismissed.¹⁴¹² As the margin of appreciation of the court is significant in this regard, the legal outcome of proceedings become inherently unpredictable, especially given that national courts tend to be influenced by political reasoning rather than legal ones if the case involves a foreign State. The *de facto* error-quota in assessing a foreign court capability to litigate a claim is consequently significant. A study conducted in Canada has shown that almost all court cases rejected on the basis of *forum non conveniens* were never introduced somewhere else.¹⁴¹³ The ILA, in a guideline summarizing the best practices in the area of transnational civil human rights litigation, hence urges common law countries to make *forum non conveniens* conditional upon:

- a) the defendant undertaking to accept the jurisdiction of the courts of the State in favour of which jurisdiction is stayed; and

¹⁴¹⁰ Annuaire de l'Institut de droit international de Tallinn, p. 106 f., FOX/WEBB, p. 474.

¹⁴¹¹ *Tolofson v. Jensen*, Judgment of the Supreme Court of Canada of 15.12.1994, [1994] 3 S.C.R. 1022, more information in: TERRY, p. 123 where the author argues that not all agree on *lex loci delicti* to be applicable: ORANGE Jennifer, Torture, Tort Choice and Law and Tolofson, in: Scott Craig (eds.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Tort Litigation*, Oxford, 2001, p. 291 ff.

¹⁴¹² *Upper Lakes Shipping Ltd. v. Foster Yeoman Ltd.*, Judgment of the Ontario Superior Court of Justice of 12.4.1993, Ontario General Division, 14 O.R. (3d) 548, para. 570, TERRY, p. 122.

¹⁴¹³ MANIRABONA Amissi, La responsabilité civile des entreprises pour complicité aux violations des droits humains à l'étranger: Au-delà de l'exception du *forum non conveniens* en droit québécois, *Journal Européen des Droits de l'Homme*, Vol. 2013/3, 2013, p. 458.

b) the actual exercise of jurisdiction by the courts of the State in favour of which jurisdiction is stayed within a reasonable time and in accordance with fundamental standards of access to justice.¹⁴¹⁴

In a comprehensive analysis over the matter of universal civil jurisdiction, the *Institut de Droit International* concluded that the *forum non conveniens* doctrine was an inapt tool for the regulation of universal civil jurisdiction as it led to a widespread denial of justice for victims of severe human rights violation essentially making universal jurisdiction inoperable.¹⁴¹⁵ This observation seems persuasive. It is unlikely for a victim of torture to travel abroad for the introduction of a civil claim if he or she had the real and effective opportunity to do the same in the forum where violations were committed, especially so as it involves higher costs and a lower chance of success, given the involvement of foreign immunities. It is consequently legally more coherent to take a “minimum threshold approach” like the one implemented by the doctrine of *forum necessitatis* instead of the “top-down approach” introduced by *forum non conveniens*.

b. *Forum necessitatis*

In 2012, the ILA adopted the Sofia Guidelines on Best Practices for International Civil Litigation for Human Rights Violations. This document not only defines the circumstances under which *forum necessitatis* should be applied but urges the United Nations and the European Union to promote the adoption of *forum necessitatis* by their Member States.¹⁴¹⁶ According to the ILA, a national court should exercise jurisdiction in order to prevent a denial of justice in circumstances where “no other court is available; or the claimant cannot reasonably be expected to seize another court”¹⁴¹⁷. *Forum necessitatis* should serve as a safety net for the preservation of the plaintiff’s right to access to court and effective remedy.

¹⁴¹⁴ Art. 2.5 (2 a) and (2b) of the Sofia Guidelines on Best Practices for International Civil Litigation for Human Rights Violation, based on Resolution No. 2/2012 adopted by the ILA in their 75th Conference on International Civil Litigation and the Interests of the Public held in Sofia, ILA Report 2012, p. 321 ff. (cited: Sofia Guidelines).

¹⁴¹⁵ Annuaire de l’Institut de droit international de Tallinn, p. 102.

¹⁴¹⁶ Preamble of the Sofia Guidelines.

¹⁴¹⁷ Art. 2.3 (2 a) and (2b) Sofia Guidelines.

Nevertheless, the exercise of jurisdiction can be made conditional upon a sufficient connection to the forum. Following the theory of complementarity in international law, the State, on whose territory a violation of law has been committed, has a justified interest to hear the claim before an international court or foreign domestic court do.¹⁴¹⁸ In *Bouzari v. Iran*, the Ontario Court of Appeals rejected the application of a *forum non conveniens* test as no alternative forum was available in the specific case.¹⁴¹⁹ It consequently analyzed, whether a sufficient connection existed to Canada that would allow the Court to assume jurisdiction under *forum necessitatis*. During the proceedings, different opinions were presented in relation to the substantial connection test. The plaintiff, on one hand, argued that because of the *jus cogens* character of the prohibition of tortures as a fundamental international norm, the only condition for a substantial connection that can be reasonably required was the physical presence of the defendant.¹⁴²⁰ Amnesty International even advocated for a full universal jurisdiction in absence of any *nexus* requirement, while the Attorney General urged the Court to apply a stricter application of the connection test as it affects foreign relations, comity and the international legal order.¹⁴²¹ The Court, first of all, recognized that the connection tests could potentially be restrictive on the individual's right to access to court, however refused to clarify, what elements could be considered as constituting a sufficient *nexus*.¹⁴²² Instead, the Court simply stated that the plaintiff's relation to Ontario was "very tenuous"¹⁴²³. It did not give any recommendation or advice on how courts would need to resolve the sufficient connection requirement in the future but simply dismissed the claim without any referral to an alternative forum.¹⁴²⁴

¹⁴¹⁸ See Art. 17 ICC-Statute, DONOVAN/ROBERTS, p. 158.

¹⁴¹⁹ *Bouzari v. Iran*, para. 24.

¹⁴²⁰ *Ibid.*, para. 25.

¹⁴²¹ *Ibid.*, para. 25 and 27.

