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State Immunity
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**Or How Does a Victim of a Human Rights Violation
Claim Compensation?**

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Abbreviations

ECHR	European Court of Human Rights
ICC	International Criminal Court
ILC	International Law Commission
Inter-Am. Ct. of H.R.	Inter –American Court of Human Rights

1 Introduction

It is well established in international law that adequate reparation¹ should be paid by the responsible state if an international obligation, including Human Rights,² is violated or breached.³ But in practice an injured private party faces almost insurmountable obstacles when he/she claims reparation, and in particular compensation, from a state.⁴

If a private person brings an action for compensation in connection with an alleged violation of Human Rights in the courts of one state against a second state, Human Rights clash with state immunity. These are, in general terms, the circumstances against which the principle of state immunity shall be tested in this paper. Moreover, it is in fact exactly in these circumstances, i.e., in the domestic courts,⁵ in which the

¹ Consisting of restitution, compensation or satisfaction, singly or in combination, according to Art. 34

² "Human Rights", for ease of reference, is to be understood herein as including both human rights in their strict sense, as embodied, i.e., in the International Covenant on Civil and Political Rights, adopted by General Assembly resolution 2200A (XXI) of December 16, 1966 ("ICCPR"), or the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in Rome on November 4, 1950, as amended by Protocols No. 11 and 14 ("European Convention on Human Rights") and individual rights based on humanitarian law, as embodied, i.e., in the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, August 12, 1949, or the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly resolution 39/46 of December 10, 1984 ("Torture Convention").

³ Commentary on Draft Articles on Responsibility of States for Internationally Wrongful Acts, as adopted by the ILC at its 53rd session in 2001 ("Commentary on Articles of State Responsibility"), Art. 1 para. 2, Art. 31; *Velasquez Rodriguez* case, Judgment of July 21, 1989, Inter-Am. Ct. of H.R., Ser. C, No. 7 (Damages) ("*Velasquez Rodriguez* No. 7 (Damages)"), para. 25 and 28, with further references; Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report by Theo van Boven, July 2, 1993, E/CN.4/Sub.2/1993/8, ("Boven, Final Report"), para. 8;

⁴ Magarrell, Lisa / Peterson, Lorna, *After Torture - U.S. Accountability and the Right to Redress*, International Center for Transitional Justice, August 2010, <http://ictj.org/sites/default/files/ICTJ-USA-Right-Redress-2010-English.pdf> ("Magarrell/Peterson, After Torture"), p.9, 12; See cases below.

⁵ In cases of Human Rights violations, the victim is only allowed to bring his/her claim before an international judicial body after he/she exhausted all domestic remedies: Art. 46(1)(b) American Convention on Human Rights, adopted in San Jose on November 22, 1969 ("American Convention on Human Rights"); Art. 35(1) European Convention on Human Rights; Art. 2, Art. 5(2)(b) Optional Protocol to the ICCPR, adopted by General Assembly Resolution 2200A (XXI) of December 16, 1966; Art. 87(g) Human Rights Council resolution 5/1 of June 18, 2007, United Nations Human Rights Council Institution Building. Moreover, wherever possible the victim may prefer to file suit in the courts of a state other than those of the impleaded state.

current understanding of the doctrine of state immunity is most frequently and most fiercely challenged by private parties calling for a jus cogens exception to state immunity.⁶

The goal of this paper is to answer the question whether the doctrine of state immunity should be restricted in cases of jus cogens violations. According to the prevailing view as of today, international law does not provide for such restriction.⁷ This author contends that such restriction is justifiable only if a) a jus cogens exception achieves its purpose of promoting justice and if b) a jus cogens exception does not vitiate the purpose of state immunity. For one, it is argued, a jus cogens exception does not achieve the legitimate goals of providing the victim with an effective remedy and, in turn, promoting greater justice. On the other hand, a jus cogens exception undermines the equally legitimate purposes of state immunity, i.e. to protect and promote friendly and peaceful relations between states and to protect the sovereignty, dignity and independence of states. On balance, a jus cogens exception to state immunity is, thus, clearly not justified. It follows that the pursuit for a jus cogens exception in fact is misguided. Fairness and justice will not be achieved in domestic courts. The legal arguments⁸ in favor of a jus cogens exception may be interesting theoretically, but they should not prevail in practice. An injured private party should remain barred from impleading the offending state in the courts of another state.

This result is obviously highly dissatisfying. A victim of a violation of Human Rights must be afforded opportunity to sue the offending state for compensation. The finding that state immunity must stand has no bearing on this premise. It only means that

⁶ See Knuchel, Sévrine, State Immunity and the Promise of Jus Cogens, *Northwestern University Journal of International Human Rights*, Spring 2011, 9 NWUJIHR 149, para 2; see further the cases discussed below, section 2.

⁷ See section 2.1

⁸ E.g. normative hierarchy, implied waiver, ultra vires, to name the most prominent.

domestic adjudication is not the solution. Another, better way must be found. Arbitration, both in its form as international commercial arbitration based on the New York Convention⁹ and investment arbitration based on the ICSID Convention¹⁰, has proven itself as a valuable means to settle monetary international disputes between private and state parties.¹¹ Consequently, arbitration may be a feasible way to finally provide the victims with an effective remedy. Furthermore, the threat of being held responsible by the victims for any number of Human Rights violations may prompt states to ensure internal compliance with Human Rights more resolutely. For these reasons it is suggested that a solution modeled on and inspired by arbitration may make international Human Rights litigation more equitable and Human Rights enforcement more effective.

This paper commences with the discussion of three important cases on the point. The most recent case, *Germany v. Italy*,¹² decided by the ICJ as recently as February 3, 2012, provides for an overview on the of state immunity vs. jus cogens. Looking at the *Al-Adsani*¹³ and *Distomo*¹⁴ cases, certain particular aspects shall be highlighted. The case analyses then will serve as a basis to further explore the “conflict” between state immunity and jus cogens. Concluding that state immunity should not be set-aside in jus cogens cases, the idea of “Human Rights arbitration” is briefly touched upon as a possible solution to the dilemma.

⁹ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNTS, No. 4739, <http://www.uncitral.org> (“New York Convention”).

¹⁰ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, produced in Washington, D.C., March 18, 1965 (“ICSID Convention”).

¹¹ Born, Gary, A New Generation of International Adjudication, *Duke Law Journal*, January 2012, 61 *DUKELJ* 775 (“Born, A New Generation of International Adjudication”), p. 826-844.

¹² *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of the ICJ dated February 3, 2012, <http://www.icj-cij.org/docket/files/143/16883.pdf> (“*Germany v. Italy*”).

¹³ *Al-Adsani v. United Kingdom*, European Court of Human Rights, November 21, 2001, (2002) 34 *E.H.R.R.* 11 (“*Al-Adsani*”).

¹⁴ *Inter alia Kalogeropoulou and others v. Greece and Germany*, European Courts of Human Rights, Admissibility Decision of December 12, 2002, Appl. No. 59021/00 (“*Kalogeropoulou v. Greece*”), see sect. 2.3 below.

2 Selected Cases

2.1 *Germany v. Italy*

The *Germany v. Italy*¹⁵ case is a recent case decided by the ICJ on February 3, 2012. Germany brought the case before the ICJ claiming that Italy violated its international obligations pertaining to jurisdictional immunities of states by 1) allowing civil claims based on violations of international humanitarian law to be brought against the Germany, 2) taking measures of constraint against 'Villa Vigoni', German State property, and 3) declaring Greek judgments enforceable.¹⁶ The ICJ held on all three counts that Italy violated jurisdictional immunities to which Germany was entitled pursuant to international law.¹⁷ The case is interesting because it addresses the issue of jurisdictional immunities in proceedings for adjudication, recognition and execution. The judgment in effect provides for a summary of the contemporary international law of state immunity¹⁸ regarding a jus cogens exception.¹⁹

The case resulted out of two Italian cases, *Ferrini* and *Mantelli*, and one Greek case, *Distomo*.²⁰ All three cases turned on violations of humanitarian law, including

¹⁵ *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of the ICJ dated February 3, 2012, <http://www.icj-cij.org/docket/files/143/16883.pdf> ("*Germany v. Italy*").

¹⁶ *Germany v. Italy*, para. 15.

¹⁷ *Germany v. Italy*, para. 139(1) to (3).

¹⁸ For an overview of state immunity in international law please refer to Harris, David, *Cases and Materials on International Law*, 7th edition, London 2010 ("Harris, Cases and Materials"), p. 258 et seq.; Fox, Hazel, *The Law of State Immunity*, Oxford Library of International Law 2004 ("Fox, State Immunity"); Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property, ILC Report A/46/10, Yearbook of the ILC 1991, Vol. II, Part Two ("Commentary on Articles of State Immunity"), Commentary on Art. 6 (State Immunity) of the Draft Articles on Jurisdictional Immunities of States and Their Property, Yearbook of the ILC 1980, Vol. II, Part Two, A/CN.4/Ser.A/1980/Add.1(Part 2) ("Commentary on Art. 6"), p. 142 et seq.

¹⁹ The Court, based on the argument of Italy, not only discussed and decided on the question of a jus cogens exception but also on the question of a tort exception, *Germany v. Italy*, para. 62 et seq. However, as this paper addresses the question of state immunity and jus cogens only, the parts of the judgment pertaining to a tort exception will not be discussed below.

²⁰ See *Germany v. Italy*, paras. 27 to 36. For more information regarding the *Distomo* case, please refer to section. 2.3.

international crimes²¹ such as large-scale killing of civilians, deportation of civilians and members of Italian armed forces to slave labor, committed by German armed forces during World War II.²²

2.1.1 State Immunity from Adjudication

The ICJ considered that, because there is no treaty on state immunity in force between Germany and Italy, the entitlement to state immunity from adjudication had to derive from customary international law.²³ Relying on the findings of the ILC in 1980²⁴, the ICJ held that there is a right and obligation to immunity under international law,²⁵ which ultimately derived from the fundamental principle of sovereign equality of states pursuant to Art. 2 of the UN Charter.²⁶ The ICJ held further that the acts of the German forces in question constitute *acta jure imperii*, notwithstanding their unlawfulness.²⁷ It went on to state:²⁸

“The Court considers that the terms “*jure imperii*” and “*jure gestionis*” do not imply that the acts in question are lawful but refer rather to whether the acts in question fall to be assessed by reference to the law governing the exercise of sovereign power (*jus imperii*) or the law concerning non-sovereign activities of a State, especially private and commercial activities (*jus gestionis*).”²⁹

Then the ICJ moved on to examine whether a restriction of the right to immunity from adjudication applied 1) in cases of violations of humanitarian law, 2) in cases of

²¹ Pursuant to Art. 6(b) and (c) Charter of the International Military Tribunal (Nuremberg) dated August 8, 1945, United Nations, Treaty Series (UNTS), Vol. 82, p. 279.; and to Art. 3 The Hague Convention IV.

²² *Germany v. Italy*, para. 52.

²³ *Germany v. Italy*, para 54.

²⁴ See in particular Commentary on Art. 6, p. 147, para. 26.

²⁵ It should be noted that, while the ICJ's position represents the prevailing view today, a school of thought exists that qualifies state immunity as a comity, and not as a matter of legal obligation. See Fox, State Immunity, p. 13; Caplan, Lee, State Immunity, Human Rights and Jus Cogens: A Critique of the Normative Hierarchy Theory, *The American Journal of International Law*, 97 AMJIL 741 (2003), <http://www.asil.org/ajil/caplan.pdf> (“Caplan, State Immunity”); *Smith v. Libya*, 101 F.3d 239, US Court of Appeals, 2nd Circuit.

²⁶ *Germany v. Italy*, para. 56 and 57.

