



# **IMMUNITY v. ACCOUNTABILITY:**

## **Considering the Relationship between State Immunity and Accountability for Torture and other Serious International Crimes**

**December 2005**

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*"State immunity is the number one barrier in any international case that involves torture. State immunity is a way where torturers hide behind a veil called "immunity"."*

**Sulaiman Al-Adsani** (Torture Survivor) 17 November 2005

*"Foreign states have always denied our (mine and others) rights to reparation under international law. Hiding behind the barrier of state immunity, they have never had to dispute the alleged heinous crimes. Nor have they ever had to admit to a blatant breach of international treaties outlawing torture. State immunity incites travesties of justice.*

*Even worse – almost – foreign states have 'paid millions' to their lawyers to fight their cause on the technicality – state immunity – to avoid a full trial. Instead, they could have used these substantial funds to recompense the victim."*

**Keith Carmichael** (Torture Survivor,  
Founder and Honorary President of REDRESS)  
19 November 2005

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## EXECUTIVE SUMMARY

Torture, by definition, is an abuse carried out by public officials or others acting in an official capacity, and at times is committed with the implicit or explicit approval or acquiescence of the state. Whilst the prohibition of torture is clear and absolute, in reality, the practice of torture persists on a global scale and torture survivors can face substantial obstacles in seeking and obtaining justice and other forms of reparation. Given the limited opportunities for justice in territorial or international jurisdictions, survivors may be forced to turn to the courts of another state, often in the country of their nationality or residency, in order to bring a claim against the state allegedly responsible for their torture. However, the operation of the principle of state immunity has often acted as a bar to jurisdiction or has otherwise frustrated such claims.

The relationship between state immunity and the prohibition of torture and other international crimes is of particular importance in light of recent, divergent decisions in Canada, Greece, Italy, the United Kingdom and the United States; certain law reform initiatives advocating the explicit adoption of a human rights 'exception' to domestic legislation on state immunity in countries such as Canada and the United Kingdom; and the new UN Convention on the Jurisdictional Immunities of States and their Properties, which opened for signature on 17 January 2005.

That said, state immunity is a particularly complex issue to assess. Debates persist as to whether state immunity reflects a rule of international law, domestic law or purely a matter for international relations. Little uniformity in state practice exists, with some states continuing to grant absolute immunity and others restricting immunity to specific instances (the so-called 'restrictive' approach to immunity). Moreover, even within this 'restrictive' framework, the reach of immunity and the tests employed to determine its availability vary considerably.

In the small number of cases in which a foreign state has been sued for serious international crimes, domestic courts have diverged on their analysis of the application of state immunity and on the end result. In dualist countries with domestic legislation on immunity, most courts have interpreted the domestic law to constitute a 'comprehensive code.' Moreover, despite the history, rationale and practice on immunities, the courts of dualist countries have increasingly attempted to distinguish the availability of immunity based on the type of proceeding involved, whether civil or criminal. In contrast, the domestic courts in some monist countries characterise state immunity and the prohibition of torture and other serious international crimes reaching the status of *jus cogens* norms, as rules of international law. This construction has resulted in two cases in Italy and Greece in which the courts respectively have denied the applicability of immunity in cases concerning *jus cogens* violations.

This Report recognises that state immunity is not a static concept inextricably tied to its historical origins. In areas such as commerce, the principle of state immunity has had to adjust to the changing notion of statehood in order to meet the demands of corporations that would have otherwise refused to contract with the state. In cases of serious international crimes, the survivor does not enjoy the equivalent bargaining power, and the explicit recognition of the inapplicability of state immunity in cases concerning serious international crimes has proved significantly more difficult to achieve, despite the developments in international law.

Furthermore, the Report argues that state immunity should not present a barrier to access to justice in the very limited context of serious international crimes, the prohibition of which reaches the level of *jus cogens*. Although access to justice is not an absolute right, the European Court of Human Rights in particular, has repeatedly emphasised that any restriction on the access to a court must meet the requirements of proportionality. The Court has

emphasised that an alternative forum before which to bring the claim should be available in practice and not just in theory as the restriction must not have the effect of extinguishing the underlying right.

The Report makes a series of recommendations (abbreviated here):

### **1. Support for National Law Reform Expressly Excluding the Availability of State Immunity for Serious International Crimes**

Ideally, the explicit acknowledgment of a clear 'exception' to state immunity in cases of serious international crimes would be agreed at a multilateral level. For example, within Europe the adoption by the European Union of a framework decision on state immunity and serious international crimes would minimise inconsistencies between member states on jurisdictional requirements such as the presence of the person bringing the case. A multilateral approach would also minimise the concern of some governments, about bringing about law reform unilaterally. Multilateral initiatives would link up well with national law reform proposals which comply with the spirit and letter of the Convention against Torture, such as what has been proposed in Canada and the United Kingdom.

### **2. REDRESS Opposes Ratification of the UN Convention without the Adoption of a Protocol Expressly Excluding Serious International Crimes from the Reach of the Terms of the Convention**

In drafting the *Convention on the Jurisdictional Immunities of State and their Properties*, criminal proceedings were specifically excluded from its reach in recognition of the fact that the Convention conflicted with certain international obligations requiring accountability for serious international crimes. However, no similar exclusion was made in respect of civil proceedings for serious international crimes, and this failure creates an anomaly in the reach of the Convention in respect of common law and civil law states. In civil law countries, a claim for compensation can be brought within criminal proceedings, and hence immunities are unlikely to apply to the entirety of the process; whereas in common law countries where criminal proceedings and civil claims for reparation are brought separately, the Convention will apply so as to bar civil proceedings. Moreover, despite the recognition by the International Law Commission Working Group and the Sixth Committee of developments in respect of the relationship between state immunity and serious international crimes, the General Assembly failed to address it and the drafters of the Convention also removed the clause subjecting the Convention to future developments in international law.

### **3. REDRESS Advocates the Adoption of a General Comment on the Scope of Article 14 of the Convention against Torture**

The United Nations Committee against Torture has recently recognised the challenges posed by state immunity and the failure to provide access to justice in civil proceedings, in the context of its consideration in May 2005 of Canada's State Party Report. Particularly in cases where no alternative forum exists, the provision of state immunity can be said to undermine the purpose and intent of the Convention against Torture by denying the torture survivor access to an effective remedy. A general comment by the Convention's interpretative body would assist in removing any ambiguity and clarifying the scope and obligations under Article 14.



# I. Introduction

The prohibition of torture is clear and absolute under international law and an overwhelming number of states recognise and support the prohibition. The strong international legal protection makes it difficult for any state to claim the right to commit torture.<sup>1</sup> Yet, in reality, the practice of torture persists on a global scale and torture survivors can face substantial obstacles in seeking and obtaining justice and other forms of reparation.

Torture, by definition, is an abuse carried out by public officials or others acting in an official capacity, and at times is committed with the implicit or explicit approval or acquiescence of the state. In some instances, it will be impossible for survivors to access justice in the location in which the torture took place. This can be due to an absence of political will, procedural or legislative hurdles, or weak institutions incapable of instituting the rule of law. In some cases survivors may simply rule justice out; they may consider that seeking justice would result in too high a risk to their own or their family's security.

As very few options exist for torture survivors seeking to bring a case at the international level, they may be forced to turn to the courts of another state, often in the country of their nationality or residency, in order to bring a claim against the state responsible for their torture. However, the application of the principle of state immunity by domestic courts may prevent or otherwise frustrate such a claim. Yet, in contrast to the attention paid to the subject of state immunity in areas such as commerce, very little analysis has been undertaken into its role in civil claims relating to torture and other serious international crimes.

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<sup>1</sup>All of the major human rights instruments contain provisions on the prohibition of torture as does common Article 3 of the four Geneva Conventions (Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, entered into force 21 October 1950; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, entered into force 21 October 1950; Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force 21 October 1950; Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force 21 October 1950.) The United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment 1984 (CAT) was adopted by unanimous agreement by the General Assembly in 1984 (UN General Assembly, Thirty-ninth Sess., Agenda item 99, A/Res/39/46 (17 December 1984)) and has been ratified by 140 States (Statistics available at <<http://www.ohchr.org/english/countries/ratification/9.htm>> (last updated 7 October 2005). Torture that is committed as part of a widespread or systematic attack against any civilian population is characterised as a crime against humanity in the statutes of the International Criminal Court (Part II, Article 7 of the Rome Statute of the International Criminal Court, available from <<http://www.un.org/law/icc/statute/rome.htm>>) and the International Criminal Tribunals for the Former Yugoslavia and Rwanda (Articles 2 and 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia, available at <<http://www.un.org/icty/legaldoc/index.htm>>); Articles 3 and 4 of the Statute of the International Criminal Tribunal for Rwanda, available at <<http://www.ictr.org/ENGLISH/basicdocs/statute.html>>.) In *Prosecutor v. Furundzija*, the International Criminal Tribunal for the Former Yugoslavia characterised torture as a *jus cogens* norm (*Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, PP155-156 (10 December 1998). The prohibition against torture is also contained in domestic instruments. Following the events of 11 September 2001, some states have attempted to argue that the prohibition of torture should be balanced against national security interests despite the absolute nature of the prohibition. This position has been condemned by a number of United Nations bodies, the Secretary-General and the Special Rapporteur listed in the bibliography. This year alone, see *Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted at 61<sup>st</sup> Session of the Commission of Human Rights, 20 April 2005, Res. E/C.4/RES/2005/39; General Assembly, *Protecting Human Rights and Fundamental Freedoms While Countering Terrorism (Report of the Secretary-General)*, A/60/374 (22 September 2005); Secretary-General, *A Global Strategy for Fighting Terrorism*, Key note address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security in Madrid (10 March 2005); General Assembly Resolution, *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, A/RES/59/191 (1 March 2005); General Assembly, *Protection of Human Rights and Fundamental Freedoms while Combating Terrorism: Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Combating Terrorism*, A/60/370 (21 September 2005); Committee against Torture, *Agiza vs. Sweden*, CAT/C/34/D/233/2003 (May 2005); *The Report of the independent expert on the protection of human rights and fundamental freedoms while countering terrorism*, Robert K. Goldman, E/CN.4/2005/103, 7 February 2005; Statement of the Special Rapporteur on Torture, Manfred Nowak to the 61<sup>st</sup> Session of the UN Commission on Human Rights, (4 April 2005); See also, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *15<sup>th</sup> General Report on the CPT's Activities: Covering the Period 1 August 2004 to 31 July 2005*, CPT/Inf (2005) 17 (22 September 2005); Office of the Commissioner for Human Rights, Council of Europe, *Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, On His Visit to the United Kingdom, 4 – 12<sup>th</sup> November 2004, for the Attention of the Committee of Ministers and the Parliamentary Assembly*, CommDH (2005) 6, See also, REDRESS, TERRORISM, COUNTER-TERRORISM AND TORTURE: INTERNATIONAL LAW IN THE FIGHT AGAINST TERRORISM, (July 2004) at 25.

## Immunity v. Accountability

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Most attempts to 'codify' the law on state immunity, including the *United Nations Convention on the Jurisdictional Immunities of States and their Properties*, which opened for signing on 17 January 2005, avoid addressing how state immunity and international human rights law relate. As a result, the law is inevitably unclear and the approach of domestic courts has been far from consistent. On the one hand, the Italian Supreme Court in *Ferrini v. the Federal Republic of Germany* and the Greek Supreme Court (*Areios Pagos*) in *Prefecture of Voiotia v. the Federal Republic of Germany* found that state immunity does not apply to *jus cogens* norms (a category of norms accorded a peremptory status under international law and which includes torture). In contrast, in *Al-Adsani v. the United Kingdom* and *Bouzari v. the Islamic Republic of Iran*, the European Court of Human Rights and the Ontario Court of Appeal in Canada, respectively upheld the claim of state immunity in civil proceedings for torture. In another English case, *Ron Jones v. Saudi Arabia*, in which REDRESS intervened before the Court of Appeal and which is currently on appeal to the House of Lords, the Court of Appeal found that the Kingdom of Saudi Arabia enjoyed immunity for civil proceedings relating to torture but denied the protection of immunity to the individual state officials.

As a practical matter within REDRESS' work, state immunity has posed a barrier for torture survivors to access justice. As a result, REDRESS identified the need for further exploration into the principle of state immunity and its relationship to torture survivors' right to a remedy and reparation. One of the founding and continuing objectives of REDRESS is to ensure that torture survivors, and when appropriate, their families, have access to effective and enforceable remedies; e.g., justice and other forms of reparation, including restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition,<sup>2</sup> in line with the obligations enshrined in the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.

REDRESS continues to promote the adoption of a *Redress for Torture Bill*<sup>3</sup> in the United Kingdom which would provide a clear legislative framework for victims to seek remedies against individuals, institutions and/or states which carry out, authorise, condone or fail to take reasonable steps to prevent the commission of torture, wherever it occurred. One of the central barriers to its swift adoption has been the provision in the Bill which specifically denies immunity to states in civil claims for torture.<sup>4</sup> Likewise, state immunity has presented the central obstacle to torture survivors seeking to hold to account foreign states which systematically perpetrate torture, as in the cases of *Al-Adsani v. Kuwait* and *Ron Jones v. Saudi Arabia* discussed throughout this Report.

Beginning in September 2004, REDRESS began an international and comparative law research project with a focus on the laws on state immunity in countries in Europe as well as certain other countries with a developed jurisprudence, such as Canada and the United States. We established an Advisory Committee composed of experts on state immunity and human rights in the United Kingdom and consulted with a number of experts in Europe and North America. As the Project progressed, we conducted detailed outreach in order to deepen our understanding of the various perspectives of relevant actors. We held meetings at the European Union and the Council of Europe; attended and presented at international law

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<sup>2</sup> These different forms of reparation are set out in detail in the recently adopted *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*, C.H.R. res. 2005/35, U.N. Doc. E/CN.4/2005/ L.10/Add.11 (19 April 2005).

<sup>3</sup> The *Redress for Torture Bill* was introduced as a private members' bill in the House of Commons in 1999.

<sup>4</sup> Section 4 of the *Redress for Torture Bill* provides that, "The State Immunity Act 1978 shall be amended by the insertion after section 5 of the following section: "Liability for torture. 8A. (1) A State is not immune as respects proceedings in England and Wales concerning an action for damages in respect of torture or death caused by torture."

conferences, such as the Annual Meeting of the American Society of International Law in April 2005; convened a meeting of British non-governmental organisations and held a workshop on state immunity in Berlin in association with the Republican Lawyers' Association, the Centre for Constitutional Rights and the International Federation of Human Rights (FIDH). In addition, we participated in the United Kingdom's Foreign and Commonwealth Office's public consultation process on the impact of the *United Nations Convention on the Jurisdictional Immunities of States and their Properties*<sup>5</sup> on the international obligations of the United Kingdom, and following on from our intervention before the Court of Appeal, we have applied to intervene before the House of Lords in *Ron Jones v. Saudi Arabia* along with a number of other international human rights organisations.

This Report attempts to draw together all of the strands of REDRESS' work on state immunity to date. In writing this Report, REDRESS is fully aware of the legal and political uncertainty which prevails in the relationship between state immunity and serious international crimes, particularly in light of ongoing litigation and law reform initiatives in various countries. We are equally conscious of the different perspectives and interests that weigh on this complex relationship.

This Report does not attempt to reconcile this relationship and does not seek to definitively answer the question of where any 'balance' between what appear to be competing interests may indeed lie. Instead, the Report seeks to comprehensively dissect and analyse the multiple issues and sub-issues when considering the question as to how the principle of state immunity should impact upon claims concerning torture and other serious international crimes. It is hoped that by providing this comprehensive overview, the Report will serve as a useful starting point for practitioners, policymakers, activists and academics working on this and related areas. Given the topicality of the relationship in light of the recent and ongoing decisions before national courts, domestic law reform initiatives and the opening for signature of the *UN Convention on the Jurisdictional Immunities of States and their Properties*, this issue is not of academic interest only, but requires urgent and thorough attention and investigation.

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<sup>5</sup> REDRESS' letter to the Foreign and Commonwealth Office, 28 April 2005 is available on REDRESS' website at <<http://www.redress.org>>.

# II. Accountability of the State as a System and Right to Reparation

## 1. State Responsibility under International Law

For the torture survivor, the words, “Scream as loud as you like, no one will believe you,”<sup>6</sup> resound long after the end of the actual torture. Without redress, feelings of powerlessness and disenfranchisement can hold torture survivors in a state of perpetual ‘victimhood’.<sup>7</sup> The ability to access effective remedies can be a key factor in overcoming the effects of torture and in efforts to combat impunity. The *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 Humanitarian Law* which were recently adopted at the 61<sup>st</sup> session of the United Nations Human Rights Commission in April 2005 focus on four pillars of reparation: restitution; compensation; rehabilitation as well as satisfaction and guarantees of non-repetition.<sup>8</sup>

As discussed in the introduction to this Report, Article 1 of the *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* 1984 (CAT) defines torture as an act 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.”

The involvement of the state underlines the egregiousness of the crime, making it qualitatively different from ‘ordinary’ crime.<sup>9</sup> As REDRESS has previously pointed out, “[p]robably one of the worst aspects of torture and many of the other crimes under international law is that the State – the very body that is designed to protect the rights of individuals – has abused its position of power and itself been responsible for the perpetration of serious crimes.”<sup>10</sup> The fight to fully and effectively combat the practice of, and impunity for, torture will be frustrated if the state is not also held to account.

There is no question that states are responsible for wrongful acts, including torture, under international law.<sup>11</sup> Article 1 of the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* (Draft Articles on State Responsibility), adopted by the

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<sup>6</sup> Stanley Cohen, *STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING*, (Polity, 2001) at 103.

<sup>7</sup> See, Yael Danieli, *Preliminary Reflections from a Psychological Perspective*, in 1 *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES: GENERAL CONSIDERATIONS* (Neil Kritz, ed., United States Institute for Peace Press, Washington DC, 1995) (discussing the “conspiracy of silence”) and Roger Gurr and José Quiroga, *Approaches to Torture Rehabilitation: A Desk Study covering Effects, Cost-effectiveness, participation and sustainability*, in 11(1) *Torture*, Quarterly journal on rehabilitation of torture victims and prevention of torture, 3-35 (2000).

<sup>8</sup> *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*, UN Doc. E/CN.4/RES/2005/35, Annex, 20 April 2005. See, also REDRESS, *TORTURE SURVIVORS PERCEPTIONS OF REPARATION: PRELIMINARY STUDY*, (London, June 2001) at 14 available at <<http://www.redress.org>>.

<sup>9</sup> See, Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 *Harv. Hum. Rts. J.* 39 - 97 (2002) at 41 – 42 (distinguishing state-sponsored crime from domestic crime and questioning whether the former requires different “responses and remedies”).

<sup>10</sup> REDRESS, *REPARATION: A SOURCEBOOK FOR VICTIMS OF TORTURE AND OTHER VIOLATIONS OF HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW* (London, March 2003) at 5.

<sup>11</sup> Permanent Court of Justice, *Chorzow Factory Case (Pol v. FRG)* 1927 PCIJ (ser. A) No. 17 at 47 (21 November); Security Council Resolution 674, adopted on 29 October 1990 reprinted in 29 *ILM* 1561 (1990).

International Law Commission in 2001, provides that, “[e]very internationally wrongful act of a State entails the international responsibility of that State.”<sup>12</sup> Liability arises where the violation is attributable to the state, meaning that the individual official must have been acting in an official capacity or holding themselves out to be acting in an official capacity, even if their acts were beyond their authorised powers (*ultra vires*).<sup>13</sup> The state may also be held responsible if it fails to provide an effective remedy for the violation as required by international law.<sup>14</sup>

Yet, despite ingrained state responsibility under international law, states are often depicted as abstract entities which only become real through their individual officials.<sup>15</sup> In the enforcement of the prohibition of torture, the focus on the individual without acknowledgment of the overall state involvement only serves to sustain impunity through the exceptionalisation of the actions of an individual perpetrator as distinct from the state itself.<sup>16</sup> For example, in the military trial of Specialist Charles A. Graner Jr. in Fort Hood, Texas, for alleged prisoner abuse at Abu Ghraib in Iraq,<sup>17</sup> the prosecutors, “tried to portray the soldier accused as the ringleader of the abuse scandal there as a sadistic thug who punched detainees for sport, posed smiling next to the bloody face of a detainee and bragged about forcing an Iraqi woman to let him photograph her naked.”<sup>18</sup> Whatever the personality and motivation of the particular individual perpetrator, the abuse at issue in this trial would appear to form part of a much bigger picture of allegations of torture by US troops in Iraq, a point which the prosecutors try to move away from by presenting the accused’s actions as isolated and unrelated to any wider practice.

By portraying individual officials who commit torture as exceptional, states manage to distance themselves from their own responsibility. They can still point to their support for international standards on the prohibition of torture but may continue to engage in the abuse or sustain a culture of impunity, leading one academic to argue that, “[t]hat States commit violations of human rights is an undeniable, if much denied, truth,”<sup>19</sup> and another to add that the “modern state use of torture requires the rhetoric of denial.”<sup>20</sup>

Moreover, while holding individual officials civilly and criminally responsible presents an essential component of the prohibition of torture, it cannot substitute or suffice for the accountability of the state itself. Actions against individual perpetrators rarely expose the broader patterns of abuse underlying the acts of the individual by anything more than

<sup>12</sup> Article 1, Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR 56<sup>th</sup> Sess., Supp. No. 10, UN Doc A/56/10 (2001), available from <[http://www.un.org/law/ilc/texts/State\\_responsibility/responsibilityfra.htm](http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm)> [hereinafter Draft Articles on State Responsibility].

<sup>13</sup> French-Mexican Claims Commission, *Caire* claim 5 RIAA (1929).

<sup>14</sup> See, Steven R. Ratner and Jason S. Abrams, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY (Clarendon Press, Oxford, 1997), 13-14; John F. Murphy, *Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 Harv. Hum. Rts. J. 1 - 56 (1999).

<sup>15</sup> See, James Crawford and Simon Olleson, *The Nature and Forms of International Responsibility*, in INTERNATIONAL LAW (Malcolm D. Evans, ed., Oxford University Press, 2003) 445 - 472 at 454.

<sup>16</sup> Cohen, *supra* note 6 at 113 (describing such denial as ‘spatial isolationism’).

<sup>17</sup> *Preferred Charges Against Spc. Charles Graner*, (14 May 2004) available from <<http://news.findlaw.com/hdocs/docs/iraq/graner51404chrg.html>> (last visited, 21 September 2005) (charges included conspiracy to maltreat detainees; dereliction of duty for wilfully failing to protect detainees from abuse, cruelty, and maltreatment; maltreatment of detainees; assaulting detainees and committing indecent acts).

<sup>18</sup> Kate Zernike, *Central Figure in Iraq Abuse Goes on Trial*, New York Times, 11 January 2005, available from <<http://www.nytimes.com/2005/01/11/national/11abuse.html?th>> (last visited on 12 September 2005).

<sup>19</sup> Angela Hegarty, *Dealing with the Past: The Government of Memory: Public Inquiries and the Limits of Justice in Northern Ireland*, 26 Ford. Int’l L.J. 1148 – 1192 (2003) at 1148.

<sup>20</sup> Talal Asad, *On Torture or Cruel, Inhuman and Degrading Treatment* in SOCIAL SUFFERING 285 - 308 (Kleinman, Das, Lock, eds, Oxford University Press, New Delhi, 2000) at 290.

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implication, unless the case involves specific crimes such as crimes against humanity which, by definition, require that the acts be committed as “part of a widespread or systematic attack”<sup>21</sup> and may therefore bring out the broader patterns of abuse in the course of the proceedings in the individual case.<sup>22</sup> In the same way that the principle of command responsibility recognises that individuals occupying a relationship of superiority are as responsible as the perpetrators that pulled the trigger or physically committed the acts,<sup>23</sup> the state possesses the ultimate position of authority which must be addressed in order to fully combat impunity.

### **2. Available Forums in which States May Be Held Responsible**

As the legal responsibility of states for torture and other serious international crimes is well established, the challenges to hold states to account relate more to the available forums in which to institute proceedings. The courts of the state in which the torture took place would appear to be the most obvious judicial arena. In reality, however, these courts may be inaccessible for a variety of legal and/or practical reasons, including the existence of domestic immunities or amnesties, *de facto* impunity and security risks. In *Ferrini v. the Federal Republic of Germany* in Italy; *Prefecture of Voiotia v. the Federal Republic of Germany* in Greece; and *Princz v. the Federal Republic of Germany* in the United States, the claimants had attempted to adjudicate their disputes in Germany but were refused access to the courts because they did not fall within the precise terms of domestic legislation on compensation for violations committed during World War II.<sup>24</sup> In other cases, such as the situation of Mr. Al-Adsani, for example, who initiated civil proceedings against Kuwait in English courts, bringing a claim in the courts of Kuwait could not have constituted an effective remedy<sup>25</sup> due to the absence of the rule of law and the strong likelihood that he would not have received a fair hearing.