¹⁴²² *Ibid.*, para. 31.

¹⁴²³ *Ibid.*, para. 33.

¹⁴²⁴ *Ibid.*, see also MCGREGOR, The Need to Resolve the Paradoxes of the Civil Dimension of Universal Jurisdiction, p. 127.

In its 2018 *Naït-Liman v. Switzerland* judgment, the Grand Chamber of the ECtHR was asked to clarify in what way the sufficient connection requirement as contained in Art. 3 FAIPL, the Swiss *forum necessitatis* provision, violated the individual's right to access to court.¹⁴²⁵ The case concerned a recognized Tunisian refugee, who initiated civil proceedings against the Ministry of Interior of Tunisia for alleged violation of the prohibition of torture committed in Tunisia. The Swiss Courts refused to hear the claim as they did not see a sufficient connection to the forum, even though the plaintiff had been living in Switzerland over a decade and had, in the meantime, been naturalized.

First of all, the Grand Chamber noted that due to the fact that the Anglo-American law tradition does not recognize *forum necessitatis*, it did not constitute any customary duty of Switzerland to provide an emergency forum. States were consequently free to refuse jurisdiction over cases that did not have a sufficient close connection.¹⁴²⁶ Switzerland did further not exceed its margin of appreciation in the specific case of Mr. Naït-Liman as all relevant ties to the forum were only established after the alleged torture was committed. This fact essentially ignores that procedural rules on the jurisdiction of a court, unlike substantive norms, are not affected by temporal elements and must be appreciated at the moment of initiation of proceedings.¹⁴²⁷ The Grand Chamber leaves a significant margin of appreciation to States to elaborate what elements could be considered as connection factors. By making the cause, however, dependent on the nationality or residence of the applicant, Swiss courts did not act in violation of the Convention.¹⁴²⁸

The *forum necessitatis* principle, as it stands today, does consequently not sufficiently protect victims of severe human rights violations from a denial of justice and should be concretized on one central aspect. All States where *forum necessitatis* has been

¹⁴²⁵ *Naït-Liman v. Switzerland*, Grand Chamber Judgment, para. 200.

¹⁴²⁶ *Ibid.*

¹⁴²⁷ *Natoniewski v. Germany*, p. 301, TALMON, Substantive and Procedural Rules Distinguished, p. 984, see for more information § 6 (II.1), p. 150 ff.

¹⁴²⁸ *Naït-Liman v. Switzerland*, Grand Chamber Judgment, para. 214 ff.

practiced ask for a sufficient close connection to the forum not implementing civil universality in a sufficiently clear manner.

The ILA, the Steering Committee of Princeton University as well as IDI have elaborated their own guidelines on how universal civil jurisdiction should be applied on the basis of *forum necessitatis*. First of all, Art. 2.3 (3) of the Sofia Guidelines provide:

A sufficient connection in the sense of paragraph 2.3 (1) consists in particular in:

- a) the presence of the claimant;
- b) the nationality of the claimant or the defendant:
- c) the presence of assets of the defendant:
- d) some activity of the defendant: or
- e) a civil claim bases on an act giving rise to criminal proceedings in the court seized of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings.

While the ILA tries to give guidance on the application of *forum necessitatis*, it does so in a rather general manner. First of all, the list contained in Art. 2.3 (3) is non-exhaustive given the terminology of “in particular” contained in the first sentence. While no discussion is needed regarding the nationality of the claimant or of the defendant (lit. b), already the presence of the claimant in lit. (a) seems misplaced. Of course, the claimant will be present for the introduction of the proceedings. Could it be that ILA meant to write the presence of the defendant as an element of connection? Even in this scenario, the physical determination of the defendant might be difficult to assess, especially if it involves a corporation or a foreign State. Regarding the latter, could proceedings only be introduced if the defendant State has a diplomatic representation in the forum? This could lead to absurd effects that States would close their representation to prevent civil suits being introduced against them, which is not in the interest of international collaboration and diplomacy. Further, it is not clear what the ILA means by “some activity” of the defendant. While it is honorable that the ILA attempts to strengthen the protection of human rights victims from a

denial of justice, the broad approach taken in the Sofia Guidelines does not give rise to sufficient security of law neither for the victim concerned nor the national court asked to implement them.

The Princeton Principles on Universal Jurisdiction echo the elements described by the Sofia Guidelines. However, both stress that next to the *locus delicti*, the prevention of a denial of justice is of utmost importance within the appreciation of *nexus* elements.¹⁴²⁹ The Principles should exclusively apply to serious crimes under international law including piracy, slavery and torture strengthening and recognizing their *jus cogens* nature.¹⁴³⁰ According to its Principle 8, a State should base its decision to assume jurisdiction over an international crime on the likelihood, good faith, and effectiveness of the prosecution in the requesting State (lit. f), the fairness and impartiality of the proceedings in the requesting State (lit. g), the convenience to the parties and witnesses, as well as the availability of evidence and the general interest of justice (lit. i). The Princeton Principles are correct in assuming that the interests of justice are often not taken sufficiently into consideration by courts when assessing jurisdiction. The Principles however, fail to give a clear suggestion on how victims' rights and international relations and foreign policy interests can be adequately balanced with one another.

The most elaborated project in this regard is the resolution prepared by IDI during its 2015 Tallinn session. It takes a completely different approach and does not attempt to enumerate *nexus* requirements for jurisdiction but gives a clear guideline for courts on what procedure they must follow in order to assess universal jurisdiction in a specific case. Highlighting the significance of an effective and appropriate right to reparation and access to justice, the IDI proposes in Art. 2 of their 2015 Tallinn Resolution:

- 1) A State shall accept that its courts have universal civil jurisdiction over claims for relief by victims of an international crime, provided that:

¹⁴²⁹ The Princeton Principles on Universal Jurisdiction, elaborated by the Steering Committee of the Princeton University in 2001, available: <http://hrlibrary.umn.edu/instree/princeton.html> [last accessed 2.10.2018].

