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PUTTING THE TORT IN TORTURE:  
STATE IMMUNITY IN CIVIL CASES FOR  
HUMAN RIGHTS ABUSES BREACHING  
PEREMPTORY NORMS

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Before the law stands a doorkeeper. To this doorkeeper there comes a man from the country and asks to be admitted to the law. But the doorkeeper says that he cannot at present grant him admittance. The man considers, and then asks whether that means he may be admitted later on. 'It is possible,' says the doorkeeper, 'but not at present.'

Franz Kafka, *Before the Law*<sup>1</sup>

## INTRODUCTION

In recent years, the immunity from domestic criminal prosecution of perpetrators of gross human rights violations has been significantly restricted, most notably by the House of Lords in *Regina v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte (No. 3) (Pinochet (No. 3))* in 1999.<sup>2</sup> However, despite this development, state immunity persists in the civil sphere.

The question of whether a state is entitled to civil immunity before domestic courts for human rights violations in breach of peremptory norms is a vexed question, as it involves two fundamentally important but competing values of international law. On the one hand, the international community has an undoubted interest in bringing human rights violators to account, providing redress to their victims, and discouraging future violations. On the other hand, it is also crucially important that inter-state relations should be peaceful, stable and predictable.<sup>3</sup> As a result of this fundamental contradiction, states have taken divergent approaches to the issue of immunity, with some upholding state immunity while others deny it. Consequently, it is unclear whether there is a rule of customary international law according to which a state is obliged to grant immunity. The International Court of Justice (ICJ) will be confronted with this question in the upcoming

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<sup>1</sup> Franz Kafka "Before the Law" in *Metamorphosis and Other Stories* (Penguin Books, London, 2000) at 165.

<sup>2</sup> *Regina v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte (No. 3)* [2000] 1 AC 147 (HL).

<sup>3</sup> *Report of the International Law Commission: Fifty-eighth session, Annex A: Immunity of State Officials from Foreign Criminal Jurisdiction* at [17], A/61/10 (2006).

case of *Jurisdictional Immunities of the State*,<sup>4</sup> in which Germany alleges that Italy has infringed international law by assuming jurisdiction over acts of the German state during the Second World War.

This paper will examine whether a state is, and whether it ought to be, entitled to state immunity from civil actions before domestic courts for human rights violations constituting breaches of peremptory norms.<sup>5</sup> Chapter one will examine whether there is a rule of customary international law according to which a state is entitled to immunity for breaches of peremptory norms. As chapter one concludes that there is no such customary rule, chapter two explores the effects of the peremptory prohibition on torture on immunity as a rule of domestic law. Chapter three analyses whether a state ought to be entitled to immunity for breaches of peremptory norms. Finally, assuming that a state should not be entitled to immunity, chapter four will examine the role of private international law in domestic claims alleging breaches of peremptory norms.

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<sup>4</sup> *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (Proceedings Instituted 23 December 2008) (International Court of Justice). The Court began deliberations on 16 September 2011. See “Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)” (2011) International Court of Justice - Cases <<http://www.icj-cij.org/docket/index.php?p1=3&p2=1&code=&case=143&k=60>>.

<sup>5</sup> This paper will use the term peremptory norms, however direct quotations also use the analogous term *jus cogens*.

## CHAPTER ONE: CUSTOMARY INTERNATIONAL LAW ON STATE IMMUNITY FOR BREACHES OF PEREMPTORY NORMS

At the outset it is necessary to examine whether there is a rule of international law according immunity to a state in respect of violations of peremptory norms. As the 2004 United Nations Convention on the Jurisdictional Immunities of States and Their Property (the 2004 Convention) has not yet entered into force,<sup>6</sup> at present the only source of law on state immunity can be customary international law.<sup>7</sup>

Article 38(1)(b) of the Statute of the International Court of Justice is widely accepted as the most authoritative statement of the sources of international law.<sup>8</sup> Article 38(1)(b) states that the Court shall apply “international custom, as evidence of a general practice accepted as law”.<sup>9</sup> Custom therefore has two components: uniform state practice, and a belief that states are legally obliged to act in conformity with that practice (*opinio juris*).

Evidence of state practice in relation to state immunity consists primarily of national legislation and court decisions.<sup>10</sup> Accordingly, this chapter will examine national legislation on state immunity, as well as national judicial decisions in which the question of immunity for breaches of peremptory norms has arisen. It will also examine decisions

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<sup>6</sup> United Nations Convention on Jurisdictional Immunities of States and Their Property (opened for signature 17 January 2005) (the 2004 Convention). According to article 30, the 2004 Convention will enter into force when it has been ratified by 30 states. As at 11 August 2011, the 2004 Convention had been ratified by 11 states. See “United Nations Convention on Jurisdictional Immunities of States and Their Property” (2011) United Nations Treaty Collection - Status of Treaties <[http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=III-13&chapter=3&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-13&chapter=3&lang=en)>.

<sup>7</sup> Thomas Giegerich “Do Damages Claims Arising From *Jus Cogens* Violations Override State Immunity from the Jurisdiction of Foreign Courts” in Christian Tomuschat and Jean-Marc Thouvenin (eds) *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff Publishers, Leiden, 2006) at 213.

<sup>8</sup> Malcolm N. Shaw *International Law* (6th ed, Cambridge University Press, Cambridge, 2008) at 70.

<sup>9</sup> Statute of the International Court of Justice, art 38(1)(b).

<sup>10</sup> Rosalyn Higgins *Problems and Process: International Law and How We Use It* (Clarendon Press, Oxford, 1994) at 81.

of international courts which have dealt with this question. It will then explore the consequences of the existence or otherwise of a rule of custom on domestic law on state immunity.

## **A National Legislation and Judicial Decisions**

### *1 The United Kingdom*

The State Immunity Act 1978 (UK) (SIA 1978) is the primary source for determining whether a state is entitled to immunity. Section 1 sets out the general rule of immunity, which is subject to a number of express exceptions in ss 2–11. However, the SIA 1978 does not include an express exception to immunity in cases involving violations of international law or breaches of peremptory norms. Therefore, on the face of the SIA 1978 a state is still entitled to immunity even if it breaches a peremptory norm.

The leading case in the United Kingdom is *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia (Jones v Saudi Arabia)*.<sup>11</sup> The House of Lords unanimously held that both the state of Saudi Arabia and the individual officials involved were entitled to immunity for alleged acts of torture committed against United Kingdom nationals in Saudi Arabia. The claim against the individual officials was dismissed on the ground that state immunity under the SIA 1978 extends to state officials. Otherwise the state's immunity would be circumvented by a claimant suing a state official.<sup>12</sup> The claim against Saudi Arabia was rejected because the claimants could not bring their case into one of the express exceptions to immunity in the SIA 1978.<sup>13</sup> The claimants then argued that a grant of immunity under the SIA 1978 was a disproportionate restriction on their right of access to a court under art 6 of the European Convention on Human Rights, as a grant of immunity would be inconsistent with the peremptory prohibition on torture at international law. However, the House of Lords rejected this argument, finding that

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<sup>11</sup> *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2007] 1 AC 270 (HL).

<sup>12</sup> *Ibid*, at [10], [13].

<sup>13</sup> *Ibid*, at [13].

despite the peremptory prohibition on torture, states had not yet recognised an exception to customary international law on state immunity in civil cases.<sup>14</sup>

## 2 Canada

Section 3 of the State Immunity Act 1985 (SIA 1985) contains a similar general rule of immunity to that in the SIA 1978, which is also subject only to limited express exceptions in ss 4-8.<sup>15</sup>

In *Bouzari v Islamic Republic of Iran (Bouzari v Iran)*,<sup>16</sup> the Court of Appeal for Ontario reached the same conclusion as the House of Lords in *Jones v Saudi Arabia*.<sup>17</sup> Bouzari could not bring a civil action in Canadian courts against the Iranian state for alleged acts of torture committed in Iran, as Iran was entitled to state immunity. The Court held that Bouzari was unable to bring his case into any of the exceptions in the SIA 1985.<sup>18</sup> It then proceeded to examine the state of international law. If there was a rule of international law denying immunity, then Canadian domestic law (upholding immunity) would not be invalid, but Canada might be in breach of its international obligations.<sup>19</sup> In any event, the Court held that there was no rule of international law which obliged Canada to provide an exception to immunity for cases of torture committed abroad. The Court held that “Canada’s treaty obligation pursuant to Article 14 [of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture)] does not extend to providing the right to a civil remedy against a foreign state for torture committed abroad.”<sup>20</sup> The Court also concluded that, at customary

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<sup>14</sup> Ibid, at [34] per Lord Bingham, [64] per Lord Hoffmann.

<sup>15</sup> State Immunity Act RSC 1985 c S-18.

<sup>16</sup> *Bouzari v Islamic Republic of Iran* (2004) 71 OR (3d) 675 (Ont CA).

<sup>17</sup> *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*, above n 11.

<sup>18</sup> *Bouzari v Islamic Republic of Iran*, above n 16, at [59].

<sup>19</sup> Ibid, at [66].

<sup>20</sup> Ibid, at [83].

international law, the peremptory prohibition of torture does not extend to a requirement to provide the right to a civil remedy for torture committed abroad by a foreign state.<sup>21</sup>

### 3 *Australia*

Again, the Foreign States Immunities Act 1985 (Cth) (FSIA 1985) provides a general rule of state immunity.<sup>22</sup> This applies unless the claimant can bring his or her case under an express exception in the statute.<sup>23</sup>

Although there are no cases that have directly considered the FSIA 1985 in the context of breaches of peremptory norms, the Full Court of the Federal Court of Australia appears to have endorsed the reasoning of the House of Lords in *Jones v Saudi Arabia* in an obiter statement in *Habib v Commonwealth*.<sup>24</sup> Habib, an Australian citizen, sued Australia for the torts of misfeasance in public office and intentional but indirect infliction of harm. Habib alleged that these torts had been committed by Australian officials aiding and abetting acts of torture committed against him while in detention in Pakistan, Egypt, Afghanistan and at Guantánamo Bay, Cuba. Although the decision centred on the act of state doctrine,<sup>25</sup> citing *Jones v Saudi Arabia*, Jagot J acknowledged:<sup>26</sup>

In the present case, if the agents of Pakistan, Egypt and the USA were sued directly in an Australian court for the alleged acts inflicted on Mr Habib those agents would be entitled to invoke sovereign immunity under s 9 of the *Foreign States Immunities Act 1985* (Cth) (a proposition Mr Habib accepted).

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<sup>21</sup> Ibid, at [90].

<sup>22</sup> Foreign States Immunities Act 1985 (Cth), s 9.

<sup>23</sup> Ibid, ss 10-22.

<sup>24</sup> *Habib v Commonwealth* [2010] FCAFC 12, (2010) 183 FCR 62.

<sup>25</sup> According to the act of state doctrine, “every sovereign State is bound to respect the independence of every other sovereign State, and the Courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.” (*Underhill v Hernandez* 168 US 250 (1897) at 252 per Fuller CJ)

<sup>26</sup> Ibid, at [85].

#### 4 *New Zealand*

There is no New Zealand legislation regulating state immunity. Thus the grant or denial of immunity is a matter of common law, which incorporates international law.

In *Fang v Jiang*, where New Zealand residents claimed they had been tortured as members of the Falun Gong movement in China, their claim was barred by state immunity.<sup>27</sup> Applying the reasoning in *Jones v Saudi Arabia*, Randerson J held that there was no exception to state immunity at international law (and therefore at common law) for breaches of peremptory norms, such as torture. Randerson J concluded that he was not “persuaded that it would be appropriate to depart from the persuasive reasoning of the House of Lords in *Jones*, a case [he] consider[ed] to be directly in point.”<sup>28</sup>

#### 5 *The United States*

##### (a) Foreign Sovereign Immunities Act 1976

The Foreign Sovereign Immunities Act 1976 (FSIA 1976) also contains a general rule of immunity subject to limited express exceptions, but no express exception for breaches of peremptory norms.<sup>29</sup> Nevertheless, there are a number of statutory exceptions to immunity for human rights violations.

In 1996 the Antiterrorism and Effective Death Penalty Act 1996 (AEDPA) amended the FSIA 1976. The AEDPA removes the immunity under the FSIA of states designated by the State Department as state sponsors of terrorism, if the state commits a terrorist act.<sup>30</sup>

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<sup>27</sup> *Fang v Jiang* [2007] NZAR 420 (HC).

<sup>28</sup> *Ibid*, at [72].

<sup>29</sup> Foreign Sovereign Immunities Act 28 USC § 1330.

<sup>30</sup> Antiterrorism and Effective Death Penalty Act of 1996 28 USC § 1605A.

In its current form, a claimant must satisfy seven statutory elements in order for this exception to apply.<sup>31</sup>

The recent Supreme Court case of *Samantar v Yousuf* has placed significant restrictions on state immunity under the FSIA 1976.<sup>32</sup> The Supreme Court held that state officials are not entitled to immunity under the FSIA 1976 for acts of torture, as the definition of ‘foreign state’ in §1603 of the FSIA does not include state officials.<sup>33</sup> This conclusion is contrary to that reached in *Jones v Saudi Arabia*, in which the House of Lords held that immunity does extend to state officials.<sup>34</sup> However, in the United States, officials may still be entitled to immunity at common law.<sup>35</sup>

In addition, there are other statutes that the United States courts have interpreted as providing an exception to state immunity for human rights abuses, such as torture.

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<sup>31</sup> The seven elements are: [1] the claimant is a United States national, a member of the armed forces, a United States government employee or contractor; [2] the claim seeks money damages for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking; [3] the act was performed by the foreign state or a non-state actor' that received material support from the foreign state defendant; [4] the act or provision of material support was engaged in by an official, employee, or agent of such foreign state while acting within the scope of his office, employment, or agency; [5] the foreign state was designated as a state sponsor of terrorism at the time the act occurred, or was so designated as a result of such act; [6] the foreign state was designated as a state sponsor of terrorism at the time the claim was filed or was so designated within the 6-month period before the claim is filed; [7] if the act occurred in a foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration. See Sean Hennessy “In Re The Foreign Sovereign Immunities Act: How the 9/11 Litigation Shows the Shortcomings of FSIA as a Tool in the War on Global Terrorism” (2011) 42 Geo J Int'l L 855, at fn 38.