For individual victims, international tribunals and other international judicial bodies are not obvious forums in which to obtain redress. Indeed, individuals were traditionally not afforded a right to participate at all at the international level. While individuals have rights under international law, the Permanent Court of International Justice (PCIJ) found in the *Peter Pazmany* case that, “[i]t is scarcely necessary to point out that the capacity to possess civil rights does not necessarily imply the capacity to exercise those rights oneself.”<sup>26</sup> Although Part III to the Commentaries on the Draft Articles on State Responsibility acknowledges the possibility for individuals to invoke claims against states, Article 33(2) notes that the issue should be addressed elsewhere.<sup>27</sup>

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<sup>21</sup> Article 7 Rome Statute, *supra* note 1.

<sup>22</sup> See, Hegarty, *supra* note 19; Aukerman *supra* note 9.

<sup>23</sup> See, Danesh Sarooshi, *Decisions of International Tribunals II: Command Responsibility and the Blaskic Case*, 50(2) Int'l & Comp. L.Q. 452 – 465 (2001) at 460 – 61.

<sup>24</sup> The *Distomo case* in Germany, BGH, Decision of 26 June 2003, III ZR 245/98, published in NJW 2003, 3488; The *Ferrini case* in Germany, BUNDESVERFASSUNGSGERICHT 2 BVR 1379/01 vom 28.6.2004, Absatz-Nr. (1-45).

<sup>25</sup> Lady Fox notes that, “local remedies may well be manifestly futile” pointing to the investigation by Kuwaiti courts of the “plaintiff’s complaint against the Sheikh and others and obtaining undertakings from all parties as to their future good behaviour.” Fox, *infra* note 37 at 521.

<sup>26</sup> PCIJ, Series A/B, No. 61, *Appeal from a Judgment of the Hungaro-Czechoslovakia Mixed Arbitral Tribunal*, 231 (1933).

<sup>27</sup> *Commentaries to the Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, Report of the International Law Commission on the work of its Fifty-third session, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10, (A/56/10)* chp. IV.E.2 (November 2001).

Individuals cannot bring a claim against a state to the International Court of Justice (ICJ), as the court only hears inter-state claims. In order for a claim relating to torture or other international crimes to be heard before the ICJ, a state must bring a claim against the offending state, on the basis that its rights were violated by the torture of its citizens, or on some other basis. States do not automatically espouse the claims of their citizens but have discretion in this regard.<sup>28</sup> Rather the victim may have to negotiate with one state in order to bring suit against the other state in which the torture was committed.<sup>29</sup> In any case, an inter-state claim further distances the individual from the process by framing the violation as a violation against the applicant state rather than against the individual. If the state is found to have breached international law (thereby invoking the obligations of cessation and reparation<sup>30</sup>) the offending state will only have to pay reparations to the aggrieved state, and not to the direct victims of the violation.<sup>31</sup> Moreover, as a result of the discretion involved, no state has ever brought a case against another state for torture and the likelihood of an inter-state claim being made in the future appears remote given the definition of torture and the evident fear of political backlash and reciprocity.<sup>32</sup>

While many treaties obligate states to protect the rights of individuals, very few agreements afford survivors of human rights violations the ability to bring a claim directly before an international forum. UN treaty mechanisms such as the Committee against Torture and the Human Rights Committee provide for individual complaints,<sup>33</sup> however, the ability of survivors to access these forums depends on whether the relevant state has specifically permitted these mechanisms to consider individual cases concerning them.<sup>34</sup> Moreover, even if a UN treaty mechanism does find against the state, it can only issue recommendations. Some regional judicial institutions, such as the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights and the newly established, although not yet operational, African Court

<sup>28</sup> *Panevezys-Saldutiskis Railway, Judgment, PCIJ, Ser A/B, No 76, 4 (1939)*; *La Grand (Germany v. United States of America) Merits, Judgment, ICJ Reports 2001*, para 42. Although this position is beginning to change under international law. See, REDRESS, THE PROTECTION OF BRITISH NATIONALS DETAINED ABROAD: A DISCUSSION PAPER CONCERNING CONSULAR DIPLOMATIC PROTECTION (February 2005) at 9.

<sup>29</sup> *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, ICJ Reports, 1970*, 3 paras 78-79 ("the State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease" and "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."); Amnesty International, *Letter to the Foreign and Commonwealth on the UN Convention on the Jurisdictional Immunities of States and their Properties*, 5 May 2005 at 2 (footnote 2) ("Even when diplomatic interventions are made on behalf of a state's own nationals seeking reparations for crimes under international law against another state, they are generally an ineffective means for victims and their families to obtain reparations for such crimes. They are largely dependent on the political, economic, and military power of the state of the victim's nationality and its political will. That state will be asserting the claim on its own behalf for the harm to its interests, not as an agent for the victim, and it will often sacrifice the legal rights of the victim to competing political considerations, such as maintaining friendly relations with the state responsible for the wrong. For example, the Allies often settled claims with former Axis countries for crimes committed during the Second World War against their own nationals, such as torture of prisoners of war or sexual enslavement, for derisory awards of compensation."); see also, REDRESS, *supra* note 28.

<sup>30</sup> Part II, Chapter 1, Draft Articles on State Responsibility, *supra* note 12.

<sup>31</sup> *Chorzow Factory (Jurisdiction) PCIJ, Ser. A, no. 9.*

<sup>32</sup> See, Henry J. Steiner, *International Protection of Human Rights*, in INTERNATIONAL LAW (Malcolm D. Evans, ed., Oxford University Press, 2003) 757 – 788 at 773 (arguing that, "[o]ther States are unlikely to protest, let alone take weightier measures to end the violations, even though the violator may have broken its obligations *erga omnes vis-à-vis* all other States.") See also, Cohen, *supra* note 6 at 17 (characterising the failure of states to hold each other accountable as denial by Bystander States, pointing to examples throughout history, from the atrocities preceding and during World War II and the belated responses to Rwanda, Kosovo and Chechnya).

<sup>33</sup> Article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 provides for an individual complaints mechanism and The Optional Protocol to the International Covenant on Civil and Political Rights 1966 established the individual complaints mechanism within the Human Rights Committee.

<sup>34</sup> For example, The Commission on Human Rights, may hear complaints if the relevant state party has ratified the Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force 23 March 1976. For the Committee against Torture, individual complaints may be heard if the states parties have made a specific declaration under Article 22 of the Convention against Torture.

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on Human and Peoples' Rights, allow individuals to bring claims against states parties once they have exhausted domestic remedies and the courts can issue 'binding' decisions, though even these decisions are difficult to enforce in practice. Furthermore, the decisions of related bodies such as the African Commission on Human Rights and the Inter-American Commission on Human Rights only have recommendatory effect. Moreover, in regions such as Asia, no regional body exists.<sup>35</sup>

Having regard to the above, domestic courts outside of the state in which the torture took place would represent an important way in which survivors may bring claims against the state responsible, if state immunity did not constitute a bar to the court's exercise of jurisdiction. The courts of these states can be used on the basis of obligations *erga omnes*, meaning that when a state violates certain obligations under international law, including *jus cogens* norms such as the prohibition of torture, "all States can be held to have a legal interest in their protection."<sup>36</sup>

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<sup>35</sup> For further discussion on enforcement, see, REDRESS and Freshfields Bruckhaus Deringer, CONFERENCE ON ENFORCEMENT OF AWARDS FOR VICTIMS OF TORTURE AND OTHER INTERNATIONAL CRIMES, (June 2005).

<sup>36</sup> *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (Advisory Opinion) ICJ (2004) at para 155 (quoting, *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970, p32 at para 33*); at para. 159 (explaining the obligation *erga omnes* in the context of the case as, "It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end"); Article 41 of the ILC Draft Articles on State Responsibility *supra* note 12; See, also Institut de Droit International, *Resolution: Obligations Erga Omnes in International Law*, (Krakow Session, 2005) (Article 2 states that, "When a State commits a breach of an obligation *erga omnes*, all States to which the obligation is owed are entitled, even if they are not specially affected by the breach, to claim from the responsible State in particular, (b) performance of the obligation of reparation in the interest of the State, entity or individual which is specially affected by the breach."

### III. THE DEVELOPMENT OF STATE IMMUNITY

#### 1. What is State Immunity? Terminology

**What are Immunities?** Immunities are procedural rules which act as a barrier to the adjudication of disputes and can arise at two points in a case. First, at the jurisdictional stage, immunity can have the effect of preventing a court from hearing a case, where it otherwise would have been capable of doing so. This is often termed *immunity from jurisdiction* or *immunity from adjudication*. The second point at which immunity may arise is at the moment of the enforcement of the judgment of the court. This is often referred to as *immunity from enforcement* or *immunity from execution*. This Report focuses on the immunity of the foreign state from jurisdiction (or adjudication) before domestic courts. Immunity from execution (or enforcement) will be considered in brief at the end of the Report.

**To Whom Does Immunity Apply?** The field of immunities is complex and often unclear in its source, coverage, rules and relationship to other areas of law. The field of immunities addresses the state, its entities and officials in different ways and different rules and rationales apply. Very generally, the immunity accorded to a state as an entity (*state or sovereign immunity*) is borne out of customary international law on the basis of sovereign equality, non-intervention in the internal affairs of another state, dignity, comity and international relations. Historically, states were granted *absolute immunity* before the courts of another, meaning that they enjoyed immunity under all circumstances. Many states have now moved away from the doctrine of absolute immunity towards a position in which immunity is only granted to a foreign state in certain circumstances.<sup>37</sup> This is often called *restrictive immunity*. However, due to the divergent approaches of states, whether a rule of customary international law on restrictive immunity exists is a contentious issue.<sup>38</sup>

Two types of immunity may apply to individual officials. First, immunity *ratione materiae* which applies to acts performed in an official capacity. This immunity is often referred to as *subject-matter* immunity or *functional* immunity and continues to apply even once the official has left office. Immunity *ratione personae* attaches to a limited category of officials by virtue of their particular role in representing the state abroad, for example heads of state or heads of government and diplomats. Customary international law governs the immunities available to heads of state which are distinct from the immunity available to the state as an entity.<sup>39</sup> Diplomatic immunity is accorded on a functional basis in order to allow diplomats to carry out their duties when posted abroad without the threat of being sued or arrested in the receiving state and is not motivated by concerns of sovereign equality, status or dignity but rather granted out of practical necessity and utility.<sup>40</sup> Unlike other areas of immunity, diplomatic immunity is not governed by customary international law but by the Vienna Convention on Diplomatic Relations of 1961. Recently, the ICJ held that immunity *ratione personae* may be

<sup>37</sup> Hazel Fox QC, *THE LAW OF STATE IMMUNITY* (The Oxford International Law Library, 2002) at 2 (dividing the evolution of the international law on immunities into three phases: absolute immunity between states; restrictive immunity incorporating the individual as a third party; and the “post-modern phase” in which immunity may not apply).

<sup>38</sup> Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (Sixth Edition) (Oxford University Press, 2003) at 325.

<sup>39</sup> See, *Tachiona v. Mugabe* 169 F. Supp. 2d 259 (SDNY 2001).

<sup>40</sup> H.F. Van Panhuys, *In the Borderland between Act of State Doctrine and Questions of Jurisdictional Immunity*, 13 Int'l & Comp. L.Q. 1193 – 1213 (1964) at 1203 – 4; Jonathon Brown, *Diplomatic Immunity: State Practice under the Vienna Convention on Diplomatic Relations*, 37 Int'l & Comp. L.Q. 53 – 88 (1988) at 54.

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available to foreign ministers.<sup>41</sup> Certain international organisations may also enjoy immunity in order to guarantee their independence and ability to carry out their activities without interference from the host state. Immunity may be provided in the constituent instrument of the international organisation; a multilateral agreement; the headquarters agreement between the host state and the international organisation or under customary international law.<sup>42</sup>

***In What Circumstances Does Immunity Apply?*** Immunities may be provided for in a number of different circumstances. Domestic law may grant the state itself and its individual officials certain types of immunities before their own courts. A state may grant foreign states and foreign state officials immunity from the jurisdiction of its courts. International bodies may also address the issue of the immunities of states and their officials before international judicial forums and dispute resolution mechanisms. However, a different approach has been taken in respect of international criminal tribunals. The statutes of the range of international criminal tribunals specifically refer to the inapplicability of immunities in all circumstances, and this has been confirmed by the jurisprudence of such bodies, even in respect of acting heads of state.<sup>43</sup> The Special Court for Sierra Leone, for example, in *Prosecutor v. Charles Ghankay Taylor*,<sup>44</sup> found that,

"A reason for the distinction ... between national courts and international courts, though not immediately evident, would appear due to the fact that the principle that one sovereign state does not adjudicate on the conduct of another state; the principle of state immunity derives 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."<sup>45</sup>

## **2. The Historical Emergence and Character of State Immunity**

State immunity is often justified on two bases: first, the principle of *par in parem non habet jurisdictionem* or "legal persons of equal standing cannot have their disputes settled in the courts of one of them;"<sup>46</sup> and second, the principle of non-intervention in the internal affairs of other states. International relations, comity and reciprocity are also often cited as additional reasons to grant state immunity<sup>47</sup> as is the potential inability of the forum courts to enforce any judgment rendered against a foreign state.<sup>48</sup>

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<sup>41</sup> *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)* (ICJ, 2002). (Hereinafter, "Arrest Warrant").

<sup>42</sup> Dapo Akande, *International Organisations* in INTERNATIONAL LAW (Malcolm D. Evans, ed., Oxford University Press, 2003) 269 - 297 at 286 - 7.

<sup>43</sup> Article 27 of the Rome Statute, *supra* note 1. Article 7(2) of the Statute of the International Criminal Tribunal for the Former Yugoslavia, *supra* note 1, does not refer to immunities specifically but states that the official status of the accused has no relevance on the jurisdiction of the tribunal (as does Article 6(2) of the Statute of the International Criminal Tribunal for Rwanda, *supra* note 1.) The International Criminal Tribunal for the Former Yugoslavia, interpreting Article 7(2), dismissed the contention that it did not have jurisdiction over Slobodan Milosevic as a result of his status as the former president of the Federal Republic of Yugoslavia, *Milosevic, Decision on the Preliminary Motions, "Kosovo"*, IT-02-54 (8 November 2001) at paras. 26 - 34.

<sup>44</sup> Special Court for Sierra Leone, *Prosecutor v. Charles Ghankay Taylor*, Case Number SCSL-2003-01-I (3014 - 3039) 31 May 2004 (In the Appeals Chamber).

<sup>45</sup> *Id.* at paragraph 51.

<sup>46</sup> Brownlie, *supra* note 38 at 321.

<sup>47</sup> See, *Al Adsani v The United Kingdom* (35763/97) [2001] ECHR 752 at para.54.

<sup>48</sup> See Fox, *supra* note 37 at 28.

There are differences in opinion as to whether immunity developed as a matter of domestic law, international law or purely international relations. Further questions persist as to the nature of a claim of immunity. On the one hand, immunity is framed as a right or entitlement of the foreign state. On the other, immunity is characterised as a privilege granted by way of exception to the jurisdiction which the forum state would otherwise be entitled to exercise but which it chooses not to, in order to promote comity and international relations.

a) *State Immunity Emerged out of the Immunity Granted to the Sovereign Ruler*

Before the concept of the nation-state emerged between the fifteenth and seventeenth centuries, the authority of the sovereign ruler was understood as supreme. The sovereign was absolutely immune from the jurisdiction of his or her own courts.<sup>49</sup> As a matter of reciprocity, sovereign rulers later extended immunity to foreign sovereigns on the basis that it would be illogical for them to be held responsible for their actions in foreign courts when they enjoyed complete immunity from their own domestic courts.<sup>50</sup> Here, state immunity is understood to have grown directly out of the immunity of the sovereign ruler, when the state and the sovereign were considered as the same. This theory may account for why the immunity of the state is sometimes termed as *sovereign* immunity, despite the fact that the sovereign of a state (more commonly referred to as the head of state) and the state itself are now understood as separate entities, subject to separate rules on immunity. This theory posits that immunity was historically conceived as a means of preventing the sovereign from ever being held accountable for his or her actions; the idea that, “the power of the sovereign is incapable of legal limitation.”<sup>51</sup> On this view, immunity did equate to impunity.<sup>52</sup>

b) *State Immunity as a Right of the Foreign State under International Law*

The second theory focuses much more on the connection between state immunity and the sovereign equality of states. Sovereign equality or state sovereignty formed the basis of international law and relations following the Peace of Westphalia in 1648 at which point the concept of a nation-state began to develop. Each state was understood to have exclusive control and competence over affairs within its own territory. In their relations with one another, states were understood to be independent and equal, although the effects of industrialisation and colonialism meant that in reality, the European powers dominated the international community.<sup>53</sup> Following decolonisation, newly independent states also argued in favour of state sovereignty in order to protect their territorial boundaries.

By recognising state sovereignty as a founding principle of international law, this second theory posits that state immunity developed as an essential corollary in order to protect the sovereignty of states. By linking the origins of state immunity to state sovereignty, the theory presents state immunity as a fundamental right of states under international law. Advocates of

<sup>49</sup> See, *Ex parte Pinochet R. v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No. 3)* [2000] I AC 147 at 16; see also, Andrea Bianchi, *Immunity versus Human Rights: The Pinochet Case*, 10(2) Euro. J. Int'l L. 237 – 278 (1999) at 262.

<sup>50</sup> See, Malcolm N. Shaw, *INTERNATIONAL LAW*, (Fourth Edition, Cambridge University Press, 1997) at 492.

<sup>51</sup> Gamal Moursi Badr, *STATE IMMUNITY: AN ANALYTICAL AND PROGNOSTIC VIEW* (Martinus Nijhoff Publishers, The Hague/Boston/Lancaster 1984) at 74 (quoting Lord Wilberforce).

<sup>52</sup> See, Conclusion V(1).

<sup>53</sup> See Antonio Cassese, *INTERNATIONAL LAW*, (Oxford University Press, 2001) at 28.

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this theory, point to domestic statutes on state immunity which usually provide for a general rule on state immunity subject to enumerated exceptions.<sup>54</sup>

The idea that states enjoy a fundamental right or entitlement to state immunity under international law due to the close connection with state sovereignty has been criticised however. One academic points out that if state immunity really was a fundamental entitlement or right inherent to state sovereignty, the subsequent move to a restrictive theory of state immunity would have encountered many more difficulties.<sup>55</sup> Another advances a similar view by arguing that,

“the principle of the sovereign equality of states has always been a central plank of international law, it does not follow from this principle that a state could never exercise jurisdiction over the activities of another state. In fact, for international law to have required states to accord absolute immunity to others would have been inconsistent with another well-established international law principle, the doctrine of territorial sovereignty.”<sup>56</sup>

### c) *State Immunity as an Exception to the Jurisdiction of the Forum State*

The third theory also recognises state sovereignty as one of the founding principles of international law but does not interpret state immunity to enjoy the same status. Rather, under this theory, state immunity developed as an exception to the “full and absolute” jurisdiction which the forum state was otherwise entitled to exercise over its own territory. The characterisation of state immunity as an exception to jurisdiction makes logical sense: as one commentator notes, “a foreign state cannot be entitled to immunity without the prior existence of a jurisdictional anchor to establish the court’s competence.”<sup>57</sup> A number of prominent scholars support this contention,<sup>58</sup> as illustrated by the ICJ Judge, Rosalyn Higgins:

“It is very easy to elevate sovereign immunity into a superior principle of international law and to lose sight of the essential reality that it is an exception to the normal doctrine of jurisdiction. It is a derogation from the normal rule of territorial sovereignty. It is sovereign immunity which is the exception to jurisdiction and not jurisdiction which is the exception to a basic rule of immunity. An exception to the normal rules of jurisdiction should only be granted when international law requires – that is to say, when it is consonant with justice and with equitable protection of the parties. It is not to be granted “as of right.””<sup>59</sup>

In what is known as the *Arrest Warrant* case, the Democratic Republic of Congo (DRC) brought a claim against Belgium before the ICJ, following the issuance of an arrest warrant against the

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<sup>54</sup> However, as will be discussed in the next section on the rules of state immunity under international law, these domestic statutes, which are a regular feature of common law countries, may reach further than international law requires. As a result, they may not provide as much support for this theory as might initially appear.

<sup>55</sup> Lee Caplan, *State Immunity, Human Rights and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 *Amer. J. Int’l L.* 741 – 781 (2003) at 754.

<sup>56</sup> Richard Garnett, *Should Foreign State Immunity be Abolished?* 20 *Aus. YB of Intl Law* 175 – 190 (1999) at 177.

<sup>57</sup> Caplan, *supra* note 55 at 754.

<sup>58</sup> Sir Ian Sinclair, *The Law of Sovereign Immunity: Recent Developments*, 167 *Recueil des Cours* 113 – 284 (1980 - II) at 215 (discussing that immunity, “operates by way of exception to the dominating principle of territorial jurisdiction.”); Sir Robert Jennings, *THE PLACE OF THE JURISDICTIONAL IMMUNITY OF STATES IN INTERNATIONAL AND MUNICIPAL LAW* (Vortrag vor dem Europa-Institut der Universität des Saarlandes No. 108, 1987) at 19 (cited in Caplan, *supra* note 55 at 749) (claimed that with regard to state immunity, “territorial jurisdiction is the dominating principle”).

<sup>59</sup> R. Higgins, *Certain Unresolved Aspects of the Law of State Immunity*, 29 *Neth. Int’l L. Rev* 265 – 276 (1982) at 271.

foreign minister of the DRC by a Belgian judge.<sup>60</sup> The DRC claimed that Belgium had violated the “principle of sovereign equality” by failing to grant the foreign minister immunity,<sup>61</sup> a contention which the majority of the ICJ upheld. However, in their Joint Separate Opinion, judges Higgins, Kooijmans and Buergenthal disagreed with the majority and focused on immunity as an exception to jurisdiction. While they agreed with the majority’s finding of immunity in principle, they noted that, “[t]he impression is created that immunity has value *per se*, whereas in reality it is an exception to a normative rule which would otherwise apply.”<sup>62</sup> They used the move towards restrictive immunity in civil law<sup>63</sup> and the developments in extraterritorial jurisdiction in international criminal law<sup>64</sup> to demonstrate the exceptional status of immunity, particularly with regard to international crimes.<sup>65</sup>

Some judges and legal scholars have used the interpretation of state immunity as an exception to jurisdiction to frame state immunity not as an obligation under international law but as a matter of respect for the dignity of the foreign state, comity, reciprocity and international relations.<sup>66</sup> On this view, immunity developed as a matter of privilege and finds support in earlier caselaw and the writings of jurists. In the classic case on state immunity, the *Schooner Exchange v. McFaddon*, decided in 1812, the United States Supreme Court found that:

“One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him. 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.”<sup>67</sup>

At the time during which international law and relations were developing, the grant of immunity as a matter of privilege and international relations made practical sense. Between the fifteenth and seventeenth centuries, states interacted minimally and generally preferred to resolve disputes through diplomatic rather than judicial channels.<sup>68</sup> As already discussed, domestically most states protected their own sovereigns or heads of state from their own courts by providing them with absolute immunity. It would have made little logical sense to

<sup>60</sup> As background to this case, in 1998, a criminal complaint was lodged by Congolese citizens, a number of whom resided in Belgium, against Yerodia Ndombasi *in absentia* for grave breaches of the Geneva Conventions and crimes against humanity. Judge Vandermeersch issued an arrest warrant on 11 April 2000, at which point Yerodia held the post of foreign minister to the Democratic Republic of Congo (DRC). The judge acknowledged the political implications of issuing a warrant against a current foreign minister but decided to do so in view of importance of the investigation in collecting information for use once the minister left office.

<sup>61</sup> *Arrest Warrant*, *supra* note 41.

<sup>62</sup> *Separate Opinion of Judges Higgins, Kooijmans and Buergenthal*, *Id.* at para 71. (Hereinafter, “Higgins et. al. (Arrest Warrant).”)

<sup>63</sup> *Arrest Warrant* *supra* note 41 at para 72.

<sup>64</sup> *Id.* at para 73.

<sup>65</sup> *Id.* at paras 73 – 79.