¹⁴³⁰ Principle Nr. 2 (1) of the Princeton Principles.

a) no other State has stronger interests in respect of the claim, based on its connection with the victims and the defendants and on the relevant facts and circumstances; or

b) even though one or more other States have such stronger interests, such victims do not have in their courts of any such other State reasonably available remedies.

2) The courts of a State shall be considered to provide a reasonably available remedy if they have jurisdiction over the defendant and the claims by the victims and if they are capable of dealing with the claim in compliance with the requirements of due process and in providing remedies that afford appropriate and effective redress.¹⁴³¹

First of all, the IDI Resolution convincingly combines the *forum non conveniens* with the *forum necessitatis* theory by giving first priority to the forum with the most factual ties (para. 1a), however demands that no denial of justice occurs when it cannot be reasonably asked of the plaintiff to introduce proceeding somewhere else (para. 1b) or if due process rules are not sufficiently guaranteed (para. 2). Further, IDI restricts the application of the *forum necessitatis* to “victims of international crimes”, meaning that not all human rights violations may enjoy universal civil jurisdiction but only the most severe violations of international norms. With regard to the prohibition of torture this would potentially exclude a significant number of victims as international criminal law demands a systematic nature of torture being committed within a State in order to constitute an international crime, an element that is inherently difficult to prove for a single victim and would cause significant denial of justice to a number of persons fallen victims to a *jus cogens* violation.¹⁴³² The author rejects any arguments that an immunity exception should be made dependent on the systematic character of the violation or the quantity of victims.¹⁴³³ Within the assessment of the individual’s right

¹⁴³¹ Art. 2 Tallinn Resolution, see *Annuaire de l’Institut de droit international de Tallinn*, p. 135 f.

¹⁴³² See § 1 (1.2), p. 9 ff.

¹⁴³³ BRÖHMER, p. 204 and specifically p. 208 ff., APPELBAUM p. 264 f., BALDEGGER Mirjam, *Das Spannungsverhältnis zwischen Staatenimmunität, diplomatischer Immunität und Menschenrechten*, Bern, 2015, p. 277 f.

to reparation and remedy, it is irrelevant to consider whether other victims exist.¹⁴³⁴ Reasonable measures have been created to channel mass complaints within a civil proceeding. Historically, the introduction of criminal universality as well as examples of civil universality exercised in the U.S., Canada and the Netherlands show that no collapse of the national justice system occurred when dealing with mass violations. The reader is advised to consider the upcoming chapter, where the author proposes a concrete legislative solution that would allow all victims of torture access to justice while balancing the national interests of efficiency of court proceedings. An amendment to para. 1 should consequently be suggested allowing both victims of international crimes and victims of non-systematic *jus cogens* violation (including cruel, inhuman and degrading treatment) to benefit from *forum necessitatis*, given the fundamental values protected by peremptory norms as well as obligations contained in Art. 14 (1) CAT and 6 ECHR.¹⁴³⁵

Further, in para. 3 of the Resolution, not reproduced above, IDI allows for the forum to reject jurisdiction in cases where the claim could be brought before the International Criminal Court or before an already established claims authority based in international law, both reasonable and proportionate restriction within the implementation of a civil universality.¹⁴³⁶

With the exception of not giving sufficient consideration to victims of *jus cogens* violations, the Institute seems to have found a convincing middle path combining both elements of the *forum non conveniens* and the *forum necessitatis* doctrine, which guarantees an effective right to reparation for victims of severe human rights violation while balancing the interest of international relations, community and trade.

¹⁴³⁴ *Germany v. Italy*, Dissenting opinion Judge GAJA, para. 9.

¹⁴³⁵ NOVOGRODSKY, p. 952, KREIKER, p. 115, AKANDE/SHAH, Immunities of State Officials, p. 839 f., REIMANN, p. 403 ff. support this conclusion.

¹⁴³⁶ DONOVAN/ROBERTS, p. 160, Brief of the European Commission in *Sosa v. Álvarez-Machain*, para. 24.

c. Other Implementation Proposals

Domestic courts primarily argued with the separation of power principle that prevented them from assessing civil jurisdiction over foreign State in case torture was committed. Courts emphasized that the introduction of a torture-related exception to State immunity will depend on the legislator to become active in the matter and adopt new and binding rules.¹⁴³⁷ If both *forum non conveniens* and *forum necessitatis* show flaws regarding the implementation of a universal civil jurisdiction, in what way should legislation be amended to better reflect the protection of individual rights? As balancing both interests of the effective administration of the justice system and protection from impunity and denial of justice is not a simple task, this section is dedicated to a selection of legislative and doctrinal proposals that have been presented in this area. However, not subject of this chapter are suggestions such as the establishment of a new international commission¹⁴³⁸ or the adoption of an additional protocol to the UN Torture Convention or UNCSI¹⁴³⁹, as it should be focused on how a single State may be able to assume universal civil jurisdiction without the consent of other international actors.

The U.S. Legislation regarding the Reparation of Acts of Terrorism

The U.S. legislator has adopted a set of national statutes allowing for the introduction of civil claims against a foreign State for violations of rights committed abroad. These are not in specific reference to violations of peremptory norms but regard the commission and support of acts of terrorism within and outside the U.S. The 1996 Antiterrorism and Effective Death Penalty Act creates an additional exception to the U.S.

¹⁴³⁷ *Siderman de Blake v. Argentina*, para. 719, *Jones v. Saudi Arabia*, House of Lords, *Bouzari v. Iran*, *Natoniwski v. Germany*, Supreme Court of Poland, Polish Yearbook of International Law, Vol. 30, 2010, p. 299.

¹⁴³⁸ *Germany v. Italy*, Dissenting opinion Judge CAÑADO TRINDADE, para. 253, BLANKE/FALKENBERG, p. 1845 ff., KAMMINGA Menno, Towards a Permanent International Claims Commission for Victims of Violations of International Humanitarian Law, Windsor Yearbook of Access to Justice, Vol. 25, 2007, p. 23.