<sup>32</sup> *Samantar v Yousuf* 560 US \_\_\_ (2010).

<sup>33</sup> *Ibid*, at 7-13.

<sup>34</sup> *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*, above n 11, at [10], [13].

<sup>35</sup> *Samantar v Yousuf*, above n 32. The Supreme Court remanded the case to the District Court to consider whether Samantar (the alleged torturer) was entitled to immunity at common law. The District Court deferred to the State Department and held that state immunity did not apply as the State Department had made a determination to that effect: see Lorna McGregor “Two New Decisions on Subject-Matter Immunity, Torture and Extrajudicial Killings” (2011) EJIL: Talk! <<http://www.ejiltalk.org/two-new-decisions-on-subject-matter-immunity-torture-and-extrajudicial-killings/>>. McGregor concluded that the case is likely to be appealed. For up to date information on the case, see “Samantar v Yousuf - Pleadings” (2011) The Center for Justice and Accountability <<http://www.cja.org/article.php?list=type&type=142>>.

(b) Alien Tort Claims Act 1789 and Torture Victim Protection Act 1991

The Alien Tort Claims Act 1789 (ATCA) provides federal courts with jurisdiction over certain violations of international law in the following terms:<sup>36</sup>

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

This statute received little attention by the United States courts, until it was “revived” in *Filártiga v Peña-Irala* in 1980.<sup>37</sup> The 2<sup>nd</sup> Circuit of the Court of Appeals held that the ATCA provided federal jurisdiction over individuals for breaches of international law on human rights.<sup>38</sup>

[W]e hold that deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, s 1350 provides federal jurisdiction.

This case has been followed by a significant number of cases.<sup>39</sup> Furthermore, the Supreme Court has upheld the basic principle in *Filártiga v Peña-Irala* in *Sosa v Alvarez-Machain*, by confirming the applicability of the ATCA to international human rights litigation.<sup>40</sup>

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<sup>36</sup> Alien Tort Claims Act 28 USC § 1350.

<sup>37</sup> *Filártiga v. Peña-Irala* 630 F 2d 876 (2d Cir 1980).

<sup>38</sup> *Ibid*, at 878.

<sup>39</sup> Ellen Lutz and Kathryn Sikkink “The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America” (2001) 2 CJIL 1 at 8. See for example *Kadic v Karadzic* 70 F 3d 232 (2d Cir 1995), *In re Estate of Ferdinand Marcos* 25 F 3d 1467 (9th Cir 1994).

<sup>40</sup> *Sosa v Alvarez-Machain* 542 US 692 (2004).

The scope of ATCA was increased by the Torture Victim Protection Act (TVPA), enacted in 1991.<sup>41</sup> This statute extends the protection offered to aliens under ATCA to United States citizens in cases of torture and extrajudicial killings.<sup>42</sup>

(c) Other judicial decisions restricting immunity

Even in cases where the ATCA or TVPA do not apply, there has been some acceptance of the idea that a state impliedly waives its right to immunity under the FSIA 1976 in cases where the plaintiff alleges breaches of peremptory norms of international law. According to this approach, torture and other human rights violations are recognised as violations of peremptory norms, which are non-derogable, binding on all states, and give rise to *erga omnes* obligations (owed to all other states). When a state commits such acts, it constructively waives its right to immunity.<sup>43</sup> This was the approach of Judge Wald in her dissenting opinion in *Prinz v Federal Republic of Germany*:<sup>44</sup>

Peremptory norms are by definition nonderogable, and thus when a state thumbs its nose at such a norm, in effect overriding the collective will of the entire international community, the state cannot be performing a sovereign act entitled to immunity.

6 Italy

There is no specific legislation in Italy that deals with state immunity. Instead, customary international law, including rules on state immunity (if any), automatically form part of Italian domestic law according to article 10 of the Constitution of the Italian Republic.

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<sup>41</sup> Torture Victim Protection Act 28 USC § 1350.

<sup>42</sup> Michael Swan “International Human Rights Tort Claims and the Experience of United States Courts: An Introduction to the US Case Law, Key Statutes and Doctrines” in Craig Scott (ed) *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart, Oxford, 2001) at 74.

<sup>43</sup> Hazel Fox *The Law of State Immunity* (2nd ed, Oxford University Press, Oxford, 2008) at 341.

<sup>44</sup> *Prinz v Federal Republic of Germany* 26 F 3d 1166 (DC Cir 1994).

While accepting the existence of a customary rule of state immunity, the Italian Court of Cassation rejected a plea of immunity in *Ferrini v Federal Republic of Germany*.<sup>45</sup> In that case, Ferrini brought an action against Germany in the Italian courts, alleging that he had been subjected to forcible deportation and forced labour by German military authorities during the Second World War. The Court of Cassation rejected Germany's plea of immunity. The Court's reasoning was based on what has become known as the normative hierarchy theory,<sup>46</sup> whereby peremptory norms override inferior rules of state immunity.<sup>47</sup>

[Fundamental human] rights are protected by norms, from which no derogation is permitted, which lie at the heart of the international order and prevail over all other conventional and customary norms, including those which relate to State immunity...

## 7 Greece

Just as in Italy, art 28 the Greek constitution incorporates rules of customary international law on immunity (if any) into Greek domestic law.

Yet the Greek Court of Cassation has held that, despite a customary rule of immunity, state immunity did not bar a claim against Germany brought by relatives of those massacred by German forces in the Greek village of Distomo in 1944.<sup>48</sup> The Court of Cassation, in *Prefecture of Voiotia v Federal Republic of Germany (Prefecture of Voiotia)* upheld the decision of the trial court which concluded that Germany was not entitled to immunity as it had waived its right to immunity by committing acts in breach of peremptory norms, which were thus also not sovereign acts. The Court concluded:<sup>49</sup>

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<sup>45</sup> *Ferrini v Federal Republic of Germany* (2005) 128 ILR 658 (Italian Court of Cassation).

<sup>46</sup> ?

<sup>47</sup> *Ibid*, at 668.

<sup>48</sup> *Prefecture of Voiotia v Federal Republic of Germany* (2003) 123 ILR 513 (Greek Court of Cassation).

<sup>49</sup> *Ibid*, at 521.

[T]he defendant state could not invoke its right of immunity, which it had tacitly waived since the acts for which it was being sued were carried out by its organs in contravention of the rules of peremptory norms... and did not have the character of acts of sovereign power.

However, the basis for this decision was later doubted by the subsequent decision of the Greek Special Supreme Court.<sup>50</sup> The majority (six votes to five) in *Margellos and Others v Federal Republic of Germany (Margellos)* implicitly rejected the approach of the Court of Cassation in *Prefecture of Voiotia* by concluding as follows:<sup>51</sup>

[I]t appears that a foreign State continues to enjoy sovereign immunity in respect of proceedings relating to a tort committed in the forum State in which its armed forces participated, without distinction as to whether the actions at issue violated peremptory norms or whether the armed forces were participating in an armed conflict.

The minority would have affirmed the decision of *Prefecture of Voiotia*. The dissent was based on two rationales. First, the minority found that there was a rule of customary international law excluding state immunity for tortious claims arising from war crimes committed on the territory of the forum state. Secondly, the Court expressly affirmed the superiority of peremptory norms over ordinary rules of state immunity:<sup>52</sup>

The prohibition of war crimes has the status of a peremptory rule of international law (*jus cogens*) which is hierarchically higher than any other rule of international law.

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<sup>50</sup> *Margellos and Others v Federal Republic of Germany* (2003) 123 ILR 526 (Greek Special Supreme Court).

<sup>51</sup> *Ibid*, at 532.

<sup>52</sup> *Prefecture of Voiotia v Federal Republic of Germany*, above n 48, at 521.

## 8 Germany

After the decision of the Court of Cassation in *Prefecture of Voiotia*, the claimants in that case sought recognition and enforcement of the trial court judgment in *Prefecture of Voiotia* in the German courts. The German Federal Supreme Court unanimously rejected the claim for enforcement and recognition in the *Distomo Massacre Case*,<sup>53</sup> rejecting the argument that peremptory norms override inferior rules of immunity:<sup>54</sup>

There have, however, been recent attempts to restrict the principle of State immunity and not to recognize its application in the case of violations of mandatory norms of international law (*jus cogens*)... The majority view is, however, that this is not applicable international law.

The Court also noted that the Special Supreme Court in *Margellos* had “superseded” the decision of the Court of Cassation in *Prefecture of Voiotia* (which held immunity was inapplicable).<sup>55</sup>

### **B Decisions of International Courts**

#### *1 The European Court of Human Rights*

The European Court of Human Rights (ECHR) by a nine-eight majority upheld a plea of immunity in *Al-Adsani v United Kingdom*.<sup>56</sup> The claimant had brought a claim for damages against Kuwait in the English courts, but the Court of Appeal rejected his claim, applying immunity under the SIA 1978.<sup>57</sup> After leave to appeal to the House of Lords was denied, the claimant appealed to the ECHR, alleging that the grant of immunity

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<sup>53</sup> *Distomo Massacre Case* (2003) 123 ILR 556 (German Federal Supreme Court).

<sup>54</sup> *Ibid*, at 560.

<sup>55</sup> *Ibid*, at 561.

<sup>56</sup> *Al-Adsani v United Kingdom* (2002) 34 EHRR 11 (Grand Chamber, ECHR).

<sup>57</sup> *Al-Adsani v Government of Kuwait* (1996) 103 ILR 420 (English High Court).

breached his right of access to a court under art 6 of the European Convention on Human Rights. The majority of the ECHR rejected this argument, as it was:<sup>58</sup>

[U]nable 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.

The eight-member minority, however, reached the opposite conclusion. In a joint dissenting opinion, six judges held that state immunity did not apply in cases of torture, as immunity conflicted with a superior peremptory norm of international law.<sup>59</sup>

The acceptance therefore of the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions.

### **C Conclusion on The Status of State Practice**

The ICJ in the *North Sea Continental Shelf* cases stated that state practice must be “both extensive and virtually uniform” to qualify as a rule of customary international law.<sup>60</sup> It is therefore necessary to examine whether state practice, as outlined above, is “extensive and virtually uniform”.

Of the states that have considered the issue, there are two divergent approaches. First, several states uphold immunity even where breaches of peremptory norms are alleged. The common law jurisdictions (excluding the United States) and Germany fall into this

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<sup>58</sup> *Al-Adsani v United Kingdom*, above n 56, at [61].

<sup>59</sup> *Ibid*, at [3] of the Joint Dissenting Opinion of Judges Rozakis and Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic.

<sup>60</sup> *North Sea Continental Shelf (Federal Republic of Germany v Netherlands/Denmark)* [1969] ICJ Rep 3 at

group. The decision of the ECHR in *Al-Adsani v United Kingdom* could be included in this group, though the narrow nine-eight majority significantly diminishes the weight of this decision as evidence of practice forming a rule upholding immunity. On the other hand, the United States and a number of civil law countries have held that state immunity is limited in various ways where a claimant alleges a breach of a peremptory norm. Given the divergent nature of these two approaches, it is difficult to conclude that state practice is “extensive and virtually uniform”.

In the *North Sea Continental Shelf* cases the ICJ also emphasised the importance of uniformity of state practice among those states “whose interests are specially affected” by the purported rule of customary international law.<sup>61</sup> This is particularly important in this context because the limited evidence of state practice indicates that practice is not particularly “extensive”. The states whose practice is examined above are the only states in which this issue has arisen. Therefore, these are the states that are “specially affected” by a rule of custom on immunity for breaches of peremptory norms. Again, there is no uniformity of practice among these states.

The practice of influential and powerful states can be given greater weight than that of other states. Shaw, when discussing the role of more powerful states, notes:<sup>62</sup>

[I]t is inescapable that some states are more influential and powerful than others and that their activities should be regarded as of greater significance. This is reflected in international law so that custom may be created by a few states, provided those states are intimately connected with the issue at hand, whether because of their wealth and power or because of their special relationship with the subject-matter of the practice, as for example maritime nations and sea law.

According to this view, the practice of the United States takes on greater significance. The United States is “intimately connected” with the issue of state immunity in cases of breaches of peremptory norms as the greatest number of cases have been brought in the

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<sup>61</sup> Ibid.

<sup>62</sup> Shaw, above n 8, at 79.

United States in which this issue has arisen. As indicated above, the United States has carved out significant exceptions to state immunity, which would point against a rule of immunity for breaches of peremptory norms.

As the ICJ noted in the *Nicaragua v United States* case, state practice need not be “in absolute rigorous conformity” with the purported rule of customary international law.<sup>63</sup> The Court stated:<sup>64</sup>

In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.

It could be argued that state practice allowing an exception to immunity could merely constitute a *breach* of an existing rule of immunity that does not admit an exception for peremptory norms. However, because state practice rejecting immunity for breaches of peremptory norms is, in relative terms, quite extensive, it is difficult to conclude that this practice constitutes a mere breach of an existing rule upholding immunity.

Arguably, state practice disallowing immunity may be seen as evidence of the beginning of the formation of a new rule, though this has not yet crystallised into a rule of customary law. The emergence of such a new rule was acknowledged by the Joint Separate Opinion in the *Case Concerning the Arrest Warrant of 11 April 2000*. (*Arrest Warrant Case*).<sup>65</sup> In any event, it cannot be said that a rule of customary international law exists under which a state is entitled to immunity for breaches of peremptory norms.

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<sup>63</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Merits)* [1986] ICJ Rep 14.

<sup>64</sup> *Ibid.*, at 98.

<sup>65</sup> *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 3 at 77.