²⁷ *Germany v. Italy*, para. 60.

²⁸ *Id.*

²⁹ The ICJ therefore proceeded on the basis of the doctrine of restrictive immunity, which introduced a commercial restriction of state immunity, i.e. for *acta iure gestionis*. Regarding the doctrine of restrictive immunity, please refer to Commentary on Art. 6, p. 143 et seq.; *I Congreso Del Partido*, [1983] 1 A.C. 244, House of Lords (“*I Congreso*”); Fox, State Immunity, p. 201 et seq., p. 235.

violations of jus cogens and 3) as a matter of last resort.³⁰ It is worth pointing out that these arguments were considered despite the logical problem that, by virtue of the jus cogens exception, the preliminary question of jurisdiction would be made dependent on the gravity of unlawful acts effectively committed, which can only be assessed after an enquiry into the merits.³¹

On the first item the ICJ concluded that there is no restriction on immunity by reason of violations of humanitarian law under customary international law as it stands today.³² This conclusion was reached after a review of national court decisions³³, national legislation³⁴ and the European, United Nations and draft Inter-American Conventions on jurisdictional immunities³⁵. Particular attention was paid to the British decision in *Pinochet No.*³⁶ and the ECHR decisions in *Al-Adsani* and *Kalogeropoulou v. Greece*. The *Pinochet No. 3* case was not considered relevant for two reasons; for one, because it concerned the immunity of a former head of state,³⁷ and secondly, because it concerned immunity from criminal jurisdiction.³⁸ The ICJ further pointed out that the decision in *Pinochet No. 3* was based on the specific language of the Torture

³⁰ *Germany v. Italy*, para. 80.

³¹ *Germany v. Italy*, para. 82.

³² *Germany v. Italy*, para. 89.

³³ *Germany v. Italy*, para. 85.

³⁴ *Germany v. Italy*, para. 88.

³⁵ *Germany v. Italy*, para. 89.

³⁶ *R. v. Bow Street Metropolitan Stipendiary Magistrate And Others, Ex Parte Pinochet Ugarte (No. 3)*, House of Lords, [2000] 1 A.C. 147 (“*Pinochet No. 3*”).

³⁷ Regarding official immunity please refer to Fox, p. 666, State Immunity; *Pinochet No. 3*; *Jones v. Saudi Arabia*, House of Lords, June 14, 2006, [2006] UKHL 26 (“*Jones v. Saudi Arabia*”); *Arrest Warrant of April 11, 2000 (Democratic Republic of Congo / Belgium)*, Judgment Preliminary Objections and Merits, February 14, 2002, ICJ Reports 2002 (“*Arrest Warrant case*”), Commentary on Articles of State Immunity, Art. 2; Vienna Convention on Diplomatic Relations, 18. April 1961, Art. 39; UN Convention on Jurisdictional Immunities of States and Their Properties, 2004, adopted by General Assembly Resolution 59/38, December 2, 2004 (“UN Convention on Immunities”), Art. 2.1(b)(i) and (v), 3.1 and 3.2. The UN Convention on Immunities is largely based on the Draft Articles on Jurisdictional Immunities of States and Their Property 1991, adopted by the ILC in its 43rd session, Yearbook of the ILC 1991, Vol. II, Part Two; The UN Convention on Immunities is not yet in force. As of February 29, 2012, thirteen States (Austria, France, Iran, Japan, Kazakhstan, Lebanon, Norway, Portugal, Romania, Saudi Arabia, Spain, Sweden, Switzerland) ratified the Convention. Thirty ratifications are required (see <http://treaties.un.org/pages/ParticipationStatus.aspx>, Chapter III).

³⁸ *Germany v. Italy*, para. 87.

Convention.³⁹ The rationale of *Pinochet No. 3* therefore had no bearing on the question if a restriction of immunity due to violations of humanitarian law existed in international law.⁴⁰ The two ECHR decisions⁴¹ were cited as evidence that an exception to immunity in cases of violations of humanitarian law is not accepted in international law.

Regarding the second argument it was equally concluded that no jus cogens exception to state immunity exists in international law.⁴² Presuming that the prohibition of murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labor and the deportation of prisoners of war to slave labor constitute jus cogens, the ICJ held that there is no conflict between these prohibitions and the rules on state immunity.⁴³ According to the ICJ the two sets of rules address different matters.⁴⁴ The rules of state immunity are procedural in character and confined to the question of jurisdiction between states.⁴⁵ As such, they have no bearing on the substantive question of lawfulness of the conduct in respect of which the proceedings are brought.⁴⁶ Further, the ICJ held that the procedural rules of state immunity do not derogate from the substantive rules, which may possess jus cogens status; nor does the jus cogens character of a substantive norm inherently require the modification of rules pertaining to jurisdiction.⁴⁷ In particular it was pointed out that based on vast

³⁹ Id.; see opinion of Lord Browne Wilkinson, *Pinochet No. 3*, p. 205 and 206.

⁴⁰ Id.; the restriction of immunity was based on a necessary implication based on the Torture Convention rather than on the jus cogens nature of the prohibition of torture: per Lord Millet, *Pinochet No. 3*, p. 278, and per Lord Hoffmann, *Jones v. Saudi Arabia*, para. 81.

⁴¹ *Al-Adsani and Kalogeropoulou v. Greece* will be further discussed below in sect. 2.2 and 2.3.

⁴² *Germany v. Italy*, para. 97.

⁴³ *Germany v. Italy*, para. 93.

⁴⁴ *Germany v. Italy*, para. 93.

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ *Germany v. Italy*, para. 95.

evidence in national court decisions, a jus cogens norm does not confer upon a court a jurisdiction, which it would not otherwise possess.⁴⁸

On the third item, the ICJ, aware of the preclusive effect of state immunity in terms of redress for the Italian nationals,⁴⁹ rejected the “last resort” argument for a restriction of immunity, as well.⁵⁰ The ICJ reiterated that the procedural bar that immunity may pose does not alter the applicability of the substantive rules of international law.⁵¹ According to the ICJ, the question of state immunity is entirely separate from the question of international responsibility or an obligation to make reparation.⁵² Alleged shortcomings of Germany in providing for reparation cannot deprive Germany of jurisdictional immunity.⁵³ Moreover, the ICJ considered practical aspects of reparation payments in the aftermath of armed conflict.⁵⁴ In such circumstances, it was held, lump sum settlements are the normal practice.⁵⁵ Between Germany and Italy, such settlement was effectuated. Given the settlement, according to the ICJ, the national courts of one of the countries concerned are not well placed, however, to probe into whether or not a particular individual claimant continued to have an entitlement to compensation, i.e. notwithstanding the settlement.⁵⁶

2.1.2 State Immunity from Execution

The ICJ stated that immunity from execution in regard to property of states situated in foreign territory is governed by distinct rules and goes further than the immunity from

⁴⁸ *Germany v. Italy*, para. 95 and 96.

⁴⁹ *Germany v. Italy*, para. 104.

⁵⁰ *Germany v. Italy*, para. 103.

⁵¹ *Germany v. Italy*, para. 100.

⁵² *Id.*

⁵³ *Germany v. Italy*, para. 101.

⁵⁴ *Germany v. Italy*, para. 102.

⁵⁵ *Id.*

⁵⁶ *Id.*

adjudication discussed in sect. 2.1.2. above.⁵⁷ Referring to Art. 19 of the UN Convention on Immunities as codification of international customary law,⁵⁸ the ICJ held that execution against state property is only permissible if at least one out of the following conditions are satisfied: 1) the property in question must not be used for governmental, non-commercial activities, 2) the state owning the property in question consents, or 3) that the property was allocated specifically for the satisfaction of a judicial claim.⁵⁹ None of these conditions, however, were satisfied in respect to Villa Vigoni.⁶⁰ The ICJ accordingly concluded that Italy violated its obligations towards Germany concerning immunity from execution.⁶¹

2.1.3 State Immunity and Recognition Proceedings

Following the ICJ, recognition proceedings, also referred to as exequatur or, more confusingly, as enforcement proceedings, have to be distinguished clearly from execution proceedings.⁶² Immunity in recognition proceedings equals as immunity from adjudication.⁶³ As already mentioned above, section 2.1.2., immunity from adjudication and immunity from execution are governed by different sets of rules.

The ICJ held that a national court, the Italian court, seized with an application to declare enforceable, i.e. recognize, a judgment on the merits rendered in a foreign state, the Greek judgment, must decide this question from its very own, independent viewpoint.⁶⁴ The Italian court must ask itself whether or not the respondent state, Germany, would have been entitled to immunity, if the Italian court itself had to decide

⁵⁷ *Germany v. Italy*, para. 113; see also Fox, *State Immunity*, p. 8, 601 et seq.

⁵⁸ *Germany v. Italy*, para. 115.

⁵⁹ *Germany v. Italy*, para. 118.

⁶⁰ *Germany v. Italy*, para. 119.

⁶¹ *Germany v. Italy*, para. 120.

⁶² *Germany v. Italy*, para. 124.

⁶³ *Id.*

⁶⁴ *Germany v. Italy*, para. 130.

on the merits of the case.⁶⁵ The question whether or not the Greek judgment violated the international law on state immunity remains irrelevant in the course of proceedings for recognition.⁶⁶ Applying the findings in respect to immunity from adjudication of Italian cases *mutatis mutandis*, the ICJ concluded that the Italian courts, by declaring the Greek judgment enforceable, violated Germany's immunity.⁶⁷

2.2 *Al-Adsani*

The *Al-Adsani*⁶⁸ case, handed down by the ECHR, can arguably be considered the leading case in respect to state immunity from civil jurisdiction involving an alleged violation of jus cogens. The case was and still is receiving a lot of attention in courts in- and outside Europe.⁶⁹ The decision is particularly interesting because of the closely split court, in which a strong dissenting minority argued that state immunity should not be granted due to the (undisputed) peremptory character⁷⁰ of the prohibition of torture. However, it will be shown that both the majority as well as the minority approached the issue on a rather technical level. The majority strictly limited itself to the search for a norm in customary law regarding a torture exception to state immunity from civil jurisdiction. The minority on the other hand held without much ado that state immunity could not be claimed by Kuwait due to the peremptory nature of the prohibition of torture. Neither explained why their respective view should prevail *de lege ferenda*. Considering the tightly split court and said characteristics of the reasons provided it is

⁶⁵ *Id.*

⁶⁶ *Germany v. Italy*, para. 127.

⁶⁷ *Germany v. Italy*, para. 131.

⁶⁸ *Al-Adsani v. United Kingdom*, European Court of Human Rights, November 21, 2001, (2002) 34 E.H.R.R. 11 ("*Al-Adsani*").

⁶⁹ O'Keefe, Roger, *State Immunity and Human Rights: Heads and Walls, Hearts and Minds*, Vanderbilt Journal of Transnational Law, October 2011, 44 VNJTL 999 ("*O'Keefe, State Immunity and Human Rights*"), p. 1013 et seq.

⁷⁰ *Al-Adsani*, para. OIII1.

quite surprising that the decision in favor of state immunity was received with little criticism by judges and scholars throughout the world.⁷¹

2.2.1 Facts and Procedure

The facts of the case were never proven in court. However, according to the applicant, on May 2, 1991, he was abducted and imprisoned in Kuwait and subjected to inhuman treatment and torture. These wrongful acts were carried out by or on the order of a relative of the Emir of Kuwait (the “Sheikh”) who allegedly had an influential position in Kuwait at that time, and by Kuwaiti prison guards. Moreover, governmental property, such as vehicles or prison facilities, was employed in connection with these alleged activities.⁷²

As early as August 29, 1992, the applicant instituted civil proceedings in England against the Sheikh and the Government of Kuwait for compensation for injury of his physical and mental health caused by torture in Kuwait in May 1991 and threats against his life and well-being made after his return to the United Kingdom. On December 15, 1992, the applicant obtained a default judgment against the Sheikh. However, the Kuwaiti Government invoked state immunity and the applicant remained barred from the British courts in respect to his claim against the foreign state.⁷³

Before the ECHR the applicant contended that the defendant, i.e., the United Kingdom, violated Art. 3, prohibition of torture, and Art. 6, right to fair trial of the European Convention of Human Rights. In respect to the violation of Art. 3 of the European Convention the ECHR unanimously held that there has been no violation.