¹⁴³⁹ HALL, UN Convention on State Immunity, p. 425 f., FOX, Where does the Buck Stop?, p. 359, REDRESS, Immunity v. Accountability, p. 56 f., AMNESTY INTERNATIONAL, Letter to Emily Willmott, Assistant Legal Adviser, Foreign and Commonwealth Office of 5.5.2005.

FSIA for acts of torture, extrajudicial killing, aircraft sabotage and hostage taking¹⁴⁴⁰. The Act, however, takes a rather unique approach in its implementation. Exclusively U.S. nationals are allowed to sue a foreign government, if the plaintiff has been injured in an act of terrorism committed by State officials or by an organization supported by the State.¹⁴⁴¹ In addition, the AEDP relies on the list provided by the U.S. Department of State designating so-called “State Sponsors of Terrorism”.¹⁴⁴²

While it is praiseworthy that the State department shows transparency in this matter and attempts to bring justice to victims of international crimes, the arbitrary way in which this is done is highly influenced by a political power play and not by objective reasoning. From a legal point of view, it is not possible to make the plea of State immunity dependent on whether a State sponsors international terrorism. Either torture is de-immunized for all States or for none. In addition, the list has been changed several times in the last decades. Iraq was, for example, removed and enlisted again three times since 1979.¹⁴⁴³ Does this mean Iraq’s State immunity should apply during the time it was not on the list? Such a system is hardly compatible with legal certainty and only strengthens the need for State protection against arbitrary treatment abroad. Lastly, making this mechanism only available to U.S. nationals is inherently discriminatory.¹⁴⁴⁴ Applying AEDP on one specific act of terrorism would create an unjustified distinction between a group of people allowed to bring a civil claim based on their nationality and another group that would be excluded from litigation. The listing approach taken by the AEDP is therefore not satisfying.

In 2016, the Justice against Sponsors of Terrorism Act was adopted with the purpose of “provid[ing] civil litigants with the broadest possible basis, [...] to seek relief against persons, entities and foreign countries [...] wherever they may be found, that have

¹⁴⁴⁰ Sec. 221 (6C) AEDP.

¹⁴⁴¹ Ibid.

¹⁴⁴² Sec. 221 (7) AEDP, see YANG, *State Immunity in International Law*, p. 227 and § 2 (II.1.a), p. 42 ff.

¹⁴⁴³ See YANG, *State Immunity in International Law*, p. 226 f.

¹⁴⁴⁴ GERGEN, p. 797 f., BIANCHI, *Immunity versus Human Rights*, p. 266, BRADLEY CURTIS/GOLDSMITH Jack, *Pinochet and International Human Rights Litigation*, *Michigan Law Review*, Vol. 97, 1999, p. 2157.

provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States.”¹⁴⁴⁵ No sovereign immunity should prevent litigation to be held in U.S. courts consequently amending the FSIA on the matter.¹⁴⁴⁶ JASTA, on one hand, drops the listing approach while holding on to the nationality requirement as contained in AEDP. On the other hand, it introduces a unique territorial scope. While terrorist acts may have been committed within or outside U.S. territory, the physical injury, death or material damage must have occurred in the U.S.¹⁴⁴⁷ The author has doubts in what way this legislation does not simply implement the territorial tort exception to State immunity law already recognized by the U.S. FSIA, UNCSI and ECSI.¹⁴⁴⁸ One element should nonetheless briefly be pointed out: JASTA extends the liability of a State for acts of aiding and abetting terrorist acts. Violations must not have necessarily been committed by a State actor but by a private terrorist organization as well, a dangerous precedent to be set.¹⁴⁴⁹ First of all, it is not clear how far the aiding and abetting exception reaches and could potentially include failure to freeze assets of a suspected terrorist as well as donations of humanitarian nature given by both private individuals, corporations as well as foreign governments.¹⁴⁵⁰ Secondly, the author argues that this approach is in immense danger of being misused for political means. A State should only be denied jurisdictional immunity for violations it has itself committed directly and not additionally be made liable for the acts of private organizations.

¹⁴⁴⁵ Sec. 2 (7b) JASTA.

¹⁴⁴⁶ Sec. 3 1605B (b) JASTA.

¹⁴⁴⁷ Ibid.

¹⁴⁴⁸ WHITESELL Lee, JASTA Not as Bad as It seems, the Newjurist Blog, published on 17.10.2016, JASTA does indeed extend the scope of the territorial tort exception by ignoring the double geographical precondition for trans-frontier torts, however adds an unnecessary nationality requirement, see § 5 (I.1.a), p. 114 ff.

¹⁴⁴⁹ UNWALLA Kayaan, Litigation Against International Terrorism in the United States of America, <https://www.reedsmith.com/en/perspectives/2016/10/the-justice-against-sponsors-of-terrorism-act-jast> [last accessed 22.3.2018].

¹⁴⁵⁰ WHITESELL, para. 3, WUERTH Ingrid, Immunity from Execution of Central Bank Assets, in: Ruys Tom/Angelet Nicolas/Ferro Luca (eds.), Cambridge Handbook of Immunities in International Law, Cambridge, (forthcoming).

Consequently, the legislative approach taken by the U.S. is for several reasons unsatisfying.

Canada's Victims of International Crimes Act

In the aftermath of the *Bouzari* and *Kazemi* judgments, an outcry went through the Canadian civil society and academic elite leading to a number of legislative proposals.¹⁴⁵¹ The goal was to pressure parliament into amending the Canadian State Immunity Act by adding a human rights provision to the existing exceptions to foreign immunity. In 2005, MP Irwin Cotler proposed Bill C-483, also known as the Redress for Victims of International Crimes Act, which was never voted upon and consequently never successfully made it through the legislative process. Nevertheless, the Bill is useful as an example on how Canada had intended to amend its State Immunity Act in favor of victims of severe human rights violations.