Courts generally do not take the correct approach in ascertaining the existence of a rule of customary international law. They often assert the existence of a rule of customary international law without providing evidence of state practice supporting such a rule.<sup>66</sup> For example, the ECHR in *Al-Adsani v United Kingdom* referred to “generally recognized rules of public international law on state immunity”,<sup>67</sup> without explaining “the way in which those rules acquired their ‘generally recognized’ character.”<sup>68</sup> The Court of Appeal for Ontario made a similar error in *Bouzari v Iran*, when it stated that “the immunity of states from civil proceedings in the courts of foreign jurisdictions is an example of a principle of customary international law”,<sup>69</sup> though again no any evidence of practice supporting this view was provided.<sup>70</sup>

In other cases, where courts have examined state practice, they have ignored or minimised the significance of practice that excludes immunity for breaches of peremptory norms. In *Jones v Saudi Arabia*, Lord Hoffman stated that it “is necessary carefully to examine the sources of international law concerning the particular immunity claimed.”<sup>71</sup> Unfortunately, rather than examining contrary state practice, Lord Hoffmann relied on decisions that upheld immunity, and merely doubted the correctness of decisions that had rejected a plea of immunity, such as *Prefecture of Voiotia* and *Ferrini v Federal Republic of Germany*,<sup>72</sup> as well as the cases decided pursuant to the ATCA.<sup>73</sup> Lord Hoffmann did not mention the requirement that state practice must be “virtually uniform”, nor did he acknowledge that the practice he had cited rejecting immunity did not meet that threshold.

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<sup>66</sup> Alexander Orakhelashvili *Peremptory Norms in International Law* (Oxford University Press, Oxford, 2006) at 338.

<sup>67</sup> *Al-Adsani v United Kingdom*, above n 56, at [56].

<sup>68</sup> Orakhelashvili, above n 66, at 338.

<sup>69</sup> *Bouzari v Islamic Republic of Iran*, above n 16, at [86].

<sup>70</sup> Orakhelashvili, above n 66, at 338.

<sup>71</sup> *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*, above n 11, at [49].

<sup>72</sup> *Ibid*, at [59]-[63].

<sup>73</sup> *Ibid*, at [99].

Even decisions which deny immunity adhere to the view that there is a rule of customary international law according to which a state would be entitled to immunity for breaches of peremptory norms. As an example, the Joint Dissenting Opinion in *Al-Adsani v United Kingdom* assumed that there is such a rule of custom,<sup>74</sup> which was subsequently overridden by the hierarchically superior peremptory prohibition against torture.<sup>75</sup> The Italian Court of Cassation and the Greek Court of Cassation took a similar approach.<sup>76</sup>

#### **D Views of Commentators on State Practice**

Under art 38(1)(d) of the Statute of the ICJ, “the teachings of the most highly qualified publicists of the various nations” are a “subsidiary means for the determination of rules of law.”<sup>77</sup> The views of commentators can therefore be used to elucidate the state of customary international law.

Fox, after examining what she considers relevant state practice, concludes that at customary international law state immunity applies even for breaches of peremptory norms:<sup>78</sup>

In general, on this view the overriding effect of *jus cogens* norms has been restricted; the doctrine of State immunity in respect of civil proceedings against the State is held to be compatible with the obligations under international law relating to the implementation of *jus cogens* norms; exhaustion of local remedies remains the appropriate method of settlement.

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<sup>74</sup> *Al-Adsani v United Kingdom*, above n [2] of the Joint Dissenting Opinion.

<sup>75</sup> *Ibid*, at [3].

<sup>76</sup> *Ferrini*, above n 45, at 669; *Prefecture of Voiotia*, above n 48, at 516.

<sup>77</sup> Statute of the International Court of Justice, art 38(1)(d).

<sup>78</sup> Fox, above n 43, at 156. But see Jane Wright “Retribution but No Recompense: A Critique of the Torturer’s Immunity from Civil Suit” (2010) 30 OJLS 143 at 144.

However, Fox's review of state practice focuses primarily on those cases that continue to uphold immunity, whilst placing little emphasis on contrary practice and the requirement that state practice must be "extensive and virtually uniform".<sup>79</sup>

On the other hand, other commentators take the opposite view, claiming that there is insufficient uniformity in state practice to form a rule of customary international law. Orakhelashvili is firmly of this view:<sup>80</sup>

[I]f one tries to find in international law a general rule requiring States to grant immunity to other States in certain circumstances, one should at least support such a finding with a uniform and coherent practice affirming that international law itself obliges States to grant immunity to a foreign State for certain acts. This has still to be awaited and consequently at present there is no customary international law on State immunity.

Caplan agrees. He considers that there is only sufficient uniformity of practice on immunity for "a limited core body of state conduct", such as the freedom of the foreign sovereign from arrest or detention and the diplomatic protection of foreign ministers.<sup>81</sup> This leads him to the conclusion that a "broader range of state behaviour not included in the core, such as state sponsored human rights violations, is entitled to immunity solely as matter of domestic law."<sup>82</sup> In a similar vein, Schreuer concludes that because it is "difficult, if not impossible, to find proof of a uniform practice supporting immunity",<sup>83</sup> "it has become difficult to say whether state immunity is a question of customary international law, of treaty law or of domestic law."<sup>84</sup>

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<sup>79</sup> *North Sea Continental Shelf* above n 60, at 43.

<sup>80</sup> Orakhelashvili, above n 66, at 337.

<sup>81</sup> Lee M. Caplan "State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory" (2003) 97 AJIL 741 at 757.

<sup>82</sup> *Ibid.*

<sup>83</sup> Christoph H Schreuer *State Immunity: Some Recent Developments* (Grotius Publications Cambridge, 1988) at 5.

<sup>84</sup> *Ibid.*, at 4. See also Ian Brownlie *Principles of Public International Law* (3rd ed, Clarendon Press, Oxford, 1979) at 334.

According to Finke, state practice on state immunity is so diverse in matters of detail and substance that states only agree on immunity at a very high level of abstraction.<sup>85</sup> In particular, the current state practice on the exceptions to immunity is too diverse for state immunity to form a rule of custom. As an example, Finke cites the exception to immunity for torts committed within the forum state. Some states apply this exception, but other states do not. Even those that do apply the exception do so differently.<sup>86</sup> State immunity is therefore not a rule of customary international law, but rather a general principle of international law, under art 38(1)(c) of the Statute of the ICJ.<sup>87</sup> As a general principle, states are free to determine specific rules of immunity within their domestic legal systems as to when immunity should apply and when it should be restricted. With these considerations in mind, the words of Lord Denning are apposite: “There is no uniform practice. There is no uniform rule. So there is no help there.”<sup>88</sup>

### **E State Immunity as Rule of Domestic Law**

Because it is likely that there is no settled rule of custom on state immunity for breaches of peremptory norms, states cannot be in breach of an international obligation by upholding immunity in such cases, nor will a state violate international law if it provides an exception to immunity. State immunity is therefore regulated exclusively by domestic law. Instead of forming a rule of international law, state immunity is “little more than a sub-branch of each state’s domestic law.”<sup>89</sup> As a consequence, states are free to develop domestic rules of immunity as they see fit.<sup>90</sup> Lauterpacht reached this conclusion as early as 1958 in respect of state immunity generally.<sup>91</sup>

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<sup>85</sup> Jasper Finke “Sovereign Immunity: Rule, Comity or Something Else?” (2010) 21 EJIL 853 at 871.

<sup>86</sup> Ibid, at 874.

<sup>87</sup> Ibid, at 873.

<sup>88</sup> *Rahimtoola v Nizam of Hyderabad* [1958] AC 379 (HL) at 418.

<sup>89</sup> Richard Garnett “Should Foreign Sovereign Immunity be Abolished” (1999) 20 Aust YBIL 175 at 175.

<sup>90</sup> See Giegerich, above n 7, at 216.

<sup>91</sup> H Lauterpacht (ed) *International Law: A Treatise* (Longmans, Green and Co., London, 1958) at 274.

Pending the regulation, through comprehensive international agreement, of the question of jurisdictional immunity, the situation must be regarded as governed, in particular cases, by the Municipal Law of the country concerned.

Although most domestic courts, both civil and common law, have treated immunity as an obligation imposed by international law,<sup>92</sup> both United States judicial decisions and legislation illustrate the domestic law approach to immunity. The recent Supreme Court decision of *Samantar v Yousuf* provides firm support for a purely domestic approach.<sup>93</sup> The Court's decision that individual officials were not entitled to immunity under the FSIA 1976 was based purely on interpretation of that statute, a matter of domestic law. Because the FSIA 1976 is the "sole basis for obtaining jurisdiction over a foreign state in federal court",<sup>94</sup> it followed that there was no scope for examining the role of international law on questions of immunity. Indeed, at no point did the Court examine the relevance of international law to the question before it.<sup>95</sup>

The enactment of the AEDPA as an amendment to the FSIA 1976 is further evidence of this exclusively domestic approach. The AEDPA removed immunity in certain cases purely as a matter of domestic law. As there has been a distinct lack of protest among states against the AEDPA apart from those states that it targets,<sup>96</sup> the AEDPA would lend support to the argument that "it is not contrary to [international] law for a state to enact domestic legislation restricting the immunity."<sup>97</sup>

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<sup>92</sup> Hazel Fox "In Defence of State Immunity: Why the UN Convention on State Immunity is Important" (2006) 55 ICLQ 399 at 404.

<sup>93</sup> *Samantar v Yousuf*, above n 32.

<sup>94</sup> *Ibid*, at 7, citing *Argentine Republic v Amerada Hess Shipping Corp.* 488 US 428 (1989) at 439.

<sup>95</sup> See also *Republic of Austria v Altmann* 541 US 677 (2004). The United States Supreme Court's approach in this regard is different to that of the House of Lords in *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*, above n 11, which examined the state of international law in order to determine whether the peremptory prohibition on torture meant that state immunity would be a disproportionate restriction on the right of access to a court under art 6 of the European Convention of Human Rights.

<sup>96</sup> Katherine Reece Thomas and Joan Small "Human Rights and State Immunity: Is there Immunity from Civil Liability for Torture?" (2003) 50 NILR 1 at 28.

<sup>97</sup> *Ibid*.

A principal reason why states enact domestic state immunity legislation is out of a desire to make domestic law consistent with the state's obligations under customary law. The SIA 1978, for example, was partially intended to ensure that United Kingdom domestic law was in line with customary international law on state immunity.<sup>98</sup> However, as there is no rule on state immunity for breaches of peremptory norms, states could be acting according to a mistaken belief that they are required to, or at least should, ensure their domestic legislation is consistent with customary international law. Consequently, "the current formulation of the doctrine of foreign state immunity, as adopted by most states, grants foreign states more immunity privileges than customary international law dictates."<sup>99</sup> If states were aware that there is no rule of customary international law, they might be more likely to restrict immunity in cases involving breaches of peremptory norms.

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<sup>98</sup> Andrew Dickinson, Rae Lindsay and James P. Loonam *State Immunity: Selected Materials and Commentary* (Oxford University Press, Oxford, 2004) at 330.

<sup>99</sup> Caplan, above n 81, at 760.

## CHAPTER TWO: EFFECTS OF THE PEREMPTORY PROHIBITION ON TORTURE ON STATE IMMUNITY AS A RULE OF DOMESTIC LAW

Even though there is no rule of customary international law on state immunity for breaches of peremptory norms, and state immunity is thus regulated exclusively by domestic law, the peremptory prohibition on torture may nevertheless have an effect on state immunity in domestic law. Courts and commentators have found a number of ways in which a peremptory prohibition can have an exclusionary effect on immunity in domestic law.

### A Implied Waiver of Immunity for Breaches of Peremptory Norms

#### 1 *The implied waiver theory*

It has been argued that a state impliedly waives its entitlement to immunity when it breaches a peremptory norm. This argument, which was first expounded in 1989, proceeds as follows.<sup>100</sup> Peremptory norms of international law are by definition non-derogable, binding on all states, and incorporate obligations owed *erga omnes* to all other states. When states recognise peremptory norms, they “are implicitly consenting to waive immunity when they violate one of these norms.”<sup>101</sup> As the Greek Court of Leviaia put it:<sup>102</sup>

When a state is in breach of peremptory rules of international law, it cannot lawfully expect to be granted the right of immunity. Consequently, it is deemed to have tacitly waived such right (constructive waiver through the operation of international law).

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<sup>100</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” (1989) 77 CLR 365.

<sup>101</sup> *Ibid*, at 394.

<sup>102</sup> *Prefecture of Voiotia v Federal Republic of Germany* (Multi-member Court of Leviaia) 137/1997, 30 October 1997, translated in Maria Gavouneli “War Reparation Claims and State Immunity” (1997) 50 RHDI 595 at 599.

According to the implied waiver argument, ever since the end of the Second World War, there has been an erosion of the concept of state sovereignty and a concomitant expansion of legal limits to state sovereignty.<sup>103</sup> The primary source of these limits is peremptory norms,<sup>104</sup> which are well established as a concept in international law. The rise of peremptory norms has now reached the point that they are “an essential component of the modern law definition of sovereignty.”<sup>105</sup> Sovereignty and its element of state immunity must therefore be limited by peremptory norms.

Furthermore, peremptory norms contribute to the public order of the international community. A civilised system of law requires certain principles of law that are “indispensable and necessary to the continued existence of an ordered society.”<sup>106</sup> Peremptory norms represent these norms in the international system. They are:<sup>107</sup>

[T]he body of those general rules of law whose non-observance may affect the very essence of the legal system to which they belong to such an extent that the subjects of law may not, under pain of absolute nullity, depart from them.

Consequently, certain principles and norms must be given absolute protection in order to promote the public order of the international community.<sup>108</sup> These considerations lead to the conclusion that peremptory norms are of such importance and preeminent status in international law that a state is deemed to have waived its entitlement to immunity when it breaches one of these norms.

The main criticism levelled at the implied waiver theory is that a state can only waive its entitlement to immunity if it shows an intention to waive immunity. It is argued that by

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<sup>103</sup> Belsky, Merva and Roht-Arriaza, above n 100, at 376.

<sup>104</sup> Ibid, at 386.

<sup>105</sup> Ibid, at 392.

<sup>106</sup> Ibid, at 387.