⁷¹ The situation that developed after the *Al-Adsani* judgment can be described as “customary international legal feedback loop”, O’Keefe, *State Immunity and Human Rights*, p. 1019; Rau, Markus, *After Pinochet: Foreign Sovereign Immunity in Respect of Serious Human Rights Violations – The Decision of the European Court of Human Rights in the Al-Adsani Case*, 3 *German Law Journal* (2002), <http://www.germanlawjournal.com> (“Rau, After Pinochet”), para. 17.

⁷² *Al-Adsani*, para. 9 to 13.

⁷³ *Al-Adsani*, para. 14 to 19.

Regarding Art. 6 of the Convention the majority, in a narrow decision of nine votes to eight,⁷⁴ likewise held that there has been no violation of Art. 6(1) of the Convention.⁷⁵

2.2.2 The Reasoning of the Majority

The majority's reasoning concentrated on the finding that the right of access to court according to Art. 6(1) of the European Convention of Human Rights is not absolute, but may be subject to limitations. Such limitations are permitted only if (a) they pursue a legitimate aim and if (b) there is proportionality between the means employed and the aim sought.⁷⁶ The Court held that the denial of access to court for reasons of state immunity pursuant to the UK State Immunity Act 1978 is a lawful limitation.⁷⁷ Further, the majority accepted that the prohibition of torture achieved the status of a peremptory norm in international law.⁷⁸ However, the Court then went on stating that

"[n]otwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a [s]tate no longer enjoys immunity from civil suit in the courts of another [s]tate where acts of torture are alleged."⁷⁹

This approach can arguably be described as positivist. The Court confined itself to looking for evidence of state practice and *opinio juris* in respect to an exception from state immunity in cases of torture. Finding that there was no such evidence it concluded that there is no torture exception to state immunity from civil jurisdiction in international law. While I agree in substance with the finding of the court, I think that the issue of state immunity could have been elaborated, with respect, more thoroughly. The question why there is no evidence of such exception was not

⁷⁴ Majority: Judges Palm, Gaukur Jörundsson, Jungwiert, Zupancic, Pellonpää, Bratza, Tsatsa-Nikolovska, Levits and Kovler; minority: Judges Rozakis, Caflich, Wildhaber, Costa, Cabral Barreto, Vajic, Ferrari Bravo, Loucaides

⁷⁵ *Al-Adsani*, para. 67.

⁷⁶ *Al-Adsani*, para 53.

⁷⁷ *Al-Adsani*, para. 56

⁷⁸ *Al-Adsani*, para. 61.

⁷⁹ *Al-Adsani*, para. 61.

answered, indeed it was not even asked. Further, no argument was offered whether the (non-)existence of such exception could be justified for any reason. The practical argument (rightly) offered by Judge Pellonpää, i.e., lack of coercive means to enforce a judgment against a state,⁸⁰ does not achieve to fill in this gap either. As a consequence, the complexities, which lie at the core of the matter, unfortunately remain unresolved.

2.2.3 The Reasoning of the Minority

Interestingly enough, in my humble opinion, the argument of the minority likewise fails to address any complexities. In so many words the minority argues that, due to the peremptory nature of the prohibition of torture, Kuwait should not be granted state immunity by foreign courts in a case of civil proceedings where a violation of said norm is alleged.⁸¹ While this argument in its simplicity certainly exudes considerable appeal, again with all due respect, it omits to address the complexities behind the simple formula “the prohibition of torture trumps state immunity”.⁸²

2.2.4 Illustrations of Some Complexities

With regards to both the majority’s and the minority’s reasoning I would like to highlight four implications that were not addressed by the minority. First, it cannot be ignored that the situation at hand is tripartite. There is Kuwait, a sovereign state, there is the United Kingdom, another sovereign state, and there is a British-Kuwaiti individual who allegedly was tortured by Kuwait. The jus cogens norm protects the individual, and a Kuwaiti violation thereof creates a civil claim for compensation of the

⁸⁰ *Al-Adsani*, para. O-II1 et seq.

⁸¹ *Al-Adsani*, para. O-III3 (Rozakis and Caflisch); *Al-Adsani*, para. O-V1 (Loucaides)

⁸² Rau, After Pinochet, para. 14

individual against Kuwait.⁸³ In the context of such civil claim the prohibition of torture operates exclusively⁸⁴ between the individual and Kuwait.⁸⁵ State immunity, on the other hand, concerns jurisdiction to adjudicate and regulates the rights and obligations between independent states. It applies between Kuwait and the United Kingdom. In this constellation it is quite difficult to engineer a true clash of the prohibition of torture and state immunity.⁸⁶

Second, the jus cogens argument itself is not as simple as advocated by the minority. It is very difficult to argue that the exception in criminal proceedings established in the *Pinochet No. 3* judgment applies, by analogy or otherwise, in civil proceedings, too.⁸⁷ Other than its provisions in respect to criminal jurisdiction⁸⁸ the Torture Convention, in Art. 14, does not create universal jurisdiction in respect to civil proceedings.⁸⁹ The prohibition of torture as embodied in the Torture Convention, therefore, can hardly affect questions of civil jurisdiction and state immunity therefrom, let alone overrule such norms.⁹⁰ Thus, the minority over-simplified the matter when it stated:

“The prohibition of torture, being a rule of jus cogens, acts in the international sphere and deprives the rule of sovereign immunity of all its legal effects in that sphere. The criminal or civil nature of the domestic proceedings is immaterial.”⁹¹

⁸³ It is beyond the scope of this paper to elaborate on the proper foundations of such claim in domestic or international law.

⁸⁴ Unless of course the United Kingdom, the home state of the victim, volunteers to pursue the victim's claims against Kuwait by means of diplomatic protection. However, this would make the issue purely inter-state and the case would completely be taken out of the hands of the individual. To discuss the possibility of enforcing the claim by way of diplomatic protection thoroughly exceeds the scope of this paper. However, it may be stated that this option is not a promising route for the victim at best, see O'Keefe, *State Immunity and Human Rights*, pp. 1037-1039.

⁸⁵ As opposed to criminal proceedings in respect to which the third party state is engaged through direct obligations, e.g., to take a suspect into custody (Art. 6(1) Torture Convention), to investigate (Art. 6(2) Torture Convention) and to extradite or prosecute and punish (Art. 7 Torture Convention).

⁸⁶ See above, sect. 2.1.1, and the distinction between procedural and substantive norms as advanced by the ICJ in *Germany v. Italy*, p. 93.

⁸⁷ See Rau, *After Pinochet*, id., para. 15;

⁸⁸ Art. 5 Torture Convention.

⁸⁹ *Jones v. Saudi-Arabia*, para. 25 (Lord Bingham)

⁹⁰ See also the reasoning of the ICJ in *Germany v. Italy* above, sect. 2.1.1.

⁹¹ *Al-Adsani*, para. O-III4, p. 300; See also Rau, *After Pinochet*, para. 14, referring to Judge Kreca's distinction between the legal nature of a norm, e.g. peremptory, and the enforcement of a that norm.

Third, the troublesomeness of the minority's approach reveals itself if it is applied with a different set of parties. For example, take an Egypt national who brings a claim for compensation based on allegations of torture committed in Guantanamo against the United States in a domestic court in Iran⁹². Applying the minority's view, Iran is allowed to adjudicate such compensation claim against the United States. It is hardly conceivable how any judgment by Iran in such a case could be seen as fair, unbiased judgment. It is a safe bet to predict that the United States will not respect nor comply with the Iranian judgment. Moreover, the political bearing on the case is likely to replicate as soon as the plaintiff seeks to have the Iranian judgment recognized in a third party state. One cannot but presume that the outcome of any recognition proceeding outside Iran will strongly be dependent on the political position towards the United States in the respective state.

Finally, it is only in the dissenting opinion of Judge Loucaides that a certain willingness to look behind the simplistic arguments of the majority and the minority can be found.⁹³ He categorically stated that any blanket immunity should be considered as a violation of Art. 6(1) of the European Convention of Human Rights and calls for a balanced approach taking into account

"[...] the competing interests, namely those connected with the particular immunity and those relating to the nature of the specific claim which is the subject matter of the relevant proceedings [...]"⁹⁴

This statement can be endorsed in so far as that such a nuanced approach is desirable. But first of all it should have been the ECHR itself, who should have balanced the competing interests when discussing the *Al-Adsani* case. Such endeavor

⁹² Iran is not the only state that serves well for this hypothetical. Candidates for a politically motivated anti-American stance are numerous, e.g. Syria, Russia, China, North Korea, Cuba, but even France, Germany or Switzerland as far as atrocities in connection with the latest Irak war are concerned. Of course you may also find several countries which presumably are inclined to a pro-American approach, i.e. Israel, Saudi-Arabia, South Korea, United Kingdom.

⁹³ *Al-Adsani*, para. O-V1 et seq.

⁹⁴ *Al-Adsani*, para. O-V2.

could have increased the persuasiveness of the majority opinion against such exception. Likewise, an analysis of the competing interests may have benefitted the minority's opinion arguing in favor of it.

However, this author respectfully disagrees with Judge Loucaides in as far as he contends that any blanket state immunity should be outlawed in view of Art. 6(1) of the European Convention of Human Rights and replaced with a case-by-case assessment of the interests at stake to be performed by the respective domestic court. It is highly doubtful that state immunity is able to fulfill its purpose if domestic judges are allowed to decide on a case-by-case basis whether or not they wish to grant immunity. Such an approach, scaled up and applied worldwide, entails the danger of immense inconsistencies in the application of the doctrine of state immunity. Each and every judge assumes great discretion and may "balance" the competing interests quite arbitrarily. It must be assumed that the cultural and political background of every individual judge strongly influences the outcome of such balancing. Nothing but a widely varied application of the doctrine of state immunity (and possibly also of Human Rights, if immunity is restricted) is likely to be the result. Only blanket immunities (and blanket exceptions) may effectively prevent such inconsistencies and arbitrariness.⁹⁵

2.3 *Distomo*

While the *Distomo* case⁹⁶, inter alia, addressed the issue of state immunity from adjudication in the event of a claim for compensation for a violation of a humanitarian

⁹⁵ See also *Germany v. Italy*, para. 106, arguing that, because questions of immunity have to be decided before considering the merits, immunity cannot be made dependent upon the outcome of a balancing exercise of the specific circumstances of each case.

⁹⁶ Unfortunately full translations of the Greek decisions could not be made available. The discussion of the case therefore is based on the German court decisions, the ECHR decision, the ICJ decision as well as case reviews of both the Greek and the German decisions.

law, i.e. a violation of the The Hague Convention IV⁹⁷, two other more interesting features of the case shall be highlighted below.⁹⁸ First, the case was decided on the merits both in Germany and in Greece. It will be interesting to see how the courts of two different countries, notably the courts of the defendant state on one hand and the courts of the state of which the plaintiffs are nationals on the other, approached and decided the same matter. To start with, the outcome was diametrically opposed: the claim was dismissed in Germany whereas compensation in the amount of approximately USD 30 million was awarded in Greece. Second, the *Distomo* case demonstrates formidably that even if the victims achieve to secure a final and binding judgment in a domestic court, the struggle may not be finished due to immunity of the defendant state from execution.