<sup>66</sup> Adam C. Belsky, Mark Merva and Naomi Roht-Arriaza, *Implied Waiver under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 Calif. L. Rev. 365 – 415 (1989) at 379 (“the waiver was not binding or universal; the local state could withdraw it whenever it chose to exercise the plenitude of its territorial sovereignty.”).

<sup>67</sup> *The Schooner Exchange v. McFaddon*, 11 US 116; 7 Cranch. 116 (1812) at 137.

<sup>68</sup> Caplan, *supra* note 55 at 754.

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protect sovereigns from their own courts but allow them to be exposed to the potential of judicial process in foreign courts.

The idea that state immunity was granted as an exception to jurisdiction on the basis of international comity and good relations is supported by the contrast in the ways in which states dealt with claims against friendly and enemy states. Historically, domestic courts denied enemy states immunity but granted immunity to friendly or allied states.<sup>69</sup> Indeed, this practice has been and continues to be particularly evident in the United States. Before the enactment of the *Foreign Sovereign Immunities Act* 1976 (FSIA), the US State Department determined whether a foreign state would be granted immunity before the courts of the United States. More recently, some of that power has been transferred from the judiciary back to the Executive through the introduction of the *Anti-Terrorism and Effective Death Penalty Act* of 1996 which amends the FSIA. Section 221 provides that immunity will not be available to state sponsors of terrorism as designated by the State Department (currently: Cuba, Iran, Libya, North Korea, Sudan and Syria),

"any case . . . in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act."<sup>70</sup>

Furthermore, the Executive Branch still determines the availability or existence of immunity in respect of a foreign head of state as illustrated by the recent case in the US Court of Appeals for the Seventh Circuit deciding on the immunity of the Chinese President in *Wei Ye v. Jiang Zemin and Falun Gong Control Office*.<sup>71</sup>

Moreover, in response to the FSIA amendment in the United States, Iran has reacted by passing legislation which enables, "Iranian victims of United States "interference" to sue the United States in Iranian courts."<sup>72</sup> These developments suggest that certain states grant immunity not out of the belief that they are obliged to do so under international law because of a fundamental entitlement of the foreign state or its officials to immunity, but as a matter of habitual practice in order to promote comity and international relations.

Whether immunity emerged as a fundamental entitlement; an exception to jurisdiction or a matter solely for international comity and good relations does not change the historical practice of states granting each other absolute immunity. However, as will be discussed below, the

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<sup>69</sup> Thomas H. Hill, *A Policy Analysis of the American Law of Foreign State Immunity*, 50 Ford. L. Rev. 155 – 238 (1981 - 82) at 170.

<sup>70</sup> The denial of immunity only applies to US nationals seeking to bring claims. For foreign nationals, the general rules on immunity apply. See also, Lori F. Damrosch, *Enforcing International Law*, 269 Recueil Des Cours 9 – 250 (1997).

<sup>71</sup> *Wei Ye v. Jiang Zemin and Falun Gong Control Office*, 383 F. 3d 620 (7<sup>th</sup> Cir. 2004) (the Court held that, "The FSIA does not, however, address the immunity of foreign heads of states. The FSIA refers to foreign states, not their leaders. The FSIA defines a foreign state to include a political subdivision, agency or instrumentality of a foreign state but makes no mention of heads of state. Because the FSIA does not apply to heads of states, the decision concerning the immunity of foreign heads of states remains vested where it was prior to 1976 – with the Executive Branch" at 10. "Our deference to the Executive Branch is motivated by the caution we believe appropriate of the Judicial Branch when the conduct of foreign affairs is involved" at 15. "The Executive Branch has represented to this court that permitting service of process is often viewed by foreign governments and their heads of state "as an affront to the dignity of both the leader and the state." The Executive Branch has also indicated that "the potential for insult is the same, regardless of whether the service relates to the visiting head of state himself, or to service on the visiting leader in some purported representational or agency capacity" at 20 – 21).

<sup>72</sup> Keith Sealing, *"State Sponsors of Terrorism" Is a Question, Not an Answer: The Terrorism Amendment to the FSIA Makes Less Sense Now Than It Did Before 9/11*, 38 Tex. Int'l L.J. 119 – 144 (2003) at 121; *Iran MPs cry "Down with America", approve lawsuits against United States*, 1 November 2000, Agence France Press ("Iran's pro-reform parliament gave final approval Wed to new legislation that will allow all Iranian "victims of US interference" to sue the United States for damages ... To cries in the chamber of "Down with America," MPs overwhelmingly passed the law on second reading, striking back after Washington said it would use frozen Iranian assets to pay US victims of what it call Iran-sponsored terrorism in the 1980s.").

way in which state immunity is understood may impact upon whether it can be considered to have reached the level of a customary international law rule.

### 3. Is there a Rule of State Immunity under International Law?<sup>73</sup>

Although states used to enjoy *absolute immunity* before the courts of another, many states have moved away from this practice for a variety of reasons. One of the first motivations for withholding immunity in certain circumstances, related to the increase in international trade during the 20<sup>th</sup> century,<sup>74</sup> where, in the interests of fairness to private parties contracting with a state, immunity was denied in order to allow the parties to deal with commercial disputes. Developments at the national level recognising instances in which immunity did not protect governments from civil suit before their own courts may also have prompted a similar approach with regard to foreign states. As will be discussed at the end of this Report, other jurisdictional protections were perceived to adequately address the underlying concerns of bringing claims against a foreign state, for example, the doctrines of *forum non conveniens* and act of state. The shift back to emphasising the primacy of the jurisdictional authority of the forum state rather than the automatic application of immunity also contributed to this move towards a restrictive approach to state immunity, as did the rise in the instances in which states voluntarily chose to waive immunity.<sup>75</sup>

Up until very recently, no international agreement on state immunity existed and very few states had ratified regional agreements, such as the *European Convention on State Immunity*. As a result, state immunity is sometimes framed as a rule of customary international law. However, as is discussed below, it is not clear that state immunity reaches even traditional understandings of customary international law.

#### a) *A Customary International Law Rule?*

For a rule to be considered to have achieved the status of 'customary international law', the ICJ statute requires two elements: first, evidence of general and consistent state practice and second, *opinio juris* - evidence of states' belief that they are under a legal obligation.<sup>76</sup>

Under traditional international law, heavy emphasis was placed on state practice as evidence of customary international law.<sup>77</sup> In this respect, a large number of states have moved away from granting foreign states absolute immunity, towards a practice in which immunity is restricted by enumerated exceptions or limited in application to specific circumstances. However, only at the very abstract level is it possible to identify a general and consistent state practice on

<sup>73</sup> See Lord Denning in *Trendtex Trading Corp v Central Bank of Nigeria* [1977] 1 All ER 881, [1977] 1 QB 529 at 558 (stating that European Union member states and national courts within those states were under a duty to "bring the law as to sovereign immunity into harmony throughout the community," quoted in Fox *supra* note 37 at 72, discussing the wrestle of courts in moving towards the restrictive doctrine of immunity, "with the nature of the evidence required to establish what international law requires with regard to immunity of one State before the national courts of another State.")

<sup>74</sup> Badr, *supra* note 51 at 18.

<sup>75</sup> See, Peter D. Trooboff, *Foreign State Immunity: Emerging Consensus of Principles*, 200 Recueil Des Cours 235 – 432 (1986) at 266-8.

<sup>76</sup> Article 38(1)(b) of the Statute of the International Court of Justice.

<sup>77</sup> See, Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 Amer. J. Int'l L. 757 – 791 (2001).

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immunity.<sup>78</sup> No state has abolished the practice of immunity completely but when actually trying to identify clear rules, the process becomes significantly more difficult. There first appears to be a divide in practice between monist and dualist countries.<sup>79</sup> Many dualist countries such as Australia, Canada, Malaysia, Pakistan, South Africa, the United Kingdom and the United States, frame immunity as a domestic issue through domestic legislation on state immunity.<sup>80</sup> With the exception of Argentina which also has domestic legislation on state immunity, most monist countries restrict immunity through judicial practice. In contrast to dualist countries, as will be discussed later, courts in monist states tend to locate the rules on state immunity in international law.

Reference is often made to a general rule of state immunity subject to specific exceptions. This is the approach taken by a number of dualist countries in their domestic legislation on state immunity. As a result of such legislation, phrases such as 'the commercial exception' and the 'tort exception' have entered into common usage as a form of shorthand. However, it is not clear whether international law also recognises this framework. Rather than providing for a general rule, international law may simply recognise specific areas in which immunity applies. This would align with the position discussed above, in which immunity is understood as an exception to jurisdiction rather than a general rule subject to exceptions. Moreover, reference to 'exceptions' suggests a common approach. However, the content of each 'exception' varies considerably from state to state as do the tests applied to decide whether a particular act falls within its definition. For example, in some states, such as the United States, the courts look to the 'nature' of the underlying act to determine whether the state is immune, whereas in other states, such as France, the courts consider the 'purpose' of the act as the determining factor.<sup>81</sup> These divergences demonstrate a lack of uniformity in national and judicial practice, thus undercutting the assumption that customary international law continues to protect state immunity.<sup>82</sup> As one commentator claims, "it is now almost impossible to speak of a 'customary international law' of foreign state immunity given the divergences in state practice. Immunity has, in fact, become little more than a sub-branch of each state's domestic law."<sup>83</sup>

In terms of the *opinio juris* element to customary international law, as discussed above, the history of state immunity makes it difficult to ascertain whether states grant immunity in recognition of an obligatory international law rule or simply as a matter of comity and international relations.<sup>84</sup> As the ICJ held in the *North Sea Continental Shelf Cases*,

"The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty."<sup>85</sup>

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<sup>78</sup> Caplan *supra* note 55 at 761 (discussing the development of, "roughly similar responses that are collectively described by the rubric of the "restrictive theory of foreign state immunity. A closer examination of the details of the several approaches to foreign state immunity . . . demonstrates, however, that consensus exists only at a rather high level of abstraction.").

<sup>79</sup> Damrosch *supra* note 70 at 168 (discussing the FSIA).

<sup>80</sup> See Fox *supra* note 37 at 124-5.

<sup>81</sup> Caplan *supra* note 55 at 761.

<sup>82</sup> See, Alexander Orakhelashvili, *State Immunity in National and International Law: Three Recent Cases Before the European Court of Human Rights*, 15 *Leiden Journal of Intl Law*, 703 – 714 (2002).

<sup>83</sup> Richard Garnett, *Should Foreign State Immunity be Abolished?* 20 *Aus. YB of Intl Law* 175 – 190 (1999) at 175.

<sup>84</sup> Alexander Orakhelashvili *State Immunity and International Public Order*, 45 *German YB of Intl Law*, 227 – 267 (2002) at 249.

<sup>85</sup> *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark and the Netherlands)* ICJ Reports (1969) at para. 77.

In states with domestic statutes on the issue, it is unclear whether national legislation was adopted in reference to international law.<sup>86</sup> One academic argues that international law only requires states to grant immunity for acts which “collectively benefit the community of nations.” He notes that if the actions of a state would harm interstate relations, any domestic law on state immunity would be inconsistent with international law. To illustrate his point he uses examples of cases involving, “murder, torture or victimization of citizens of the forum state.” Immunity from jurisdiction for such acts would only arise out of domestic law rather than international law.

In line with the discussion on the United States’ approach to state immunity, both historically and following the amendment to the FSIA, the lack of consistency in state practice and belief that states are acting out of a legal obligation may also reflect a situation of *realpolitik*. Although international law assumes that all states are equal, the reality exposes significant imbalances. Beyond commercial acts, less powerful states may grant foreign states immunity in order to avoid political challenges, even where they themselves may not enjoy immunity in foreign courts. In the field of immunities and universal jurisdiction, the impact of the ICJ’s decision in the *Arrest Warrant* case and the significant pressure brought to bear on Belgium by the United States and Israel following criminal complaints against their respective high-ranking officials, was one of the major factors in subsequent decisions to amend Belgian law. These amendments, among other things, introduced provisions on immunity, where none had previously existed.<sup>87</sup>

#### b) *Agreements at the International Level*

Before the *UN Convention on the Jurisdictional Immunities of States and their Property (Immunity Convention)* opened for signing in January 2005, very few agreements on state immunity had been reached at the international level and none addressed the issue comprehensively.

The European Convention on State Immunity (commonly referred to as the Basle Convention) reflected the first multilateral attempt to legislate on state immunity.<sup>88</sup> The Preamble to the Convention provides that, “there is in international law a tendency to restrict the cases in which a State may claim immunity before foreign courts.” Chapter I of the Convention then lays out the instances in which a state cannot claim immunity from the jurisdiction of another contracting state, which mainly relate to commercial acts and torts committed by the foreign state in the forum state.<sup>89</sup> Notably, Article 33 provides that, “[n]othing in the present

<sup>86</sup> Orakhelashvili, *supra* note 84 at 247 (discussing that, “there is hardly any convincing evidence that States adopt their legislation on State immunity in belief of an international obligation.”). However, the Lord Chancellor stated that the purpose of the State Immunity Bill in the United Kingdom as, “[i]t will codify and, I think, bring greater certainty into an area where guidance is needed ... and bring our law on the immunity of States into line with current international practice.”), House of Lords, *Hansard*, Vol. 388, col. 59 (quoted in Fox, *supra* note 37 at 130); See also, R.C.R. Siekmann, *Netherlands State Practice for the Parliamentary Year 1981 – 1982*, 14 Neth. Y.B. Int’l L. 245 – 339 (1983) at 252 (framing state immunity as a rule under international law, but presenting the divergences that exist over whether state immunity is a general rule under international law or only available in defined circumstances).

<sup>87</sup> See, Stefaan Smis and Kim van der Borgh, Introductory Note to Belgium’s Amendment to the Law of June 16, 1993 (As Amended by the Law of February 10, 1999) Concerning the Punishment of Grave Breaches of Humanitarian Law, 42 I.L.M. 740 (2003); Sean D. Murphy (ed.), *Contemporary Practice of the United States Relating to International Law: International Criminal Law: U.S. Reaction to Belgian Universal Jurisdiction Law*, 97 Amer. J. Int’l L. 984 – 987 (2003); *Belgium’s Amendment to the Law of June 15, 1993 (As Amended by the Law of February 10, 1999 and April 23, 2003) Concerning the Punishment of Grave Breaches of Humanitarian Law*, 42 I.L.M. 1258 – 1270 (2003).

<sup>88</sup> European Convention on State Immunity, Basle 16 May 1972.

<sup>89</sup> Violations of international human rights law are not addressed, although Article 11 provides that a state cannot claim immunity, “in proceedings which relate to redress for injury to the person or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred.”

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Convention shall affect existing or future international agreements in special fields which relate to matters dealt with in the present Convention.” As the Basle Convention came into effect twelve years before the UN Convention Against Torture 1984, the question of the Basle Convention’s continuing applicability to civil claims for torture against foreign states arises. The format of the Basle Convention has been used as a template for many subsequent domestic laws on state immunity through its provision for a general rule of state immunity subject to enumerated exceptions. However, at the time of writing, only eight states had ratified the Convention (Austria, Belgium, Cyprus, Germany, Luxembourg, the Netherlands, Switzerland and the United Kingdom).

A substantial number of bilateral treaties have been concluded between states on the issue of immunity. Most concerned trade arrangements and immunity over state property at the enforcement or execution stage.<sup>90</sup> Beyond bilateral treaties, a large number of agreements on immunity have been reached on state property. Immunity has usually been denied in respect of warships, vessels owned and/or operated in an exclusively public capacity and in a commercial capacity. Immunity has generally been upheld with regard to environmental matters and civil liability for nuclear damage and in relation to aircraft.

Codification projects have also been initiated at the governmental level.<sup>91</sup> Most address immunity on the basis of the differing functions of the state and distinguish between what are considered the ‘public’ and ‘private’ acts of a state.<sup>92</sup> Over the last seven years, the Council of Europe has conducted a comparative analysis of the laws on state immunity based on member state submissions. The final report is due to be published this year.<sup>93</sup> A number of other non-governmental codification projects have been undertaken. Although many of the substantive areas overlap, the projects have differed in emphasis as to whether state immunity is understood as the starting point or an exception to the jurisdiction which would otherwise exist. For example, the International Law Association’s Draft Convention on State Immunity adopts a similar framework to domestic legislation by providing for a general rule of immunity subject to enumerated exceptions.<sup>94</sup> In contrast, the Institut de Droit addresses the issue from the opposite perspective, namely outlining situations in which the domestic court is competent

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<sup>90</sup> James Crawford, *Execution of Judgments and Foreign Sovereign Immunity*, 75 *Amer. J. Int’l L.* 820 – 869 (1981) (chronicling the bilateral agreements. He identifies fourteen treaty agreements, “of friendship, commerce and navigation” negotiated by the US before it adopted an official policy on immunity and twenty-nine treaties negotiated by the Soviet Union. However, he cautions against drawing definitive conclusions on state practice from these bilateral treaties, which may only constitute waivers of immunity by the forum state as a matter of comity and international relations.).

<sup>91</sup> For example, *Bustamente Code of Private International Law 1928*, adopted by the Final Act of the Sixth International Conference of American States in 1928 in Havana (translation of Code in 22 *Am. J. Int’l L.* 273 (1928)); see also, *League of Nations Sub-Committee on Competence of the Courts in Regard to Foreign States* in Shabtai Rosenne, *THE LEAGUE OF NATIONS COMMITTEE OF EXPERTS FOR THE PROGRESSIVE CODIFICATION OF INTERNATIONAL LAW (1925-1928)* (Dobbs Ferry, NY, Oceana Publications, 1972); Harvard Research, *Competence of Courts in regard to Foreign States*, 26 *Amer. J. Int’l L.* (1932) Supplement, 455.

<sup>92</sup> For example, *Asian/African Legal Consultative Committee’s Final Report 1968*, in Marjorie Whiteman, 9 *DIGEST OF INTERNATIONAL LAW*, (Washington D.C. United States Government Printing Office, 1968) (at paragraph 4 the Committee notes that, “a distinction should be made between different types of state activity and immunity to foreign states should not be granted in respect of their activities which may be called commercial or of private nature”) at 572-4 (Final Report of its Committee on Immunity of States in respect of Commercial and Other Transactions of a Private Character); Article 3 of the Organisation of the American States, *Inter-American Draft Convention on Jurisdictional Immunity of States*, approved by the Inter-American Juridical Committee on 21 January 1983 (providing that, “a State is granted immunity from jurisdiction for acts performed by virtue of governmental powers.”).

<sup>93</sup> Committee of Legal Advisers on Public International Law (CADHI), *Pilot Project of the Council of Europe on State Practice Regarding Immunities: Analytical Report*, (CADHI, 30<sup>th</sup> Meeting, Strasbourg, 19 – 20 September 2005). Report currently restricted.

<sup>94</sup> *International Law Association’s Draft Convention on State Immunity 1982*, 22 *ILM* 287 (1983) (Article II provides for general immunity for foreign States from adjudication unless the enumerated exceptions of waiver, commercial contracts, the property of the foreign State, intellectual or industrial property, appropriation of property in violation of international law and death, personal injury or damage to property wholly or partly in the territory of the forum state.).

to hear disputes against the foreign state.<sup>95</sup> None of the projects on codification discussed addressed the relationship of state immunity to serious international crimes.

The *United Nations Convention on the Jurisdictional Immunities of States and their Property* opened for signing on 17 January 2005.<sup>96</sup> The General Assembly first proposed that the International Law Commission conduct a study of the jurisdictional immunities of states in 1977 and the Convention is the result of decades of inter-state negotiation, demonstrating how difficult it has been to reach consensus on this issue. Thirty states must ratify the Convention for it to enter into force. So far Austria, Belgium, Morocco, Portugal and the United Kingdom<sup>97</sup> have signed the Convention.

The UN Convention does not apply to criminal proceedings as states parties were concerned that such inclusion might result in a conflict between the duty to prosecute certain crimes under international law and the immunity of officials of a state.<sup>98</sup> Under Article 3, the UN Convention also does not affect diplomatic and consular immunity, "missions to international organizations" and rather ambiguously "persons connected with them" as well as the immunity *ratione personae* of a head of state.

Article 5 provides for a general rule of immunity to which enumerated exceptions apply. These exceptions include, commercial transactions;<sup>99</sup> contracts of employment;<sup>100</sup> personal injuries and damage to property occurring "in whole or in part in the territory" of the forum state;<sup>101</sup> and arbitration agreements.<sup>102</sup> Article 5 originally included a provision subjecting the terms of the Convention to the "relevant rules of international law." This provision was intended to allow for subsequent developments, potentially including clarification on the relationship between state immunity and serious international crimes.<sup>103</sup> However, it was later removed due to the concern of states parties that it would allow for the creation of unilateral exceptions.

A number of issues in the Convention remain unclear. First, the definition of the state appears much broader than normally provided for under international law. Article 2(1)(b)(iv) includes "representatives of the State acting in that capacity" within the definition of the State, other than specified individuals such as diplomats and Heads of State who are expressly excluded.<sup>104</sup>

<sup>95</sup> Institut de Droit International, *Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement*, Session of Basel – 1991, available from <[http://www.idi-ii.org/idiE/resolutionsE/1991\\_bal\\_03\\_en.PDF](http://www.idi-ii.org/idiE/resolutionsE/1991_bal_03_en.PDF)> (last visited, 12 September 2005) (Article 2 provides that domestic courts have competence in commercial transactions; disputes arising from relationships of a private law character; contracts of employment; relationships based upon elements of good faith and reliance; and death or personal injury occurring with the forum state; Article 2(3) provides factors which indicate the incompetence of the forum state to hear the dispute, including, "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"; "the relation between the subject-matter of the dispute and the validity of the internal and administrative and legislative acts of the defendant State in terms of public international law"; and "to inquire into the content or implementation of the foreign defence and security policies of the defendant State.").

<sup>96</sup> United Nations (U.N.) Convention on Jurisdictional Immunities of States and Their Property, Resolution A/RES/59/38 adopted by the United Nations General Assembly, Fifty-ninth session (2 December 2004).

<sup>97</sup> 16 states (Austria, Belgium, China, Finland, Iceland, Madagascar, Morocco, Norway, Paraguay, Portugal, Romania, Senegal, Slovakia, Sweden, Timor Leste, United Kingdom) have signed the Convention. (correct as of 11 November 2005)

<sup>98</sup> Mr. Reuter and Mr. Ushakov, Year Book of the International Law Commission (1986) vol I, 1943<sup>rd</sup> Meeting, 7 May 1986, para 30 and para 56 (cited in Fox, *supra* note 37 at 222).

<sup>99</sup> Article 10.

<sup>100</sup> Article 11.

<sup>101</sup> Article 12.

<sup>102</sup> Article 17; Articles 13 – 16 (also provide for exceptions in relation to certain property of the state).

<sup>103</sup> General Assembly, *Report of the Ad Hoc Committee on Jurisdictional Immunities of States and their Properties* (1-5 March 2004) A/59/22; see also, Fox, *supra* note 37 at 227.

<sup>104</sup> General Assembly *Id.*

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Yet, the state and its individual officials are subject to separate rules on immunity. Attempts to extend the coverage of state immunity to individual officials, particularly with regard to serious international crimes, appears inconsistent with international law and practice.<sup>105</sup>

More specifically for the purposes of this Report, the Convention does not specify how its terms relate to serious international crimes. Article 26 provides that the “rights and obligations of States Parties under existing international agreements which relate to matters dealt with in the present Convention” shall not be affected. This provision presumably includes states’ obligations under international human rights and international humanitarian law. Although Article 12 excludes personal injuries and damage to property, it limits the exception to acts or omissions committed in the territory of the forum state, and requires the presence of the author at the time of the act or omission.

The Working Group on Jurisdictional Immunities of States and their Properties raised the relationship of immunity to norms reaching the status of *jus cogens*, in particular the prohibition of torture, as an issue requiring consideration.<sup>106</sup> However, in its report to the Sixth Committee of the General Assembly, the Working Group explained that as the relationship between the two areas of law was in a state of development, the Convention - as a codification project - did not seem to be the most appropriate place in which to address the matter.<sup>107</sup> As far as REDRESS is aware, no further consideration to this issue has been given.

Notably, when the Convention was still in draft form, the Chairperson of the United Nations Committee against Torture in its discussion of Canada’s laws on state immunity considered that the terms of the Convention would not preclude Canada from enacting an exception to state immunity for cases of torture. The Chairperson observed that,

“as 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.”<sup>108</sup>

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<sup>105</sup> See, Jones *supra* note 206.

<sup>106</sup> International Law Commission, *Report of the International Law Commission on the work of its fifty-first session* (1999) (A/54/10), *Annex: Report of the Working Group on Jurisdictional Immunities of States and their Properties* at paras 1 – 13, available from < <http://www.un.org/law/ilc/reports/1999/english/annex.htm>> (last visited, 12 September 2005).