<sup>107</sup> E. Suy “The Concept of *Jus Cogens* in International Public Law” (Conference on International Law, Lagonissi (Greece), April 1966) at 18.

<sup>108</sup> Belsky, Merva and Roht-Arriaza, above n 100, at 387.

allegedly breaching a peremptory norm, a state does not intend to waive its immunity. The majority in *Prinz v Federal v Republic of Germany* rejected the implied waiver argument on the ground that “an implied waiver depends upon the foreign government's having at some point indicated its amenability to suit.”<sup>109</sup>

This criticism can be rejected on a number of grounds. First, it could be argued that the element of intent is incompatible with the binding, *erga omnes* nature of peremptory norms. The applicability of these norms does not depend on notions of consent or intent. On the contrary, the importance of peremptory norms means that a state *automatically* waives immunity when it breaches a peremptory norm, regardless of whether it intends to or not. Second, if one accepts that a state must intend to waive its entitlement to immunity, it can be argued that by recognising the concept of superior peremptory norms, a state in effect waives its immunity in advance should it breach that norm. Third, before the passage of the FSIA 1976, United States courts had held that a state can impliedly waive immunity in respect of commercial activities, regardless of whether it intends to waive immunity or not.<sup>110</sup> If intention is not relevant in that context, it is difficult to see why intention should be required when breach of a peremptory norm is involved. Finally, Judge Wald significantly narrowed the scope and importance of the requirement of intention in her dissent in *Prinz v Federal Republic of Germany*. Judge Wald found that the cases upholding the intentionality requirement were all cases in which “the foreign sovereign ‘contemplated’ the involvement of United States courts.”<sup>111</sup> In the case before her:<sup>112</sup>

In inflicting theretofore unimaginable atrocities on innocent civilians during the Holocaust, Germany could not have helped but realize that it might one day be held accountable for its heinous actions by any other state, including the United States.

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<sup>109</sup> *Prinz v Federal Republic of Germany*, above n 44, at 1174.

<sup>110</sup> Belsky, Merva and Roht-Arriaza, above n 100, at 395.

<sup>111</sup> *Prinz v Federal Republic of Germany*, above n 44, at 1184.

<sup>112</sup> *Ibid.*

On that basis Germany did “contemplate” the involvement of United States courts in that case, and the intentionality requirement was thus satisfied.

## 2 *Application of the implied waiver theory to domestic state immunity legislation*

As considered above, various domestic statutes regulating state immunity contain a general rule of state immunity, with a limited number of express exceptions. A common exception is where the state waives its entitlement to immunity under the domestic statute, either expressly or impliedly. For example, the FSIA 1976 provides:<sup>113</sup>

- (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...

This provision could be used to provide an exception to immunity where breaches of peremptory norms are alleged. Even if domestic legislation provides no express exception to immunity for violations of peremptory norms, a claimant may be able to circumvent immunity through the application of the implied waiver theory to the waiver of immunity provisions of domestic immunity statutes. However, while the implied waiver theory received some support from Judge Wald’s dissent in *Princz v Federal Republic of Germany*,<sup>114</sup> it has not been accepted by courts generally.

It may be more difficult to incorporate the implied waiver theory into the United Kingdom equivalent, the SIA 1978. Similar provisions in the SIA 1978 do not use the language of implied waiver, but rather refer to submission to jurisdiction.<sup>115</sup>

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<sup>113</sup> Foreign Sovereign Immunities Act 28 USC § 1330. § 1605.

<sup>114</sup> *Princz v Federal Republic of Germany*, above n 44.

<sup>115</sup> State Immunity Act 1978 (UK).

## 2 Submission to jurisdiction.

(1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom.

If a state is required to submit to the jurisdiction of the United Kingdom courts, rather than impliedly waiving its entitlement to immunity, as under the FSIA 1976, this would seem to require an explicit submission to the jurisdiction by the state.

The application of the implied waiver theory would be even more difficult in Canada. Under the SIA 1985, a state is not entitled to immunity only where it “explicitly submits to the jurisdiction of the court by written agreement or otherwise”.<sup>116</sup> The nature of this language excludes the possibility of an implied waiver.

## **B Breaches of Peremptory Norms as Non-Sovereign Acts**

### *1 The restrictive approach to state immunity*

The doctrine of state immunity was originally an absolute doctrine, according to which a state was always entitled to immunity without exception.<sup>117</sup> However, the absolute doctrine gradually gave way to what is now known as the restrictive doctrine of state immunity,<sup>118</sup> due to the unfairness that resulted from a state being entitled to immunity in ordinary commercial transactions. Under this doctrine, a state’s immunity is not unlimited. Once a state enters the market, the sovereign is deemed to have stepped down from its throne.<sup>119</sup> Thus a state is only entitled to immunity for sovereign acts or acts *jure imperii*. A state is not entitled to immunity for non-sovereign acts, or acts *jure gestionis*, as in these cases it acts not as a sovereign but as an ordinary person.<sup>120</sup> The restrictive doctrine of immunity is well established in many legal systems around the world, and

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<sup>116</sup> Ibid, s 4(2)(a).

<sup>117</sup> See for example *The Parlement Belge* [1880] PD 197 (CA).

<sup>118</sup> Wright, above n 78, at 164.

<sup>119</sup> *Ohio v Helvering* 292 US 360 (1934) at 369.

<sup>120</sup> Orakhelashvili, above n 66, at 322.

restrictive immunity in general terms can be said to be a rule of customary international law.<sup>121</sup>

The restrictive doctrine of state immunity can be applied to exclude immunity for breaches of peremptory norms. Put simply, when a state breaches a peremptory norm, it is not performing a sovereign act, and is therefore not entitled to immunity.<sup>122</sup> If an ordinary commercial transaction is treated as a non-sovereign act, it is difficult to argue that breaches of peremptory norms are sovereign acts, as the normative objection to violations of peremptory norms is much stronger than in commercial cases.<sup>123</sup> McGregor succinctly states this objection:<sup>124</sup>

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.

Peremptory norms are non-derogable and their violation offends against the international community as a whole. A breach of a peremptory norm thus necessitates “absolute illegality translated into nullity” which “prevents its recognition in any way within the international legal system”,<sup>125</sup> including recognition as a sovereign act. The Court of

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<sup>121</sup> Fox, above n 43, at 235.

<sup>122</sup> Wendy Adams “In Search of a Defence of the Transnational Human Rights Paradigm: May Jus Cogens Norms be Invoked to Create Implied Exceptions in Domestic State Immunity Statutes?” in Craig Scott (ed) *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart, Oxford, 2001) [“Abbreviated In Search of a Defence of the Transnational Human Rights Paradigm: May Jus Cogens Norms be Invoked to Create Implied Exceptions in Domestic State Immunity Statutes?”] at 253.

<sup>123</sup> Ed Bates “State Immunity for Torture” (2007) 7 HRLR 651 at 667.

<sup>124</sup> Lorna McGregor (on behalf of *Redress*) *Immunity v Accountability: Considering the Relationship between State Immunity and Accountability for Torture and other Serious International Crimes* (Redress, London, 2005) at 55.

<sup>125</sup> Orakhelashvili, above n 66, at 326.

Appeal in *Jones v Saudi Arabia* rejected state immunity for individual officials on this basis. The Court held, citing *Pinochet (No. 3)*, that torture was a breach of a peremptory norm and thus could not be treated as the exercise of a state function.<sup>126</sup>

The restrictive approach to immunity is easy to state in theory but much more difficult to apply in practice. The difficulty lies in precisely where the line is drawn between sovereign and non-sovereign acts.<sup>127</sup> There are different ways of drawing this line. For example, some jurisdictions adhere to the view that it is the nature of the acts that is important, whereas in other jurisdictions the purpose of the act determines whether an act is a sovereign act or not.<sup>128</sup> No such difficulties arise in the context of breaches of peremptory norms. Either an act constitutes a breach of a peremptory norm or it does not. While there may be some difficulty in determining whether a rule of international law is a peremptory norm or not, certain prohibitions of serious human rights violations can be said to be peremptory rules with a large degree of certainty, including torture, the fundamental principles of humanitarian law, genocide, crimes against humanity and slavery.<sup>129</sup>

According to this approach, cases that uphold immunity for breaches of peremptory norms, without examining whether the alleged acts are sovereign or non-sovereign, can be criticised on the ground that they adhere to the out-dated doctrine of absolute immunity.<sup>130</sup> For example, in *Bouzari v Iran*, the Court of Appeal for Ontario upheld state immunity in cases of torture because of “the principle that States must treat each other as equals not to be subjected to each others’ jurisdiction.”<sup>131</sup> The Court did not undertake an analysis of whether torture was a sovereign act.<sup>132</sup>

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<sup>126</sup> *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2005] QB 699 (CA) at [127]. See also *Prefecture of Voiotia v Federal Republic of Germany*, above n 48, at 521.

<sup>127</sup> Fox, above n 43, at 502.

<sup>128</sup> *Ibid*, at 503.

<sup>129</sup> Antonio Cassese *International Law* (2nd ed, Oxford University Press, Oxford, 2005) at 203.

<sup>130</sup> Orakhelashvili, above n 66, at 326.

<sup>131</sup> *Bouzari v Islamic Republic of Iran*, above n 18, at [95].

<sup>132</sup> Orakhelashvili, above n 66, at 327. See also *Al-Adsani v United Kingdom*, above n 56, at [54].

## 2 *The application of the restrictive approach to domestic immunity legislation*

It would be very difficult, if not impossible, to apply the restrictive doctrine to domestic immunity legislation to exclude immunity for breaches of peremptory norms. For example, the SIA 1978 excludes immunity for a “commercial transaction”,<sup>133</sup> which is “a transaction or activity... into which a State enters or in which it engages otherwise than in the exercise of sovereign authority.”<sup>134</sup> Despite the exclusion of immunity for non-sovereign acts, it cannot be argued that human rights violations constituting breaches of peremptory norms are a “commercial transaction”.

The restrictive doctrine of state immunity would also be difficult to apply to the Canadian state immunity legislation. The SIA 1985 does not exclude immunity for non-sovereign acts.<sup>135</sup>

A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state.

As there is no reference to sovereign acts, the restrictive doctrine of immunity cannot be used as an interpretive tool to restrict immunity for breaches of peremptory norms.<sup>136</sup>

### **C The Normative Hierarchy Theory**

Another approach that courts and commentators have used to restrict the scope of immunity relies on the superior nature of peremptory norms in relation to ordinary rules of state immunity. According to this approach, a grant of immunity in the case of torture would conflict with the peremptory prohibition on torture, and so the peremptory

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<sup>133</sup> State Immunity Act 1978 (UK), s 3(1).

<sup>134</sup> State Immunity Act 1978 (UK), s 3(3)(c).

<sup>135</sup> State Immunity Act RSC 1985 c S-18, s 5.

<sup>136</sup> A similar position exists in the Australian and United States legislation. See Foreign States Immunities Act 1985 (Cth), s11 and Foreign Sovereign Immunities Act 28 USC § 1330. § 1603(d), § 1605(a)(2).

prohibition on torture overrides the inferior rule of immunity. As the Italian Court of Cassation put it in *Ferrini*, “a contradiction between two equally binding legally norms ought to be resolved by giving precedence to the norm with the highest status.”<sup>137</sup> As such, immunity cannot apply to breaches of peremptory norms.<sup>138</sup>

This approach cannot be applied where there is no ordinary rule of customary international law on state immunity. A prerequisite of the normative hierarchy theory is the existence of a customary rule of state immunity, but as has been demonstrated, such a rule does not exist. There is therefore no conflict of norms. If there is any conflict, it is between a peremptory norm and domestic rules that uphold immunity for breaches of peremptory norms,<sup>139</sup> such as the SIA 1978, which does not provide an exception for such breaches. This raises the question whether peremptory norms, as rules of international law, can override domestic rules on state immunity.

#### **D The Peremptory Effects of the Torture Prohibition on Domestic State Immunity Statutes**

If state immunity is a matter that is solely regulated by domestic law, a state could still provide immunity in its domestic law and not be in breach of a rule of international law on state immunity, as no rule *compelling* an exception to immunity has crystallised yet. However, a state’s domestic law may nevertheless be in breach of the peremptory prohibition on torture where this is incorporated into domestic law. In common law countries, customary international law automatically forms part of the common law.<sup>140</sup> Thus the prohibition on torture, as a peremptory norm of customary international law, is part of domestic common law in those countries.

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<sup>137</sup> *Ferrini v Federal Republic of Germany* above n 45, at 669.

<sup>138</sup> See the Joint Dissenting Opinion in *Al-Adsani v United Kingdom*, above n 56, at 29-30.

<sup>139</sup> Caplan, above n 81, at 771. Caplan posits this as a clash between peremptory norms and adjudicatory jurisdiction, which is “the right of the forum state to regulate the authority of its judicial organs.” Domestic rules of immunity are a way in which a state regulates the authority of its judicial organs.

<sup>140</sup> See *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529 (CA).

Where there is no exception to immunity under domestic legislation, it is difficult to argue that the peremptory prohibition on torture should override the domestic legislation so as to provide an exception to immunity. The claimant in *Al-Adsani v Government of Kuwait* in the English Court of Appeal attempted to argue in a “bold submission” that the SIA 1978 contained an implied exception to the effect that a state would only be entitled to immunity if it acted in accordance with international law (including, of course, the prohibition on torture).<sup>141</sup> The Court of Appeal summarily dismissed this argument. A statute must be interpreted in accordance with international law “unless the clear language of the statute compels such a conclusion”.<sup>142</sup> As the SIA 1978 was “as plain as plain can be”,<sup>143</sup> the SIA 1978 prevailed, and the Court was unable to read in an exception for breaches of peremptory norms.