The underlying undisputed facts of the case occurred on June 10, 1944. On this day during the World War II, German occupation forces killed 200 to 300 civilian inhabitants of the village Distomo, prefecture Voiotia, located in the mountains of central Greece, as a retaliation measure.⁹⁹ The village was effectively razed.¹⁰⁰ The

⁹⁷ Convention (IV) respecting the Laws and Customs of War on Land, adopted in The Hague on October 18, 1907, and its annex: Regulations concerning the Laws and Customs of War on Land, <http://www.icrc.org/ihl.nsf/full/195> (“The Hague Convention IV”).

⁹⁸ The issue of state immunity from adjudication in civil proceedings versus jus cogens in the *Distomo* case was decided along the lines of *Al-Adsani*, see *Kalogeropoulou v. Greece*, section 1.D.1.(a) of the reasoning („The Law“), *Judgment of the Federal Court of Justice of Germany* (BGH) dated June 26, 2003, III ZR 245/98 (“*Judgment of the BGH*”), section B.1.2., *Judgment of the Federal Constitutional Court of Germany* (BVerfG) dated February 15, 2006, 2 BvR 1476/03 (“*Judgment of the BVerfG*”), para. 18; The reasoning of the Greek courts in the *Distomo* case providing for a jus cogens exception to state immunity from adjudication in civil proceedings must be considered overruled by virtue of the ECHR decisions in *Al-Adsani*, *Kalogeropoulou v. Greece* and the ICJ’s decision in *Germany v. Italy*, as well as the Greek Special Highest Court’s decision in *Federal Republic of Germany v. Miltiadis Margellos*, case 6/17-9-2002, dated September 17, 2002.

⁹⁹ See *Judgment of the BGH*, sect. “Tatbestand”, sect. “Entscheidungsgründe” IV.2.b)aa); *Judgment of the BVerfG*, para. 2; *Germany v. Italy*, para. 30.

¹⁰⁰ Pittrof, Sabine, Compensation Claims for Human Rights Breaches Committed by German Armed Forces Abroad During the Second World War: Federal Court of Justice Hands Down Decision in the *Distomo* Case, *German Law Journal*, vol. 05 No. 01 (2004) (“Pittrof, Compensation Claims”), p. 16.

victims of the massacre, among them the plaintiffs' parents, were mainly elderly persons, women and children.¹⁰¹

2.3.1 German proceedings

In September 1995, the plaintiffs filed a lawsuit with the Landgericht Bonn seeking compensation, both in their own right and by way of succession on behalf of their parents, for material damages, i.e., destroyed property, physical and mental damages and lost expectations.¹⁰² The Landgericht dismissed the claim on June 23, 1997.¹⁰³ Subsequently, the decision was confirmed by the Oberlandesgericht Köln on August 27, 1998¹⁰⁴, by the Federal Court of Justice (BGH) on June 26, 2003¹⁰⁵ and by the Federal Constitutional Court (BVerfG) on February 15, 2006.¹⁰⁶ Arguing their case in the German courts, the plaintiffs invoked Art. 3 The Hague Convention IV and German state liability law.¹⁰⁷ Both the Federal Court of Justice and the Federal Constitutional Court in addition examined German legislation on expropriation¹⁰⁸, but denied a claim for compensation on the basis on all of these grounds.¹⁰⁹ It should be noted that the German courts applied the law as in force in 1944.¹¹⁰ Citing international principles of state responsibility, the courts rejected the contention that based on a violation of Art.

¹⁰¹ Rau, Markus, State Liability for Violations of International Humanitarian Law – the *Distomo* Case Before the German Federal Constitutional Court, German Law Journal, vol. 07 No. 07 (2005) (“Rau, State Liability”), p. 702.

¹⁰² *Judgment of the BVerfG*, para. 3; *Judgment of the BGH*, sect. „Tatbestand“; Pittrof, Compensation Claims, p. 16.

¹⁰³ *Judgment of the Landgericht Bonn* dated June 23, 1997, 1 O 358/95.

¹⁰⁴ *Judgment of the Oberlandesgericht Köln* dated August 27, 1998, 7 U 167/97.

¹⁰⁵ *Judgment of the BGH* dated June 26, 2003, III ZR 245/98.

¹⁰⁶ *Judgment of the BVerfG* dated February 2, 2006, 2 BvR 1476/03.

¹⁰⁷ § 839 German Civil Code (Bürgerliches Gesetzbuch, BGB) as last amended per March 15, 2012, http://www.gesetze-im-internet.de/englisch_bgb/index.html, in conjunction with Art. 34 German Basic Law (Grundgesetz für die Bundesrepublik Deutschland) as last amended per July 21, 2010, http://www.gesetze-im-internet.de/englisch_gg/index.html, or Art. 131 Weimar Constitution (Weimarer Verfassung) entered into force on August 14, 1919, respectively.

¹⁰⁸ § 7 German Imperial Law on the Liability for Civil Servants (Gesetz über die Haftung des Reichs für seine Beamten, RBHG) as last amended per July 28, 1993, in conjunction with the German Basic Law, Art. 34 or the Weimar Constitution, Art. 131, respectively.

¹⁰⁹ Markus Rau, State Liability, p. 707 to 719, with further references; Pittrof, Compensation Claims, p. 19, 20, with further references.

¹¹⁰ *Judgment of the BVerfG*, para. 22; *Judgment of the BHG*, sect. „Entscheidgründe“ IV; Pittrof, Compensation Claims, p. 19, 20, with further references.

3 The Hague Convention IV the victim may directly sue the offending state in his/her own right. Contemplating the law in 1944, any recent developments in international law strengthening the legal position of individuals in international law in this respect were consequently ignored.¹¹¹

Furthermore, the German courts addressed, inter alia, two preliminary or ancillary questions. First, it was held that Germany was entitled to state immunity in the Greek courts, or that, in other words, the Greek courts lacked jurisdiction to hear the case.¹¹² Therefore, the Greek judgments could not be attributed an effect *res judicata* and the Federal Court of Justice was not barred from hearing and deciding the case.¹¹³ Second, it was considered that the Federal Republic of Germany might be held liable according to the principles of state succession, but that, in fact, the claim was pertaining to a liability of the German Empire.¹¹⁴ On this premise, the Federal Court of Justice examined the effect of the London Debt Agreement dated February 27, 1953,¹¹⁵ and concluded that this agreement had no bearing on the case due to the Moscow Treaty¹¹⁶ as of September 12, 1990.¹¹⁷ In other words, the London Debt Agreement, providing for a moratorium for claims against Germany, no longer applied. The plaintiffs were therefore allowed to bring, and the German courts were allowed to hear, compensation claims pertaining to World War II.¹¹⁸

¹¹¹ *Judgment of the BVerfG*, paras. 20-22; *Judgment of the BGH*, sect. "Entscheidungsgründe", IV.1.

¹¹² Pittrof, *Compensation Claims*, p. 17, 18 with further references; Rau, *State Liability*, p. 705-707, with further references.

¹¹³ *Judgment of the BGH*, id., sect. „Entscheidungsgründe“ I.

¹¹⁴ Pittrof, *Compensation Claims*, p. 18

¹¹⁵ Published at BGBl. II 1953, 336.

¹¹⁶ „Zwei-Plus-Vier-Vertrag“, published at BGBl, II 1990, 1381.

¹¹⁷ Pittrof, *Compensation Claims*, p. 18, 19.

¹¹⁸ *Judgment of the BGH*, sect. „Einscheidungsgründe“ III.1.

2.3.2 Greek Proceedings

In the Greek courts, the plaintiffs sought damages and compensation from Germany for commensurate injury suffered as well as for psychological distress suffered as a result of torts amounting to a breach of internal law and international customary law, in particular of the The Hague Convention IV, as in force at the time.¹¹⁹ The action was filed on November 27, 1995, with the Court of First Instance of Levidia. Germany was duly served but rejected to participate in the proceedings pleading state immunity and denying jurisdiction of the Greek courts. In a default judgment dated October 30, 1997, the court of first instance in Levidia awarded damages to the plaintiffs in the amount of approximately 30 million USD.¹²⁰ Subsequently, on May 4, 2000, the Greek Supreme Court, upheld the judgment of the Levidia district court and denied Germany state immunity as well.¹²¹

Unfortunately, comprehensive translations of the Greek judgments were not available in order to conclusively examine the substantive grounds upon which the courts awarded the damages. However, based on the partial translations and reviews¹²² available, it seems that the Greek district court relied on Greek tort law in conjunction with the Greek Criminal Code as in force at the time of the judgment as well as Art. 3 of the Royal Decree of June 24, 1835, as in force in 1944, to establish liability of

¹¹⁹ Gavouneli, Maria, War Reparation Claims and State Immunity, *Revue Hellenique du Droit International*, 50 RHDI 595, 1997 (“Gavouneli, War Reparation Claims”), p. 600.

¹²⁰ Gavouneli, War Reparation Claims; Bantekas, Ilias, State Responsibility in Private Civil Action – Sovereign Immunity – Immunity for Jus Cogens Violations – Belligerent Occupation – Peace Treaties, *Prefecture of Voiotia v. Federal Republic of Germany*, Case No. 137/1997, Court of First Instance of Levidia, Greece, October 30, 1997, in *American Journal of International Law*, October 1998, 92 AMJIL 765 (“Bantekas, Judgment of the District Court of Levidia”), p. 765.

¹²¹ Oxman, Bernard H. / Gavouneli, Maria / Bantekas, Ilias, Sovereign Immunity – Tort Exception – Jus Cogens Violations – World War II Reparations – International Humanitarian Law, *Prefecture of Voiotia v. Federal Republic of Germany*, Case No. 11/2000, Areios Pagos (Hellenic Supreme Court), May 4, 2000, in *American Journal of International Law*, January 2001, 95 AMJIL 198 (“Oxman/Gavouneli/Bantekas, Judgment of the Areios Pagos”), p. 198.

¹²² Perusal of comprehensive translations surely would allow for a deeper inquiry into this interesting question. The sources upon which this author relied in this paper are: Gavouneli, War Reparation Claims; Bantekas, Judgment of the District Court of Levidia; Oxman/Gavouneli/Bantekas, Judgment of the Areios Pagos.

Germany. Furthermore, the Greek district court seems to have established the liability of Germany vis-a-vis the plaintiffs¹²³ based on Art. 3 The Hague Convention IV and Art. 46 of the Regulations on the Laws and Customs of War on Land attached to said Convention.¹²⁴ Both norms were held to constitute customary international law.¹²⁵ As regards the claim against Germany presented by the plaintiffs directly in their individual capacity, the district court explicitly held that this is admissible, because no international norm exists acting to the contrary.¹²⁶ Furthermore, the claim of the plaintiffs was found not to be precluded neither by a Greek law adopted in 1952 on the suspension of the war between Greece and Germany, nor by the London Debt Agreement of February 27, 1953,¹²⁷ in conjunction with the Moscow Treaty of September 12, 1990.

On the question of state immunity the Greek courts adopted a very progressive stance. The argument of the District Court of Levadia was based on the jus cogens nature of the violated norm, i.e., Art. 3 The Hague Convention IV. It reasoned that Germany could not invoke state immunity for following six reasons.¹²⁸ First, a state that breaches jus cogens tacitly waives state immunity. Second, acts of states in breach of jus cogens are not *acta jure imperii*. Third, acts in breach of jus cogens are null and void and therefore cannot entail the privilege of state immunity. Fourth, to grant immunity for acts in breach of jus cogens would amount to complicity in that unlawful act. Fifth, to invoke state immunity for an act in breach of jus cogens constitutes an abuse of rights. Finally, due to the principle of territorial sovereignty a state cannot invoke immunity for acts committed during the illegal occupation of

¹²³ The Prefecture of Boetia was denied legal standing, Gavouneli, War Reparation Claims, p. 601.