<sup>107</sup> General Assembly, Sixth Committee, *Convention on jurisdictional immunities of States and their property: Report of the Chairman of the Working Group*, (1999) (A/C.6/54/L.12) at paras 46 – 48.

<sup>108</sup> Committee Against Torture, *Summary Record of the Second Part (Public) of the 646<sup>th</sup> Meeting*, 6 May 2005. CAT/C/SR.646/Add.1 at para 67. Article 49 of Draft Articles on State Responsibility, *supra* note 12, define countermeasures as, “limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.” However, as discussed in Part III of this Report, it is not clear that the forum state is under an international obligation to grant a foreign state immunity. For further discussion on the scope and application of countermeasures, see Chapter II of the Draft Articles on State Responsibility and accompanying commentaries.

## IV. Attempts to Address the Relationship between State Immunity and Serious International Crimes

The law on state immunity and the prohibition against torture and other serious international crimes developed separately from each other and even now, very little analysis or commentary exists on how the two relate. As a result, in the small number of cases in which a foreign state has been sued for serious international crimes, domestic courts have diverged in their analysis of the application of state immunity and on the end result. In dualist countries domestic legislation has usually dictated the approach to claims against a foreign state. As most courts interpret domestic legislation to provide a 'comprehensive code' on state immunity, attempts to sue foreign states have generally been unsuccessful due to the lack of an explicit 'human rights exception' and the unwillingness of the domestic courts to interpret the enumerated exceptions to apply to cases of torture and other serious international crimes which took place outside of the forum state.

In contrast, domestic courts in some monist countries have found that both state immunity and norms reaching the status of *jus cogens* such as the prohibition of torture constitute rules of international law. As will be discussed, this construction has resulted in two cases in Italy and Greece in which the courts respectively have denied the applicability of immunity in cases concerning *jus cogens* violations. However, even in these cases, the relevant tests to resolve the relationship between the two areas of law differ, with the Italian Supreme Court focusing on the 'normative hierarchy theory' or the 'trumping argument' and the Greek Supreme Court applying a test of implied waiver.

### 1. Immunity for Commercial Acts

At a very general level, state immunity covers acts *jure imperii* (acts of a public, governmental or sovereign nature) but does not extend to acts *jure gestionis* (acts which are not integral or exclusive to the sovereign or governmental nature of a state but which a private actor could perform). This distinction was first recognised by the Belgian and Italian courts during the nineteenth century and reflected the first move away from the doctrine of absolute immunity.<sup>109</sup> As international trade began to increase, the availability of state immunity in disputes with private parties was increasingly viewed as unfair, particularly as both sides had consented to the transaction. As a result, immunity no longer attaches to commercial dealings in which the state acts as a "trader" rather than "an independent sovereign State," in order to put both parties on an even playing field.<sup>110</sup>

As has already been mentioned, however, determining whether an act of a state is commercial or public can prove difficult in practice. Particularly with regard to complex commercial deals, a transaction may contain elements of both.<sup>111</sup> States have developed a variety of tests to address the distinction, and as Lady Fox explains, will take into account one or more of the following factors:

<sup>109</sup> Brownlie, *supra* note 28 at 323.

<sup>110</sup> Fox, *supra* note 37 at 280.

<sup>111</sup> Fox, *supra* note 37 at 292 (citing the defendant states arguments in the *International Tin* case that some acts could not be straightforwardly divided into acts *jure imperii* and acts *jure gestionis* as they often contain elements of both. This argument was rejected by the Court. *See, Alcom Ltd. v. Republic of Colombia and Others* [1984] AC 580, [1984] 2 WLR 750, [1984] 2 All ER 6, at 10.).

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- whether the state acts as a 'sovereign' or as a legal person under private law;
- the implied waiver of the foreign state to the jurisdiction of the courts of the forum state by entering into contractual relations;
- an act which a private person may perform;
- the 'nature' of the act;<sup>112</sup>
- the 'purpose' of the act as one of a public or private nature.<sup>113</sup>

The differences in coverage notwithstanding, at both the international and domestic level, consensus exists in principle that immunity is not available to states in cases concerning commercial activities. In some cases, human rights violations have taken place in the course of the commercial activities of a state or have been perpetrated for the purpose of commercial gain. Survivors of such violations have tried to argue that the foreign state is not entitled to immunity from the jurisdiction of the domestic court on the basis of the 'commercial exception.' However, this approach has usually been unsuccessful.

In *Princz v. Federal Republic of Germany*, the United States' Court of Appeals found that the leasing of the plaintiff to a private corporation in order to conduct slave labour did not fall within the ambit of the commercial exception as the terms of the exception require a "direct effect" in the United States. In Mr. Princz's case, the lease and the resulting "lingering effects of a personal injury suffered overseas"<sup>114</sup> were not considered sufficient to meet the requirements of the "direct effect" in the United States.<sup>115</sup> In *Saudi Arabia v. Nelson*, the Supreme Court of the United States found that the commercial exception did not apply to Mr. Nelson's alleged torture following his reporting of safety defects in a hospital in Saudi Arabia. The Supreme Court focused on the nature of the act and the artificial division between acts *jure imperii* and acts *jure gestionis* to find that,

"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 ... Exercise of the powers of police and penal officers is not the sort of action by which private parties can engage in commerce."<sup>116</sup>

More recently, the Canadian courts in the case of *Bouzari v. the Islamic Republic of Iran*, held that the commercial exception did not apply, despite the underlying facts of the case in which Mr. Bouzari was allegedly tortured following his refusal to accept the assistance of the Iranian President on an oil and gas project in return for a substantial commission.<sup>117</sup>

## 2. Immunity for Torts

The second area in which it was recognised that immunity does not apply is in the area of torts. This "exception" developed on two grounds. First, using the distinction between acts

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<sup>112</sup> This test is used by Switzerland, Austria, Germany, the United States and the UK, for example.

<sup>113</sup> Fox, *supra* note 37 at 272 – 302.

<sup>114</sup> *Princz v. Federal Republic of Germany* 26 F 3d 1166 (DC Cir. 1994) *id.* at paras 6 - 7.

<sup>115</sup> *Princz* at para 6.

<sup>116</sup> *Saudi Arabia, King Faisal Specialist Hospital and Rovspec, Petitioners v. Scott Nelson et ux*, 507 U.S. 349, 113 S.Ct. 1471, (U.S. Fla., 1993); *see also, Hwang Geum Joo, et. al v. Japan, Minister Yohei Kono, Minister of Foreign Affairs* (C.A.D.C., 27 June 2005) (denying the application of the commercial exception to immunity in the case of 'comfort women').

<sup>117</sup> *Bouzari v. Iran (Islamic Republic)* Ont. C.A. (2004).

*jure imperii* and acts *jure gestionis*, immunity only applied to torts committed in the course of specific governmental activities. In this regard, the classic example cited to distinguish between the governmental and non-governmental activities of a state relates to the situation in which a state official negligently knocks a person over while driving to an official meeting on behalf of the state. As the negligent driving of a motor vehicle does not relate to specific governmental activities, immunity would not be available. Second, the courts of the United States developed an exception to immunity based on the underlying illegality of the tort.

Although torture, and other serious international crimes, would naturally seem to fall under the 'tort exception' to immunity, two factors have limited the successful application of this 'exception.' First, some jurisdictions, predominantly in common law countries, require that the commission of the tort occur in the territory of the forum state in order for immunity not to apply. Second, some jurisdictions distinguish between 'public' and 'private' torts.

a) *Commission of the Tort in the Territory of the Forum State*

In many common law countries, in order for the "tort exception" to apply, the tort must have been committed by the foreign state in the territory of the forum state. For example, if an individual wished to sue the United Kingdom in Canadian courts, the United Kingdom would have to have committed the tort within Canadian territory. Such a requirement would rule out many cases involving torture and other serious international crimes where the violation is usually committed within the territory of the foreign state being sued.

Similar to commercial acts, problems of definition arise and the approaches of states vary. Differences generally relate to 'how much' of the tort must occur in the territory of the forum state and whether territory only means the actual geographical territory of the state or other areas over which it has quasi-jurisdiction such as ships, aircraft over the high seas and embassies or *de facto* control, such as the presence of the United Kingdom and the United States in Iraq.<sup>118</sup>

The territoriality requirement may also be an anomaly of common law jurisdictions. In most civil law countries, the court first determines whether it has jurisdiction to hear the case, then it considers whether any immunity is available to bar the jurisdiction of the court which would otherwise exist.<sup>119</sup> Where the tort was committed is only relevant at the point of determining jurisdiction and does not arise again when deciding upon immunity.<sup>120</sup> For this reason, the fact that in the cases of *Prefecture of Voiotia v. Federal Republic of Germany* and *Ferrini v. Federal Republic of Germany* the violations took place in Greece and Italy respectively, does not hamper the application of these judgments in cases where the *jus cogens* violation takes place outside of the forum state as for the purposes of immunity, the reach of the decisions is not undermined by the locality of the tort. Rather, where the tort was committed was only relevant to the question of jurisdiction: in Greece, the *Areios Pagos* required a nexus between the violation and the forum state in order to assert jurisdiction; in Italy, the *Corte di Cassazione* (Supreme Court) based its decision on universal jurisdiction for international crimes.<sup>121</sup> Once

<sup>118</sup> Xiaodong Yang, *State Immunity in the European Court of Human Rights: Reaffirmations and Misconceptions*, 74 B.Y.B. Int'l L. 333 – 408 (2003) at 376.

<sup>119</sup> However, see *Argentine Republic v. Amerada Hess Shipping Corp.* 109 S Ct. 683 (1989) for illustration of the conflation of immunity and jurisdiction by the courts of the United States which consider the Foreign Sovereign Immunities Act 1976 as the sole basis for jurisdiction.

<sup>120</sup> Maria Gavouneli, *STATE IMMUNITY AND THE RULE OF LAW*, (Ant. N. Sakkoulas Publishers, Athens – Komotini 2001) at 50.

<sup>121</sup> See Pasquale de Sena and Francesca de Vittor, *State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case*, 16 Eur. J. Int'l L 89 – 112 (2005) at 97.

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the courts reached the issue of immunity, the location of where the tort was committed did not arise again.

### b) "Public" and "Private" Torts

The non-applicability of immunity discussed so far has related to instances in which the state has acted in a private or commercial capacity; its role could be likened to that of a private actor rather than that of a state specifically. In contrast, "public torts" directly address wrongs committed by a foreign state when acting in a sovereign or public capacity. Particularly when these wrongs relate to violations of international law, national courts have generally felt uncomfortable looking in to the public acts of foreign states.<sup>122</sup>

In 2001, the ECtHR decided three cases on state immunity: *Al-Adsani v. the United Kingdom*<sup>123</sup> (on torture); *Fogarty v. the United Kingdom*<sup>124</sup> (on employment); and *McElhinney v. Ireland*.<sup>125</sup> In *McElhinney*, Mr. McElhinney claimed that the Irish Supreme Court had violated his right of access to justice under Article 6(1) of the ECHR by granting immunity to the United Kingdom in a case concerning the actions of a British soldier who had attempted to shoot Mr. McElhinney at the Northern Irish border. The ECtHR upheld the Irish Supreme Court's decision on the grounds that the soldier had been acting in the course of governmental functions. Specifically, the Court found that,

"there appears to be a trend in international and comparative law towards limiting state immunity in respect of personal injury caused by an act or omission within the forum State, but ... it appears ... that the trend may primarily refer to 'insurable' personal injury, that is incidents arising out of ordinary road traffic accidents, rather than matters relating to the core area of state sovereignty such as the acts of a soldier on foreign territory which, of their very nature, may involve sensitive issues affecting diplomatic relations between States and national security."<sup>126</sup>

The Italian Courts have also upheld the immunity of the state in two cases concerning military activities. First, in *Cermis*, a claim was brought against the United States for the alleged damage to the health of Italian citizens brought about by its military training on Italian territory.<sup>127</sup> The court explained that Italian law only recognised state immunity in civil proceedings for acts which "constitute "immediate and direct exercise" of the sovereignty of a foreign state." The court held that, military activities, as acts *jure imperii*, fell within this category and as such were entitled to immunity. It found that, "the potentially injurious character of the activities did not per se exclude the fact that they were sovereign activities ... the activity of training of the Armed Forces in defensive function "represents an essential public aim of the State."<sup>128</sup> In the second case, *Markovic*, the court upheld the immunity of the Italian Prime Minister and the Defence Ministry for the collateral damage resulting from NATO

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<sup>122</sup> Gavouneli, *supra* note 120 at 76.

<sup>123</sup> *Al-Adsani v The United Kingdom* (35763/97) [2001] ECHR 752. For a full discussion on this case, see below on *jus cogens*, 3(b).

<sup>124</sup> *Fogarty v. the United Kingdom*, Application No. 37112/97 (2001).

<sup>125</sup> *McElhinney v. Ireland*, Application No. 31253/96 (2001).

<sup>126</sup> *Id.* at paragraph 38.

<sup>127</sup> Presidenza Consiglio ministry e al. c. Federazione italiana lavoratori trasporti e al; Stati Uniti d'America c. fedrazione italiana lavoratori trasporti e. al., Italian Court of Cassation, 3 August 2000, 530/2000.

<sup>128</sup> Para 6, Unofficial translation of judgment on file with REDRESS.

activities in the Kosovo intervention on the basis that the activities of a sovereign in wartime are an expression of a “political function” entailing “protected interests.”<sup>129</sup>

Notably, the Italian *Corte di Cassazione*<sup>130</sup> and the Greek *Areios Pagos* have respectively found that, as a general matter, a foreign state enjoys immunity for acts *jure imperii* committed during armed conflict. However, where the underlying violation reaches the status of a *jus cogens* norm, immunity does not attach. In *Ferrini v. the Federal Republic of Germany*, Mr. Ferrini brought a civil claim for reparation for his alleged capture and deportation from Italy to Germany by the German military forces during World War II, for the purpose of forced labour. He had first attempted to bring a claim for compensation in Germany, but the courts refused his claim on the basis that it did not fall within the terms of the domestic statute which provided the exclusive basis upon which compensation could be sought.<sup>131</sup> In Italy, both the Court of First Instance and the Court of Appeal acknowledged that the violations amounted to war crimes but held that state immunity applied by characterising Germany’s actions as acts of a sovereign nature. The *Corte di Cassazione*, however, rejected the lower courts’ reasoning, to find that immunity does not extend to violations of *jus cogens* norms, their sovereign nature notwithstanding.

Similarly, during the German occupation of Greece in 1944, German military forces retaliated against the attacks on its forces by resistance fighters by wiping out almost all of the civilian population of the village of Distomo in what they termed a measure of “atonement.”<sup>132</sup> In 1995, the prefect of Voiotia and survivors and relatives of the deceased brought a civil action against Germany in the Court of First Instance of Livadia in Greece. In *Prefecture of Voiotia v. Republic of Germany*, the court found that Germany was not entitled to immunity as the acts in question constituted war crimes and as a result could not be considered sovereign acts. As violations of *jus cogens* norms, the court held that the violations constituted an implied waiver under international law and ordered Germany to pay compensation to the survivors and their relatives.<sup>133</sup> Germany then appealed to the *Areios Pagos* (Supreme Court) on the basis that it was entitled to jurisdictional immunity. The *Areios Pagos* explained that, “crimes carried out by organs of the occupying power in abuse of their sovereign power do not attract immunity.”<sup>134</sup>

However, when the survivors sought to enforce the judgment, they had to seek the authorisation of the Greek Minister of Justice under Article 923 of the Greek Code of Civil Procedure. The Minister refused to authorise execution and the survivors initiated proceedings for enforcement. In 2002, the *Areios Pagos* determined that Article 923 conformed to the European Convention on Human Rights and Article 2(3) of the International Covenant on Civil and Political Rights and as a result the judgment was not enforced.<sup>135</sup> The survivors then brought a case before the European Court of Human Rights on the basis that the failure on the

<sup>129</sup> *Presidenza Consiglio ministry v. Markovic and others*, order No. 8157, 5 June 2002, 85 *Rivista di diritto internazionale* (2002).

<sup>130</sup> See, De Sena and De Vittor, *supra* note 121 at 98 (“There is no question that the acts carried out by Germany occurred in the course of wartime activities and constituted the exercise of sovereign powers”).

<sup>131</sup> *Ferrini*, Bundesgesverfassungsgericht, 2 BVR 1379/01 vom 28.6.2004, Absatz-Nr. (1-45) Chamber of the German Constitutional Court.

<sup>132</sup> Elizabeth C. Handl, *Introductory Note to the German Supreme Court: Judgment in the Distomo Massacre Case*, 42 *ILM* 1027 - 1029 (2003) at 1027.

<sup>133</sup> *Prefecture of Voiotia v. Federal Republic of Germany*. Case. No. 137/1997. Court of First Instance of Leivadia (30 October 1997). For the facts of the case, see Ilias Bantekas, *Case report: Prefecture of Voiotia v. FRG*, 92 *Amer. J. Int'l L.* 765 (1998); Maria Gavouneli, *War reparation claims and state immunity*, 50 *Revue hellénique de droit international* 595 (1997).

<sup>134</sup> Maria Gavouneli, and Ilias Bantekas, *Sovereign Immunity – Tort Exception – Jus Cogens Violations – World War II Reparations – International Humanitarian Law*, *Amer. J. Int'l L.* 198 - 204 (2001) at 200 (translating the judgment of the court). *Prefecture of Voiotia v. FRG*, Case no. 11/2000, *Areios Pagos*.

<sup>135</sup> Decision of the Greek Supreme Court, No. 36/2002. 51 *Nomiko Vima* 856 (2003).

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part of the Greek and German authorities to execute the judgment of the *Areios Pagos* constituted a violation of access to a court under Article 6(1). However, the ECtHR rejected the claim as inadmissible.<sup>136</sup>

Finally, the German Federal Court of Justice found that it was not obliged to recognise the *Areios Pagos'* decision in Greece. The Court reasoned that under the governing laws on the recognition of foreign judgments, (the German-Greek Treaty on Mutual Recognition and Execution of Court Judgments, Settlements and Public Documents in Civil and Commercial Matters of 4 November 1961 and Article 328 of the German Civil Procedure Code), the German courts were only obliged to recognise judgments in which the foreign court enjoyed jurisdiction.<sup>137</sup> In this case, the Federal Court of Justice found that even though the acts of the German military were illegal, they constituted acts *jure imperii* nonetheless. The Court concluded that state immunity therefore applied to the acts, and the Greek courts consequently had no jurisdiction.<sup>138</sup>

It should be noted, however, that all of these proceedings related only to immunity at the enforcement stage and as such do not affect the *Areios Pagos'* decision on jurisdictional immunity. That said, the current position in Greece on the availability of jurisdictional immunity in cases of *jus cogens* norms is now unclear. The Greek Constitution provides in Article 100 (1F) for a Special Supreme Court, an *ad hoc* court composed of a combination of judges and legal scholars, which decides whether rules of international law are "generally recognised" and part of Greek law. The effect of such pronouncements is that such rules of international law are recognised as superior to that of statutes as per Article 28(1) of the Constitution. On the occasion of another war reparation case brought before the First Chamber of the *Areios Pagos*, the First Chamber referred the case to this Special Supreme Court.<sup>139</sup> By six votes to five, the Special Supreme Court found, "that Germany enjoyed immunity without any restrictions or exceptions and therefore could not be sued before any Greek Civil Court for torts committed." The Court based its decision on "a general norm of customary international law that rendered inadmissible any claim against a foreign state for tortures committed by its armed forces."<sup>140</sup> However, its decision is not binding on future judicial decisions as Greek law does not recognise the system of precedent, but requires the judiciary to decide each case on the merits; notwithstanding this, Supreme Court decisions do have persuasive value.<sup>141</sup>

Finally, the distinction in the applicability of immunity for torts on the basis of their public or private nature may again relate to a difference in approach between common and civil law countries. Most states with legislation on state immunity (usually common law countries) do not look at whether the act is *jure imperii* or *jure gestionis* but rather focus on the injury or damage caused.<sup>142</sup> The courts of the United States, which led the way in developing an

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<sup>136</sup> *Kalogeropoulou et. al. v. Greece and Germany*, (App. 59021/00).

<sup>137</sup> *Distomo*, Bundesgerichtshof (BGH), decision of 26 June 2003, III ZR 245/98, published in NJW 2003, 3488.

<sup>138</sup> Sabine Pittroff, *Compensation Claims for Human Rights Breaches Committed by German Armed Forces Abroad During the Second World War: Federal Court of Justice Hands Down Decision in the Distomo Case*, 5(1) German Law Journal (January 2004).

<sup>139</sup> This contrasts to Article 100(1D) which allows the court to consider conflicting judgments of Greek Courts. Here, the decisions of the *Areios Pagos* related to two different aspects of immunity, therefore could not conflict.

<sup>140</sup> See, Maria Panezi, *Sovereign immunity and violation of ius cogens norms*. AED 6/2002, 56 RHDJ 199 (2003). Kerstin Bartsch and Björn Elberling, *Jus Cogens vs State Immunity, Round Two: The Decision of the European Court of Human Rights in Kalogeropoulou et al. v. Greece and Germany Decision*, 4(5) German Law Journal (May 2003), (citing the Special Highest Court of Greece, *Federal Republic of Germany v. Miltiadis Margellos*, Case 6/17-9-2002, Decision of 17 September 2002).

<sup>141</sup> Article 87 of the Greek Constitution.

<sup>142</sup> This is the approach of Article 11 of the European Convention on State Immunity; Article 12 of the UN Convention; s13 of the Australian Foreign Sovereign Immunities Act 1985; s6 of the Canadian State Immunity Act 1985; s7 of the Singaporean State

exception to immunity in tort initially in the context of road and rail accidents but broadening to cover intentional torts, based upon the illegality of the tort itself, from a public policy perspective. For example, in *Letelier v. Republic of Chile*, the US District Court applied the tort “exception” to deny Chile immunity in a case where its agents assassinated a political opponent and former ambassador to Chile within the territory of the United States.<sup>143</sup>

Basing the non-applicability of immunity to serious international crimes on the illegality of the act rather than on the distinction between acts *jure imperii* and acts *jure gestionis* seems like the preferable approach. The *acta jure imperii/gestionis* test can prove too rigid and unworkable in cases of serious international crimes. The history of the development of the restrictive doctrine on immunity exposes the artificialness of the division between the availability of immunity on the basis of acts *jure imperii* and acts *jure gestionis*. In cases involving the commercial ‘exception’, courts often have difficulty determining the nature of the act in question as it may bear sovereign and non-sovereign characteristics. The simplification of the *acts jure imperii/gestionis* division is illustrated in the case of *Alcom v. Republic of Colombia and others*, in which Lord Diplock acknowledges that the State Immunity Act of the United Kingdom does not, “adopt the straightforward dichotomy between *acta jure imperii* and *acta jure gestionis* that had become familiar doctrine in public international law.”<sup>144</sup>

The traditional rationale for according immunity to the sovereign acts of the state was based on preventing foreign courts from looking into the public acts and the internal organisation of the state.<sup>145</sup> However, international crimes cannot be categorised as internal public acts beyond the inquiry of the international community, including foreign courts. Rather, by their very nature, serious international crimes are the concern and responsibility of the international community as a whole, the protection of which all states have a ‘legal interest.’<sup>146</sup> Lord Denning’s statement in *Rahimtoola v. Nizam of Hyderabad* is particularly instructive in this regard. In advocating the restrictive approach to immunity in English courts, he argued that,

“In all *civilised countries* there has been a progressive tendency towards making the sovereign liable to be sued in his own courts ... Foreign sovereigns should not be in any different position. There is no reason why we should grant to the departments or agencies of foreign Governments an immunity which we do not grant our own.”<sup>147</sup>

Moreover, in cases against individual state officials, international and domestic courts have made clear that the official nature of the violation does not offer a defence to accountability. The distinction between the availability of immunity *ratione materiae* on the basis of the official nature of the act has been rejected in cases of serious international crimes as treating a serious international crime as an official act would produce the result that the individual official

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Immunity Act 1985; Artículo 2° of the Inmunidad Jurisdiccional de los Estados Extranjeros ante los Tribunales Argentinos 1995; s6 of the South African FSIA 1985; s5 of the SIA and 28 USC §1605 of the US FSIA.

<sup>143</sup> *Letelier v. Republic of Chile* 488 F. Supp. 665 (DDC 1980) 63 ILR 378.