Despite this difficulty, peremptory norms may still be invoked to defeat state immunity as provided by domestic legislation. The Court of Appeal in *Jones v Saudi Arabia* invoked the peremptory prohibition on torture to defeat immunity for state officials under the SIA 1978.<sup>144</sup> While the Court of Appeal would usually be bound by the decision of *Propend Finance v Sing*,<sup>145</sup> which held that immunity under the SIA 1978 extends to state officials, the Court distinguished *Propend Finance v Sing* on the ground that that case did not involve alleged breaches of peremptory norms.<sup>146</sup> The Court thus interpreted immunity under the otherwise comprehensive SIA 1978 in a restrictive manner, excluding immunity for individuals for breaches of peremptory norms.<sup>147</sup> It must be noted, however, that this argument was rejected in the House of Lords.<sup>148</sup>

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<sup>141</sup> *Al-Adsani v Government of Kuwait* (1997) 107 ILR 536 (English Court of Appeal) at 540.

<sup>142</sup> *Ibid*, at 542, citing *Alcom v Republic of Colombia* [1984] 1 AC 580 (HL) at 597.

<sup>143</sup> *Al-Adsani v Government of Kuwait*, above n 141, at 549.

<sup>144</sup> *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*, above n 11, at [31]–[39] per Mance LJ and at [130]–[136] per Lord Phillips.

<sup>145</sup> *Propend Finance Pty Ltd v Sing* (1997) 111 ILR 611 (English Court of Appeal).

<sup>146</sup> *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*, above n 11, at [31] per Mance LJ and at [130] per Lord Phillips.

<sup>147</sup> *Orakhelashvili*, above n 66, at 555.

<sup>148</sup> *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*, above n 11.

Further support [for this approach](#) can be obtained from the *Committee of U.S. Citizens Living in Nicaragua v Reagan*,<sup>149</sup> in which the Court of Appeals for the District of Columbia Circuit suggested that peremptory norms could have domestic legal effect. The Court gave the following example:<sup>150</sup>

If Congress adopted a foreign policy that resulted in the enslavement of our citizens or of other individuals, that policy might well be subject to challenge in domestic courts under international law.

Consequently, in the future states may be more willing to incorporate peremptory norms of international law into their domestic legal systems, though it does not appear that this trend is currently widely accepted in domestic law.

### **E States Without Domestic State Immunity Statutes: the New Zealand Example**

The situation is somewhat different in countries in which immunity is not regulated by domestic legislation, such as New Zealand. A claimant could argue that at common law, a state is not entitled to immunity before the New Zealand courts for acts of torture, as this would conflict with the common law prohibition on torture. Cooke P hinted at such an approach in *Controller and Auditor-General v Sir Ronald Davison*:<sup>151</sup>

One can speculate that the law may gradually but steadily develop, perhaps first excepting from sovereign immunity atrocities or the use of weapons of mass destruction, perhaps ultimately going on to except acts of war not authorised by the United Nations.

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<sup>149</sup> *Committee of U.S. Citizens Living in Nicaragua v Reagan* 859 F 2d 929 (DC Cir 1988). See also *Doe I v Unocal Corporation* 395 F 3d 932 (9th Cir 2002), at 948. In that case, the Court held that under the ATCA, it would be preferable to apply the peremptory prohibition against forced labour instead of the domestic law of Myanmar, because the prohibition against force labour had peremptory status.

<sup>150</sup> *Committee of U.S. Citizens Living in Nicaragua v Reagan*, above n 149, at 941.

<sup>151</sup> *Controller and Auditor-General v Sir Ronald Davison* [1996] 2 NZLR 278 (CA) at 290.

Lord Cooke restated this argument in more concrete terms in *Holland v Lampen-Wolfe*.<sup>152</sup>

[T]o deny sovereign immunity would not be obnoxious to any established principle of either international law or English law. Moreover, denial could be seen as appropriate to give effect to the ever-growing recognition of human rights...

In New Zealand, a claimant would face the difficulty presented by the case of *Fang v Jiang*,<sup>153</sup> which held that a state was entitled to immunity for torture. The Court's decision was based solely on the House of Lords decision in *Jones v Saudi Arabia*.<sup>154</sup> Although Randerson J held this decision was an authoritative statement of customary international law, a claimant could argue that *Fang v Jiang* was wrongly decided. First, it is based on the reasoning of *Jones v Saudi Arabia*, which held that there was no exception for peremptory norms to the general rule of immunity at customary international law. Yet, based on the preceding analysis, there is no rule of customary international law on state immunity for breaches of peremptory norms. Secondly, once it is accepted that there is no rule of customary law on this issue, *Jones v Saudi Arabia* can be distinguished on the basis that it was decided pursuant to the SIA 1978, of which there is no equivalent in New Zealand.

A New Zealand court could therefore be free to decide whether a state is entitled to immunity for breaches of peremptory norms without the significant constraint of domestic legislation.

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<sup>152</sup> *Holland v Lampen-Wolfe* [2000] 1 WLR 1573 (HL) at 1578.

<sup>153</sup> *Fang v Jiang*, above n 27.

<sup>154</sup> *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*, above n 11.

## CHAPTER THREE: LOOKING AHEAD – THE POSSIBLE FUTURE DEVELOPMENT OF THE LAW OF STATE IMMUNITY

Having determined that the current nature of state immunity is solely a matter of domestic law, what is the future of the law of state immunity?

The different approaches, examined above, that attempt to apply the peremptory prohibition on torture to domestic state immunity statutes are unsatisfactory. Either they cannot realistically apply to domestic immunity statutes, or courts have given them little support. A far more preferable approach involves the recognition of the fundamental contradiction between state immunity and human rights protections that have peremptory status. This chapter will examine reasons why a state should not be entitled to immunity for breaches of peremptory norms in civil cases. First, there is a questionable distinction between civil and criminal cases for the purpose of immunity, which is exemplified by the contrast between *Pinochet (No. 3)* and *Jones v Saudi Arabia*.<sup>155</sup> Secondly, the concept of sovereignty, upon which immunity is based, requires re-examination in the modern human rights context. Finally, further theoretical bases of immunity, such as the independence/equality and dignity of states, no longer provide a convincing rationale for a grant of immunity.

### A The *Pinochet (No. 3)* Development and the *Jones v Saudi Arabia* Retreat

The seminal decision of *Pinochet (No. 3)* represented a great leap forward in holding perpetrators of human rights abuses to account, thereby restricting the scope of state immunity.<sup>156</sup> In that case, the House of Lords held by a six to one majority that Pinochet, as the former head of state of Chile, was not entitled to state immunity under the SIA

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<sup>155</sup> *Regina v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte (No. 3)*, above n 2.

<sup>156</sup> *Ibid*; *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*, above n 11.

1978 for criminal allegations of torture. It was the first time that a domestic court had refused immunity for international crimes.<sup>157</sup>

The decision was subsequently hailed as “a milestone for the international human rights law.”<sup>158</sup> The importance and significance of this decision is reflected in a report of the International Law Commission (ILC):<sup>159</sup>

Although the judgement [sic] of the House of Lords in that case only holds that a former head of State is not entitled to immunity in respect of acts of torture committed in his own State and expressly states that it does not affect the correctness of decisions upholding the plea of sovereign immunity in respect of civil claims, as it was concerned with a criminal prosecution, there can be no doubt that this case, and the widespread publicity it received, has generated support for the view that State officials should not be entitled to plead immunity for acts of torture committed in their own territories in both civil and criminal actions.

Despite the significant progress made by *Pinochet (No. 3)* in the criminal sphere, the House of Lords in *Jones v Saudi Arabia* refused to follow that decision in the civil sphere. As described in greater detail above, in an action brought in the United Kingdom courts for civil compensation the House of Lords refused to remove Saudi Arabia’s immunity for alleged acts of torture committed in Saudi Arabia. Given the advances made in *Pinochet (No. 3)*, the international human rights movement was understandably disappointed by this decision.<sup>160</sup>

In contrast to the approach of the Court of Appeal, the House of Lords in *Jones v Saudi Arabia* distinguished *Pinochet (No. 3)* on the basis that that case concerned criminal

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<sup>157</sup> Ibid, at 201 per Lord Browne-Wilkinson.

<sup>158</sup> Nick Hopkins et al. “Reaction: The 122-page report left both sides claiming victory but it was” *The Guardian* (United Kingdom, 25 March 1999) 7, quoting Amnesty International.

<sup>159</sup> *Report of the International Law Commission: Fifty-first session, Annex: Report of the Working Group on Jurisdictional Immunities of States and Their Property*, A/54/10 (1999) at 172.

<sup>160</sup> Elena Steinerte and Rebecca MM Wallace “Jones v Ministry of the Interior of the Kingdom of Saudi Arabia” (2006) 100 AJIL 901 at 904.

proceedings under the Convention against Torture.<sup>161</sup> Accordingly, the ratio in *Pinochet (No. 3)* could not be extended to civil proceedings.<sup>162</sup> The question thus arises whether there is a defensible distinction between civil and criminal proceedings for the purposes of state immunity.

## **B The Civil/Criminal Distinction**

### *1 The supposed distinction between civil and criminal proceedings*

Criminal and civil proceedings perform different functions within a legal system. The main aim of criminal proceedings is to punish the offender,<sup>163</sup> whereas the chief goal of civil proceedings is to compensate the plaintiff for harm suffered. Despite these differences, civil and criminal proceedings do share some common features. Both civil and criminal proceedings serve the purpose of determining what conduct a community is prepared to accept and what conduct is prohibited. The goals of compensation and punishment, though distinct, are complementary ways of condemning past conduct and deterring future conduct.<sup>164</sup> Just as incarceration and monetary fines are intended not only to punish but also to deter in the criminal sphere, the prospect of having to pay monetary damages in the civil sphere serves not only to provide redress to the person wronged but also to deter future breaches of that kind.<sup>165</sup>

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<sup>161</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (opened for signature 10 December 1984, entered into force 26 June 1987).

<sup>162</sup> *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*, above n 11, at [68].

<sup>163</sup> Andrew Ashworth *Principles of Criminal Law* (5th ed, Oxford University Press, Oxford, 2006) at 16.

<sup>164</sup> Donald Francis Donovan and Anthea Roberts “The Emerging Recognition of Universal Civil Jurisdiction” (2006) 100 AJIL 142 at 154.

<sup>165</sup> *Ibid*, at 154.

## 2 Immunity in the criminal context

The overlapping nature of civil and criminal proceedings is also evident on the international plane. In *Jones v Saudi Arabia*, Saudi Arabia was immune from a civil action brought in the courts of the United Kingdom. It is well established in international law that a defendant is unable to claim immunity for international crimes, such as torture.<sup>166</sup> Had a criminal prosecution been brought against the individual torturers or the Saudi officials that allegedly ordered the torture or acquiesced in it, those individuals would not have been entitled to state immunity for the very same acts. It is thus a contradiction to grant immunity in civil proceedings but not criminal proceedings.<sup>167</sup>

The statutes of many international criminal tribunals explicitly exclude a plea of immunity. Originally, the Nuremburg Charter excluded the official position of defendants as freeing them from responsibility or mitigating punishment for crimes they had committed.<sup>168</sup> Article 7(2) of the Statute of the International Criminal Tribunal for the Former Yugoslavia contains virtually identical words,<sup>169</sup> as do the Statutes of the International Criminal Tribunal for Rwanda,<sup>170</sup> and the Special Court for Sierra Leone.<sup>171</sup> Most recently, pursuant to the Rome Statute of the International Criminal Court, the statute “shall apply equally to all persons without any distinction based on official capacity”,<sup>172</sup> and “immunities or special procedural rules ... shall not bar the Court from exercising its jurisdiction over such a person.”<sup>173</sup>

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<sup>166</sup> Cassese, above n 129, at 450-451.

<sup>167</sup> Christian Tomuschat *Human Rights: Between Idealism and Realism* (Oxford University Press, Oxford, 2003) at 317.

<sup>168</sup> Charter of the International Military Tribunal at Nuremburg, art 7.

<sup>169</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, See [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf), art 7(2).

<sup>170</sup> Statute of the International Criminal Tribunal for Rwanda, See <http://www.unictr.org/Portals/0/English/Legal/Statute/2010.pdf>, art 6(2).

<sup>171</sup> Statute of the Special Court for Sierra Leone, See <http://www.sc-sl.org/LinkClick.aspx?fileticket=uCInd1MJeEw%3d&tabid=176>, art 6(2).

<sup>172</sup> *Rome Statute of the International Criminal Court*, A/CONF.183/9\*, art 27(1).

<sup>173</sup> *Ibid*, art 27(2).

If a defendant is not entitled to immunity before an international tribunal, that defendant should not be entitled to immunity before a national court for the same acts. The main reason justifying the exclusion of immunity before international tribunals is that these tribunals act on behalf of the international community,<sup>174</sup> so no single state intrudes into the affairs of another state. On the other hand, where a national court exercises jurisdiction, it is much more likely to interfere in the internal affairs of the state, which justifies a grant of immunity.<sup>175</sup>

However, this argument loses its strength where breaches of peremptory norms are involved. Due to their *erga omnes* nature, peremptory norms apply to the international community as a whole, and so a state is merely acting on behalf of the international community where its own courts restrict immunity and take jurisdiction over acts constituting breaches of peremptory norms. This situation is well established through the concept of universal jurisdiction in the criminal sphere,<sup>176</sup> and as argued above, there is no coherent reason for maintaining a distinction between the criminal and civil spheres.

Furthermore, certain international criminal tribunals include domestic legal elements. The Special Court for Sierra Leone is such a court.<sup>177</sup> While it has jurisdiction over crimes under international law,<sup>178</sup> it also has jurisdiction over certain specified offences under Sierra Leonean law.<sup>179</sup> The Special Tribunal for Lebanon (STL) also features a mix of international and domestic elements. The judges of the STL are both international and

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<sup>174</sup> Ilias Bantekas and Susan Nash "International Criminal Law" (3rd ed, Routledge-Cavendish, London, 2007) at 93-94.

<sup>175</sup> Ibid, at 101.

<sup>176</sup> Antonio Cassese *International Criminal Law* (2nd ed, Oxford University Press, Oxford, 2008) at 338.

<sup>177</sup> Diane F Orentlicher "Striking a Balance: Mixed Law Tribunals and Conflicts of Jurisdiction" in Mark Lattimer and Philippe Sands (eds) *Justice for Crimes Against Humanity* (Hart Publishing, Oxford, 2003) at 215.