The Bill was not only meant to create an exception to the jurisdictional immunity of States in case torture was committed but also applied to genocide, crime against humanity and war crimes occurring around the world.¹⁴⁵² Jurisdiction should, however, only be assessed “after all domestic remedies have been invoked and exhausted in the matter”¹⁴⁵³ and only if the application is not unreasonably prolonged or is not “unlikely to bring effective relieve to the person who is the victim [...]”¹⁴⁵⁴.

While exhaustion of local remedies can be considered a legitimate and proportionate precondition to access to justice, several other elements must be criticized in this legislative proposal. First of all, the Bill does not mention through what mechanism Courts could deny jurisdiction in the situation where a flood of cases would threaten the good administration of the justice system. Assuming that Canadian courts would continue to apply a combination of both *forum non conveniens* and *forum necessitatis*, as is their practice so far. Canadian courts would eventually only give applicants with

¹⁴⁵¹ See i.e: 2005 Bill C-394, or the so-called Crimes Against Humanity and War Crimes Act of 2000, or Bill S-35, see overview in NOVOGRODSKY, p. 948 ff.

¹⁴⁵² §3 (1) RVICA.

¹⁴⁵³ §3 (2) RVICA.

¹⁴⁵⁴ Ibid.

sufficient connection to the forum an additional means of reparations. This consequently adds nothing to the discussion and, as we have discovered, created a significant protection gap for a number of victims.

Secondly, as the name suggests, the exception would only comply for acts that constitute an international crime. As discussed above, for torture to constitute an international crime, a systematic nature of the violation is necessary. This is rather difficult to assess for a foreign court, especially if only a small group of victims introduced proceeding in one forum and secondly unjustifiably excludes victims of scattered or non-systematic acts of torture.¹⁴⁵⁵ Given the obligation contained in Art. 14 CAT, a reparations mechanism must at least be made available to victims of torture as defined by Art. 1 (1) CAT. The author, however, argues that, given the complementary effect of Art. 6 ECHR (or its relevant counter parts in other human rights treaties) binding on the national legislator in this matter, an immunity exception should be introduced to cover all acts of torture as defined by international human rights law to include cruel, inhuman and degrading treatment and punishment for which the State can be made responsible.¹⁴⁵⁶

Regarding the element of foreseeability of an actual effective relief, the author first of all argues that it is impossible for a court to confidently analyze this criterion at the moment when civil claims are introduced. Even if this was the case, this issue is in relation to the difficulty of enforcing a judgment but not in relation to the jurisdiction of the forum over such crimes. Courts should not confuse matters in relation to the immunity form jurisdiction with the one on immunity from enforcement; these are two linked but separate legal constructs. The Canadian Redress for Victims of International Crimes Act is hence not suited to implement a torture-related exception to State immunity law.

In 2012, the Canadian Parliament has adopted a new amendment to the Canadian SIA following the U.S. American approach of denying immunity of “State Sponsors of

¹⁴⁵⁵ NOVOGRODSKY, p. 952 arrives to the same conclusion and suggests amending the legislation to include peremptory norms instead.

¹⁴⁵⁶ See § 8 (1.2.a), p. 295 ff., where the author shows that reparations obligation contained in CAT exclude cruel, inhuman and degrading treatment.

Terrorism” on the basis of list provided by the Cabinet in Ottawa.¹⁴⁵⁷ This legislation does, however, not apply to acts of torture committed by a foreign entity.¹⁴⁵⁸

The UK Torture Damages Act

Rejected by the House of Commons in the legislative process within the UK was a project making amendments to the 1978 State Immunity Act with regard to civil proceedings brought by victims of torture.¹⁴⁵⁹ The so-called Torture Damages Bill should apply to acts of torture as defined by the Bill in § 5 repeating the UN Torture Convention’s definition as contain in Art. 1 (1) CAT and applies to both territorial and extra-territorial acts.¹⁴⁶⁰ It does not depend on the nationality or residency of the plaintiff and creates an exception to the immunity of all States for the direct infliction of torture on an individual. Further, it usefully contains a definition of the State and its organs, whose immunity should be revoked by the Bill. Jurisdiction should nevertheless only be exercised “when no adequate and effective remedy for damages is available in the State in which the torture is alleged to have been committed”¹⁴⁶¹ making claims depending on exhaustion of local remedies.

The British Torture Damages Bill may serve as an ideal proposal on how the legislator might implement a torture-related exception to State immunity law.¹⁴⁶² This opinion was, among others, shared by the UN Committee against Torture that encouraged the British authorities to adopt the Torture Damages Bill.¹⁴⁶³ Nevertheless, it must be

¹⁴⁵⁷ Canadian Safe Streets and Communitites Act of 2012 which enacts the Justice for Victims of Terrorism Act Bill C-10, 41st Parliament 1st Session, 2011-2012, see VAN ALEBEEK, Jurisdictional Immunities of the State, p. 299.

¹⁴⁵⁸ FOX/WEBB, p. 473, PROVOST René, Canada’s Alien Tort Statute, European Journal of International Law, European Journal of International Law, EJIL Talk of 29.3.2012.

¹⁴⁵⁹ See summary of legislative history of the bill in MORA, p. 394 f.

¹⁴⁶⁰ § 3 of UK Torture Damages Bill [HL] 2010-12 as introduced by Lord Archer of Sandwell on 25.11.2010, REDRESS, Bringing the International Prohibition of Torture Home, p. 83.

¹⁴⁶¹ § 1 (2) Torture Damages Bill.

¹⁴⁶² REDRESS, Bringing the International Prohibition of Torture Home, p. 81.