<sup>144</sup> *Alcom v. Republic of Colombia and Others* [1984] 2 Lloyd’s Rep. 31; [1983] 3 WLR 906; [1984] 1 All ER 1; 2 All ER 6 HL; *See also, I Congreso del Partido* [1983] 1 AC 244 (Lord Wilberforce, stating that, “in considering, under the restrictive theory, whether State immunity should be granted or not, the court must consider the whole context in which the claim against the State is made, with a view to deciding whether the relevant act(s) on which the claim is based should, in that context, be considered fairly within an area of activity, trading, or commercial or otherwise of a private law character, in which the State has chosen to engage or whether the relevant activity should be considered as having been done outside the area and within the sphere of governmental or sovereign activity.”) *See, also Controller and Auditor General v. Davidson* [1996] 2 NZLR 278 at 289 (Thomas J advocates a balancing approach to state immunity due to the “uncertainty of international law and practice, the lack of uniformity between States, the breadth of the exceptions to the doctrine of sovereign immunity, the significance of the classification of the activity adopted by the court, the test applied in determine the outcome of a claim to sovereign immunity.”)

<sup>145</sup> Fox, *supra* note 37 at 299.

<sup>146</sup> *See, The Wall*, *supra* note 36.

<sup>147</sup> *Rahimtoola v. Nizam of Hyderabad* [1958] AC 379 at 418 (emphasis added).

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would always be protected from judicial process outside his or her own state, since immunity *ratione materiae* continues to protect the official even after he or she leaves office. Such a position would undermine international obligations on individual responsibility<sup>148</sup> as the commission of the violation in an official capacity or under the colour of the law does not provide any kind of excuse, defence or bar to the jurisdiction of the court to hold the individual to account.<sup>149</sup> Furthermore, in the case of states specifically, to frame torture as an act *jure gestionis*, would be, as one commentator puts it, "inelegant ... States do not enter the market place to commit torture."<sup>150</sup> The egregiousness of certain violations, such as torture, is underscored precisely because, by definition, they are committed in an official capacity.

### 3. Jus Cogens Norms

The concept of a *jus cogens* norm evolved out of the recognition that certain values or interests are common to and affect the international community as a whole,<sup>151</sup> and that the violation of these values or interests threatens peace and security and world order. *Jus cogens* norms command a peremptory status under international law. They are superior to other rules of international law because of their very nature and cannot be changed or derogated from through agreement or custom.<sup>152</sup> The binding nature of *jus cogens* norms renders any attempt

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<sup>148</sup> See, Adam Day, *Crimes Against Humanity as a Nexus of Individual and State Responsibility: Why the ICJ Got Belgium v. Congo Wrong*, 22 Berkeley J. Int'l L. 489 – 512 (2004) at 490; Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Thoughts on the Congo v. Belgium Case*, 13(4) EJIL 853 – 876 (2002); Van Panhuys, H.F., *In the Borderland between Act of State Doctrine and Questions of Jurisdictional Immunity*, 13 Int'l & Comp. L.Q. 1193 – 1213 (1964) at 1193; Finn Seyfersted, *Jurisdiction over Organs and Officials of States, the Holy See and Intergovernmental Organisations*, 14 Int'l & Comp. L.Q. 31 – 82 (1965).

<sup>149</sup> Michael Akehurst, *Jurisdiction in International Law*, 46 Brit. Y.B. Int'l L. 145 – 257 (1972 – 3); *Attorney-General of Israel v. Eichmann* 361 ILR 5 (D.C.Jm., 1961) at 309 – 10. The courts in the United States have been criticised for using the distinction of official and unofficial acts to deny immunity *ratione materiae* to individual officials accused of serious international crimes by finding that immunity only covers acts conducted under the 'color of the law.'. See, *Filartiga v. Pena Irala* 630 F. 2d. 876 (2d. Cir. 1980); *Cabiri v. Assasie* 921 F. Supp. 1189 (S.D.N.Y. 1996); *Re: Estate of Ferdinand Marcos Human Rights Litigation* (25 F. 3d. 1467, 9<sup>th</sup> Cir., 1994); *Xuncax v. Gramajo* (886 F. Supp. 162, D. Mass. 1995); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (ND Cal. 1987), *Chuidian v. Philippine National Bank*, 912 F. 2d. 1095 (9<sup>th</sup> Cir., 1990), see also, Luc Reydam, *International Decision: Belgian Tribunal of First Instance of Brussels (Investigating Magistrate), November 8, 1998*, 93 Amer. J. Int'l L. 700 – 703 (1999) at 700 (discussing the approach of the Belgian Magistrate who found that the alleged crimes, including torture, "could not possibly be official acts performed in the normal exercise of the function of a head of state.")

<sup>150</sup> Katherine Reece-Thomas and Joan Small, *Human Rights and State Immunity: Is there Immunity from Civil Liability for Torture*, Neth. Int'l L.R. 1 – 30 (2003) at 25. On point of terminology, the difference between the official and unofficial acts of an individual official and acts *jure imperii* and acts *jure gestionis* of the state is nuanced but separate.<sup>150</sup> Official/unofficial acts relate to the individual responsibility and whether the individual official acted within his or her powers or acted *ultra vires*. In terms of the state, the characterisation of the official's conduct as official or unofficial will affect its responsibility under international law. Acts *jure imperii/jure gestionis* do not affect state responsibility as they are the acts of the state, but only impact upon the availability of immunity to the state itself.

<sup>151</sup> In one of the first cases to look at the notion of *jus cogens*, Judge Schucking, in his dissenting opinion, discussed the possibility of *jus cogens* norms under international law as norms closely resembling rules of public morality and international public policy in *Oscar Chinn* case, PCIJ, Ser. A/B, no. 63 (1934); see also, *South West Africa* case (Second Phase) ICJ Reports, 1966 (Judge Tanaka, Dissenting); and *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. US)*, ICJ Reports (1986). For more recent commentary on *jus cogens*, see Alexander Orakhelashvili, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, 16 Eur. J. Int'l L. 59 – 88 (2005) at 62.

<sup>152</sup> Specifically *jus cogens* norms cannot be changed by state practice, agreement, unilateral reservation or customary international law. On agreements, Article 53 of the Vienna Convention on the Law of Treaties provides that, "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is 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." Article 64 continues that, "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." On unilateral reservation, see, United Nations Human Rights Committee, *General Comment No. 24: Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant*, CCPR/C/21/Rev.1/Add.6 (Fifty-Second Session, 1994) (commenting that, "Reservations that offend peremptory norms would not be compatible with the object and purpose of the [International] Covenant [on Civil and Political Rights]" at paragraph 8 and "some non-derogable rights, which in any event cannot be reserved because of their status as peremptory norms, are also of this character – the prohibition of torture and arbitrary deprivation of life are examples" at paragraph 10). On customary international

to derogate from them void *ab initio*; *jus cogens* norms can only be modified by new norms of equal status.<sup>153</sup> In contrast to most areas of international law, *jus cogens* norms have independent validity and status, separate and untouched by the consent and practice of states.<sup>154</sup>

Although considerable debate persists on which norms can be considered to have reached this status, some serious international crimes such as the prohibition of torture have been recognised as a *jus cogens* norm.<sup>155</sup> This has been confirmed by the International Criminal Tribunal for the former Yugoslavia in the *Furundzija* case, in which it was held that:

"... because of the importance of the values it protects, [the prohibition of torture] has evolved into a peremptory norm or *jus cogens*, that is a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules ... Clearly the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate."<sup>156</sup>

In almost all of the cases addressing the relationship of state immunity to torture and other serious international crimes, national courts have acknowledged the nature of the underlying crime as a *jus cogens* norm under international law. However, as the doctrine of *jus cogens* developed without specific reference to state immunity and its relationship to state immunity still remains unclear,<sup>157</sup> national courts have differed in their approaches to the significance of the *jus cogens* status.

#### a) *Cases Finding that Immunity is not Available for Jus Cogens Norms*

In monist states, the courts of countries such as Italy and Greece have interpreted state immunity and *jus cogens* norms as rules of international law directly incorporated into domestic law through provisions in their respective constitutions.<sup>158</sup> As two rules of international law, the courts have denied the availability of state immunity in cases involving *jus cogens* norms due to their peremptory status under international law.

law, see, N.G. Onuf and Richard K. Birney, *Peremptory Norms of International Law: Their Source, Function and Future*, 4 Denv. J. Int'l L. & Pol'y, 187 – 198 (1974) at 192; Gordon A. Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 Vir. J. Int'l L., 585 – 648 (1988) at 594.

<sup>153</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, (ICJ, Advisory Opinion of 28 May 1951) (held that, "the principles underlying the Convention are principles which are recognised by civilised nations as binding on States, even without any conventional obligation.")

<sup>154</sup> Of course, in reality, the enforcement of such norms to a large extent still depends on the will of states. This creates a point of conflict, see, Christenson, *supra* note 152 at 593 (discussing that, "It is precisely in the areas most vitally important to the power of States that the *jus cogens* concept should apply. If wider interests and demands clash with the state system, how can any limits beyond those of general international law effectively stem from the "community of States as a whole?").

<sup>155</sup> See, *Draft Articles on State Responsibility* *supra* note 12.

<sup>156</sup> *Furundzija*, *supra* note 1 at paras 153-4.

<sup>157</sup> Belsky, Merva and Roht-Arriaza, *supra* note 66 at 377.

<sup>158</sup> Article 10(1) of the Italian Constitution, Article 28(1) of the Greek Constitution.

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In one of the most recent cases on immunity, the Italian *Corte di Cassazione* in *Ferrini v. the Federal Republic of Germany*<sup>159</sup> addressed the availability of state immunity in a civil claim for reparation for forced labour during World War II, which the court defined as a violation of a *jus cogens* norm under international law. The *Corte di Cassazione* contrasted the progressive movement away from the principle of absolute immunity which, “has become, and continues to become, gradually limited,”<sup>160</sup> to the absolute nature of a *jus cogens* norm.<sup>161</sup> As discussed above, although the court conceded that Germany’s actions would normally be characterised as ‘sovereign acts’ committed in a time of war and therefore immune, the violations of a peremptory norm under international law rendered immunity unavailable.

Thus, the central question for the court was whether, “immunity from jurisdiction can exist even in relation to actions which ... take on the gravest connotations, and which figure in customary international law as *international crimes*, since they undermine *universal* values which transcend the interest of single States.”<sup>162</sup> Due to the peremptory status of the prohibition of forced labour under international law, the court determined that it ranked higher than state immunity as a customary international law rule.<sup>163</sup> The court found that the grant of immunity, “would *hinder* the protection of values whose safeguard is to be considered ... essential to the whole international community.”<sup>164</sup> The court employed what is often referred to as the ‘hierarchy of norms’ or ‘trumping’ argument to deny the applicability of state immunity. This argument is based on the premise that *jus cogens* norms displace ‘lower’ rules in the international law hierarchy, such as state immunity. The hierarchy is justified by focusing on the nature of both sets of norms: *jus cogens* norms enjoy a peremptory status under international law, from which no derogation is permitted; ‘ordinary customary rules’ like state immunity<sup>165</sup> are not absolute but can be waived by either the foreign state submitting to the jurisdiction of the forum state or denied by the forum state in certain circumstances.<sup>166</sup>

In 2001, the *Areios Pagos* (Greek Supreme Court), in *Prefecture of Voiotia v. the Federal Republic of Germany*,<sup>167</sup> also found that the Federal Republic of Germany did not enjoy immunity in another civil claim for reparation arising out of *jus cogens* violations committed during World War II. The court acknowledged the rationale for state immunity as, “a consequence of the sovereignty, independence, and equality of states and purports to avoid any interference with international affairs.”<sup>168</sup> However, the *Areios Pagos* found that immunity did not attach to Germany’s actions on two grounds. First, the Court found that immunity was not absolute but under customary international law only applied to acts of a sovereign or public

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<sup>159</sup> *Ferrini v. Federal Republic of Germany*, (Cass. Sez. Un. 5044/04) (reproduced in the original Italian text in 87 *Rivista di diritto internazionale* (2004) 539.

<sup>160</sup> *Id.* at paragraph 5 (translated in De Sena and De Vittor *supra* note 121 at 94).

<sup>161</sup> As discussed in section 2 on immunity for torts, in order to answer this question, the Court had to distinguish the facts of the case from two previous decisions of the Italian courts, *Cermis* and *Markovic*, and the Irish Supreme Court decision in *McElhinney*.

<sup>162</sup> Judgment, note 159 at para 7 (translated in De Sena and De Vittor, *supra* note 121 at 98) (emphasis in translation and original).

<sup>163</sup> *Id.* at para 9 (translated in De Sena and De Vittor, *supra* note 121 at 101).

<sup>164</sup> *Id.* at para 9.2 (translated in De Sena and De Vittor, *supra* note 121 at 102).

<sup>165</sup> Since a state can waive immunity (and therefore derogate from it) state immunity cannot enjoy the status of a peremptory norm under international law. The minority European Court of Human Rights judges addressed this issue in *Al-Adsani v. the United Kingdom*, *supra* note 123 and their reasoning is discussed in the following section on the case itself. Furthermore, as discussed at the beginning of this Report, whether state immunity even constitutes a rule of customary international law has been questioned.

<sup>166</sup> Bartsch and Elberling, *supra* note 140 at 13.

<sup>167</sup> *Id.* at 198 (translating the decision of the *Areios Pagos*).

<sup>168</sup> *Prefecture of Voiotia v. Federal Republic of Germany*, Case No 11/2000, Decision of 4 May 2000, *Areios Pagos*, translated by M. Gavouneli in 95 *Amer. J. Int'l L.* 198 – 201 (2001).

nature; as Germany's actions were, "in breach of rules of peremptory international law ... they were not acts *jure imperii*."<sup>169</sup> Second, in contrast to the Italian *Corte di Cassazione*, the *Areios Pagos* found that a breach of a peremptory rule of international law invoked an implied waiver of immunity. The theory of implied waiver focuses on the recognition that states can always waive their immunity in order to submit to the jurisdiction of foreign courts. Building on the concept of waiver generally, the argument runs that if states enter into international agreements which define certain conduct as an international crime the prohibition of which has achieved the status of *jus cogens*, by implication they waive any immunity that might otherwise attach.<sup>170</sup>

However, it should be noted that the concept of implied waiver has lost favour in other courts. In the United States, following a seminal article written by three law students,<sup>171</sup> attempts were made to use the explicit provision for implied waiver to address *jus cogens* violations in 28 U.S.C. § 1605 of the United States' FSIA which states that,

- (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case -
- (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.

In the first case to address the issue, the District Court in *Siderman de Blake* found that Argentina had waived its immunity by implication. The Court of Appeal for the Ninth Circuit then reversed the District Court's judgment on the basis of the terms of the domestic statute on immunity. However, the Court of Appeal highlighted the inconsistency of the national legislation with international law by stating that under international law, the peremptory status of *jus cogens* norms would render immunity inapplicable.<sup>172</sup> In the later case of *Prinz v. Federal Republic of Germany*,<sup>173</sup> Mr. Prinz, a United States citizen who was sent with his family to a concentration camp in Czechoslovakia during World War II, argued that an exception to state immunity applied for violations of the laws of nations by virtue of the implied waiver clause. In violating international law, Mr. Prinz argued that the German state had been 'on notice' of its obligations and thus indicated its amenability to suit. Again, the District Court denied the availability of state immunity but the Court of Appeal reversed. It found that *jus cogens* violations alone do not satisfy the implied waiver exception: "an implied waiver depends upon the foreign government's having at some point indicated its amenability to suit."<sup>174</sup> In

<sup>169</sup> *Id.* At 200 (Translating the decision of the court at 15).

<sup>170</sup> Roger O'Keefe, *European Convention on State Immunity and International Crimes*, 2 Cam. YB of Euro. Legal Studies 507 – 520 (1999) at 512 (discussing the implied waiver theory with regard to the immunities of individual officials in cases involving allegations of international crimes: "it is relevant to note that all conventions recognising or creating an international crime of universal jurisdiction make this jurisdiction *mandatory* – that is, they impose on states parties the obligation to try or extradite (*aut dedere aut judicare*) any offender over whom they have custody. In other words, states parties to these conventions clearly foresee the exercise by foreign criminal courts of universal jurisdiction over offenders" at 517 - 8).

<sup>171</sup> See, Belsky, Merva and Roht-Arriaza, *supra* note 66 (proposing a theory of implied waiver for *jus cogens* violations, which was later cited in *Prinz v. Federal Republic of Germany* *supra* note 114 at 58).

<sup>172</sup> *Siderman de Blake v. the Republic of Argentina*, 965 F. 2d 688 (9<sup>th</sup> Cir. 1992) at 718.

<sup>173</sup> *Prinz v. Federal Republic of Germany*, 2d F 3d 1166 (DC Cir. 1994), 33 ILM 1483 (1994) 103 ILR 594.

<sup>174</sup> *Prinz, id.* at 1174. However, see, Justice Wald, in her dissent, argued that the implied waiver exception applied to *jus cogens* norms, "[b]ecause the Nuremberg Charter's definition of "crimes against humanity" includes what are now termed *jus cogens* norms, a state is never entitled to immunity for any act that contravenes a *jus cogens* norm, regardless of where or against whom the act was perpetrated. The rise of *jus cogens* norms limits state sovereignty "in the sense that the 'general will' of the international community of states and other actors, will take precedence over the individual wills of states to order their relations." At 1182 (quoting, Mary Ellen Turpel and Phillippe Sands, *Peremptory International Law and Sovereignty: Some Questions*, 3 Conn. J. Int'l L. 364 (1988) at 365). More recently, the District Court applied the Court of Appeal's reasoning in *Prinz* to find that Japan enjoyed immunity in a civil claim for reparation brought for the sexual enslavement of the 'Comfort Women' during World War II. The court found that a violation of a *jus cogens* norm does not constitute an implicit waiver and rejected the argument that the enslavement of women for the purpose of rendering sexual services met the requirements of the commercial activity exception.

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*Ferrini v. the Federal Republic of Germany*, the Italian *Corte di Cassazione* also rejected the doctrine of implied waiver. The court commented that, "a waiver cannot ... be envisaged *in the abstract*, but only encountered *in the concrete*."<sup>175</sup>

The uncertainty over the current status of the implied waiver doctrine and the divergence in reasoning notwithstanding, the approach of the Italian and Greek Supreme Courts undermine the arguments of some commentators that *jus cogens* norms simply constitute "symbolic" principles<sup>176</sup> or "signify only the existence of a right rather than a binding legal obligation."<sup>177</sup> Rather, the peremptory status of *jus cogens* norms under international law requires that they be made practical and effective. However, much of the judicial and academic analysis on *jus cogens* norms has so far focused on the identification of the norm; very little attention has been paid to the implications and consequences of peremptory status under international law. The Vienna Convention on the Law of Treaties provides little guidance in this respect as its sole concentration was on the impact of treaties on *jus cogens* norms and as such, cannot have been expected to address wider aspects of international law.<sup>178</sup> Judicial opinion, such as the minority in *Al-Adsani v. the United Kingdom* before the European Court of Human Rights, also does not assist as the judges simply pronounced upon the peremptory status of the prohibition of torture without, as one commentator puts it, "telling us what else, apart from acts of torture and agreements not to commit torture, the prohibition actually proscribes or demands."<sup>179</sup>

However, the ICTY in *Furundzija* made clear that the *jus cogens* norm of the prohibition of torture entails more than simply "delegitimi[sing] any legislative, administrative or judicial act authorizing torture."<sup>180</sup> The Tribunal found that,

"[I]t would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute, and punish or extradite individuals accused of torture who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty making powers of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad ... It would seem that other consequences include the fact that the torture may not be covered by a statute of limitations and must not be excluded from extradition under any political offence exemption."

Although this case concerned criminal proceedings against an individual - the implications of which will be discussed in the next section - the tribunal's discussion highlights that consequences flow from the peremptory status of a *jus cogens* norm in order to make it practical and effective. This is supported by a number of commentators, one of whom argues

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*Hwang Geum Joo, et. al v. Japan* (D.C.C.C., 27 June 2003). The Court of Appeal for the Seventh Circuit reached a similar decision in *Wei Ye v. Jiang Zemin and Falun Gong Control Office*. *Wei Ye v. Jiang Zemin and Falun Gong Control Office*, 383 F. 3d 620 (7<sup>th</sup> Cir. 2004) at para 4 (citing, *Sampson v. Federal Republic of Germany* 250 F. 3d 1145 (7<sup>th</sup> Cir. 2001) at 1149 – 50).

<sup>175</sup> *Ferrini v. Germany*, *supra* note 159 at para 8.2 (translated in De Sena and De Vittor, *supra* note 121 at 101 -2) (emphasis in translation and original.)

<sup>176</sup> Onuf and Birney *supra* note 152 at 190 and 196; see Christenson, *supra* note 152 at 589 – 91.

<sup>177</sup> M. Cherif Bassiouni, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: International Crimes: Jus Cogens and Obligation Erga Omnes*, 59 Law & Contemp. Prob. 63 – 74 (1996) at 65.

<sup>178</sup> Onuf and Birney, *supra* note 152 at 187 (discussing "the inquiring into the relationship between peremptory norms and the sources and functions of international law has been virtually non-existent").

<sup>179</sup> Emmanuel Voyiakos, *Access to Court v. State Immunity*, 52 Int'l & Comp. L.Q. 297 – 332 (2003) at 322 – 3.

<sup>180</sup> *Furundzija*, *supra* note 1 at paras 155 – 157.

that, “every *jus cogens* rule contains or presupposes a procedural rule which guarantees its judicial enforcement.”<sup>181</sup> Another goes further to suggest that,

“[legal] obligations which arise from the higher status of such crimes include the duty to prosecute or extradite, the non-applicability of statutes of limitations for such crimes, the non-applicability of any immunities up to and including Heads of State, the non-applicability of the defense of “obedience to superior orders” ... the universal application of these obligations whether in time of peace or war, their non-derogation under “states of emergency,” and universal jurisdiction over perpetrators of such crimes.”<sup>182</sup>

On states specifically, the International Law Commission in the commentary to the *Draft Articles on State Responsibility* points out that, “it is necessary for the Articles to reflect that there are certain *consequences* flowing from the basic concepts of peremptory norms of general international law and obligations to the international community as a whole within the field of State responsibility.<sup>183</sup> Article 41 of the Draft Articles imposes a positive duty on states to “cooperate to bring to an end through lawful means any serious breach.” The Commentaries note that a range of ways in which to bring to an end the violation may be available and as a result the Draft Articles do not prescribe the means<sup>184</sup> but lays out the obligations on the part of the state primarily responsible as, “to cease the wrongful act, to continue performance and, if appropriate, to give guarantees and assurances of non-repetition ... and entails a duty to make reparation.”<sup>185</sup>

Some commentators have argued that state immunity has no impact upon *jus cogens* norms such as the prohibition of torture; state immunity, as a procedural rule, cannot interact with a substantive rule such as a *jus cogens* norm. As a result, they argue that the underlying responsibility of the state is not removed. Rather, procedural rules only determine when and where a claim is heard.<sup>186</sup> For example, in the *Arrest Warrant* case, the ICJ found that the foreign minister of the DRC enjoyed immunity from the jurisdiction of foreign courts for as long as he remained in office (when) but in the meantime could be prosecuted before the courts of the DRC or before an international forum (where).<sup>187</sup> Regardless of whether this argument carries any merit with regard to individual officials, in the case of the state, this Report has already discussed that *de facto* impunity persists within many of the states responsible for *jus cogens* violations and at the international level. As a result, there may be no alternative forum before which to bring a claim against the state primarily responsible. When considering that *jus cogens* norms must be made practical and effective, the availability of immunity only undermines the status of the peremptory norm. Particularly in cases of serious breaches of peremptory norms as defined by the *Draft Articles on State Responsibility*, where impunity persists, violations of *jus cogens* norms are not brought to an end as required by the Draft

<sup>181</sup> Bartsch and Elberling, *supra* note 140 at 20.

<sup>182</sup> Bassiouni, *supra* note 177 at 63.

<sup>183</sup> Commentaries, *supra* note 27 at Chapter II(7) at 281 (it should be noted that Chapter III addresses what the International Law Commission refers to as “serious breaches of obligations arising under peremptory norms” defined under Article 40(2) as involving “a gross or systematic failure by the responsible state to fulfil the obligation.”)

<sup>184</sup> Commentaries, note 27 at (2) – (3) at 286 – 7.

<sup>185</sup> Commentaries, *supra* note 27 at (13) at 291; *see also* The Wall, *supra* note 36 at para 159.