<sup>178</sup> Under articles 2-4, the Special Court for Sierra Leone has jurisdiction over crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, and other serious violations of international humanitarian law.

<sup>179</sup> Statute of the Special Court of Sierra Leone, above n 171, art 5.

Lebanese,<sup>180</sup> and it has concurrent jurisdiction with Lebanese domestic courts.<sup>181</sup> While it only has jurisdiction over certain offences in the Lebanese Criminal Code,<sup>182</sup> the STL has recently held that it can take account of international law for the purpose of interpreting Lebanese law.<sup>183</sup> Because of this fusion of domestic and international legal elements, it is more difficult to maintain a distinction between international tribunals and domestic courts for the purposes of immunity.

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### 3 *Intrusion into the domestic affairs of the state*

One justification for maintaining a rigorous distinction between civil and criminal proceedings, and restricting immunity only in criminal proceedings, is that civil proceedings are more intrusive in the internal affairs of the state than criminal proceedings. As Fox puts it:<sup>185</sup>

To allow suit against a foreign government by its own nationals in a third State's courts for acts, even if they be violations of human rights, which take place wholly within their state is a particularly intrusive kind of jurisdiction and, when the acts take place pursuant to government policy, implicates the inner workings of government.

There a number of reasons why civil proceedings are seen as more intrusive than criminal proceedings. First, civil proceedings can be brought against the state itself whereas criminal proceedings can only be brought against an individual. According to Lord Bingham in *Jones v Saudi Arabia*, "a state is not criminally responsible in international or

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<sup>180</sup> Statute of the Special Tribunal for Lebanon, See <http://www.stl-tsl.org/en/documents/statute-of-the-tribunal/statute-of-the-special-tribunal-for-lebanon> , art 8.

<sup>181</sup> Ibid, art 4.

<sup>182</sup> Ibid, art 2.

<sup>183</sup> *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* STL1101/I/AC/R176bis (Special Tribunal for Lebanon) at [2](#).

<sup>185</sup> Fox, above n 43, at 405-406.

English law, and therefore cannot be directly impleaded in criminal proceedings.”<sup>186</sup> Second, public authorities have much less control over civil proceedings. In most states, criminal proceedings are initiated at the discretion of public authorities, who exercise significant subsequent control over the proceedings.<sup>187</sup> When deciding whether to initiate a prosecution, the public authority is able to consider competing public policy factors such as foreign policy and international comity. By contrast, private claimants have neither a reason to consider such factors nor the expertise to do so.<sup>188</sup> Without public authority control, it is feared private claimants will too easily be able to bring cases against states that interfere in the domestic affairs of the state, which will in turn harm the stability of the international system.

These fears are perhaps overstated. Public authorities are not excluded from civil claims brought against states. Obviously it is the role of the court to assess liability and quantify damages. Courts also employ general legal and procedural doctrines to ensure that cases do not proceed where there is an insufficient connection to the forum state. Examples of these doctrines include the requirements of establishing extraterritorial jurisdiction and *forum non conveniens*.<sup>189</sup>

In any event, it is doubtful whether civil proceedings do represent a greater intrusion into the internal affairs of the state than criminal proceedings. Indeed, the exercise of criminal jurisdiction over state officials, especially over high-ranking state officials, may be more intrusive than the exercise of civil jurisdiction. A report of the ILC has noted:<sup>190</sup>

[I]t is highly likely that a State conducting a criminal investigation of an official of a foreign State will gain access to information relating to the sovereignty and security

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<sup>186</sup> *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*, above n 11, at [31].

<sup>187</sup> Donovan and Roberts, above n 164, at 155. See *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*, above n 126, at [80] per Mance LJ.

<sup>188</sup> Donovan and Roberts, above n 164, at 155.

<sup>189</sup> *Ibid*, at 155. See *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*, above n 126, at [81] per Mance LJ.

<sup>190</sup> RA Kolodkin *International Law Commission Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, A/CN.4/601 (2008) at [53].

of the State served by the official. In these situations, although legally this concerns criminal prosecution of physical persons, it essentially concerns the exercise of sovereign prerogatives of one State in relation to another. At the same time, the sovereign interests of the other State are affected. In the exercise of criminal jurisdiction, which often involves extremely intrusive actions of investigation, these sovereign interests may be affected to a much greater degree than in the exercise of civil jurisdiction.

Thus it is hard to see why “civil proceedings against an alleged individual torturer should be regarded as involving any greater interference in or a more objectionable form of adjudication upon the internal affairs of a foreign state.”<sup>191</sup> Although there are obvious differences between civil and criminal proceedings, in that a criminal proceeding cannot be brought against the state, such a difference is of form only and is inconsequential. A closer examination, going beyond mere surface differences, reveals that criminal and civil proceedings do have a similar substantive impact on the internal affairs of the state.

#### 4 *Suits against individual officials*

The ability to sue individual state officials, but not the state itself, would represent a lesser intrusion into the internal affairs of the state.<sup>192</sup> For one thing, the state itself would not be sued in name. The main reason why state immunity is extended to officials is because it is believed that the ability to sue individual officials would indirectly implead the state. According to Lord Bingham in *Jones v Saudi Arabia*, a “foreign state’s right to immunity cannot be circumvented by suing its servants or agents.”<sup>193</sup> This reasoning assumes that the state would be obliged to meet any damages awarded against the individual. This, however, “is not correct as a matter of international or English law.”<sup>194</sup> A state would be indirectly impleaded if it were obliged to indemnify an official for

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<sup>191</sup> *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*, above n 126, at [75].

<sup>192</sup> See generally Wright, above n 78.

<sup>193</sup> *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*, above n 11, at [10].

<sup>194</sup> Wright, above n 78 at 172. See also *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*, above n 126, at [76] per Mance LJ.

damages awarded against the official, which is “contrary to well-established principles of English law.”<sup>195</sup> Lord Phillips changed his mind on this issue between *Pinochet (No.3)* and *Jones v Saudi Arabia*. In *Pinochet (No. 3)*, Lord Phillips noted in an obiter statement that:<sup>196</sup>

[T]o sue an individual in respect of the conduct of the state's business is, indirectly, to sue the state. The state would be obliged to meet any award of damage made against the individual.

In an about-turn, Lord Phillips recanted in the Court of Appeal in *Jones v Saudi Arabia*.<sup>197</sup>

It would be absurd to suggest that a state is bound to indemnify its officials for conduct which states have outlawed, and in respect of which the signatories to the Torture Convention have agreed to prosecute offenders and to compensate victims.

If a state is not obliged to indemnify officials for damages awarded against them, then rejecting immunity for civil actions brought against state officials represents a lesser intrusion into the internal affairs of the state.

##### 5 Execution against state property

Fox cites the “municipal court’s inability to enforce its judgments against the foreign state” as “the outstanding reason for the retention of immunity” in civil cases.<sup>198</sup> This is due to the separate concept of immunity against execution, which generally provides an absolute bar to enforcement of judgments against foreign state property.<sup>199</sup> An absolute

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<sup>195</sup> Wright, above n 78, at 172-173.

<sup>196</sup> *Regina v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte (No. 3)*, above n 2, at [286].

<sup>197</sup> *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*, above n 126, at [126].

<sup>198</sup> Fox, above n 43, at 56.

<sup>199</sup> *Ibid.*

rule in this context is justified on the legal ground that execution would amount to intervention in the internal conduct of a state's public functions as well as on the political ground that it is practically impossible, short of invasion, to compel a state to comply with a court order.<sup>200</sup> As the concurring opinion of Judge Pellonpää and Judge Sir Nicolas Bratza in *Al-Adsani v United Kingdom* concluded, there is little point in restricting the scope of state immunity from jurisdiction given the absolute nature of immunity from execution.<sup>201</sup>

It is obvious that excluding immunity for state officials would not invoke this concern, especially if one accepts that the state is not liable to indemnify a state official for a damages award against the official.

In any case, in the context of breaches of peremptory norms, the ability to execute a judgment and obtain monetary damages is less important than in an ordinary commercial case, where the primary motivation in bringing a civil claim is to compensate for actual loss suffered. Different considerations are at play in human rights cases involving the breach of peremptory norms. In cases such as torture:<sup>202</sup>

[T]he value of civil redress may be suggested to lie as much in terms of the ability to establish the truth and so to assist rehabilitation or closure as in terms of the prospect of any financial recovery.

## 6 Other legal systems do not insist on a rigorous distinction

Treating civil and criminal cases differently for the purposes of state immunity in common law states might seem defensible given the sharp distinction between civil and

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<sup>200</sup> Ibid.

<sup>201</sup> *Al-Adsani v United Kingdom*, above n 56, at 27.

<sup>202</sup> *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*, above n 126, at [80] per Mance LJ. See also Reece Thomas and Small, above n 96, at 30: “[T]here is more at stake in these cases than the mere desire for financial recompense and an amount of naming and shaming can be of important emotional value to the claimant victims.”

criminal proceedings in these jurisdictions. However, other legal systems do not maintain such a strict demarcation between civil and criminal proceedings. In civil legal systems, in particular, a civil action for compensation can be brought as an adjunct to a criminal prosecution.<sup>203</sup> In France, the victim of a crime can join a criminal prosecution as a *partie civile*, who has a right to seek compensation for the harm caused.<sup>204</sup> Further, in Spain, the ability to seek compensation is automatically part of a criminal prosecution.<sup>205</sup> Article 44(2) of the Code of Criminal Procedure of the Russian Federation reads as follows.<sup>206</sup>

A civil claim may be presented after the institution of criminal proceedings and before the completion of the investigation in court, when the criminal case is tried by a court of first instance.

Because many legal systems do not insist on a strict cleavage between civil and criminal proceedings, it is harder to justify treating civil and criminal cases differently. As Justice Breyer put it in *Sosa v Alvarez-Machain*, “because the criminal courts of many nations combine civil and criminal proceedings, allowing those injured by criminal conduct to be represented, and to recover damages, in the criminal proceeding itself”, the exercise of “universal tort jurisdiction would be no more threatening” than the exercise of universal criminal jurisdiction.<sup>207</sup>

## 7 *The peremptory nature of the prohibition against torture*

More importantly, in the context of torture, the distinction between civil and criminal cases is untenable. The nature of the act of torture in question is more important than the

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<sup>203</sup> Countries that adhere to this system include, for example, Austria, Egypt, France, Italy, Mexico, Poland, Romania, Spain, Sweden, and Venezuela: Beth Stephens “Translating *Filartiga*: A Comparative and International Law Analysis of Domestic Remedies For International Human Rights Violations” (2002) 27 Yale J Int’l L 1 at 19, fn 62

<sup>204</sup> Wright, above n 78, at 173.

<sup>205</sup> Stephens, above n 203, at 19.

<sup>206</sup> Cited in Kolodkin, above n 190, at 27, fn 116.

<sup>207</sup> *Sosa v Alvarez-Machain*, above n 40, at 762, 763.

nature of the proceedings. For a start, with regard to the restrictive approach to state immunity generally, it has always been the nature or purpose of the acts that determines whether a state is entitled to immunity rather than the nature of the proceedings.<sup>208</sup>

This argument is even more compelling in the context of breaches of peremptory norms. Given the non-derogable, binding nature of peremptory norms, it is hard to see how the peremptory nature of a norm can be used as a justification for limiting state immunity in the criminal sphere but not in the civil sphere. According to the Joint Dissenting Opinion in *Al-Adsani v United Kingdom*, the applicability of peremptory norms does not depend on the type of the proceedings but rather on the interaction between a superior peremptory norm and a hierarchically inferior rule.<sup>209</sup> A peremptory norm should thus override inferior rules of immunity regardless of whether the case is a civil or criminal one. This line of reasoning led the Joint Dissenting Opinion to conclude that “[t]he criminal or civil nature of the domestic proceedings is immaterial.”<sup>210</sup>

### **C Immunity Based on Concepts of Sovereignty**

Recourse to general notions of sovereignty is one method employed by courts in order to justify the grant of immunity in a particular case. The ECHR in *Al-Adsani v United Kingdom*, for example, concluded that the grant of immunity was a legitimate restriction on the right of access to a court in art 6 of the European Convention on Human Rights, as it “pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State’s sovereignty.”<sup>211</sup> It is questionable, however, whether the concept of sovereignty continues to provide a convincing basis for immunity, if indeed it ever has.

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<sup>208</sup> Lorna McGregor “State Immunity and Jus Cogens” (2006) 55 ICLQ 437 at 444.

<sup>209</sup> *Al-Adsani v United Kingdom*, above n 56, at 31 (Joint Dissenting Opinion).

<sup>210</sup> *Ibid.*

<sup>211</sup> *Al-Adsani v United Kingdom*, above n 56, at 54.

The foundational case on state immunity in the United States is *The Schooner Exchange v McFaddon*,<sup>212</sup> which is often cited as an early expression of the principle of absolute state immunity. However, it is doubtful that this is an accurate reflection of the decision.<sup>213</sup> Chief Justice Marshall started from the position that “[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute.”<sup>214</sup> As a consequence, a grant of immunity was only possible where the forum state waived, either expressly or impliedly, its jurisdiction. In practice, according to Chief Justice Marshall, states had agreed to waive jurisdiction in limited cases,<sup>215</sup> such as the waiver of jurisdiction for visiting foreign ministers.<sup>216</sup> A grant of immunity was therefore an exception to the full jurisdiction of the forum state.<sup>217</sup> As Lauterpacht put it in 1951:<sup>218</sup>

It is clear from the language of [*The Schooner Exchange v McFaddon*] that the governing, the basic, principle is not the immunity of the foreign state but the full jurisdiction of the territorial state.

Jurisdiction as the starting point was recognised more recently by the Joint Separate Opinion in the *Arrest Warrant Case* before the ICJ. The Joint Separate Opinion was critical of the majority opinion’s exclusive focus on the issue of immunity without considering the issue of jurisdiction. The focus on immunity gave the impression “that immunity has value per se, whereas in reality it is an exception to a normative rule which would otherwise apply.”<sup>219</sup>

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<sup>212</sup> *The Schooner Exchange v McFaddon* 11 US 116 (1812).