¹⁴⁶³ Concluding Observations of the Committee against Torture on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, UN Doc. No. CAT/C/GBR/CO/5, para. 22.

criticized on two points. First of all, as the UK follows the common law system, civil claims introduced in its courts follow the *forum non conveniens* doctrine.¹⁴⁶⁴ As described above, this inherently leads to a significant protection gap and, as studies have shown, to a widespread denial of justice. Secondly, according to § 2 of the Bill, an action of civil damages must have been introduced within the period of six years beginning with the date when it first became reasonably practicable for the person concerned to bring an action.¹⁴⁶⁵ While the author can understand the urge to mitigate the flood of potential litigation through a time limitation, it does not do so in an objective and just way as evidence gathering and rehabilitation for the injuries suffered may take a considerable time.¹⁴⁶⁶ Victims would be urged to introduce insufficiently substantiated claims because of the time pressure and could not re-submit it later as the judgment would have gained *res judicata* quality.

Instead, the author suggests substituting the time limitation clause with a provision of *forum necessitatis* as elaborated by the IDI 2015 Tallinn Resolution with the amendments as discussed in the previous chapter. There the author also proposes to apply the new exception not in relation to torture as international crimes but to the wider definition of torture in human rights law including cruel, inhuman and degrading treatment or punishment.

The British Torture Damages Bill as amended with the IDI 2015 Tallinn Resolution *forum necessitatis* provision might therefore allow a State to assume universal civil jurisdiction for torture while reducing significantly the possible flood of litigants threatening the efficiency of its domestic judicial system. At the same time, it should be used as a legislative measure to introduce a torture-related exception to the jurisdictional immunity of a State from civil proceeding introduce in a domestic court.

¹⁴⁶⁴ REDRESS, Bringing the International Prohibition of Torture Home, p. 85.

¹⁴⁶⁵ § 2 Torture Damages Bill.

¹⁴⁶⁶ REDRESS, Bringing the International Prohibition of Torture Home, p. 71.

III. Conclusion on the Right to Remedy and Reparation

The obligation to give remedy and reparation to victims of torture is a well-established right of individuals in international, regional and domestic law. In relation to human rights violations, victims have an enforceable claim and an inherent interest to demand restitution, compensation and satisfaction. Courts and Tribunals generally enjoy a significant margin of appreciation in deciding between these forms of reparation and the payable amount. Courts and Tribunals are, however, restricted by the fact that reparation should not constitute a disproportionate measure to the breach at hand. This should be assessed on a case-by-case basis, as a proportionality analysis will inherently depend on the circumstances of each case.

With a specific reference to the prohibition of torture, the United Nations Convention against Torture obliges contracting States to provide for a reparation mechanism for any victims of torture within the definition of Art. 1 (1) CAT. Following the recognized methods of treaty interpretation, the author believes that jurisdictional immunities of a foreign State will enter in direct conflict with this obligation as Art. 14 (1) CAT and must be understood in a way to bind all contracting States to provide remedy and reparation irrespective of the location where torture was committed. Resolving the norm conflict may only be achieved in favor of Art. 14 CAT through the application of the *lex specialis derogat generalis* doctrine. Lifting the procedural bar on jurisdiction in civil matters may, however, be made conditional upon the exhaustion of local remedies or on the burden to prove that granting immunity would constitute a denial of justice in the specific circumstances of the claimant.

Nevertheless, the author argues that Art. 14 (1) CAT does contain the obligation to assess jurisdiction over torture committed outside the jurisdiction of the forum State, even if this involves denying jurisdictional immunities. This consequently leads to the extension of universal jurisdiction in civil matters under international law. As we have discovered, universal civil jurisdiction is not a new phenomenon and has been practiced by a significant number of countries around the world, especially the United States, Canada, the Netherlands and any country allowing for “adhesive” criminal procedures. No international provision can be found that would prohibit the introduction of universal jurisdiction in civil matters and no objectively convincing argu-

ment can be raised that would explain why a distinction between criminal and civil universal jurisdiction is necessary.

In future cases, if a torture-exception to the civil immunity of a State is recognized and put into practice, the national legislator has two mechanisms available to ensure that no abusive or unjustified claims are introduced within its legal system, namely *forum non conveniens* and *forum necessitatis*. While it is objectively understandable that cases should be trailed within the national judicial system that shows the most factual ties to the case, the strict application of *forum non conveniens* has led to a systematic denial of justice rendering universal civil jurisdiction inoperable. Hence, the “minimum threshold approach” as represented by the *forum necessitatis* doctrine presents a more adequate way for establishing jurisdiction over foreign acts of torture. Given the lack of sufficient guidelines on what constitutes a relevant *nexus* requirement, *forum necessitatis* must be concretized in the interest of security of law and legal certainty.

Given the large margin of appreciation for the introduction of civil universality on a domestic level, the national legislator is encouraged to study the proposition elaborated by British Torture Damages Bill as well as by IDI in their Tallinn Resolution of 2015. The British Bill with its time limitation clause substituted by Art. 2 of the IDI Tallinn Resolution seems to strike a fair balance between the effective implementation of the individual’s right to reparation and the national interests of foreign policy and international comity. The author, however, suggests that the text of the legislation should be concretized to include not just victims of torture as an international crime but torture victims in a broader sense (most importantly within the meaning of the ECHR and ICCPR). This would compensate a significant protection gap, better implementing the right to an effective remedy and reparation of all victims of *jus cogens* violations and be in line with standards used in human rights law.

PART IV: CONCLUSIONS AND SUMMARY

The present study comprehensively assessed the complex legal situation that emerges, when an alleged victim of torture, inhuman or degrading treatment brings a civil claim against a foreign State in the domestic justice system of another country.

After an introduction into the research matter, in Part I the reader was familiarized with the notion, scope and legal sources of the jurisdictional immunity of States, which is a privilege not to be subjected to the jurisdiction of a foreign court. The author, in § 1, after differentiating the jurisdictional immunity of States from other concepts known in international law, identified the sovereignty, dignity, and equality of States as well as the principle of non-interference and protection of international relations as the main interests assured by State immunity law. Further, the author described the personal scope of the immunity from civil proceedings and presented the reader with the necessary historical context to understand the gradual abandonment of the absolute theory of State immunity law in favor of a restrictive practice in the matter.