<sup>186</sup> *See*, Fox, *supra* note 37 at 525 (arguing that, “State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive content in the procedural plea of State immunity upon which a *jus cogens* norm can bite.”); *see also*, Andreas Zimmerman, *Sovereign Immunity and Violations of International Jus Cogens – Some Critical Remarks*, 16 Mich. J. Int'l L. 433 – 440 (1994 – 1995) at 438 (arguing that, “it seems to be more appropriate to consider both issues as involving two different sets of rules which do not interact with each other.”).

<sup>187</sup> *See*, Orakhelashvili, *supra* note 84 at 227.

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Articles and as a result, immunity renders the peremptory status of *jus cogens* norms, such as the prohibition of torture, meaningless.

### *b) Why the Approach of the Courts of Dualist States Must Be Assessed for Its Compatibility with International Law*

In dualist states such as Canada, the United Kingdom and the United States, international law is not directly incorporated into domestic law. As all three states have domestic legislation on state immunity, the courts have respectively found immunity to be available in cases concerning *jus cogens* norms. The judgments have focused on the comprehensiveness of the domestic statutes, despite the courts' acknowledgment of the peremptory status of the *jus cogens* norms.

### **Canada**

In *Bouzari v. the Islamic Republic of Iran*, Mr. Bouzari, an Iranian citizen, brought civil proceedings against the Islamic Republic of Iran. He alleges that following his refusal to accept the assistance of the then Iranian president in return for a commission of \$50m while working on an oil and gas project in the Persian Gulf, he was tortured in state prison by methods such as fake executions, beatings with cables, and being hung by his shoulders.

Acknowledging the existence of the Canadian *State Immunity Act* and its provision for a general rule of immunity, Mr. Bouzari argued that the case fell within one of the three enumerated exceptions or, in the alternative, that a "further exception should be read into the Act to permit a civil action for damages for torture against a foreign state."<sup>188</sup> However, the Ontario Court of Appeal found no appropriate exception to apply to Mr. Bouzari's case. It found that section 18, which excludes criminal cases from the reach of the State Immunity Act, did not apply as the mere seeking of punitive damages does not make the claim criminal.<sup>189</sup> The commercial exception did not apply under section 6 as although the purpose of the torture may have been for commercial gain, the applicable test focuses on the nature of the act which was in tort.<sup>190</sup> The tort exception also did not apply as the injury took place outside the territory of Canada, the plaintiff's continuing post-traumatic stress disorder notwithstanding.<sup>191</sup> The Court of Appeal also held that an implied human rights exception to state immunity did not exist, despite its recognition of the peremptory status of the prohibition of torture under international law. On the basis of a comparative study, the court argued that no evidence exists in state practice to demonstrate that the violation of a *jus cogens* norm means that state immunity does not apply.<sup>192</sup> Further, the Ontario Court of Appeal found that even if Canada's international obligations required the provision of a civil remedy for torture committed extraterritorially – which it found they did not - its domestic law would still take precedence in cases of inconsistency. Here, the court argued, the *State Immunity Act* deals with the issue comprehensively and as it does not provide for a human rights exception and no other enumerated exceptions apply, the general rule of state immunity applies.<sup>193</sup>

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<sup>188</sup> *Bouzari v. Islamic Republic of Iran*, *supra* note 117.

<sup>189</sup> *Id.* at para.44.

<sup>190</sup> *Id.* at 48 – 55.

<sup>191</sup> *Id.* at paras. 46 – 7.

<sup>192</sup> *Id.* at para. 88 (citing the lower court's decision at para. 63).

<sup>193</sup> *Id.* at para. 67.

Mr. Bouzari was subsequently denied leave to appeal to the Supreme Court of Canada. He has now lodged a new civil claim in Ontario against the individuals allegedly responsible for his torture. The suit names Akbar Hashemi Rafsanjani (the former President of Iran between 1989 and 1998), his second eldest son, a former prosecutor and four intelligence agents.<sup>194</sup>

### ***The United Kingdom***

In the United Kingdom, the issue of whether a human rights exception applies to state immunity has been addressed in two cases; one of which is currently on appeal to the House of Lords.

In *Al-Adsani v. Kuwait*,<sup>195</sup> the plaintiff, Mr. Al-Adsani, a dual national of the United Kingdom and Kuwait, brought a civil claim before the English courts against the state of Kuwait and individual officials of Kuwait for his alleged torture in the Kuwaiti State Security Prison through methods such as holding him underwater in a pool full of corpses and putting him in a room with mattresses doused in petrol and set alight. His claim against the Kuwaiti state was based on the doctrine of vicarious liability, the characterisation of which the Court of Appeal accepted and a default judgment was entered against the individual.

The Court of Appeal held that the state of Kuwait was entitled to immunity even in a case involving allegations of torture on the basis of the *State Immunity Act* 1978 which it referred to as a "comprehensive code." It found that any exception to the general provision of immunity must be enumerated within the Act itself and as the alleged torture took place in Kuwait, it did not fall under the exception of section 5 which provides that death or personal injury must be caused by an act or omission within the United Kingdom. Although the court conceded that torture as, "a violation of a fundamental human right, it is a crime and a tort for which the victim should be compensated," it rejected the argument put forward by Mr. Al-Adsani that the *jus cogens* status of torture resulted in an implied exception to the *State Immunity Act* and that immunity would only be provided where the state acted within the Law of Nations.<sup>196</sup> The court also referred to the "practical consequences of the Plaintiff's submission,"<sup>197</sup> citing the difficulty the court would face in attempting to assess the genuineness of allegations of torture made by asylum seekers and refugees coming to the United Kingdom. The House of Lords refused to grant Mr. Al-Adsani permission to appeal.<sup>198</sup> He then brought a case before the ECtHR. In a judgment of 9-8, the Court reached the same result as the English Court of Appeal.<sup>199</sup>

The majority first noted the importance of the prohibition of torture, which had reached the level of a peremptory norm, under international law. It pointed out that,

"The existence of this corpus of general and treaty rules proscribing torture shows that the international community, aware of the importance of outlawing this heinous phenomenon, has decided to suppress any manifestation of torture by operating both at the interstate level and at the level of individuals. No legal loopholes have been left."<sup>200</sup>

<sup>194</sup> Filed in the Superior Court of Justice in Toronto on 30 May 2005, see Tracey Tyler and Khosro Sherimanie, *Top Iranian Candidate Sued: Toronto-area man was tortured, jailed; Cleric among 7 named in \$9m action*, Toronto Star, 15 June 2005.

<sup>195</sup> *Al-Adsani v. Government of Kuwait and Others*, CA 12 March 1996; 107 ILR 536.

<sup>196</sup> *Judgment, id.* as per Stuart Smith LJ.

<sup>197</sup> *Id.*

<sup>198</sup> 27 October 1996.

<sup>199</sup> *Al-Adsani v. United Kingdom* App. No. 35763/97 (2001).

<sup>200</sup> *Al-Adsani v. the United Kingdom supra* note 123 at para. 30 (citing *Furundzija, supra* note 1 at para 146).

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Yet, it failed to conduct a detailed analysis of the significance of the *jus cogens* nature of torture. Rather, the majority simply upheld the English Court of Appeal's decision to grant Kuwait immunity, with blanket effect.<sup>201</sup> In addition to the *Pinochet* judgment, an amendment to the FSIA in the United States (that allows suits to be brought against states sponsoring acts of terrorism) was also deemed insufficient to demonstrate a crystallisation of a shift in international law to mean that immunity no longer applied in cases of torture and other serious crimes.<sup>202</sup> The court reasoned that the very need for the FSIA amendment at all served to demonstrate that as a general rule of international law state immunity can be claimed even in respect of violations of *jus cogens* norms such as officially-sanctioned torture.<sup>203</sup>

In addressing this conflict, the minority found that it was widely accepted that state immunity did not belong to the category of peremptory norms, as evidenced by the fact that states have on occasion chosen to waive their right to immunity.<sup>204</sup> As a result, should the prohibition on torture come into conflict with a claim of 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."<sup>205</sup>

The issue of state immunity did not end with the ECtHR's decision in *Al-Adsani*. In *Ron Jones and Ors. v. Saudi Arabia*,<sup>206</sup> the claims of three British citizens and one dual national who allege that they were tortured in Saudi Arabia were joined. Mr. Jones initiated civil proceedings against the individuals allegedly responsible for the torture and the Kingdom of Saudi Arabia itself. The other three claimants brought civil proceedings against the named Saudi officials only. The Court of Appeal dismissed the claim against the Kingdom of Saudi Arabia on the basis of state immunity. The court referred to the *Al-Adsani* judgments before the Court of Appeal and the ECtHR and the subsequent application of the ECtHR's decision in *Al-Adsani* to the *Bouzari* case in Canada to find that although "international law is in the course of continuing development,"<sup>207</sup> "as of yet, no evidence exists to show that the peremptory status of *jus cogens* norms means that immunity should not apply."<sup>208</sup> In addressing Article 14(1) of the United Nations Convention Against Torture, however, the court found that both the individual and the perpetrating state should be held responsible for the act of torture but questioned whether this resulted in an obligation upon the forum state to hold the foreign state responsible. However, the court did deny the individual officials the protection of immunity. The appeal and cross-appeal to the House of Lords is scheduled to be heard in April 2006.

### United States

Although the earlier case of *Von Dardel v. Union of Soviet Socialist Republics* found that immunity does not apply, "where the foreign state defendant has acted in clear violation of international law,"<sup>209</sup> the United States Supreme Court in *Amerada Hess*<sup>210</sup> held that the FSIA

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<sup>201</sup> *Al-Adsani v. Government of Kuwait and Others*, 107 ILR 536.

<sup>202</sup> Judgment, *supra* note 123 at para. 24.

<sup>203</sup> *Id.* at para. 64.

<sup>204</sup> However, see, Caplan, *supra* note 55 at 771 (arguing that a presumption should be made against the availability of state immunity because state immunity is an exception to the jurisdictional authority of the forum state that would otherwise exist. However, he argues that, ironically, those in support of the normative hierarchy theory presume that there is an inherent right to state immunity).

<sup>205</sup> Joint Dissenting Opinion of Judges Rozakis *et. al.*, *Al-Adsani v. the United Kingdom supra* note 123 at para 3.

<sup>206</sup> *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya (The Kingdom of Saudi) and another Mitchell and others v. Al-Dali and others* [2004] All ER (D) 418 (Oct.)

<sup>207</sup> *Id.* para 16.

<sup>208</sup> *Id.* para 17.

<sup>209</sup> *Von Dardel v. Union of Soviet Socialist Republics* 623 F. Supp. (D.C.D.C. 1985) at 246.

provides the exclusive basis for jurisdiction; any exceptions to the general rule of immunity had to fall within those enumerated under the Statute. The approach adopted in *Amerada Hess* was upheld in *Siderman de Blake*, where the court held that,

“we do not write on a clean slate. We deal not only with customary international law but with an affirmative Act of Congress, the FSIA ... the Court [in *Amerada Hess*] was so emphatic in its pronouncement, “that immunity is granted in those cases involving alleged violations of international law that do not come within one of the FSIA’s exceptions” ... that we conclude that if violations of *jus cogens* committed outside the United States are to be exceptions to immunity, Congress must make them so.”<sup>211</sup>

The student note in the *California Law Review* (discussed above in the section on implied waiver), accepted the comprehensiveness of the FSIA but argued that within its terms, developments in international law could be taken into account through the “implied waiver exception,”

“[s]tatutory codifications of international law doctrines should leave room for developments in international law. The concept of sovereign power is constantly evolving, as demonstrated by the substantial limitations placed on this power since World War II. To freeze the development of sovereign immunity law at one point in time forecloses the responsiveness of U.S. law to further evolutions in the scope of sovereign power.”<sup>212</sup>

However, as discussed, the District Court in *Princz v. Germany*, rejected this argument. Similarly, the terms of the FSIA have generally suppressed any attempts to use the ‘trumping’ argument.<sup>213</sup>

The common thread to the approach in Canada, the United Kingdom and the United States is the comprehensiveness with which the domestic statutes on immunity are treated. The courts of all three countries have refrained from analysing how *jus cogens* norms impact upon state immunity as the respective domestic legislation does not expressly address the issue. However, under international law, the ‘comprehensiveness’ or clarity of the terms of domestic law provides no basis or justification for the failure to take international law into account.<sup>214</sup> As a result, even in dualist countries, courts must analyse how *jus cogens* norms relate to state immunity, instead of simply acknowledging that the prohibition of torture, for example, constitutes a *jus cogens* norm, and then pointing to the comprehensiveness or exclusivity of the state immunity legislation as the reason for failing to conduct a closer investigation and resolution between the two issues.

<sup>210</sup> *Amerada Hess*, *supra* note 119.

<sup>211</sup> *Siderman*, *supra* note 172 at 718 – 719.

<sup>212</sup> Belsky, Merva and Roht-Arriaza, *supra* note 66 at 397 – 398.

<sup>213</sup> *Chuidian v. Philippine National Bank*, 734 F. Supp. 415 (DC 1990); *Boshnjaku v. Federal Republic of Yugoslavia* 2002 WL 1575067 (N.D. Ill. July 18, 2002); *Garb v. Republic of Poland* 207 F.Supp.2d 16 (E.D.N.Y. 2002); *Abrams v. Societe Nationale des Chemins de Fer Francais* 175 F.Supp.2d 423 (E.D.N.Y. 2001); *Joo v. Japan* 172 F.Supp.2d 52 (D.D.C. 2001); *In re World War II Era Japanese Forced Labor Litigation* 164 F.Supp.2d 1160 (N.D. Cal. 2001).

<sup>214</sup> Brownlie, *supra* note 38 at 34 (“A state cannot plead provisions of its own law or deficiencies in that law in answer to a claim against it for an alleged breach of its obligations under international law.”); *See*, Human Rights Committee, General Comment 31, CCPR/C/21/Rev.1/Add.13 (adopted on March 2004) (“Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant’s substantive guarantees.”)

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- c) *Attempts to Distinguish Between the Availability of Immunity on the Basis of the Type of Proceeding, Civil or Criminal*

Despite the fact that both *Prefecture of Voiotia v. the Federal Republic of Germany* and *Ferrini v. the Federal Republic of Germany* concerned civil proceedings, the courts of dualist countries such as the United Kingdom and Canada have attempted to distinguish the availability of immunity based on the type of proceeding, civil or criminal, involved.

In *Al-Adsani v. the United Kingdom*, the majority of the ECtHR distinguished the case before it - as a civil claim - from the authority it cited as evidence of the *jus cogens* status of the prohibition of torture, such as *Furundzija* and *Pinochet*, which related to criminal proceedings.<sup>215</sup> On the basis of this distinction, the court concluded that,

“Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.”<sup>216</sup>

Similarly, in *Bouzari v. the Islamic Republic of Iran*, the Ontario Court of Appeal found that the text of the Convention Against Torture “does not provide clear guidance” on the territorial reach of Article 14(1). It then cited the lack of state practice interpreting Article 14(1) as requiring the provision of a civil remedy for torture committed extraterritorially to demonstrate that no obligation exists.<sup>217</sup>

However, in *Al-Adsani v. the United Kingdom*, in their joint dissenting opinions, Judges Rozakis, Cafilisch, Wildhaber, Costa, Cabral Barreto and Vajić, disputed the majority’s division between criminal and civil proceedings. Rather, they held that the type of proceeding - whether criminal or civil - is irrelevant and inconsistent with the nature of a *jus cogens* norm, which relates to the underlying act.<sup>218</sup> The key issue is the conflict between a peremptory norm and another norm under international law.<sup>219</sup> Notably, the United Nations Committee against Torture, addressed the implications of Article 14(1) within its consideration of the Canadian legal system, following the *Bouzari* case. It criticised, “the absence of effective measures to provide civil compensation to victims of torture in all cases”<sup>220</sup> and recommended that Canada, “review its position under article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture.”<sup>221</sup>

The history, rationale and practice on immunities in the other contexts demonstrates that the availability of immunity has never been determined on the basis of the type of proceeding involved, whether administrative, criminal or civil. Rather, courts have focused on the nature of the underlying act, for example, commercial acts or torts. Although immunity is not a concept divisible by the type of proceeding used, in traditional cases on immunity, the

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<sup>215</sup> *Id.* at para 61.

<sup>216</sup> *Al-Adsani v. the United Kingdom*, *supra* note 123 at para. 61.

<sup>217</sup> *Bouzari v. Islamic Republic of Iran*, *supra* note 117 at paras. 68 – 95.

<sup>218</sup> Joint Dissenting Opinion of Judges Rozakis and Cafilisch Joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić 29 – 31.

<sup>219</sup> Dissenting Opinion of Judge Loucaides, *Id.* 34.

<sup>220</sup> Committee against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Conclusions and Recommendations of the Committee against Torture*, 34<sup>th</sup> Session (May 2005), CAT/C/CO/34/CAN at para. C (4)(g).

<sup>221</sup> Committee against Torture, *Id.* at D(5)(f).

particular 'exception' involved will often correlate to civil or criminal proceedings. For example, in cases involving the commercial 'exception', the parties involved demonstrate a clear preference for the use of civil suits. However, the courts do not determine the availability of immunity in these cases based on the type of proceeding used; rather they look at whether the acts in question constitute *acta jure imperii* or *jure gestionis*.

In the context of serious international crimes, both civil and criminal proceedings offer equal means by which to achieve accountability. In common law countries, the type of proceedings used is usually determined by the person or official body bringing the case. In criminal cases, the ability to initiate the case usually lies within the domain of the Attorney-General who has discretion as to whether to initiate proceedings. In contrast, in civil proceedings, the victim or the victim's family is usually the party to bring civil suit. In civil law countries, clear divisions do not exist due to the *partie civile* system which allows victims and sometimes other interested parties to participate in criminal proceedings and bring civil claims for compensation within the same proceedings. As a result, the arguments advanced in support of a split on the basis of the type of proceeding involved seem to relate less to legal principles underlying *jus cogens* norms or immunity and arguably more to an attempt to protect states, which at least under current thinking, can only be held accountable in the courts of a foreign state in civil rather than criminal proceedings.<sup>222</sup>

#### **4. Immunity and Access to Justice**

The final approach to addressing the relationship of the prohibition of torture and other serious international crimes and state immunity does not look at their interaction directly. Rather, it focuses on the relationship of immunity to access to justice. This debate has generally taken place in the context of the European Convention on Human Rights (ECHR) but may extend beyond its specific reach. Article 6(1) of the ECHR provides that,

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

Two arguments have been advanced in this regard: first, courts must properly weigh and balance the competing interests of an individual's right of access to justice and state immunity. The second position, however, is that no weighing and balancing can take place as state immunity is necessarily inconsistent with access to justice and therefore one must take precedence over the other.

As discussed above, in *Al-Adsani v. the United Kingdom*, the ECtHR upheld the English Court of Appeal's grant of immunity to Kuwait (albeit in a narrow judgment of 9-8), without any significant analysis or explanation. The United Kingdom argued that Article 6(1) did not apply to "matters outside the State's jurisdiction" and "as international law required an immunity in

<sup>222</sup> See, Chapter III(6) of the Commentaries to the Draft Articles on State Responsibility, *supra* note 12 at 280.

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the present case, the facts fell outside the jurisdiction of the national courts and, consequently, Article 6.<sup>223</sup> The ECtHR rejected these arguments and found that Article 6(1) was applicable,

“Whether a person has an actionable domestic claim may depend not only on the substantive content, properly speaking, of the relevant civil right as defined under national law but also on the existence of procedural bars preventing or limiting the possibilities of bringing the potential claims to court. In the later kind of case Article 6 §1 a substantive civil right which has no legal basis in the State concerned. However, it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6(1) – namely that civil claims must be capable of being submitted to a judge for adjudication – if, for example, a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons.”<sup>224</sup>

The court reasoned, however, that the right of access to justice is not absolute but subject to a margin of appreciation. Any restriction on the right of access to justice must pursue a legitimate aim and in order to satisfy proportionality requirements must not impair the essence of the right.<sup>225</sup> It then found that state immunity pursued the legitimate aim of comity and international relations “through respect of another State’s sovereignty”<sup>226</sup> and did not “impose a disproportionate restriction on the right of access to a court.”<sup>227</sup> The court found that, “[j]ust as the right of access to a court is an inherent part of the fair trial guarantee, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity.”<sup>228</sup>

The majority’s decision has been criticised for its failure to engage in a detailed analysis of the rights to be balanced. Rather than consider the ways in which to balance the competing rights, the court simply endorsed what effectively amounts to a blanket application of immunity. In his dissenting opinion, Judge Loucaides, observed that, in line with his opinion in two other ECtHR cases on immunity, *Fogarty v. United Kingdom* and *McElhinney v. Ireland*, the grant of a blanket immunity without balancing the competing interests constituted a disproportionate limitation on Article 6(1).<sup>229</sup>

With regard to whether state immunity constitutes a ‘legitimate aim’, one commentator points out that aims considered as legitimate generally relate to “policy objectives pursued by national governments, such as public safety, national security, the protection of public health and economic well-being of the country, or the rights of other individuals.”<sup>230</sup> In contrast, the aims of “international comity and international relations” are very vague and broad. Similarly, the ECtHR did not examine in detail the proportionality of the restriction on access to justice resulting from the imposition of immunity which, as one commentator notes, “either renders the concepts of legitimate aim and proportionality meaningless or misapplies them.”<sup>231</sup>

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<sup>223</sup> *Id.* at para 44.

<sup>224</sup> *Id.* at para 47 (citing *Fayed v. the United Kingdom*, 21 September 1994).

<sup>225</sup> *Id.* at para 53.

<sup>226</sup> *Id.* at para 54.

<sup>227</sup> *Id.* at para. 56.

<sup>228</sup> *Id.* at para 56.

<sup>229</sup> *Supra* note 124.

<sup>230</sup> Voyiakis, *supra* note 181 at 310.

<sup>231</sup> Voyiakis, *supra* note 179 at 313.

The approach of the ECtHR in *Al-Adsani* contrasts to the general jurisprudence of the ECtHR in which it normally looks to a range of factors such as the nature of the right restricted, whether the restriction effectively extinguishes the right and whether alternative measures are available. For example, in *Connors v. the United Kingdom*, the ECtHR held that the margin of appreciation is narrower “where the right at stake is crucial to the individual’s effective enjoyment of intimate or key rights.”<sup>232</sup> In such cases, the court would adopt a “strict” and “rigorous” approach, “where Article 6 provides a vehicle for redress in respect of violations of *jus cogens* norms such as torture.”<sup>233</sup>

In cases which have specifically considered the question of other types of immunity, such as parliamentary immunity and the immunity of international organisations, the ECtHR has conducted a more in-depth analysis. In the recent judgment of *Cordova v. Italy (No. 1)*,<sup>234</sup> Mr. Cordova, a public prosecutor, had brought an action in defamation in the Italian courts for statements made about him by a member of the Italian Parliament at an election meeting. The Italian Court of Cassation found that parliamentary immunity applied to the statements and Mr. Cordova petitioned the ECtHR on the basis that his rights under Article 6(1) had been violated. The ECtHR found that the necessity and proportionality tests require a “fair balance” to be struck “between the requirements of the general interest of the community and the need to safeguard the fundamental rights of individuals.”<sup>235</sup>

The court first noted that limitations on access to justice under Article 6, “must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.”<sup>236</sup> The court went on to add that,

“It would be incompatible with the purpose and object of the Convention, however, if the Contracting States, by adopting a particular system of parliamentary immunity, were thereby absolved from their responsibility under the Convention in relation to parliamentary activity. It should be borne in mind that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to a court in view of the prominent place held in a democratic society by the right to a fair trial. It would not be consistent with the rule of law in a democratic society, or with the basic principle underlying Article 6 § 1 – namely that civil claims must be capable of being submitted to a judge for adjudication – if a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities on categories of persons.”<sup>237</sup>

On the facts of the case, the court considered that the attachment of immunity to, “statements made in the course of parliamentary debates in the legislative chambers and designed to protect the interest of Parliament as a whole, as opposed to those of individual parliamentarians, was compatible with the Convention.”<sup>238</sup> However, the court noted that the underlying acts in question were not directly related to the functions of parliament.<sup>239</sup> The lack

<sup>232</sup> *Connors v. The United Kingdom*, Application no. 66746, 27 May 2004 at para 82.

<sup>233</sup> *Id.* at para. 82.

<sup>234</sup> *Cordova v. Italy (No. 1)*, Application no. 40877/98 (2003).

<sup>235</sup> *Id.* at para. 64.

<sup>236</sup> *Id.* at para 54.

<sup>237</sup> *Id.* at Para 58.

<sup>238</sup> *Id.* at para 61.

<sup>239</sup> *Id.* at para 62.