¹²⁴ Gavouneli, War Reparation Claims, p. 767.

¹²⁵ Gavouneli, War Reparation Claims, p. 601.

¹²⁶ Gavouneli, War Reparation Claims, p. 601.

¹²⁷ 4 UST 443, 333 UNTS 3.

¹²⁸ Gavouneli, War Reparation Claims, p. 599.

foreign territory.¹²⁹ It may further be noted that in the judgment of the Areios Pagos, the emphasis slightly shifted. In addition to the arguments advanced by the District Court, the Supreme Court argued that Germany was not entitled to state immunity due to a tort exception in international law.¹³⁰

2.3.3 Execution Proceedings

In any event, on May 4, 2000, after five years of litigation in Greece and litigation still ongoing in Germany, the victims held in their hands a final and binding judgment of the Greek Supreme Court entitling them to approximately USD 30 million in damages. Unfortunately for the victims, this was only the beginning of the next chapter of their odyssey.

When Germany refused to comply with the final judgment, the victims had to institute execution proceedings in Greece. However, enforcement against a foreign state in Greece requires prior consent of the Minister of Justice.¹³¹ When the minister did not consent the victims proceeded with the enforcement proceedings nevertheless. Germany objected but the Athens Court of First Instance dismissed the objection by decision dated September 19, 2000. Germany appealed. On September 14, 2001, the Athens Court of Appeal upheld Germany's objection and set aside the decision of the Athens Court of First Instance. The victims appealed. By judgment dated June 28, 2002, the Court of Cassation upheld the decision of the Athens Court of Appeal. The victims took the decision of the Court of Cassation to Strasbourg. The ECHR, in *Kalogeropoulou v. Greece*, held against the victims. Admissibility was denied applying the same reasoning as in the *Al-Adsani* case, i.e., holding that at present a jus cogens

¹²⁹ Bantekas, Judgment of the District Court of Levadia, p. 766.

¹³⁰ Oxman/Gavouneli/Bantekas, Judgment of the Areios Pagos, p. 199, 200.

¹³¹ Art. 923 Greek Code of Civil Procedure, introduced by Presidential Decree 503/1985.

exception to state immunity cannot be found in customary international law. The refusal of the Greek authorities to execute and expropriate, therefore, did not violate Art. 6(1) of the European Convention of Human rights because it served a legitimate aim and was proportionate.¹³²

However, as we have already seen in section 2.3, this was still not the end of the saga. Unsuccessful with enforcement both in Greece and in Germany, the plaintiffs sought to enforce the Greek judgment in a third country taking a very progressive stance on state immunity, namely Italy. With the ICJ judgment in *Germany v. Italy*, the case is now probably put to rest – leaving the victims with empty hands.

2.3.4 Conclusion

In terms of the substantive decisions in Germany and Greece the following high-level observations may be offered.¹³³ It may be noted that, despite the fact that Greece and Germany share a relatively similar cultural and legal background, the decisions in the case display major differences both in the result as well as in the reasoning. Despite the international character of the dispute the courts could not but rely on their respective national legislation, both substantive and procedural. In addition, the international principles of state responsibility and state immunity were understood and construed in a fundamentally different manner, which resulted in an equally fundamentally different outcome. But then, this outcome is hardly surprising considering that the decisions were issued by German domestic courts, i.e. the domestic courts of the defendant state, and Greek domestic courts, i.e. the domestic courts of the state of which the victims are nationals. Clearly, the Greek courts did

¹³² *Kalogeropoulou v. Greece*, sect. The Law, 1.D.1(a).

¹³³ The substantive decisions of the German and the Greek courts evidently deserve a more detailed comparative analysis than the scope of this paper allows for,

everything in their power to lift state immunity and to allow for a direct claim of its fellow nationals against Germany; whereas the German courts were obviously not willing to waive the privileges Germany was granted by international law, not even to the smallest extent. Under these circumstances, a neutral observer cannot but being skeptical towards the reasoning both in Germany and Greece. It seems likely that neither provides for a well-balanced solution to the problem of state immunity in view of a violation of jus cogens.

The execution proceedings in Germany, Greece and Italy cannot be described other than as an utter failure. The plaintiffs clearly exhausted any possibility to obtain the payment that they were promised by the Greek judgments. It was all in vain. The assessment of Judge Pellonpää in *Al-Adsani*¹³⁴ concerning the inexistent possibilities of execution was fully proven as accurate.

3 The Problem of Jus Cogens vs. State Immunity

3.1 Identifying the Right Question to Resolve the Problem.

The problem of state immunity vs. jus cogens is not conclusively addressed by asking what the current international law of state immunity is. As we have seen above,¹³⁵ the prevailing view in international law is that there is no jus cogens exception¹³⁶ in contemporary customary international law. However, there are forceful legal arguments in favor of such an exception. The Greek District Court of Levadia advanced six reasonable arguments why it considered itself not obliged to grant state

¹³⁴ *Al-Adsani*, para. O-II1 et seq.

¹³⁵ Sect. 2.1.

¹³⁶ And even less so an exception for violations of Human Rights in general.

immunity to Germany in the event of a jus cogens violation.¹³⁷ The Greek Supreme Court added the notion of a tort principle to the reasoning of the District Court.¹³⁸ Both the tort exception and the jus cogens exception were argued by Italy before the ICJ defending its case against Germany.¹³⁹ On the basis of this non-exhaustive list of reasonable arguments it appears that the law of state immunity, in fact, could be construed in this way. The ECHR and the ICJ, however, dismissed these arguments by stating that no state practice or opinio juris can be found to date supporting such exception.¹⁴⁰ Arguably, however, this argument is not conclusive. After all, at least to a certain extent, it is the courts themselves that are creating customary international law. Court decisions constitute evidence of state practice and opinio juris.¹⁴¹ Moreover, it is particularly in the field of state immunity that domestic court decisions played, and may still play, an important role in developing the international law on state immunity.¹⁴² If the victim contends in court that state immunity does not apply in the case of a violation of jus cogens, the court is in fact invited to create law. Consequently it cannot be sufficient to merely examine the existing law.

The true question that needs to be answered by the courts, legislators and the academia is what the law should be. The existing law is the source of the problem. If we only look at the existing law, we are turning in circles.¹⁴³ To move ahead, it is required to look beyond the law, i.e., to the purpose of the proposed new restriction.

¹³⁷ Sect. 2.3.2.

¹³⁸ Sect. 2.3.2.

¹³⁹ Sect. 2.1.

¹⁴⁰ In *Germany v. Italy, Al-Adsani and Kalogeropoulou v. Greece*.

¹⁴¹ See *Germany v. Italy*, para. 55.

¹⁴² See for example the ICJ's reliance on domestic court decisions, *Germany v. Italy*, para. 55.

¹⁴³ See O'Keefe's observation of an argumentative loop triggered by *Al-Adsani*, O'Keefe, *State Immunity and Human Rights*, p. 1019.

3.2 Applying Lord Wilberforce's Test to the Jus Cogens Exception

According to Lord Wilberforce in *I Congreso* the commercial restriction to state immunity was justified on the basis of two main foundations:

“(a) It is necessary in the interest of justice to individuals having [commercial] transactions with states to allow them to bring such transactions before the courts. (b) To require a state to answer a claim based on such transactions does not involve a challenge to or inquiry into any act of sovereignty or governmental act of that state.”¹⁴⁴

This “test” may, *mutatis mutandis*, be applied to assess the viability of a new jus cogens exception to state immunity. Under the purposive approach mentioned above, it will now be examined if a) a jus cogens exception achieves its purpose of promoting justice and if b) a jus cogens exception does not vitiate the purpose of state immunity. Accordingly, the jus cogens exception to state immunity is justified only if it qualifies under both limbs.

3.2.1 A Jus Cogens Exception Does not Achieve its Purpose

Arguably, the purpose of a new jus cogens exception is to provide victims of jus cogens violations with an effective remedy for redress. Moreover, enforcement of Human Rights should be strengthened. Enforcement of Human Rights should not be limited to criminal prosecution for the most heinous violations of these fundamental principles, but should also entail liability to pay compensation.¹⁴⁵ Ultimately and similar like the commercial restriction, the jus cogens exception aims at achieving greater justice for individuals.

¹⁴⁴ *I Congreso*, p. 262.

¹⁴⁵ *Velasquez Rodriguez* case, judgment of July 29, 1988, Inter-Am. Ct. of H.R. (Ser. C) No. 4 (“*Velasquez Rodriguez* No.4”), para. 134: “The international protection of human rights should not be confused with criminal justice. States do not appear before Courts as defendants in a criminal action. The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the [s]tates responsible.”

To assess the likelihood of the jus cogens exception achieving its purpose, one must look at the result that the exception will achieve. The most immediate outcome of the jus cogens exception is that the domestic courts are assigned two new functions, i.e., redress for violations of and enforcement of Human Rights. Advocates of a jus cogens exception, therefore, in effect contend that domestic courts adjudicating jus cogens cases will achieve greater justice.

However, the following considerations suggest that this assumption is not true. The arguments can roughly be divided into two groups. The first group turns on the point that the domestic courts are the wrong forum to achieve justice in international cases involving violations of jus cogens to begin with. The second group, presuming that domestic courts are a suitable forum, argues that one should rather call for a Human Rights exception than for a jus cogens exception. To call for a jus cogens exception seems to be an arbitrary choice motivated by practical reasons. The most forceful legal arguments for a jus cogens exception, e.g. overriding nature, waiver, ultra vires etc., do not apply to a broader Human Rights exception. It is for this reason that redress for Human Rights violations in a broader sense is omitted, although in fact not only victims of jus cogens violations deserve to be provided with an effective remedy. It will be argued that this approach, as understandable it may be, is misguided and leads to a dead end.

3.2.1.1 The Domestic Courts Are the Wrong Forum

First, and in my view most importantly, domestic courts are never impartial.¹⁴⁶ A Swiss judge, for example, always looks through Swiss eyes at the law and at the facts of a

¹⁴⁶ Maybe it is this fact, that underpins the reluctance to accept as legitimate universal jurisdiction to try foreign citizens, see Mayerfeld, Jamie, Who Shall be Judge? The United States, the International Criminal Court, and the Global Enforcement of Human Rights, Human Rights Quarterly, 25 Hum. Rts. Q. 93, 2003 (“Mayerfeld, Who Shall Be Judge?”), p. 113/114, with further reference.

case.¹⁴⁷ It is not realistic to expect from a judge to sever himself from his culture, his education and his personal experiences of a lifetime. The culture, education and personal experiences are what define the judge as a person. They are what formed and still form his values and convictions. Nobody is able to shake this off entirely.¹⁴⁸ In this sense, a judge, and consequently a judgment, is always prejudiced. This is not a problem, if the Swiss judge applies Swiss law to fellow Swiss nationals or to fact patterns which have a sufficient nexus to Switzerland. However, a Swiss judge has no business at all deciding on a compensation claim, for example, of a Tibetan against the People's Republic of China for violations committed in Tibet. A Swiss judge is not able to sufficiently understand the relevant issues of such a case, because he is unable to grasp the case's circumstances, historical and cultural background, sub-text or whatever description one prefers for what lies behind the law and behind the hard facts.