In § 2, both the international and domestic sources of State immunity were discussed. Since the 2012 ICJ judgment of *Germany v. Italy*, where the Court acknowledged a State's entitlement to immunity on the basis of international customs, scholars may no longer argue that immunity from civil jurisdiction would be granted out of comity or practical courtesy of the forum. In addition, treaty law, most notably the European Convention on State Immunity and the UN Convention on Jurisdictional Immunities of States, regulate the matter on an international level providing national courts with a codified set of rules on the establishment of jurisdiction over foreign entities.

Further, national practices and legislations of State immunity law may be subdivided into two groups: first, States which have adopted domestic legislation, the author provides a summary of the domestic acts of, most notably, the United States, Canada, and the United Kingdom, and second, States without any immunity statutes. The Greek, Italian and Swiss practices were outlined in this respect as they represent the most relevant national developments within the research subject.

Part II was dedicated to existing (*de lege lata*) exceptions to the jurisdictional immunity of a foreign State from civil proceedings. § 3 analyzed whether States have explicitly or implicitly waived their claim to immunity over acts of torture. The author concluded, firstly, that the ratification of the UN Convention against Torture, which contains a universal jurisdiction provision and recognizes the individual's right to reparation, does not constitute a waiver of immunity privileges. Secondly, by torturing individuals, a State does not implicitly waive its claim to immunity regarding compensation claims directed against it in a foreign court. While the implicit waiver concept has historically provided States with the necessary tool to reconcile changes in State sovereignty with the rules on State immunity, courts are not advised to fictionally create a State's intent to waive where there is none in order to accommodate *jus cogens* violations within the State immunity system.

§ 4 tackled the fundamental issue of qualifying torture as either an *acta de jure gestionis* or *acta de jure imperii*. Strictly applying the recognized "private person" test to differentiate sovereign from private acts would suggest that most acts of torture fall under the *acta de jure imperii* category. Qualifying torture as a sovereign act in this perspective would, however, go against the recent evolution of functional immunity of State representatives. It would quintessentially be contrary to the very nature of peremptory norms as absolute limits of State power. While the author emphasizes that immunity *ratione materiae* and *acta de jure imperii* must be treated separately, certain contradictions and inconsistencies emerge when comparing these two concepts. It seems international crimes and other peremptory violations fall outside the traditional *de gestionis/de imperii* dichotomy as the established "private person" test fails to be useful in this perspective. This fact alone is, however, not sufficient for a court to assume jurisdiction over civil claims introduced by a victim of torture as State practice – given the *in dubio pro immunitate* concept – will most likely continue to include torture as an act for which a State enjoys immunity from civil jurisdiction.

In § 5, the author considered the so-called "territorial tort exception" as a basis for a victim of torture to bring civil proceedings against a foreign State in case violations occurred on the territory of the forum. In a very limited number of situations of acts committed during peacetime by non-military personnel, torture does not constitute an act for which a State enjoys jurisdictional immunity. Neither the nationality of the

victim, nor, so the author concludes, the fact that torture might consist of an *acta de jure imperii* changes this legal conclusion. However, only acts committed within the forum by a foreign non-military official also present on the forum during the violation will be considered, excluding all transboundary events or trans-frontier torts. Further research and development is needed regarding the customary character of the territorial tort exception. While convincing arguments may be raised that Art. 12 UNCISL does reflect customary law, the author criticizes the ICJ for not being sufficiently clear in this respect, thus leaving this issue open for discussion. As a consequence of the Court's silence on the matter, only the eight contracting parties to the European Convention on State Immunity could potentially use Art. 11 ECSI as a legal basis for assessing jurisdiction, further diminishing the practical relevance of the territorial tort exception. From a legal perspective the territorial tort exception is meaningful nonetheless. It represents the first instance in international law by which a State may no longer enjoy jurisdictional immunity for *acta de jure imperii*, giving priority to the principle of territoriality over the equality, sovereignty and independence of a State.

Except for the limited situation described in § 5, victims of torture might consequently not bring civil proceedings against a State in the domestic court of another country. In Part III, the author analyzed several legal arguments raised against the continued immunity of States for torturous acts and considered whether a conflict of international obligations arises on the forum where proceedings are introduced.

§ 6 was dedicated to legal issues in relation to the peremptory quality of the prohibition of torture, inhuman and degrading treatment. While, in theory, a potential conflict between jurisdictional immunities and the prohibition of torture could be resolved by giving priority to the hierarchical superior rule, most scholars and courts emphasize a conceptual distinction between the substantive norm of the prohibition of torture and the procedural norms of jurisdictional privileges. The author joins the minority of scholars in this respect and rejects the idea that *jus cogens* norms represent purely substantive obligations. These secondary procedural elements in relation to the prohibition of torture are, however, not recognized sufficiently to enjoy the same hierarchical superiority and could therefore not be used as a legal means to provide victims of torture with access to courts. The author further emphasizes that the classical substance/procedural distinction has lost its value since the restrictive

theory on State immunity law has become predominant. Since then, a court must necessarily analyze the merits of a case to accept or reject jurisdiction over a foreign State rendering a traditional substance/procedure distinction obsolete.

As the current legal situation leads to a denial of justice for many alleged victims of torture in violation of fundamental international values, some authors propose a holistic interpretation of the international legal order to consider State immunity and torture in a wider context. Indeed, many areas of tension can be identified, once State immunity law is contrasted against recent developments of international law. Given the continued struggle of the international community to prevent impunity for serious violations of international law which, among others, has led to the establishment of universal jurisdiction of national courts, a State's immunity privilege used to elude responsibility for torture in civil matters becomes inherently contradictory. Further, the concepts of State sovereignty, equality and the principle of non-interference have undergone significant changes since the Westphalian Treaties were signed. Courts often fail to sufficiently consider the gradual humanization of those concepts and the fact that the international legal order already today allows for the exercise of jurisdiction over a foreign State for both *de jure gestionis* and *de jure imperii* acts. Additionally, the developments of international refugee law, international human rights, international investment protection and of the individual criminal responsibility mechanism in international law must have significantly influenced the position of the individual as both an object and subject of international law. Under these circumstances a *jus cogens* exception to the jurisdictional immunity of a State can no longer be understood as a more significant threat to international relations and the sovereignty of the defending State. The author concludes that no torture-related exception to the jurisdictional immunity of a State may be established based on the hierarchy argument that, however, the statutory interpretation approach is one way of harmonizing State immunity law with the fundamental values represented by peremptory norms.