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of a clear connection to the justification advanced for the immunity meant that the Court would “adopt a narrow interpretation of the concept of proportionately.”<sup>240</sup> The Court concluded that immunity did not apply as,

“the decisions that Mr Cossiga had no case to answer and that no further proceedings could be brought to secure the protection of the applicant's reputation did not strike a fair balance between the requirements of the general interest of the community and the need to safeguard the fundamental rights of individuals.”<sup>241</sup>

A central factor in the ECtHR's decision in *Cordova* was the impact of the immunity which left Mr. Cossiga with, “no reasonable alternative means of effectively protecting his Convention rights.”<sup>242</sup> This point undercuts the argument discussed in the section on ‘trumping’ that immunity only dictates the forum in which the case is heard by demonstrating that immunity can adversely impact the enjoyment of the substantive right: the provision of immunity would effectively extinguish the individual's right of access to justice, if no alternative forum is available in practice. Indeed, as will be addressed later in this Report when considering the immunity of international organisations in the case of *Waite and Kennedy*, the issue of the availability of alternative means of access to justice is a recurrent theme in ECtHR cases.<sup>243</sup>

Where no alternative forum exists, one commentator argues that even if the ECtHR did attempt to engage in a balancing act, “it is difficult to see how [the Court] could avoid finding that virtually all measures granting immunity to foreign States or international organisations impose a disproportionate restriction on the right of access to court.”<sup>244</sup> He argues that a balancing approach between state immunity and access to justice cannot take place where no alternative forum in which to hear the claim exists as Article 6 would always trump. Rather, he argues that the Court in *Al-Adsani* should have addressed the respondent states' arguments that they should be granted immunity in order to comply with international law and weighed this against the applicants' claim of right to access to justice under the ECHR.<sup>245</sup> Essentially the question before the Court would then have been how to resolve a conflict between international law and Article 1 of the ECHR.<sup>246</sup> Had it taken such an approach, he concludes that,

“it was clear that the respondent States could not have pursued the legitimate aim of complying with their international obligations [to grant immunity] – assuming that those obligations did exist – except by not exercising jurisdiction and thereby completely depriving the applicants of their right of access to court. Were the Court to apply the usual tests of proportionality here, it is difficult to see how it could avoid finding that virtually all measures granting immunity to foreign States or international organisations impose a disproportionate restriction on the right of access to court.”<sup>247</sup>

## **V. CONCLUSION: IS STATE IMMUNITY A LEGITIMATE BAR IN EXTRATERRITORIAL CIVIL CLAIMS FOR**

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<sup>240</sup> *Id.* at para 63.

<sup>241</sup> *Id.* at para 64.

<sup>242</sup> *Id.* at para. 65

<sup>243</sup> European Court of Human Rights, *Waite and Kennedy v. Germany*, Application No. 26083/94 (1999).

<sup>244</sup> Voyiakis, *supra* note 179 at 312.

<sup>245</sup> *Id.* at 311.

<sup>246</sup> *Id.* at 308.

<sup>247</sup> *Id.* at 312.

## TORTURE AND OTHER SERIOUS INTERNATIONAL CRIMES?

State immunity is not a static concept inextricably tied to its historical origins. Rather, it has been characterised as, “a classic subject of international law in perennial need of adjustment to contemporary notions of State and the rule of law.”<sup>248</sup> As has already been demonstrated by the restriction of state immunity in areas such as commerce, the doctrine is capable of responding to the changing conception of statehood. The “commercial exception” emerged out of the perceived unfairness that state immunity caused by preventing the party contracting with the state from adjudicating disputes. In his discussion on the justification for the development of the restrictive doctrine of state immunity under English law, Lord Wilberforce stated that, “it is necessary in the interests of justice to individuals having transactions with the State to allow them to bring such transactions before the courts.”<sup>249</sup> In torture cases, the unfairness rendered by the potential availability of state immunity is even more evident: the torture survivor does not voluntarily transact with the state, the crime is one of the most egregious under international law and in practice very few, if any, alternative remedies will be available. Yet, while the “commercial exception” developed decades ago, states demonstrate very little motivation or will to similarly exempt torture cases from the reach of state immunity.

The contrast between the power of commercial actors and torture survivors raises questions as to whether the commercial restriction of state immunity has much to do with fairness, access to justice and the rule of law or more to do with the relative bargaining power of the two sets of actors. As the defendant, litigation is never a welcome prospect. State immunity provides a means to avoid answering suits. However, in contrast to the case of the torture survivor, the availability of state immunity in contractual relations with commercial actors can have serious consequences to the state. A commercial actor can choose not to contract with the state if state immunity presents a foreseeable bar to resolving disputes. Given the increasing power of corporations on the international landscape, corporations would simply refuse to enter into contractual relations with a state if any disputes arising out of the relationship could not be dealt with through litigation or arbitration. As a result, in order to protect its trading capacity, the state had little option but to restrict the availability of immunity with regard to commerce. As Scrutton LJ noted in the *Porto Alexandre* case, “[i]f ships of the State find themselves left on the mud because no one will salvage them when the State refuses any legal remedy for salvage, their owners will be apt to change their views.”<sup>250</sup> The same force of motivation does not apply to torture cases and may account for lack of analysis into the continuing justification of state immunity in such cases.

Courts, like the ECtHR, simply accept that the availability of state immunity in cases of torture and other serious international crimes fulfils the, “legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State’s sovereignty,” without explaining why. Courts offer the theoretical argument that immunity does not equate to impunity without demonstrating how this claim holds true in practice. They also argue that the removal of immunity at the jurisdictional stage is meaningless as immunity will still be available at the point of enforcement without taking into consideration the value of access to justice in and of itself. Finally, courts claim that the restriction of immunity in the limited cases of torture and other serious international crimes

<sup>248</sup> Gavouneli, *supra* note 120 at 19.

<sup>249</sup> *I Congreso del Partido* [1983] 1 AC 244, [1981] 2 All ER 1062 at 1070.

<sup>250</sup> *The Porto Alexandre* [1920] P 30 at 39.

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would open the courts to a flood of claims without demonstrating whether this would actually happen in reality.

### **1. State Immunity May Result in Impunity for Torture**

The *UN Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, define impunity as:

“Impunity” means the impossibility, de jure or de facto, of bringing the 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, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.”<sup>251</sup>

Principle 1 lays out how impunity arises:

“Impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations.”

Despite this definition of impunity, the ICJ in the *Arrest Warrant* case found that immunity does not equate to impunity.<sup>252</sup> As the case concerned the arrest warrant issued by a Belgian magistrate over the foreign minister of DRC, the Court reasoned that immunity would only be available while the foreign minister held public office. Thereafter, immunity would only cover the foreign minister’s official acts, which, in the view of the ICJ, would not cover the commission of international crimes. The Court further noted that while the foreign minister remained in office his government could waive his immunity before foreign domestic courts; he could be tried in his own country and also by an international court.<sup>253</sup> Similar arguments advancing the position that immunity does not equate to impunity have also been made in relation to heads of state.<sup>254</sup>

In relation to the availability of immunity to international organisations, courts have also focused on whether an alternative forum exists before which the individual can seek access to justice. For example, in *Waite and Kennedy v. Germany*,<sup>255</sup> Mr. Waite and Mr. Kennedy (two

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<sup>251</sup> Economic and Social Council, *Promotion and Protection of Human Rights: Impunity: Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, Diane Orentlicher: *Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, E/CN.4/2005/102/Add.1 (2005); See, also the original principles on impunity, *Set of Principles for the Protection and Promotion of Human Rights Through Act to Combat Impunity*, E/CN.4/Sub.2/1999/20/Rev.1, annex II (1997) (“The Joint Principles”); *The CPT standards, “Substantive” sections of the CPT’s General Reports*, CPT/Inf/E (2002) 1- Rev.2004, IX. Combating Impunity; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *14<sup>th</sup> General Report on the CPT’s Activities: Covering the Period 1 August 2003 to 31 July 2004*, CPT/Inf (2004), 28 (Strasbourg, 21 September 2004) (noting that, “[t]he credibility of the prohibition of torture and other forms of ill treatment is undermined each time officials responsible for such offences are not held to account for their actions.”).

<sup>252</sup> *Arrest Warrant* case, *supra* note 41.

<sup>253</sup> *Id.* at para 61.

<sup>254</sup> See, Salvatore Zappalà, *Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes, The Ghaddafi Case Before the French Court of Cassation*, 12(3) Eur. J. Int’l L., 595 – 612 (2001).

<sup>255</sup> *Waite and Kennedy v. Germany*, *supra* note 243.

British nationals) were contracted out by a British company to work for the European Space Agency (ESA) in Germany. Mr. Waite and Mr. Kennedy then attempted to bring an employment dispute against the ESA in German courts but their case was dismissed on the basis of immunity. The employees then applied to the former European Commission on Human Rights, claiming that they had been denied access to a court under Article 6(1) of the ECHR. The ECtHR first noted that while Article 6(1) did not provide an absolute right of access to a court, any restriction on such access must not “impair the very essence of the right” under Article 6(1).<sup>256</sup> The Court found that the immunity available to the ESA pursued the legitimate aim of protecting the functioning of the international organisation from interference from individual governments.<sup>257</sup> However, the Court noted that the restriction would only be proportionate if the “applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.”<sup>258</sup> In this respect, the Court was satisfied that the independent Appeals Board within the ESA provided a “reasonable alternative means” of access to a Court and therefore upheld the German court’s decision to grant immunity to the ESA.<sup>259</sup>

In line with the ECtHR’s decision, a Belgian court recently found that if the internal laws of an international organisation did not provide an effective mechanism for dealing with disputes with employees and other individuals, the right of access to a court would prevail over the jurisdictional and enforcement immunity to which the international organisation is normally entitled in the host state.<sup>260</sup> In reaching its decision, the court focused on whether the individual would have reasonable alternative means to secure his right of access to a court, based on the judgment of the ECtHR in *Waite and Kennedy*. In a subsequent case on enforcement immunity, a Belgian court considered that the internal mechanism of an international organisation in dealing with disputes was inadequate because hearings were not public and the members of the commission who decided upon the outcome of the review were nominated by the intergovernmental council of the international organisation and only appointed for two years. These factors led the court to conclude that the internal commission was unable to act independently and impartially.

When considering whether immunity results in impunity, setting the ICJ’s decision in the *Arrest Warrant* case against the cases against international organisations provides useful comparison. The line of international organisation cases underscores that the right of access to a court must not be theoretical or illusory but practical and effective.<sup>261</sup> In contrast, the ICJ’s judgment in the *Arrest Warrant* case bases its assertion that immunity does not equate to impunity on theoretical alternative sources of access to a court: the foreign minister’s government *could* waive immunity before foreign domestic courts; the foreign minister *could* be prosecuted in his own country or before an international court; and once he left office, a foreign domestic court *could* try him for unofficial acts. *Ad hoc* Judge van den Wyngaert, in her dissenting opinion, rejects the ICJ’s position, stating that, “[i]n practice immunity leads to *de facto* impunity.”<sup>262</sup> She points out that the government of the DRC did not waive immunity, and had not investigated or prosecuted the foreign minister for the alleged crimes. In addition, she finds that, “[t]he Court grossly overestimates the role an international criminal

<sup>256</sup> *Id.* at Paragraph 59.

<sup>257</sup> *Id.* at Paragraph 63.

<sup>258</sup> *Id.* at Paragraph 68.

<sup>259</sup> *Id.* at Paragraphs 68 – 74,

<sup>260</sup> Journal des Tribunaux No. 6110, (18 October 2003).

<sup>261</sup> *Waite and Kennedy*, *supra* note 243 at paragraph 67.

<sup>262</sup> Dissenting Opinion of Judge van der Wyngaert in *Arrest Warrant supra* note 41 at paragraph 34.

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court can play,<sup>263</sup> due to limited mandates and capacity. As a result, while immunity may not equate to impunity in theory, in practice it very often does. Indeed, Principle 19 of the *Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, sets out the importance for a “distribution of jurisdiction between national, foreign, international and internationalized courts”<sup>264</sup> in order to combat impunity fully.

In relation to states, the availability of immunity may very well result in impunity. As discussed at the outset of this Report, in theory, the survivor of the international crime should be able to access the courts of the state in which the crimes took place. In theory, states can waive their immunity before foreign national courts. In theory, states can bring cases against the violating state before an international forum. In practice, however, the courts of the state in which the crimes took place are very often unavailable for a variety of practical and legal reasons. In practice, states do not waive their immunity in cases concerning serious international crimes; and the concept of ‘implied waiver’ has faced many challenges in domestic courts. In practice, states have rarely brought cases against the offending state before an international forum in a case concerning serious international crimes; and individuals can only access a limited number of forums at the international level. Finally, in contrast to individual officials, who may leave office at some point (although this cannot always be assumed), states almost always constitute continuous entities, so no future opportunity to access foreign courts will arise. Against this reality, immunity may very well foreclose the means by which to hold the responsible state to account, effectively meaning responsibility is circumvented.

## **2. Can the Traditional Justifications for State Immunity Apply in Cases of Serious International Crimes?**

Outside of the state as a system, other actors are increasingly being held responsible before domestic courts for torture and other serious international crimes. In the *Sosa v. Alvarez-Machain* case in the United States, the Australian, Swiss and British governments submitted a joint intervention against the application of the Alien Tort Claims Act.<sup>265</sup> They opposed, “broad assertions of extraterritorial jurisdiction over aliens arising out of foreign disputes because such litigation can interfere with national sovereignty and impose legal uncertainty and costs.”<sup>266</sup> The governments argued that, “States are the primary objects of public international law on which human rights violations generally rest. Sovereign immunity applies to governmental entities charged with the Alien Tort Statute ... Thus, the main targets of modern Alien Tort Statutes are necessarily individuals or enterprises.” Citing the *South Africa Apartheid Litigation*, the governments argued that, “the Government of South Africa – appropriately – asserts its sovereign immunity while several British, Australian and Swiss companies and numerous companies from the United States and elsewhere are left to defend themselves against charges.”<sup>267</sup>

The joint governmental submission in *Sosa* perhaps inadvertently raises the inconsistencies of the availability of immunity against the wider fight against impunity. The definition of torture

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<sup>263</sup> *Id.* at Paragraph 37.

<sup>264</sup> Economic and Social Council, *Promotion and Protection of Human Rights: Impunity: Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, Diane Orentlicher, E/CN.4/2005/102 (2005).

<sup>265</sup> *Jose Francisco Sosa v. Humberto Alvarez-Machain*, 124 S. Ct. 2739 (2004).

<sup>266</sup> *Brief of the Governments 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* (23 January 2004) at 2.

<sup>267</sup> *Id.* at 14.

provides useful illustration in this regard. By definition, torture must be committed in an official capacity. To hold corporate actors responsible, therefore, they must have acted in conjunction with state actors, either by aiding and abetting or complicity. The grant of immunity to the state in such circumstances would mean that an aider and abetter could be held responsible but not the principal actor. Like the *Apartheid Litigation* case referenced by the governments in their joint submission in *Sosa*, the recent *Unocal* settlement illustrates the problems with this approach. Whereas the Myanmar (formerly Burmese) military is alleged to have committed serious international crimes against villagers living along the route of a natural gas pipeline in Myanmar, the state of Myanmar would be protected from litigation by state immunity. In contrast, the company, Unocal, who is alleged to have “aided and abetted” the Myanmar military, does not enjoy the protection of immunity and as a result, recently settled the case after the litigation had proceeded as far as the Ninth Circuit in the United States.<sup>268</sup> Another case is pending before Belgian courts against the oil company, TotalFinaElf, for its alleged complicity with the Myanmar military in the torture and forced labour of workers building a pipeline in Myanmar.<sup>269</sup>

With an increase in the use of national courts to hold perpetrators of serious international crimes responsible, the parameters of impunity are narrowed. Yet, impunity can never be fully addressed if the state, as the system or structure at the heart of many serious international crimes is left unaccountable. One commentator observes that, “[g]iven the diminishing role of the state both as a national and international actor, at least relative to the transnational corporation and the individual, a serious question arises as to a state’s continued entitlement to any special protection from the domestic jurisdiction of other states.”<sup>270</sup>

As a result, in order to justify the immunity afforded to the state as an entity, states must present strong arguments as to why they should be treated differently from other responsible actors in order to demonstrate why they should be entitled to the protection of immunity at the jurisdictional stage of a case. In the cases litigated thus far, courts have tended to simply assume the availability of state immunity, particularly in common law countries where courts point to the “comprehensiveness” of existing laws. As a result, the traditional justifications of state immunity (such as the sovereign equality of states; respect for their dignity; non-intervention in the internal affairs of another state; and in order to promote comity and international relations) are listed in rote without any explanation as to why the rationale behind state immunity reflects a legitimate barrier to the torture survivor’s ability to access the court.

### **Dignity**

In *Ferrini v. the Federal Republic of Germany*, the *Corte di Cassazione* commented that as immunity *ratione materiae* does not protect individual officials in cases of violations of *jus cogens* norms, this rationale could equally be extended to deny immunity to the state itself. The court likened the immunity of the state to the functional immunity of certain individual officials, finding at the end of the judgment that, “since the functional immunity of the state organ is designed to protect the sovereignty of the state, then ‘there is no valid reason’ to maintain the immunity of the state in all those cases in which the functional immunity of the organ is denied.”<sup>271</sup>

<sup>268</sup> Associated Press, *Unocal Reaches Deal to Settle Myanmar Human Rights Suit*, 14 December 2004.

<sup>269</sup> Steven R. Ratner, *Editorial Comment: Belgium’s War Crimes Statute: A Postmortem*, 97 Am. J. Int’l L. (2003) 888 - 897 at 890.

<sup>270</sup> Richard Garnett, *Should Foreign State Immunity Be Abolished?*, 20 Aus. YBIL 175 – 190 (1999) at 175.

<sup>271</sup> Andrea Gattini, *War Crimes and State Immunity in the Ferrini Decision*, 3 Journal of International Criminal Justice, 224-242 (2005) at 230.

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Although this part of the *Corte di Cassazione's* decision has been heavily criticised,<sup>272</sup> the court does raise a valid point that when the rationale for the immunity of individual officials is generally based on functional concerns, so that they can conduct the business of the state without the fear of being sued or arrested, the justification for the immunity of the state on the basis of its status and dignity seems weak in comparison. Given that states themselves have promoted and advanced the importance of international human rights law, the blanket justification for immunity in such cases on the basis of status appears unconvincing.

Moreover, Judge Rosalyn Higgins points out that, "the concept of the dignity of the sovereign has altered. International law no longer regards it as being contrary to the dignity of nations to respond to claims against them."<sup>273</sup> Her position is supported by Lord Denning's statement in *Rahimtoola v. Nizam of Hyderabad*, holding that,

"It is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it, and his independence is better ensured by accepting the decisions of courts of acknowledged impartiality, than by arbitrarily rejecting their jurisdiction."<sup>274</sup>

Arthur Watts adds, "[f]ormerly, much weight was attached to the dignity of States as an inherent quality of sovereign States which other States were under a duty to respect." He notes that the absolute jurisdictional immunity of states was based, in part, on dignity but concludes that, "dignity ... is an elusive notion, although it is still a convenient label." He argues that dignity is only relevant, "in the realms of protocol and State ceremonial. It is there, rather than rules of international law, that weight may still attach."<sup>275</sup>

### ***State Sovereignty and Non-Intervention in the Internal Affairs of a State***

As was discussed at the beginning of this Report, state sovereignty and the related notion of non-intervention in the internal affairs of a state constitute grounding principles of international law. That said, these concepts have adjusted and modified to accommodate modern developments under international law, such as international human rights law. From this perspective, where state sovereignty has adjusted, the weight accorded to state immunity, as a derivative doctrine, in cases of serious international crimes must be examined.

State sovereignty formed the basis of international law and relations. As originally conceived, in their external relations states were, at least formally, understood to be independent and equal and internally, each state was understood to have exclusive control and competence over its own territory. In order to protect the sovereignty of each state, the principle of non-intervention in the internal affairs of a state applied. In short, therefore, each state could do whatever it pleased within its own territory and it could not be subject to scrutiny by other states or other bodies.

As a whole, state sovereignty and the principle of non-intervention are not obsolete but remain influential components of international law and are embodied in Article 2(1) and 2(7) respectively of the United Nations Charter. Although states are only formally equal, the

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<sup>272</sup> De Sena and De Vittor, *supra* note 121 at 105.

<sup>273</sup> Higgins, *supra* note 59 at 271.

<sup>274</sup> *Rahimtoola v. Nizam of Hyderabad* [1958] AC 379 at 609.

<sup>275</sup> Arthur Watts, *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers*, Recueil Des Cours 1994 III (Dordrecht/Boston/London: Martinus Nijhoff Publishers) at 40 – 41.

principles can provide important protection to weaker states against powerful states.<sup>276</sup> However, following World War II, a strong body of international law on human rights and international crimes began to emerge. These norms were embodied in documents such as the Universal Declaration of Human Rights, the United Nations Charter, the International Covenant on Civil and Political Rights and the International Covenant on Economic and Social Rights and increasingly developed with the plethora of treaties, custom and wider jurisprudence. In 1992, the Secretary-General of the United Nations, Boutros-Boutros Ghali stated that, “[r]espect for fundamental sovereignty and integrity [is] crucial to any common international progress. The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality.”<sup>277</sup> This position was supported by Boutros-Boutros Ghali’s successor, Kofi Annan, in 1999.<sup>278</sup>

As a result, the growing acceptance of human rights norms directly confronted the traditional international law principles of state sovereignty and non-intervention; international law now regulates the way in which states behave towards their own citizens within their own territorial boundaries. These developments under international law, also impacted upon the understanding and basis for the principle of state sovereignty, moving away from traditional notions of the absolute power and authority of states, to a principle based on the state as a representative of its citizens.<sup>279</sup>

Under international law, serious international crimes are not considered to be the internal domain of one state, but the concern and responsibility of the international community as a whole. The ICJ in *Barcelona Traction Light and Power Company, Limited*,<sup>280</sup> held that states owe certain obligations to the international community as a whole, such as human rights. These obligations are termed as *erga omnes* and will often reflect rules of a *jus cogens* character, such as the prohibition against torture. *Erga omnes* obligations qualify the principles of state sovereignty and non-intervention as states cannot hide behind these principles when a claim is brought against them on the basis of a violation of the obligation.<sup>281</sup>

As a result of the developments in international law, states could not argue that they had the legal right to commit serious international crimes on the basis of state sovereignty. In support of the maintenance of state immunity, state sovereignty and non-interference are some of the primary justifications advanced. Yet, courts have failed to take into account the developments on state sovereignty when addressing the availability of state immunity in cases concerning serious international crimes. Instead, courts usually begin with a description of the

<sup>276</sup> However, some commentators, such as Louis Henkin, *INTERNATIONAL LAW: POLITICS AND VALUES* (1995) at 10, argue that state sovereignty should be eliminated in modern international law.

<sup>277</sup> AN AGENDA FOR PEACE – PREVENTATIVE DIPLOMACY, PEACEMAKING, AND PEACE-KEEPING, REPORT OF THE SECRETARY GENERAL, UN Doc. A/47/277-S/24111, para. 17 (1992) (cited in John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97(4) *Amer. J. Int’l L.* 782-802 (2003) at 787).

<sup>278</sup> *Secretary-General’s Annual Report to the General Assembly*, UN Press Release (20 September 1999).

<sup>279</sup> Article 21(3) of the Universal Declaration on Human Rights provides that, “the will of the people shall be the basis for the authority of government; this will be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures;” see also, W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84(4) *Amer. J. Int’l L.* 866-876 (1990) at 872 (discussing, “International law is still concerned with the protection of sovereignty, but, in its modern sense, the object of protection is not the power base of the tyrant who rules directly by naked power or through the apparatus of a totalitarian political order, but the continuing capacity of a population freely to express and effect choices about the identities and policies of its governors”).

<sup>280</sup> *Supra* note 29.

<sup>281</sup> The qualification of state sovereignty and non-intervention in the internal affairs of a state should be set apart from the particularities of the debate on the concept of “humanitarian intervention,” including the discussion on whether states use developments on state sovereignty and human rights to pursue political objectives. For a more detailed discussion of this issue, see Karima Bennoune, ‘Sovereignty vs. Suffering?’ *Re-examining Sovereignty and Human Rights through the Lens of Iraq*, 13(1) *Eur. J. Int’l L.* 243 – 262 (2002).