Indeed, prejudice is not a bad thing per se.¹⁴⁹ It may be particularly helpful to arrive at a judgment that is just and fair. Fairness and justice cannot be achieved objectively. To claim that one knows or is able to find "objective fairness" or "objective justice" seems quite pretentious.¹⁵⁰ Fairness¹⁵¹ is never objective, because what you consider as fair is strongly influenced by who you are and where you come from. Different people consider different results as fair. Thus, the goal must be to arrive at a judgment, which is considered fair in the eyes of the parties. These eyes are the only

¹⁴⁷ "A person who is trying to understand a text is always projecting." Gadamer, Hans-Georg, *Truth and Method*, 2d ed., transl. by Joel Weinsheimer and Donald G. Marshall, London 1989 ("Gadamer, *Truth and Method*"), p. 266/267. Of course this applies no less when one is confronted with a fact pattern.

¹⁴⁸ "[W]e are always situated within traditions, and this is no objectifying process – i.e., we do not conceive of what tradition says as something other, something alien. It is always part of us." Gadamer, *Truth and Method*, p. 282.

¹⁴⁹ „If we want to do justice to man's finite, historical mode of being, it is necessary to fundamentally rehabilitate the concept of prejudice and acknowledge the fact that there are legitimate prejudices.“ Gadamer, *Truth and Method*, p. 277.

¹⁵⁰ Moreover, such stance is likely to be resented at least by the impleaded state.

¹⁵¹ In the following argument it is only referred to fairness for ease of reference. However, the argument equally applies to justice or what is just.

ones that count.¹⁵² In my view, there is only one way in which it is likely to achieve a judgment which is accepted as fair (or which at least is grudgingly endorsed) by the parties: The judges must share the same or a similar cultural background with the victim and the offending state.¹⁵³ This is the sense in which prejudice may even be helpful in order to do justice.¹⁵⁴

By way of illustration it may be recalled that what is contemplated here is a lawsuit for payment of compensation.¹⁵⁵ According to the Basic Principles on Remedy and Reparation

“Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, [...], such as: (a) Physical or mental harm; (b) Lost opportunities, including employment, education and social benefits; (c) Material damages and loss of earnings, including loss of earning potential; (d) Moral damage; (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.”¹⁵⁶

It may be argued that in respect to the underlying jus cogens violation, abstract principles are applied and, hence, familiarity of the judges with the local circumstances and culture is not required.¹⁵⁷ However, a proper understanding of the local culture and circumstances is indispensable at least in order to assess the appropriate and proportional amount of damages as prescribed by Art. 20. Furthermore, the notion of “moral damage” and the assessment of what is fair compensation for such damage are strongly coined by the local culture and tradition.

¹⁵² It is important to avoid any perceived unfairness from the outset, see Mayerfeld, *Who Shall Be Judge?*, p. 113

¹⁵³ Should the victim and the offending state not share the same background, the court must equally reflect both sides.

¹⁵⁴ This is not to say that the prejudice ought to be described by a third party. Ideally both parties are free to determine, what prejudices they would like to see on the bench.

¹⁵⁵ We are not discussing criminal jurisdiction for the worst atrocities known to mankind.

¹⁵⁶ Art. 20 Basic Principles on Remedy and Reparation; underlining added by the author.

¹⁵⁷ It should be noted, however, that this is not the position of the author. Even though human rights, and in particular jus cogens, are universal concepts of law, the law still is applied locally. In applying the law, local “color” cannot be avoided. Take the example of a Mexican descendant of a convict sentenced to death in the United States. If this case is disputed in France, should Art. 6(2) on death penalty of the ICCPR be applied by the French court?

To summarize, a tribunal adjudicating on international cases of jus cogens violations must be able to understand who the parties are and where they come from. The domestic courts of a random foreign country, however, are unable to adequately do so. Consequently, it is wrong to establish a universal civil jurisdiction of sorts and direct cases concerning jus cogens violations to domestic courts. The establishment of a jus cogens exception, however, would have this effect precisely. The solution that is offered by the proponents of a jus cogens exception, therefore, is fundamentally flawed. A jus cogens exception does not achieve more fairness or greater justice.

Second, the political dimension of cases involving jus cogens violations renders them unsuitable to be tried in domestic courts.¹⁵⁸ Such cases are prone to be used and abused for a number of ends. Domestic and international politicians may want to use such cases to gain publicity in their own personal interest. Media may seek commercial profit from such cases. Foreign governments may use such cases to pursue state interests, being political or commercial. The list could be continued, and the mentioned free-riders may not even be of the worst kind imaginable. In any event, it would be naive to expect cases of jus cogens violations not to attract this kind of attention. As a consequence of such attention, the wrongful act itself and the victim are no longer the center of concern. Rather, political, commercial and national interests disguised in the cloak of Human Rights advocacy turn the domestic courtroom into a political arena. Prejudice is inevitable, as the courts will be strongly influenced, if not pressured, by other states¹⁵⁹ and the public opinion. One cannot but doubt the fairness and impartiality of the outcome of proceedings conducted under

¹⁵⁸ See the *Distomo* case, sect. 2.3 and 2.3.4 above.

¹⁵⁹ These political pressures manifest themselves in criminal cases in so far as the established universal jurisdiction is only very cautiously invoked, see Mayerfeld, *Who Should Be Judge?*, p. 121.

such circumstances.¹⁶⁰ Once again, a jus cogens exception does not achieve its goal of providing for greater justice and fairness.

Third, introducing a jus cogens exception is likely to weaken Human Rights as a universal concept. Despite a jus cogens exception the problem persists that a private injured party does not have a direct claim against the offending state in international law. Such claim is excluded by virtue of the international law on state responsibility¹⁶¹ and the victim is pointed to diplomatic protection accordingly. Therefore, in domestic courts, at least to some extent, the victim will have to argue its claim for compensation based on substantive domestic law.¹⁶² It goes without saying that domestic laws around the world greatly vary. Equally diverse are the domestic procedural law applicable, introducing yet another feature of domestic peculiarity and arbitrariness.¹⁶³ Local legal, cultural and political considerations may suddenly have an undue bearing on the universal principles of Human Rights and their application in civil proceedings for compensation. In order to strengthen the universal concept of Human Rights, such interference of domestic considerations should be avoided. However, a jus cogens exception is likely to have this adverse effect precisely. Such exception, therefore, cannot be seen as effectively buttressing Human Rights or promoting greater justice.

¹⁶⁰ See also Born, A New Generation of International Adjudication, p. 820.

¹⁶¹ The contemporary international law on state responsibility does provide for such only vis-a-vis other states, Art. 42 to 48 of the Articles of State Responsibility.

¹⁶² See the *Distomo* case, sections 2.3 and 2.3.4 above.

¹⁶³ Moreover, a universal civil jurisdiction established by a jus cogens exception naturally would not only apply in the courts of democracies, but also in the courts of dictatorships. The procedural laws in a number of countries are likely failing to meet adequate standards of due process. This may play out to the detriment of the victim or the offending state, as the case may be. But most definitely it will impair the legitimacy and authority of any judgment administered according to inadequate procedural rules. See also Mayerfeld, Who Should Be Judge?, p. 113 and 117.

3.2.1.2 The Jus Cogens Exception: Remedy for a Symptom, not a Cure

First, a jus cogens exception does not go far enough. A jus cogens exception means that many other serious Human Rights violations still escape civil jurisdiction.¹⁶⁴ A state should also be liable for compensation of violations of Human Rights, which do not amount to torture. Why should compensation be paid for torture, but not, for example, for unlawful imprisonment in a singular instance? A jus cogens exception is only able to provide relief in a very limited scope of cases, i.e. cases of worst violations of Human Rights. In other words, a jus cogens exception favors victims of violations of jus cogens and neglects the right to redress of victims of other violations of Human Rights. Even worse, the latter may well find themselves not only neglected, but downright disadvantaged. Due to an exception established for jus cogens violations, it might become substantially more difficult for the victims of other violations to secure access to an effective remedy. Therefore, even if possibly improving the situation for victims of violations of jus cogens, a jus cogens exception does not achieve greater justice from a broader perspective, quite to the contrary.

Second, jus cogens is not a clearly shaped concept of international law. Consequently, the debate concerning state immunity does not end, if a jus cogens exception is established. The debate only shifts to whether or not the violated norm qualifies as a jus cogens norm. The victims seek to bring more and more norms under this privileged category, whereas the states argue that in fact there is no such thing as a jus cogens norm to begin with, maybe with some very limited exceptions.¹⁶⁵ Litigation in the domestic courts continues to be very onerous, because the objection of lack of jurisdiction due to state immunity is not lifted per se. Moreover, due to the

¹⁶⁴ See Mayerfeld, *Who Should Be Judge?*, p. 114, in respect to the limited criminal jurisdiction of the ICC.

¹⁶⁵ E.g. torture.

blurry edges of a jus cogens exception there still is vast room for argumentation and interpretation. The effective impact of a jus cogens exception is therefore further limited.

Third, it follows from the foregoing that a jus cogens exception is primarily effective in cases of torture, genocide, war crimes and crimes against humanity. Such cases, more often than not, occur in the course of systematic and gross violations of Human Rights. Redress in these instances is more likely to be available than in other cases of Human Rights violations. For one, reparation programs¹⁶⁶ may be set up, limiting the function of an individual remedy to challenging flawed reparation programs. Moreover, victims of such violations enjoy increased protection through the threat of prosecution¹⁶⁷ and personal liability¹⁶⁸ against perpetrators according to the Rome Statute and universal criminal jurisdiction created by special treaties.¹⁶⁹ Therefore, there is relatively little that a jus cogens exception in civil proceedings can possibly add to the enforcement of violations that constitute an international crime.

Taking the three items above together, the jus cogens exception cannot be seen as a significant contribution to greater justice. For one, the scope of its application is not only limited, but very limited. The impact of a jus cogens exception is further minimized due to existing mechanisms of protection and redress for violations of jus cogens. Overall, a jus cogens exception can cure the existing injustice only to a minimal extent, while at the same time a new and illegitimate distinction between jus cogens and other Human Rights violations is created.

¹⁶⁶ See Magarrell, Lisa, *Reparations in Theory and Practice*, International Center for Transitional Justice, 2007, <http://ictj.org/sites/default/files/ICTJ-Global-Reparations-Practice-2007-English.pdf>.

¹⁶⁷ Art. 5 of the Rome Statute of the International Criminal Court, effective July 1, 2002 („Rome Statute“).

¹⁶⁸ Notably owed to the victim by the convicted person and not by the state, Rome Statute, Art. 75

¹⁶⁹ E.g. Torture Convention.

Finally, introducing a jus cogens exception to state immunity from adjudication does not remedy the problems relating to execution against a foreign state. The *Distomo* case bears sad evidence of the implications of such undertaking.¹⁷⁰ The private party, despite a new jus cogens exception in terms of adjudication, is likely to remain precluded from execution.¹⁷¹ A jus cogens exception is unlikely to achieve effective redress to the benefit of the victim. Therefore, such exception can ultimately not be seen as providing for greater justice.

3.2.2 A Jus Cogens Exception Vitiates the Purpose of State Immunity

The idea of state immunity itself is not challenged in international law.¹⁷² There is consent why state immunity in domestic courts is called for, even though different states may emphasize different aspects. According to Marshall C.J., the rationale of state immunity is to promote and protect the friendly relations between states and the exchange of good offices.¹⁷³ A foreign state is granted immunity in the courts of another state to protect the states' sovereignty, dignity and independence.¹⁷⁴ Differences of states are limited to how far immunity should be restricted; the conservative view being skepticism towards restrictions.¹⁷⁵

Arguably, state immunity takes effect in two different ways. First, it protects the stability of the international community as such, and second, it protects the internal stability of its main constituents, namely the states themselves. State immunity puts in effect a principle of non-interference by excluding states from being dragged before the courts of another state against their will. However, the sovereignty of a state is not

¹⁷⁰ See above, sect. 2.1.3 and 2.3.3.