<sup>213</sup> H. Lauterpacht “The Problem of Jurisdictional Immunities of Foreign States” (1951) 28 *Brit YB Int’l L* 220 at 228-229.

<sup>214</sup> *The Schooner Exchange v McFaddon*, above n 212, at 136.

<sup>215</sup> *Ibid.*

<sup>216</sup> *Ibid.*, at 137.

<sup>217</sup> Ian Sinclair “The Law of Sovereign Immunity: Recent Developments” 1980(II) *Recueil Des Cours: Collected Courses of the Hague Academy of International Law* 113 at 215. See also Caplan, above n 749-751; R. Higgins “Asser Institute Lectures on International Law: Certain Unresolved Aspects of the Law of State Immunity” (1982) 29 *NILR* 265 at 271; Lorna McGregor “Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty” (2007) 18 *EJIL* 903, at 913.

<sup>218</sup> Lauterpacht, above n 213, at 29.

<sup>219</sup> *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, above n 65, at [71] of the Joint Separate Opinion.

The ability of courts to exercise this full jurisdiction over matters brought before them is itself an exercise of sovereignty.<sup>220</sup> Chief Justice Marshall recognised this in *The Schooner Exchange v McFaddon*, when he stated that “the jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power.”<sup>221</sup> Indeed, the United States currently adheres to this approach.<sup>222</sup> In *Samantar v Yousuf*,<sup>223</sup> the Supreme Court’s treatment of the issue of immunity as solely an issue of domestic law can be viewed as an exercise of the sovereignty of the forum state.<sup>224</sup> It follows that if a state is unable to exercise jurisdiction due to a grant of immunity, the sovereignty of the forum state will be violated. A grant of immunity thus brings about “an impairment of the sovereignty of the territorial state and must not readily be assumed.”<sup>225</sup> The real issue, then, involves the balancing of competing sovereignties,<sup>226</sup> rather than invocation of sovereignty as a principle that will always uphold a grant of immunity.

A modern interpretation of sovereignty would tip the balance of competing sovereignties in favour of jurisdiction of the forum state as an exercise of sovereignty. Sovereignty is not a static concept. As it is “a persistent concern of international law”, it “does not exist in a vacuum but moves and evolves with the progression of time.”<sup>227</sup> According to this view, the modern conception of sovereignty can be used as a sword as well as a “negative shield from accountability”.<sup>228</sup> Cryer points out:

As jurisdiction involves one state asserting rights to adjudicate events in (and often involving the officials of) other states, this involves an assertion of sovereignty. Thus

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<sup>220</sup> Robert Cryer “International Criminal Law vs State Sovereignty: Another Round?” (2005) 16 EJIL 979 at 987.

<sup>221</sup> *The Schooner Exchange v McFaddon*, above n 212, at 136.

<sup>222</sup> Finke, above n 85, at 870.

<sup>223</sup> *Samantar v Yousuf*, above n 32.

<sup>224</sup> See also *Republic of Austria v Altmann*, above n 95, at 696.

<sup>225</sup> Lauterpacht, above n 213, at 229.

<sup>226</sup> Martti Koskeniemi *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, New York, 2005) at 486.

<sup>227</sup> McGregor, above n 217, at 915-916.

<sup>228</sup> *Ibid*, at 916.

international criminal law, by accepting universal jurisdiction and limiting material immunities empowers states, enabling them to expand their sovereign rights to events beyond their borders... it also shows that sovereignty is not always the enemy.

The modern conception of sovereignty is therefore more consistent with the removal of immunity than the granting of it.

The force of these arguments is strengthened given the present emphasis in international law on human rights and the role of the individual. If the primacy of jurisdiction of the forum state was recognised as long ago as 1812, when *The Schooner Exchange v McFaddon* was decided, then surely the jurisdiction of the forum state is even more important today. States now recognise the existence of fundamental norms of international law, the breach of which is permitted under no circumstances. In this context, the starting point on the question of immunity should be the jurisdiction of the forum state. This will mean that there is a much greater chance that these fundamental rights will be able to be enforced, as “it will be incumbent upon the foreign state defendant, not the individual plaintiff, to point to the rule, domestic or otherwise, that requires immunity.”<sup>229</sup> Jurisdiction as the starting point will therefore ensure that the enforcement of these rights is as important as the normative content of the rights themselves. By contrast, if the starting point is immunity, it is much less likely that these norms will be able to be enforced.

Indeed, the current formulation of many state immunity statutes, as well as the 2004 Convention, denies the importance of the forum state as the starting point for immunity. All of the statutes examined above take immunity as the starting point, with the forum state only able to exercise jurisdiction if a claimant can bring his or her case into an express exception. This emphasis on immunity has inappropriately reversed the presumption of jurisdiction in favour of a presumption of immunity.<sup>230</sup> It is only when the

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<sup>229</sup> Caplan, above n 81, at 757.

<sup>230</sup> Ibid, at 758.

true presumption is restored that “the possibilities for meaningful and effective human rights litigation [will] emerge.”<sup>231</sup>

## **D The Theoretical Bases of Immunity**

Courts base the existence of a rule providing immunity on a number of different theoretical bases, primarily independence and equality of states, and the dignity of states. The following examination will show that these are no longer convincing rationales for immunity. A functional approach to immunity, however, remains the only convincing rationale for immunity.

### *1 Independence and equality of sovereign states*

The chief theoretical basis which is used to justify a grant of immunity is the independence and equality of states. These principles are reflected in the maxim *par in parem non habet imperium*: one sovereign state is not subject to the jurisdiction of another state.<sup>232</sup> Thus the grant of immunity from jurisdiction in *The Parlement Belge* in the English Court of Appeal was justified as it was “a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state.”<sup>233</sup> While the absolute doctrine of immunity no longer exists, the independence and equality of states is still employed as a justification for the continuing immunity in respect of sovereign acts,<sup>234</sup> even where human rights violations are involved. The continuing application of the independence and equality of states was cited by Lord Bingham in *Jones v Saudi Arabia* as a basis for the supposed rule of international law according to

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<sup>231</sup> Ibid, at 757.

<sup>232</sup> Fox, above n 43, at 57.

<sup>233</sup> *The Parlement Belge*, above n at 214-215.

<sup>234</sup> Fox, above n 43, at 57.

which a state was entitled to immunity.<sup>235</sup> Similarly, in *Bouzari v Iran*, Goudge JA placed the rationale for immunity “on the concepts of the sovereign equality of states and the non-interference of states in the internal affairs of each other”.<sup>236</sup>

These principles no longer provide a convincing theoretical basis for immunity. As long ago as 1951, Lauterpacht subjected these principles to stringent criticism as a basis of absolute immunity. The independence and dignity of a foreign state would not be impaired where “the state exercising jurisdiction merely applies its ordinary law, including its rules of private international law, and so long as it applies it in an unobjectionable manner not open to the reproach of a denial of justice”.<sup>237</sup> For Lauterpacht, independence and equality of the foreign state would be even less impaired where the forum state had agreed to submit itself to the full jurisdiction of its own courts without claiming immunity.<sup>238</sup> If the forum state treats foreign states in the same way that it treats itself before its own courts, it is hard to see how the equality and independence of the foreign state is infringed.

Based on these considerations, Lauterpacht developed a new theory of immunity, whereby the immunity of the foreign state should only be as extensive as that which the forum state enjoys before its own courts. One justification for this was the fact that foreign state immunity was to some extent based on the domestic immunity of the state.<sup>239</sup> The subjection of the state to its own courts had only just begun in the United Kingdom in 1951, after the passage of the Crown Proceedings Act 1947 (UK).<sup>240</sup> That process is now largely complete, such that the liability of the government in private law is virtually as coextensive as that of an individual citizen.<sup>241</sup> Given the further erosion of domestic state immunity since Lauterpacht wrote in 1951, the argument in favour of the restriction of immunity to that enjoyed by the forum state is surely more compelling.

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<sup>235</sup> *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*, above n 11, at [14].

<sup>236</sup> *Bouzari v Islamic Republic of Iran*, above n 16, at [40].

<sup>237</sup> Lauterpacht, above n 213, at 229.

<sup>238</sup> *Ibid.*

<sup>239</sup> *Ibid.*, at 232. See also Garnett, above n 89, at 176.

<sup>240</sup> Fox, above n 43, at 60.

<sup>241</sup> *Ibid.*

Just as the rights of individuals to bring actions against their own states before their own courts have grown, the rights of the individual at international law vis-à-vis the state have also expanded. Lauterpacht concluded his theory with the following prescient words:<sup>242</sup>

At a period in which in enlightened communities the securing of the rights of the individual, in all their aspects, against the state has become a matter of special and significant effort, there is no longer a disposition to tolerate the injustice which may arise whenever the state – our own state or a foreign state – screens itself behind the shield of immunity in order to defeat a legitimate claim.

These words apply with even greater force today in the context of international law with its emphasis on human rights. Given the elevated position of 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>243</sup>

Despite these considerations, Fox maintains that the independence and equality of states continue as a valid theoretical basis for immunity. In a highly circular fashion, Fox justifies the “concept of the sovereign equality of states” on “the rule, still pertaining in international law, that there can be no independent settlement of a state’s disputes without its consent.”<sup>244</sup> It is hard to see how a theoretical basis of immunity can be based on a rule of international law itself. Surely, if anything, a specific rule of international law should be based on a general theoretical rationale, rather than the other way around. In any event, Fox does not provide any evidence of the existence of this supposed rule of international law, which would directly contradict the conclusion reached above that there is no rule of international law providing state immunity.

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<sup>242</sup> Lauterpacht, above n 213, at 235.

<sup>243</sup> Garnett, above n 89, at 175.

<sup>244</sup> Fox, above n 43, at 62.

## 2 Dignity

Somewhat surprisingly, respect for the dignity of the state is still invoked as a rationale for immunity. The English Court of Appeal in *Jones v Saudi Arabia*, in upholding the immunity of the state of Saudi Arabia for torture, found that it “would be an affront to the dignity and sovereignty of a state for that state... to be impleaded before the courts of another state.” The principle of dignity is perhaps even less convincing as a justification for immunity. Fox describes dignity as something that “has always seemed a questionable ground in relation to an artificial person.”<sup>245</sup> Although it may have been a valid justification before the advent of the modern state, when the state was analogous to the person of the sovereign, the current relevance of dignity in relation to the state must be only relevant “in the realms of protocol and State ceremonial. It is there, rather than in rules of international law, that weight may still attach.”<sup>246</sup>

Indeed, given the erosion of the traditional concept of state sovereignty in international law, and the concomitant rise in the rights of the individual, “[i]t 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.”<sup>247</sup>

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<sup>245</sup> Ibid, at 63.

<sup>246</sup> Arthur Watts “The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers” 1994(III) *Recueil Des Cours*: Collected Courses of the Hague Academy of International Law 9 at 40-41.

<sup>247</sup> *Rahimtoola v Nizam of Hyderabad*, above n 88, at 609 per Lord Denning. See also Robert Jennings and Arthur Watts *Oppenheim's International law* (9th ed, Longman, London, 1992) at 342: in reference to the rationales of independence, equality and dignity, Jennings and Watts stated that “it is doubtful whether any of these considerations supply a satisfactory basis for the doctrine of immunity. There is no obvious impairment of the rights of equality, or independence, or dignity of a State if it is subjected to ordinary judicial process within the territory of a foreign state – in particular if that state, as appears to be the tendency in countries under the rule of law, submits to the jurisdiction of its own courts in respect of claims brought against it. The grant of immunity from suit amounts in effect to a denial of a legal remedy in respect of what may be a valid legal claim; as such, immunity is open to objection.”

### 3 *The functional approach to immunity*

A further rationale for immunity is the functional role that immunity plays in enabling the state to facilitate orderly and friendly relations with other states.<sup>248</sup> In *The Schooner Exchange v McFaddon*, Chief Justice Marshall based immunity on, *inter alia*, the “mutual benefit” of states in having good relations with each other, which would be “promoted by intercourse with each other”, and by the “interchange of those good offices which humanity dictates and its wants require”.<sup>249</sup> This rationale continues to apply today with the same force as in 1812. States still have a strong interest in ensuring that their relations are conducted in a peaceful and orderly manner. The achievement of this goal would contribute to the general aim of international law of securing the values that people desire, such as security, freedom, and the provision of “sufficient material goods”.<sup>250</sup> Thus immunity can, in perhaps limited cases, promote rather than prevent the realisation of shared goals.

The functional rationale would appear to be the only valid basis for a grant of immunity. The currency of this rationale was affirmed in the recent ICJ decision in the *Arrest Warrant Case*. The ICJ upheld the immunity of a serving foreign minister for international crimes because the functions of the foreign minister would otherwise be impaired. Immunities are designed to enable ministers to fulfil their representative functions effectively and to protect them from acts of authority of another state that would impair them in effectively carrying out those functions.<sup>251</sup>

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<sup>248</sup> Jürgen Bröhmer, *State Immunity and the Violation of Human Rights* (Martinus Nijhoff Publishers, The Hague, 1997) at 197.

<sup>249</sup> *The Schooner Exchange v McFaddon*, above n 214, at 136.

<sup>250</sup> Higgins, above n 10, at 1.

<sup>251</sup> *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, above n 65, at [54]. See also Fox, above n 43, at 1: The purpose of immunity is to enable states “to carry out their public functions effectively” and to “secure the orderly conduct of international relations.” Brownlie makes similar observations. He sees immunity as resting partially on the functional need to leave the foreign nation, its organs and representatives “unencumbered in the pursuit of their mission.” (Ian Brownlie *Principles of Public International Law* (7th ed, Oxford University Press, Oxford, 2008) at 326.)