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development of state immunity as based on the principles of state sovereignty and the non-interference in the internal affairs of a state. Courts do not examine or analyse the contemporary meaning of these two principles and how they impact upon the contemporary availability of state immunity. As a result, an illogical situation is produced. On the one hand, state sovereignty and the non-interference in the internal affairs of the state are qualified by the requirements of international human rights law. On the other, state immunity – which does not enjoy the same fundamental status under international law but is only a derivative doctrine – continues to be based on traditional notions of the absolute power and authority of the state. In this respect, the evolution of state immunity should in parallel to the recognition of the evolution of state sovereign in relation to serious international crimes. Without such transformation, state immunity cannot support contemporary notions of state sovereignty, if it remains based on the historical understandings of the doctrine.

### ***Comity and International Relations***

The final justification advanced to support the availability of immunity relates to comity and international relations. Comity is an amorphous term with many meanings. As between states specifically,<sup>282</sup> comity has been characterised as, “rules of politeness, convenience, and goodwill. Such rules of International conduct are no rules of International Law, as it is distinctly the contrast to the Law of Nations.”<sup>283</sup>

In cases concerning serious international crimes, such as the prohibition of torture which commands a peremptory status of international law, courts often justify their decision to make state immunity available on the basis of comity and international relations without any considered analysis. However, in contrast to state sovereignty and non-intervention in the internal affairs of another state, comity and international relations are not even rules of international law.<sup>284</sup> On this definition, “rules of politeness, convenience, and goodwill” should not present a legitimate encroachment upon the upholding of *jus cogens* rules.

Indeed, how the protection of human rights could even undermine “rules of politeness, convenience and goodwill,” appears unclear given the overwhelming support of states themselves for treaties such as the Convention Against Torture. This has been illustrated by a recent ICJ decision. A complaint was filed by a group of human rights organisations in France using the *constitution de partie civile* system to request an investigation into the actions of the President of the Republic of Congo, the Congolese Minister of the Interior, Public Security and Territorial Administration and other officials on allegations of torture, forced disappearances and crimes against humanity committed in Congo against Congolese nationals, Congo brought an action against France before the ICJ, claiming, amongst other things, that France should respect head of state immunity under international law. It argued that the proceedings in France were “perturbing the international relations of the Republic of Congo as a result of the publicity accorded”; they would “[i]mpugn the honour and reputation of the Head of State ... and, in consequence, the international standing of Congo” and the proceedings would damage the “traditional links of Franco-Congolese friendship. If these injurious proceedings were to

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<sup>282</sup> In contrast to “judicial comity” (which courts generally do not refer to when considering immunity), meaning that one court declines to exercise jurisdiction on the basis that the case should be adjudicated more appropriately elsewhere, this type of comity relates to forum allocation.

<sup>283</sup> Brownlie, *supra* note 38 at 28 (citing Oppenheim) (Brownlie also characterises comity as, “a species of accommodation not unrelated to morality but to be distinguished from it nevertheless. Neighbourliness, mutual respect and the friendly waiver of technicalities are involved, and the practice is exemplified by the exemption of diplomatic envoys from custom duties.”)

<sup>284</sup> Unless, as Oppenheim states, the rule of comity has become a rule of customary international law, which as discussed in the beginning is a debatable development in and of itself. Even if it has developed into custom, the question would then be an issue of the relationship between two legal norms (custom and *jus cogens*) and does not, therefore, impact his discussion.

continue, that damage would become irreparable.<sup>285</sup> Congo requested that the ICJ issue provisional measures to halt proceedings in France while the case was heard before the ICJ. However, the ICJ denied provisional measures finding no evidence that the proceedings had impacted Congo in the way argued.

### **3. Focus on Barriers at the Enforcement Stage Undermines the Value of Access to Justice In and Of Itself**

In *Al-Adsani v. the United Kingdom*, Judges Pellonpää and Bratza, in their concurring opinion, found that, “[i]t is established case-law that mere access to a court without the possibility of having judgments executed is not sufficient under Article 6.”<sup>286</sup> The judges found that, if the court found that jurisdictional immunity did not apply in cases involving torture:

“[I]n order not to contradict itself the Court would have been forced to hold that the prohibition of torture must also prevail over immunity of a foreign State’s public property, such as bank accounts intended for public purposes, real estate used for a foreign State’s cultural institutes and other establishments abroad (including even, it would appear, embassy buildings), etc., since it has not been suggested that immunity of such public property from execution belongs to the corps of *jus cogens*. Although giving absolute priority to the prohibition of torture may at first sight seem very “progressive”, a more careful consideration tends to confirm that such a step would also run the risk of proving a sort of “Pyrrhic victory”. International cooperation, including cooperation with a view to eradicating the vice of torture, presupposes the continuing existence of certain elements of a basic framework for the conduct of international relations. Principles concerning State immunity belong to that regulatory framework, and I believe it is more conducive to orderly international cooperation to leave this framework intact than to follow another course.”<sup>287</sup>

The judges rightly pointed out the very real challenges posed by immunity at the point of execution, an issue which also requires considerable analysis and rethinking in cases of serious international crimes. However, by focusing on Article 6 the judges conflated jurisdictional and enforcement immunity. This approach contradicts the way in which immunity is dealt with at the national and international level, within which immunity from jurisdiction and immunity from execution are framed as two separate regimes. While this Report has documented the move away from absolute immunity at the jurisdictional stage of a case, enforcement immunity remains a much more difficult barrier to overcome. Indeed, during the drafting process of the *UN Convention on the Jurisdictional Immunities of States and their Property*, enforcement immunity was referred to as, “the last bastion of State immunity.”<sup>288</sup> As a result, while the challenge of enforcement immunity must be addressed in cases of serious international crimes, its more restrictive application cannot be used to impede the clarification of the relationship between jurisdictional immunity and serious international crimes.

Moreover, to make the removal of jurisdictional immunity contingent on the removal of enforcement immunity undermines the value of access to a court. The judges in *Al-Adsani* send the message that unless any judgment rendered will be successfully enforced, the litigation has no valid purpose. It is true that survivors place importance on the enforcement

<sup>285</sup> *Case Concerning Certain Criminal Proceedings in France: Republic of Congo v. France: Request for the indication of a provisional measure* (International Court of Justice, June 2003) 42 ILM 852 at para 26 (quoting the Court at paras 22 – 40).

<sup>286</sup> *Al-Adsani v. the United Kingdom*, *supra* note 123 at 25 (Concurring Opinion of Judges Judges Pellonpää and Bratza) (citing *Hornsby v. Greece* 19 March 1997).

<sup>287</sup> *Id.* at 27.

<sup>288</sup> Commentary to the ILC Draft Articles, C/AN.4/L/452/Add.3 (Article 18(1)).

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of judgments and the ability to obtain financial compensation almost always plays a part in the decision to sue a state or its officials. As a result of the human rights violations endured, survivors may be physically, mentally or emotionally unable to work. Financial compensation can alleviate difficult economic circumstances, particularly when the survivor must support a family and requires extensive medical care.<sup>289</sup> However, as discussed at the outset of this Report, the right to reparation contains broader elements than financial compensation, including restitution, rehabilitation and satisfaction and guarantees of non-repetition.<sup>290</sup>

Access to a court can empower survivors through the ability to initiate and participate in a case against the state responsible,<sup>291</sup> in contrast to other avenues for redress in which the victim may be required to rely on the discretion of the state. Access to a court can also establish the site of responsibility and expose the truth of what happened to the torture survivor through official means. This can act as a measure of punishment and contribute to the fight to combat impunity.<sup>292</sup> The litigation may also generate public discourse, social reform and activism, thus assisting the individual survivors but also impacting broader society.<sup>293</sup> In the United States, for example, despite the large damages awarded in cases against foreign state officials under the *Alien Tort Claims Act* and the *Torture Victim Protection Act*, very few judgments have been enforced.<sup>294</sup> Yet, NGOs claim that the survivors have still valued the ability to bring a case before the courts of the United States.<sup>295</sup> If the potential availability of immunity at the enforcement stage is given weight at the point of determining whether jurisdictional immunity applies to cases concerning serious international crimes, these broader goals and values will also be undermined, in addition to compensation.

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<sup>289</sup> See, Beth van Schaack, In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention, 42 Harv. Int'l L.J. 141 – 200 (2001) at 157.

<sup>290</sup> For a more detailed examination on the range of forms of reparation, see, REDRESS, TORTURE SURVIVORS' PERCEPTIONS OF REPARATION: PRELIMINARY SURVEY (2001).

<sup>291</sup> Unless provision is made in criminal proceedings for the *constitution de partie civile*, whereby a survivor may be able to initiate or participation in criminal proceedings, the initiation and participation of suits is usually limited to civil proceedings. For example, in France the victim can join the criminal prosecution as a party to the case with a right to access proceedings; In Spain, reparations to the victim has an automatic part in the criminal prosecution. Private parties can also file charges or pursue action as private prosecutor. Notably, damages within the *partie civile* system may only be symbolic. For example, in the Netherlands, damages are capped at \$600. The *constitution de partie civile* is a feature of civil law; in common law countries criminal proceedings are usually preserved to state authorities as an "executive function. See, Daniel D. Ntanda Nsereko, *Prosecutorial Discretion Before National Courts and International Tribunals*, 3 Journal of International Criminal Justice, 124-144, 126 (2005). Moreover, in the context of a discussion on the accountability of a foreign state, civil suits will usually offer the only avenue for redress because of the general conception that states cannot be prosecuted. Civil suits are often framed as individualistic and motivated solely by pecuniary gain and thus rendered unsuitable to address international crimes such as torture. For example, during the negotiation phase of the establishment of the International Criminal Court, some state representatives opposed the inclusion of financial compensation on the basis that monetary redress did not reflect the nature of the crime. Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN GAOR, 51<sup>st</sup> Sess., Supp. No. 22A, Vol. I (Proceedings of the Preparatory Committee, March-April and August 1996) art 47 at 63 UN Doc A/51/22 (1996).

<sup>292</sup> See Hegarty, *supra* note 19 at 1187; Priscilla B. Hayner, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY (Routledge, New York and London, 2001) (discussing the importance of public disclosure).

<sup>293</sup> B. Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 Yale J. Int'l L. 1 – 57 (2002) at 3, 13.

<sup>294</sup> William Aceves, *Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation*, 41 Harv. Int'l L.J. 129 – 184 (2000) at 145; footnote 81 (citing one of the few instances in which financial compensation has been paid as the \$150 settlement reached in Marcos case); see also, van Schaack, *supra* note 289 at 170 ("[N]o judgment stemming from cases seeking to enforce human rights norms in the United States has ever been enforced, with the exception of a paltry sum retrieved from General Suarez-Mason of Argentina."); see also, R.B. Lillich, *Damages for Gross Violations of International Human Rights Awarded by US Courts*, 15 Human Rts Q. 207 (1993).

<sup>295</sup> *Brief for the Centre for Justice and Accountability, National Consortium of Torture Treatment Programs, and Individual ATCA Plaintiffs as Amici Curiae in Support of Respondents* (27 February 2004).

## 4. Does the Floodgates Argument Really Carry Weight, Especially in Light of Other Barriers to Jurisdiction?

In a number of recent cases, courts have raised what is termed as “the floodgates” argument as one of the main reasons for continuing to grant state immunity. For example, in *Al-Adsani v. the United Kingdom*, Judges Pellonpää and Bratza, in their concurring opinion, claimed that to deny immunity risked opening a flood of civil claims for compensation brought by refugees and asylum seekers. They implied that this would somehow ‘punish,’ “precisely those States which so far have been most liberal in accepting refugees and asylum-seekers [by imposing] upon them the additional burden of guaranteeing access to a court for the determination of perhaps hundreds of refugees’ civil claims for compensation for alleged torture.”<sup>296</sup>

On the surface, the “floodgates argument” makes some logical sense due to limitations on judicial resources and the cost of litigation.<sup>297</sup> On the other hand, very little evidence of the true risk that national courts will be opened to a flood of claims ever accompanies judicial pronouncement on the issue. As Judge van den Wyngaert noted in her dissenting opinion in the *Arrest Warrant* case, the floodgates argument is driven by “fear of chaos and abuse.”<sup>298</sup> Without a clear assessment of the actual risks involved, the justification for immunity in cases of torture and serious international crimes on the basis of the floodgates argument falls into question, particularly when the fundamental interest and commitment of states in combating impunity for serious international crimes is considered.<sup>299</sup>

With regard to immunities in particular, courts simply cite the floodgates argument without demonstrating how the explicit removal of the barrier of immunity would result in a torrent of claims. Greater analysis is required into how access to courts in cases concerning serious violations of international crimes actually burdens the legal system concerned by looking into issues such as the percentage of the total litigation made up by cases involving serious international crimes and whether these cases take up a disproportionate amount of resources, in terms of cost, time and personnel, in comparison to other cases. A detailed examination of the floodgates argument may show that practical considerations such as the cost of bringing a civil suit mitigate against frivolous or excessive cases. Even where legal aid is available, clients will still have to pay certain legal costs. Moreover, where much of the evidence is abroad, the claimants will face challenges in actually providing sufficient evidence to support their case, particularly if witnesses have to come from abroad. In contrast to prosecutions where the state involvement means that the state shoulders the burden of collecting – and therefore paying – for the evidence, no such assistance will be available in civil proceedings.

It is unlikely that the explicit denial of the availability of jurisdictional immunity in cases concerning serious international crimes would result in a flood of claims. By focusing on serious international crimes, immunity would only be explicitly unavailable in a very limited number of cases. Since the underlying concern behind the floodgates argument is the resistance of the use of national courts to adjudicate cases which bear little or no connection to the forum, Judge Rosalyn Higgins explains why the issue does not relate to the question of immunities but is rather a matter that should squarely be addressed within the context of whether a court has jurisdiction:

<sup>296</sup> *Al-Adsani v. the United Kingdom* *supra* note 123 (Concurring Opinion of Judges Pellonpää and Bratza) at 25 (citing Lord Justice Stuart-Smith in the English Court of Appeal).

<sup>297</sup> Damrosch *supra* note 70 at 191.

<sup>298</sup> Dissenting Opinion of Judge van den Wyngaert in *Arrest Warrant case*, *supra* note 41 at 42.

<sup>299</sup> See, Belsky, Merva and Roht-Arriaza, *supra* note 66 at 367.

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“The continuing protection of immunity granted to a foreign State for acts having no territorial connection with the forum are, in this speaker’s view, not properly a question for sovereign immunity at all. This requirement of “connection” reflects a feeling that courts should not pronounce upon the acts of a foreign sovereign that are so far removed from their own concern. But this is really a question of *jurisdiction*, not of immunity. It is for countries to formulate the circumstances in which they will be prepared to assert jurisdiction over events occurring abroad.”<sup>300</sup>

As a jurisdictional matter, the very narrow removal of immunity in cases concerning serious international crimes would have little impact on the opening of the court to a flood of claims - if that risk exists - due to the number of other jurisdictional and procedural hurdles and challenges which may restrict access to a court, such as the doctrine of *forum non conveniens* and limitation periods.<sup>301</sup> Furthermore, beyond the jurisdictional stage many more barriers exist, including during the hearing of the merits of the case and as discussed above, at the point of enforcement.

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<sup>300</sup> Higgins, *supra* note 59 at 273.

<sup>301</sup> See, REDRESS and FIDH, LEGAL REMEDIES FOR VICTIMS OF “INTERNATIONAL CRIMES”: Fostering an EU Approach to Extraterritorial Jurisdiction (Final Report) (March 2004).

## RECOMMENDATIONS

The debate over whether immunity should be available in cases concerning serious international crimes is not new: since the decision of the United States' Supreme Court in *Amerada Hess* in 1989, courts have been faced with the issue. Yet, over fifteen years later the situation is no clearer, with the Italian and Greek courts denying the availability of immunity, the Canadian and United States' courts upholding immunity and the House of Lords in the United Kingdom currently faced with the question in the pending appeal and cross-appeal in *Ron Jones and others v. Saudi Arabia*. Moreover, the debate and analysis on the availability of state immunity in cases concerning serious international crimes has not progressed or developed to any significant extent since 1989. As a result, the same repetitive arguments are advanced by those supportive of and against the availability of immunity. However recurrent, the discussion thus suffers from saturation and a lack of creativity in developing avenues for a resolution of the issues concerned.

In REDRESS' work, state immunity has presented a significant obstacle to fulfilling our mandate to seek reparations for torture survivors wherever the torture occurred and whoever the alleged perpetrators. Yet, despite the increasing topicality of the issue, no comprehensive document existed which even laid out the history and practice on the availability of state immunity and cases concerning serious international crimes. Moreover, while many articles had been written from the perspective of the United States, material on the jurisprudence in other states was lacking. As a result, practitioners and judges were often only citing and interpreting certain cases without taking into consideration conflicting judgments elsewhere. In REDRESS' consultations and workshops, it became apparent that many other policy makers, individuals and organisations would find a document which comprehensively traced and drew together the history and practice on state immunity and serious international crimes useful in their own work on these and related-issues. As REDRESS hopes that this Report will form the starting point for a wide range of actors working on state immunity and serious international crimes, the main body of the Report attempts to document current thinking and practice from as objective a stance as possible.

However, the research process has also clarified and informed REDRESS' position on the current state of the law in this area. Having closely analysed the issue, REDRESS believes that no justifiable basis for the maintenance or provision of state immunity exists in the very specific instance of cases involving the most serious international crimes such as torture. This is particularly the case when the torture survivor lacks an effective remedy in the courts of the state in which the alleged crime took place and/or before an international judicial forum. States cannot be allowed to hide behind the doctrine of state immunity in order to evade their own responsibility under international law. If states are willing to accommodate the interests of corporations and restrict immunity in commercial contexts, they cannot reasonably argue that immunity should still be available in cases involving the most serious international crimes, the prohibition of and accountability for which the majority of states have demonstrated their support and commitment and which do not merely concern the internal acts of one state, but the concern and legal interest of the international community as a whole.

On the basis of the research and consultations, REDRESS makes the following recommendations:

### **1. Support for National Law Reform Expressly Excluding the Availability of State Immunity for Serious International Crimes**

Ideally, the explicit acknowledgment of a clear 'exception' to state immunity in cases of serious international crimes would take place at a multilateral level. For example, within Europe the adoption of a framework decision on state immunity and serious international crimes by the European Union would offer a practical and straightforward approach to clarify the position and would minimise inconsistencies between the member states on issues such as the definition of a serious international crime and jurisdictional requirements such as the presence of the person bringing the case.<sup>302</sup> A multilateral approach would also minimise the concern of some governments, such as those expressed by the Lord Chancellor's Department in the United Kingdom, about bringing about law reform unilaterally.<sup>303</sup>

In considering the development of an explicit acknowledgment of a clear 'exception' to state immunity in cases of serious international crimes much more information and discussion is required on the possible forms such a coordinated approach could take. Concurrently, certain national law reform initiatives such as the *Redress for Torture Bill*, introduced as a private members' bill in the UK in 1999,<sup>304</sup> and Canadian initiatives to amend the State Immunity Act should proceed.<sup>305</sup>

### **2. REDRESS Opposes Ratification of the UN Convention without the Adoption of a Protocol Expressly Excluding Serious International Crimes From the Reach of the Terms of the Convention**

In drafting the Convention, the states parties identified the conflict between the Convention and the international obligations of states under international human rights and humanitarian law. As a result, criminal proceedings are expressly excluded from the terms of the Convention yet civil proceedings are not. In civil law countries, a claim for compensation can be brought within criminal proceedings, and hence immunities are unlikely to apply to the entirety of the process; whereas in common law countries where criminal proceedings and civil claims for reparation are brought separately, the Convention will apply so as to bar civil proceedings. This substantial difference in effect in common law and civil law countries, is worrisome, and should be clarified prior to further signing and ratification.

Moreover, despite the recognition by the International Law Commission Working Group and the Sixth Committee of the developments on the relationship between state immunity and serious international crimes, the General Assembly failed to address it and the drafters of the Convention also removed the clause subjecting the Convention to future developments in international law.

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<sup>302</sup> REDRESS/FIDH *supra* note 301.

<sup>303</sup> REDRESS, *THE IMPACT OF AL-ADSANI v. THE UNITED KINGDOM* (November 2002) at 5.

<sup>304</sup> Presented to the United Kingdom Parliament as a private members' bill in 1999.

<sup>305</sup> A Conference was held on this issue at the University of Toronto in October 2004; *See also*, question by Ms. Francine Lalonde M.P. of La Pointe-de-L'Île, Bloc Québécois before the Canadian House of Commons, Edited Hansard, No. 122, 38<sup>th</sup> Parliament, 1<sup>st</sup> Session (Thursday, 23 June 2005) questioning the availability of civil remedies for torture survivors in Canada following the Committee against Torture's comments *supra* note 220.

Following the Government of the United Kingdom's decision to sign the UN Convention with minimal debate,<sup>306</sup> at a recent House of Lords hearing on the United Kingdom's obligations under the Convention against Torture, the Rt. Hon. The Lord Archer of Sandwell QC sought the Lord Chancellor's assurance that no further steps or decisions would be taken on the Convention, such as ratification, without a full public debate. Although the Lord Chancellor did not specify when or where the debate would take place, he did support Lord Archer's position that the issue should be debated.<sup>307</sup> The Government of the United Kingdom should now take swift, transparent and inclusive steps to arrange this public debate. Similar debates should take place in states which have already or are still considering whether to sign the Convention.

### **3. REDRESS Advocates the Adoption of a General Comment on the Scope of Article 14 by the Committee Against Torture**

In monist states with national legislation on state immunity, domestic courts have clearly struggled in addressing the question of whether state immunity should be available in cases concerning serious international crimes. In cases such as *Bouzari v. the Islamic Republic of Iran*, the Ontario Court of Appeal pointed out that:

"The choice of the more convenient forum does not arise, since it would appear that there is no forum other than Ontario capable of assuming jurisdiction ... the appellant cannot sue in Iran, particularly in light of the evidence that he might well be killed by agents of the state if he were to return there. Nor is there any suggestion of any other forum except Ontario in which the appellant could bring this action."<sup>308</sup>

Yet, the Court still upheld the plea of immunity based on the terms of the national legislation. Following the *Bouzari* case, the Committee against Torture in its examination of Canada's most recent state party report highlighted the dual problem posed by state immunity and the failure of Canada to provide access to justice in civil proceedings. Particularly in cases where no alternative forum exists, the provision of state immunity clearly undermines the purpose and intent of the Convention against Torture by denying the torture survivor access to an effective remedy and contributing to the practice and impunity for torture. In order to remove ambiguity within the Convention against Torture, the Convention's interpretative body, the Committee against Torture, should adopt a general comment on the availability of state immunity in cases of torture and clarify the scope and obligations under Article 14.

### **4. REDRESS Advocates Parallel Developments in Related Areas**

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<sup>306</sup> The Foreign and Commonwealth Office did accept written submissions on the Convention as part of a consultation process, however no feedback was received following the written submissions in contrast to the consultation process undertaken by the Foreign and Commonwealth Office in relation to the decision as to whether to sign the Rome Statute, which included discussion between a wide range of actors.

<sup>307</sup> The Lords Hansard Text, 12 October 2005.

<sup>308</sup> *Bouzari v. the Islamic Republic of Iran*, *supra* note 117 at para. 24.

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The issue of the relationship of state immunity to serious international crimes does not exist in a vacuum, but is situated within the broader problem of the persistence of impunity for serious international crimes. Against this background, measures must be taken to address issues such as the lack of political will on the part of states to bring cases against each other for the commission of serious international crimes; the discretionary nature of diplomatic protection which very often results in a failure of states to espouse their citizens claims and the lack of adequate forums within which victims and survivors can bring cases against states at the international level and participate fully and effectively. If the relationship between state immunity and serious international crimes is practically addressed within the broader context of impunity for serious international crimes, domestic courts are unlikely to be overly burdened and greater prospects for tackling impunity will result.

### **5. Accessible Information on State Immunity in Cases Concerning Serious International Crimes**

As a result of the workshop in Berlin and REDRESS' broader meetings throughout the year, we discovered that the availability of state immunity in cases concerning serious international crimes presents an area under-explored by academics, lawyers and activists working on related-areas involving serious international crimes. Moreover, even between actors working on or monitoring the specific cases on immunity and serious international crimes, very little information-sharing or coordination has taken place, an issue aggravated by a lack of understanding of the legal systems in monist and dualist countries. As already noted, in light of the lack of a comprehensive study on state immunity and serious international crimes, the purpose of this Report was to provide a resource document for individuals and organisations working on these and related-issues. REDRESS has also created a network of interested individuals and organisations to enhance information-sharing.

As greater movement and development on state immunity and serious international crimes is still inhibited by a lack of easy access to international and comparative primary and secondary legal documents, we believe that the establishment of a website containing the relevant international and domestic case-law, UN documents, domestic legislation, international agreements, and commentaries would greatly assist. All interested actors could contribute documents in order to keep the website up to date with the latest developments.

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