¹⁷¹ See *Al-Adsani*, para. O-II1 et seq.

¹⁷² *Germany v. Italy*, para. 57 et seq., with reference to the UN Convention on Immunities.

¹⁷³ *Schooner Exchange, The v. Mc Faddon*, 7 Cranch 116 (1812), US Supreme Court; see also *Oxman/Gavouneli/Bantekas*, Judgment of the Areios Pagos, p. 198;

¹⁷⁴ Commentary on Art. 6, p. 223.

¹⁷⁵ *Germany v. Italy*, paras. 55, 56, 57.

by default challenged if a state is subject to the jurisdiction of the courts of another state.¹⁷⁶ The question at hand therefore is whether a jus cogens exception entails adjudication on a state in a manner that challenges the sovereignty of that state.¹⁷⁷ The following considerations show that cases involving a jus cogens violation strongly relate to core aspects of the sovereignty of states. Thus, a jus cogens exception vitiates the purpose of the doctrine of state immunity.

First, acts or omissions of the state that violate jus cogens are actions in the exercise of its sovereign power. International law does not provide for a jus cogens exception in terms of attribution of responsibility to the state.¹⁷⁸ The argument that individuals, i.e., officials, commit the acts or omissions constituting jus cogens violations *ultra vires* is not decisive either.¹⁷⁹ Although the state or the victim may, based on international or domestic law, have certain means of recourse against the erring official personally,¹⁸⁰ the wrongful act is attributed to the state and entails its responsibility.¹⁸¹ Moreover, jus cogens violations are almost by definition inflicted in exercise of powers lying at the core of the idea of sovereignty, e.g. military or police powers.¹⁸² Despite their wrongful nature, such acts qualify as acts jure imperii.¹⁸³ Clearly, adjudicating a compensation claim for a jus cogens violation involves an inquiry into an act of sovereignty.¹⁸⁴ Taking

¹⁷⁶ This is the underlying idea of the restrictive theory, as expressed by Lord Wilberforce in *I Congreso*, p. 262.

¹⁷⁷ *I Congreso*, p. 262.

¹⁷⁸ See Art. 40 and 41 Articles of State Responsibility.

¹⁷⁹ Art. 7 Articles of State Responsibility; Commentary on Articles of State Responsibility, Art. 7 para. 2: „The State cannot take refuge behind the notion that, according to the provisions of its internal law or to instructions which may have been given to its organs or agents, their actions or omissions ought not to have occurred or ought to have taken a different form. This is so even where the organ or entity in question has overtly committed unlawful acts under the cover of its official status or has manifestly exceeded its competence.“; *Velasquez Rodriguez* No. 4, paras. 170, 172-174 re responsibility for omission / lack of due diligence.

¹⁸⁰ See Art. 54 and 58 Articles of State Responsibility, Art. 75 Rome Statute

¹⁸¹ Art. 2 Articles of State Responsibility.

¹⁸² By way of illustration please see the acts underlying the *Velasquez Rodriguez* No. 4, *Al-Adsani*, *Distomo* and *Germany v. Italy*.

¹⁸³ See *Germany v. Italy*, above sect. 2.1.1.

¹⁸⁴ *I Congreso*, p. 262.

away state immunity in civil proceedings turning on jus cogens violations, therefore, vitiates the purpose of state immunity.

Second, as already mentioned above, cases turning on jus cogens violations have an inherently political character. The cases are publicly discussed. Politicians, governments, mass media and public opinion strongly influence the outcome of cases involving a jus cogens violation. Neither the state in the courts of which the case is disputed nor the impleaded state will be able to sit quietly awaiting the decision. It is likely that considerable pressure will be exerted either against the impleaded state, against the state in the courts of which the case is argued or against both states. From the perspective of state immunity, such pressure is particularly problematic if executed by other governments. However, regardless of the originator, such pressure generally must be seen as infringing on the sovereignty, dignity and independence of the respective state. Moreover, it is the immense public attention, which usually accompanies court proceedings in respect to jus cogens violations that carries a significant potential to deteriorate the international relations.

Third, it should not be imposed on the domestic courts to cure the imperfections of the international legal system. International law and adjudication thereof, until this day, are imperfect. States are not subject to any jurisdiction unless they agree to it. In this respect, international law is fundamentally different from domestic law. As a consequence, the formal equality of states¹⁸⁵ in international law cannot be compared with the equality of individuals in domestic law. In international law, power and politics play an important role making some states distinctively less equal than others.¹⁸⁶

¹⁸⁵ Art. 2(1) UN Charter

¹⁸⁶ While the United States, for example, may readily be adjudicating compensation claims against foreign officials in their own courts based on the Torture Victim Protection Act, 28 USC §1605A, and the Alien Tort Statute, 28 USC §1350, it must be expected that they oppose civil jurisdiction abroad over their own officials as vigorously as they oppose foreign criminal jurisdiction, see Mayerfeld, Who Shall Be

Moreover, as we have seen above, domestic courts find themselves exposed to pressure from various sides, i.e. other governments, public opinion and the media when seized with a case involving jus cogens violations. Yet unfortunately, they are badly equipped to handle these implications. Domestic courts are simply not designed to adjudicate cases of international law, let alone cases of jus cogens violations.¹⁸⁷ Without state immunity, domestic courts and legal systems run the danger of being corrupted by power politics, national interests, advocacy and lobby groups. State immunity protects the independence of states by protecting the proper functioning of the states' judiciary. Restricting this protection touches on the core rationale of state immunity and vitiates its purpose.

3.3 Conclusion

Lord Wilberforce's test reveals that a jus cogens exception is not the suitable solution for the dilemma of jus cogens v. state immunity. On one hand, the domestic courts are neither suitable nor capable to handle jus cogens cases. Any solution that points jus cogens cases to the domestic courts is misguided from the outset. In addition, the improvement in terms of fairness and justice that one may realistically expect from a jus cogens exception is very limited. Finally, instead of strengthening the concept of Human Rights and the enforcement thereof, a jus cogens exception might even entail adverse consequences. On the other hand the core of the rationale of state immunity is very much affected if compensation claims for jus cogens violations are disputed in the domestic courts. The sovereignty and independence of both states involved is at stake. Moreover, the adjudication of jus cogens cases in domestic courts must be

Judge?, p. 95 et seq.; For an example how less powerful states are exposed to power politics please see Harris, *Cases and Materials*, p. 256 on the fate of the Belgian legislation providing for universal criminal jurisdiction regarding human rights abuses and its (non-)application following the *Arrest Warrant* case.¹⁸⁷ It should be noted that this is a key distinction to the commercial restriction of state immunity. The commercial restriction results in the domestic courts adjudication on contractual disputes, clearly something which they are perfectly familiar with.

expected to have an adverse impact on the relations between states. On balance, the scale tips heavily against a jus cogens exception. Due to the strong impact on the core of state immunity, the threshold to justify the jus cogens exception is very high. Given the limited prospects of the jus cogens exception achieving its goals, such exception cannot be regarded as justifiable.

The above considerations show that the issue is not limited to the conflict between jus cogens and state immunity. To address only this narrow problem is not leading anywhere, because doing so means omitting the fact that the issue touches on fundamental questions of international law. For a long period of time international law was understood as strictly regulating the rights and obligations between sovereign states.¹⁸⁸ It is only more recently and incrementally that individuals, to a certain extent, have gained legal standing in international law. State immunity clearly is a doctrine that developed out of the original understanding of international law and serves legitimate purposes. The question is, if more recent developments, for example the prohibition of torture, or Human Rights in general, render the “old” doctrine of state immunity obsolete. Concluding from the purposive test above, the answer is no. However, this shall not mean that the legitimacy of the more recent developments is to be questioned. Clearly Human Rights represent important values that deserve protection and that should further be buttressed. The above conclusion simply means that, if one wants to strengthen and enforce Human Rights, another way than restricting state immunity by a jus cogens exception must be found.

¹⁸⁸ The Westphalian system.

4 Human Rights Arbitration – An Idea

International commercial arbitration¹⁸⁹ or international investment arbitration¹⁹⁰ can arguably be seen as the most successful forms of international adjudication.¹⁹¹ In the following, a number of interesting features of the arbitration model will be outlined. Then, the key issues of jurisdiction and execution will be discussed more extensively. It should further be noted that the following shall be read as a preliminary outline of an idea only. It is clear that there is no simple solution to finally provide victims of Human Rights violations with an effective remedy. The devil, as always, will be in the details. However, prima facie it appears worthwhile to take a closer look at the arbitration model if one intends to finally provide for an effective remedy for Human Rights violations.

4.1 Advantages of the Arbitration Model

In comparison to the route via the domestic courts, arbitration provides for a number of advantages. First, arbitration has proven itself as an efficient means to settle disputes between private parties and state parties directly¹⁹² by a binding decision.¹⁹³ Accordingly, three of the major obstacles, namely the limited standing of private persons in respect to state responsibility, the problem of state immunity and the problem of the non-binding nature of decisions in international law may be overcome by arbitration.¹⁹⁴ Second, the arbitration tribunal is impartial,¹⁹⁵ because the parties

¹⁸⁹ Based on the New York Convention, United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNTS, No. 4739, <http://www.uncitral.org> ("New York Convention").

¹⁹⁰ Based on ICSID Convention, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, produced in Washington, D.C., March 18, 1965 ("ICSID Convention") or bilateral investment treaties (BIT).

¹⁹¹ See Born, A New Generation of International Adjudication.

¹⁹² I.e. without diplomatic protection.

¹⁹³ See Born, A New Generation of International Adjudication, p. 828.

¹⁹⁴ Born, A New Generation of International Adjudication, p. 819 et seq.

themselves appoint the arbitrators.¹⁹⁶ In addition to resolving the impartiality issue addressed above in sect. 3.2.1.1, this would be a major step forward for the victim, because he/she would not be compelled to sue the offending state in its own courts or in the courts of a state that entertains friendly ties with the offending state. Likewise it would be an improvement for the impleaded state, because the state would not be sued in the courts of the state of which the victim is a national or in the courts of an unfriendly state. Third, there is no standing court.¹⁹⁷ For each case a specific tribunal will be composed. Consequently it may be ensured that the judges, i.e. the arbitrators, dispose of the required legal expertise and (cultural) background knowledge in order to properly decide and assess the compensation claim. Hence, the decision eventually is more likely to be accepted as fair and endorsed by the parties. Simultaneously, any perceived partiality that may surround a standing tribunal may be avoided. Fourth, the procedural rules may be tailor-made for the purposes of compensation claims for Human Rights violations.¹⁹⁸ Particularities may be taken into consideration, for example, in respect to evidentiary and default rules. A review of the award may also be provided for, if deemed appropriate. Fifth, the remedy would be truly effective¹⁹⁹ in the sense that the victim will not be required to exhaust domestic remedies. He/she would be able to invoke his/her right to arbitration directly, and the arbitration award will be final and binding. Sixth, the legal grounds pertaining to a compensation claim for Human Rights violations may be unified.²⁰⁰ The issue of translating the international law of Human Rights into municipal law, which most likely will arise in domestic courts and result in inconsistent application, may be avoided.

¹⁹⁵ Born, *A New Generation of International Adjudication*, p. 867.

¹⁹⁶ Born, *International Arbitration*, p. 609 et seq.

¹⁹⁷ Born, *A New Generation of International Adjudication*, p. 872/873.

¹⁹⁸ Born, *A New Generation of International Adjudication*, p. 874.

¹⁹⁹ Born, *A New Generation of International Adjudication*, p. 867/868.

²⁰⁰ E.g. by means of a model law.