Accepting a jurisdictional plea does, nevertheless, not constitute an act of assistance or complicity within the meaning of ARSIWA and only constitute a prohibited act of recognition for "illegal" States or entities, whose statehood is severely disputed in international law. In addition, judicial countermeasures against the jurisdictional immunity of a State are legal from an international law point of view. They cannot,

however, serve as a basis for victims of torture to receive access to court in a systematic fashion. The victim has no enforceable right to be assisted by the forum and any potential reprisals ordered by the judicial branch of a country will cause internal and international political tensions. As long as no torture-related exception is recognized, a court may, however, refer to countermeasures on a case-by-case basis and does not violate international law when assuming civil jurisdiction over a foreign State.

The author further discussed the relationship between State immunity and the prohibition of torture in the light of general principles of law. The emerging principle of forfeiture of sovereignty rights could become inherently relevant for the research subject as both treaty law and international customs seem incomplete. The author concludes that jurisdictional immunities are indeed a forfeitable privilege, although both the threshold of application as well as its recognition on the international level as a general principle of law need further clarification. Hitherto, the forfeiture principle may not be used for the establishment of jurisdiction over a foreign State.

In § 7, the author considered the impact of jurisdictional immunities on the individual's right to access to court, most notably fair trial guarantees as contained in Art. 6 ECHR. The European Court of Human Rights has continuously applied the Convention over questions of State immunity law. Scholars that argue against this conclusion must be dismissed as the forum does indeed exercise a significant control over the implementation of an individual civil right to reparation and consequently exercises jurisdiction over the matter within the meaning of Art. 1 ECHR. Once the applicability of Art. 6 ECHR is established, the legal argumentation found in this thesis strongly indicates that jurisdictional immunities for acts of torture are contrary to Art. 6 rights. While both the respect of international law as well as the protection of sovereignty and international relations may constitute a legitimate aim for the purpose of restricting access to court, the acceptance of an immunity plea will in many circumstances lead to a disproportionate interference into the fair trial guarantees of an individual. Proportionality assessment must, however, always be exercised on a case-by-case basis. As the ECtHR strictly follows the margin of appreciation doctrine, national courts must be urged to better assess the situation of the plaintiffs taking into consideration the reduced significance of sovereignty and State equality interests and favor humanity concerns in a balancing exercise.

Regarding the protection of the essence of Art. 6 ECHR, the author concludes that the requirement of an effective alternative remedy is applicable in case State immunity would bar a victim of torture from introducing proceedings. The forum may not simply refer to the domestic courts of the perpetrating State in order to relinquish itself from fair trial obligations but must insure that victims have a *de jure* and *de facto* access to an independent tribunal and that it may reasonably be expected from the victim to use this mechanism. Diplomatic protection may also not constitute a viable alternative means. Victims have no enforceable right to be diplomatically assisted by a State plus, in many circumstances, diplomatic protection is not available following the rules contained in the ILC Draft Articles on Diplomatic Protection. The author can only conclude that the essence of the right to fair trials is violated in most circumstances in which a victim of torture is threatened with a denial of justice as a consequence of an accepted plea for immunity.

The jurisdictional immunity of States was further considered in the context of the individual's right to remedy and reparation. After familiarizing the reader with the legal bases and the forms of reparation in international law, § 8 particularly analyzed Art. 14 CAT and emphasized its geographical scope. Applying the recognized methods of treaty interpretation, the author arrives at the conclusion that this provision has an extraterritorial effect on contracting parties and consequently contains the duty to assume civil jurisdiction regardless of the location where torture occurred. This essentially leads to a conflict of obligations incumbent on the forum which can only be resolved through the *lex specialis derogat generalis* rule, thus giving priority to the implementation of reparation rights over the jurisdictional immunity of a State. As a consequence, an emergence of the concept of universality in civil matters for torture can be observed. The author, first of all, summarizes the practices of different State in applying universal civil jurisdiction on many violations of law, including acts of torture. According to the author, no provision of international law is violated in case a State exercises civil jurisdiction over torture committed abroad and no convincing argument may be raised for the continued need to differentiate between universality in civil matters and universal jurisdiction in criminal law.

To administer a potential flood of litigation, an argument frequently raised against universal civil jurisdiction, the author analyzed concepts used by national courts to

prevent frivolous and malicious claims from being litigated. First of all, while disputes should be heard by the forum that shows the most factual ties to the case, a too strict application of the *forum non conveniens* doctrine has historically led to a widespread denial of justice. Instead, States should adopt and apply a so-called *forum necessitatis* provision, asking for a minimum factual threshold for the establishment of jurisdiction instead of a “top-down” approach represented by *forum non conveniens*. The author proposes a combination of the British Torture Damages Bill as amended by Art. 2 of the 2015 Tallinn Resolution of the *Institut de Droit International* as an ideal way to balance individual rights with the State’s interest of protecting bilateral relations and international comity. Given the combined effect of both Art. 14 CAT and Art. 6 ECHR, not only should acts of torture as defined by Art. 1 (1) CAT benefit from an exception to jurisdictional immunity of a State. It should additionally include cruel, inhuman and degrading treatment as defined by human rights law. As long as the legislator does not become active in the matter, civil courts should consider counter-measures to be implemented against the jurisdictional immunity of a foreign State in case torture was committed. This better reflects the individual’s right to access to court and to remedy and reparation and is in line with the fundamental values represented by the prohibition of torture within a wider international law context. In addition, this could exercise the necessary political pressure on the legislator to regulate the issue accelerating the implementation process and serving the legitimacy needs of a democratic society.