The functional rationale of immunity would not permit a grant of immunity for a state that commits breaches of peremptory norms. Just as a breach of a peremptory norm cannot be considered as a sovereign act under the restrictive approach to immunity, it is not a state function for the purposes of the functional rationale of immunity. Peremptory norms reflect values of the international community that cannot be violated in any circumstances.<sup>252</sup> It follows that acts that breach peremptory norms, such as a state torturing its citizens, are not legitimate state functions.<sup>253</sup> A state does not exist for the purpose of torturing its citizens.

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<sup>252</sup> Orakhelashvili, above n 66, at 325.

<sup>253</sup> *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*, above n 126, at [71] per Mance LJ.

## CHAPTER FOUR: THE ROLE OF PRIVATE INTERNATIONAL LAW

Assuming that there is no rule of immunity at international law, and states should not provide immunity as a matter of domestic law, a claimant must still show that the domestic court has jurisdiction to hear the claim pursuant to principles of private international law. This section will analyse the issues that a court must consider under private international law before it is able to assert jurisdiction, as well as assessing the positive role that private international law can play in these cases.

### A The Requirements of Extraterritorial Jurisdiction

Before a state can assume jurisdiction over a matter, there are two main issues that must be considered under private international law. First, there must be some connection with the forum state that allows the forum state to assert jurisdiction over the issue despite the presence of foreign elements in the case. The general common law approach is that a claimant can only bring a case where the tortious acts occurred within the forum, or where damage occurred within the forum.<sup>254</sup> The New Zealand High Court Rules, as an example, specify that a claimant can serve proceedings for a claim in tort out of the jurisdiction where the act or omission in respect of which damage was sustained was done or occurred in New Zealand,<sup>255</sup> or where damage was sustained in New Zealand.<sup>256</sup> Identical provisions exist in the English Civil Procedure Rules for non-European cases.<sup>257</sup> While the United States approach uses different terminology, in practice the test is the same as that under common law rules.<sup>258</sup>

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<sup>254</sup> Garnett, above n 89, 184.

<sup>255</sup> High Court Rules, r 6.27(2)(a)(i).

<sup>256</sup> Ibid, r 6.27(2)(a)(i).

<sup>257</sup> Civil Procedure Rules (UK), r 6.36. Practice Direction 6B, r 3.1(9) provides that a claimant may serve proceedings out of the jurisdiction with the permission of the court where (a) damage was sustained within the jurisdiction; or (b) the damage sustained resulted from an act committed within the jurisdiction. Broadly speaking, these rules apply to cases not involving European elements. See David McLean and Kisch Beevers *Morris's The Conflict of Laws* (7th ed, Sweet & Maxwell, London, 2009) at 69-70.

<sup>258</sup> Garnett, above n 89, at 184.

Such rules may be an obstacle to redress for a victim of torture in a domestic court.<sup>259</sup> Given that a claimant is unlikely to obtain a remedy in the state in which he or she was tortured, the claimant must therefore show that he or she suffered some form of harm within the jurisdiction of the forum. While this requirement may appear difficult to satisfy at first, there are some indications that courts are prepared to take a broad approach.

In one of the claims in *Kazemi v Islamic Republic of Iran (Kazemi v Iran)*,<sup>260</sup> the son of a woman who had been tortured in Iran brought a claim before the courts of Québec, alleging that he had suffered psychological harm in Québec. The court accepted his argument that his alleged injuries, assuming they were proven at trial, fell under the exception to immunity in s 6 of the SIA 1985.<sup>261</sup> This section provides an exception to immunity where the proceedings relate to “death or personal or bodily injury” that occurs in Canada. The son’s case would succeed at trial if he was able to demonstrate that “his alleged ‘trauma’ touche[d] upon his physical integrity or constitute[d] the equivalent of a ‘nervous shock’.”<sup>262</sup>

Due to the psychologically harmful nature of torture, it is likely a victim of torture would be able to satisfy the private international law requirement of suffering harm within the jurisdiction of the forum, provided the victim suffers from a sufficient degree of psychological harm. Although *Kazemi v Iran* involved an examination of a statutory exception to immunity, the same considerations should apply in determining whether harm has been suffered within the jurisdiction for the purposes of private international law. Indeed, it may be even easier for a claimant to satisfy the private international law requirement than it was to satisfy the immunity exception in *Kazemi v Iran*. In that case, the claimant was a secondary victim, whose injuries occurred as a result of the torture of

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<sup>259</sup> However Garnett notes that rules of jurisdiction may be more amenable to human rights claims than rules of immunity: *ibid*, at 187.

<sup>260</sup> *Kazemi v Islamic Republic of Iran* 2011 QCCS 196 (Québec Superior Court).

<sup>261</sup> *Ibid*, at [92]; State Immunity Act RSC 1985 c S-18.

<sup>262</sup> *Ibid*, at [92].

his mother. It may well be that a lesser degree of psychological suffering is required than that which touches upon “physical integrity” in relation to a primary victim of torture than for a secondary victim who does not directly suffer from torture.

However, it is arguable that a victim of torture should not have to suffer the requisite level of psychological harm within the jurisdiction in order to be able to bring a claim for damages. The ability to bring a claim for damages for torture should depend on the importance of preventing and providing compensation for torture generally and not on the specific condition of suffering of psychological harm within the forum state. Goudge JA acknowledged this difficulty in *Bouzari v Iran*.<sup>263</sup> Although not required to decide the issue of jurisdiction conclusively because Iran was entitled to immunity, Goudge JA stated that “there are several circumstances that make the presumptive conclusion of no jurisdiction troubling.”<sup>264</sup> First, the case involved torture, the prohibition of which Goudge JA noted was a peremptory norm.<sup>265</sup> Second, Bouzari was highly unlikely to get a remedy in Iran, which “would otherwise be the most logical jurisdiction.”<sup>266</sup> Third, if the court had no jurisdiction, then Bouzari “will be left without a place to sue.”<sup>267</sup> Perhaps, then, the rules of private international law need to be reformed in order to:<sup>268</sup>

[A]ddress the particularities of these claims, namely, the nearly inevitable lack of territorial connection with the forum, the international public interest in enforcing peremptory norms, and the imperative of avoiding denials of justice.

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<sup>263</sup> *Bouzari v Islamic Republic of Iran*, above n 16.

<sup>264</sup> *Ibid*, at [36].

<sup>265</sup> *Ibid*.

<sup>266</sup> *Ibid*.

<sup>267</sup> *Ibid*.

<sup>268</sup> Francois Larocque “Recent Developments in Transnational Human Rights Litigation: A Postscript to *Torture as Tort*” (2008) 46 *Osgoode Hall LJ* 605 at 633-634.

## **B *Forum Non Conveniens***

Once a court has decided that there is a sufficient connection to the forum state, the court must decide whether there is a more appropriate forum to hear the case under the doctrine of *forum non conveniens*.<sup>269</sup> According to this doctrine, the court has to identify the forum in which the case can suitably be tried for the interests of all the parties and for the ends of justice.<sup>270</sup> In determining this question, the court must take into account such factors as the nature of the dispute, the legal and practical issues involved, the availability of witnesses and their evidence, and expense.<sup>271</sup>

The inability of a claimant to obtain a fair trial is another relevant factor in the *forum non conveniens* enquiry.<sup>272</sup> This would be of particular relevance in torture cases, as it is highly unlikely that the claimant will receive a fair hearing in the state in which he or she was tortured. Indeed, in *Bouzari v Iran*, the court held that Bouzari could not sue in Iran as there was evidence that he may well have been killed if he was to return there.<sup>273</sup> On the other hand, the defendant state could argue that the security or diplomatic functions of the state could be impaired by the forum court's exercise of jurisdiction.<sup>274</sup> However, a further factor in favour of the assumption of jurisdiction would be the interest of the international community in deterring the commission of human rights abuses.<sup>275</sup>

The important point here is that the doctrine of *forum non conveniens* provides a far more flexible way of balancing the competing interests at stake than does a blanket grant of

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<sup>269</sup> In New Zealand, *forum non conveniens* is incorporated into the High Court Rules. See rr 6.28(5)(c) and 6.29(1)(a)(ii).

<sup>270</sup> Lawrence Collins (ed) *Dicey, Morris and Collins on The Conflict of Laws* (14th ed, Sweet & Maxwell, London, 2006) at 365.

<sup>271</sup> *Ibid.*

<sup>272</sup> See *Oppenheimer v Louis Rosenthal & Co* [1937] 1 All ER 23 (CA).

<sup>273</sup> *Bouzari v Islamic Republic of Iran*, above n 16, at [24].

<sup>274</sup> Garnett, above n 89, at 184.

<sup>275</sup> *Ibid* 187. But see Elihu Lauterpacht *Aspects of the Administration of International Justice* (Grotius Publications, Cambridge, 1991) at 56. Writing in 1991, Lauterpacht was of the view that if immunity was abolished as a matter of domestic law, a domestic court would still not have jurisdiction over sovereign acts, because it is unlikely to be the *forum conveniens*.

state immunity. A grant of immunity operates automatically to prevent the court from hearing the matter, such that only the defendant state's interests are taken into account, but not those of the claimant. Even Fox, who is generally in favour of the maintenance of immunity, admits that, due to the conflicting principles of non-intervention and the right of access to a court, "the automaticity of immunity as a bar may require some modification".<sup>276</sup> In cases involving breaches of human rights, a court examining *forum non conveniens* would be able to weigh the state's interest in immunity against the claimant's interest in obtaining a remedy. The court could take into account considerations underpinning the doctrine of immunity, such as the functional rationale of immunity, but these would not constitute automatic bars but would be discretionary factors.<sup>277</sup> The court should have the ability to "weigh the competing interests in favour of upholding an immunity or allowing a judicial determination of a civil right, after looking into the subject matter of the proceedings."<sup>278</sup>

*Forum non conveniens* would also allay the fears of those who oppose the removal of immunity. According to Fox, the removal of immunity as a rule of international law "must result in anarchy."<sup>279</sup> However, there would be no anarchy if the matter were left solely to private international law and *forum non conveniens*.<sup>280</sup> If state immunity were removed, it would not follow that a court would automatically be able to exercise jurisdiction over a state, due to the requirements of private international law.<sup>281</sup> Accordingly, a state will only be able to exercise jurisdiction where private international law determines such an exercise is appropriate. Indeed, the rules of private international

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<sup>276</sup> Hazel Fox "Where Does the Buck Stop? State Immunity from Civil Jurisdiction and Torture" (2005) 121 LQR 353 at 358. See also Richard Falk *The Role of Domestic Courts in the International Legal Order* (Syracuse University Press, Syracuse, NY, 1964) at 139-145, who advocated the abolition of immunity because it was too crude a method for identifying when national jurisdiction should be restrained or asserted.

<sup>277</sup> Garnett, above n 89, at 184.

<sup>278</sup> *Al-Adsani v United Kingdom*, above n 56, at 34 (Dissenting Opinion of Judge Loucaides). See also *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*, above n 126, at [94]-[97] per Mance LJ.

<sup>279</sup> Fox, above n 43, at 405.

<sup>280</sup> See also Lauterpacht, above n 275, at 57. There would be no flood of litigation because of effort and expense.

<sup>281</sup> Garnett, above n 89, at 185.

law are becoming increasingly uniform,<sup>282</sup> such that the same result will follow regardless of where the case is brought. As a consequence, in addition to preventing ‘anarchy’ within the international system, private international law will also be able to restrict the phenomenon of ‘forum shopping’, whereby a plaintiff chooses to bring his or her claim in the forum in which he or she has the greatest chance of success.<sup>283</sup> These considerations led Mance LJ in *Jones v Saudi Arabia* to conclude that, by limiting the immunity of state officials, “England will [not] become a forum of choice for the bringing of claims for torture committed throughout the world.”<sup>284</sup>

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<sup>282</sup> Ibid, at 190.

<sup>283</sup> See Campbell McLachlan *Lis Pendens in International Litigation* (Martinus Nijhoff Publishers, Leiden/Boston, 2009) at 37.

<sup>284</sup> *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*, above n 126, at [97].

## CONCLUSION

Given the rapid development of both the normative content and the ability to enforce human rights in recent years, it is somewhat surprising that many states continue to uphold civil state immunity where another state commits flagrant human rights violations, the more so when these violations are of peremptory norms of international law.

On present state practice, there is no rule of customary international law on state immunity for extraterritorial breaches of peremptory norms in civil cases. Nevertheless, courts and commentators succumb to the mistaken belief that immunity for peremptory norms is a rule of customary international law, without undertaking the requisite examination of state practice. As there is no rule on the international plane, immunity is solely governed by each state's domestic law. Many states' domestic laws continue to provide immunity, without breaching any obligations under international law. Within this domestic legal context, various methods have been employed in an attempt to recognise the peremptory effects of the prohibition on torture in domestic law. Yet these approaches have not proven to be successful in giving effect to the peremptory status of the prohibition on torture.

The way forward, instead, lies in the recognition that state immunity is fundamentally inconsistent with the peremptory prohibition on torture. There are a number of reasons for this. Immunity has been significantly eroded in the criminal sphere, and there is no justification for treating civil cases any differently. Furthermore, the modern concept of sovereignty is inconsistent with a grant of immunity, and should instead apply to restrict it. The traditional rationales for immunity, such as the independence, equality and dignity of states, are out-dated and archaic given the importance of human rights in modern international law.

It follows, then, that states should no longer provide immunity in civil proceedings under their domestic legal systems. A far better approach would be to leave the matter to the

well-established principles of private international law relating to extraterritorial jurisdiction and *forum non conveniens*. Application of these principles would enable a court to balance the factors in favour of the assumption of jurisdiction with those that go against it. An example of the latter would be the state's functional interest in ensuring it is able to facilitate friendly relations with other states.

If enough states restrict immunity in civil actions within their domestic law, the practice of those states will form a new rule of international law obliging states to restrict immunity for human rights violations prohibited by peremptory norms. While no such rule currently exists, the seeds of a new rule requiring states to restrict immunity in civil actions are beginning to emerge. When such a new rule emerges, victims of torture will be more likely to receive a meaningful remedy for the abuses they have suffered, and states will truly think twice before committing acts of torture. Only when this occurs will the ability to enforce the peremptory prohibition on torture equal the importance of the normative prohibition on torture itself.

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