4.2 The Problem of Jurisdiction

For any of the above advantages to be put into practice, however, states must first submit to the jurisdiction of arbitral tribunals.²⁰¹ Based on the experience in connection with international commercial and international investment arbitration, states are more likely to submit to arbitration if the arbitral jurisdiction is delimited narrowly.²⁰² International commercial and international investment arbitration is aimed to adjudicate and enforce monetary claims only.²⁰³ Similarly limiting the jurisdiction of “Human Rights arbitration” should not pose difficulties. Human Rights arbitration could be designed to provide for monetary relief, i.e., compensation, only.²⁰⁴ Moreover, the arbitral jurisdiction could be limited by describing the type of violations that fall under it. The scope of jurisdiction could for example cover violations infringing upon the right to life (Art. 6 ICCPR), right to physical integrity (Art. 7 ICCPR) and the right to personal liberty (Art. 8, 9, 10 and 11 ICCPR) only. An additional limitation may be required in order to address the particular situation in the aftermath of an armed conflict.²⁰⁵ Notably, these violations describe a jurisdiction that is significantly broader than that provided by means of a jus cogens exception.

In the present instance there are basically three alternatives how a state can submit to arbitration. A state may voluntarily submit to arbitration, a state may accede to a international treaty submitting to arbitration or domestic laws may provide unilaterally for mandatory jurisdiction of a tribunal created like an arbitral tribunal.

²⁰¹ Arbitral jurisdiction is based on an arbitration agreement, which can be entered into before or after the dispute arose. See Born, *International Arbitration*, p. 159 et seq.

²⁰² Born, *A New Generation of International Arbitration*, p. 871.

²⁰³ Born, *A New Generation of International Arbitration*, p. 871/872.

²⁰⁴ Nevertheless, a judicial procedure aimed at compensation does also include an element of truth-finding.

²⁰⁵ Historically, reparation claims were settled between states by lump sum payments, see *Germany v. Italy*, para. 102. This practice seems reasonable. Claims for violations committed decades earlier or in the course of an armed conflict regarding which an international settlement was reached could remain barred in order to provide for closure and stability.

4.2.1 **Arbitral Jurisdiction by Voluntary Submission**

A state may submit to arbitration after a private party has initiated arbitral proceedings for compensation against it. While this type of arbitration may in principle rest on the foundation of the New York Convention, it is contended that a special set of rules is required in order to appropriately address the particularities of Human Rights cases. This is probably particularly true in respect to evidentiary rules and review procedures. Accordingly, this first alternative presumes the existence of an arbitral institution for Human Rights arbitration, including a model law and institutional rules designed especially for Human Rights arbitration.

From the requirement of voluntary submission by the state it follows that the jurisdiction is not mandatory. However, the impleaded state may be interested to submit to the jurisdiction of an arbitral tribunal given its alternative choice of being publicly accused and dragged before domestic courts. To provide for a confidential arbitral proceeding may constitute an additional incentive for the state to submit to arbitration. The idea would be to exclude the public in order to allow for an impartial proceeding. The mass media and other factors would be precluded from unduly influencing the proceedings. The impleaded state would not be faced with a campaign directed against it on the basis of mere allegations. However, after termination of the proceedings, the awards rendered by the arbitral tribunal would be reported and published in order to allow for a body of case law to develop. Moreover, publicity is desired in order to increase the pressure on a state that was actually found having breached Human Rights. The victim, on the other hand, would be interested in having the dispute settled by arbitration due to the simple fact that the alternative route through the domestic courts is very onerous and unlikely to lead to a satisfactory result.

4.2.2 Arbitral Jurisdiction by Virtue of International Treaty

A state may subject itself to arbitration by accession to an international treaty.²⁰⁶ Clearly, this would be the preferred alternative. Such treaty could be designed on the basis of the ICSID as a multilateral convention.²⁰⁷ The necessary arbitral institution, the model law and the special procedural rules would be established by such convention accordingly. It may further be argued that a state in fact would at least be morally obliged to accede to such convention.²⁰⁸ Given the limited arbitral jurisdiction, the impartiality of the arbitral tribunal as well as the other advantages described above, a state cannot reasonably oppose to accede to such treaty. Moreover, given the alternative of domestic litigation, state may even welcome the alternative presented.

4.2.3 Mandatory “Arbitral” Jurisdiction by Virtue of Domestic Law

Third, states may unilaterally introduce a mandatory jurisdiction of arbitral tribunals regarding compensation claims for Human Rights violations. A state, relying on its international obligations to provide for an effective remedy for Human Rights violations,²⁰⁹ may create an “arbitral institution”, a domestic law and procedural rules

²⁰⁶ O’Keefe, *State Immunity and Human Rights*, p. 1034.

²⁰⁷ If submission by way of bilateral treaties are feasible could not be examined here.

²⁰⁸ See Boven, Final Report paras. 26-32, 35-39, with further references: Such obligation is arising from various international human rights norms: Art. 8 Universal Declaration of Human Rights, Art. 2(3)(a), Art. 9(5) and Art. 14(6) ICCPR, Art. 6 Declaration on the Elimination of All Forms of Racial Discrimination, Art. 10, Art. 63(1) and Art. 68 American Convention on Human Rights, Art. 21(2) of the African Charter on Human and Peoples’ Rights, Art. 5(5) European Convention of Human Rights, Art. 14(1) Torture Convention, Art. 19 Declaration on the Protection of All Persons from Enforced Disappearance, Art. 11 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 15(2), Art. 16(4) and (5) ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries, Art. 39 Convention on the Rights of the Child. Moreover, such obligation arises from the following international humanitarian law norms: Art. 3 The Hague Convention IV and Art. 41 of The Hague Regulations annexed to it, Art. 68 of the Geneva Convention relative to the Treatment of Prisoners of War, Art. 55 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, Art. 91 of the Protocol I (Protocol Additional to the Geneva Conventions of August 12, 1949, relating to the Protection of Victims of International Armed Conflicts).

²⁰⁹ See enumeration in Fn 209.

for “Human Rights arbitration”.²¹⁰ The idea is to confer jurisdiction to arbitral tribunals based on domestic law and competence-competence, but without agreement or consent by the impleaded state. The tribunal, the institution, the domestic law and the procedural rules, however, are strictly designed along the lines of the arbitral model. The rules should in particular provide for a limited jurisdiction as outlined above. Moreover, the default procedures, i.e. subsidiary appointment of arbitrators, should be designed such that they do not taint the impartiality of the tribunal.

Clearly this is the boldest of the three alternatives outlined. Lacking the consensual character, it is significantly moving away from the arbitration model. Moreover, issues in terms of execution are likely to remain unresolved, if the impleaded state stays away from the proceedings. However, it is contended that a unilateral approach along these lines is still preferable over unilaterally removing state immunity in domestic courts. Provided that an “arbitral” framework particularly safeguarding the advantages mentioned above²¹¹ is created, the impleaded state may even see more advantages in participating in the proceeding than in defaulting. The result in fact may be that the states are submitting to the proceedings, thereby curing the initial lack of consensus and making the outcome a proper arbitral award.

4.3 The Problem of Enforcement

Enforceability is a key concern also in the event of an arbitral award. Although it must be admitted that enforcement may be difficult also in the event of arbitration, compliance with international arbitration awards is significantly higher than compliance

²¹⁰ Alternatively, the states may also point to such institution and rules created by a third party.

²¹¹ It is required that this “arbitral” procedure can be clearly distinguished from the ordinary procedure in domestic courts. In domestic courts, obviously, states are not willing to waive their right to immunity, or in other words, they do not consent to be part of a lawsuit for compensation.

with the outcome of any other type of international adjudication.²¹² It can be stated that even absent a centralized enforcement agency, the highly decentralized process under the New York Convention or the ICSID Convention in principle provides for an effective and efficient enforcement mechanism.²¹³ Furthermore, questions of execution may also be addressed by the rules of “Human Rights arbitration” or the model law. The impleaded state may be asked to place a certain amount of money or any asset in escrow as a security. At the same time, such placement would have the effect of singling out assets that are dedicated for the purpose of satisfying the claim at stake. Such an asset would automatically be available for execution according Art. 19(b) UN Convention on Immunities. Another possibility would be to create a fund out of which the claims of the victim are satisfied after they were confirmed by the arbitral award.

In sum, the situation pertaining to execution is significantly increased in the event of “Human Rights arbitration” by virtue of the decentralized enforcement system provided by the New York Convention. Yet, the system may be further improved by specific measures. The two measures mentioned above are by no means exhaustive.

4.4 Roadmap

What transpires from the above is that creating an effective remedy for compensation could start with bringing into existence an arbitral institution, a model law and arbitral procedures particularly designed for Human Rights arbitration. Such framework underpins all three alternatives described above. If the impleaded state agrees, and as we have seen the state may have good reasons to do so, the victim will instantly have an effective remedy leading to a binding and enforceable award subject to the

²¹² Born, A New Generation of International Adjudication, p. 831.

²¹³ Born, A New Generation of International Adjudication, p. 857.

New York Convention. Furthermore, the framework may be the focal point around which a multilateral agreement similar to the ICSID may come into existence. And finally, it may be used by states unilaterally, in order to further compel foreign states to submit to arbitration in cases of Human Rights violations.

5 Conclusion

There is no justification for a victim of a Human Rights violation being barred from claiming compensation from the offending state. Quite to the contrary, it is paramount to finally cater to the victim's right to redress. In addition, an effective remedy may entail a deterring effect on the state parties. Deterrence by incrimination can only extend to violations of the severest kind.²¹⁴ Whereas the possibility that a state may be held liable for compensation by the victim may also be extended to lesser Human Rights violations.²¹⁵ An effective remedy for compensation is therefore not only desirable from the perspective of the victim but also from the perspective of creating a more comprehensive system of Human Rights enforcement.

However, the principle of state immunity is legitimate and useful today as it was two hundred years ago. It was shown above that a jus cogens exception amounts to challenging the principle of state immunity as such. Moreover, it was shown that a jus cogens exception does not hold its promise. It is unlikely to provide the victim of a jus cogens violation with an effective remedy. Moreover, it completely neglects claims from Human Rights violations not amounting to jus cogens violations. Additionally, a jus cogens exception does not improve the enforcement of Human Rights. It represents a piecemeal approach, which ultimately leads to a dead end. Finally,

²¹⁴ See also Mayerfeld, *Who Shall Be Judge*

²¹⁵ I.e. any violation of the right to life (Art. 6 ICCPR), right to physical integrity (Art. 7 ICCPR) and the right to personal liberty (Art. 8, 9, 10 and 11 ICCPR)

compensation claims for Human Rights violations of foreign states should simply not be disputed in domestic courts.

The challenge therefore is to find, or create, a suitable forum to adjudicate such international compensation claims. A solution endorsing the successful arbitration model seems to be particularly promising. Notably, the approach is fundamentally different from trying to create a mandatory jurisdiction to which all states are subject. Institutions like the ICC demonstrate the problems of such approach.²¹⁶ Instead, it is contended, “Human Rights arbitration” may be framed in such way that states, in their own interest, are willing to submit to it. To further pursue this idea, as a next step, institutional and procedural rules as well as a model law may be developed taking into account the particular issues and needs that arise in connection with “Human Rights arbitration”. In doing so, the viability of the second-generation tribunals²¹⁷ as a model for international adjudication in broader terms²¹⁸ may be tested on the example of “Human Rights arbitration”. Considering the extraordinary improvement that an effective remedy for victims of Human Rights violations would represent, it can only be hoped that the experiment will be successful.

²¹⁶ See Mayerfeld, Who Should Be Judge?

²¹⁷ As defined by Gary Born, Born, A New Generation of International Adjudication.

²¹⁸ As suggested by Gary Born, Born, A New Generation of International Adjudication.